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ANNOTATED

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VOL. 68

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CASES REPORTED

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TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 68 INCLUSIVE.

BERNIER v. PARADIS.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur, and Mignault, JJ. June 20, 1921.

CROWN LANDS (§ I—5)—COLONIZATION LOTS—LOCATION TICKETS—SALE OF TIMBER—FRAUD—ORDER-IN-COUNCIL—EFFECT—R. S. Q. 1909, SEC. 1572—CONSTITUTION.

An agreement which is a part of a scheme by which Crown lands, which are not suited for settlement are to be acquired, contrary to the policy of the statute concerning colonization, with the object of enabling the parties to get possession of the timber on terms less onerous than those which would have been imposed had they attempted to buy the timber as such from the Government, is null and void and cannot be enforced by legal proceedings.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, 30 Que. K.B. 372, reversing the judgment of Roy, J., at the trial, and maintaining the respondent's action. Reversed.

L. St.-Laurent, K.C., for appellant.

A. Perreault, K.C., for respondent.

IDINGTON, J.:—This appeal raises the question of the legality of the following contract between the parties hereto, who signed same:—

"In the year one thousand, nine hundred and thirteen, the twenty-fourth day of December.

Mr. Daniel Bernier, farmer, of the parish of Cap St. Ignace, who acknowledges by these presents to have sold, with warranty and free and clear, unto Alfred A. Paradis, civil engineer, of DuGueslin, hereunto present and accepting as acquirer, the right to cut all the wood on lots Nos. (16 and 17) sixteen and seventeen of range B. in the Canton Bourdages, for a period of ninety-nine years (99) from this date, with the right to enter at will upon the said lots and to erect any buildings thereon for the exercise of his wood-cutting rights.

The present sale is made for the price of four hundred dollars ($400.00) payable when the vendor shall have obtained letters patent from the Government of the Province of Quebec for the said lots. The vendor undertakes to do all the necessary work, including residence, etc., in the shortest possible time. He also agrees to carry out his obligations in the places indicated by the purchaser, and if he cuts a single tree except as required by these obligations he shall be liable in damages.

In witness whereof the parties have signed in the presence of Messrs. Henri Michon and Adélard Morneau, both of the parish

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of Cap St. Ignace, who have signed as witnesses after reading these presents."

The lands in question therein were at the date thereof Crown lands set apart with other like lands for the purposes of colonisation and offered on such terms as to encourage those acquiring same to become actual settlers.

A scheme far from being in harmony with the said public policy and more calculated to retard settlement and to promote speculation in timber on said lands, seems to have been conceived by the respondent and presented to the mind of the appellant, whereby each of four lots should be applied for in the respective names of appellant and others likely to co-operate in carrying out said scheme and secure to the respondent the timber on the two lots named in the said agreement.

Article 1572 of the R.S.Q. 1909, contains the relevant law governing the appellant and others in becoming locatees of the Crown in order to carry out anything like unto the said scheme.

It reads:—

"Lots sold or otherwise granted for settlement after the first day of July, 1909, shall not, for five years, following the date of the location ticket, be sold by the holder of the location ticket or otherwise alienated, wholly or in part, except by gift *inter vivos* or by will in the direct line ascending or descending or in the collateral line, or by abintestate succession, and in that case the donee, heir, or legatee shall be subject to the same prohibition as the original grantee."

The location tickets for each of the lots in question herein were duly applied for on the date of above agreement and the Crown Land's agent received authority on December 29, 1913, to issue location tickets to each of the respective applicants, but only upon his swearing to an affidavit in the form which the regulation required containing 10 paragraphs intended to secure the execution of the public policy I have above adverted to.

Those bearing directly on the question raised herein, are as follows:—

"4. I wish to acquire this lot in my own name, to clear and cultivate it for my personal benefit.

7. I am not acting as *prête-nom* for any person in order to acquire this lot.

8. I am not acquiring this lot for the sole purpose of exploiting the wood upon it or of enabling others to do so, but in order to make of it a serious agricultural establishment."

The respondent, notwithstanding the rather formidable obstacles in his way by reason of the art. 1572 above quoted, and the said paragraphs in the oath taken by the respective applicant

for each of the said lots, named in the above quoted agreement, saw fit to bring this action after the patents had issued for the said lots.

The trial Judge properly dismissed said action on the grounds of the illegality of the contract.

The Court of King's Bench, by a majority, the Chief Justice and Carroll, J., dissenting, reversed said judgment of dismissal. Hence this appeal.

I have no hesitation in holding that the contract was null and void by reason of its violation of the art. 1572 above set forth, and the impropriety of the affidavits upon which the title of respondent rests to acquire the cut of timber for 99 years from the date of the agreement.

It seems to me idle to pretend that a sale of the most valuable part of the whole property to be acquired was not a sale of part of those lots.

And a sale that bound the patentee to refrain, for 90 odd years, from clearing and cultivation of the greater part of the land in question, seems directly in conflict with the public policy of promoting reclamation of the land pursuant to which, and that alone, the patent was to issue.

The pretension that discovery was made before the 5 years prescribed for doing settlement duties had expired that the land in fact should have been otherwise classified does not and cannot touch the question of the original illegality of the contract from the time it was executed or validate it.

The case of *Howard* v. *Stewart* (1914), 20 D.L.R. 991, 50 Can. S.C.R. 311, is partly relied upon by some of the Judges comprising the majority of the Court below. The argument therein, it is said, is applicable herein in great part.

For my part in that case, I may be permitted to refer to the following paragraph at p. 330 (50 Can. S.C.R.):—

"I am unable to see how we can find such alleged policy of the law unless by express legislation, or clear implication thereof, cutting out the usual operative effect which the law gives to the contracts between parties."

Clearly that is against any use of that case to support the judgment appealed from.

And as to the affidavit in use at that time I said at pp. 333, 334, as follows:—

"In argument stress has been laid upon this affidavit. All it amounts to is that the applicant has an honest purpose at the time of making the application as specified in the affidavit. There is no pledging or promising in reference to the future disposition of the lot or of the improvements. If it had been

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shown that this locatee, Thibault, had conceived the purpose of selling to the Austin Lumber Company when he made his affidavit, the transaction, of course, would be fraudulent. Nothing of the kind appears in this transaction. I, therefore, fail to see any argument that can be founded upon this affidavit when we have in view the actual facts of this case. The affidavit itself is in harmony with the general expressions relative to sales used in the foregoing statutes."

I evidently had there the same conception as I have now as to the one in use at the time when the contract in question herein was made, and adopt here my language there as expressive of what I then and still think of such a project as respondent had in view in promoting such a bargain as he relies upon.

'The law upon which that case was decided was changed by the Legislature just after the party there concerned had got his location ticket, and made, as result of experience, radically more restrictive as to what a locatee could do or could not do.

This question of trying to defeat the public policy in regard to Crown Lands' sales, has come up in other provinces. See the case of *Brownlee* v. *McIntosh* (1913), 15 D.L.R. 871, 48 Can. S.R. 588. And incidentally I had to consider it and cases thereon in another case heard before us this term.

I think the honest observance of such policy once legislatively declared should be rigorously enforced by the Courts and all attempts such as in question herein of defeating it by circuitous methods defeated.

This appeal should, therefore, be allowed with costs here and in the Court of King's Bench and the judgment of the trial Judge restored.

DUFF, J.:—The question raised by this appeal is not, I think, strictly the question which was so much discussed on the argument, namely whether the agreement was an agreement transferring a *droit réel* in the lands to which it related. The agreement is, in my judgment, inoperative for a much more fundamental reason. The statutes of the Province relating to the disposal of the public lands provides for the acquisition of land suitable for settlement by persons intending in good faith to become settlers upon very advantageous terms. Under these provisions the consideration received by the public who are the owners of the lands in reality arises from the fact that the applicant for them is a person who does so intend and who presumably will carry out such intention by becoming a permanent resident upon them and making his livelihood by the cultivation of them. Such expectations no doubt frequently are not realised, but the form of the affidavit required from the applicant abund-

antly manifests the policy of the Legislature and the Government of Quebec and makes it abundantly clear that under that policy only *bonâ fide* intending settlers are to be given the benefit of the enactments touching this subject. The agreement which is in question in this litigation was, beyond all question, a part of a scheme by which lands which were not really suited for settlement were to be acquired—through the instrumentality of applications by applicants lending their names for the purpose of the scheme—with the object of enabling the respondent and the appellant to get possession of the timber on terms less onerous than those which would have been imposed had they attempted to buy the timber as such from the Government. The scheme necessarily involved the making of a statement by each of the applicants—a sworn statement—that he was acquiring the lot for which he applied in order to become a *bona fide* settler and further that he was not lending his name to any other person for the purpose of acquiring the lot. It is undisputed that the respondent understood all that would be involved in carrying out this scheme. It is impossible to contend, it seems to me, that an agreement so conceived having such intended consequences can be enforced by legal proceedings.

The appeal should be allowed and the judgment of the trial Judge restored.

ANGLIN, J.:—The contract sued upon was made with the intent and for the purpose on the part of the parties to it of effecting a result contrary to the policy of the law. It was on this ground null and void *ab initio*. The property dealt with was to be obtained from the Crown under location tickets on applications purporting to be those of four *bonâ fide* intending settlers. The applicants did not in fact intend to become such settlers. The real purpose of the scheme to which they became parties at the instance of the respondent was to obtain for him and the appellant the timber upon the lots to be applied for. The applications were supported by affidavits containing misrepresentations of fact and intention. Each applicant was required to swear that he wished to acquire the lot applied for for the purpose of clearing and cultivating it for his own personal benefit; that he had not lent his name to any other person for the purpose of acquiring such lot; and that he was acquiring it in order to *bonâ fide* settle thereon and not for the sole purpose of cutting the timber thereon or having it cut for sale by others. These statements must have been false to the knowledge of the affiants as well as to that of the plaintiff by whom the making of such affidavits was induced. That the lands were subsequently found by the department to be unsuitable for settlement or cultivation

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cannot render valid an agreement which was void for illegality and fraud upon the Crown when it was made. While the defendant appellant, who sets up the defence of invalidity is certainly entitled to no sympathy, the Courts may not lend their aid to a plaintiff seeking to enforce such a contract as that sued upon. I would, with respect, allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the trial Judge.

BRODEUR, J.:—Paradis was employed in 1913 as an engineer in connection with the construction of the Transcontinental Railway in the county of Montmagny. He found that certain lots of Crown lands near one of the railway stations in the Canton of Bourdages could be exploited with advantage as timber limits. So he approached Bernier, a farmer in one of the old parishes of the county, with a view to inducing him to take these lots as a settler. Bernier probably knew that he could not fulfil the conditions imposed by the law upon those who wish to obtain colonization lots, but Paradis told him that he could get over the difficulty through the good offices of certain influential persons of his acquaintance in the department of lands and elsewhere. Bernier believed him and procured from his relations and his partner the affidavits that were necessary in order to secure location tickets for these lots. Prior to this, however, Paradis got him to sign a deed whereby he sold "the right to cut all the wood on lots 16 and 17, Canton Bourdages for a period of ninety-nine (99) years from this date," for $400, which should be payable when Bernier had obtained his letters patent.

Bernier, having obtained his location tickets, began to cut wood in sufficient quantities to meet the exigencies of the law, but his development was commercial rather than agricultural. He did not, for example, fulfil the conditions of residence imposed upon him by his location ticket and by law. He could not, therefore, obtain his letters patent. But he claimed that the lots were unsuited for cultivation; and he seems to have induced the Department to classify them as forest lands and obtained letters patent in consideration of an additional cash payment.

It is quite evident to me that he was not a settler in good faith and that from the beginning he and Paradis intended to take advantage of the colonization laws in order to get possession illegally of certain lands from which they would take all the wood, Bernier receiving $400 as his share of the transaction, while Paradis would receive all the profits resulting from the sale of the wood.

Paradis now asks for the enforcement of the contract which he made with Bernier; and the latter pleads, amongst other defences, that the contract is absolutely null.

The Quebec Legislature, wishing to put an end to the deplorable speculations in Crown lands by pretended colonists who were nothing more than disguised wood merchants, saw fit to amend the law in 1909 by declaring that colonists could not sell the lots they had obtained from the Department within 5 years from the date of their location tickets, unless authorised by the Minister after the latter had been convinced that it was in the interests of colonisation that such transfer should be made. And the Act added:—"Any transfer made in contravention of the present article is radically null as between the parties."

The Superior Court held that the contract between Paradis and Bernier was null. The Court of Appeal, by a majority of three to two, held that the contract was valid, since it had reference to a sale of rights posterior to the issuance of the letters patent.

It is well to remark in this connection that the contract in question states specifically that the right to cut wood is sold as from the date of the contract, that is to say from 1913. It is true that payment was not to be made until letters patent had been issued; but it is unquestionable that Paradis, if the contract was valid, had rights in the wood upon this property. It, therefore, follows that Bernier had sold and transferred some of the rights which he had in the lots in question.

The sale of these rights was illegal by virtue of the Act of 1909, because it was expressly forbidden for colonists to dispose of their rights by sale, except when authorised by the Minister of Lands. Without discussing the morality of the transaction between the plaintiff and the defendant, or enquiring if that transaction was made with the intention of evading the law, I consider that a contract whereby Bernier undertook to dispose of the right to cut wood on the lots which he held, or would soon hold, under location ticket, was a contract which, as the law declares, was radically null and, consequently, cannot be enforced by the Courts.

If such a contract could have the force of law, it would simply have the effect of nullifying the evident intention of the Legislature to grant colonisation lots only to settlers in good faith. A little wood, and ignore his obligation to live upon the land in a little wood, and ignore his obligation to live upon the land in the hope of being able to make a considerable profit out of the wood. The very evident intention of the Legislature was that these Crown lands, which were acquired for nothing, or next to nothing, should only be given to *bonâ fide* colonists and not to

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persons who would make a show of carrying on some colonisation operations while in reality intending merely to deal in wood.

Mr. Perrault pleaded very skilfully that this sale of 1913 was valid because an Order in Council was made in 1918 whereby these lots had been virtually classified as forest lands. He urged that this Order in Council had a retroactive effect, which could render valid the contract made in 1913 by Paradis and Bernier.

I cannot share this opinion. There is nothing in the law to show that the Order in Council could have a retroactive effect. We have to consider the contract of 1913 with reference to the date on which it was made. Now, at that time, a colonisation lot, or part of a colonisation lot, was sold. The law forbade sales of this nature; and the present contract was, therefore, null *ab initio*, and nothing could be done to revive it.

For these reasons, the judgment of the Court of Appeal should be reversed and the judgment of the Superior Court reaffirmed, the whole with costs of this Court.

MIGNAULT, J.:—On December 24, 1913, the appellant sold to the respondent "the right to cut all the wood on lots Nos. 16 and 17 of range B in the Canton Bourdages, for a period of 99 years from this date, with the right to enter at will upon the said lots and to erect any buildings thereon for the exercise of his wood-cutting rights.

The present sale is made for the price of $400 payable when the vendor shall have obtained letters patent from the Government of the Province of Quebec for the said lots. The vendor undertakes to do all the necessary work, including residence, etc., in the shortest possible time. He, also, agrees to carry out his obligations in the places indicated by the purchaser, and if he cuts a single tree except as required by these obligations he shall be liable in damages."

The appellant argues that this sale is null and many authorities have been quoted in support of this contention. Before enquiring into the question of validity, it is advisable to explain the circumstances in which the sale was made. I must say that those circumstances seem very strange, not to use a stronger expression.

The respondent was chief engineer of the Transcontinental Railway. The appellant was a farmer in the parish of Cap St. Ignace. The respondent suggested to the appellant that the latter should acquire certain lands from the Government so that he might sell to him (the respondent) the right to cut wood thereon. He undertook to make all the necessary arrangements with the Government and, in fact, on December 10, 1913, he recommended to the Hon. Mr. Caron, Minister of Roads and

Agriculture, that lots 15, 16, 17 and 18 should be granted "to good settlers", namely Adelard Morneau, Daniel Bernier, the appellant, Joseph Bernier, appellant's minor son, and Phileas Bernier, appellant's brother, "who will offer the best security to the Government for the faithful fulfilment of the obligations required."

Mr. Caron sent the respondent's letter to his colleague, the Hon. Mr. Allard, Minister of Lands and Forests, and the latter's deputy authorised the agent at Montmagny to make the present sale.

Prior to this, the Departmental inspector, Pouliot, had certified, on December 1, 1913, to the Minister of Lands and Forests, that these 4 lots contained, to his personal knowledge, 50% of arable land each.

At the time of the sale of the wood-cut, December 24, 1913, there were not even location tickets for these lots. These location tickets were issued on December 29, 1913, and contained the ordinary conditions of cession of colonisation lots. In the affidavit required for the concession, each of the recipients swore that he was not acquiring the land for the sole purpose of exploiting the wood or of allowing it to be exploited by others, but for the purpose of serious agricultural development. He further declared that after visiting the lot he considered it fit for agricultural purposes.

The conditions imposed by the location ticket upon colonists appear to have been fulfilled, with the exception of residence, which had only been maintained for 8 months in each year, and it was precisely for default of continued residence on the land that the Departmental officers decided that letters patent for these lots could not be granted to the acquirers.

It was then that influence was brought to bear upon the Government with a view to obtaining letters patent, although the conditions for granting colonisation lots had not been fulfilled. It was suggested that the lots be sold to the concessionaires for $2 an acre. We find in the record several letters written to the Minister by the county deputy recommending the grant. There is also in the record a letter addressed by the Deputy-Minister to another deputy who appears to have been interested in the matter. In his testimony, the respondent also stated that he went to the Department to ask that letters patent be issued.

In order to overcome the difficulty resulting from default of sufficient residence, it was proposed to sell the lots to the concessionaires for the price I have mentioned, as being collectively unsuitable for agricultural development. These intrigues succeeded and, on July 2, 1918, the Government made an Order in

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Council stating "that it appears that this lot is, in its entirety, unsuited to agriculture; that it is expedient *to convert this sale into a sale without the conditions usually applicable to location tickets,*" and it was ordered that letters patent be issued unconditionally, provided the owner paid an additional price equivalent to $2 per acre.

This price was paid by the appellant, who then received his letters patent.

But, when he found himself armed with these letters patent, the appellant refused to accept the price of $400 which the respondent offered him. It appears that the price of wood had increased very considerably and the appellant did not regard the matter in the same light as in December, 1913. It was then that the matter was taken to the Courts.

I have recited the above-mentioned facts without commenting upon them. In fact, they can very well do without comment. It is absolutely impossible for me to believe that Mr. Pouliot was mistaken in 1913 when he certified, from a personal knowledge of the territory, that each of the lots contained fully 50% of arable land. Besides, the appellant stated in his affidavit for obtaining the location ticket that after visiting the lot he considered it fit for agricultural purposes. And what of the oath which he made on December 29, 1913, that he was not acquiring the land for the sole purpose of exploiting the wood or of permitting others to do so, when 5 days before, he had sold to the respondent the right to cut wood for 99 years? Furthermore, the sworn certificate of Mr. Letourneau, who visited the land at the appellant's request, states, under date September 13, 1917, that the land had been well prepared for cultivation and that there was at that time 15 1-3 acres sown with hay.

It was after that that the lots were declared unsuitable, in their entirety, for agricultural purposes.

Now we have to decide if the respondent can claim the woodcut or if the sale is null.

Many grounds of nullity have been raised against the sale of the right to cut wood. It has been declared to be a sale of a thing belonging to another and further, a thing which is not an object of commerce, since it belonged at that time to the Government. It is also claimed that art. 1572 R.S.Q., which forbids settlers to sell or otherwise dispose of their concessions held under location ticket before letters patent have been issued, applies to the present case.

In my opinion, it is not necessary to discuss these grounds of nullity, for there is another serious objection to the respondent's action. From the beginning, the latter appears to have intended

to procure for himself the right to cut wood on lands destined for colonisation, in spite of the laws which protect both the colonists against speculators wishing to acquire the wood, and the Government which, in the public interest, grants under very favourable conditions lands belonging to the Crown, with the object of having them opened up for colonisation. I cannot believe that the appellant would have ever thought of asking for this concession if he had not been influenced by the respondent. Again, when default of residence was set up against the appellant, the respondent and others intervened to procure for him the sale of the lots without the very wise conditions imposed in the case of grants of land for colonisation purposes. All this was clearly done in order to enable the respondent to reap the benefit of his wood cutting rights, for, according to the contract, the appellant and his heirs were to have no rights therein for a period of 99 years. Unfortunately, the Government appears to have facilitated the evasion of the law by issuing the Order in Council of July 2, 1918, but it may possibly have been ignorant of the purchase made by the respondent, who was probably prudent enough to refrain from disclosing it. In any case fraud has been committed, and the person who would profit by it, if the sale of December 24, 1913, were maintained, would be the respondent and not the appellant. But the appellant was a party to this fraudulent conspiracy and thereby obtained a concession of public lands to which he was not entitled.

I cannot uphold the respondent's action, but at the same time the appellant should not obtain costs against the latter, for he participated in the fraud and is now the only person to gain by it, since the sale of the wood cutting rights is annulled. He may consider himself lucky if the Government does not revoke the concession which it was induced to make to him.

The appeal should be maintained and the judgment of the Superior Court reaffirmed, without costs in this Court and the Court of King's Bench. *Appeal allowed.*

REVENTLOW-CRIMINIL v. RUR. MUN. OF STREAMSTOWN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

COSTS (§ I—2c)—ALBERTA RULE 739—APPLICATION—CASE NOT PROVIDED FOR BY—POWER OF APPELLATE COURT TO FIX BY DIRECTION AFTER FINAL JUDGMENT.

Rule 739, (Alberta) which is the only one relating to the Appellate Division, requiring the direction as to costs if a direction is made, to be embodied in the formal judgment, does not provide for a case where the scale applicable below has not been fixed, and there being no rule regulating the matter the Court may do so by a direction subsequent to the formal judgment.

[See also (1922), 65 D.L.R. 193, Can. S.C.R. 8.]

Alta.

App. Div.

REVENTLOW-CRIMINIL v. RUR. MUN. OF STREAMS-TOWN.

Stuart, J.A.

APPLICATION by plaintiff for a direction that the costs of her appeal be taxed upon a higher scale than the 2nd column of schedule "C". Application granted.

C. F. Newell, K.C., for applicant.

S. B. Woods, K.C., for respondents.

SCOTT, C.J. concurred with BECK, J.A.

STUART, J.A.:—I have some doubt as to the propriety of this matter being dealt with by the Court constituted differently from the way in which it was constituted upon the hearing of the appeal. But, if the Court is entitled to fix the scale of costs after the formal judgment has been entered I presume it would be often found to be inconvenient to secure the attendance of the particular Judges who heard the appeal. Hereafter, of course, there will be less chance of such a difficulty occurring. In the circumstances, I think the Court, as now constituted, should deal with the matter, if the Court, no matter how constituted, has power to act at all, owing to the judgment having been already entered.

My opinion is that we have here a clear *casus omissus* from the rules as to costs. I do not think it can be said that there was any scale "fixed under the judgment appealed from" so as to make Rule 736 apply. There could be no scale fixed for taxation of costs "under a judgment appealed from" when that judgment did not give any costs to either party. There were no costs to be paid at all "under the judgment appealed from", so that there could really be no scale *fixed*.

The scale upon which the costs of the appeal are to be taxed must be fixed somehow. If not fixed by the rules nor by the judgment, then certainly the Court has jurisdiction to fix the scale. Someone must fix it, and if anyone can, certainly the Appellate Division can.

I agree that col. 5 may be applied particularly, as there were no costs given of the action and the judgments in the Supreme Court of Canada, inferentially at least, suggest that costs might very properly have been given to the plaintiff even at the trial.

BECK, J.A.:—This case is reported in the Supreme Court of Canada in (1922), 65 D.L.R. 193, 63 Can. S.C.R. 8, where the decisions in the Courts below are noted.

The trial Judge gave judgment for the plaintiff *without costs* (1919), 15 Alta. L.R. 204, the Appellate Division dismissed an appeal by the defendants *with costs* (1920), 52 D.L.R. 266, the Supreme Court of Canada dismissed a further appeal *with costs*, 65 D.L.R. 193, 63 Can. S.C.R. 8. The plaintiff is now about to tax her costs of the appeal to the Appellate Division, and asks

for a direction that the costs should be taxed upon a higher scale than the 2nd column of schedule C. In effect we are asked to interpret Rule 739.

The formal judgment has been issued and entered, dismissing the appeal "with costs". Mr. Woods, K.C., contends that we cannot now make the direction asked in view of Rule 739, which reads:—

"On any appeal the scale of costs of the appeal, and if so stated in the judgment, also of the proceedings in the Court below, shall be as directed by the judgment in appeal, and in default of direction shall be the same as that fixed under the order or judgment appealed from."

Rules 730, 732, 734, 735 and 736 (these last two, I think, should be read together) 737, 741, 742 and 746, all deal with costs and the authority of the Court or Judge to deal with costs. I think this authority can be exercised under these rules after the formal judgment or order has been issued and entered. All these rules apply, and apply only, to a Judge or to the Court acting otherwise than in appeal, and obviously the power to give direction expires upon the final taxation of the costs in question.

Rule 739 is the only rule relating to the Appellate Division. That rule requires the direction, if a direction is made, to be embodied in the formal judgment. There are obvious reasons for such a provision with regard to the Appellate Division; the schedule of costs based, as it is, largely upon the amount involved, has no necessary relationship to the importance of the questions raised upon the appeal; the Court, as a Court, is not as readily accessible as a Judge.

Under the Rule two cases will arise; (1) The Court expressly fixing in its judgment the scale of costs; (2) The Court refraining from so doing. In the latter case, the rule provides for only one case, namely, where the judgment or order below fixes the scale. I think this means fixes expressly, but even if it does not, it is not fixed automatically by any rule. The rule does not provide for the case which has arisen here, where the scale applicable below has not been fixed. There being thus no rule regulating the matter, I think we can do so by a direction subsequent to the formal judgment regulating the quantum of costs.

Under the circumstances, I think it is proper to direct that the plaintiff be entitled to tax her costs on column 5 of the schedule.

There will be no costs of this application.

HYNDMAN, J.A. concurs with BECK, J.A.

CLARKE, J.A.:—I do not think the Court, as presently constituted, should undertake to make any order as to costs, which it

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was within the province of the Court as constituted when the judgment was given to make, but that Court gave costs, and all that remains is to settle the amount. In my opinion, it is quite competent under the proviso to sec. 734, for the Supreme Court or a Judge thereof, to allow any amount, regardless of the scale, applicable, and this warrants the use of a higher column as the basis for the increased allowance, especially where, as here, the scale has not been fixed. Any application for increased allowance can best be dealt with by the Judge or Court which heard the case.

In the present application some of the members of the Court heard the appeal and, as they think, the costs should be allowed under column 5, I agree.

Judgment accordingly.

SHERLOCK v. GRAND TRUNK R. Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

CARRIERS (§ IIM—310)—LIMITATION OF LIABILITY—PERSONAL BAGGAGE—VALUES—RAILWAY ACT.

By sec. 340 of the Railway Act a railway company cannot, by contract or otherwise, limit its liability in respect to the carriage of traffic unless authorized by the Board of Railway Commissioners; the Board may, by regulation, determine the extent to which the liability may be limited, and it may prescribe the terms and conditions under which any traffic may be carried. A regulation, providing that a carrier shall not be liable for loss of or damage to personal baggage caused by negligence or otherwise to an amount greater than one hundred dollars unless greater values are declared and extra charges paid at time of checking, is *intra vires* of the powers of the Board.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1920), 54 D.L.R. 524, 48 O.L.R. 237, affirming the judgment at the trial 47 O.L.R. 473, in favour of the respondent. [See 67 D.L.R. 217.]

The appellant is a commercial traveller residing in the City of Hamilton, and on May 7, 1919, she purchased a ticket from Hamilton to Toronto, which ticket was the ordinary ticket issued by the respondent, and contained no conditions or restrictions whatever either on its face or back. After she had purchased her ticket, the appellant went to the baggage office and checked her trunk containing her wearing apparel and personal belongings and received in return a check. There was nothing said to her by the clerk who handed her the check to draw her attention to the fact that this check was anything more than a mere receipt for the trunk and the plaintiff herself did not notice that the check contained thereon any terms or conditions whatever.

The trunk was lost on the journey and has not yet been recov-

ered, and the appellant brought this action for the value of same. The respondent paid the sum of $100 into Court but denied further liability, relying on the terms and conditions which were printed on the back of the check and pleaded that the said conditions were authorized by and contained in General Order 151 of the Railway Board of Canada, dated November 8, 1915, and that said order was duly published in the Canada Gazette and had therefore the same effect as if contained in the Railway Act.

The case was tried before Rose, J. and judgment was delivered on May 4, 1920, giving effect to the respondent's contention and dismissing the appellant's action with costs. This judgment was affirmed by the Appellate Division.

Hellmuth, K.C., and *J. Y. Murdock*, for appellant.

D. L. McCarthy, K.C., for respondent.

DAVIES, C.J.:—I think this appeal fails and should be dismissed with costs.

The action was brought by a passenger claiming the value of the contents of a trunk checked as personal luggage and lost by the company. The question to be determined was whether the liability of the company is limited in the matter of a passenger's personal baggage by General Order No. 151 of the Board of Railway Commissioners dated November 8, 1915. The order was duly published in the Canada Gazette and by sec. 31 of the Railway Act, R.S.C. 1906, ch. 37, if there was power to make it, it has, while it remains in force, the like effect as if enacted in the Act itself.

I concur in the reasons for his judgment of Rose, J. the trial Judge (1920), 47 O.L.R. 473, which judgment was unanimously confirmed by the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario (1920), 54 D.L.R. 524, and to which I have nothing to add.

IDINGTON, J.:—The appellant sued the respondent for damages arising from its having lost her baggage for which it has given her a check on presentation of an ordinary ticket as a passenger entitled to travel on its train.

It was assumed on argument that there was no condition expressed on the ticket as to the terms upon which her baggage was to be carried.

On the check for baggage there was expressed something which it is said by respondent should have informed her that she was only entitled to claim, in case of loss, $100, unless she had declared on getting the check the value of the baggage beyond that sum and paid an increased charge for such excess in value.

The counsel for appellant argues that the basis of the liability is contract and that, he submitted, was contained in the ticket.

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I am afraid the reasoning is rather technical and omits reading into the contract what the law nowadays imputes as knowledge of all implied in a mere ticket, by virtue of the regulation No. 151 of the Board of Railway Commissioners, and imputes to her knowledge thereof and all else that ensued, or was to ensue, before she had got a check for her baggage, and all inscribed on such check hence part of the contract. These several imputations of knowledge of what her ticket implied, and especially the rights thereby acquired to get her baggage carried, cannot be overlooked, and she got a check for same so inscribed which she must be held in law to have known and assented to.

If any one doubts these several imputations of knowledge let him read the facts set out in my judgment in the case of *Robinson* v. *Grand Trunk R. Co.* (1913), 12 D.L.R. 696, 47 Can. S.C.R. 622, 15 C.R.C. 264, as well as what is said therein by my brother Judges.

I refer to my own because it appears therein that the form never was filled up, yet the Court above reversed us and the decision of that case as reported in 22 D.L.R. 1, [1915] A.C. 740, 19 C.R.C. 37, binds us.

Surely it goes much further in imputing knowledge than anything required herein to bind the appellant thus presumed in law to have had knowledge of the condition and to have given her assent thereto by accepting the check inscribed as above stated.

In regard to the validity of the regulation as part of a contract so interpreted, there is no question but the appellant must fail herein.

Apart from all that, can it be said that the power of the Board to fix tolls for any and every service by a railway does not cover the case of baggage?

And does not sec. 340 give the Board almost unlimited powers in the way of impairing, restricting or limiting the liability of a railway company within its jurisdicton?

It reads as follows:—

"340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board, may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

The exact thing in question herein seems within these powers, or some one of them, and I need say no more in regard thereto.

The framing of Rule No. 151, which I think was intended to be an exercise of the power it was asked by the railway company to exercise, may be open for the criticism that it might have been better expressed if intended to reach the understanding of ordinary people, but its legal import, assuming what was done in way of its publication was all that the Act requires to give it vitality, seems clear. I am almost tempted to suggest that contract as a basis for such dealings as in question is fast becoming a fiction of law.

I think this appeal should be dismissed with costs.

DUFF, J.:—It was competent, in my opinion, to the Board, acting under sec. 340, (3) to limit the value of the personal baggage or other property to be carried on a passenger train for a passenger and to require a declaration by the passenger as to the value of his baggage in excess of $100, and further that the charges for such declared excess should be prepaid. Where the value of the passenger's baggage exceeds the sum mentioned and no declaration is made in respect of it then, as the company is under no obligation to receive such baggage for carriage and does not knowingly consent to carry that which it is not bound to carry, I am unable myself to understand upon what foundation the responsibility of the company for such baggage can be based. I do not think sec. 284 (1) applies to such case nor do I think sub.-sec. 7 applies.

If such excess baggage were accepted knowingly by the company's servants without declaration and without payment of tolls a very different situation would arise; but where there is no declaration and the company is ignorant of the facts the company's responsibility is, in my judgment, neither more nor less than its responsibility in respect of property wrongfully placed in one of the company's cars.

If this be the correct view the basis of Mr. Hellmuth's argument fails because the order does no more than declare the legal consequences of the conditions laid down and validly laid down in respect of the reception of such "traffic."

ANGLIN, J.:—The question for determination on this appeal is whether the Board of Railway Commissioners has the power by general regulation, to relieve a railway company from liability consequent upon loss of, or damage or delay to, personal baggage ascribable to negligence of its servants for any amount exceeding a stated sum, unless such baggage has been declared to be of

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greater value and extra charges therefor, according to a tariff approved by the Board, paid at the time of delivery to the company for checking. The Board passed such a regulation (No. 151) on November 8, 1915, restricting the value of baggage entitled to free carriage to the sum of $100. The governing statute is the Railway Act of 1906 (R.S.C., ch. 37) and amendments thereto made prior to the year 1919.

The plaintiff sues to recover damages for loss of personal baggage valued by her at $2,000. The existence of the conditions limiting the company's liability to $100, if the impugned regulation be valid, is admitted; if it is invalid the company's liability for damages beyond that sum, to be assessed on a reference, is conceded.

Sec. 283 of the Railway Act requires every railway company to check each parcel of baggage equipped with suitable means for attaching a check to it which is delivered by a passenger for transport and provides for the collection by the company of such tolls for excess baggage as may be authorized. By sec. 284 the company is required to receive, carry and deliver all traffic offered without delay and with due care and diligence (sub.-sec. 1) and any person aggrieved by any breach of that duty is given a right of action from which the company cannot relieve itself by any notice, condition or declaration where the damage arises from its negligence or omission or that of its servants (sub.-sec. 7). This right, however, as is pointed out in *Robinson* v. *Grand Trunk R. Co., supra*, at p. 2, is explicitly made "subject to this Act."

By sec. 340 any contract, condition, by-law, regulation, declaration or notice purporting to impair, restrict or limit the company's liability in respect of the carriage of any traffic is declared ineffectual unless of a class authorized or approved by order or regulation of the Board of aRilway Commissioners (sub.-sec. 1); the Board is empowered to determine the extent to which the company's liability may be so impaired, restricted or limited (sub.-sec. 2); and, by regulation, to "prescribe the terms and conditions under which any traffic may be carried by the company (sub.-sec 3)."

By sec. 30 the Board is empowered to make orders and regulations governing a number of enumerated matters and, *inter alia*, "(h) with respect to any matter, or thing which by this or the special Act is sanctioned, required to be done, or prohibited; and (i) generally for carrying this Act into effect."

It is apparent, therefore, that the Board's powers are very comprehensive. By sec. 31 it is provided that any regulation, etc., of the Board shall when published for three weeks in the

Canada Gazette, have the like effect as if enacted in the Railway Act. Due publication of regulation No. 151 is admitted.

I think it is unnecessary to determine whether personal baggage of such weight and dimensions as would, under the regulation of the Board, entitle the passenger owning it to have it carried free may properly be classified as "excess baggage" within sec. 283 because its value exceeds a sum fixed by regulation of the Railway Commissioners as that of baggage which a passenger is entitled to have carried free. Whether that section does or does not apply, it is in my opinion within the competence of the Board under sec. 340 (3) to prescribe the terms and conditions under which baggage may be carried by railway companies—that if under a certain weight, of less than fixed dimensions and of value not exceeding a stated sum (all to be prescribed by the Board) it shall be carried free, and that if not within the limits set in any one or more of these particulars, tolls according to approved tariffs shall be paid for its carriage. I find nothing to preclude the Board ordering that in the event of the passenger failing to declare the value of his baggage, if it exceeds the amount within which he is entitled to have it carried free, and to pay or tender the approved toll in respect of such excess when presenting it to be checked, his right of recovery under sec. 284 (7) in respect of it shall be limited to the amount prescribed by the Board as the value up to which he was entitled to have it carried free. That seems to me to be nothing more than fixing "terms and conditions under which (this) traffic may be carried by the company" as authorized by sec. 340 (3). Notwithstanding the presence in sub.-sec. 2 of the word "so", which I read as intended merely to carry into it the words "in respect of the carriage of any traffic" found in sub.-sec. 1, rather than to restrict the application of sub.-sec. 2 to cases in which the company, proceeding under sub.-sec. 1, should attempt to impair, restrict or limit its liability by contract, condition, by-law, regulation, declaration or notice, I incline to think that regulation No. 151 may also be sustained as an exercise of the power which that subsection confers. Sec. 340 is one of the provisions of the Act to which sub.-sec. 7 of sec. 284 is made subject. The impeached regulation was therefore, in my opinion, *intra vires* of the Board and effectual to limit the respondent company's liability to the appellant.

The appeal fails and should be dismissed with costs.

BRODEUR, J.:—I concur with my brother ANGLIN.

MIGNAULT, J.:—I think the regulation relied on by the respondents was within the power of the Board of Railway Commissioners under sub.-sec. 3 of sec. 340 of the Railway Act

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(R.S.C. 1906, ch. 37). That the liability of the railway company can be restricted by order of the Board, even where the damage arises from the negligence or omission of the company or of its servants, notwithstanding sub.-sec. 7 of sec. 284, which, however, is stated to be "subject to this Act," is shewn by the decision of the Judicial Committee in *Grand Trunk Co.* v. *Robinson, supra.* This removes the doubt which I otherwise would have felt, and I therefore concur in the judgment dismissing the appeal.

Appeal dismissed.

SMITH v. MUN. DIST. OF STOCKS No. 343.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

HIGHWAYS (§ IV—115)—COUNTY ROAD—STRAW PLACED ON TRAVELLED PORTION—INVITATION TO MOTORIST—STRAW GATHERING UNDER CAR—DAMAGES TO CAR BY FIRE—NEGLIGENCE OF MUNICIPALITY—LIABILITY.

The placing of straw on the travelled portion of a country road in order to make it more passable, is an invitation to the driver of a motor car to travel thereon, and where the straw is placed in such quantities as to cause the car to gather up the straw underneath it to such an extent as to cause it to stall, and the car catches fire and is damaged, there being nothing to shew that the driver could reasonably have foreseen the danger or guarded against it, the municipality is liable for such damage. [See Annotation 46 D.L.R. 133.]

APPEAL by defendant from the trial judgment in an action for damages to plaintiff's automobile. Affirmed.

R. A. Smith, for appellant.

C. H. Russell, for respondent.

SCOTT, C.J.:—This is an appeal by the defendant from the judgment of Ives, J., awarding the plaintiff $675 for damages to his automobile.

On June 22, 1921, the plaintiff was driving his automobile upon a highway within the municipality when, by reason of straw having been spread thereon, it was seriously damaged by fire escaping from it and setting fire to the straw.

At the place where the fire occurred the roadway was sandy and, by direction of a councillor of the municipality, dry straw had been spread thereon the day of the fire and shortly before it, for the purpose of improving the roadway.

It is shewn that it was not an unusual practice to place straw upon the roadway in sandy places for that purpose, that the roadway at that point had been so treated year after year for many years, that the straw was spread only upon the traveled portion of the highway, and that on each side of the straw the highway was in its natural state. It was also shewn that, after the

straw was placed that day and before the fire, another automobile had safely passed over it.

The traveled portion of the road at that point was covered with straw for a distance of about 100 yards. One Mack, a witness for the defence who had placed it there, states that it was from 5 to 12 inches deep, which was the usual depth; that at the place where the fire occurred it was from 10 to 12 inches deep; that when he placed it he tramped it down into the ruts.

The plaintiff had driven the automobile some distance over the straw when it stalled. He attempted to start it again with the result that the rear wheels began to spin and he was unable to proceed. He then discovered that the automobile in passing over the straw had gathered the straw under it to such an extent that it was closely packed underneath it, thus blocking its passage. He and his traveling companion then started to remove the packed straw underneath the automobile and, when doing so, they discovered that it had ignited. They then endeavoured to push the automobile out of danger but they were unable to do so. The only reasonable inference is that the fire was caused by sparks from the automobile.

It may be open to question whether the placing of straw or other combustible matter to any extent upon a highway used by automobiles is not a source of danger by reason of the possibility of fire escaping from such vehicles but, apart from this question, the spreading thereon of straw in such quantities and to such a depth as to cause the plaintiff's automobile to gather up the straw underneath it to such an extent to cause it to stall and thus increase the danger of fire was negligence on the part of the plaintiff, which, in the absence of contributory negligence on his part, would render it liable for the damage which he sustained.

In my opinion, the plaintiff was not guilty of contributory negligence. The placing of the straw was an invitation by the defendant to him to travel thereon, and there is nothing to show that he could reasonably have foreseen the danger or guarded against the consequences which ensued.

I would dismiss the appeal with costs.

STUART, J.A.:—After some considerable hesitation I have come to the conclusion that this appeal should be dismissed with costs.

But I think it should be pointed out that our present function is not one of declaring the law as Judges. We are really acting, as the trial Judge was acting, as a jury. The parties, including the defendant, could have had a jury in this case. And where the thing to be decided is the standard of reasonable care to be

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applied to the action of a municipal district in attempting to make a sandy road more passable for vehicles, in the present age when automobiles with inflammatory exhausts reaching near the ground have become a usual method of conveyance. I think a jury of 6 men taken from the community would have been a more suitable tribunal.

But the duty of acting as a jury was cast upon the trial Judge. His decision, even when upheld by us, is not a decision upon the law but a decision as to what in his judgment amounted to reasonable care. A jury in another case or another Judge would, as I conceive the matter, be quite free to apply a different standard. It is a question of fact not of law.

The trial Judge was of opinion that the defendant district was negligent and he found no contributory negligence in the plaintiff. For the reasons given by the Chief Justice I am strongly inclined to agree with him. But in any case, to say the least, I cannot say that the trial Judge was clearly wrong. There was evidence upon which he could reasonably find as he did upon the existence of negligence. We ought not in such circumstances to interfere with his decision.

BECK, J.A. concurs with HYNDMAN, J.A.

HYNDMAN, J.A. (dissenting):—With great deference to the opinion of the trial Judge I think this appeal should be allowed.

The action is based on negligence, not for leaving the road in an impassable condition, but because the municipality in attempting to make it available for use by wagons and motor cars, used more straw than was really necessary or, in view of the general use of motor cars, advisable, assuming its officers ought to realize that fire might result from close contact of the exhaust tube with dry straw.

The evidence was largely confined to the question of the depth to which the straw was strewn on the road. The witnesses vary greatly on the point, and in nearly all instances I regard their statements as largely guesswork, although it would appear that it is fairly clear that it was excessive.

From a careful reading of the judgment, however, I am satisfied that all he found was that "it should not be scattered about over the entire road at a depth which could be gathered up by any vehicle such as a motor car and carried along and result in an accident such as we have here."

Now a very important fact was established at the trial, namely, that a short time prior to the accident a Ford car drove over the very same spot, stopped on it for a short time without turning off the gas, and proceeded again, without any difficulty. The height of the front axle of a Ford car is 12 inches and a Me-

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Laughlin is about 11½ inches. Why one car should pass safely and the other gather up and pack under it the very same straw is something I am unable to understand.

Granting, as I think we must, that the defendant is bound to exercise reasonable care and skill in doing work of this nature, I am of opinion that the standard of the work must be fixed by all surrounding circumstances. What might be the grossest act of negligence in a city, or even a village, might not be considered even negligence on a remote country road. The topographical features of the district, the length of time settled, the degree of improvements, the natural characteristics of the road itself all must be considered.

In the case before us, we have a very sandy piece of road, impassable without the addition of straw which was apparently the only available substance for the purpose. At the time of the accident, as a matter of fact, the work had not been finished, and surely the municipality ought to be given a reasonable time within which to inspect and remedy defects.

To say to a nicety just how much straw should be placed on a road of this nature, to my mind is a very difficult problem; to calculate within a few inches in laying new and "springy" straw is by no means an easy task.

What impresses me most is the fact that the other car easily and safely negotiated the road and no special attention was paid to its condition. If the work was sufficient to enable the first car to safely traverse it, I think it very satisfactory proof that the work was not done in the negligent manner alleged or sufficiently so as to render the defendant liable in damages.

My own theory is that something peculiar attached to the car had the effect of catching or gathering up the straw and causing it to crowd underneath it with the unfortunate result complained of.

I am not saying that under certain circumstances liability might not arise, but merely that on the facts disclosed here, in my opinion, it does not.

I would, therefore, allow the appeal with costs.

CLARKE, J.A. concurs with STUART, J.A.

Appeal dismissed.

ROYAL BANK OF CANADA v. THE KING.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. June 7, 1921.

TIMBER (§ I-3)—LICENSE TO CUT—STUMPAGE DUES—CROWN LANDS.

Licenses for lumbering on Crown lands in New Brunswick contain a regulation passed by the Lieutenant-Governor in Council which

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provides that the licensee may be required to cut, annually, at least 10,000 superficial feet of lumber for each square mile of his holding with the option in any case of paying the stumpage that would be due on the required quantity and not cutting. Held, that a licensee who, for one or more years, had elected to pay and not cut is not entitled to have the amount so paid deducted from the stumpage fees due to the Crown when he eventually operates over the limits.

APPEAL from a decision of the Supreme Court of New Brunswick Appeal Division (1920), 55 D.L.R. 499, 48 N.B.R. 285, reversing the judgment at the trial in favour of the defendant.

The defendant was holder of a license to cut lumber on Crown lands with a right of annual renewal for a number of years on complying with all stipulated conditions. The license was subject to, and contained, the following regulation passed by the Governor in Council:—

"As a protection to the Government against lands being held under license for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under license as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least 10,000 superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10,000 superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before August 1. On failure of the licensee to comply with any of the foregoing conditions, the licenses shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person."

For 3 years the defendant paid the stumpage dues without cutting. In the 4th year the lumber was cut and the stumpage paid without question, but the next year when operations were continued the claim was set up that the amounts paid in the first 3 years should be credited to defendant and deducted from the stumpage for that season's cut. This claim was allowed by the trial Judge but his judgment was reversed on appeal to the Appeal Division 55 D.L.R. 499.

H. A. Powell, K.C., for appellant.

J. J. F. Winslow, for respondent.

DAVIES, C.J.:—This was an action brought by the Attorney-General of New Brunswick, to recover the sum of $5,616.68, be-

ing the alleged balance due for "stumpage" on Crown lands during the year ending August 1, 1919, with interest.

The defence was that this sum had already been paid by the defendant appellant to the Crown in the years 1913, 1914 and 1915, excepting $619.20 which was admitted to be due, and paid before action.

In the year 1913, pursuant to ch. XI of the Acts of Assembly of New Brunswick of that year, the then holders of licenses were permitted to take out new licenses very similar to the old ones, but providing for annual renewals for 20 years from August 1, 1913.

In addition to "stumpage" on lumber cut, the Province charges annual mileage at $8 per mile and other fees, and it was stated and was not denied that from these stumpage, mileage and other fees, the Province derives about ½ of its total annual revenue.

The whole contest in this appeal turns upon the construction of Regulation 17 issued under and pursuant to the statute before referred to. Shortly put it is this:—

Is the licensee of any area having elected not to cut timber under his license in any year, and having paid to the Crown the "charge in lieu of stumpage," provided for in the regulation for that year, entitled, in a subsequent year when he has elected to cut lumber on his lot, to set off or deduct from the amount payable under the regulation for such cutting the amounts he had paid in previous years when he had elected not to cut as and for stumpage, or "in lieu of stumpage."

Mr. Powell contended very strongly for the appellant that to hold he was not so entitled was tantamount to asking him to pay stumpage twice over.

Section 17, on the construction of which the controversy between the parties depends, reads as follows:—

"As a protection to the Government against lands being held under license for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under license as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Land and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or

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cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licenses shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person."

The trial Judge held that under the true construction of this section the licensee having once paid the charge for stumpage, or, as the regulation states, "in lieu of stumpage" for a specific year, he could, in a subsequent year when he elected to cut, claim to have the sum so previously paid by him credited to the charge he was liable to pay in the year he elected to cut.

On appeal to the Appeal Division of the Supreme Court of New Brunswick (1920), 55 D.L.R. 499, 48 N.B.R. 285, that Court unanimously reversed the finding of the trial Judge. Grimmer, J., in delivering the judgment of the Court, puts the question very clearly and I fully agree with his construction of the section.

He says at pp. 505-6:—"In my opinion the intention of this section is clear. It enabled the Crown to secure a certain amount of protection as far as revenue was concerned, from the lands held by the licensee thus preventing the tendency to speculation and it conferred upon the licensee an option either to cut or to pay for the privilege of not cutting, which option if elected by the licensee, in my opinion, simply entitled him to retain his license and prevent the forfeiture, which otherwise would take place under the provisions of the regulation. The words "such charge in lieu of stumpage" are, to my mind, clear and unmistakable, and the choice once made by the licensee and consented to by the Minister became final, the licensee thereby paying for the option which he enjoyed as hereinbefore stated . . . I cannot and do not consider that sec. 17 requires a payment from the licensee in any sense as a penalty for not making the operation or cut required by the Minister, but it does confer upon him, as stated, the privilege of holding his lands without making a cut or operation, upon payment of a sum fixed by the Minister. In such a case an election to pay would not be in the nature of an anticipated payment for stumpage, but would be simply for the enjoyment of the privilege which was conferred. Should there be any uncertainty in the words "the stumpage that would be due", in my opinion, it is fully explained and the purpose and intention made plain by the other words "such charge in lieu of

stumpage," which to my mind, place upon the object of the section a construction clear, plain and unequivocal."

I do not consider it necessary to elaborate upon the Judge's remarks. I would, therefore, dismiss the appeal with costs.

IDINGTON, J.:—The respondent sued appellant for stumpage dues it had become responsible for, as holder of a license to cut timber in the Province of New Brunswick, in the year from August 1, 1918, to August 1, 1919, which amounted to $6,070.25, but was reduced before action by the payment of $602.75.

The appellant's license was one of the kind that was renewable from year to year and the annual stumpage dues might be increased from year to year without the consent of the licensee by the Minister of Lands and Mines, as he saw fit.

Section 4 of the Act of 1913, ch. 11, relative to such Crown timber lands and licenses to cut thereon, reads as follows:—

"The Lieutenant-Governor in Council shall, from time to time, fix and determine the rates of stumpage to be paid upon the various kinds of lumber cut from the Crown lands by the licensees, and shall determine the mileage to be paid annually by the Licensee, and shall make such other rules and regulations in regard to the cutting and removing of lumber from the Crown Land Areas as may seem to him just, wise and prudent."

Thereunder the Lieutenant-Governor in Council made the following amongst other regulations:—

"(c) As a protection to the Government against lands being held under license for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under license as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least 10,000 superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber of 10,000 superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licenses shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person."

That was set forth in full in the license issued to the appel-

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lant in 1913, as part of the terms upon which the license was continued in force; and also in each succeeding renewal thereof.

The parties hereto at the trial agreed upon the facts to be had in view in determining the issue raised.

That remarkable issue is that the appellant, after having acted upon the said regulation not only for the year 1913-1914, but also for each of the 2 succeeding years, and paid each year the sum of $1,822.50 as the yearly price for the privilege of refraining from cutting, without any resistance, now sets up the contention that such payments were mere payments on account of future cutting under later licenses.

The amusing feature of appellant's claim is that it did cut in the 4th year and paid the full amount of the dues for and in respect of said year's actual cut, and never suggested what now is claimed until settlement demanded for the actual cutting of the 5th year.

Not only did it forget to raise the question when paying for the dues it owed for its actual cut of the year August, 1917, to August, 1918, but in the admissions made at the trial it described what had transpired in respect to the first year's exercise of a privilege of refraining from cutting, as follows:—

"And the Minister, after the issuing of such renewal licenses called upon the defendant, as licensee, to cut during the said term upon the said lands 1,225,000 superficial feet of timber, an amount equal to 10,000 superficial feet of timber, for each square mile of the same, and the defendant preferring to pay the stumpage that would be due on such quantity of timber, namely, 1,225,000 superficial feet, instead of making the said required operation or cut during the said term thereupon notified the Minister of its said preference and the Minister consented that the defendant should exercise such preference and fixed at $1,822.50 the amount of stumpage the defendant should pay on such quantity of timber in accordance with the rates of stumpage then payable by licensees of Crown timber lands for timber cut thereon by the licensees thereof, and the defendant accordingly did not cut during the said term any timber on the said lands but paid to the provincial treasurer the sum of $1,822.50, being the amount of stumpage so fixed to be paid . . . . "

There does not seem to have been a shadow of doubt in the minds of those concerned at the times of the several renewals and payments made by appellant of the nature of the transaction being what respondent contends. Nor was any pretension to the contrary set up till 2 years of cutting had taken place.

Had such a pretension been set up at an earlier date doubtless it would have been ended by the Minister advising an increase

of the stumpage dues under the licence to what was necessary to cure the complaint.

The appellant, I submit, cannot now, properly, steer in silence past such a danger for 2 years and then set up what rests on nothing but a war of words, regardless of the conduct of appellant in paying on the actual basis of what was clearly a common mutual understanding quite inconsistent with what is now contended for.

I always prefer the interpretation so given, to results to be got by doubtful arguments as to words, suggested by afterthought, of what either might have claimed long ago.

However, I doubt if the interest to be saved the Province would ever have occurred to its Minister as worth taking such pains for or as an effectual check upon speculation.

For these reasons, and adopting in the main the reasoning of the Court of Appeal, 55 D.L.R. 499, I think the appeal should be dismissed with costs.

DUFF, J.:—My opinion touching the questions in controversy accords with that of Grimmer, J., 55 D.L.R. 499, whose reasoning is, I think, conclusive. The appeal should be dismissed with costs.

BRODEUR, J.:—This appeal turns upon the construction of Regulation 17 made by the Lieutenant-Governor in Council of New Brunswick concerning the persons having saw mill licenses on Crown lands.

A licence was issued in 1913 in favour of the Royal Bank *in trust* for different persons and it contained a provision that the licensee would carry out the rules and regulations made in connection with the Crown land areas.

Regulation 17 in dispute reads as follows:—[See judgment of Davies, C.J., *ante* p. 25.]

It appears that before the legislation of 1913 there was no disposition by which the Government could get the timber limits under license exploited, and the licensees could for years and years keep the limits without making any cutting. This regulation 17 remedied this undesirable state of affairs and gave the Minister of Lands the power of forcing the licensees to make a certain quantity of cutting.

However, the right of the Minister was not absolute, for the regulation provided that if the licensee preferred not to do the cutting required by the Minister then he would have to pay "the stumpage that would be due on the quantity of timber which he had been ordered to cut," and such *charge in lieu of stumpage* should be payable on August 1.

For 3 years the appellant did not make the operations ordered

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by the Minister and paid to the Government the charge stipulated in the regulation. In the 4th the appellant cut a larger quantity than the one required by the Minister for that year and paid the stumpage dues on the whole quantity he cut. In the 5th year, he still cut a much larger quantity than the one required; but this time, instead of paying the dues, he claimed that he should be given credit for the sums which he had paid in the first 3 years. It is contended on the contrary by the Government that the amount which was paid did not form part of the stumpage dues but that it was an additional charge.

In the first part of the regulation in which is mentioned the payment of stumpage alone, there would be no doubt, according to my opinion, that the licensee would be entitled to claim that the money which he paid was an advanced payment of stumpage on lumber to be cut, but the last part of the regulation makes it very clear that the payment which he makes is a *charge in lieu of stumpage*. This charge or payment is for the privilege which he acquires to have his licence renewed in paying a sum of money representing the dues which he would have paid if he had cut the quantity of timber required by the Minister. This payment is not an advance payment, but it is a charge which he is called upon to pay if he does not fulfil the obligation imposed upon him by the Minister.

The appellant itself appears to have so construed the agreement, since, in the 4th year, it did not claim, when it paid its dues, that the previous payments were to be considered as advance payments.

I, therefore, agree with the construction made by the Court below of this Regulation 17, 55 D.L.R. 499, and the appeal should be dismissed with costs.

MIGNAULT, J.:—The counsel for the appellant left nothing unsaid that could serve as an argument against the judgment appealed from. At first sight, there appeared to be a certain plausibility in his contentions which prevailed before the trial Court, but when carefully scrutinised, I cannot accept these contentions as being sound. The whole question turns upon the construction to be placed upon the licence under which the appellant held from the Crown the right to cut timber on 122½ square miles of land belonging to His Majesty in right of the Province of New Brunswick.

The clause which gave rise to the difficulty is section 17, which reads as follows:—[See judgment of Davies, C.J. *ante* p. 25.]

I may add that the licence was also subject, as a condition of

its renewal, to the payment of $8 per square mile over and above all stumpage dues, and this mileage has been regularly paid.

In February 1912, Hilyard Bros. assigned to the appellant a saw mill licence for the territory in question. In the 2 years ending August 1, 1912, and 1913, no lumber was cut on these lands and a new licence was issued to the appellant on August 1, 1913, for another year ending August 1, 1914. In the latter and subsequent licences was inserted section 17 above quoted.

During the years beginning on August 1, 1914, 1915, and 1916, the licensee was called upon by the Minister of Lands and Mines to cut an amount of at least 10,000 superficial feet of lumber for each square mile. The appellant did not cut this lumber but under sec. 17 paid to the Government $1,822.50 in each year, which would correspond to the stumpage on the quantity which it had been required to cut. In the year beginning on August 1, 1917, the appellant being again called upon to cut this quantity of lumber, cut an excess amount and paid the stumpage thereon without asserting any right to set off previous payments.

The claim to offset these previous payments was first made in answer to the demand of stumpage dues on lumber cut during the year beginning on August 1, 1918. Whether the appellant is entitled to have these payments applied so as to reduce the stumpage due for the latter year is the question to be decided.

Briefly the appellant's contention is that although it cut no lumber during the 3 years beginning on August 1, 1914, 1915, and 1916, it paid the stumpage dues that would have been payable on the required cut of 10,000 superficial feet per square mile, and that when it subsequently did cut lumber, these stumpage dues should be credited on the lumber then cut. It lays stress on the words in sec. 17:—"Should the licensee prefer to pay the stumpage that would be due on such quaitity of lumber . . . . "

The respondent answers that the amounts paid for the years wherein lumber was not cut were paid for the privilege of holding lands without cutting lumber thereon, and relies on the words:—"such charge in lieu of stumpage shall be payable, etc.," as shewing that the appellant paid a charge, *not* for stumpage but in lieu thereof, for this privilege.

Section 17 expressly states that its purpose is to protect the Government against lands being held under licence for speculative purposes and not operated on. Reading the whole clause, it appears clear that the intention was to require the payment each year of a minimum amount whether or not the licensee cut any lumber. Had the required quantity been cut, this payment would undoubtedly be for stumpage, but where no lumber was

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cut, I cannot, on my construction of this clause, come to the conclusion that the payment was on account of stumpage, for stumpage being by definition "a tax charged for the privilege of cutting timber on State lands" (New English Dictionary), there could be no stumpage in the absence of the cutting of any lumber. And although the licensee, to use the language of this clause, was allowed to pay the stumpage that would be due on the minimum quantity required to be cut instead of making the required operation or cut, he really paid a charge in lieu of stumpage, for it would be an abuse of language to term such a payment as one made for stumpage when no lumber was cut and no stumpage had accrued, and the only meaning it can have is that it was made for the privilege of not cutting the quantity specified by the Minister.

Another consideration is that stumpage dues might increase and did in fact increase in the subsequent years, and it would be unreasonable to allow the licensee, when he actually did cut lumber, to escape from paying the increased stumpage, by reason of previous payments at a lower rate for the privilege of making no cut of lumber.

For these reasons my conclusion is that the appeal fails and should be dismissed with costs.

Appeal dismissed.

SKIDMORE v. B. C. ELECTRIC RAILWAY.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. June 6, 1922.

NEGLIGENCE (§ IIF—120)—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF—FAILURE TO LOOK BEFORE CROSSING STREET—INJURY BY STREET CAR—BOTH PARTIES AT FAULT—EXCESSIVE SPEED OF STREET CAR—LIABILITY.

Where a jury has found a plaintiff guilty of contributory negligence in crossing the street behind a street car from which he had alighted without looking out for an aproaching car on the opposite track, he cannot recover damages for injuries caused by being struck by such street car, although the car was at the time of the accident travelling at an excessive rate of speed.

[*B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719; 85 L.J. (P.C.) 23 distinguished; *Neeman* v. *Hosford*, [1920] 2 I.R. 258 referred to.]

APPEAL by plaintiff from the trial judgment dismissing an action for damages for injuries received by being run into by one of defendant's street cars. Affirmed.

A. Alexander and *G. L. Fraser*, for appellant.

L. G. McPhillips, K.C., for respondent.

MACDONALD, C.J.A.:—The appeal can only succeed if the Court is prepared to abrogate the doctrine of contributory negligence.

We have not gone as far as that yet, and I am not prepared to go that far now.

The jury answered questions finding the defendants guilty of negligence in running their car at an excessive rate of speed. They found the plaintiff guilty of contributory negligence in not taking due care. They negatived ultimate negligence when they said that after the defendant's motorman became aware, or ought to have become aware, of plaintiff's danger, it was too late to save him.

The facts are clearly and well defined. The defendant's only negligence was in the rate of speed, the plaintiff's only negligence was in not looking out for the danger; the negligence of each continued until it was too late to avoid the injury of which the plaintiff complains.

The statement of these facts would appear to me to lead only to one conclusion, namely, that the action was properly dismissed. I understand the rule of law which has long prevailed in our Courts, to be, that when both parties are at fault in respect of the occurrence and neither could, by the exercise of reasonable care, after the danger had become or ought to have become apparent, have prevented the injury, neither can recover against the other. *The B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, 85 L.J. (P.C.) 23, a much canvassed decision of the Privy Council, was cited to us, as were also conflicting decisions of the Courts of Alberta and Saskatchewan, but I think no useful purpose can be served by further discussion of these cases. As I understand *Loach's* case, it does not strike at the doctrine of contributory negligence, but decides that if the failure of the one to avoid the occurrence was due to his having disabled himself by antecedent neglect to supply the usual facilities to enable him to do so, then that party must be held to be the real author of the injury.

The appeal should be dismissed.

MARTIN, J.A.:—This appeal should, I think, be dismissed; the findings of the jury can only, in the light of the circumstances, be interpreted as against the plaintiff, who is in a position indistinguishable in principle from that of the unsuccessful plaintiff in the instructive case *Neenan* v. *Hosford*, [1920] 2 I.R. 258, which I have noticed in *Winch* v. *Bowell* (1922), 67 D.L.R. 471, wherein judgment is being delivered this day. I regard the present case as being, shortly, one wherein the plaintiff negligently stepped into immediate and unavoidable danger.

GALLIHER, J.A.:—In my opinion this appeal must fail. It was ably and ingeniously argued by Alexander, but unless the principle laid down in the *Loach* case, 23 D.L.R. 4, by the Privy

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Council, can be applied here to the circumstances of this case, the appeal cannot succeed. That case is, in my opinion, distinguishable on the facts. Here, the unfortunate man stepped round the rear of the car from which he alighted, right into danger without looking, and to say that had the defendants been running at a less rate of speed, the accident might have been avoided, may be true, but the rate of speed was the original negligence of the defendants, and had the plaintiff looked before stepping into danger, he could have seen the car coming and avoided the accident.

Under such circumstances, it does not seem to me he can succeed.

MCPHILLIPS, J.A.:—I would dismiss the appeal.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

McKEAN v. BLACK.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. June 20, 1921.

EVIDENCE (§ VIE—535)—CONTRACT—PAROL EVIDENCE — MEANING — CORROBORATION—CONVEYANCE FOR SECURITY.

Statements and representations as to the meaning and purport of a written agreement, made by the parties thereto at the time it was entered into, is admissible evidence of its meaning; such evidence is admissible to prove that a conveyance of lumber was only intended as a security and operative only until the advances secured thereby have been paid. Such statements coupled with the provisions of the document constitute sufficient corroborative evidence.

APPEAL from a decision of the Supreme Court of Nova Scotia (1921), 56 D.L.R. 160, 54 N.S.R. 245, affirming the judgment at the trial in favour of the respondents.

F. R. Taylor, K.C., and *Jenks*, K.C., for the appellants.

Henry, K.C., for respondents.

DAVIES, C.J.:—I think this appeal fails and should be dismissed. The action was one brought by Black against the heirs and representatives of the late George McKean in which the plaintiff claimed a reconveyance to him of a certain lumber property which he had conveyed and assigned to McKean as security, as he contended, for certain advances then and afterwards to be made to him and certain guarantees to be given on his behalf to enable him to complete his purchase of the property and to enable him further to carry on his lumbering operations, and which advances had all been repaid. The defence was practically a denial that the plaintiff had carried out the obligations imposed upon him by the agreement in other respects than the repayment of the moneys advanced or guaranteed and which

it was essential he should carry out before he was entitled to the reconveyance claimed. The repayment of all advances and interest which McKean had made to Black or guaranteed for him, was not challenged or denied, but it was claimed that it was a condition and a term of the agreement that before Black could claim a reconveyance of the property he was obliged completely to lumber the property and to cut, saw and manufacture and deliver to McKean all the lumber on said property at a price to be agreed upon, or that said lumber should be shipped on terms in paragraph one (1) of the agreement stated. It was agreed that this had not been done and Black's contention was that it was not obligatory on him to do this, once he had paid McKean all advances made by him with interest and discharged him from all guarantees and liabilities he had incurred in this respect by the agreement.

Apart from the legal construction of the agreement itself, a question arose as to the statement said to have been made by McKean to Black as to the meaning of the agreement, which statement Black swore was what induced him to sign the agreement. This evidence is as follows:—

(Charles O. Black, direct examination).

"After we had bargained, Mr. McKean, the young man, went out and got that agreement drawn up by a lawyer; I had no lawyer, and I am not one myself, and have a limited education; there was a clause where it said we hold all the lumber on this property estimated at thirty million; I said there might not be thirty million on the property, in fact, I know there is not; it is only an estimate, and I might not be able to cut all that lumber, and it is a bad thing for me to sign things like that. He said, 'the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest; that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have security, and that is what the agreement means.' I said, 'if that is what it means, all right.' That is what I thought it was, but now it seems it is interpreted they hold it all after it is paid off; he said the meaning and intention of the agreement was that. Q. You then signed the agreement? A. Yes, with young McKean. Q. On the understanding you had with Mr. George McKean, as you have just told us about? A. Yes."

The trial Judge accepted this statement of fact as proved, and also held that there was sufficient corroboration of it and the question for our consideration is whether the statement was admissible as evidence, and if so, whether McKean being then dead

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there was sufficient corroboration under the statute and what effect, if any, was to be given to it.

I am of the opinion that the trial Judge was right in holding that the agreement in question was an ambiguous one, the real meaning of which, considering the apparently conflicting clauses of it, was most difficult to determine. I must say I myself have found it so and agree fully with the trial Judge as to its ambiguity. I think the evidence was properly admitted and that there was sufficient corroboration of it under the statute.

In my judgment, the agreement in question was in reality a mortgage intended to secure to McKean all moneys advanced or guaranteed by him together with interest charges and as these were conceded to have been fully repaid to McKean when the action was commenced and he was discharged from all liability in respect of them, the equity of redemption of Black in the property was complete and entitled Black to the reconveyance claimed.

Once the evidence of McKean's statement, as to the meaning and intent of the agreement before set out, is accepted, and that such meaning and intent were indeed the inducements which led Black to sign it, the controversy would be at an end and Black's claim to a reconveyance would, in my opinion, be complete.

I accept fully the findings of the trial Judge confirmed by the majority of the Court on appeal on this point, and think that it is a reasonable construction of the agreement that all its other provisions relating to the cutting of the lumber on the land were at an end when McKean's advances and guarantees were fully paid and discharged. In other words, I hold that the statement of McKean as to the intent and meaning of the agreement and which formed the inducement on which Black signed it, was a correct statement and was accepted by the parties as such. If and when Black paid off all advances and interest and discharged McKean from his guarantees, he became at once entitled to a reconveyance.

The other provisions of the contract as to the cutting of the lumber by Black and handing it over to McKean for sale on a commission were, in my judgment, intended to be in force only while McKean's advances to Black, or his guarantees to the bank for Black, or some part of them, were still outstanding, and were intended as securities to McKean as against such liability and guarantees.

Section six (6) of the agreement provides for a condition which never arose, namely: Black "desiring to sell the property free from the agreement," and need not now be considered.

For these reasons I would dismiss the appeal with costs.

IDINGTON, J.:—The late Charles O. Black, engaged in the lumber business and, as the trial Judge finds, in course thereof bought from the Nova Scotia Lumber Co. a large property for $40,000, of which all had been paid but $5,000. Having met with some business reverses he needed help in order to pay that and raise $18,000 to carry on his lumbering business on said property.

The late George McKean agreed to go his surety to the Bank of Montreal for such amount as thus needed.

The Nova Scotia Lumber Co. had given Black a bond to convey the said land upon the payment of the price and that was indorsed over, as Black expresses it, to the late George McKean at the time of entering into the agreement presently to be referred to. By virtue thereof, the said company, three months later, conveyed the land to said McKean. Under the circumstances an ordinary form of mortgage might have easily been framed to express all that the parties intended, but, instead thereof, an agreement was entered into between said Black and said McKean (whom I shall hereinafter call the mortgagor and mortgagee respectively) drawn up by the latter's solicitor, dated January 29, 1914, which recited the facts that the mortgagee had agreed to guarantee "a certain advance to be made by the Bank of Montreal to the said party of the first part, and has also agreed to arrange for further advances to the said party of the first part during the lumbering season of 1914," and also had entered into an agreement to purchase certain lumber from the said mortgagor, and, as security, said mortgagor had agreed to assign the said agreement for purchase of the said land to said mortgagee.

Then the operative part of the agreement contained a half dozen covenants such as might have been inserted in an ordinary mortgage had the parties taken that method of carrying out their arrangement.

If we have regard to what the parties were about these several instruments must be read together, and so read, the transaction was nothing more nor less than a mortgage accompanied by these covenants to secure the mortgagee against loss and incidentally get the profits to be derived from handling the mortgagor's entire lumber from timber on said land, until the advances and 6% per annum thereon had been repaid.

That product for a year would seem to have been likely to be about three million feet of lumber.

From the expressions in the agreement the term of the year 1914 would seem to be all that was in the minds of the parties.

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The first paragraph provided for the said mortgagor completely lumbering the property and selling the lumber to the mortgagee at such prices as they might agree on, or commission named.

The second provided that no other lumber should be cut on the premises nor should any cut there be sold to any one else than the mortgagee, his assigns or representatives.

These provisions the appellants contend entitle them as the successors in title of the mortgagee (who died in 1915) to hold the property free from the redemption by the said mortgagor who instituted this suit for the redemption of said mortgage. This contention I will presently consider, after stating the substance of the other paragraphs.

The third paragraph was for quiet enjoyment and will be set forth later in full.

The fourth paragraph provided for the payment by the said mortgagor to the mortgagee of "all loss or damage which may be caused to the said timber lands, lumber or property by fire or other casualty, and will hold the said party of the second part, his executors, administrators and assigns, harmless and indemnified therefrom."

The fifth bound the mortgagor to pay all rates and assessments on the property.

The sixth provided for the case of the mortgagor wishing to sell the property doing so on the terms of paying fifty cents a thousand on a basis of there being thirty million feet thereon.

These were followed by the following power of sale given McKean:—

"Provided always and it is hereby agreed, that on default in the repayment of the sums so guaranteed by the said party of the second part and all other sums that hereafter may be guaranteed by the said party of the second part, his executors, administrators or assigns, and all expenses, charges, costs, rates, taxes and assessments with interest at 6% as aforesaid on the said property or any portion thereof, or the said lumber thereon, or any portion thereof, or in case of the loss or destruction of said property or any portion thereof or the lumber thereon or any portion thereof, by fire or other casualty, or in case of the breach by the party of the first part, his heirs, executors or administrators of any of the covenants or agreements herein contained it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, either by public auction or private sale to sell and convey the said property hereinbefore referred to or any portion thereof and either in one block or in separate parcels as he or they may deem fit, and upon such terms

as he or they in their discretion may deem advisable after giving notice to the said party of the first part of such sale by mailing at least 7 days prior thereto at some post office in the Province of New Brunswick by registered mail addressed 'C. O. Black, Oxford, N.S.' written notice of the time and place of such sale and no other or further notice or demand shall be necessary, and such notice shall be effectual whether the said Charles O. Black be living or dead; and the proceeds of such sale or sales the said party of the second part, his heirs, executors, administrators or assigns, shall apply in the first place to the expenses of such sale or sales and necessary conveyances, and, secondly, so far as they will go to or towards the repayment to the said party of the second part, his heirs, executors, administrators or assigns, of any sums that he may have paid or be liable for under said guarantee or may have advanced hereunder, together with interest, expenses, costs, charges, rates, assessments, moneys paid on account of rates, taxes and impositions or such portions thereof as may remain unpaid; and thirdly, to or towards any sums otherwise accruing due by the said party of the first part or his aforesaid to the said party of the second part, and shall pay the balance, if any, to the party of the first part, his heirs, executors, administrators or assigns, and that all contracts which shall be entered into, and all conveyances which shall be executed by the said party of the second part, his heirs, executors, administrators or assigns, for the purpose of effecting any such sale or sales shall be valid and effectual notwithstanding that the party of the first part, his heirs, executors, administrators or assigns, shall not join therein or assent thereto, and that it shall not be incumbent on the respective purchasers of said lands, property or premises or any part thereof, to ascertain or inquire whether such notice of sale shall have been given or to see to the application of the proceeds thereof."

This certainly (in the third part regarding the application of such proceeds of sale) does not countenance anything like the contentions of the present appellants.

It should have provided expressly for that fifty cents a thousand or for the commissions provided for in foregoing or something like thereunto, if the contentions set up are sound.

In the argument much was said by counsel for appellants about this agreement being unambiguous and not ambiguous as suggested by some of those dealing with it in the Courts below.

It is contended that the language is plain and express.

So I answer is the third paragraph of the agreement, which reads as follows:—

"3. That the said party of the second part, his heirs, execu-

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tors, administrators and assigns, shall quietly and peaceably enjoy the said property and the said timber and lumber, and that the same are free from incumbrances."

If the sort of argument applied to paras. 1 and 2 is valid, why not rely on this one and simplify the whole business by setting up that least ambiguous of all.

Thereby the appellants are entitled to enjoy forever, as there is no limit of time named, the land in question.

Of course the answer thereto is that such was not within the contemplation of the parties.

The question thus raised as to the first and second paragraphs is whether the remarkable contentions set up by the appellants can be imagined as within the like contemplation of the parties when due regard is had to the surrounding circumstances and the conduct of the mortgagor and much more so of the appellants in later years.

I think the intention was made quite clear by the first part of the recital as quoted above that the mortgage was simply to indemnify the mortgagee for his suretyship for the contemplated advances by the bank.

No doubt the parties intended that the mortgagee, as part of the inducement to him to become surety, was to get the benefit to be derived from handling the lumber produced so long as the advances made within the scope of said recital or interest thereon remained unpaid.

But I cannot imagine such a proposition as appellants contended for, that the advantages so implied during that period were to extend for 10 years or more, being the length of time probably required to complete the lumbering.

It is not only inconsistent with the recital but also with the terms of the power of sale, and with the correlative right of redemption which the mortgagor would have the moment the condition came into existence, which would render the power of sale capable of operation.

The curiosities presented in the document shewing others like to the first two giving rise to these contentions of the appellants, do not end there or in the covenant number three, above quoted, for the pith of the fourth covenant, above quoted in part, provides, not for the protection of the mortgagee against his loss by reason of any fire, but for the payment to him "of the damage which may be caused to the said timber lands."

In as plain, unambiguous language as appellants claim for these other covenants in question the mortgagee would hereunder be entitled to claim the whole value of the timber destroyed by fire.

Of course no one ever imagined that such was the intention of the parties, but such is its literal meaning and we are left to guess what could be claimed under this covenant.

There is much to be said in favour of all these covenants presenting curiosities demonstrating such an inconsistency with the right of redemption as to render them null and void within many cases to be found when mortgagees had attempted to bar or render impossible the right of redemption.

I mean, of course, on the assumption that the results appellants claim are the true meaning thereof, interpreting and construing, in light of all the surrounding circumstances, as I do, that these first two covenants were only to be operative during the existence of the indebtedness for or in respect of the advances contemplated and then to cease. Though they are no models of accurate draftmanship, they are consistent with the creation of a mortgage and only a mortgage as being all that was intended by those concerned.

In the sense contended for by appellants, they might be such as might be found in a partnership agreement but are hardly consistent with being part of a mortgage.

Evidently the explanation given the mortgagor, (who never met the solicitor who drew this document) who asked the mortgagee its meaning before its execution, and was told by him what he swore to and the trial Judge believed, did not need much corroboration, if any needed in such a case.

Moreover the maxim relied upon in respondents' factum—*verba chartarum fortius accipiuntur contra proferentem*—may, under such circumstances, be borne in mind.

The chances are, I suspect, that if the mortgagee had survived no one would have heard him set up such contention as appellants make.

The unfortunate slips so evidently the result of haste in preparation of the document are cogent warnings against taking those now in question as literally correct.

Parts of any document, and especially one so prepared, may have in it sentences and covenants clear and unambiguous if taken alone, yet be most ambiguous when read in light of surrounding circumstances clearly demonstrating its real purpose.

Then as to the appellants, and relative thereto, it is to be borne in mind that their own conduct, as set forth in correspondence and accounts against them, is quite inconsistent with such claims as they set up.

In regard thereto I think the following passage in Fisher on Mortgages (Can. ed.) relative to the analogous subject of mortgage or no mortgage, to be found in the 14th paragraph of that

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work, is worth quoting as a guide herein as against appellants' contention for what, I submit, is a claim for partnership.

"14. And while the Courts protect a *bona fide* purchaser, and will not lightly infer an intention to make a mere security, if none be expressed they will give effect to an intention, if proved, to create a security, and will also take care that a borrower shall not suffer from the omission by fraud, mistake, or accident, of the usual requisites of a mortgage.

An instrument which purports to be an absolute conveyance, may therefore be construed as a mortgage, where according to the true intention of the parties, it was intended to be regarded as a mortgage."

In conclusion I take the conduct of the mortgagor and mortgagee, the nature of the business they had in hand and the fact that by the hypothecation of the product of the lumber to the bank by the mortgagor with the knowledge and assent of the mortgagee to secure payment of the advances by the bank, to be cogent evidence of the transaction being a redeemable mortgage and not a partnership, or something akin thereto. And the conduct of appellants in relation thereto after the death of the mortgagor, renders it clear that respondents are entitled to succeed quite independently of the evidence of the mortgagor of what the mortgagee told him.

But I do not doubt that such evidence may well be received on the basis of what transpired being used in regard to the right of redemption denied by the appellants on the strength of a most ambiguous provision, if room for the contentions set up, and that there is abundant corroboration in the other provisions of the document.

Suppose the case of a mortgagor bound by the terms of his mortgage to insure, having assigned his policy to the mortgagee by an instrument that was absolute in form and expressed as made for due consideration, but nothing else disclosing the actual consideration, and the insurers saw fit to pay what became due thereon, as result of fire, to such assignee next day after all the money due on the mortgage had been paid, and he died immediately after the receipt of such insurance money, how much and what kind of corroboration would be needed for the mortgagor to establish his rights to recover same from the representatives if the innocent mortgagee's representatives chose to insist as appellants do that the mortgagor's version of his rights must be corroborated?

I submit the surrounding facts and circumstances might suffice as they ought to do herein.

I think the appeal should be dismissed with costs.

DUFF, J.:—This appeal, in my opinion, should be dismissed. Parol evidence is, I think, admissible in all cases where the question arises whether a covenant absolute in form is intended as security and whether the real transaction is or is not a transaction of loan, that is to say, whether the property was to stand as security for the repayment of money advanced. The trial Judge had held that such was the nature of this transaction and that according to the true intent of the parties the provisions of the agreement notwithstanding their form were intended to stand as security for the repayment of money advanced or to be advanced. I have discovered no satisfactory ground upon which that finding could be reversed.

ANGLIN, J.:—Not, I confess, without some lingering doubt, I concur in the conclusion of the trial Judge affirmed by the majority of the Judges of the Nova Scotia Appellate Court (1921), 56 D.L.R. 160, 54 N.S.R. 245, as to the nature and scope of the agreement between the late Charles Black and the late George McKean; but the award of damages to the plaintiff for the defendants' refusal to reconvey the land in question I think cannot be upheld.

This is not the comparatively familiar case of a defendant maintaining that a deed of conveyance in form absolute truly represents the transaction it purports to evidence against the plaintiff's assertion that it was intended to be held merely as security and is therefore in reality a mortgage. That the transfer to the late George McKean, of the property in question, was merely as security is common ground. The controversy between the parties is rather as to what it was given to secure—whether merely repayment of advances made by McKean with interest, as the plaintiffs assert, or also performance of an agreement, which the defendants maintain that the plaintiffs' testator, the late Charles Black, made, to lumber the property completely and either to sell and deliver the entire product to McKean at prices to be agreed upon, or, if such agreement should not be reached, to ship such product to him on consignment and commission at stated rates. The parties also differ as to the extent and duration of the right conferred on McKean to handle the lumber produced by Black from the property. The plaintiffs maintain that that right was given merely as security for the repayment of McKean's advances and interest and was to terminate upon such repayment being completed. The defendants insist that it was absolute, that it formed the inducement for making the advances, and that it was to subsist after they were repaid and until all the lumber on the land had been cut by Black and delivered to McKean, either as its purchaser or as commission agent, even though

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Black should sooner become entitled to a reconveyance of the land.

While the omissions from the recital in the contract under consideration of any reference to the cutting of lumber subsequent to the year 1914, and from its concluding clause of all provision for compensation to McKean for loss of profit on the sale of lumber still uncut should his power of sale for default be exercised, may be open to observation, as is pointed out by the Chief Justice of Nova Scotia, I am disposed to agree with Russell, J., that they scarcely created an ambiguity sufficient to justify a refusal to give effect to the plain and unambiguous covenant of Black to cut, manufacture and deliver to McKean all the lumber on the land, etc. The evidence of W. K. McKean, if accepted, would make it reasonably clear that the obtaining of this business advantage was the chief, if not the sole, consideration which moved his father to enter into the agreement and at least one passage in the cross-examination of Black would support that view. The provision of the agreement for the payment by Black to McKean, in the event of the former selling the property, of 50 cents per M for 30,000,000 feet of lumber, estimated to be standing on the property, less what might have been already shipped to or handled by McKean, also tends to indicate that the defendants' contention as to the real intent of the parties in making the arrangement is sound.

While the recital declares that the property is to stand as security for advances, it also states that it is to serve as security "for the performance of this agreement," the first operative provision of which, immediately following the recital, is the covenant of Black "to completely lumber the said property" and to "saw, manufacture and deliver all the lumber on the said property" to McKean, at prices to be agreed upon, or, in default, of such agreement, "on consignment and commission" at stated rates. But for the findings of the learned trial Judge based on the oral evidence of Black, and accepted by the Appellate Court, that it had been represented to him by the late George McKean, immediately before the execution of the agreement that this was not its purport or intent, but, on the contrary, that the meaning and scope of the agreement was that McKean should hold the lumber on the property only until he should be repaid all advances with interest and that Black executed the document under the belief, so induced, that this was its effect, I should probably have felt constrained to uphold the contention, ably and forcefully presented by Taylor and Jenks, on behalf of the appellants, that the covenant for cutting and delivering all the lumber on the premises must be given effect according to its tenor and that

Black's property had been pledged as security for its performance. But I am inclined to think we should not interfere with the findings made by the trial Judge and affirmed on appeal unless the evidence on which they are based was inadmissible, or sec. 35 of the N.S. Evidence Act (R.S.N.S., 1900, ch. 163) prevents effect being given to it.

The admissibility of the evidence cannot, I think, be rested on ambiguity in the agreement. In the first place, as already stated, I do not find any such ambiguity. But if, as held by the trial Judge and the Chief Justice of Nova Scotia, there is inconsistency between the recital and the final proviso on the one hand and the covenant invoked by the defendants on the other, which renders the whole instrument equivocal, that, with respect, would seem to be a patent ambiguity and as such, in the quaint language of Lord Bacon, not to be "holpen by averment." *Saunderson* v. *Piper* (1839), 5 Bing. (N.C.) 425, 132 E.R. 1163, 8 L.J. (C.P.) 227.

But in support of a claim for reformation or of a plea of estoppel grounded on misrepresentation, whether fraudulent or innocent, the evidence under consideration was, I think, admissible. Its sufficiency is of course another question.

Fraud, it is true, is not alleged, and there may therefore be a difficulty in the way of the plaintiffs recovering on that ground without amendment. But the defendants seem to me to be in this dilemma. Accepting the finding that the representation deposed to by Black was made to and acted upon by him, it was either honestly and innocently, or dishonestly and fraudulently made. If the latter, the defendants would scarcely be heard to allege the turpitude of the party through whom they claim. If the former, there was mutual mistake such as would afford a ground for reformation. Moreover, for a party who had made such a misrepresentation or for those claiming under him to insist upon holding the other party to the terms of a contract his execution of which was so induced, however innocently, would be the *ex post facto* fraud dealt with by Jessel, M. R., in *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 51 L.J. (Ch.) 113, 30 W.R. 251. We had to consider the admissibility of somewhat similar evidence and the effect of such a misrepresentation as raising an equitable estopped in the recent case of *Bathurst Lumber Co.* v. *Harris* (23rd of Nov. 1920). [See (1919), 46 N.B.R. 411.]

The trial Judge found in the circumstances and in the terms of the agreement itself corroboration sufficient to satisfy sec. 35 of the N.S. Evidence Act. The Chief Justice of Nova Scotia, and Longley and Ritchie, JJ. and also (with some doubt) Chisholm, J., concurred in that view, and I do not understand Russell, J.,

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to express any dissent from it. I am not convinced that the conclusion reached on this point was wrong. Yet the corroboration relied on, if any, is very slight, and while, as was held in *Radford* v. *Macdonald* (1891), 18 A.R. (Ont.) 167, all that the statute requires is that the evidence to be corroborated shall be "strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to," and, as was said in *Green* v. *McLeod* (1896), 23 A.R. (Ont.) 676, "the 'material evidence' in corroboration may consist of inferences or probabilities arising from other facts and circumstances." I share Chisholm, J.'s doubt as to the value as corroboration of an agreement alleged by the plaintiffs to be ambiguous, and were it not for the aid on this branch of the case afforded to them by the letter of the defendants' agent, C. H. Read, of December 28, 1918, I should doubt whether the statute had been satisfied. But I find in the record that at the close of the trial "it was agreed between the parties that for the purpose of this action the defendants are to be taken to be in the same position as if the defendant were George McKean, and he was still alive."

If that were the situation no question of corroboration would arise, and I am disposed to think that this agreement, although that may possibly be a result which the parties did not contemplate, wholly excludes the application of sec. 35 of the N.S. Evidence Act.

During the course of the argument the suggestion was made from the Bench, that if the contract should be held to give to the defendants the right for which they contend, it would be unenforceable as obnoxious to the rule of equity prohibiting the clogging or fettering of the mortgagor's equity of redemption. Counsel, however, did not discuss this aspect of the case, and, in the absence of argument, I should not be disposed to express a concluded opinion upon it. It might be a very nice question, whether the right asserted by the defendants, that after repayment of all advances and interest they should still control the output of the mortgaged property, either as purchasers at a price to be agreed upon, or as commission agents at fixed rates, was inconsistent with Black's contractual and equitable rights to have his property restored unfettered upon such repayment, as was held to be the case in *Bradley* v. *Carritt*, [1903] A.C. 253, 72 L.J. (K.B.) 471, 51 W.R. 636, or was merely a stipulation for an independent collateral advantage not in itself unfair or unconscionable, not in the nature of a penalty clogging the equity of redemption, and not inconsistent with or repugnant to the contractual and equitable right to redeem as, in *Kreglinger* v. *New*

Patagonia Meat & Cold Storage Co., [1914] A.C. 25, at p. 61, 83 L.J. (Ch.) 79, a provision for an option of pre-emption was deemed to be under the circumstances of that case.

As at present advised, I should be disposed to regard the transaction as evidenced by the written instrument, as fair and businesslike, and not within the mischief aimed at by any equitable rule or maxim relating to the clogging or fettering of the equity to redeem a mortgage. If the evidence of Black, on the strength of which the contrary view has prevailed, were not in the record, I should have said the intention of the parties as shewn by their contract was that Black should not by repaying the McKean advances and interest be entitled to put an end to McKean's stipulated right to handle the entire output of the mortgaged property either as purchaser or as commission agent. As put by Lord Parker in the *Kreglinger* case, at p. 61:—

"I doubt whether even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. The only possible way of deciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intention of the parties. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty nor was it nor could it ever become inconsistent with or repugnant to any part of the real bargain within any such rule or maxim. The same is true of the commission payable on the sale of skins as to which the option was not exercised."

Mutatis mutandis, this language seems to fit the case at Bar. But it is unnecessary to pass upon this aspect of the case and, as I have said, I prefer not to do so without the assistance of argument upon it.

Subject to modifying it by striking out the clauses awarding damages and providing for a reference to assess them the judgment in appeal should be affirmed.

MIGNAULT, J.:—In my opinion, clause 1 of the agreement signed by the parties, obliging the plaintiff, Charles O. Black, to completely lumber the property and sell the timber to the appellants, is not ambiguous nor should it be construed as being merely a guarantee to secure the repayment of the advances made to Black, and as ceasing to produce effect when these advances are repaid. It is, in my opinion, an independent covenant. See *Kreglinger* v. *New Patagonia Meat & Cold Storage Co. supra*, where a somewhat similar covenant was made.

The case of the plaintiff, now represented by the respondents,

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is, however, that he was induced to sign this agreement by the representations of the late George McKean, that "the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest, that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did, we would not have enough security, and that is what the agreement means."

The trial Judge believed Black's evidence that this representation was made to him. It is contended that the matter could not be proved by parol evidence. The trial Judge decided otherwise, and under all the circumstances of the case, I do not think he was in error in allowing this evidence.

He also considered that there was sufficient corroboration under the statute requiring corroboration as to statements alleged to have been made by deceased persons. This is the only point on which I entertain any doubt, but this doubt is not sufficient in my judgment to justify me in reversing the finding of the trial Judge. The question of corroboration has already been passed upon by two Courts, and I am satisfied to abide by their decision.

I would dismiss the appeal with costs.

Appeal dismissed.

THE KING v. ASSESSORS OF TOWN OF WOODSTOCK; Ex. p. BANK OF NOVA SCOTIA.

New Brunswick Supreme Court, Appeal Division, Barry, Crocket, and Grimmer, JJ. April 21, 1922.

CERTIORARI (§ IB—10)—WHEN REFUSED—REMEDY BY APPEAL—REVIEW OF TAXATION—NEW BRUNSWICK STATUTES.

Certiorari does not lie to review an assessment for taxes under the New Brunswick statutes where a remedy by appeal has been provided. An aggrieved party having failed to resort to the remedy of appeal within the statutory period cannot thereafter invoke *certiorari*.

TAXES (§ IIID—135)—PROPERTY STATEMENT—INSUFFICIENCY—BANK—INEQUALITY OF ASSESSMENT—REVIEW.

A bank failing for taxation purposes to furnish a sufficient property statement as required by statute cannot complain of an inequality of the assessment.

CERTIORARI (§II—15)—BOND — NEW BRUNSWICK TAX STATUTE — TOWNS AND CITIES—"COUNTY"—PARISH."

The requirement of a bond as a condition precedent to *certiorari* under the New Brunswick General Act, 1913, ch. 21, relating to rates and taxes, applies to town assessments. The words "county," "parish," include the towns, and cities within their limits.

[*Ex parte Lewin* (1879), 19 N.B.R. 425, not followed.]

ORDER *nisi* for *certiorari* to quash assessment made by the assessors of the Town of Woodstock, against the Bank of Nova Scotia. Dismissed.

J. C. Hartley, K.C., against *certiorari*.

A. B. Connell, K.C., and *F. R. Taylor*, K.C., in support of rule.

BARRY, J.:—The Town of Woodstock was incorporated by Act 1856 (N.B.), ch. 32, which provided for the election of a Board of Assessors and prescribed a method of assessment of the inhabitants of the town upon their real and personal property and income. By subsequent legislation, the assessors became appointive by the town council, the original method of assessment was superseded and a new scheme introduced. During the town's corporate life of 66 years, more than 100 separate and distinct Acts relating to it have been passed by the Legislature of the Province. Twenty-six of those Acts either exclusively relate to, or touch or concern in some way the question of assessment of rates and taxes or the appointment and duties of assessors. And although those 26 Acts were passed with the object and had the effect of either repealing, adding to, restricting or amending previous legislation, strange to say that in none of them that I recall, is there any language which in express terms repeals any antecedent legislation.

There is to be found in each of these Acts, it is true, generally in the last section, a provision to this or to the like effect:—"All Acts and parts of Acts which are inconsistent with this Act, are hereby repealed, in so far as the same may be so inconsistent"—language which in reality means nothing, and without which the Act would be just as effective in repealing inconsistent legislation; for it is declaratory of no new law or doctrine, but is merely the enunciation of a principle of construction applicable to all cumulative legislation upon the same subject-matter. The result is, that in order to find the law of today relating to the assessing of rates and taxes within the Town of Woodstock, one has to travel through 66 years of legislation, back to the very beginning of the life of the town, as it were, and read and carefully examine over 100 Acts of the Legislature. This is necessary in order to discover whether or not there are "inconsistencies" between subsequent and precedent legislation; for Acts may overlap each other, re-assert a previously enacted principle, add to or enlarge some previous scheme of assessment, and yet be consistent. It is only the "inconsistencies" which have to be eliminated, and to do this is not always easy. To the patient investigator this, it is obvious enough, must prove a very unsatisfactory condition in the legislation relating to the Town of Woodstock, a condition which, if I may be permitted to say so, should not be suffered to continue.

The law in force at the present time relating to the levying and assessing of rates and taxes within the Town of Woodstock upon the inhabitants generally is to be found in 1890 (N.B.) ch. 40, and 1920, ch. 78; joint stock companies and corporations are

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still, I think, notwithstanding subsequent legislation, assessable under 1883 (N.B.) ch. 26; the right of appeal and the method of appealing from what the ratepayer may regard as an unfair or an unjust assessment is given in 1873 (N.B.) ch. 81, secs. 16 and 17. In order to a clearer understanding of the question involved in the case before us, it is desirable that I should refer to these four statutes, which I shall proceed to do, briefly, in the order named.

By 1890, ch. 40, real estate, property and income are assessable equally at the same rate and in the same proportion (sec. 1) and the assessor shall deduct from each person's personal property, the amount of his or her indebtedness, as the case may be, and assess the balance remaining of said personal property after making such deduction (sec. 2).

By 1920, ch. 78, sec. 1, it is declared to be the duty of every person liable to be assessed in the town, within 20 days after notice published in the newspapers by the assessors, requiring the same to make and file with the assessors a statement under oath in such form as the Town Council or assessors may determine, of his real estate situate in the town and personal property of every nature and kind wherever situate, and income derived from his profession, trade, occupation or calling. Should any person fail to comply with these requirements, then the assessors from the best information they can obtain regarding the value of the personal property and income of the person so failing, shall, to the best of their judgment, assess such property and income; and no appeal shall lie from such assessment to either the assessors or the town council, but the assessment shall stand as made, and the person so assessed shall be liable to pay the same without any deduction, unless the assessors or the town council shall be of opinion that there exists a reasonable excuse for failure to file the statement.

By 1883, ch. 26, sec. 11, all joint stock companies or corporations who shall carry on business within the town, shall be rated and assessed in like manner as any inhabitant upon any real or personal property owned by such company or corporation, and upon the income received by them; (then follows a special provision applicable to insurance companies alone) and for the purpose of enabling the assessors to rate such company or corporation with accuracy, the agent, sub-agent or manager thereof, shall, if required by the assessors so to do, according to the form in the schedule to the Act, furnish to them a true and correct statement in writing under oath to be made before a Justice of the Peace, setting forth the whole amount of annual income received for such company or corporation within the town during

the year preceding the making up of the assessment, and the amount of the real and personal estate held by or for such company or corporation in the town, or in connection with the business done therein; and in the event of the neglect or refusal on the part of the agent, sub-agent or manager to furnish the required information to the assessors within 10 days after the application therefor, the assessors shall rate and assess the company or corporation according to the best of their judgment, and there shall be no appeal from such rate or assessment; but nothing herein shall be deemed to make such demand of a statement necessary in order to make such assessment.

By 1873, ch. 81, an aggrieved ratepayer may within 10 days after notice of his assessment, petition the assessors under oath for relief; if the assessors, after consideration, deem the petitioner entitled to relief, they grant it, and reduce his taxes to what shall appear to them to be just and right; if they think him disentitled to relief they, of course, confirm the assessment. In either case the assessors are required to give to the appellant notice in writing of their decision. Should the appellant be dissatisfied with the decision of the assessors, he may appeal to the town council; but no appeal to the council can be made or received by them unless the petition to the assessors under oath, or a duplicate of the same, be filed in the town clerk's office within 10 days after notice of the decision of the assessors shall have been given to the appellant. The town council may, on such appeal, either affirm the first or amended assessment, or otherwise deal with the matter as they may deem just and right, and their decision shall be final.

It may be advisable here to point out that, in the absence of the special provisions of 1883, ch. 26, sec. 11, in regard to the assessment of joint stock companies and corporations, those bodies would, doubtless, be assessable under, and their assessments regulated by, the provisions of the general Act 1920 ch. 78, sec. 1, which are applicable alike to all persons liable to assessment. By the Interpretation Act, Con. Stats. 1903 (N.B.) ch. 1, sec. 8, sub-sec. 31, the word "person" or "party" includes any party or person, or any body corporate, company, or society, to which the context is capable of applying. So that it would seem to be quite clear that the word "person" would include the bank. But, in view of the special provisions of the Act of 1883, it is not necessary to take the word out of its primary meaning in order to apply it to a corporation, because the Legislature has made special provisions in regard to corporations, and those special provisions still stand, I think, notwithstanding the general provisions of the Act of 1920. In such a case the

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general statute is to be read as silently excluding from its operation, the cases, which have been provided for by the special one. *Barker* v. *Edger*, [1898] A.C. 748 at 754; *Garnett* v. *Bradley* (1878), 3 App. Cas. 944—950.

The real difference between sec. 11 of the Act, 1883 ch. 26, and sec. 1 of the Act 1920, ch. 78, is that by the former section the corporation is to furnish the information required by the schedule to the Act, while by the latter the "person" liable to be assessed is to make and file with the assessors a statement under oath "in such form as the town council . . . . or on their failure to prescribe a form, the assessors thereof may determine." In one Act there is a form prescribed, in the other there is none.

In the year 1921, before the assessment for that year was made up, the Bank of Nova Scotia furnished and filed with the assessors a statement under oath of its assessable real and personal property and income. It is not clear from the return to the *certiorari* whether this statement was made up with a view to conformance with the earlier or the later Act; but, if my view of the law be the correct one, then, clearly, the statement should have been framed to meet the requirements of the Act 1883, ch. 26, and should have answered the questions propounded in the schedule. Whether the assessors rejected the statement because it did not conform to the statute, or because it was not sent in time, or because they did not believe it, is somewhat obscure, but reject it they did.

By this statement, the bank placed the value of its real estate at $4,000; the assessable value of its personal property, consisting of all loans and investments, including over-drawn accounts, notes and bills discounted, current accounts, call loans, loan accounts, past due bills, foreign exchange, and all other advances of every kind and description for the year 1920, was placed at $2,825,731.68, or, a monthly average of $235,477.64; the total of its liabilities or indebtedness for its Woodstock branch for the year 1920, consisting of deposits, including current accounts, savings bank balances, special deposits, and all other balances, and amounts due and owing by the bank, it placed at $8,724,561.01, or, a monthly average for the year of $727,046.75, which, being deducted from or set off against the total or monthly average of its personal property, had the effect of wiping out its assessment upon personal property altogether.

In the same statement, the bank declared that in the Town of Woodstock for the previous year it had earned no income, and afterwards, at the hearing of the appeal before the assessors, in confirmation of this declaration as to income, it was shown that

the actual operating expenses of the bank for the year 1920 were $12,218.87; the total interest paid on deposits, $17,508.94, making a total of $29,727.81. Income from interest, commissions and all other sources was placed at the sum of $28,110.99; thus showing a net loss on its Woodstock business of $1,616.82.

The assessors, as I have said, did not accept the sworn statement of the bank's officers, but rated it for the year 1921 as possessing real estate of the value of $5,700, and personal property of the value of $64,100, and upon such valuation assessed it in the sum of $1,130.76. From this assessment, the bank appealed to the assessors, who, after a hearing in which the *viva voce* evidence of the manager and the accountant of the bank was taken under oath, decided that the assessment as made should stand, and so notified the bank.

The bank did not pursue to the town council the appeal from the decision of the assessors given by the Act 1873, ch. 81, but on November 12, last, obtained from Chandler, J., an order absolute for a *certiorari* to remove into the Court the said assessment, together with a rule *nisi* to quash the same on the following grounds:—1. By the assessment law governing the Town of Woodstock the assessors are bound to assess the real estate, personal property and income of the inhabitants of the town equally, at the same rate and in the same proportion, which they did not do in the present case, but assessed the bank specially, unequally and not in the same proportion as other inhabitants of the town. 2. In making the assessment the assessors should have deducted from the personal property of the bank, the amount of the indebtedness or liability of the bank, and have assessed the balance, if any, remaining; but they made no deduction whatever in the assessment complained of. 3. In making the assessment, the assessors took one-fifteenth of the average total deposits and loans of the bank and applied thereto the town rate of assessment for the current year, $1.62, for which there is no authority in law. 4. There was no legal assessment made by the assessors upon the Bank of Nova Scotia for the year 1921.

The bank is not appealing against the assessment upon its real estate, and the question of assessment upon income is also eliminated, for the bank has not been assessed in respect of income. The only question, therefore, arising for determination here, is the question of the legality of the assessment which the assessors have levied against the bank in respect of its personal property, for the year 1921.

Mr. Hartley, who showed cause against the rule *nisi* to quash the assessment, took certain preliminary objections, which may,

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conveniently, be reduced to these two:—1. An appeal from the decision of the assessors to the town council being given by the Act 1873, ch. 81, sec. 17, *certiorari* does not lie until after the appellant has exhausted the remedy by appeal there provided. 2. Sections 122 to 126, both inclusive, of the Act 1913, ch. 21, the General Act relating to rates and taxes, are applicable to assessments in the Town of Woodstock, and before applying for the rule of *certiorari*, the appellant should have furnished a bond in the sum of $200, as required by sec. 123 of the Act mentioned, and that it has not done.

Dealing first with the preliminary objections, it is to be observed that for very many years, and especially since the decision in *Ex parte Price* (1883), 23 N.B.R. 85, it has been regarded as the practice of this Court, not to interfere by way of *certiorari* in cases where there is a remedy open to the aggrieved party either by review or by appeal. Exceptional cases have occasionally arisen where the rule has been departed from, but the rule which I have mentioned has generally been regarded as the settled jurisprudence of the Court. *The King* v. *Murray; Ex parte Damboise* (1909), 39 N.B.R. 265; *Ex parte Beloni St. Onge* (1915), 25 Can. Cr. Cas. 169, 43 N.B.R. 517.

The three cases cited by Mr. Taylor as a justification of the bank's course in applying for *certiorari* without first pursuing the remedy by appeal from the assessors to the town council given by the statute, will, I think, be found upon examination to be in reality authorities affirming the principle to which I have alluded, rather than authorities supporting his right to be here. In *Jones* v. *City of St. John* (1899), 30 Can. S.C.R. 122, an appeal had been taken to the common council of the City of St. John as provided by 1896, ch. 61, before the appellant applied for *certiorari*. In *Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417, one of the grounds upon which the Judicial Committee of the Privy Council reversed the decision of the Supreme Court of Victoria, which, by the order appealed from had quashed upon *certiorari* an order made by the Court of Mines for the winding up of a mining company, was that before resorting to *certiorari* the respondents should have pursued the remedy given by the colonial statute and appealed from the lower Mining Court to the Chief Judge of the Court of Mines, who was also one of the Judges of the Supreme Court.

The King v. *Town of Grand Falls* (1913), 13 D.L.R. 266, 42 N.B.R. 122, is also an authority against the bank's position. There, as here, it was objected that because the Grand Falls Co. had not taken advantage of the remedy given it by the Act, 1890, ch. 73, sec. 69, and appealed against the assessment, it could not proceed by *certiorari*. But White, J., who delivered the un-

animous judgment of the Court said, 13 D.L.R. at 271:—"the objection urged against the validity of this assessment . . . . goes, I think, to the jurisdiction of the assessors to make such assessment, and therefore, according to well-settled principles of law, *certiorari* is not taken away by the section quoted."

The rule which White, J., alluded to, that is, that *certiorari* will lie to an inferior tribunal where that tribunal acts without jurisdiction, is, as he says, well settled. It is, indeed fundamental. But it is equally well-settled that the question of jurisdiction is determinable on the commencement, not on the conclusion of an inquiry; and affidavits to be receivable must be directed to the former stage and not to the facts disclosed in the progress of the inquiry. *The Queen* v. *Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054. Objections on the ground of defects of jurisdiction may be founded either on the character and constitution of the inferior tribunal, or upon the nature of the subject-matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior tribunal. But the objection of defect of jurisdiction cannot be entertained, if it rests solely on the ground that the tribunal has erroneously found a fact which was essential to the validity of its order, but which it was competent to try. *Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417.

It is not questioned that the Board of Assessors was regularly appointed and constituted; nor is it disputed that they had the right to enter upon the inquiry. In none of the grounds upon which Chandler, J., granted the rule is the jurisdiction of the assessors to enter upon the inquiry challenged, and not being questioned, must, I think, be taken to be tacitly admitted. But it is said that the assessors proceeded upon wrong principles; that they did not assess the bank upon an equality with the other inhabitants of the town, but assessed it especially; that they did not deduct from the personal property of the bank, the amount of its liabilities and assess for the balance; that they took one-fifteenth of the average total deposits and loans of the bank and applied thereto the town rate of $1.62 for which there is no authority in law. This may be all quite true, but yet if there is nothing wanting in the constitution of the Board, and the nature of the inquiry came within the scope of the duties assigned to them by law, and they had jurisdiction to enter upon the inquiry, then, it seems to me under the authorities, that the mere fact of their having proceeded upon a wrong principle, or come to an erroneous conclusion in regard to a matter which they were competent to determine, does not oust them of their jurisdiction.

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In the Act of 1883, ch. 26, which provides for the rating and assessing of all joint stock companies and corporations, the Legislature, realizing, doubtless, that assessors are not expert mathematicians, any more than are Judges, nor schooled in the intricacies of corporation book-keeping, prescribed a form of requisition to be made upon the company or corporation to be assessed, for the purpose of enabling the assessors accurately to rate such company or corporation. This requisition demands the answering of four questions, and contains an intimation that in case the questions are not answered, the company or corporation will be assessed in the discretion of the assessors, and that there will be no appeal. A glance at the statement sent in to the assessors by the bank will demonstrate that neither the requirements of sec. 11 of the Act, nor the demand for information in reply to the specific questions has been complied with. There is attached to the statement sent in by the bank a schedule which is said to contain the monthly averages of the total loans and deposits for the year 1920, a schedule which it is a little difficult fully to understand—that is, understand in its applicability, if it has any, to an assessment upon personal property.

What then, in the circumstances, were the assessors to do? They were, in the terms of the Act, to rate and assess the bank, in like manner as any inhabitant, upon its real and personal property and income, according to the best of their judgment. In exercising their judgment and in making the assessment upon the bank, the principal assessor says:—"the assessors endeavoured to make a fair and equitable assessment, having regard to the business of the several branches of the said banks in receiving deposits and making loans, which I believe to be fair and just, and in this, the two other assessors who, along with myself, composed the Board of Assessors, did concur.

I did not think it would be either fair or equitable for us to assess the said branches of said banks for the full amount of the monies actually loaned by them, but took only a portion of the same together with a portion of the deposits received, and in this way arrived at the amounts for which the several branches of the said banks were assessed in the year 1921; and in this I had the concurrence and approval of the other members of the Board of Assessors. The proportion of the average monthly loans and deposits which was assessed in each case, works out at 15% thereof."

It is admitted that nowhere in the law relating to the assessing of rates and taxes within the Town of Woodstock, is there any authority for the adoption by the assessors of the principle upon which they have acted; it may be also admitted that the assessors

did not rate the bank on an equality with the other inhabitants; that is to say, they did not apply the same principle to all, but adopted in the case of the bank, an entirely different principle from that which they followed in the case of other inhabitants. The assessors do not claim that they were assessing the bank in strict compliance with the prescriptions of the Act. They could not do so, because the bank had not furnished them with the information necessary for the purpose. But in exercising a sound discretion in the matter, which is all they could do, who shall say that the principle upon which they acted was wrong? The bank, in my judgment, has little right to come here and complain of the inequality and illegality of the assessment, when the fact is that it was owing to its own neglect and default that the assessors were unable to follow the prescriptions of the Act and levy upon the bank an assessment uniform and on an equality with the other inhabitants of the town.

As to the second preliminary objection. Section 1 of the Act of 1913 (N.B) ch. 21, provides, that "this Act shall extend and be applicable to all parishes, incorporated towns and cities, except so far as special provisions inconsistent herewith may exist or may be made in reference to the assessing and levying of rates and taxes in any such parishes, cities or towns." And sec. 149 provides that "the sections of this Act headed 'General Provisions,' (under which heading come the secs. 122 to 126 invoked here) shall extend where applicable to all rates howsoever or by what authority laid, imposed, assessed and levied."

This, certainly, is very broad and comprehensive language; broad enough, one would have thought, to have made it necessary for the bank to have furnished the bond required by sec. 123, before proceeding by *certiorari*. Where these are special provisions in regard to the assessing and levying of rates and taxes in any town, those provisions prevail to the exclusion of inconsistent provisions in the general Act in regard to the same matter. But *Ex parte Lewin* (1879), 19 N.B.R. 425, is quoted as a conclusive authority against the view that a bond was required as a condition precedent. That case was decided at a time when the Court *en banc* sat in two divisions of 3 Judges each, and is the decision of a divided Court, Palmer, J., having dissented; a decision of weight no doubt, but not of the same weight as if it were the unanimous judgment of the Court. The law in force at the time the case was decided Con. Stats. 1876, ch. 100, contained sections exactly similar to secs. 1 and 149, 1913, ch. 21, and the like provisions as to the giving of a bond as a condition precedent to *certiorari* (sec. 109) and a majority of the Court held that because neither the Clerk of the Peace, to whom, on receipt of

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any objection to an assessment, the assessors are directed by sec. 109 to apply for advice, nor the county secretary, to whom, by sec. 110, the bond is directed to be given were city officers, therefore, the sections mentioned were not applicable to assessments made in the City of Saint John.

With every deference to the wisdom of the past, I cannot accede to that reasoning, in so far as it is sought to apply it to the case now under consideration. Because the word "county" includes city and county, Con. Stats. N.B., 1903, ch. 1, sec. 8, sub.-sec 7, and a "parish" includes any city or town which is within the limits of such parish, *Ib.* sec. 8, sub.-sec. 30, it seems to me that a Clerk of the Peace, whose duties are defined by Con. Stats., 1903, ch. 59, is to be regarded as much an officer of the town as he is of the county. Clerks of the Peace, of whom there is but one for each county, are appointed for the whole county, and not for any particular part of it, and it is as much his duty, I should think, to advise assessors of the town, as it is to advise assessors of the rest of the municipality.

So, also, in regard to the county secretary. For many purposes the Town of Woodstock and the Municipality of the County of Carleton are still united. They are united in support of the poor; they are united in the maintenance of the county hospital; representatives of the town sit at the municipal council board; the common gaol of the county is the common gaol of the town; and so on, in regard to other matters. But even if the town and county were not in any way connected, I could see nothing either inconsistent or incongruous in the idea of a bond being given in the name of the county secretary as trustee for the benefit of the town. And besides all this, there is, in the Act of 1913, ch. 21, a provision which is not to be found in the Con. Stats, 1876, ch. 100, and which to my mind clearly indicates an intention on the part of the Legislature to make the secs. 122 and 126 applicable to cities and towns. That is the provision to be found in sec. 126, which imposes upon the clerk of the Crown the duty, in case an order for the amendment of an assessment be made under the powers conferred on the Court by sec. 125, of entering the same on record and certifying the same to the chamberlain, city or town clerk, county secretary or other proper officer of the city, town or municipality wherein such assessment was made.

While in view of the decision in *Ex parte Lewin*, 19 N.B.R. 425, the question of the necessity of a bond as a condition precedent to *certiorari* may not, perhaps, be wholly free from doubt, still, were I obliged to determine it at the present moment, I should be disposed to think that such a bond was necessary. But

in the circumstances of the case, I do not feel obligated to determine the question, because in my view the bank, before proceeding by *certiorari* should have pursued and exhausted the remedy provided by the statute, and appealed from the decision of the assessors to the Town Council; and not having done that, I would discharge the rule *nisi*, with costs.

CROCKET, J., agrees.

GRIMMER, J.:—An order for *certiorari* was granted in this case by Chandler, J., upon the application of the defendant, on the following grounds. (See judgment of Barry, J., p. 53.)

Supporting these grounds it was strongly contended by counsel for the bank that there is no law in existence relating to the Town of Woodstock, authorizing an assessment on banks in the town. For the town it was contended that the assessment was legally and properly made under the authority of law, and that the case was not properly before the Court.

The points involved in this case are as I will take them:—

1. As to the legality of the assessment made upon the bank in the year 1921, in the Town of Woodstock, and 2, whether or not the writ of *certiorari* should have issued in this case.

By the Act of Incorporation of the town provision was made for the appointment of assessors and the manner in which the assessment for rates and taxes should be made in the said town. In the year 1873, ch. 81, it was provided that the assessment of rates levied in the said Town of Woodstock should be raised, first, by an equal poll tax of not less than $1.25 upon the male inhabitants of said town above the age of 21 years; secondly, upon the real estate situate within said town, and personal estate of the inhabitants thereof, and upon real and personal estate situate within the town, of non-residents, and upon the annual income and emoluments of such inhabitants over and above the sum of $300, derived from any office, profession, etc.; and also upon the capital stock, income or other thing of joint stock companies or corporations, etc. This latter phrase would seem to have authorized an assessment to be made upon the joint stock or any other possession or, as the statute says, thing, of a company or corporation. However, it would appear from subsequent legislation that it became necessary for a more distinctive reference to corporations in respect to assessments in the town, and therefore in the year 1883 by ch. 26, sec. 11, it was provided as follows:—

"All joint stock companies or corporations who shall carry on business within the said town, or who shall have an agent, subagent or manager within said town, shall be rated and assessed in like manner as any inhabitant upon any real or personal pro-

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perty owned by any such company or corporation, and upon the income received by them, and the income of any company or corporation, being an insurance company, shall be appraised at 12½ per centum of the premiums and moneys received from said company by such manager, agent or sub-agent; and for the purpose of enabling the assessors to rate such company or corporation with accuracy, the agent, sub-agent or manager thereof shall, if required in writing by the assessors so to do, according to the form in the schedule to this Act, furnish to them a true and correct statement in writing under oath to be made before a Justice of the Peace, setting forth the whole amount of annual income received for such company or corporation within said town during the year preceding the making up of the assessment, and the amount of the real and personal estate held by or for such company or corporation in said town, or in connection with the business done therein; and in the event of the neglect or refusal on the part of such agent, sub-agent or manager to furnish the required information to the assessors within 10 days after such application therefor, the assessors shall rate and assess the said company or corporation according to the best of their judgment, and there shall be no appeal from such rate or assessment; but nothing herein shall be deemed to make such demand of a statement necessary in order to make such assessment."

Section 12 provides the manner in which the rate assessed against the company or corporation may be collected after demand has been made, and no payment, and it will appear from an examination of the section that authority was given to the town to sue the company or corporation for the amount of such assessment in the County Court of the County of Carleton, and to recover the same with costs of suit.

Section 13 provides that in case a suit is brought it shall not be necessary for the town to set forth the special matter, but it shall be sufficient to declare that the defendant is indebted to the town in the sum of money to which the said taxes amount, whereby the action has accrued.

Section 14 provides that on the trial of such action or on an assessment before a Judge, a certificate from the town treasurer stating the amount of taxes shall be conclusive evidence of such assessment and of the right of the town to recover. As has been observed, sec. 11 provides that the company or corporation carrying on business within the town shall be rated and assessed in like manner as any inhabitant upon any real or personal property owned by such company or corporation, and upon income received by them. Also, that if required in writing so to do by

the assessors, they shall furnish to them a true and correct statement in writing under oath setting forth the whole amount of the annual income, etc., of the corporation, and the amount of the real and personal estate. Also that in case of neglect or refusal on the part of the agent, sub-agent or manager to furnish the required information to the assessors within 10 days, then the assessors shall rate and assess the company or corporation according to the best of their judgment, and there shall be no appeal from such rate, nor shall anything in the section be deemed to make such a demand of the statement necessary in order to make such assessment. The schedule provides a form of questions, which must be answered by the bank to the assessors.

Referring to the proceedings which have been returned under the writ of *certiorari*, it would appear as if a demand had been made upon the bank to furnish the assessors with a statement of their real and personal property and income liable for assessment in the Town of Woodstock, in the year 1921. At all events, there is a statement attached to the return signed by the manager and accountant of the defendant bank purporting to give the value of the real estate owned by the bank in the said town, and an account of the average amount of deposits, loans and investments. This statement does not cover any other personal property of the defendant bank nor is it at all in the form provided for by sec. 11 of the Act quoted, but it however was presented to the assessors as and for a compliance with the provision of the section. It appears from the subsequent act of the assessors that the statement was not satisfactory, and was treated by them as if there had been neglect or refusal on the part of the bank to furnish the required information; and without imputing any improper motives to the manager and accountant of the said bank it certainly appears to me that the assessors were not furnished with a true and correct statement as required by the section quoted, and that, therefore, there was neglect at least on the part of the bank to furnish to the assessors the required information, and that being the case, in my opinion, there then became vested in the assessors a discretion to proceed to make an assessment according to the best of their judgment, which they apparently did. It would appear from the return mentioned, that the assessors were justified in so refusing the statement, for the reason that the valuation given of real estate of the bank, in the statement, was $4,000. The assessors afterwards rated the bank on its real estate at $5,700, to which the bank has made no objection and stated on the argument of this matter that there was no exception or fault to be found with the valuation of the real estate. In my opinion, there was no such statement

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furnished by the bank to the assessors as is required by sec. 11, and as stated that the assessors were fully justified in exercising their discretion and making the assessment according to the best of their judgment, and they apparently did so. A careful examination of the various statutes relating to assessment in the Town of Woodstock, passed since 1883, has convinced me that this legislation has not been in any way repealed or interfered with; that it is in no way inconsistent with or repugnant to the provisions of any subsequent Act which has been passed relating to assessments in the Town of Woodstock, and therefore it was and still is in full force and effect, as much so as when passed. It is special legislation evidently obtained for a particular and special purpose, and, apparently, has achieved the purpose for which it was obtained without objection or interference, until the present application.

In respect to the second point, the writ of *certiorari* in this case is not taken away by statute, but it is, as is well recognized, and for many many years has been so recognized, a discretionary writ which may be issued by the Court when it is of opinion it may be necessary to protect the interests of those who may be improperly affected by some action on the part of the Court of inferior jurisdiction. Here by the Act 1873, ch. 81, which is a statute amending the Act to Incorporate Certain Districts in the Parish of Woodstock, in the County of Carleton, by sec. 16 it is provided that:—

"Any person thinking himself or herself aggrieved by any assessment for town taxes may appeal by petition under oath made before any Justice of the Peace to the assessors who shall duly consider the same; and if they deem the party entitled to relief shall make such reduction in his or her taxes as to them shall appear to be just and right and forthwith make the necessary alteration caused by said reduction in the assessment list filed in the town clerk's office, and also notify the treasurer or collector of rates of the said reduction and alteration; provided always that such appeal be made within 10 days after such person shall have received notice of such assessment; notice in writing of the decision of the assessors shall also be given to the appellant, signed by said assessors or the majority of them."

Section 17 of the same Act is as follows:—

"Should the appellant be dissatisfied with the decision of the assessors he may appeal to the Town Council, who may either affirm the first or amended assessment or otherwise deal with the matter as they may deem just and right, and their decision shall be final; provided no such appeal to the Town Council shall be made or received by them unless the said petition under oath or

a duplicate thereof be filed in the Town Clerk's office within 10 days after notice of the decision of the assessors shall have been given to the appellant."

Though this Act was passed in 1873, and while there have been many amendments to the Town of Woodstock Act of Incorporation relating to assessment of rates and taxes, I can find no provision relating to an appeal other than that I have now quoted, nor can I find that the same has in any way been repealed by subsequent legislation, and while passed very many years ago it is the only authority now in existence which governs or relates to appeals against assessment rates in the said Town of Woodstock. The procedure followed by the bank in this case was under sec. 16 of the last quoted Act. A petition was prepared and filed with the assessors on or about July 8, 1921, by which the petitioner stated that it felt itself aggrieved by the assessment for that year and appealed therefrom, and prayed that the assessors might take the petition into their consideration. The notice of assessment had been served upon the manager of the bank on June 20, and according to the return made to the writ of *certiorari* the petition against the appeal was not signed until July 8, and it was not presented to the petitioners until July 11, so that 20 days instead of 10 elapsed between the time of the service of the notice of assessment on the bank and the date of the making of the appeal against the same. However, the matter was heard by the assessors, who subsequently having heard the evidence which was presented on the appeal of the bank on July 29, notified the said bank that after hearing the evidence and upon due consideration they, the assessors, had come to the conclusion that the assessment should stand as made. Thereupon, the bank did not pursue the further appeal which was provided for by sec. 17 of the Act, but proceeded later on to obtain the writ of *certiorari* under which the return is now before this Court. The writ as stated is a discretionary writ and may be issued by the Court when it is of the opinion the circumstances are proper for the issuing thereof, yet it has been repeatedly held by this Court, following well established precedent, that where a remedy is given by appeal that that appeal must first be exhausted before the Court will entertain any application for a writ of *certiorari*. As I have pointed out there was full provision made for an appeal by the bank in this case, first to the assessors, then if they were dissatisfied with that, to the town council, but they have seen fit to discharge the provision so far as the appeal to the town council is concerned and have followed the course which has brought them before this Court.

I am of opinion, therefore, under all these circumstances that

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the writ of *certiorari* should not have issued. I am also of the opinion that the assessors had full jurisdiction to make the assessment, and that there is full and sufficient law in existence relating to the Town of Woodstock which authorizes an assessment to be made on banks operating in the said town.

In view, therefore, of the reasons which I have given upon both of the points which are of importance in this case, I am of opinion that the rule should be dismissed.

The costs of this appeal must be paid by the defendant bank.

Rule dismissed.

Re FRANKEL, ART SWISS EMBROIDERY AND DOMINION BANK.

Quebec Superior Court in Bankruptcy, Panneton, J. February 7, 1921.

BANKRUPTCY (§ I—6)—SETTLEMENT WITH CREDITORS—CONSENT OF BANKRUPT—RIGHT TO WITHDRAW BEFORE RATIFICATION—BANKRUPTCY ACT.

An insolvent has the right to withdraw his consent to a settlement with his creditors at any time before the Judge has ratified the settlement.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

APPLICATION to ratify a composition made by an insolvent with his creditors; the insolvent opposed the settlement. Application dismissed.

The facts of the case are as follows:—

An assignment was made on December 29, 1920, by one Frankel. On January 13 following, the insolvent made an offer of composition at 25% in the dollar. On the 17th of the same month, at a meeting of the inspectors, it was unanimously decided to accept this offer. On February 7, 1921, the following motion was presented in Court for the approval of the composition offered: "Whereas, in the opinion of the undersigned authorized trustee, it is in the interest of the debtor that the deed of composition be approved by the Judge sitting in and for the Bankruptcy Division of the Superior Court." The insolvent Frankel, opposed the motion. The settlement, he said, had been found impracticable. He argued that he could not be forced to carry out the agreement in the circumstances. He further objected that the settlement was illegal inasmuch as it was made at the first general meeting of the creditors and the 10 days' notice required by the Act (sec. 13) was not given to the creditors; nor had any notice of the terms of settlement been served according to law.

The trustee urged that when once a settlement had been accepted by the creditors, the Court should enforce it. Not only had the creditors agreed to the settlement, but money had been advanced by a third party namely, Henry Faber of Toronto, to

pay privileged creditors and secure instalments on the settlement.

Against this, Frankel gave as one reason why he could not carry out the settlement that would result in the loss of his business. Another reason, he said, was that it was clear he and Faber could not agree. The creditors would thereby suffer prejudice.

It was further stated that inspectors who previously approved the settlement now desired that it should not be carried out.

B. Shulman, for the estate.

J. M. Ferguson, K.C., for Frankel.

S. G. Tritt, for respondent.

PANNETON, J., said the question was important. It would be useless, he added, to call evidence on the other points raised before deciding the first question whether an insolvent could withdraw from a settlement after it had been accepted by the creditors?

After an adjournment, the Court decided that an insolvent had the right to withdraw his consent until such time as the Judge ratified the settlement.

Accordingly, the trustee's motion was dismissed without entering into the other question raised.

Motion dismissed.

CHONG JAN v. QUONG WO ON.

Victoria County Court, B.C., Lampman, Co.J. May 26, 1922.

CONTRACTS (§ IIA—125)—CONSTRUCTION—INTENTION OF PARTIES—CONSTRUING AS A WHOLE—VALIDITY OF STAMP AS SIGNATURE.

In construing a clause of a contract the Court will look at the whole contract, and give effect to the intention of the parties having regard to the object of the contract. A person may bind himself by putting his name to a document without putting it in his own handwriting, and if he uses a stamp it is just as effective as if he writes his name.

ACTION to recover a certain sum, alleged to be due under a contract guaranteeing a workman. Judgment for plaintiff.

W. C. Moresby, for plaintiff.

C. E. Wilson, for defendant.

LAMPMAN, Co. J.:—The plaintiff is a cannery contractor of Vancouver and the defendant is a Chinese mercantile partnership, carrying on business in Victoria.

The plaintiff being desirous of getting men to work in a cannery at Rivers Inlet, sent an agent named Chung Chow to Victoria in an endeavour to find men, and on his visiting Victoria, he came in touch with a Chinaman named Leong Jiong Yee, who was willing to go to the Rivers Inlet cannery, but he wanted an

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advance of $85, which Chung Chow was unwilling to give him unless some one guaranteed the workman. It seems that the practice is that when men are engaged in this way, that before the advance money is paid, some firm guarantees that the workman will either leave for the cannery with his employer or will actually arrive at the cannery and take up his work. This workman, Leong Jiong Yee took Chung Chow to the defendant's store with the idea of having the defendant guarantee him on their arrival there, Chung Chow paid the $85 and he also paid $2 to the defendant, who signed a written contract, the translation of which is as follows:—

"Upon engagement of Leong Jiong Yee to go to Rivers Inlet Fish Canneries to work, and having paid him in advance $85, it is agreed that the monthly wage shall be $65 for 26 days' work, irrespective of the date the work starts. The day shall be 11 hours, and anything over 11 hours to be regarded as overtime, for which extra pay shall be 25 cents per hour. Unless employee stays to the end of the season no overtime will be paid. Wages for overtime will be paid to the employee upon his departure when the season closes. Food, passage both ways, and poll tax to be provided by employer.

The date of departure of employee is definitely settled to be June 16.

If Leong Jiong Yee do not go to shop
does not arrive at cannery
the payment in advance to be asked of
refunded by

person guaranteeing, without demur.
1921, June 15th day,
Leong Jiong Yee.
Chop or
Stamp. Quon Wo On. Person guaranteeing."

The workman left Victoria along with some others, who were also going to the Cannery at Rivers Inlet, but when the boat on which Leong Jiong Yee was travelling reached Alert Bay, he was arrested on a charge of having opium in his possession, and was, subsequently, convicted and sentenced to 6 months' imprisonment, and as he served his sentence, he was unable to do the work which he had contracted to do at the cannery. Plaintiff then sought to recover from the defendant the $85, and upon the defendant refusing to pay, action was commenced.

At the time the contract was entered into, Chung Chow paid the defendant the sum of $2. Just what this payment is, there was some conflict at the trial, the plaintiff contending that it was

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a commission and the defendant that it was "tea-money," but it seems to be more in the nature of an insurance premium.

There is a conflict as to the proper interpretation of the contract which was in Chinese. In the last paragraph the plaintiff's contention that the proper translation is that Leong Jiong Yee should arrive at the cannery, but the defendants say that it is "if he does not go to the cannery", and the defendants contend that by reason of the fact that he left Victoria on his trip to the cannery the provisions of the contract were fulfilled.

I think, in deciding what is the proper construction to be put on this last clause of the contract, the whole contract must be looked at. It is clear that what the plaintiff wanted was a man to go and work at the cannery and unless the man would actually arrive at the cannery and work, they would lose their $85, so I think, having regard to the object of the contract, plaintiff's contention is correct, and the contract requires that the workmen should actually arrive at the cannery.

There is a further defence in that the defendant's name is signed with a stamp, and there is no initial or name to authenticate it. The stamp has the name of the partner who affixed it to the document, and opposite the stamp there are the words "person guaranteeing". The partner who affixed the stamp says that he did not consider the putting on of the stamp as a serious matter and says that had he considered he was signing a contract he would have written in his name or his initials.

I do not think that this defence can prevail. I think it is clear that a person may bind himself by putting his name to a document without putting it in his own handwriting, and if he uses a stamp, it seems to me that it is just as effective as if he writes his name. See *Schneider* v. *Norris* (1814), 2 M. & S. 286, 105 E.R. 388, and *Baker* v. *Dening* (1838), 8 Ad. & E. 94, 112 E.R. 771.

As the sum of $2 was paid to the defendants at the time this contract was entered into, and they have stamped their name on the document opposite to the words "person guaranteeing", I do not think they can now be heard to say that they did not consider the contract as binding on them. The result is that the plaintiff is entitled to judgment for $85, as claimed.

Judgment accordingly.

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Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish, J. February 18, 1922.

TRIAL (§ IF—30)—COMMISSION TO TAKE EVIDENCE OF WITNESSES BEYOND JURISDICTION—ORDER FIXING DATE OF TRIAL—PLAINTIFF COMPLYING WITH TERMS OF ORDER—IMPOSSIBILITY OF HEARING CASE WITHIN TIME LIMITED BY ORDER—PRESS OF BUSINESS OF JUDGES—RIGHT OF DEFENDANT TO HAVE CASE DISMISSED FOR NON-COMPLIANCE WITH ORDER.

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Where in an action, an order taken out by the plaintiff for a commission to examine witnesses outside of the jurisdiction contains a provision that the plaintiff shall bring the case on for trial within three months from the date of the order, and the plaintiff does all in his power to comply with the provision, but the Court is unable, owing to press of business, to fix a date within the time limit, the fact that the case is not set down for trial and heard within the time limited in the order is not a ground for dismissing the action.

TROVER (§ IC—21)—PLEDGE OF STOCK—RETURNABLE WHEN DEBT FOR WHICH IT IS GIVEN IS PAID—CONVERSION—NECESSITY OF TENDER OF DEBT.

Where under an agreement and a receipt given at the time of a pledge of stock, the stock is not returnable until the debt is paid, there can be no conversion of the stock until tender of the debt has been made.

COSTS (§ II—20)—NO SUBSTANTIAL GRIEVANCE—TECHNICAL AND FICTITIOUS CLAIM—JUDGMENT—DISCRETION OF COURT.

A claimant who really has no substantial grievance but who brings an action for a purely technical and fictitious grievance may be deprived of the costs of the proceedings, in the discretion of the Court.

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action to recover money loaned by plaintiff to defendant and others for the promotion of a fox company. The amount sued for was not disputed but the action was defended on the ground that plaintiff, without defendant's authority, had delivered to one C. B. Lewis, who was associated with defendant in the promotion of the company, a certificate for 1,000 shares in a Massachusetts company, and that Lewis, subsequently, went into insolvency and that no trace could be found of him or the stock, as the result of which defendant claimed he had suffered damages in the sum of $10,000. There was also a preliminary objection taken that by order made at Chambers the cause was to be brought on for trial within 3 months from the date of the order, failing which the action was to stand dismissed, and that the terms of the order had not been complied with.

A. Whitman, K.C., and *T. R. Robertson*, K.C., for appellant.

J. McG. Stewart, for respondent.

HARRIS, C.J.:—There was a preliminary objection in this case that the action was dead and should not have been tried when it was. On November 10, 1920, there was an order for a commission to examine witnesses at Boston, taken out by the plaintiff. This order contained a provision:—

"That the plaintiff shall bring this cause on for trial within 3 months from this date and in case the plaintiff does not bring this cause on for trial within 3 months from this date it is hereby adjudged and decreed that the plaintiff's action herein shall stand dismissed without further order."

The evidence taken in Boston under the commission occupies

some 34 pages of the printed case and that on the trial some 17 or 18 pages.

On January 25, 1921, the plaintiff's solicitor moved the Chambers Judge on notice to set the cause down for trial. This motion was heard 2 months and 15 days after the date of the order for commission and the Chambers Judge fixed February 15 as the date for the trial. Counsel for defendant attended on the motion and there is nothing in the order to show why the date fixed was February 15, nor does it show that any objection was made to the trial being fixed for a date beyond 3 months from November 10.

It appears that I was the Chambers Judge for the months of January and February, 1921. The term of the Full Court opened on January 10, and as Drysdale, J., was ill and Mellish, J., engaged sitting on a Commission regarding roads, there was a shortage of Judges for the Full Court and I sat as a member of the Court all through January and until February 2. A number of applications were made to me in January to set down trials but, as it was necessary for me to sit in the Full Court, I refused to set down any cases for trial except for dates in February, and I find from the Chambers Book that before the application was made to me to fix a date for the trial of this cause, I had made orders for trials of other cases which took every available date before February 15. As it happened, when February 15 came, I was still engaged on a trial begun on the 14th, and so Longley, J., at my request, took the trial of this cause. It, therefore, appears that the date fixed for this trial was for the convenience of the trial Judge, or because, on account of other engagements, he could not fix an earlier date. The plaintiff had brought on his motion in ample time to get a date well within the 3 months mentioned in the order of November 10, and it was not his fault that he could not get an earlier date than February 15. He had done all he could.

It also appears that when the case came on for trial, counsel for defendant moved to dismiss the action on the ground that it was not brought to trial within the time specified, and that this motion was dismissed, and thereupon, the trial proceeded, Mr. Whitman, K.C., taking part in the trial, examining and cross-examining witnesses on behalf of the defendant. The judgment filed by the trial Judge makes no mention of the motion to dismiss the action but deals simply with the merits of the action and counterclaim.

The notice of appeal is in the usual form from the whole judgment, but it makes no specific mention of the decision of the trial Judge dismissing the motion made at the beginning of the

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trial, nor is there anything to indicate that it is appealed from.

I doubt very much under the circumstances whether the point raised is now open to the defendant, but it is unnecessary to decide this question because the plaintiff by moving to set the cause down for trial had done everything he could to bring it on for trial and had therefore complied with the order of November 10.

When the order for November 10 was granted, the defendant's counsel knew that the only way the trial could be brought on was by moving the Chambers Judge to fix a day for it. It would be absurd for a Court of Justice to hold that the action had to be begun all over again under these circumstances, when the party was not at fault. There is no reason why plaintiff should be punished because he could not get a Court. There is another good answer to this objection, and that is, that the order of the Chambers Judge fixing the date of the trial operated as an extension of the time fixed by the order of November 10, and this order was properly granted and never was appealed from. The objection fails.

The trial Judge gave judgment for the plaintiff for the sum of $5,095 with interest on $4,521.29, from August 8, 1919, to date of the judgment. On the trial as well as on the hearing of the appeal, the defendant's counsel admitted the plaintiff's cause of action but claimed that defendant was entitled to damages on his counterclaim, and that was the only question argued in the Full Court, except the preliminary objection already referred to. The facts are that the plaintiff lent to the defendant and one Clifford B. Lewis, a large sum of money in connection with a fox company. Lewis had made a payment of $2,000 on account and then a new agreement in writing was made on or about May 8, 1916, in which defendant and Clifford B. Lewis admitted the balance due to the plaintiff and promised to pay it with interest on or before November 1, 1916, and the agreement contained this provision:—

"And as security for the payment of the above mentioned sum to become due upon November 1, 1916, said Harlow has this day deposited with said James Rayner a certificate for 1,000 shares of the capital stock of the H. B. Ruggles Co., a Massachusetts corporation."

The plaintiff signed a receipt for this stock certificate, reading as follows:—

"Received of D. G. Harlow, certificate No. 15 of the H. B. Ruggles Co., for 1,000 shares common stock as security for Rayner Harlow, Lewis agreement of even date certificate to be returned upon fulfilment of agreement."

Later, this stock certificate was exchanged for one for a similar

number of shares in the Ruggles Chair Co., and this exchange was made at the request of Lewis. Later, Lewis, on October 16, 1917,—long after the money was due to the plaintiff—wrote plaintiff requesting that the latter certificate be sent to him, saying he had a chance to make a deal, and if it went through they would pay plaintiff "some real money." The plaintiff sent the stock certificate to Lewis, and when he asks for his money, defendant demands the return of the stock certificate which had been sent to Lewis, and Lewis conveniently disappears from view.

The counterclaim now set up is the value of this stock. The plaintiff has produced evidence showing the close business relationship which existed between Lewis and defendant, and one cannot read it without having a very strong suspicion that defendant knew all about the return of the stock to Lewis, and concurred in it, but there is a denial of this fact by the defendant, and I am unable to say that a finding to that effect would be justified.

On this view of the evidence, the defendant, it is claimed, is entitled to recover the value of the stock as of the date when it was sent to Lewis. Counsel on the argument seemed to concede this.

Under the agreement and the receipt given at the time of the pledge of the stock it was not returnable until the debt was paid, and it has never been paid. There was, however, a tender after the action was brought, of the amount of the debt conditional on the return of the stock. That was the first time when defendant was entitled to demand it and the case of *Halliday* v. *Holgate* (1868), L.R. 3 Ex. 299, 37 L.J., (Ex.) 174, 17 W.R. 13, is, I think, an express authority for the proposition that the time of conversion was the date when the tender was made and the stock ought to have been returned.

The value of the stock on that date is, I think, the test to be applied here. If the stock had increased in value subsequently, that might have been taken into consideration; but that is not this case. The question as to whether the value is to be fixed on the date when the stock was sent to Lewis or on the date of the tender, is in one sense of no importance because on a careful reading of the evidence I am convinced that the stock was of no value when it was sent to Lewis, and it never has been of any value since. The defendant is, I suppose, entitled to nominal damages and I fix the amount at $1.

The defendant set up a counterclaim for an exorbitant sum, when he must have known or ought to have known that the stock was of no value and, as a result of that, the plaintiff was obliged,

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in order to meet this demand, to take a Commission for the examination of witnesses in Boston in which defendant joined and the costs of that Commission and the taking of that evidence, ought to be borne by the defendant. The costs which ought to be paid by defendant would equal, if not exceed, the amount which defendant would be entitled to if given costs on his counterclaim, and under these circumstances the proper course, I think, is to allow no costs on the counterclaim to either party.

As to the costs of the appeal; defendant raised the preliminary objection referred to and argued it at some length. If he had succeeded on this objection the plaintiff's judgment for his debt would have been set aside. Under all the circumstances there should be no costs on the appeal to either side. The sum of one dollar allowed to defendant on his counterclaim will be set off against the plaintiff's judgment.

RITCHIE, E.J.:—I agree.

MELLISH, J.:—I agree.

RUSSELL, J.:—A preliminary question was raised in this case by a motion on behalf of the defendant to dismiss the action on the ground that it had not been brought to trial within 3 months of November 10, as required by an order of that date made at Chambers by Ritchie, J. There was such an order providing that if the plaintiff should not bring his case on for trial within 3 months, it should stand dismissed without further order. But plaintiff took the proper proceedings to bring the case on for trial well within the period limited, by a motion before the Chief Justice on which an order was made on January 25, setting down the case to be tried on February 15, a few days later than the expiration of the 3 months' period which expired February 10. Counsel for the defendant was present when this order was made. He was either assenting or opposing. If he assented, that is the end of the question. If he opposed, the fixing of the time for trial was an act of the Court to which I think the maxim is applicable "*actus curiae neminem gravabit.*" It might well be that there was no convenient day on which the Chief Justice could try the case before February 10. The plaintiff had done all that he was bound to do to comply with the order of Ritchie, J., and the preliminary objection fails.

The case for the plaintiff was not contested at the argument.

The only question raised by the appeal has reference to the defendant's counterclaim. Plaintiff had advanced certain sums of money to the defendant and two other persons who were jointly interested in a fox-breeding or fox-selling company from which he was expecting returns for his advances as also the members of the company were from the profits of the speculation.

The first advance was made in connection with an agreement of May 15, 1915. That agreement was modified by a subsequent arrangement entered into with the plaintiff on September 24, 1915, which was in the nature of a compromise of the plaintiff's rights under the original agreement. This was signed by C. B. Lewis and the defendant Harlow, who were then acting, as they were throughout the whole course of the business which gives rise to this litigation in close concert.

In May of the following year a further compromise and extension of time for the borrowers became necessary, and the following agreement was entered into:—

"Whereas by a certain agreement made on May 15, 1915, by and between James Rayner of the first part and Dawson G. Harlow, Benjamin I. Rayner and Clifford B. Lewis of the second part, calls for payment to said James Rayner of a balance of $4,250 upon May 1, 1916, together with a bonus of $8,000.

And, whereas said money and bonus is now overdue and remains unpaid, it is hereby agreed by and between the said James Rayner of the first part and said Dawson G. Harlow and Clifford B. Lewis of the second part, that the said agreement of May 15, 1915, be cancelled by the signing of this instrument insofar as the liability of said Harlow and Lewis is concerned.

And in consideration of said cancellation said Harlow and Lewis do hereby agree to pay to said James Rayner on or before November 1, 1916, the sum of $4,250 with interest at the rate of 6% per annum. And as security for the payment of the above mentioned sum to become due upon November 1, 1916, said Harlow has this day deposited with said James Rayner a certificate for 1,000 shares of the capital common stock of the H. B. Ruggles Co., a Massachusetts corporation.

In witness hereof we have hereunto set our hands and seals this eighth day of May, year of Our Lord, 1916, at Boston, Massachusetts. Sgd. James Rayner (Seal), Dawson G. Harlow (Seal), Clifford B. Lewis (Seal).

It is in connection with the deposit of stock referred to in the last paragraph of this agreement that the counterclaim arises. The plaintiff Rayner, some time in June, 1917, sent forward the original certificate to be exchanged for another for the same number of shares in what was in effect the same company operating under a different name. Later on, in October, 1917, at the request of Lewis, and it is claimed without any authority from the defendant, plaintiff sent the substituted certificate to Lewis who said he was expecting to make a deal by means of which the claim of the plaintiff would be at least partially satisfied.

The circumstances under which the certificate referred to in

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this agreement came to be deposited are described in the evidence of the plaintiff. "Q. Will you tell me what took place? A. They had failed to pay me my money and to show good faith they offered me this to hold for it. Q. What was said? A. D. G. Harlow said—I was wanting my money—Harlow said: 'Now, C. B., in order Jim may feel that we are going to pay him, let us give him one of these stock certificates.' Q. By 'C.B.', he meant Lewis? A. Yes, and by 'Jim' he meant me."

Just after this series of questions and answers plaintiff proceeds to say that Harlow was to give him another and he was to return the one he had at home.

"Q. Why was this being returned? A. I don't know. He asked me to return it and I took the other one they gave me and returned the one I had at home."

It is not to be wondered at if plaintiff considered that he had the authority of the defendant to treat any request from Lewis in regard to this certificate as if it had come from the defendant himself, and I suppose that if the agent of "C. B.", Miss Moynahan, to whom the stock certificate in the "H. B. Ruggles Co." had been sent for exchange had not returned to plaintiff the certificate of stock in the "Ruggles Chair Co.", to which the name of the company had been changed in April, 1917, the question now being discussed would have arisen at this date instead of at a later stage. The plaintiff would have been charged with a conversion of the substituted certificate.

This exchange of certificates occurred in June 27, 1917; Miss Moynahan writes to the plaintiff on that date saying:—

"Dear Mr. Rayner,

Your letter of June 16 received and I have forwarded it to Mr. Lewis, who is at present out of town. I am enclosing certificate No. 4 of the Ruggles Chair Co. for 1,000 shares of common stock in exchange for old certificate No. 15 for 1,000 shares enclosed in your letter of the 16th."

I find it difficult to believe that Harlow, the defendant, was not aware of this transaction under which the plaintiff parted at least temporarily, with the original certificate and entrusted it to the keeping of Miss Moynahan, who was the stenographer of C. B. Lewis. He says he spent half his time in Boston, working on the promotion of the fox company in which he and Lewis were interested, and that he had his headquarters in Lewis's office. If he was aware of the exchange transaction, and impliedly ratified it, I think he also, impliedly, authorized the handing over of the certificate to Lewis, on the request of the latter in October of the same year. I am, therefore, inclined to the opinion that there was really no conversion of the property. But I

should not care to rest my opinion entirely upon this reasoning. Defendant may be entitled, under the evidence, to say that the exchange of the certificates was provided for by an express agreement and authorization of which there is some evidence.

If there was a conversion of the certificate and the shares which it represents, it still becomes necessary to inquire whether they had any value. There, possibly, was a time when there was a market for them, though I still consider this doubtful as regards the common stock. There is some evidence of a few sporadic sales after the date of the alleged conversion, which it is contended, occurred in October, 1917, though as to this, it is not clear that the stock so sold may not have been of the preferred shares. I am referring now to a sale in November, 1917, of which the witness, Jane H. Skillings, gives evidence. She really did not know whether this was common or preferred. If it was preferred stock the fact of the sale throws no light whatever on the question as to the value of the common stock. There is no evidence in the case that I have been able to discover of any human being having ever received a cent of dividend on the stock, either common or preferred, and there are many instances throughout the evidence of stockholders who have to report that they never received any dividend. If the common stock ever had a market value, that value must have reached the vanishing point when the United States became an associate in the great war, which was in April, 1917.

The following passage relating to this branch of the case is taken from the evidence of Horatio B. Ruggles, the organizer of the company:

"Q. 1914 you began to feel the stress of war conditions, from 1914 on? A. Yes, sir; from the time I started we began to feel it. It started in 1913, I think, and things began to get bad right away. Q. And it became acute and brought the company to a standstill about the time the Americans went into the war? A. Yes. Q. Which was April, 1917? A. Yes. Q. And practically after April, 1917, until the time you got out, towards the end of that year, there wasn't very much doing in the company? A. No, things were quiet. Q. Can you tell about the last time you made a sale of chairs? A. No, I couldn't say. I think it was in 1917. Q. Somewhere in the summer of 1917? A. I think so."

After the United States entered the war it became impossible to manufacture the chairs for the production and sale of which the company had been organized because the metal required in the manufacture could not be obtained.

Mr. Trefry, the Commissioner of Corporations and Taxation, was officially charged with the duty of ascertaining the true mar-

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ket value of the shares of business corporations doing business in Massachusetts. It was his official duty to inquire into the circumstances of this company among others and he did so. He pronounces the common stock to have had no value on April 1, 1918, and makes the same statement as to conditions on April 1, 1917. If so, it follows that the stock had no market value at the date when defendant transferred it, which was in October, 1917. In his re-direct examination by Mr. Crawford, acting,I assume, on behalf of the plaintiff in the examination of the witnesses under the commission,—the witness assents to the proposition of counsel that the reason no value was given to the common stock was that such value as there was in the assets of the company was not sufficient to reach the par value of the preferred shares. "There was nothing left for the common." This statement, he says, applies to both years, 1917 and 1918.

I have not referred to the subsequent misfortunes of the company because it seemed to be taken for granted at the argument that the conversion of the stock occurred when it was handed over to C. B. Lewis, in October, 1917, and that if it had a selling value in the market at that date the defendant would have a good claim for the value of the certificate at that date, being the date of the conversion. It seems now clear from the cases cited in the opinion of my brother Mellish, that the conversion was not complete at that date. The only person who can claim damages in trover is the person who has the right of immediate possession, and there was no such right in the plaintiff until he tendered the amount for which the stock was deposited, which was a much later date than the date, which seemed at the argument, to be agreed upon as the date of the conversion. If the stock was worth nothing in October, 1917, it certainly had not recovered its value at the date of the tender. The counterclaimant has suffered merely nominal damages and that I suppose is the judgment which should have been given by the trial Judge.

This being the case, a question has been raised with reference to the costs. The case is one of *injuria sine damno*, and the distinction is well established between such a case and that of *damnum absque injuriâ*. In the former case as Broom quotes from Holt, C. J., in the great case of *Ashby* v. *White* (1704), 2 Lord Raymond 938, (Broom L.M. 157), ed. 7, 1900: "A damage is not merely pecuniary but an injury imports a damage when a man is thereby hindered of his right." Nevertheless, if such a case as this had occurred before the reform of our practice under the Judicature Act, the defendant, as a plaintiff, as he would then have been, would not have been awarded costs. The damages are only nominal and would have been less than $8. He

could not, under R.S.N.S. 1873 (4th series), ch. 94, sec. 262, have recovered costs unless the Judge had certified that the action was brought to try a right besides the mere right to recover damages or that the grievance was wilful and malicious or that the action was not frivolous and vexatious, and that the claimant had actually sustained damage to the amount recovered and had, by notice in writing, demanded compensation therefor 8 days before action brought. The Judicature Act does not contain any corresponding section nor do the rules made thereunder, and I assume that the provision has been intentionally repealed. But I must also assume that the reason why it has been repealed. is that a more comprehensive principle has been established in its place by the provision in the Judicature Rules that subject to the provision of the Act and Rules the costs of and incident to all proceedings shall be in the discretion of the Court or Judge (subject to certain restrictions in Rule 1 of O. LXIII, which have no relevancy to the present case) and the further provision in R. II, that the costs of the several issues of law or fact shall, unless otherwise ordered, follow the event.

If the principle established by *Ashby* v. *White* (1704), 2 Lord Raymond 938, obliges us to say that "the case of *injuria absque damno* may be said to be unknown to our law" (Broom, L.M. *ubi supra*), I think it would be a sound exercise of the discretion of the Court to say that where no substantial loss has been occasioned and only nominal damages are recovered the principle underlying the old rule of practice should be applied.

There are English cases which seem to afford support to this view. In *American Tobacco Co.* v. *Guest*, [1892] 1 Ch. 630, 61 L.J. (Ch.), 242, 40 W.R. 364, where a retail trader innocently purchased a small quantity of goods which turned out to be an infringement of a trademark it was conceded that the *injuria* had been committed, but the defendant was not adjudged to pay the costs because he had innocently sold the goods and the quantity of goods so sold in infringement of the plaintiff's trademark was small. Similarly in *Cole* v. *Christie* (1910), 26 T.L.R. 469, where the action claimed damages for the negligent preparation of a catalogue, but the plaintiffs had suffered no damage, the jury found that the defendants had been negligent in the preparation of the catalogue, but that the plaintiffs had not suffered any damage in consequence of that negligence. Here, I take it, there was the *injuria* of a breach of the contract to prepare the catalogue but no damage arising from that breach. The case of *Marzetti* v. *Williams* was appositely cited (1830), 1 B. and Ad. 415, 109 E. R. 842, 9 L.J.K.B. 42 (O.S.), in which a banker having funds, did not honour the customer's cheque. There was

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no damage proved, but it was held that there must be nominal damages, Parke, J., in that case said that: "an extreme case may be put where a party, who had sustained no inconvenience, might bring an action, but the remedy in that case would be to deprive such party of costs." These words are quoted by Lawrance, J., and he arrives at the conclusion that the plaintiffs had failed to show that they were entitled to the costs of the action. He gave the defendant the general costs of the action and allowed the plaintiffs only the costs of the issue on which they had succeeded. He must have held that the plaintiffs had a cause of action or he would simply have dismissed the action. In awarding the general costs to the defendant he went farther than is here claimed. All that is contended for here is that the claimant who recovers nominal damages is not, thereby, necessarily entitled to costs. The trial Judge dismissed the counterclaim with costs. Had he been applied to to award nominal damages and costs he could have awarded the damages and refused the costs. This Court is now in the position of the trial Judge and should make the order that he should have made. It seems to me to be of little or no importance whether the appeal is dismissed or allowed without costs. Technically, the judgment below is wrong, and as an appeal is taken, it seems logical that we should allow it and award $1 to the counterclaimant as damages, but certainly he should not have any costs on his judgment nor should he, in my opinion, have costs on an appeal from a judgment which is substantially right and which, as it turns out, is asserted in order to establish his right to merely nominal damages.

I regard the question raised as an important one. I think it would be a serious reflection on our jurisprudence to rule that we have a more limited discretion in regard to costs than the Court possessed before the passing of the Judicature Act, and that a claimant who really has no substantial grievance whatever, can nevertheless, sustain an action for a purely technical and fictitious grievance and recover the costs of the proceeding.

CRAIG v. KENNEDY.

Quebec Superior Court in Bankruptcy, Panneton, J. June 29, 1922.

BANKRUPTCY (§ III—26)—PROPERTY INHERITED BY WILL DECLARED TO BE UNSEIZABLE—POWER TO DISPOSE—DISPOSITION WHEREBY IT BECOMES JOINT PARTNERSHIP PROPERTY — LIABILITY OF, ON BANKRUPTCY OF PARTNERS.

A party who inherits property which is declared to be unseizable, but with right to the party inheriting to dispose of such property, who enters into a partnership agreement whereby the partners mutually divest themselves of their property, the one in favour of the other, the property of each partner becoming the joint and common property of the partnership, cannot claim the unseizable character of the property in bankruptcy proceedings.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

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CRAIG v. KENNEDY.

Panneton, J.

BANKRUPTCY (§ I—12)—ASSIGNMENT BY ONE PARTNER—POWER TO BIND OTHER PARTNER—BANKRUPTCY ACT, CAN., 1919, CH. 36, SEC. 85.

Section 85 of the Bankruptcy Act, ch. 36, Can. Stats., 1919, provides that for all the purposes of the Act a firm may act by any of its members. This section makes no distinction and the Act applies to all partnerships.

PETITION by one of two partners to annul an assignment made by one of the partners, on two grounds, first that the assignment was signed by only one of the partners, and second that the property which he brought into the partnership was unseizable. Petition dismissed.

McGibbon, Mitchell and *Co.*, for petitioner.

Laflamme, Mitchell and *Callaghan*, for contestation.

PANNETON, J.:—As to the first grounds:—It is proved that petitioner went with Byers at the office where the assignment was made, that he was present when it was signed, that he agreed to it, and that subsequently he communicated with the trustee in his said quality on insolvency matters, and never objected until May 15, when he made a protest, though during the interval between March 31 and May 15, the estate was being liquidated to his knowledge.

Besides sec. 85 of the Bankruptcy Act, ch. 36 (Can.), 1919, provides that for all or any of the purposes of that Act a firm may act by any of its members. This article makes no distinction, and the act applies to all partnerships even to farmers on matter of abandonment of property.

Under the circumstances the abandonment of property of the firm made by Byers is valid in so far as the authority of Byers to make it is involved.

2. The unseizability of the property brought into the partnership by petitioner.

He derived his title to said property under two wills, one from his father and the other from his grandmother, in virtue of which each of them gave to petitioner all their property moveable, immoveable and mixed. Each will contains the disposition that the bequest is made for the support and maintenance of petitioner, that the property given is unseizable with right, however, to use, enjoy and dispose of said property.

In the articles of partnership dated January 27, 1920, it is declared that they have entered into partnership for the purpose of carrying on together the farms they respectively own and possess. The whole property of every kind so brought into the partnership by Byers, being valued at $17,100, and the property of petitioner at $20,000. It is further declared in said article of partnership that the said partners shall be and remain from this

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day, henceforth, joint owners and proprietors of the immoveable property and real estate above described as well as all the stock, farming tools and implements belonging to the said farm, which they, hereafter, shall own in common and undivided ownership until dissolution or liquidation of the said partnership, and it is declared . . . . . in consideration of the above stipulations the said parties hereby mutually divest themselves, the one in favor of the other of all their rights of property and other rights on the real estate and immoveable properties as well as all moveables by each of them respectively owned in order that they both become undivided owners thereof by virtue of these presents.

It was strongly argued that under the authorities and jurisprudence, the property being unseizable, it cannot be ceded. This argument, however correct it may be, is met by the clause in each will that the petitioner is given power to dispose of the property.

It is proved that the partnership is insolvent.

As the result of the article of partnership, the property of each partner, by becoming the joint and common property of the two partners lost its individuality as the particular property of one of them, neither one nor the other can give alone a clear title to the property he brought into the partnership when the property will be sold.

The unseizable character of one of the property cannot be identified as each property is merged into another, every inch of ground of the property formerly of petitioner alone, is now as much the property of Byers as his own. As the deed says, he has divested himself of his property. It was argued that when petitioner agreed to the assignment he did not know the legal effect of it. No such reason as error is alleged either in the pleading or in the protest, it cannot be urged now.

Considering that petitioner has failed to prove the essential allegations of his petition, the Court dismisses said petition with costs.

Petition dismissed.

HALL v. QUESNEL.

Yale County Court, B.C., Swanson, J. June 2, 1922.

INTERPLEADER (§ II—20)—JUDGMENT CREDITOR OF HUSBAND—SEIZURE OF GOODS—BILL OF SALE FROM HUSBAND TO WIFE—FRAUD—RIGHT OF WIFE TO SET UP OWNERSHIP OF GOODS—ESTOPPEL.

The fact that a wife has entered into an agreement for sale and a bill of sale of certain chattels from the husband as grantor to the wife as grantee for the fraudulent purpose of hindering, defeating and delaying the creditors of the husband, does not estop the wife

from giving evidence to shew that she was the real owner of the chattels before the giving of the bill of sale, and that the chattels were purchased by her with her own earnings.

[*Leippi* v. *Frey* (1921), 61 D.L.R. 11; *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278, 111 E.R. 108; *General Finance* v. *Liberator* (1878), 10 Ch.D. 15, 27 W.R. 210; *Richards* v. *Johnston* (1859), 4 H. & N. 660, 157 E.R. 1000, referred to. See Annotation, 32 D.L.R. 263.]

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TRIAL of an interpleader issue as to ownership of goods and chattels set forth in the list annexed to the issue. These goods were seized under an execution by the sheriff under a judgment recovered against the husband of the claimant herein who was the lessee of certain farm premises at Lumby, in this county, under a lease from the judgment creditor.

H. C. DeBeck, for plaintiff.

W. H. D. Ladner, for defendant.

SWANSON, Co. CT. J.:—Dispute arose between the parties to the lease during its currency and it was determined. Hall proffered a cheque to Quesnel for the amount he believed he should pay him for that particular season, which Quesnel refused to accept. Arbitration proceedings followed with the result that a much larger amount was awarded against Hall than he felt he should justly pay. No appeal was taken by Hall from the award of the arbitrators, and accordingly, as payment was refused by Hall, an application was made by Quesnel under the Arbitration Act to have the amount of the award made a judgment of the Supreme Court of B.C.

The notice of motion was served upon Hall, returnable at the coast on September 8, 1921. Subsequently on November 8, 1921, judgment was duly entered thereon against Hall; and upon a *fi fa* issued pursuant to said judgment, the seizure in question was made by the sheriff.

Now in the interval of time between the serving of the notice of motion and judgment, and just one day before the notice of motion was originally returnable, the claimant, Mrs. Hall and her husband, on September 7, 1921, enlisted the conveyancing services of a local firm of real estate dealers, Spencer and Farmer, and directed the preparation of the agreement of sale, or transfer, and of the bill of sale of the chattels in question, from the husband as grantor to the wife, claimant, as grantee. The wife says that these papers were insisted on by her, as her husband was interested in a mine at Ewing's Landing. I understand the name of the mine is the "White Elephant," a few miles south of Vernon on Okanagan Lake. She says that the reason for her insistence on the execution of these papers was the fear in her mind that her husband might be killed by a dynamite explosion in the mine, and that she wished all his property (whatever it

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was) conveyed and granted to her, so that in the event of anything happening to her husband, she and her children would be secured. It is significant, however, that the husband did not acquire any interest in this mine until September 27, 1921, and it is peculiarly significant that the husband and wife should have chosen such an extremely hazardous time to execute these papers as the day before the above named notice of motion was originally timed to be returnable.

The wife and husband stoutly repudiate any suggestion that these transfers and bill of sale were conceived as a ready means of defeating, hindering, delaying or defrauding their creditors, and particularly Quesnel, who was pressing his claim to judgment, a judgment, too, which these people seemed to have determined to resist payment of *a l' outrance*. Such transactions between husband and wife, under such circumstances, are always regarded by the Courts with grave suspicion. The mental attitude of our Courts to such transactions is outlined by the Judges of the Supreme Court of Canada in *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554, to which I beg leave to refer. No consideration was given for these transfers, and no serious attempt was made to vindicate the *bona fides* of the transaction. In fact, the learned counsel for the claimant was sincerely anxious to have the Court forget all about this transaction, which I have no hesitation in saying was conceived by the claimant and her husband with the express design to hinder, defeat and delay his creditor Quesnel, and one which could not in all honesty stand the light of day.

The amazing thing to me is that the claimant should have been guilty of such an act of folly (leaving aside for the moment its element of sheer dishonesty) when she was able to present such a strong claim on the merits as to her actual title to the goods in question.

True it is that the transfer and bill of sale covered not only the goods and chattels, the subject of the enquiry before me, but every whit of real and personal property owned or supposed to be owned by the husband, leaving him as empty of property as last year's bird's nest.

I am now confronted with a condition of things absolutely novel to me, where the counsel for the claimant seeks to get completely away from this transfer and bill of sale, and to base his claim on the assumption that the bill of sale never existed. His contention before me is that the evidence shews very clearly that his unfortunate client was always the owner of these chattels, that she purchased the same out of her hard earnings, and that her husband never had any title in fact at any time to

the same, and that the alleged bill of sale is a piece of supererogation; that the bill of sale is, therefore, a useless thing, as it purports to convey to the claimant what was always her property. If the claimant's title to the goods in question rested solely upon this bill of sale, I would have no hesitation in concluding that it is inoperative to pass the property in such goods under the circumstances of this case. I think Mr. Ladner's contention is right on the point that he raises, viz., that "fraud" can be proved, even without the necessity of launching a substantive action to set aside the bill of sale, as was done in the case of *Koop* v. *Smith supra*. Mr. Ladner's position in that matter has the authority of a ruling by the late Elwood, J., of Saskatchewan (a very old personal friend of mine) in *John Deere Plow Co.* v. *Knudston* (1915), 9 W.W.R. 574. This case I find is cited with approval in *Leippi* v. *Frey* (1921), 61 D.L.R. 11.

I must, however, confess that, notwithstanding the subsequent very questionable conduct of the claimant in connection with this bill of sale, I was impressed with her evidence as to the real ownership of all the chattels in question (except the air tight heater, value $8, which is admitted is the property of her husband). She has told a story which I am inclined to accept, that she bought these several articles chiefly out of the proceeds of her own hard toil. She laboured as a tailoress in the East (Windsor, Ont.,) and had saved $200 or $300, which she had in the P.O. Savings Dept. even before her marriage, or at least before coming to B.C., 14 years ago. She has taken in washing, and done sewing, making children's coats and house dresses. She has kept boarders. Part of the time, her husband has been ill. During the war, she kept housekeeping rooms, and had soldiers' wives living under her roof. She has certainly worked hard and I have no doubt, not simply at the work of caring for her own home and children. She has had help also from her own people. She testifies to having bought the several articles in question, producing receipts for several of same in her own name, and says she paid for same out of her own earnings. I am inclined to believe her testimony that these goods were so purchased by her, as she testifies.

I am now met with an important legal objection on part of Mr. Ladner. An objection which indeed he took "*in limine*," seeking to exclude all the testimony of the claimant as to her alleged separate ownership of these chattels. Mr. Ladner's objection is that the claimant is "estopped" from now averring that these chattels were hers antecedently to the date of the alleged bill of sale, September 7, 1921. He says that having

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signed that instrument (which, however, as Mr. DeBeck points out, was not under seal) and having sworn to the affidavit of *bona fides* thereon she is now "estopped" from denying that her husband was, prior to that date, the legal owner of all those chattels. Mr. Ladner says the claimant must stand or fall by the bill of sale, and as it is so manifestly fraudulent her claim *in toto* must now fall to the ground. If his argument is sound, I think her claim would completely fail, for the reasons I have clearly set forth above. I have considered with care the cases on estoppel submitted by Mr. Ladner:—

Bowman v. *Taylor* (1834), 2 Ad. & El. 278, 111 E.R. 108, 4 L.J. (K.B.) 58. Judgment of Lord Denman, C.J., Taunton, J., Patteson, J., and Williams, J. Also judgment of Jessel, M.R., in *General Finance* v. *Liberator etc. Soc.* (1878), 10 Ch. D. 15, 27 W.R. 210.

I have read the judgment of Jessel, M.R., with great care. In that case he held that no "estoppel" had been created. At p. 24 he says "and so it does *not* appear to me to be at all clear that that would amount to that precise averment of a fact which is necessary to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created."

See also *Richards* v. *Johnston* (1859), 4 H. & N. 660, 157 E.R. 1000, 28 L.J. (Ex.) 322.

I do not think that the doctrine of "estoppel" can be successfully invoked here to "estop" (or "stop the mouth" of), the claimant in giving her testimony as to the real ownership of these chattels.

I accordingly give judgment on the issue in favour of the plaintiff, Margaret A. Hall. In view of her reprehensible conduct in connection with the taking of the bill of sale in question, I deprive her of all costs.

Judgment for plaintiff, accordingly, without costs.

Judgment for plaintiff.

THE CENTAUR CO. v. AMERICAN DRUGGISTS SYNDICATE

Quebec Superior Court, Archibald, J. June 30, 1922.

TRADEMARK (§ II—9a)—"CASTORIA"—ARBITRARY WORD—LONG USAGE—REGISTRATION—EXPIRATION OF FOREIGN PATENT—PROTECTION OF.

The word "Castoria" in connection with the manufacture and sale of a senna laxative for infants and children is not the generic name of a medicinal preparation, but an arbitrary designation, and as such may be the subject of a valid trademark which, being registered in Canada, protects the right to the sole use of the word in Canada during the life of the trademark, although the patent rights to the preparation and sole right to the use of the word in the United States have expired, and the product has not been protected by a patent in Canada.

[See Annotation 56 D.L.R. 154.]

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A motion for a preliminary injunction ordering the defendant company to refrain from using the word "Castoria" in the sale of a certain pharmaceutical preparation having been granted by Mr. Justice Duclos. An appeal on the injunction was taken by leave to the Court of Appeal, 56 D.L.R. 137, which confirmed the judgment of Duclos, J. The present action is to determine the rights of the parties.

H. N. Chauvin, K.C., for plaintiff.

Russell S. Smart, and *L. H. Ballantyne*, for defendants.

ARCHIBALD, J.:—This is a very interesting and important case. The plaintiff more than 40 years ago adopted the word "Castoria" in connection with the name of the plaintiff's president at the time of the first registration and upon the re-organisation of the plaintiff's company, made a new registration under the name "Fletcher's Castoria," and the article has been sold ever since as plaintiff's trademark in Canada.

The defendant contended that the word "Castoria" is the name of the article and cannot be adopted as a trademark; that the article was patented in the United States by plaintiff's auteur; that that patent has expired and it is open to anyone to manufacture the article and use the name by which it was called; that plaintiff never had any exclusive right to manufacture that medicine in Canada as they never obtained a patent there for the medicine and that anybody could have manufactured the article in Canada and called it by the name "Castoria."

The parties have cited innumerable precedents, some of them leaning towards the defendant and some of them supporting the plaintiff, but these precedents when they differ from each other, are mostly found to differ in consequence of the different facts of each case.

There is one case on which the defendant strongly relies, decided by Fry, J., in England, namely what is called the *Linoleum* case (1878), 7 Ch. D. 834, 47 L.J. (Ch.) 430, 26 W.R. 463.

That case decided that when an article had been patented and given a name in the patent, although that name was invented by the patentee, for the purpose of describing the patented article, at the expiration of the patent, any person who began manufacturing the patented article, could call it by the name given to it by the patentee. The patent in question in this case was an English patent and gave the name of the article in the patent itself and in the articles of the company associated for its manufacture and in their advertisements, and the Judge held that the article itself was nothing else than solidified linseed oil, and that the name was the specific name for that substance which had not existed before.

That judgment has not been criticised in subsequent cases

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and it may be taken to be the law of England that when a substance which is not a combination or mixture of materials has been patented and given a name in England, that when the patent expires, such a substance may be manufactured by anyone in England under the same name.

There would appear, however, to have been doubts as to that in the English Trade Marks Act of 1919, ch. 79, part 2nd. p. 355, sec. 6, it is provided as follows:—

"Where in the case of an article or substance manufactured under any patent in force at or granted after the passing of this Act, a word trademark registered under the principal Act or part 1 of this Act, is the name or only practicable name of the article or substance so manufactured, all rights to the exclusive use of such trademark whether under the common law or by registration, ... shall cease upon the expiration or determination of the patent and, thereafter, such word shall not be deemed a distinctive mark and may be removed by the Court from the register on the application of any person aggrieved."

And the section proceeds:—

"No word which is the only practicable name or description of any single chemical element or single chemical compound as distinguished from a mixture, shall be registered as a trademark, provided that (a) the provisions of this subsection shall not apply where the mark is used to denote only the proprietor's brand, or make of such substance as distinguished from the substance as made by others. . . . . "

Of course this section of the Imperial Act has no force of law in Canada. But it indicates the opinion that there is a difference between combinations which results in chemical reaction so that the substance has become one substance and the case where the materials, though united, have not suffered chemical changes.

The authorities in England are numerous that a man may make a combination of substances and call it by a name and register a trademark including that name and preventing any other person from using either the name or any other part of the trademark, provided that it appears clearly that the name is not the substance as manufactured by the party registering the trademark.

I think there can be no doubt that that is the law today, both in England and in this country.

The taking out of a patent in Canada or in England does not need to be considered in this case because no patent has been taken up. The effect of a patent in a foreign country upon a trademark in this country or in England has been considered in several cases. There is no case either in this country or in England which has invalidated a trademark including the name of a

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substance in consequence of the issuing of a patent in a foreign country.

I think, therefore, that the existence of a patent on "Castoria" in the United States would not invalidate a trademark including the same name in Canada.

The word "Castoria" was first used by Samuel Pitcher in the United States to indicate a combination of substance to form a medicine for children of a laxative character. A patent was applied for and the specifications indicated, as was necessary, the different substances which entered into the patented medicine and the manner of compounding them. There was chemical reaction with regard to some of these substances and with regard to others there was only mechanical mixture, so that the material would be regarded as a mixture under the Imperial statute above cited. The article was not named "Castoria" in the patent, but Pitcher assumed the name "Castoria" in his trade and afterwards registered a trademark including the name "Castoria." Subsequently by various transfers, the plaintiffs became entitled to all the rights of the original owner and at a certain stage applied for registration as a trademark in Canada. The trademark included the word "Castoria," and also the name of the president of plaintiff's company. The plaintiff's business had been extensively advertised, especially its trademark, plaintiff spending up to $20,000 a year on such advertisements. The business had grown until the plaintiff's sales have reached a quarter of a million dollars a year. All of plaintiff's advertisements have made it clear that the word "Castoria" was the name of the medicine as manufactured by the plaintiff. "Fletcher's Castoria" is seen everywhere in the newspapers and posted in the streets with the expression "None genuine which does not bear the signature of 'Fletcher'," that is to say, nothing is "Castoria" which is not manufactured by plaintiff.

It is very true that anyone if they can find out the secret of the formula of the plaintiff for "Castoria" can manufacture the article but it would not be "Castoria" because that is the name of the article manufactured by the plaintiff. But it is said, if they can manufacture the article they must be able to give it a name. That is true, there are a large number of persons manufacturing a medicine based on senna, many of them just as near to the plaintiff's formula as that of the defendant. They call their medicine by the various names under which they advertise them. Plaintiff invented the name of "Castoria" to represent the medicine which he manufactured, and it is quite open to anybody else to manufacture in Canada the same medicine and call it by any name which they choose.

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It is manifest that the substance called "Castoria" as manufactured by the plaintiff has become a very popular medicine owing to its intrinsic merits and owing to the extent of the plaintiff's advertisements. If defendant should be allowed to use the word "Castoria" it would necessarily indicate to the public that it was the same medicine which the plaintiff was selling and the plaintiff would, consequently, suffer large damages.

The evidence has established that the formula contained in the patent of 1868 in the United States is not the formula upon which "Castoria" is manufactured in Canada. It is not the formula upon which the defendant is manufacturing its medicine which it has attempted to call "Castoria."

The defendant's manager, when examined, was asked by me upon what formula his medicine was manufactured. He declined, claiming that the formula was secret. Subsequently, on advice of his counsel, he produced the formula. The proof also establishes that in several more or less important particulars, the medicine manufactured by the plaintiff and called "Castoria" is specially different from that manufactured by the plaintiff. Its specific gravity is different, its viscosity is only half of that of the plaintiff's medicine. It differs also in acidity and in color and to a certain extent in taste. It is obvious that there must be something either in the substance used or in the preparation of substances used or in the mode of combination which is different in the one case from the other.

In any event, there is a substantial difference and even if the defendant had the right to call his substance "Castoria," he would have that right only when he manufactured the same substance.

I conclude, therefore, that plaintiff has established his right to the sole use of the word "Castoria" under his trademark and that even if the defendant had established his right to use the word "Castoria" he has not proved that the substance which he manufactures under that name is the same substance as the plaintiff manufactures and calls "Castoria."

The interim injunction granted to the plaintiff against the defendant using the name "Castoria" as the name of the medicine which he is selling for the same purpose which the plaintiff's medicine is intended (1920), 56 D.L.R. 137, was properly so granted and must be confirmed and declared perpetual and the defendant condemned to deliver over all labels, bottles of medicine printed matter bearing the said name "Castoria" which have been manufactured and are now in the possession of the

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defendant (and to render an account to the plaintiff of all medicine sold by the defendant bearing said name "Castoria,") with costs.

Judgment accordingly.

GUNNING v. LUSBY (No. 1).

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J. and Chisholm, J. January 23, 1922.

PRINCIPAL AND AGENT (§ IID—25)—SALE OF LANDS—OPTION—FORMATION OF SYNDICATE—DUTY OF PARTY HOLDING OPTION TO TURN OVER PROPERTY WITHOUT MAKING ANY PROFIT.

A party who obtains an option on property and in order to float it, forms a syndicate to which the property is turned over, is not the agent of the syndicate and is not bound to make full disclosure as to the price at which he purchased, and the members of the syndicate having ratified the price at which the property was turned over cannot complain, if there has been no fraudulent concealment which induced them to become members of the syndicate.

APPEAL from the judgment of Harris, C.J., in favour of plaintiffs in an action to recover moneys paid by plaintiffs in connection with a syndicate formed for the purchase of western lands. Reversed.

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

E. H. Nichols, K.C., and *F. L. Davidson*, for respondents.

RUSSELL, J., agrees with RITCHIE, E.J.

RITCHIE, E.J.:—For the preliminary facts I quote from the judgment appealed from:—

"This action is brought by the plaintiffs suing on behalf of themselves and all other members of the Great West Land Syndicate, No. 2, except the defendants against the three first named defendants who were trustees and the other two defendants for the recovery of the sum of $151,159.37 paid in by members of the syndicate under the circumstances hereinafter referred to.

It appears that two men named Pugsley and Trethewey had an option from one Greer residing near Moose Jaw to buy his farm at the price of $112,000. They agreed in consideration of $15,000 to be paid by the defendants, Silliker and Vail, to step aside and let Greer give them an option. When the new option was given the price was increased to $118,500 and Greer gave Pugsley and Trethewey the difference between the two options, $6,500; so that Pugsley and Trethewey got paid $21,500 for retiring, $15,000 from Silliker and Vail, and $6,500 from Greer, which was added to his price.

Having received this option for $118,500, Silliker and Vail decided to put the property on the market at $187,500, and they approached the three defendants, Lusby, Smith and Fage, all of whom were men of good repute residing at Amherst, with

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a request that they should act as trustees; Lusby was a prominent merchant; Smith a prominent barrister, and Fage was the mayor of the town of Amherst, and I suppose they were selected because of their eminent respectability and because they would inspire confidence in the pubiic, who were to be asked to put up the $187,500. Fage was not called, and there is no evidence that he got any rebate, but both Smith and Lusby on subscribing for stock in the new syndicate got a rebate or discount on their shares from Silliker and Vail, who credited the syndicate with the full value of the shares."

The agreement constituting the Great West Land Syndicate No. 2 is set out at length in the judgment under appeal. There had previously been another syndicate promoted by Silliker and Vail for speculating in western lands and in that transaction they occupied the same position as in Syndicate No. 2, that is to say, they controlled the lands sought to be acquired and made a profit on the sale. It is, I think, conceded that this was known to the members of the first syndicate, and therefore very generally known in Amherst and in the county of Cumberland. A number of the members of the first syndicate became members of the second syndicate and I think it is a fair assumption that they realised that Silliker and Vail were making a profit on turning over the land to Syndicate No. 2; for this there is the most ample support in the evidence. It is true as pointed out by Harris, C.J., that the agreement contains no mention of the fact that Silliker and Vail had an option on the property and that a man reading the agreement might get the idea that the owner in the west was the man to be dealt with.

This omission leaves room for an argument that Silliker and Vail were concealing their interest, but it is to my mind very far from being conclusive. In the first place, they were appealing to a constituency to a large extent familiar with their method of carrying on this kind of business. If the defendants, Silliker and Vail, were concealing the fact that they had an option, that concealment in order that it avail the plaintiffs must be a fraudulent concealment which induced them to become members of the second syndicate, and the burden rests upon the plaintiffs to make this reasonably clear. I must go to the evidence to see if the plaintiffs have sustained that burden. The defendants did not buy for the syndicate; they bought for themselves; the syndicate was not then formed; of course, this is important, because if they had been the agents of the syndicate when they acquired the option, that (apart from the branch of the case with which I deal later on) upon elementary principles of the law of agency would have been an end of their defence.

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Is fraudulent concealment established by the evidence sufficiently to sustain the burden of proof resting on the plaintiffs? I have reached the conclusion that this question must be answered in the negative. Gunning, one of the plaintiffs, was in Syndicate No. 1, and it is, I suppose, fair to assume that he was familiar with the fact that the defendants, Silliker and Vail, controlled the title to the property which was conveyed to that syndicate. In January, 1913, very soon after if not before he became a member of Syndicate No. 2, he received a letter from the defendants, Silliker and Vail, in which, speaking of the land in question, they say:—"This piece has been held under an option for a considerable length of time and hence we are able to sell it at the price we are offering."

Gunning, when he read this letter, knew absolutely that Silliker and Vail controlled the property and that the syndicate was buying from them. If, as he says now, he thought the syndicate was buying from a man in the west, it is inconceivable that he would not write back at once to Silliker and Vail and say: "I have been deceived; I thought I was buying from the original owner and did not know I was buying from you and paying you a profit." I think he must have known very well that Silliker and Vail were not turning over the property without a profit. This was the time for him to speak; he made no reference to it at all and by his conduct affirmed the transaction. H. W. Cameron, another of the plaintiffs, was also in the first syndicate and says he was told that practically the same syndicate was taking hold of this venture, and says he knew that practically the same men were in both ventures. Cameron does not say that he did not know he was buying from Silliker and Vail, and neither does Leydon, the third plaintiff. In a letter from the trustees to Cameron, the following appears: "As you are aware the property at Moose Jaw in which our syndicate is interested and which consists of 640 acres less 15 acres reserved for a homestead, was purchased through Silliker and Vail from Mr. S. A. Greer, of Moose Jaw, the price the syndicate agreed to pay $187,500, Messrs. Silliker and Vail under their agreement of purchase and sale then held by them but now held by your trustees. . . ." If Cameron was not so aware, and the fact that the syndicate purchased from Silliker and Vail was previously unknown to him, I would expect him to say:—"I was not aware of it at all and I signed believing we were purchasing from the man in the west." So far as these plaintiffs are concerned, it stands out in the case that no complaint is made about Silliker and Vail being the vendors until after the venture has gone on the rocks, and it cannot, I think, be successfully contended that

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they did not know it long before. I do not think that persons became members of the syndicate because the fact that Silliker and Vail controlled the property was fraudulently concealed from them; on the contrary, I think the inducing cause was that a previous venture of the same kind had been brought to a successful termination by Silliker and Vail. A number of prominent men signed and the rest followed.

But I am of opinion that the evidence goes further and shews affirmatively that there was no such fraudulent scheme on foot. If Silliker and Vail were conspiring to conceal the fact of their option, they certainly would not defeat the fraudulent purpose which they had in view by stating that fact and this they did. In the letter to Gunning dated January 13, they distinctly said they were able to sell at the price mentioned in consequence of holding an option. I am unable to understand the writing of this letter if there was any question of concealment. The syndicate agreement is dated January 2, and then was taken round for signature. It is probable that the letter was written before Gunning signed, but if not, it was very soon after. McKeen, one of the plaintiff's witnesses, knew that Silliker and Vail had the control of the land and were turning it over at a profit. Black, another of the plaintiff's witnesses, knew that Silliker and Vail were to resell it at a profit, and he got this information from them. There is a mass of testimony in the same direction; to refer to it all would unduly prolong this opinion. On the whole evidence, I am unable to agree with the finding of Harris, C.J., that the profit made by Silliker and Vail was a secret profit. With every respect for his finding, the evidence, as I understand it, forces me to differ from him.

There was a meeting of the members of the syndicate in 1917; at that meeting those present could not fail to know the fact that the purchase was from Silliker and Vail. I do not refer in detail to the evidence because there is no dispute about the fact. No suggestion was made that this was news to the members of the syndicate or that they were induced to come in by concealment of the fact. It is inherently improbable that the members of the syndicate who had been induced to go into a venture by concealment of a fact would not mention it when the deception practised on them became known, and particularly so if the venture was not going well.

There was another meeting of the members in 1918 but no suggestion that it was not known from the start that Silliker and Vail had the option.

But supposing the true state of the facts was first known to the members in 1918, can they disregard it, affirm the transac-

tion, retain what they have, and then when the option becomes of no value because some of their number do not pay up fall back on Silliker and Vail to get back the money they have lost. I think not. They could in such case rescind the contract, but as was pointed out by Lord Davey in *Burland* v. *Earle* [1902], A. C. 83, at p. 99: "To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing." The plaintiffs in this case want what is called the secret profit, or in other words, they want the purchase price to be $118,000, and in addition they seek to recover the purchase money paid in by certain members of the syndicate.

In *Burland* v. *Earle*, a director purchased property without mandate from the company and under such circumstances as did not make him a trustee for the company, and thereafter resold the same to the company at a profit; it was held that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made.

Re Cape Breton Co. (1885), 25 Ch. D. 795, cited by Mr. Milner, K.C., is I think directly in point on this branch of the case. The facts are stated by Fry, L.J., at p. 811, as follows:—

"The facts of the present case appear to me to amount shortly to these: that Mr. Fenn was the agent of the company to purchase a specific property in which, before the commencement of his agency, he had acquired an interest, that Mr. Fenn did purchase it for the company without disclosing to the company his interest in the property, and that after the purchase the facts were fully disclosed to the company, and, with the knowledge so acquired, the company elected to retain the property. Upon that state of facts arises the question whether Mr. Fenn was liable to the company for any sum, by reason of fraud or breach of trust or duty." This is a case in which the agent before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt. The option which the principal had, has in this case been exercised by confirming the contract with knowledge of the facts, and the question is whether after that affirmance, the agent is liable in any sum to his principal. There is no authority which determines this point, and it, therefore, is to be determined upon principle.

Now, notwithstanding the very powerful criticisms of Bowen, L.J., on the judgment of Pearson, J., I think that judgment right. I think that the case is one in which the adoption of the

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contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference in price at which it was bought, and some other price, is, however you may state it, and however you may turn the proposition about, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand."

I also quote from Cotton, L.J., at p. 805:

"The company have with the knowledge of the facts, determined to hold the property which they only acquired by agreeing to pay a certain price, and although they may have been entitled to set that agreement aside, yet I think that as they, with knowledge of all the facts, elected to retain the property, it would be wrong to require the trustee to hand over to them that money which was the only consideration upon which he agreed to give the property."

It was urged on behalf of the plaintiffs that the partnership relation existed between Silliker and Vail and the members of the syndicate. I cannot find on the evidence that this is so. In the judgment appealed from it is said that Silliker and Vail "were clearly the agents of the members of the syndicate and as such they were bound to make the fullest disclosure of the facts." If Silliker and Vail had been the agents of members of the syndicate when they acquired the option it would have been incumbent on them to make the fullest disclosure as to the price they were to pay, but that is not this case. After they had acquired the option they were appointed by the syndicate agreement, managers of the syndicate, but the question of the price to be paid for the land was settled by the same agreement; it was not an open question. It cannot be said that Silliker and Vail as managers under the agreement fixed the price because it is fixed by the agreement which appointed them managers. I think this class of transaction was a very ordinary one when the fever for speculation in western lands was at its height. An option is procured, the man or men who acquire it cannot carry the load and it has to be floated; this is done by turning it over to a company or group, but I doubt if anyone conversant with this kind of business expects the man who has at some trouble and expense acquired the option to turn it over without profit. It is to be noted that the evidence shews that this was not a wild

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cap speculation; it was at the time a good proposition, though of course speculative.

Coming to the question of the rebate of $500 to the trustees, no specific claim as to this appears in the statement of claim and an amendment would be necessary before it could be recovered. Apparently no amendment was asked for; it is an amendment which at this stage I would refuse, because $500 is by no means excessive remuneration for the work and responsibility incident to the office of trustee. But, apart from this, Smith refused to act unless he "got remuneration for his time and services." It would be unreasonable that he should act without remuneration and the $500 was offered and accepted for his services. So far as Smith is concerned, the remuneration was inadequate. Lusby is, I think, entitled to retain the $500 on the same principle.

I may add that if Silliker and Vail were the owners of the property and offering it for sale as intimated by Harris, C.J., then they were selling shares to the trustees, payment to be made by services. On this basis I do not see how other members of the syndicate have any concern with the transaction.

I would allow the appeal with costs and dismiss the action with costs.

CHISHOLM, J.:—I have arrived at the same conclusion. From my perusal of the case I am unable to find in it evidence to satisfy me that in obtaining from Greer the agreement to purchase, the defendants, Silliker and Vail, were acting as the agents of the parties who later became members of the syndicate, and were obliged to transfer the lands to the syndicate at the figure at which they purchased. The relation of principal and agent, with respect to the purchase, or of trustee or beneficiary or of partners, as contended by Mr. Davidson, is not, in my view of the evidence, established; and I think, therefore, that the action should be wholly dismissed.

Appeal allowed; action dismissed.

GUNNING v. LUSBY (No. 2).

Nova Scotia Supreme Court, Harris, C.J., Ritchie, E.J. and Chisholm, J. February 11, 1922.

APPEAL (§ IA—1)—AS OF RIGHT—TO PRIVY COUNCIL—AMOUNT IN DISPUTE.

A party in Nova Scotia is entitled to appeal as of right to the Privy Council where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, and this means when the whole amount in dispute is of that value, although the amount in each of a number of cases which have been consolidated is below the appealable amount.

[*Mussumat Ameena Khatoor* v. *Radhabenod Misser* (1859), 12 Moo. P.C. 470, 14 E.R. 990, applied.]

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APPLICATION for leave to appeal to the Privy Council from the judgment of the Full Court, ante p. 89. Leave granted.

F. L. Davidson, in support of application.

F. L. Milner, K.C., contra.

HARRIS, C. J.:—This action was brought by three plaintiffs suing on behalf of themselves and all other members of the Great West Land Syndicate, No. 2, so-called, except the defendants, against Charles A. Lusby, Charles R. Smith, J. N. Fage, Marshall B. Vail and Clarence J. Silliker, to recover the sum of $151,-159.37 with interest and other damages and for other relief.

The alleged cause of action arose out of an agreement or option for the purchase of land given to the defendants Silliker and Vail by one Grier at the sum of $118,500 and an agreement made by Silliker and Vail to re-sell the land at the price or sum of $187,500 to the Great West Land Syndicate, No. 2.

The agreement last referred to purported to be made between the defendants Smith, Lusby and Fage as trustees for the syndicate and the several persons who should become subscribers and by its terms Silliker and Vail were to be the managers of the syndicate subject to the orders of the trustees who were to act as trustees for the syndicate members and to hold the property of the syndicate in trust.

The statement of claim alleges that the plaintiffs suffered damage and loss by reason of the breach of duty and neglect of the defendants' trustees and managers, whereby, after collecting from the plaintiffs and other subscribers a large sum—proved on the trial to be $129,000—the property was entirely lost to the plaintiffs and the other subscribers.

The trial Judge gave judgment against Silliker and Vail for the money paid into the trustees by all shareholders who did not have notice of the agreement or option from Grier to Silliker and Vail, which it was alleged and proved had not been disclosed to many of the members of the syndicate, and there was a reference to determine the amount, which it is now contended, would not exceed largely £500 sterling, the amount mentioned in the Imperial Order in Council relating to appeals to His Majesty in Council.

The trial Judge also gave judgment against the defendants Smith and Lusby, each for the sum of $500 (and interest thereon amounting to $210.41) in respect to a rebate or discount allowed to each of them or their respective subscriptions for shares in the syndicate.

There was an appeal to the Full Court by the defendants and the decision of the trial Judge was reversed as against all of the defendants and the plaintiffs' action dismissed.

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The plaintiffs now apply for leave to appeal to His Majesty in Council claiming that such appeal lies as of right under the provisions of Rule II, relating to appeals.

It is objected on behalf of defendants Smith and Lusby, that no appeal lies as against them because it is said the matter in dispute as to each of them amounts only to $107.41.

I agree that as to each of the defendants, Smith and Lusby, the amount in dispute is limited to the $710.41 for which judgment was recovered on the trial. The plaintiffs did not appeal, but the defendants did, and the judgment of the trial Judge was set aside. On an appeal to the Privy Council the question, so far as Smith and Lusby are concerned, is, I think, whether the judgment of the trial Judge ought to be restored.

In *Cossette* v. *Dun* (1890), 18 Can. S.C.R. 222, the plaintiff claimed $1,000 damages for slander. He recovered $2,000. On appeal by the defendant the damages were reduced to $500. It was held there was a right of appeal and Ritchie, C. J., said at p. 233:—

"The question before us is not as to $1,500, but simply whether the plaintiff has a right to have the judgment obtained by him in the Superior Court for $2,000 restored. Therefore the question we have to determine is: Did the Court of Queen's Bench do right in interfering with the judgment of the Superior Court, which awarded the plaintiff $2,000 damages? . . . . and therefore the right of the plaintiff to hold his judgment in the Superior Court for $2,000 was the question before the Court of Queen's Bench, and is the matter now in controversy before us in this Court. Under these circumstances the case is clearly appealable."

But by holding that the amount in controversy as against Smith and Lusby is so limited it does not follow that the plaintiffs are not entitled as of right to bring the whole case, including their claims, against Smith and Lusby before the Privy Council on the appeal.

A party, as I understand the rule, is entitled to appeal as of right "Where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards," and that means when the whole amount in dispute is of that value. If we could imagine a case in which the plaintiffs were entitled to recover £100 sterling against each of five defendants the amount in dispute would clearly be £500 and there would be a right of appeal in the case, although each of the defendants might only be liable for £100.

The question is not how the defendants are affected, but how the interests of the party seeking to appeal are affected.

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We accordingly find that where a number of cases have been consolidated and the judgment in each is below the appealable amount, the aggregate amount of all the suits is to be taken as the amount for the purpose of determining the appealable value.

The whole matter involved in the unit is the factor which determines whether or not there is a right of appeal and the case is not to be split up into units and then each unit eliminated from the appeal unless it is of the appealable value.

The principle of the case of *Mussumat Ameena Khatoor* v. *Radhabenor Misser* (1859), 12 Moo. P.C. 470, 14 E.R. 990, I think applies.

It is significant, I think, that no case has been cited to me (nor have I been able to find any) in which the rule has been interpreted in the way it is sought to be interpreted here for the purpose of defeating the appeal.

It is certainly advisable that a case of this kind should go before the Privy Council without any limitation upon its right to deal with the whole matter.

In Safford and Wheeler's Privy Council Practice at p. 722, the rule is thus stated:—

"In estimating appealable value, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered."

And at p. 723:—

"The rule is that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal, *Allan* v. *Pratt* (Quebec, 1888) 13 App. Cas. 780."

While these citations are perhaps not applicable directly to the question involved, they shew the principles which are to guide us, and I have no doubt that an appeal lies as of right from the whole judgment.

The application should be allowed.

CHISHOLM, J.:—The plaintiffs have made application for leave to appeal to His Majesty in Council from the decision of this Court, allowing the appeal of all the defendants from the decision of the trial Judge and wholly dismissing the plaintiff's action.

The pertinent section of the rules with respect to appeals to the Judicial Committee of the Privy Council is as follows:—

"2. Subject to the provision of these rules, an appeal shall lie —(a) as of right from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting pro-

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perty or some civil right amounting to or of the value of £500 sterling or upwards; and (b) At the discretion of the court from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or, otherwise, ought to be submitted to His Majesty in Council for decision."

It cannot, I think, be successfully contended that the question involved in the claim against the defendants Lusby and Smith is one of general or public importance, and I am unable to see that the words "or otherwise" in subsection (b) assist in bringing the application within this subsection. Some meaning has to be given to the words "or otherwise," but by any meaning that I can give them I am unable to reach the opinion that the plaintiffs' claim against the defendants mentioned, standing by itself, "ought", in the words of the rule, "to be submittted to His Majesty in Council for decision."

I think, however, an appeal from the whole decision of this Court ought to be granted under subsection (a) for the reason stated by the Chief Justice.

In the case of *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (1860), 7 Moo. Ind. App. 548, 19 E.R. 415, special leave was given where five suits had been instituted between the same parties, each suit being in respect of the same Teluk and involving the same question of law. The amount involved in each suit was under the appealable value, although in the aggregate the amounts claimed exceeded that sum. Leave was given in this case. If, in two or more actions, where the aggregate amount involved is above the appealable amount, although the amount involved in each action is less, an appeal is allowed, the same rule should prevail where the amount involved in one part of the claims litigated largely exceeds the appealable amount, although the amount in another part of the claims is less, particularly where as in this case the questions of fact in dispute are so largely common, and the liability of the respective defendants, if any, arises from their conduct in the one large transaction. The plaintiffs have not appealed from the decision of the trial Judge as against the defendants Lusby and Smith, and the only question that can come before His Majesty in Council, as regards these defendants, is whether or not the judgment of the trial Judge should be restored. I think that leave to appeal should be granted. No great injustice can be done the defendants Lusby and Smith, in allowing the appeal, because, if this Court is in error, the objections taken here can be taken before His Majesty in Council.

RITCHIE, E.J.:—I agree, but not without some doubt.

Leave to appeal granted.

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IANNONE v. GRASSBY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. July 10, 1922.

LANDLORD AND TENANT (§ IIIC—80)—LIABILITY OF LANDLORD—ESCAPE OF STEAM—DANGEROUS PIPE—COVENANTS.

In the absence of his covenant to keep in repair, a landlord is not liable for damage to the tenant caused by the escape of steam from a steam pipe inadequately capped, the steam escaping from a valve opened by an unknown person, even where the landlord covenanted to keep the premises properly and sufficiently heated.

[See Annotation 52 D.L.R. 1.]

APPEAL by plaintiff from the judgment of Macdonald, J. Affirmed.

W. H. Trueman, K.C., for appellant.

R. D. Guy, for respondents.

PERDUE, C.J.M.:—This is an action by a tenant against his landlord to recover compensation for damages caused by the escape of steam from a pipe connected with the steam heating apparatus in the building of which the demised premises formed a part. The defendants had leased to the plaintiff and his partner, Duilio Smiboli, the ground floor and basement of store No. 337, Portage Avenue, Winnipeg, for 3 years from October 1, 1920. The lessees went into possession and carried on a restaurant and confectionery business. About November 1, 1920, the plaintiff bought out his partner and continued the business alone. A steam radiator for heating purposes had been placed in a corner of the premises near the front door when the heating plant was installed. This radiator had been removed prior to the making of the lease. There is no evidence showing when, or by whom, it had been removed. The end of the steam pipe, which projected a few inches above the floor, had not been capped, but the steam valve, which was left on the pipe, had been closed so as to cut off the escape of steam. The evidence shows that this was an unsafe condition in which to leave the pipe. A turn of the knob or even an accidental blow might open the valve and allow the steam to escape. The plaintiff was not aware of the danger, although he had noticed the pipe end and valve. He says he did not know what it was for. But, as will appear, he knew the valve would cut off the steam.

On November 7, 1920, the plaintiff closed and left the premises between 11 and 12 o'clock at night, everything being in good condition. On the following morning, about 8 o'clock, he opened the front door and found the premises filled with steam which was escaping from the open pipe. He found the valve open, closed it and shut off the steam. Much damage had been done to the stock-in-trade and to the furniture and decorations. The

plaintiff claims $2,100 as compensation for injuries to paintings, mural decorations, cost of repairs, loss of trade, injury to stock, furniture, etc.

The lease is made in pursuance of The Short Forms Act, R.S.M., 1913, ch. 181, and in addition to statutory provisions contains special covenants, provisos and conditions protecting and guarding the lessors against liability for various defects or accidents, even when caused by the negligence of the lessors or their employees, servants or agents. The lessors convenanted to keep the demised premises properly and sufficiently heated and warmed as it should be necessary during the term, but they were not to be responsible for any damage for breach of this covenant. It is also provided that the lessors are not to be held liable for any damage caused "by the leakage of water from the heating plant or plumbing system."

The lessee covenanted "to repair." This convenant when expanded under The Short Forms Act (See schedule 3, col. 1, sub.-sec. 3), reads that he "will, during the said term, well and sufficiently, maintain, amend and keep the said demised premises, with the appurtenances, in good and substantial repair and all fixtures and things thereto belonging . . . . when, where and so often as need shall be."

It appears to me that the question of the defendants' liability for the damage sustained by the plaintiff turns upon whether the steam pipe was or was not a part of the demised premises. The negligent or defective condition of the pipe existed when the plaintiff entered into the lease. Before doing so he had an opportunity of inspecting the premises and of seeing the pipe end with the valve attached and of ascertaining what it was. The pipe had been put there for the purpose of heating the demised premises and had been attached to a radiator in order to supply steam for that purpose. The radiator had been removed but, if necessary, could be replaced and attached to the pipe to be again used for heating the place. The pipe was therefore a part of the premises demised to the plaintiff.

It is true that the pipe should have been capped for greater safety, but even if one went so far as to pronounce the condition of the pipe to be dangerous, still the lessors are not liable.

(*Lane* v. *Cox*, [1897] 1 Q.B. 415, at p. 417, 66 L.J. (Q.B.) 193, per Lopes, L.J., concurred in by Lord Esher, M.R. and Rigby, L.J.). "A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair."

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For the same proposition of law I would also refer to *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221, 143 E.R. 768, 33 L.J. (C.P.) 1, 12 W.R. 248, *Cavalier* v. *Pope*, [1906] A.C. 428, 75 L.J. (K.B.) 609; and to the decision of this Court in *McIntosh* v. *Wilson* (1913), 14 D.L.R. 671, 23 Man. L.R. 653.

The plaintiff should have capped the pipe in order to render it completely safe. I am satisfied, however, that the valve would have prevented the steam from escaping if it had not been tampered with by someone. When the plaintiff found the steam escaping at the time the damage was caused he had only to close the valve and the steam was immediately shut off. He evidently knew the purpose of the valve and how to use it.

I have much sympathy for the plaintiff who has suffered a very serious loss through the negligence of the person who removed the radiator without putting a cap on the pipe, whoever that person was, but I see no ground upon which we can interfere with the decision of Macdonald, J. The appeal must, therefore, be dismissed with costs.

CAMERON, J.A.:—This is an action brought by a tenant against his landlord to recover damages caused by the escape of steam from a pipe in the leased premises in the circumstances set out in the judgment of Macdonald, J., who tried the case, and held that it did not differ in principle from that of *McIntosh* v. *Wilson* 14 D.L.R. 671, 23 Man. L.R. 653, and dismissed the action accordingly. In this view I entirely concur.

The principles applicable are clearly enunciated in Williams' Canadian Law of Landlord and Tenant, pp. 561 *et seq.* where he states the following articles:—

"Article 89. In the absence of express agreement a landlord is not, as between himself and his tenant, under any liability either to put the demised premises into repair at the commencement of the term or to repair during the continuance of the tenancy.

Article 90. Fraud apart, a landlord who lets any premises—other than a furnished house—in a dangerous and unsafe condition incurs no liability to his tenant, to members of his tenant's family, or to customers or guests of the tenant for any accident which may happen to them during the term, unless (perhaps) he has contracted to keep the premises in repair.

Article 91. Subject to the exceptions coming within the scope of the following article (i.e. the furnished house) there is no implied covenant or warranty that demised premises are fit for the purpose for which they are intended to be used."

These propositions are firmly established by the numerous decisions which the author cites and analyzes, and several of which

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were referred to on the argument before us. These decisions cover substantially the entire range of law on the subject, and place the authority of the principles thus stated beyond question.

That the pipe or feed-arm was part of the demised premises seems to me to be beyond question. It was in and on the premises available at any time to have a radiator attached to it. I am unable to see how the fact that it was in an imperfect state can affect the legal relations of the parties with reference to it.

In my opinion the judgment appealed from must be affirmed and the appeal dismissed with costs.

FULLERTON, J.A. (dissenting):—By indenture of lease bearing date September 27, 1920, the defendants leased to the plaintiff the ground floor and basement of store No. 337, Portage Avenue, being a portion of the building known as the Builders Exchange Building. The plaintiff took possession on October 1, 1920. On the night of November 7, 1920, the plaintiff closed his store and on opening it on the morning of November 8, found the place full of steam which was escaping through an open valve on a feed-arm which came up through the floor of the store to the height of about 4½ inches. The witnesses surmise that at one time this feed-arm had been connected with a radiator which had been removed, but there is really nothing to show that such was the fact. The witnesses all agree that if a radiator had been temporarily removed the valve should have been taken off and the opening in the arm capped, and that if it had been permanently removed the pipe should have been disconnected in the basement and plugged.

The steam which escaped caused damage to the property of the plaintiff for which the plaintiff seeks to recover in this action.

The claim is put in this way. By the lease the defendants covenanted to keep the demised premises properly and sufficiently heated. The obligation to heat involved the duty of providing and maintaining suitable equipment for supplying such heat. The defendants failed in that duty and damage resulted to the plaintiff.

Mr. Guy argued for the defendants that liability depends on contract and that as the portion of the heating plant within the premises were demised to the plaintiff the defendants had no control of it and was, therefore, under no obligation in respect of it.

The law is, undoubtedly, clear that in the absence of any agreement between the parties the landlord is under no obligation to his tenant to keep the demised premises in repair. Apart from the consideration that the feed-arm in question was not

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being utilized as a part of the equipment for heating the plaintiff's store, my view is that it was not a part of the premises demised to the plaintiff.

The feed-arm formed a part of the general heating system provided for the building which was exclusively operated by the defendants. The defendants convenanted that in case of the heating apparatus or pipes connected with the premises demised should be injured by accident, freezing or from any cause, to replace the same with reasonable despatch and reserved the right to enter upon the demised premises at any time and to place in and through the premises pipes or equipment for heat and to repair the same. Under these circumstances, I would hold that the feed-arm in question was not a part of the demised premises but was entirely under the control of the defendants.

To my mind, the defendants are in no different position from that of an independent contractor who had agreed to furnish heat and is liable for failure to supply suitable equipment. The evidence shows that no inspection of the pipes in the plaintiff's store was ever made and the witness Moorehouse, who describes himself as the inspector of buildings for the defendants, says that if he had taken the radiator off he would certainly have removed the valve and capped the pipe.

The defendants rely on sec. 32 of the lease as relieving them from reliability, but I read that clause as applying only to leakage of water from the heating plant.

I would allow the appeal with costs and enter judgment for the plaintiff for the sum of $1,502.55 and costs.

DENNISTOUN, J.A.:—To enable the tenant to recover damages against his landlord in this case it is necessary to distinguish it from *McIntosh* v. *Wilson*, 14 D.L.R. 671, 23 Man. L.R. 653, and I am unable to do so.

In that case a radiator which was insecurely fastened to the ceiling fell to the floor doing damage. This Court held that the tenant could not recover, although the landlord knew the danger existed, there being no fraud or misrepresentation on his part. The terms of the written lease signed by the parties constituted their contract, and governed their rights. In the case at bar, there was a short end of steam pipe, with valve attached, which projected into the demised premises. The valve was in good condition. A radiator which was part of the steam heating system had been removed leaving the pipe and valve in position, and it was obvious to the tenant, or any other person who looked at them, what they were. So long as the valve was unmolested no danger existed, but if any person opened the valve, it was apparent steam would be emitted. Some person

unknown did open the valve, and the plaintiff's property was damaged by escaping steam.

It is urged that there was negligence on the part of the landlord in not removing the valve and closing the pipe by means of a threaded cap which could not be opened without some effort. I am unable to accede to this argument. The tenant rented the premises with a pipe and valve as he saw them. There was nothing concealed, no trap, no misrepresentation. If the tenant did not like the risk of some person opening valve, he should have declined to rent the shop until that risk had been eliminated.

In *McIntosh* v. *Wilson, supra*, it would have been a strange conclusion if the Court had held that the plaintiff could not have damages because the radiator fell down, but could have them because steam came out after the pipe was broken. That is, in effect, what the appellant asks us to do in this case.

In my view, the lease governs and no action lies except for breach of the contract therein contained, and none is here proved.

I agree with the law as stated by Cameron, J. A., and would dismiss this appeal.

PRENDERGAST, J.A. (dissenting):—It is a rule of common law that there is no liability in a lessor for damages resulting from the unsafe condition of the demised premises. This means that no such liability is fastened on a lessor solely by virtue of the contract he has entered into as such; not that, while a lessor, he cannot be liable for such damages on other grounds.

Nor does the common law cast on the lessee any duty to repair.

In the present case, there was no duty on the defendants, as lessors, to make safe this valve considered merely as part of the demised premises; but leaving aside, for the present, the fact that there is in the lease a covenant to repair on the part of the plaintiffs, I consider there was a duty on the defendants as providers of heat, to make safe this valve considered as part of the means which they used to perform the service they had undertaken.

While in *McIntosh* v. *Wilson*, 14 D.L.R. 671, 23 Man. L.R. 653, the unsafe condition of the radiator consisted in its not being securely fastened, which had no relation to the manner in which the steam was made to circulate, the unsafe condition of the device in the present case was intimately related to the service, consisting as it did in it being liable to allow an escape of the steam which the defendants generated and put in motion from the basement. In the first case, it was proper to consider the radiator in its relation to the defendants as lessors, while in

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the present case, the valve should be considered in its relation to the defendants as providers of heating.

We have it, however, in the present lease, that the lessees have covenanted to repair. Were they bound, under that covenant, to do anything to that valve? If they were, a further difficulty arises. For we would then have on the one hand, the defendants' duty to make safe the device which they used to perform their undertaking to supply heat, and on the other, the plaintiffs' duty to repair the demised premises.

But, notwithstanding the covenant to repair, there was nothing that the lessees were called upon to do to the valve. It is a general principle that such a covenant does not obligate the lessee to put the demised premises in a better condition than he found them in. The dangerous character of the device here, was not due to a condition of breakage or wear and tear occurring during the tenancy, but to the fact that it is designed to be so connected in the system that it will lead the steam into containers as otherwise it will cause it to escape freely in the atmosphere. It was, at the time of the accident, in the same condition in all respects, that the lessees found it in when they took possession.

It is also, in my opinion, reasonable to take the view—which would by itself dispose of the case—that this valve and three-inch piece of piping (or "dead arm" as it was technically called) which, instead of being useful. was a hindrance to the tenants, served no purpose whatsoever and should not have been there at all, was not part of the demised premises.

I would assess the damages at $1,502.55 instead of $2,102.55 as claimed.

The appeal should be allowed, the judgment in the Court below set aside and judgment entered for the plaintiff for $1,502.55 with costs in both Courts.

Appeal dismissed.

ATT'Y-GEN'L FOR BRITISH COLUMBIA v. THE KING

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

COMPANIES (§ VIC—330)—BONA VACANTIA—RIGHTS OF PROVINCE AND DOMINION—B.N.A. ACT SS. 102, 109—CONSTITUTIONAL LAW.

The rights of *bona vacantia* in regard to the assets of a defunct English corporation which previously had carried on business in British Columbia is vested in the Province under sub-secs. 102, and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province.

[*Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767; *Att'y-Gen'l of B.C.* v. *Att'y-Gen'l of Canada* (1888), 14 App. Cas. 295, discussed.]

[See Annotation 63 D.L.R. 1].

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Davies, C.J.

APPEAL by the Province of British Columbia from the judgment of the Exchequer Court of Canada (1918), 40 D.L.R. 670, on an information for the recovery of the assets of a defunct corporation admitted to be *bona vacantia*. Reversed.

J. A. Ritchie, K.C., for appellant; *E. L. Newcombe*, K.C., and *Plaxton*, for respondent.

DAVIES, C.J. (dissenting):—The question to be determined in this case is whether the sum of $7,215, representing the proceeds of certain assets and effects in the province of British Columbia agreed by both parties to be *bona vacantia*, belongs to the Province of British Columbia or to the Dominion of Canada. The answer to this question depends upon the construction to be placed upon secs. 109 and 126 of the B.N.A. Act, 1867.

Cassels, J., of the Exchequer Court, held (1918), 40 D.L.R. 670, at 677, 17 Can. Ex. 109) that "the meaning of sec. 109 was to pass to the provinces royalties arising from lands, mines, minerals and royalties limited to escheats or something arising out of lands as referred to in sec. 1 of the Statute 15—16 Vict.," and he did "not think it was ever in contemplation that, under that term 'royalties' all royalties of every kind, including *bona vacantia*, were left to the provinces under the provisions of this statute."

After carefully reading the several judgments of the Judicial Committee which deal with the construction of the two sections, and having given the question before us my best consideration, I have reached the same conclusion.

Mr. Newcombe on behalf of the Crown submitted that the Legislature of British Columbia having had power before and at the union of that Province with Canada to appropriate the casual revenue arising within the colony from *bona vacantia*, with the assent of the Crown, it follows whether the power was exercised or not, that the casual revenues from this source fall within sec. 102 of the B.N.A. Act and, therefore, belong to the Consolidated Revenue Fund of Canada, unless they be part of the revenue covered by the words of exception in that section.

In *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767, 52 L.J. (P.C.) 84, 49 L.T. 312, the Earl of Selborne delivering the judgment of the Judicial Committee said (8 App. Cas. at p. 775):

"The words of exception in sec. 102 refer to revenues of two kinds: (1) such portions of the pre-existing 'duties and revenues' as were by the Act 'reserved to the respective Legislatures of the Provinces' and (2) such duties and revenues as might be raised by them, in accordance with the special powers conferred on them by the Act.' It is with the former only of these two

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kinds of revenues that their Lordships are now concerned; the latter being the produce of that power of 'direct taxation within the provinces, in order to the raising of a revenue for provincial purposes' which is conferred upon Provincial Legislatures by sec. 92 of the Act.

There is only one clause in the Act by which any source of revenue appears to be distinctly reserved to the Provinces, *viz.*, the 109th section:—'All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union . . . shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, etc'."

The Judicial Committee in that case held that 'royalties' in this section included the revenue arising from escheated lands. In *Att'y-Gen'l of British Columbia* v. *Att'y-Gen'l of Canada*; (*Precious Metals* Case) (1888), 14 App. Cas. 295, 58 L.J. (P.C.) 88, 60 L.T. 712, that Committee held that it reserved to the Provinces the revenues arising from gold and silver mines. In neither of these cases did the Judicial Committee feel called upon to decide whether the word "royalties" in sec. 109 extends to other royal rights besides those connected with or arising out of "lands, mines and minerals." (See 8 App. Cas. at 779; 14 App. Cas. at 304-5). The question now presented is whether "royalties" in this section includes the casual revenue arising from *bona vacantia* in British Columbia.

The Judicial Committee seems to have concluded the question adversely to the Province in the interpretation which it has put upon said sec. 109 in the cases which have come before it. In the *Mercer* case, *supra*, the Judicial Committee uses language as to the object and effect of the word "royalties" which limits the word to *Royal territorial rights*. This meaning is confirmed by Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, at p. 58, 58 L.J. (P.C.) 54, 60 L.T. 197, where referring to sec. 109, he said:—

"Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion, all the *ordinary territorial* revenues of the Crown arising within the Provinces. That construction of the Statute was accepted by this Board in deciding *Att'y-Gen'l of Ontario* v. *Mercer*."

If this be a correct and comprehensive interpretation of the object and effect of sec. 109, and I am disposed to think it is, then it cannot apply to royal rights which are not territorial, such as rights in respect of personal property, e.g. *bona vacantia*. The alternative contention would seem to be that "royalties" must be understood in an unlimited sense—that is to say as compre-

hending not merely all *royal territorial revenues*—i.e., the revenues arising from lands, mines, minerals—but also all other royal revenues.

In the result, I have reached the conclusion that the term "royalties" in sec. 109 following the words "lands, mines, minerals," should be construed as limited to royalties incident to or arising out of the preceding words. In other words, the term "royalties" extends to such as arise out of territorial rights only, and does not extend to *bona vacantia* such as are in question in this action.

The Judicial Committee in the cases I have referred to in accordance with its usual practice, was careful to confine its actual decision to the questions specially before it for decision in each case. But the observations used alike by Lord Selborne and by Lord Watson, which I have quoted, are such as to satisfy my mind at any rate that the true construction of the action is such as I have stated.

IDINGTON, J.:—A company incorporated in England in 1871 to carry on business in British Columbia having, in the exercise of such powers as given it in that regard, acquired property in that Province, of which the sum of $7,215.04 proceeds thereof remained in the hands of respondent Rithet some time after the time of the dissolution of the said company and later death of its liquidator without any special provision in law, for the disposition of said balance.

Mr. Rithet applied to English representatives of the Crown, and in turn was referred by such to those in British Columbia or Canada.

Hence proceedings were taken in the Exchequer Court here by the Dominion authorities as against Rithet and the Attorney General of British Columbia.

The case was tried before Sir Walter Cassels, J., of that Court who rendered judgment on January 22, 1918, awarding the said money, less costs of Mr. Rithet, to the respondent on behalf of the Dominion (40 D.L.R. 670, 17 Can. Ex. 109.)

The Attorney-General for British Columbia appeals here from that decision, claiming that such *bona vacantia* belong to the Crown on behalf of that Province.

We are not enlightened by way of evidence or admissions from what source this balance of money now in question was derived, or exactly when it was realised.

The same kind of commendable industry as was devoted to produce the interesting results put before us in the case and appendix possibly would have disclosed that the original source of the money was an exploitation of the natural resources of

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the Province, now in law beyond dispute belonging to it, such as the precious metals, for example, and realised upon since the dissolution of the company.

The exact date of the conversion thereof into money might in relation to the actual facts of the date of the extinction of the company and legal authority of anyone to represent it have shed some light upon the basic facts, or what should have been looked upon as the basic facts, to which the relevant law should be applied. It may have been that the conversion into money took place after the property had become *bona vacantia* and, under such circumstances, as to entitle appellant beyond doubt to recover same.

The converse speculation as to whether or not the conversion was of property to which the Imperial authorities on behalf of the Crown could have claimed, under the circumstances, upon the actual facts, if disclosed, might have put the respondent on behalf of the Dominion out of Court.

We are deprived of the instruction or perhaps amusement which a close investigation might have led to, and must, leaving appellant in future to see that his Province is adequately protected by administrative or legislative measures, proceed on the assumption that the *bona vacantia* in question must be of some class that is neither land, mines or minerals, but may be of the class which can be properly described as within the class named "Royalties" in sec. 109 of the B.N.A. Act of 1867, which reads as follows:—

"109.—All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

I am clearly of the opinion that the word "royalties" as used in that section never was intended to be given only the narrow and limited interpretation and construction that is contended for by counsel for the respondent on behalf of the Dominion.

I cannot conceive of the men who in fact framed the scheme of government to carry out which this Act was enacted, listening for a moment to such a contention, unless to laugh at it.

In the *Mercer* case, 8 App. Cas. 767 at 778, Lord Selborne delivering the judgment of the Judicial Committee of the Privy Council, spoke as follows:—

"It appears, however, to their Lordships to be a fallacy to

assume that, because the word 'royalties' in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronae*. The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the Provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, *primâ facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense 'royalties' is merely the English translation or equivalent of *'regalitates', 'jura regalia', 'jura regia'*. (See, in *voce* 'royalties' Cowell's 'Interpreter'; Wharton's Law Lexicon; Tomlins' and Jacobs' Law Dictionaries. *'Regalia'* and *'regalitates'* according to Ducange, are *'jura regia'*; and Spelman (Glos. Arch.) says, *'Regalia dicuntur jura omnia ad fiscum spectantia.'*) The subject was discussed with much fullness of learning, in *Dyke* v. *Walford* (1846), 5 Moo. P.C. 434, 13 E.R. 557, where a Crown grant of *jura regalia*, belonging to the county palatine of Lancaster, was held to pass the right to *bona vacantia*. 'That is is a jus', (said Mr. Ellis, in his able argument, *ibid*, p. 480), 'is indisputable; it might also be regale; for the Crown holds it generally through England by Royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats to the land between high and low water mark, to felon's goods, to treasure trove, and other analogous rights.' With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case."

Part of that was quoted by Lord Watson approvingly in the *Precious Metals* case, 14 App. Cas. 295 at p. 304.

Needless to say these cases did not decide the question raised herein, but these *dicta* from high authorities point the way in which we should go to interpret and construe such an Act as that now in question; I respectfully submit that was not the path followed by respondent or this litigation never would have arisen.

The said *dicta* indicate the trend of thought I have sought to

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apply in my perusal of this case which consists chiefly of argument.

Reading, in that spirit the word "royalties" which the conjunction 'and' in said sec. 109 indicates to be given a separate and distinctly additional item of subject matter or class of revenue, to be assigned each of the respective Provinces, I conclude that the appellant Province is entitled by such reading alone to the *bona vacantia* in question.

There is no doubt of its being entitled under the terms of its Union with the Dominion to that much.

And the articles to which we have to refer to find the terms of the Union with the Dominion, indicate to me, that if British Columbia had, before the Union, any greater rights in regard to such a subject as that now in question, she did not lose them by reason of the Union.

The respective rights in this regard of the several Provinces which originally constituted the Dominion may not have been identically the same, but the law enacted in 1852 (Imp.) ch. 39, put all such colonies as British Columbia on the same footing in that regard, unless wherein otherwise provided for.

British Columbia's history, I need not follow. She, at least by the time of her union with Canada had acquired the right to assert the right given, to claim and collect such sources of revenue as now in question.

I repeat I cannot find that she lost, by the Union, any such right.

I cannot agree with Mr. Newcombe's argument that some legislative enactment was necessary before the Union, The power to enact or assert was continued, and is all she needs to rest upon herein.

But it is the secs. 126 and 146 of the B.N.A. Act which must be read and applied, as those by and through which the negotiations which took place, under the latter, before reading sec. 102 which only gives the Dominion that which is left after such adjustment.

The legal history of that Union is to be found in the pages LXXXIV to CVII of the Orders in Council preceeding the statutes for 1872 (Dom.)

Properly read and considered along with other material above referred to, I submit, with great respect, that it seems to me there is no foundation for the judgment appealed from.

The argument of Mr. Ritchie before the Exchequer Court (40 D.L.R. 670, 17 Can. Ex. 109) relative to the powers assigned the Province over property and civil rights, deserves more attention than it got before us. For let anyone who has considered

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the questions from that point of view and all that succession duties mean, and, in the last analysis, the fundamental question of the right in or to property, and see how easy it is for the local Legislature to take care not only of the property of the intestate, who has only remote next of kin, but also by same power to avoid the need of any consideration of failure of heirs-at-law or next of kin by supplying a substitute thereof, and then it would appear that the contention set up herein is hardly worth while.

I think this appeal should be allowed with costs, if any, to be allowed respondent, Rithet to be paid by his co-respondent, or out of the fund.

If there is an understanding, as probably there is, that the other parties are not to recover from each other costs, neither ought to recover costs.

Possibly there should be no costs directed except as to Mr. Rithet.

DUFF, J.:—Both the Dominion and the Province concur in presenting the view which the very able argument on behalf of the Dominion sufficiently establishes that the hereditary casual revenues of the Crown including *bona vacantia* arising within the limits of the Province were included in the "duties and revenues" over which the Province had power of appropriation before the Union; and consequently the question to be determined is whether the word "royalties" in sec. 109 embraces *bona vacantia*. The scope of that expression was the subject of consideration by the Judicial Committee in *Attorney General of Ontario* v. *Mercer*, 8 App. Cas 767. But the question upon which we have now to pass was left undecided. In effect, their Lordships' view expressed in that case, in so far forth as presently relevant, is perhaps most clearly disclosed in the following passage from the judgment delivered by Lord Selborne taken from 8 App. Cas. at p. 778:—[See judgment of Idington, J., pp. 110-111.]

On behalf of the Dominion it is contended that the scope of the word "royalties" ought to be limited by reference to the subjects with which it is "found associated" in sec. 109; that is to say that it includes only those royalties which are connected with "lands, mines and minerals."

The object of the provisions of the B.N.A. Act beginning with sec. 102 dealing with the distribution of property between the Provinces and the Dominion was, as their Lordships pointed out in the *Mercer* case, *supra*, the attribution of Royal Rights for the purposes of revenue and government as part of a broad political scheme. I can perceive no reason why the word "royalties"

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occurring in this enumeration of the assets assigned to the Province should not be given its full natural sense—"its primary and appropriate sense" without restriction. If the intention had been to express the limited meaning the Dominion seeks to ascribe to the term it would have been easy to employ language more plainly limited in its scope. In effect, the adoption of the Dominion construction involves, I think, the addition of some qualifying words to the language of the statute.

Mr. Newcombe also argued that the qualifying words, "the property of the Province", attached to the enumeration in sec. 109 have the effect of confining the operation of that section to subjects in respect of which at Confederation the Province not only possessed the power of appropriation but had also exercised that power. Admittedly *bona vacantia* had not up to that time been subject to any special legislation or of any special appropriation to the public purposes of the Colony; but I think the suggested consequence does not follow. As Lord Watson points out in delivering the judgment of the Judicial Committee in *The Liquidators of The Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437 at pp. 443 and 444, the title to the property disposed of by this provision was and after Confederation remained in the Queen as Sovereign Head of the Province; it was the property of the Province in the sense only that the Legislature and Government of the Province had been invested with the power of appropriation over it. That, I think, is the sense in which the word "property" is used in sec. 109.

The appeal ought, I think, to be allowed.

ANGLIN, J.:—It is common ground that the monies paid into Court by the defendant Rithet are *bona vacantia*. The parties are also agreed that the Province of British Columbia prior to entering Confederation had the right to appropriate casual revenues of the Crown arising within that colony, other than droits of the Crown and droits of Admiralty 1852 (Imp.) ch. 39, and that revenues arising from *bona vacantia* did not fall within either exception. All claim to the property in question has been expressly renounced by the Imperial authorities. That it belongs either to the Provincial Government of British Columbia or to the Dominion Government may, therefore, be taken for granted.

The question at issue is whether *bona vacantia* are "royalties" reserved to the Province by sec. 109 of the B.N.A. Act, and, as such, excepted from sec. 102 and within sec. 126 of that statute. The solution of that question depends upon the scope of the word "royalties" in sec. 109—is it used, as Mr. Ritchie, representing the Attorney General of British Columbia, contended, in its

primary and natural sense, or is it used, as Mr. Newcombe argued on behalf of the Dominion Government, in a sense limited by its association with the words "lands, mines, minerals?" The latter view found favour with the learned President of the Exchequer Court.

Sec. 109 reads as follows (See judgment of Idington, J., *ante* at p. 110):—

The applicability of this section to the Province of British Columbia is of course conceded.

While in sec. 102 of the B.N.A. Act we find the clause "over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have the Power of Appropriation", and in sec. 109 the phrase, "belonging to the several Provinces . . . . . at the Union." I cannot seriously doubt that royalties of the class which the Provincial Legislatures had the right to appropriate were royalties "belonging" to the Provinces in the sense in which "belonging" is used in sec. 109.

"Lands, mines (and) minerals" actually "belonged" to the several Provinces at the Union. Strictly speaking, royalties (such e.g. as escheats—the *Mercer* case, *supra*,) belong to a Province only when they come into existence upon the occurrence of the circumstances out of which they arise—in the case of an escheat, the death of the owner of land intestate and without heirs. The abstract right to them is what "belonged" to the several Provinces at the Union. Hence the use, in the latter part of sec. 109, of the two verbs "are situate" and "arise"—the former applicable to "lands, mines (and) minerals," the latter to "royalties."

That *bona vacantia* fall within the term "royalties" *regalitates, jura regalia* or *jura regia*, when used without restriction, is authoritatively settled in *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767, at pp. 778-9, where the holding to that effect in *Dyke* v. *Walford, supra*, is accepted and a passage from the argument of Mr. Ellis in support of that view (at p. 480) is expressly approved.

Although their Lordships of the Judicial Committee have twice to consider the scope and meaning of the term "royalties" as it occurs in sec. 109, in accordance with their well-established practice when dealing with provisions of the B.N.A. Act, they, on each occasion, abstained from further definition of it than was necessary for the determination of the case actually before them. Thus, in the *Mercer* case, 8 App. Cas. 767, they held that it extended, at all events, to all revenues arising from prerogative rights of the Crown in connection with "lands" as well as

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"mines" and "minerals." In the *Precious Metals* case, 14 App. Cas. 295, they held that a conveyance by the Province of certain "public lands" did not imply a transfer of revenues arising from the prerogative rights of the Crown in regard to precious metals, found therein, which belong beneficially to the Province, not as mines or minerals and not as an incident of the land, yet under sec. 109 and, therefore, as "royalties." While their Lordships were careful in these two cases not to say that the term "royalties" is used in sec. 109 in its unrestricted sense, it may, I think, be gathered from the general tenor of the judgments that they incline to the belief that its signification is not limited by its association with the words "lands, mines, minerals." Thus in the *Mercer* case (8 App. Cas. at 778):—"They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated,—lands as well as mines and minerals," and their Lordships add:—"It is a sound maxim of law that every word ought *primâ facie* to be construed in its primary and natural sense unless a secondary or more limited sense is required by the subject or the context."

In the *Precious Metals* case, while their Lordships said (at pp. 304-5) "It is not necessary for the purposes of this appeal to consider whether the expression "royalties" as used in sec. 109 includes *jura regalia* other than those connected with lands, mines and minerals," they pointed out that "mines" and "minerals" in the sense of sec. 109 cover only the baser metals, which are incidents of land, and that the prerogative right in regard to precious metals is a *jus regale*, and as such not an accessory of land. But their Lordships add that the right to "lands" granted by the Province to the Dominion Government by the 11th article of Union did not, to any extent, derogate from the Provincial right to royalties connected with mines and minerals under sec. 109 of the B.N.A. Act, thus indicating that in their view the *jus regale* in regard to the precious metals is, in some sense, a right connected with "mines" and "minerals," notwithstanding that the latter term as used in sec. 109 comprises only the baser metals.

I find great difficulty in appreciating the force of the argument in favour of restricting the meaning of the word royalties to such *jura regalia* as are associated with "lands, mines (or) minerals." This is not the ordinary case of generic words following particular and specific words. "Royalties" is neither more nor less a generic word than "lands, mines (or) minerals." The fact is that the term "royalties" denotes a class of subjects differing entirely from "lands, mines (and) minerals." No common genus embraces them.

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Without belittling the rule of construction invoked on behalf of the respondent—*noscitur a sociis*—care must always be taken that its application does not defeat the true intention of the legislature (*Hawke* v. *Dunn*, [1897] 1 Q.B. 579, 66 L.J. (Q.B.) 364, 45 W.R. 359,) and the cardinal rule that as is said in (*Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q.B.D. 1, at p. 5), "An act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject matter, unless there is some other very strong ground derived from the context or reason why it should not be construed," should not be disregarded.

I share, to some extent, the view expressed by Rigby, L.J., in *Smelting Co. of Australia* v. *Commissioners of Inland Revenue*, [1897] 1 Q.B. 175, at 182 (66 L.J. (Q.B.) 137, 45 W.R. 203.)

"The rule of construction which is called the *ejusdem generis* doctrine or sometimes the doctrine '*noscitur a sociis*' is one which, I think, ought to be applied with great caution; because it implies a departure from the natural meaning of words, in order to give them a meaning which may or may not have been the intention of the Legislature."

Were we to accede to the argument of Mr. Newcombe, we would, I fear, put on the ordinary meaning of "royalties" a restriction that Parliament did not intend. Indeed, Parliament has already limited that word by the qualification, "belonging to the several Provinces . . . at the Union." Why should the Court superadd another? It may be that from other provisions of the B.N.A. Act other limitations upon the signification of "royalties" should be deduced. For instance, the rights asserted by the Dominion to legislate concerning *bona confiscata*, deodands and royal fish, may be well founded; but, saving such possible exceptions with profound respect, neither in "the subject nor in the context" do I find adequate reason for giving to the word "royalties" in sec. 109 other than its primary and natural meaning. I think it includes the *jus regale* to *bona vacantia*. It would, indeed, present a curious incongruity if escheats should be included in, but *bona vacantia* excluded from, the royalties granted to the Provinces.

I would, therefore, allow this appeal and direct that judgment be entered for the Attorney-General of British Columbia.

MIGNAULT, J.:—The controversy here is whether the Province of British Columbia or the Dominion of Canada is entitled to certain monies, to wit $7,131.44 brought into Court by the defendant, Robert Paterson Rithet, who, as agent for the liquidator of the Colonial Trust Co., a company incorporated in England and which was dissolved in 1904, collected these monies in British

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Columbia as being due to the company. The liquidator died in 1911, and the Crown as represented by the Government of the United Kingdom, makes no claim to this sum. Both parties before us concede that the monies in Mr. Rithet's hands are *bona vacantia* and it is on this basis that the Court below dealt with them, and decided that they should be paid to the Government of the Dominion. The Attorney-General of British Columbia now appeals, and I will assume, as the parties both contend, that the monies collected by the defendant are really *bona vacantia*. The shareholders, if any remain, of the dissolved company have made no claim to these monies, and should they ever do so, nothing in the judgment to be rendered should stand in the way of justice being done to them.

The question to be decided turns on the construction of secs. 102 and 109 of the B.N.A. Act, 1867, which are as follows:—

"102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided."

For sec. 109, see judgment of Idington, J., *ante* p. 110.

British Columbia came into the Canadian Confederation in 1871 and these sections apply to it as if it were named therein. *Att'y-Gen'l of B. C.* v. *Att'y-Gen'l of Canada* (the *Precious Metals* case) 14 App. Cas. 295, and at p. 304.

The point which arises in this case is not covered by any authority by which we are bound. In the *Mercer* case, *Att'y-Gen'l of Ontario* v. *Mercer*, 8 App. Cas. 767, the question of the meaning of the word "royalties" in sec. 109 was considered by the Judicial Committee, but as their Lordships stated in the *Precious Metals* case (14 App. Cas. 295, at p. 305) their decision did not go further than to hold that the word "royalties," "comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with 'lands,' 'mines' and 'minerals'."

On behalf of the Dominion it is contended that this is all that the word "royalties" really comprehends; that to understand it in a general sense as synonymous of *jura regalia*, would be to give to the Provinces some species of property coming within the meaning of *jura regalia*, such as wrecks, confiscated property or deodands, which belong to the Dominion; and that since the

word "royalties" as used in sec. 109 cannot be taken without some restrictions, a fair construction would be to limit these royalties to those connected with the enumerated species of property, lands, mines and minerals, applying the *ejusdem generis* rule.

The contention of British Columbia is that "royalties" in sec. 109 should receive its natural meaning as the English equivalent of *jura regalia*, and that as *bona vacantia* are among the *jura regalia* to which the King was entitled by virtue of his prerogative, the property in question belongs to the Province and not to the Dominion. It is also suggested that at least the term "royalties" comprises any species of property as to which the Province has powers of legislation, which would explain the exclusion of wrecks, deodands and property confiscated by virtue of the criminal law.

It was argued in the *Mercer* case that the term "royalties" had a special meaning restricting it to a royal right connected with mines and minerals, but their Lordships considered it a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They also said that they saw no reason why it should not have its primary and appropriate meaning, as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals, adding that the general subject of the whole section is of a high political nature, that it is the attribution of royal territorial rights, for purposes of revenue and government, to the Provinces in which they are situate or arise.

If the object of sec. 109 is to attribute royal territorial rights for purposes of revenue and government to the provinces in which they are situate or arise, can it be applied to mere personal property such as this sum of money which the defendant collected in British Columbia as being due to the dissolved company? There does not appear to be any occasion here—since the monies collected are *bona vacantia* and, therefore, without an owner—to apply any rule such as *mobilia sequuntur personam*. The property is in British Columbia and has no other situation, real or notional. Moreover, the whole question is whether *bona vacantia* of such a kind, under sec. 109 of the B.N.A. Act, come within the meaning of the word "royalties" as used in that section. If they do, they are within the exception made by sec. 109 of sec. 102 and belong to British Columbia; if not, under the general rule of sec. 102, they should go to the Dominion.

After full consideration, my opinion is that the word "royal-

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ties" in sec. 109, should be construed in its primary and natural sense as being the equivalent in English of *jura regalia*. Thus construed, it comprises *bona vacantia* (see *Dyke* v. *Walford*, 5 Moo. P.C. 434, 13 E.R. 557, approved by the Judicial Committee in the *Mercer* case). In my judgment it is not restricted or controlled by the words "lands, mines and minerals" which precede. It is a fourth head added to lands, mines and minerals, and should comprehend all property which is properly described as "royalties", or at least such property as the property here in question. It may be that under Imperial Statutes some species of *jura regalia* such as wrecks, do not go to the Province, a point on which it is unnecessary to express an opinion here. It may also be that as an incident of the legislative authority of the Dominion Parliament over criminal law, property confiscated by virtue of the decision of a Court of criminal jurisdiction, should be attributed to the Dominion, a point also which does not call for a decision in this case. All that I intend to hold is that *bona vacantia* of the kind here in question belong to the Province under sec. 109.

I have not failed to notice the ingenious argument of Mr. Newcombe, founded on the difference of expression between secs. 102 and 109, that while at the Union the Province of British Columbia had the power of appropriaition over "royalties" in the general sense, which would bring them under the general rule of sec. 102, it is not shown that this species of property "belonged" to British Columbia at the union, sec. 109, referring to "royalties" *belonging* to the province at the Union. But in my opinion the question here is of a right belonging to the Province, and where the province has the right of appropriation over property, it seems to me clear that the right to that property belongs to the Province. I, therefore, think that his argument, while ingenious, is not conclusive against the right of British Columbia to claim the property in question.

I would, in consequence, allow the appeal but without costs and decide that the monies in Mr. Rithet's hands should be paid to the Province of British Columbia. I agree with the first Court that Mr. Rithet is entitled to his costs.

BRODEUR, J.:—I concur with my brother Duff.

Appeal allowed.

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LEE MONG KOW v. REGISTRAR-GENERAL OF TITLES*

British Columbia Supreme Court, McDonald, J. June 20, 1922.

LAND TITLES (§ VIII—80)—LIABILITY OF REGISTRAR—CERTIFICATE OF TITLE—MISTAKE—CONFLICTING MAPS—DAMAGE—ASSURANCE FUND.

The act of the Registrar in issuing a certificate of indefeasible title to land with respect to a map of doubtful validity because failing to correspond with another previously filed, of which he had knowledge, although done in good faith as to protect him from individual liability, renders him guilty of a "mistake" within the meaning of sec. 99 of the Land Registry Act (B.C. 1906, ch. 23) and liable with respect to the compensation from the Assurance Fund for the "sustained loss or damage." The statutory words excepting "any error or shortage in area . . . . according to map" held inapplicable and construed to apply only to a map showing a distance on its face greater than the real distance on the ground.

ACTION for damages for negligence of Registrar of Titles. Judgment for plaintiff.

W. J. Taylor, K.C., and *W. A. Brethour*, for plaintiff.

J. B. Pattullo, K.C., for defendant.

MCDONALD, J.:—The plaintiffs claim damages against the defendant by reason of his "negligence, mistakes, omissions or commissions", and by reason of misrepresentations made by him in that he received and filed a map or plan known as No. 858 in the Land Registry Office in the city of Victoria, and later issued a certificate of indefeasible title to the plaintiff Lee Mong Kow, for Lots 6 to 13, in Block 20, according to the said map or plan No. 858. The facts are as follows:—

On February 5, 1890, Map No. 263 was filed, representing the survey of sec. 4, and on October 4, 1907, Map No. 858, representing the survey of sec. 48 immediately adjoining sec. 4 on the east, was also filed, pursuant to an order of the Supreme Court of British Columbia, made under the City of Victoria Official Map Act, 1893 (B.C.) ch. 66. Some considerable time later, in or about the month of February, 1909, the city surveyor of the city of Victoria brought to the notice of the Registrar-General of Titles, who had received and filed the latter of the above plans, the fact that the boundary line between secs. 4 and 48 was not properly fixed, and that Map No. 858 encroached upon the lands shewn on Map No. 263. Some interviews took place between the city surveyor and the Registrar-General and considerable correspondence passed between them, the result of which was that the Registrar-General, upon investigation, decided that both plans were properly filed. In my opinion the Registrar-General acted *bona fide* in dealing with the matters then before him, but in the result it appears that he acted in error.

At the time of the filing of Map. No. 858, the title to the lands

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represented thereby was in one, C. H. Lugrin, who afterwards died in June, 1917. On December 5, 1906, Lugrin conveyed the lands in question to one Gray; on December 21, 1906, Gray conveyed to Gunn and Smith; on June 18, 1907, Gunn and Smith conveyed to Gray, Hamilton, Donald and Johnston, Limited; on June 10, 1909, Gray, Hamilton, Donald and Johnston Ltd., conveyed to Martin and Martin, and on January 29, 1910, Martin and Martin conveyed to the plaintiff Lee Mong Kow, who procured, on June 20, 1910, a certificate of indefeasible title to the lots in question in this action, according to said Map 858. Lugrin remained the registered owner until the said June 20, 1910, Lee Mong Kow's application for registration being accompanied by the various documents shewing the links in the chain of title from Lugrin to Lee Mong Kow. This certificate of indefeasible title was issued by the Registrar-General of Titles nearly a year and a-half after it had been brought to his notice that there was some question as to whether or not Map No. 858 "over-lapped" Map No. 263.

The plaintiff Chetham made certain advances to Lee Mong Kow on the security of the lands in question, and is for that reason joined as a plaintiff in this action.

On April 6, 1915, in an action in the Supreme Court of British Columbia, wherein the plaintiff Lee Mong Kow was plaintiff and the British Columbia Electric R. Co., Ltd., was defendant, it was held that Map No. 858 was wrongfully deposited in the Land Registry Office insofar as the same conflicted with Map No. 263, and that Map No. 858 was void and invalid insofar as it so conflicted, and that the plaintiff's certificate of title should not include any part of sec. 4; the result being that the plaintiff lost a large proportion of his lots as shewn on Map No. 858, and was obliged to return to several persons who had purchased from him various of the lots in question the monies which they had paid on account of the purchase price.

In March 1911, Gray, Hamilton, Donald and Johnston, Ltd., being a company incorporated under the laws of Saskatchewan and licensed to carry on business in British Columbia, was struck off the register upon evidence being produced to the Registrar of Joint Stock Companies, that it had been wound up in the Province of Saskatchewan.

As stated above, Plan No. 858, was filed pursuant to an order of the Supreme Court of British Columbia, made under the provisions of secs. 23 to 35 inclusive, of the City of Victoria Official Map Act as amended and consolidated in 1893 (B.C.) ch. 66, which provided in effect, that no plan or sub-division of land within the corporate limits should be deposited with the Regis-

trar-General, except under the authority of an order of a Judge of the Supreme Court of British Columbia, obtained in the manner in the statute stated. By sec. 68 of the Land Registry Act, 1906 (B.C.) ch. 23, being the statute applicable in this action, it was provided that the Registrar "may, in his discretion, refuse to accept any map or plan the measurements of which do not correspond with any map or plan, or maps or plans, covering the same land in whole or in part already deposited in his office." The two Acts must be read together, and it seems to me that notwithstanding the provisions of said sec. 68, the Registrar was obliged to accept Plan No. 858, in pursuance of said order. Nevertheless, I am of opinion that when the Registrar some months after the filing of Plan 858, with full knowledge, that it was, at least, doubtful as to whether or not such plan failed to correspond with Plan No. 263 already filed, issued the certificate of indefeasible title to the plaintiff Lee Mong Kow, he was guilty of a "mistake" within the meaning of sec. 99 of the Act, as a result of which mistake the plaintiffs "sustained loss or damage"—and this, even though his act was *bona fide* done, (as I think it was) so as to protect him from any individual liability as provided for by sec. 85 of the Act.

If I am right in the above conclusion, then the plaintiffs are entitled to maintain this action for damages against the Registrar-General as nominal defendant, and to recover such damages out of the assurance fund, unless the plaintiffs are deprived of such remedy by some other provision of the Act. In the first place, it is suggested that the notice of action served upon the Attorney-General and upon the Registrar-General one month prior to the commencement of the action was not a sufficient notice to satisfy the requirements of the proviso to sec. 99. I think such notice was sufficient upon the principles laid down in *Jones* v. *Bird* (1822), 5 B. & Ald. 837, 106 E.R. 1397.

Next it is contended that the action cannot succeed by reason of the provisions of the last clause of sec. 105 of the Act, inasmuch as this is a case of an "error or shortage in area" of a lot, block or sub-division, "according to any map or plan filed or deposited in the office of the Registrar."

With considerable doubt, I have reached the conclusion that this clause was not intended to apply to a case such as this, but that the words "any error or shortage in area . . . . according to any map" refer rather to a case, for instance, where a map shews on its face a distance of (say) 500 ft., whereas the real distance on the ground is (say) 450 ft.

It is further contended that the plaintiffs are barred by the terms of sub.-sec. (i) of sec. 81 of the Act. I cannot agree. In

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my opinion this sub-section was intended to save the rights of a person in a position similar to that of the B.C. Electric R. Co., in the action above mentioned, and it was by virtue of this sub-section that the railway company was enabled to succeed in that action notwithstanding that Lee Mong Kow held his certificate of indefeasible title. The sub-section was not, I think, intended in any way to protect the assurance fund.

I have considered secs. 96, 97 and 98 of the Act and have concluded that they do not apply to the facts of this case.

Following the above conclusions, there will be judgment for the plaintiffs with a reference to the Registrar to ascertain the amount of the damages. Upon final judgment being entered, the necessary certificate to the Minister of Finance will be given pursuant to sec. 99 of the Act.

Judgment for plaintiff.

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Supreme Court of Canada, Davies, C.J., Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

APPEAL (§ VII L—498)—DAMAGES—ASSESSMENT OF BY TRIAL JUDGE—INTERFERENCE WITH BY APPELLATE COURT.

The advantage of the trial Judge in seeing the witnesses is of great importance in drawing conclusions as to the quantum of damage in negligence actions, and his finding should not be set aside by an Appellate Court unless from the evidence his conclusion is clearly erroneous.

[*McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299; *Wood* v. *Haines* (1917), 33 D.L.R. 166; *Morrow Cereal Co.* v. *Ogilvie* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, followed.]

APPEAL by plaintiff from the judgment of the Court of Appeal for British Columbia, reducing the damages assessed by the trial Judge in an action for damages. Reversed and trial judgment restored.

E. P. Davis, K.C., for appellant.

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

DAVIES, C.J. (dissenting):—I would dismiss this appeal which relates entirely to a question of damages, and arises from a fire which burned over the lands of the appellant. I think that the Judges of the Appeal Court with their local knowledge are better qualified than I am to assess damages. I certainly am not inclined to interfere with their judgment and I would, therefore, dismiss this appeal with costs.

IDINGTON, J.:—This appeal arises out of an action for damages caused to the appellant's property by a fire set out by respondent's agents and allowed to spread over appellant's property.

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At the trial liability was denied but the trial Judge found respondent liable and assessed the damages at $3,000.

On appeal to the Court of Appeal the liability was not disputed and the Court having only to consider the assessment of damages, allowed the appeal, and assessed the damages at $687. From that, this appeal is taken.

There is no question of law involved except a proper appreciation of the evidence.

I have perused and considered the entire evidence and am inclined to think that on a proper appreciation thereof both assessments of damages are in error; that of the trial Judge too generous, and that of the Court of Appeal less than I should have given.

The majority of this Court being in favour of allowing the appeal, and no questions of law involved, I see no useful purpose to be served by pursuing the matter further than to assume that the majority must be right, for there is some evidence to sustain their finding.

DUFF, J.:—The appeal should, I think, be allowed and the judgment of the trial Judge restored.

With great respect, I think the Judges of the Court of Appeal have failed to allow full effect to the findings of the trial Judge. There was ample evidence to support those findings assuming the existence of one condition that the Judge regarded the witnesses who gave it as credible witnesses. It is quite clear that he considered them credible witnesses, accepting evidence which the Court of Appeal appears to have ignored and that he rejected as not worthy of credit, statements upon which the Court of Appeal seems to have proceeded.

The findings of the trial Judge could only be set aside if it were established upon the whole case that the Judge had taken an erroneous view of the facts. This, I am satisfied is not shewn, and I think it is eminently a case for giving effect to the principle upon which the Lords of the Judicial Committee acted in *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299. There is indeed less to be said in support of overturning the findings of the primary tribunal in this case than might have been said in that case, for here the question of credit is the decisive point. If the appellant's witnesses are to be believed, the case is not by any means deficient in materials for arriving with reasonable certainty at a pecuniary estimate of the loss suffered.

The appeal should be allowed with costs here and below and the judgment of the trial Judge restored.

ANGLIN, J.:—The plaintiff sues to recover damages for injury done to timber on his property by fire negligently allowed to

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spread from the right of way of the defendant. At the trial, negligence of the defendant was established and the plaintiff's damages were assessed by the trial Judge at $3,000. The defendant submitted to the judgment holding it liable but appealed against the assessment of the damages and they were reduced by a majority judgment in the Court of Appeal to $687, McPhillips, J.A. dissenting. The Chief Justice alone assigned reasons for the reduction. Martin, J.A., the other member of the Court, would have reduced the damages to $650. The plaintiff appeals against the reduction of the damages and asks that the judgment of the trial Judge be restored.

This is a case in which, to quote the language of Lord Moulton in delivering the judgment of the Judicial Committee in *McHugh* v. *Union Bank*, 10 D.L.R. 562, at p. 568:—

"The assessment of the damages suffered by the plaintiff . . . . is often far from easy. The tribunal which has the duty of making such assessment, whether it be Judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous, they should not be interfered with on appeal, inasmuch as Courts of appeal have not the advantage of seeing the witnesses—a matter which is of grave inpomtance in drawing conclusions as to the quantum of damage from the evidence that they give."

While not satisfied that, if sitting in the place of the trial Judge, I should have made precisely the same assessment as he did, neither can I say that the amount given by him is clearly wrong and that some other amount would be certainly correct. No departure from the principles which govern the assessment of damages appears in his judgment and there is evidence in the record—to which he refers as that of "reputable witness"—that would support the plaintiff's claim for even a larger recovery. The case seems to me to be one in which, if sitting in the Court of Appeal, I should not have interferred with the judgment of the trial Judge.

Moreover, from the perusal of the judgment of the Chief Justice, I fear that, in at least two important particulars, some of the evidence must have escaped attention. The damages to the timber not totally destroyed are fixed by him at 25% of its value, $2 per m., for 800,000 ft. of timber found standing by the witness Chambers after the fire. To this sum of $400 the Judge adds $200 for the destruction of a cabin, $50 for destruction of some chattels and $37 for timber totally destroyed. The evidence of the plaintiff MacDonald, that 600,000 ft. of timber had

been totally destroyed by the fire, of Edwards, that before the fire there was 1,500,000 feet of timber on the property, and of three witnesses, the plaintiff, Hugh Stewart and Edwards, that what they had considered a "loggable"—a merchantable proposition, before the fire as a result of it became wholly unmerchantable, as it was found by Chambers, would appear to have been either discredited or overlooked. In respect of all the timber destroyed by the fire, the Chief Justice allowed $37—the figure at which the defendant's expert witnesses Hibberson and James W. MacDonald had placed the plaintiff's total loss.

Again the Chief Justice says: "All the witnesses agree that the 4 acres (estimated by Hugh Stewart to contain 250,000 to 300,000 ft. of cedar, for which he offered the plaintiff $5 per m.) contained the bulk of the merchantable timber."

Now Arthur Edwards had sworn that the best timber was not on these 4 acres near the track but "at the lower end" where "there would be as much again" as there was along the track and that the best fir was there." The evidence is that the timber on the property was about 50% fir and 50% cedar.

The Chief Justice expressed a decided preference for the testimony of Hibberson and James W. MacDonald. The trial Judge must have thought the evidence of Hugh Stewart, Arthur Edwards and Francis Chambers entitled to at least equal weight. Indeed, he would seem to have placed more reliance upon it. It is of them that he speake as "reputable witnesses."

On the other hand the plaintiff had in all 98 acres. If he was allowed at the trial $250 for loss of a cabin and some chattels he recovered $2750 for damages to his timber. No doubt $28 an acre seems a long price for land such as that described in the evidence situate where the plaintiff's property was. It is that fact and the circumstance that the land was acquired by the plaintiff from the Crown as agricultural land containing not more than 8,000 ft. of timber per acre on the average, and presumably for the purpose of clearing and cultivating it, that lead me to doubt whether, if sitting as the trial Judge, I should not have assessed the damages at a somewhat smaller sum. Yet, I find it impossible to say that the amount allowed at the trial was so clearly wrong that it should have been disturbed on appeal; and I do not feel justified on the evidence in the record in attempting to fix any other sum.

While very reluctant to interfere with the judgment of a provincial appellate Court on quantum of damages, I would, for the foregoing reasons, allow this appeal with costs here and in the Court of Appeal and restore the judgment of the trial Judge. In so doing, I follow the precedent established in the *McHugh*

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case, 10 D.L.R. 562, [1913] A.C. 299, and apply the principle on which the decision in *Ruddy* v. *Toronto Eastern R. Co.* (1917), 33 D.L.R. 193, 38 O.L.R. 556, 21 C.R.C. 377, 116 L.T. 257, 86 L.J. (P.C.) 95; *Wood* v. *Haines* (1917), 33 D.L.R. 166 at pp. 168-169, 38 O.L.R. 583 at 586; and *Morrow Cereal Co.* v. *Ogilvie* (1918), 44 D.L.R. 557, 57 Can. S.C.R. 403, proceeded.

BRODEUR, J.:—The only question in issue on this appeal is as to the amount of damages which should be awarded. The respondent company was found liable for damages resulting from a fire set on its right of way and which spread on appellant's neighbouring land.

There is no question as to the liability of the company. It was very strongly disputed before the trial Judge; but the latter having found against the company in that respect, the issue in this Court and in the Court of Appeal was confined to the amount of the damages.

The trial Judge assessed them at $3,000. The majority of the Court of Appeal modified the judgment and found that the damages should be assessed at $687. This is purely a question of fact about which there is conflict of evidence. This conflict of evidence covered the quantity of timber, its value, and whether the timber could be easily cut.

The trial Judge had the advantage of seeing the witnesses and of forming an opinion from their demeanour as to their truthfulness. It appears from his findings that the plaintiff's witnesses were reliable witnesses. One fact which has been proved by one of those witnesses goes a long way, according to my mind, to substantiate the case of the plaintiff. It appears that some time ago the plaintiff had an offer for the sale of a part of this timber at $5 a thousand. This evidence is corroborated by the plaintiff himself and has not been directly contradicted. Some evidence, however, has been adduced to show that in the locality timber of a similar kind had been sold for a less price.

We have then on one side the evidence of the plaintiff and of this witness which has been accepted by the trial Judge and I do not see how it can be rejected as it was by the Court of Appeal. In the case of such conflict of evidence, the Court of Appeal should not disturb the finding of the trial Judge, except in very exceptional cases. The trial Judge, having seen the witnesses, has been able with the impression formed fresh in his mind to decide between their conflicting evidence. In this case, the trial Judge finds, evidently, that the plaintiff's witnesses had to be believed and gave judgment accordingly. I am of the opinion that the judgment of the first Court ought to prevail. The

Court of Appeal should not have interfered with it and it should be restored.

Greville v. *Parker*, [1910] A.C. 335, 79 L.J. (P.C.) 86; 26 Times L.R. 375; *Ruddy* v. *Toronto Eastern Railway*, 33 D.L.R. 193, 38 O.L.R. 556, 21 C.R.C. 377, 86 L.J. (P.C.) 95; *Granby* v. *Ménard* (1900), 31 Can. S.C.R. 14; *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299.

For those reasons the appeal should be allowed with costs of this Court and of the Court below and the judgment of the trial Judge should be restored.

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Mignault, J.

MIGNAULT, J.:—The sole question here is as to the quantum of the damages to which the appellant is entitled, the respondent admitting its liability for the fire which destroyed a considerable portion of the appellant's timber. The trial Court granted $3,000 which the Court of Appeal reduced to $687, McPhillips, J.A., dissenting.

The evidence as to the amount of damages suffered by the appellant, and as to the value of its timber, was very contradictory and the trial Judge had to pass on the reliability of the conflicting estimates of these damages. While the amount granted by the trial Court seems rather large, the sum to which it was reduced by the Court of Appeal appears to me inadequate. I am fully conscious of the reluctance of this Court to interfere with the assessment of damages by the provincial Courts when no criticism can be made as to the principle on which the damages were assessed. But where the choice must be made between the amount granted by the trial Court and the greater or smaller amount assessed by the appellate Court, it seems to me, especially when the evidence is conflicting, that the trial judgment should not be lightly set aside. I recognize, of course, that there are exceptional cases where an appellate Court would not hesitate to interfere with the assessment of damages by the trial Court, but the case under consideration does not come within this description and, therefore, the trial Judge's assessment of the damages should not have been disturbed. It is obvious that no hard and fast rule can be laid down, and each case must be considered according to the circumstances disclosed by the evidence.

I have, therefore, come to the conclusion, with great respect, to allow this appeal with costs here and in the Court of Appeal and to restore the judgment of the trial Judge.

Appeal allowed.

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ROBINSON v. MILLS.

Alberta Supreme Court, McCarthy, J. June 29, 1922.

HUSBAND AND WIFE (§ IB—35)—LIABILITY OF WIFE AS SURETY—NO DECEPTION IN OBTAINING SIGNATURE TO NOTE—PRESUMPTION AS TO UNDUE INFLUENCE.

Where a wife joins with her husband in giving a promissory note in connection with the termination of a business partnership by him, the wife being a well educated woman who has had experience in business, there is no presumption of undue influence on the part of the husband in obtaining her signature and where no deception has been practised upon her, she cannot escape liability on the note.

[*Gold Medal Furniture Co.* v. *Stephenson* (1913), 10 D.L.R. 1; applied; *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, distinguished; *McCallum* v. *Cohoe* (1918), 46 D.L.R. 733, followed.]

ACTION on a promissory note signed by husband and wife in connection with the business carried on by the husband and the plaintiff as partners.

H. H. Parlee, K.C., for plaintiff.

R. E. McLaughlin and *H. L. Hawe*, for defendant.

MCCARTHY, J.:—The female defendant is a married woman who is sued together with her husband upon a promissory note given by them. The husband suffered judgment to go against him by default. The plaintiff and the male defendant had formerly carried on a partnership in the real estate business at the town of Wainwright, in the Province of Alberta, and in the year 1913 the partnership was dissolved and a settlement had between the partners with the result that on April 14, 1915, the male defendant gave to the plaintiff the note sued on herein under the following circumstances; some time prior to that date the plaintiff had removed to the city of Montreal, and on the date of the note called upon the male defendant at Wainwright, for the purpose of obtaining payment of the amount due him in connection with the business carried on by them at Wainwright, with the result that the male defendant gave to the plaintiff the promissory note but the plaintiff, insisting upon some additional security, the note, ex. 1 and the acknowledgement ex. 2 were taken by the male defendant to his wife and she signed the same. The female defendant now resists payment of the note on the ground that no proper explanation was given to her of what she was signing and she received no consideration and had no independent advice. I was prepared to give judgment for the plaintiff at the conclusion of the argument by counsel for both parties had it not been for the authority relied on by the defendant of *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, 77 L.J. (K.B.) 366. Counsel for the defendant relies on that case as also upon the *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, 80 L.J. (P.C.) 75, and *Schwartz* v. *Guerin* (1922), 65 D.L.R. 415. Counsel for the plaintiff relies upon the following authorities:—*Bank of Mon-*

treal v. *Stuart, supra*; *Macdonald* v. *Fox* (1917), 35 D.L.R. 203, 39 O.L.R. 261; *Euclid* v. *Hohs* (1911), 24 O.L.R. 447; *Hutchinson* v. *Standard Bank of Canada* (1917), 36 D.L.R. 378, 39 O.L. R. 286; *Gold Medal Furniture Co.* v. *Stephenson* (1913), 10 D.L. R. 1, 23 Man. L.R. 159. (See also 15 D.L.R. 342); *Doll* v. *King* (1913), 10 D.L.R. 518; *McCallum* v. *Cohoe* (1918), 46 D.L.R. 733, 44 O.L.R. 497; *Medland Ltd.* v. *Cowan* (1916), 28 D.L.R. 371.

The comments of Howell, C.J., in the case of *Gold Medal Furniture Co.* v. *Stephenson*, 10 D.L.R. 1, particularly at pp. 4-5, where he quotes from *Euclid Avenue Trusts* v. *Hohs* (1911), 24 O.L.R. 447 at 450, may be referred to:—

"'It must now be accepted as settled by authority that, in a case like the present, the absence of independent advice is not in itself a sufficient reason for treating a security given by a wife for the benefit of her husband as a void transaction. If undue influence on the part of the husband is relied upon the burden of proof lies upon those who allege it.'

In the case before the Privy Council the peculiar relationship existing between the husband and wife and her feeble condition were well known to the solicitor of the bank before she signed the document there impeached. In this case there is no pretence that the plaintiffs knew anything about any supposed influence the husband had over the wife or of her condition.

I am very much troubled in this matter by language used by Lord Justice Vaughan Williams in *Chaplin* v. *Brammall*, [1908] 1 K.B. 233 at 237. It is a decision of the English Court of Appeal and of course prior to the Privy Council decision above referred to. In that case he uses the following language:—'But the result is that the plaintiffs, who, through their agents, were undoubtedly aware that the execution of this guarantee was to be procured through the guarantor's husband, who was living with his wife at the time and would presumably have the influence of a husband over her, failed to show that the document was properly explained to her.'

I take that language to mean that, if the plaintiff knew, as in this case he did know, that the execution of the document was to be procured by the husband from his wife with whom he was then living, he would be presumed to have an undue influence over her, and that it would be upon the plaintiff to show that the document was properly explained to her. To support that view of the law, he cites *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188; but his attention seems not to have been called to the fact that the language of Wright, J., reported there, was not approved of when the case was heard in appeal.

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If I read the above case in the Privy Council correctly, then I think this principle laid down by Lord Justice Vaughan Williams has been overruled.

It will be observed that this case differs widely from *Turnbull* v. *Duval*, [1902] A.C. 429, 71 L.J. (P.C.) 84. In that case Mrs. Duval was strongly urged and pressed by her husband to sign the document, and the document was wholly different from what she thought it was when she signed it; and there is a further great difference in that case—her trustee was the agent of the plaintiff and used his influence in the matter. In this case, there is not the slightest evidence that the wife was pressed or persuaded by her husband to sign the document, nor that the document was different from what she had expected."

It is also to be observed in the later cases that the authority of *Chaplin* v. *Brammall, supra,* is relied on but not commented upon in the judgment. Whether or not the same view is taken that the principle laid down by Lord Justice Vaughan Williams has been overruled does not seem to be quite clear. In *Euclid, etc.,* v. *Hohs, supra,* the *Brammall* case is cited but not commented upon, and in *Gold Medal* v. *Stephenson, supra,* it is cited but not followed. In 1917 the case of *Hutchinson* v. *Standard Bank of Canada, supra,* the *Brammall* case is also cited but not commented upon and that case is the authority that there is no presumption of fraud in a transaction between husband and wife, and the onus of showing undue influence is upon the party attacked and that it also must be known to the creditor. In *McCallum* v. *Cohoe, supra,* which was decided in 1918, Riddell, J., is of the same opinion, that there is no presumption of undue influence and in *Medland* v. *Cowan, supra,* decided 1916, the *Brammall* case is not cited, but all the above authorities seem to be in favour of the contention of the plaintiff. In *Schwartz* v. *Guerin, supra,* decided in 1922, the facts are quite distinguishable. The wife sued on in that case was an ignorant woman who could simply write her own name but was uneducated and was deficient in both reading and writing. It was represented to her that the mortgage she signed was for a present advance and the judgment of Walsh, J., in the Appellate Division of the Alberta Court decided upon those facts, the transaction was impeachable. In the present case the female defendant is a very intelligent woman, having received a good education; took a six months' course in a business college at Brandon, was employed for 2 months in the Bank of British North America there, and was, subsequently, the representative of her father's estate in the transaction of certain business. She does not remember signing the note or the acknowledgement. The evidence of the male

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defendant, her husband, to my mind, is not satisfactory, and from the evidence given before me in the case, I cannot find as a fact that she did not understand what she was signing. It is inconceivable to me that a person who has received the education such as the female defendant and has been employed in a bank would not recognise a promissory note and would not know the effect of what she signed. There was no undue influence brought to bear upon her to induce her to sign. The plaintiff creditor was dealing with her at arms' length, did not meet her in the course of the transaction, and, upon all the evidence, I must find that she understood perfectly what she was doing, and that no deception was practised upon her, at least not so far as the plaintiff is concerned.

There will, therefore, be judgment for the plaintiff for the amount of the note with interest and costs.

Judgment for plaintiff.

COX TOWING LINE v. DUNFIELD & Co.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. February 24, 1922.

CONTRACTS (§ II D—180)—CHARTER PARTY—ARBITRATION CLAUSE—"ELSEWHERE"—CANCELLATION OF CONTRACT—EFFECT.

The word "elsewhere" in the clause of a charter party requiring the arbitration of any disputes or claims arising at the port of loading and making the "obtaining of an agreement or final award a condition precedent to any legal proceedings against the charterers or consignees of cargo elsewhere," construed as being intended to qualify the place of action, outside of the Province, and to apply to proceedings there, as though it read "legal proceedings elsewhere." The arbitration clause cannot be invoked where the contract has been cancelled in pursuance of a clause thereof.

DAMAGES (§ III A—40)—BREACH OF CHARTER PARTY—EARNINGS OF VESSEL—DEMURRAGE.

In an action by a shipowner for breach of a charter party, the damages allowable is the amount the vessel would have earned under the contract less her earnings during the estimated time; but not demurrage fixed by the charter party.

APPEAL by plaintiff from the judgment of Chandler, J., and motion to set aside verdict for defendant. Reversed.

M. G. Teed, K.C., for plaintiff.

F. R. Taylor, K.C., and *J. L. Ralston*, K.C., of Nova Scotia bar, for defendants.

The judgment of the Court was delivered by

WHITE, J.:—This is an action for breach of a charter party and is brought by the appellants who executed the charter party as owner of the schooner "Azua," against the respondents who executed the same as charterers. The breach alleged is "default in loading agreed cargo."

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The action was tried before Chandler, J., at St. John on August 4 and 17, 1920, and on January 18 and 19, 1921.

Naturally, the question to be first considered is the construction placed by the Judge upon para. 14 of the charter-party. The paragraph reads as follows:—"Any disputes of claims arising at the port of loading are to be adjusted there, and failing agreement to be referred to arbitration there, and the obtaining of an agreement or final award is to be a condition precedent to any legal proceedings against the charterers or consignees of cargo elsewhere, or to the exercise of any lien in respect of any claims on the grounds above mentioned. Any disputes arising at the port of discharge whether between the shipowner and charterer or any bill-of-lading holder shall be referred to arbitration pursuant to the Arbitration Act (Imp.) ch. 49, 1889."

The dispute as to meaning of this paragraph turns upon the second clause thereof, that is to say upon the words "and the obtaining of an agreement or final award is to be a condition precedent to any legal proceedings against the charterers or consignees of cargo elsewhere." The appellants contend that these words should be construed to bear the same meaning as they would unquestionably carry if the word "elsewhere" instead of being placed where it is had been inserted after the words "legal proceedings." The respondents claim that the word "elsewhere" should be construed as qualifying and relating only to the words, "consignee of cargo."

I think it well to observe at the outset that this disputed clause is manifestly narrower in its scope than are the preceding words which require arbitration not only where relief is sought by the shipowner against the charterer or consignee but to all cases where relief is sought by either charterers or consignees against the shipowner. Moreover, if the construction urged by the respondents is adopted, it must follow that only such consignees as come under the designation "consignee elsewhere" are protected by the disputed clause, leaving all other consignees liable to be sued without a prior award as a condition precedent.

The Judge decided in favour of the respondents' contention. He says:—

"I think the word 'elsewhere' used in the third line of clause 14 refers simply to consignees of cargo and not to the charterers. It does not seem to me a reasonable construction to place upon the clause that in the event of any dispute or claim arising at the port of loading, legal proceedings could be taken against the charterers in the City of St. John without any arbitration or award while legal proceedings could not be taken

against the charterers in any other place without an arbitration and award."

With all respect, I am unable to see the unreasonableness to which the Judge refers. In an action tried at St. John, the witnesses required would ordinarily be most easily available. The provision which requires arbitration at that city was doubtless framed with that in view. But when the suit is brought abroad or tried elsewhere than in St. John it would ordinarily be more difficult, and might be most difficult and costly to secure the attendance at trial of necessary witnesses. It is true that evidence of witnesses whose attendance at the trial could not be had might be taken by commission. But that mode of taking evidence depriving the Court, as it does, of the opportunity of observing the demeanor of the witness on the stand, is, especially in cases where the testimony is contradictory, far from being as satisfactory as the evidence given by the witness in Court. Therefore, it seems to me most reasonable that, when action is brought elsewhere than in St. John, an award shall be required as a condition precedent, though it might not be necessary when trial was had in St. John. Besides, why should that be regarded as unreasonable in the case of the charterer, which, if the Judge's construction of the disputed clause be correct is unquestionably authorised in the case of consignee other than "consignee elsewhere."

Bearing in mind what has been called the golden rule of construction, I will consider what meaning the disputed clause will carry when tested by the recognised rules of English grammar. It is clear beyond question that the verb "taken" or some verb of equivalent meaning *must* be implied after the words "legal proceedings." The clause would then read "and the obtaining of an agreement or final record is to be a condition precedent to any legal proceedings taken against the charterers or consignees of cargo elsewhere."

Now the word "elsewhere" is an adverb, and must, therefore, modify some verb, verb phrase, adjective or other adverb. Naturally and grammatically, the word "elsewhere" in the clause under discussion must be read as modifying the necessarily implied word "taken." Read thus the meaning of the disputed part of the clause would be "any legal proceedings taken elsewhere against the charterers or consignees."

But it is urged that some other word or words such as "resident" or "sued" or "carrying on business" may be implied before "elsewhere" in which case, the rule being that unless there is something to indicate a contrary intention, the adverb must be read as modifying its nearest antecedent verb, adjective

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or other adverb, "elsewhere" would then modify such implied word or words and not the word "taken." The answer to that is the word "taken" *must* in any event be implied after "proceedings" and that the clause being then complete so as to carry a definite meaning, it is neither necessary nor permissible to imply other words which are not requisite and would change the meaning of the clause which, in itself, and without any additional words carries a complete and definite meaning.

Again, why should it be assumed that it was the intention of the parties in requiring an award as a condition precedent to the taking of legal proceedings to give to the charterers any greater or different protection from that afforded consignees. As is frequently the case in charter parties there is no consignee named in the one before us. Usually, it is not until the bill of lading is signed that the consignee becomes a party to the contract, and then by sec. 2 of the Bills of Lading Act, R.S.C. 1906, ch. 118, the consignee if named in the bill of lading, becomes vested with all such rights of action and is subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. As he derives his right from the charterer, it must, at least, occasionally happen that when disputes arise between the shipowner and the consignee or charterer, rights and liabilities of both the consignee and charterer are involved. And if then disputes go to litigation, it may often be desirable and sometimes necessary that when the charterer is sued the consignee shall be made a party with him and *vice versa*. It, therefore, seems to me most unlikely that in assenting to the provisions contained in para. 14, the parties intended that the charterers and consignees should be placed on other than the same footing.

The clause in para. 14 which precedes the one directly in question, by virtue of the Arbitration Act, 1909 (N.B.) ch. 9, the provisions of which closely follow those of the English Act, gives to all parties a protection against being sued at law within this Province almost though not wholly co-extensive with that which the disputed clause would have afforded to the charterers and consignees had it been made applicable to actions at law tried at St. John. That being so, it seems to me that what was intended by the clause in dispute was to secure the protection which it affords in case the shipowner should sue elsewhere than at St. John, and especially in case he sued outside the Province where, of course, the provincial Arbitration Act would afford no protection.

For the reasons I have given I think that the disputed clause

must be construed as showing the intention of the parties to have been that for which the appellant contends.

If I am right in this conclusion the plaintiff is entitled to judgment and, therefore, it is not strictly necessary to consider the second ground on which the appellants rely. But while not absolutely necessary, I think it desirable that I should do so. This ground is that the respondents, having by their letter of September 4, 1919, given notice to the appellants, "that we will exercise our option as contained in the said charter party, and hereby cancel said charter party," and having pleaded as a defence to this action that the contract was terminated by such notice, cannot rely upon the arbitration clauses contained in the charter party as an additional defence.

Upon principle, and apart from the authorities cited on the argument, I would think the decision of this question must depend upon whether the arbitration clause relied upon, interpreted, as of course it must be, in view of the entire contract, would empower an arbitrator, acting thereunder to determine by his award the disputed question as to whether the contract was, in fact, terminated by the notice referred to, or still remains in force.

The arbitration provisions are all contained in para. 14 already quoted. By para. 5 of the charter party it is stipulated "charterers to have option of cancelling this charter if vessel is not ready to load on or before August 31, 1919."

There is no ambiguity or uncertainty in the terms of this option. If the vessel is not ready to load within the time named the charterers can, by notice, cancel the entire contract. Therefore, unless there is to be found in some other portion of the contract words which clearly indicate that in giving the charterers an option to cancel the contract it was not meant or intended that he could cancel para. 14, that paragraph must stand or fall with the other provisions of the contract.

The defendant's counsel relying upon the provision in the arbitration clause that "any dispute or claims arising at the port of loading" are to be referred to arbitration and laying special emphasis upon the word "any," contend that as the defendants are only empowered by the contract to declare the same cancelled in case the vessel was "not ready to load on or before August 31, 1919" and as the question as to whether the contract was cancelled or not depends upon the dispute between the parties as to whether the vessel was so ready within the time named, and such dispute is one arising at the port of loading it falls within the arbitration clause and must be determined by an award before this action can be maintained.

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There can be no question that so long as the arbitration clause remained in force, an arbitrator could have determined a dispute as to whether the vessel was ready to load within the time named, just as he could decide any other claim or dispute arising at the port of loading. But what is there in that to show it was intended that despite the clear and distinct provision of para. 5 he was to continue to possess such power after the contract was terminated. I can see nothing.

There can be no doubt that had the defendants before they gave notice declaring the contract to be cancelled, submitted to arbitration the disputed question as to whether the vessel was ready to load within the time limited, the arbitrator would have had jurisdiction to make an award finally decisive of such question. Nor do I think such jurisdiction would have been affected had the defendants in requiring such arbitration avowed, that in case the award was in their favour it was their intention to declare the contract cancelled.

Even if the defendants in giving notice that they elected to cancel the contract had gone further and stated therein that if the plaintiffs disputed their claim that the vessel was not ready to load within the time fixed by the contract they required such dispute to be submitted to arbitration under the provisions of para. 14 of the contract, I would have held that such notice would not have sufficed to deprive the arbitrator of jurisdiction to decide such dispute: because it would then be apparent that the defendants did not intend by such notice to cancel the entire contract including para. 18 unless and until an award had been first made deciding that the vessel was not ready to load by August 31, 1919. Such an holding would, I think, be supported by *Woodall* v. *Pearl Ass'ce Co.*, [1919] 1 K.B. 593, 88 L.J. (K.B.) 706.

But the defendants did not pursue any of the courses I have indicated were open to them. On the contrary, they gave the notice I have already quoted declaring that they "hereby cancel said charter party." By giving notice in these terms, the defendants took the position that the entire contract was cancelled and at an end. This position they have maintained down to the present time. In their statement of defence, they plead as a defence to this action that the contract was terminated by the notice given. That issue is one which I think an arbitrator, assuming to act under para. 14 would, under the circumstances, have no power to determine by an award.

To decide the question raised by this issue, the arbitrator admittedly must first satisfy himself as to whether the vessel was ready to load by August 31, 1919. If he came to the conclusion

that the vessel was not so ready it would necessarily follow that the notice given by defendants was effectual to cancel the contract. And since this arbitration clause forms a part of the contract, it must, as I have already said, stand or fall with the contract. The result in such case would be that the only finding the arbitrator could properly make would be that under the facts as he found them he had no power to make an award deciding the issues submitted to him. If I am right as to this it follows, I think, that even if the arbitrator reached the conclusion that the vessel was ready to load within the time named he would still be without power to make a valid award decisive of the question whether or not the contract was terminated, because, in order to decide that question, he must have power to make a valid award for or against either party.

Let me go further and assume that the arbitrator came to the conclusion that the ship was ready to load within the time fixed by the contract, and, thereupon, made an award in favour of the plaintiffs. That would not be such an award as is contemplated by the contract, because it is not an award that in any action at law founded upon it would be finally decisive of the question it professed to decide. For I entertain no doubt that in any action brought upon such an award it would be open to the defendants, by reason of the notice they had given, declaring the contract cancelled, to dispute the jurisdiction of the arbitrator by proving if they could that as a matter of fact the ship was not ready to load by August 31, 1919. For I take it to be undoubted law that the award of an arbitrator may always be impeached for want of jurisdiction just as may be the judgment of an inferior Court.

For these reasons, I think the issue raised by para. 4 of the defendants' statement of defence is not one which an arbitrator could determine by award under para. 14 of the charter party.

I will now proceed to discuss the authorities cited on the argument. I will first refer to the case of *Jureidini* v. *National British, etc., Ins. Co.*, [1915] A.C. 499, 84 L.J. (K.B.) 640, 31 Times L.R. 132.

That was an action brought by the appellant against the respondent to recover for the loss or damage to goods insured by the respondent under two policies of insurance. Each of these policies contained a number of conditions among which were the following [1915] A.C. at p. 500:—

Condition 12: "If the claim be in any respect fraudulent or if any false declaration be made or used in support thereof or if any fraudulent means or devices are used by the insured or

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anyone acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the insured . . . all benefit under this policy shall be forfeited."

Condition 17: "If any difference arises as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so in writing by the other party. . . . . And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

On April 20, 1910, the stores of the appellant, and the goods then in or upon them were destroyed by fire. The appellant claimed against the respondents reimbursement in respect of the alleged value of the goods under the terms of the two policies. The respondents disputed the value of the goods and a difference arose between the appellant and the respondents before action as to the amount of the loss or damage sustained by the appellant. Such difference was not referred to arbitration in accordance with condition 17 of the policies before the appellant commenced his action against the respondents for the sums claimed under the policies. Compliance with the condition precedent referred to in condition 17 in reference to arbitration was never expressly waived by the respondents.

The action was tried before Darling, J., with a special jury. The plaintiffs recovered the sum of £543 2s, upon the two policies. The Court of Appeal, Vaughan Williams, Farwell and Kennedy, L.JJ., set aside the judgment founded on this verdict, and entered judgment for the defendants, with costs. From this latter judgment, an appeal was taken to the House of Lords. Viscount Haldane, L.C., in giving judgment read conditions XII and XVII, and proceeded as follows: [1915] A.C. at p. 504:— "Now . . . . what happened was this: There was a loss occasioned by fire at Port Limon; the appellants made a claim under the policy, and the respondents took up the ground that the loss was caused by the felonious acts of the appellants. They charged arson, and they said that the claim was a fraudulent claim. That was obviously a case, which, if made out, went to the very root of the matter, because clause 12 of the policy which I have

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read says that if the claim was fraudulent, or the damage was occasioned by any wilful act, then all benefit under the policy is to be forfeited; and that attitude is again formally taken up by the respondents, because when the action on which this appeal arises was brought by the appellant, the respondents, in their defence, took this ground, that they maintained that the appellants were not entitled to claim under the policy."

He then referred to *Scott* v. *Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121, 25 L.J. (Ex.) 308, and proceeded at pp. 505-6:—"That was in effect a decision upon the demurrer. But the present case, as I have already pointed out, is different; there has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have according to the respondents, forfeited with every other benefit under the contract. Now. . . . speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. . . . And the learned Judge gave judgment, not that the case should go to arbitration, but for £3,000; and I think that was probably right, the arbitration clause having gone with the repudiation. The respondents appealed to the Court of Appeal on two grounds—first, that the arbitration clause was a bar to the action, and secondly, for a new trial on the ground that the verdict was against the weight of evidence, and also on the ground that there was further evidence which ought to be taken into account. . . . The Court of Appeal has never disposed of the motion for a new trial on either of the grounds which I have indicated; it has only disposed of the case on the footing that the arbitration clause is a bar, a conclusion which, for the reasons I have already assigned, I am unable to concur in, I am therefore of the opinion that the judgment of the Court below must be reversed, and that this case should go back to be disposed of by the Court of Appeal on the motion for a new trial."

Lord Dunedin [1915] A.C. at pp. 506-7:—"I concur. . . . . I think it is perfectly clear that that article necessarily refers to an existing difference, not an historical difference; and it seems to me that, when the attitude was taken up by these parties which was taken up in the letters which have been read to us which the

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Lord Chancellor has referred to in England—that they repudiated the claim altogether, and said that there was no liability under the policy—that necessarily cut out the effect of clause 17 as creating a condition precedent to all forms of action. I, therefore, concur in the motion which has been made by my noble and learned friend on the woolsack."

Lord Atkinson at pp. 507-8:—"I concur on this short ground. I think that article 17 refers to existing disputes and differences about the amount of loss sustained, and in a contract such as this I do not think that article has any application whatever when the persons to indemnify say: 'You yourself brought about the destruction of the goods which were insured for the loss of which you claim to be indemnified, and we rely upon an article which provides that in that state of circumstances all benefit under the policy is forfeited. I, therefore, think that the order should be made which has already been suggested by my noble and learned friend on the woolsack."

Lord Parker, of Waddingtons—"I concur."

Lord Parmoor:—"I concur. The respondents raised an issue upon which, if they had succeeded the appellant would have forfeited all benefit under the policy, including the benefit that would have been derived under clause 17 of the policy. At the same time I should like to express my opinion that no difference had arisen as regards matters which could come for decision under clause 17, and that consequently the clause had no application."

Before leaving the case, I think it well to point out that it was not claimed there that the contract of insurance was void through fraud in its inception; that, in other words, there never was a valid contract. There, as in the case before us, it was conceded that there was a perfectly good contract, which, in the *Jureidini* case, continued in force down, at least, to the making of the alleged fraudulent claim, just as, in the case before us, the charter party continued in force down at least, until the defendant wrote his letter declaring the same cancelled. And in view of what is said in at least one of the cases to which I will refer, I wish further to call attention to the fact, that in the *Jureidini* case, *supra*, the defendants claimed the policy became void by reason of condition XII therein contained. It is important, I think, to bear that in mind in considering the language and effect of the other authorities to which I will refer.

The next case cited on behalf of the plaintiffs is that of *The Municipal Council of Johannesburg* v. *D. Stewart & Co., Ltd.*, [1909] Sess. Cas. (H.L.) 53. In that case a contract had been entered into between the municipal council in South Africa, plaintiffs, and a firm of contractors in Scotland, defendants, to

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be implemented by the latter in South Africa. The contract contained this clause: "This contract shall be deemed for all purposes an English contract, enforceable in and subject to the jurisdiction of the English Courts." The contract also contained an arbitration clause, although arbitration was not in terms made a condition precedent to the right to sue. Subsequently, a second contract was entered into between the parties, known as a running contract, which, likewise, contained an arbitration clause; and shortly after a third contract was entered into. These three contracts, in effect, constituted one contract. The defendants having failed to carry out their contract and admitted their inability to do so, action was brought in the Scottish Courts by the municipal council and the case was remitted to the House of Lords for advice as to what the English law was in its bearing upon several questions that arose—among others, the effect of the arbitration clause referred to. The Lord Chancellor in the course of his judgment says at p. 54: "If the course of action which is established, be, that there has been a repudiation or a breaking of contract, in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clauses in either of these contracts." Lord James of Hereford, Lord Atkinson and Lord Corell all concurred. Lord Shaw of Dunfermline, in the course of his judgment, says at p. 56: "I treat this case as a case of total repudiation upon the averments, and I demur to the argument that it is possible in a question as to proof of these clear and relevant averments to investigate the averments upon the other side. You must take *pro veritate*, the pursuers' averments in a question of admission to probation. As these averments stand, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract which he has thus repudiated."

On behalf of the defendants, *Stebbing* v. *Liverpool and London and Globe Ins. Co.*, [1917] 2 K.B. 433, 86 L.J. (K.B.) 1155, was cited and relied upon. In that case, the appellant made to the respondent, an insurance company, a proposal for insurance against loss by burglary, which proposal contained a declaration by the applicant that his statements in the proposal were true, and an agreement that the proposal should be the basis of the contract. One of the conditions was that if a false declaration was made in support of a claim, all benefits under the policy should be forfeited. The policy also provided that all differences arising out of the policy should be referred to the decision of an arbitrator. The appellant made a claim under the policy

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in respect of an alleged loss by burglary and the respondent required that it should be referred to arbitration. Viscount Reading, C.J., after stating the facts, proceeded (as reported in 86 L.J. (K.B.) at p. 1158): "I think the real question is whether the truth or untruth of the answers in the policy is a 'difference arising out of the policy.' If the effect of the company's contention was that the policy was avoided, and if that was the true way of expressing their contention, and their object was to avoid the policy, I think there would be very great force in the argument of counsel for the applicant." He then proceeded to point out that the defendants instead of repudiating the policy, were really relying upon this provision not to show that it was void, but to show they were not liable under it.

Ridley, J., says at p. 1160: "I agree with my Lord in the answers to both questions. There may be cases in which on the ground of fraud the underwriters attack the policy and say that the policy is void. That would, for instance, be so if the insured were to set up the case that there had been a burglary, and that he had had the goods, which had been stolen or destroyed, when he had had nothing of the sort. In such a case the result of proving a false statement by the insured is to avoid the policy. There is, however, a great distinction between that case and the present one, when it is made a preliminary to the policy of insurance that certain questions should be answered on the proposal form, and that the answers are to be taken as the basis of the contract to be made between the insured and the company. In such a case as that, where the underwriters seek to say that the answers made to the questions are untrue, so that the contract gives them the right to say that they are not liable, they do not avoid the contract, but set up, as between themselves and the insured, a term of the contract which absolves them from the liability of paying. That, I think, is a different position, and it seems to me that, although in the first case that I was putting, it would not be a part of the policy on which they came before the arbitrator, and therefore the arbitration clause would not apply, in the other case it does—it is still in existence, although by one of its conditions it is set up by the underwriters that they are not liable. They are still affirming the contract under which the arbitration takes place. I, therefore, agree with my Lord, and think that the first question must be answered in the affirmative. As to the second question, I say nothing. I quite agree with what my Lord has said.

Avory, J.:—"I agree with regard to the answers to both questions."

Viscount Reading, C.J.:—"I wish to refer to the case of

Anderson v. *Fitzgerald* (1853), 4 H.L. Cas. 484, 10 E.R. 551, 17 Jur. 995, which was cited to us, and to say that it is important to observe in that case that the term of the policy was that if the questions were not accurately answered, the policy should be void. The term there was that the contract was void at once, not, as in this case, merely that it formed the basis of the contract between the parties. The costs, of course, will be dealt with by the arbitrator in the usual way."

In the case before us, there can be no question that the defendants' contention was and is, that the charter party was cancelled and put an end to by their letter to the plaintiffs declaring same cancelled. And it will be observed further, that in the case cited, the defendants themselves insisted upon arbitration under the contract.

There remains one more case cited by the defendants, *Woodall* v. *Pearl Ass'ce Co.*, [1919] 1 K.B. 593, 88 L.J. (K.B.) 706. This was the case of an insurance policy against accident. Condition eleven provided: "If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith, then the assured and all persons claiming through the assured may refer and shall be bound if the company shall so require to refer the same to arbitration by one arbitrator to be agreed on, or, in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, who alone shall deal with all questions including costs, or if the claimant resides in Scotland then under Arbitration (Scotland) Act, 1894, and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

The assured, while passing through a lock, accidentally fell into the canal and was drowned. The defendants insisted as a defence upon condition 11 which I have quoted, and claimed that the plaintiff had misstated the nature of his occupation in his application for the policy, and that by the terms of the policy such misstatement, *ipso facto*, rendered the policy null and void. It appears that in the negotiations which took place prior to the action, Mr. Clark, the solicitor representing the defendants, insisted upon arbitration under condition 11. The plaintiff, on the other hand, claimed that the defendants by letter of February 18, 1918, and by their defence, contended that the policy was null and void and had repudiated the contract therein contained, and the defendants were estopped from relying upon condition 11 as a defence to the action. Shearman, J., before whom the case was tried, held that the assured had not misstated the

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nature of his occupation, and that he had not altered his occupation since the date of the policy. He held further, on the ground that he was bound by the decision in *Jureidini's* case, *supra*, that an award under arbitration was not a condition precedent to bringing an action. The defendants appealed. Bankes, L.J., having stated the facts, proceeded (as reported in 88 L.J. (K.B.) at p. 711): "The next question which arises is as to whether the learned Judge was correct in his view that the case was governed by *Jureidini's* case. I am not able to agree with the view which he took on that point. This part of the case, in my opinion, turns entirely upon what is the true view of the attitude of the company, taken up by their representative, Mr. Clark, before the action was commenced. In considering this part of the case, I think it very necessary to draw a clear and sharp distinction between two separate classes of cases. There is the class where an insurance company is repudiating a contract, in the sense that it is disputing the existence of any binding contract at all. That is one class of case, and that was *Jureidini's* case. The other class of case is where an insurance company is repudiating any liability under a contract, but is accepting the existence of the contract as a binding contract. This is the second class of case, and that is the class of which an instance may be found in the case to which we have been referred in the Divisional Court, of *Stebbing* v. *Liverpool and London and Globe Ins. Co.*" The Judge then goes on to point out that Mr. Clark, having insisted upon arbitration under the contract, could not be held to repudiate it in a sense that the contract was repudiated in *Jureidini's* case. He then goes on to say (88 L.J. (K.B.) at p. 712): "The next question is,—How, under those circumstances, is the case affected by the two decisions to which our attention has been so closely drawn? The one is *Jureidini's* case, which I think is a very good illustration of the first of the two classes of cases to which I have referred, and which, I think, indicates the position of the parties where the existence of any binding contract is repudiated. The other is *Stebbing's* case, and is a very good illustration of the other class of case, where it is a question of repudiating liability but not repudiating the existence of a contract. In *Jureidini's* case it is material to note what the policy provided in reference to arbitration and in reference to any misdescription rendering the policy void. Clause 12 referred to a number of matters, one of which was the case of a false declaration having been made and used in support of the claim, and it provided that, in the event of the happening of any of those matters, all benefit under the policy should be forfeited. The arbitration clause was one which provided for arbi-

tration as to the amount of loss or damage and was confined to the ascertaining of the amount of loss or damage if the dispute between the parties was as to loss or damage only. What happened there was that the insurance company claimed that the policy had been forfeited. There was no dispute as to the liability. They claimed boldly that the policy had been forfeited, and that there was consequently no existing binding contract between the parties. Those being the circumstances, the matter proceeded, and the insurance company set up that the plaintiff had no right of action. That was the question which had to be decided, and which was ultimately decided in the House of Lords. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but in every case the fact is made perfectly plain that the decision proceeds upon the ground that the dispute between the parties was not a matter which came within the arbitration clause at all, but that the position of the insurance company had been the position of a person who was repudiating his contract in the fullest sense and asserting that the policy had been forfeited."

Warrington, L.J., said (88 L.J. (K.B.) at p. 714):—"When one of the parties concerned—as in this case—insists upon the arbitration clause, then it seems to me quite plain that arbitration is not a mere matter of procedure, but that the proceeding to arbitration is essential to a right of action in the assured. If that is the true construction, there then arises a further question: Is this a case in which the defendants have elected to avoid the contract altogether with everything contained in it, so as to preclude them from insisting upon the arbitration clause? That depends very much on the true inference to be drawn from the statement made by Mr. Clark, who represented the defendants at an interview which he had with the plaintiff's country solicitor, did he repudiate the contract altogether, or did he merely deny that the company were liable to pay the assured, but at the same time, with that denial, insist on the other term of the contract, namely, the right to have their differences settled by arbitration? When one looks at Mr. Clark's evidence, which was accepted by the Judge, I think the proper inference to be drawn from that is that he took the latter course; that he never did anything to repudiate the contract as a whole; that all that he did was to insist that there was not in fact any liability on the part of the insurance company, at the same time—as he put it in his evidence—insisting that in any event the question would have to be referred to arbitration."

Duke, L.J. says ((88 L.J. (K.B.) at p. 715):—"The judgment below in this case proceeded upon the view that there had been

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a repudiation of the contract by the defendants. If I agreed in that view, I should agree in the conclusion which follows from it. Accepting Mr. Clark's evidence, as the learned Judge accepted it, I do not see my way to arrive at any other view than that the course which Mr. Clark took was to insist that the matter between the plaintiff and the defendants was a matter which must at all events be decided by means of an arbitration, with the further declaration that the plaintiff would be shewn to have no claim under the policy by reason that the policy was avoided upon grounds arising upon the terms of the policy itself."

With reference to this case, I would make this observation. It seems very clear that the defendant, while insisting, from the outset, upon the arbitration clause contained in the contract, could not be rightfully said to be repudiating the contract.

It remains only to consider the question of damages. The trial Judge lays down, I think, correctly, the proper principle to be pursued in assessing damages. He first takes the amount which the plaintiff would have earned under the contract had the same been complied with, and then estimates the time it would have taken to earn that amount. Next, he takes the amount which the schooner earned during such estimated time, deducts that from the earnings that would have accrued, had the contract been carried out, and arrives at the balance of $1,931.90. That far I agree with him, subject to what I shall say in a moment. But to that amount he adds $200 a day, the rate fixed by the charter party for demurrage, for 10 days, that is to say from September 5, 1919, on which day the vessel was for the first time at her wharf ready to load, until September 15, when she commenced loading the cargo of laths which she carried to New York. I fail to understand how this $2,000 should be allowed, in compliance with the principle which the Judge has declared he intended to follow in estimating the damages. Had there been no demurrage, the vessel would have earned just that much more which would have had to be deducted from her estimated earnings under the charter party, and the resultant damage would have been by so much less than it was. On the other hand, had the vessel not been able to obtain a new charter party for a longer period, say 1 or 2 months, then her earnings would have been that much less than they were, and the damage, consequently, that much greater than the Judge has estimated it at. I think, therefore, that the damages should be reduced to $1,931.90. At the same time, I confess that I have had very grave doubts whether the Judge has not erred in reaching the conclusion—especially as against a wrong-doer, which the defendant was in breaking the contract—that it would have taken so much time as the Judge has estimated to earn the freight under the charter

party. He has allowed nothing for a return freight, but as the matter was one peculiarly for him, I have come to the conclusion that his judgment in that matter should not be interfered with, save in so far as I have mentioned, is necessary to make his computation agree with the principle upon which he acted.

The defendant should pay the costs here and in the Court below.

Appeal allowed.

RE COMPANIES WINDING UP ORDINANCE. RE STROME MILLING AND GRAIN Co.

Alberta Supreme Court, Tweedie, J. August 16, 1922.

PLEADING (§ II—165)—APPLICATION—COMPANIES WINDING UP ORDINANCE N.W.T. ORD. 1903 CH. 13—PROPER METHOD OF BRINGING MATTER BEFORE COURT—CONSOLIDATED RULES 1914, RULE 446—CONSTRUCTION.

An application to the Court under sec. 22 of the Companies Winding Up Ordinance N.W.T. Ord. 1903, ch. 13, for an order setting aside an order of the Master in Chambers allowing a liquidator a certain sum in compensation for his services, is a proceeding within the meaning of Rule 446 of the Consolidated Rules, 1914, and not being within the class authorised to be commenced by statement of claim or originating summons should be by way of petition, and unless leave is obtained upon the first application to make further application, each application must be by petition.

APPLICATION in Chambers under sec. 22 of the Companies Winding Up Ordinance made pursuant to a notice of motion on behalf of a shareholder and director of a company, for an order setting aside an order of the Master in Chambers, allowing the liquidator a certain sum as compensation for his services.

G. B. O'Connor, K.C., for the applicant.

Frank Ford, K.C., *contra*.

TWEEDIE, J.:—The Strome Milling and Grain Co., Ltd., was incorporated under the laws of the Province of Alberta and for the purpose of amalgamating with another company was being voluntarily wound up under the Companies Winding Up Ordinance N.W.T. Ord., 1903, ch. 13. During the process of winding up, the liquidator made an application before Mr. Justice (now Chief Justice) Scott, *ex parte*, for an order directing "that all the powers conferred upon the Court by the Companies Winding Up Ordinance, 1903, be referred and delegated to the Master in Chambers at Edmonton," which order was granted on March 29, 1919. Pursuant to this order, the Master in Chambers disposed of a large number of applications and made many orders, and amongst others, upon separate applications on June 16, 1920, one discharging the liquidator and the other passing the accounts of the liquidator and fixing his remuneration at $5,000.

Solicitors for M. J. O'Brien served the liquidator with notice

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of application to be made on January 16, 1922, at 10 o'clock, on behalf of M. J. O'Brien, whom it appears from the order sought to be set aside, was president and director, and although it does not appear, no doubt a "member" of the Strome Milling Co., to set aside the order of the Master fixing the compensation of the liquidator. They also served the liquidator with notice of motion returnable on February 13, 1922, for an order setting aside the order of Mr. Justice (now Chief Justice) Scott, above referred to, on the grounds (1) "That no winding up order had been made. (2) That no sufficient resolution of the winding up of the company had been passed, and (3) That the Master in Chambers is not a Judge of the Supreme Court of Alberta as defined by the said Act." This application was allowed to stand until the application dealing with the Master's order was disposed of.

Apart from the merits of the application, the first question to be decided is as to whether or not the application is properly before the Court on a notice of motion. Section 22 of the Winding Up Ordinance provides: "The liquidators or any member of the Company may apply to the Court to determine any question arising in the matter of the winding up; or to exercise all or any of the powers following," of which there are 16 express powers set forth in the various sub-sections applicable as the case may be to companies which are being compulsorily or voluntarily wound up.

Various other sections of the ordinance direct that the Court shall make an order at the instance of a "member" of the company, or the liquidator. Some of the sections, including some of sub-sections of 22 direct how the application shall be made, usually by summons or originating summons, in which case, that is the procedure to be followed. Section 22, however, does not say how the application "to determine any question arising in the matter of the winding up" is to be made. What then is the procedure to be followed? Sections 29 to 33 inclusive of the Act (1903), ch. 13), relate to "Matters of Practice." There is no method for making the application provided in these sections. Section 29 provides the method by which an application for the winding up of a company may be made, namely by originating summons. Section 30 provides for an application by any contributory for a stay of proceedings in the winding up after a winding up order has been made, such application to be made by summons. Section 31 provides:—"The rules of procedure for the time being as to amendments of pleadings and proceedings in the Court shall, as far as practicable, apply to all pleadings and proceedings under this ordinance; and any Court before whom such proceedings are being carried on shall have full

power and authority to apply the appropriate rules as to amendments to the proceedings so pending; and no pleading or proceeding shall be void by reason of any irregularity or default which can or may be amended or disregarded under the rules and practice of the Court."

This section cannot apply in this case. This is a voluntary winding up and the exercises of the powers under this section are confined to "the Court before whom such proceedings are being carried on." Furthermore, this is not a question of "amendment of a proceeding," but a question as to whether or not the proceeding in Court has been properly instituted. Section 32 provides that "all books, accounts and documents of the company . . . . shall . . . . be *primâ facie* evidence of the . . . . matters . . . . recorded therein," while section 33 provides for the procedure to be followed in swearing affidavits, making declarations or affirming in any proceeding when required. Section 39 provides that "The Supreme Court, or any three of the Judges thereof may, from time to time make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Ordinance . . . ." No such rules or regulations have been made. Sub-section 2 thereof is as follows: "Until such forms, rules and regulations are so approved, and subject to any which may be approved the practice under this ordinance shall, in cases not hereinbefore provided for, be the same, as nearly as may be, as under the Winding-Up Act and the rules of the said Court made thereunder or applicable thereto."

The practice under the Winding-Up Act R.S.C. 1906, ch. 144, in so far as it relates to proceedings in Court has to do with proceedings prior to the granting of the winding up order, and after. The former are commenced by way of petition and do not apply, as this is not an application for a winding up order, and even if it were, the procedure is set forth in the Winding Up Ordinance and is by way of originating summons,—under present rules by originating notice.

Sections 107 to 133 of the Winding-Up Act relate to procedure to be followed in the winding up proceedings, but all the regulations set out in these sections relate to proceedings after the winding up order has been made, that is, when the winding up is a proceeding in Court. For example, sec. 108 provides: "The proceedings under a winding up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the Court." The rules of Court would become applicable because there would be already a proceeding in Court.

If a winding up order has been made under the ordinance

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pursuant to which this company was being wound up it would not be necessary to invoke the assistance of the Winding-Up Act R.S.C. 1906, ch. 144, as sec. 29 of the Winding Up Ordinance, 1903, ch. 13, as already pointed out, provides that after an order for the winding up of the company has been made, "the matter shall proceed as a cause in Court and be subject, except where inconsistent herewith, to all the rules applicable to ordinary causes." Here, however, no winding up order was made, it being a purely voluntary proceeding, so the general rules of Court do not apply by reason of this section, so as to enable the proceedings to be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding. Section 134 of the Act R.S.C. 1906, ch. 144, empowers "a majority of the Judges of the Court, of which the Chief Justice shall be one" to make rules and regulations to be followed in proceedings under the Act. Pursuant to this section "Rules and regulations under the Winding-Up Act," C.R. 855-921 were made, but there does not seem to be any rule dealing directly with this point.

Rule 44, C.R. 898 is as follows: "Any application to a Judge for any purpose under the winding up order shall be made to him in Chambers unless the Court or Judge in the particular matter otherwise direct. All such applications in Chambers shall, unless the case be a proper one for an *ex-parte* order, be made upon notice or appointment of the Judge in writing; but the Court or a Judge may require any application to be made upon petition. An order shall be drawn up in every case unless otherwise directed." This rule, however, is applicable only after the winding up order has been made by the Court, that is after it becomes a proceeding in Court, and so cannot apply in this case as no winding up order has been made and there is no proceeding before the Court.

Rule 61, C.R. 915, provides for the use of forms in use in England, under winding up proceedings, with necessary variations.

Rule 67, C.R. 921, provides: "The general practice of the Court including the course of proceeding and practice in Judges Chambers shall in cases not provided for by the said Act and amendments thereto or these rules and so far as the same are applicable and not inconsistent with the said Act or these rules apply to all proceedings for winding up a company."

Does this rule mean that the rules governing practice and procedure which are applicable in proceedings which are in Court shall apply to proceedings which are not in Court, for the purpose of bringing them before the Court. In other words, shall a proceeding not in Court be brought before it in the manner in which interlocutory applications in proceedings before the Court

are made. In my opinion, the rule does not mean this and the matter can not be so brought to the attention of the Court. These rules were framed having in mind a proceeding in Court commenced by petition upon which the winding up order would be made. It simply means that once winding up proceedings have been instituted in Court if no provision is made in the Winding-Up Act or rules promulgated thereunder directing the practice and procedure to be followed, then the Rules of Court shall apply.

There is nothing in the Winding Up Ordinance, the Winding-Up Act or the rules made thereunder which direct how such an application as the one in question is to be made.

Is there then any provision in the Consolidated Rules of the Supreme Court, 1914, as amended, directing how it shall be made other than by the commencement of a proceeding?

Rule 206 provides that: "Where an application is authorised to be made to the Court or Judge in any action or proceeding, such application shall be made by motion."

Rule 208 provides: "Where by any statute or ordinance any application is authorised to be made by summons, such application may be made by notice of motion.

Does rule 206 authorise that any application authorised by statute where no particular procedure as suggested in Rule 208 shall be made by motion? I think not. The application under that rule is limited to any "action or proceeding." "Proceeding" is not defined in the interpretation clause of the Consolidated Rules of Court, 1914, nor in the Judicature Ordinance (Con. Ord. N.W.T., 1898, ch. 21, repealed 1919, (Alta.) ch. 3) nor in the Supreme Court Act, 1907 (Alta.) ch. 3. The word "proceeding" here, in my opinion, must be taken to mean a proceeding in Court and is not applicable to the voluntary winding up of a company under the Winding Up Ordinance.

In the case of *Caughell* v. *Brower* (1897), 17 P.R. (Ont.) 438, it was held that the word "proceeding" under a rule which gave the plaintiff a right to security for costs if the Court was satisfied that the plaintiff brought "a former action or proceeding for the same cause" meant proceeding in Court and did not apply to proceedings by way of voluntary submission to arbitration under the Arbitration Act in force in that Province (Ontario), which the defendant contended was a proceeding within the meaning of the rule.

I think that "proceeding" here has the same meaning that it has in C.R. 446 (1914), Consolidated Rules), which authorises "all proceedings not authorised to be commenced by statement of claim or originating notice shall be commenced by petition."

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There "proceeding" clearly means proceeding in Court and the limitation of "proceeding" by the words "in Court" would in Rule 206 as in this rule be mere surplusage.

As to applications to Court when authorised by statute where no particular form is prescribed, the Annual Practice, 1922, p. 893, O. 52, n. 3, says: "Where a statute provides for an application to the Court without specifying the form in which it is to be made such application may usually be made by originating motion," citing *Re Meister Lucius and Bruning*, [1914] W.N. 390, 31 Times L.R. 28, in support thereof. This case was decided on the ground that of all proceedings which were available, including petitions and originating notices that the latter was the least cumbersome and most appropriate to summarily dispose of the matter. Warrington, J., said; "There was no question about it that the Court could be, and frequently was, approached by originating motion." The originating motion was an originating process which corresponds to our originating notice and as such the proceedings under the English rules could be properly commenced in that way (Annual Practice, 1922, O. 1, R. 2; O. 5, R. 9 (c). The latter sub-rule provides for the procedure to be followed where the commencement is by notice of motion. The application was considered a commencement of proceeding. The copy of the notice was filed, entered in the cause book and assigned to a particular Judge. "This constitutes the commencement of the proceedings." Annual Practice, 1922, p. 893, under note Practice, *Re Abbott's Trade Mark* (1904), 48 Sol. Jo. 351.

Where under the Companies Consolidated Act, 1908, an application to the Court for relief for non-compliance with the section requiring a contract in writing for the issue of shares other than for cash to be filed, and the application is authorised by the Act to be made "by motion," it will be commenced by notice of motion; Annual Practice, 1922, p. 891; (note under Applications under Companies Act), *Re Concessions Acquisitions Syndicate Ltd.* (1898), 68 L.J. (Ch.) 49, 79 L.T. 666; or by originating summons; *Re Whitefriars Financial Co.*, [1899] 1 Ch. 184. These cases indicate that where there is no proceeding in Court and an application is authorised to be made to the Court "by motion" such application is a proceeding in Court to be commenced in a manner in which proceedings may be commenced under the Rules of Court.

Warrington, J. in *Re Meister*, [1914] W.N. at 390 says: "In the common law Courts before the passing of the Judicature Act, the only mode by which the Courts was approached otherwise than by the issue of a writ was by a motion." The matter then under consideration, however, was brought before the Court on

"an originating motion", a method by which proceedings might be commenced. It would seem then that where an application is authorized under a statute, to be made to the Court and no specific method for the making of such application is provided and no Rule of Court or of practice or procedure is applicable such application must be deemed to be a proceeding and as such should be commenced in the manner authorised under our Rules of Court. An application to the Court under sec. 22 of the Winding Up Ordinance is a proceeding within the meaning of Rule 446, and should be commenced by one of the methods authorised thereunder.

Rule (C.R.) 446 above referred to provides: "All proceedings not authorised to be commenced by statement of claim or originating notice shall be commenced by petition."

Commencement of proceedings by statement of claim is confined to actions which is included in the term "cause" defined in sec. 2 (1) of the Judicature Ordinance as follows: "Cause includes any action, suit or other original proceeding between a plaintiff and a defendant." This procedure is not applicable under sec. 22 of the ordinance. Commencement by way of originating notice is limited to certain proceedings set forth in Rules (C.R.) 429, 432 and 433, of which an application such as this is not one. The only way then in which the Court may be approached in such an application is by way of petition. This application should be made to the Court by petition (sec. 22) and may be heard at any time by any Judge of the Court, whether sitting in Chambers or in Court, as provided for in sub-sec. 2 of sec. 1 of the Ordinance.

In voluntary winding up proceedings in England, under the Companies (Consolidated) Act, 1908, (Imp.) ch. 69, applications to the Court to determine any question arising in the winding up are now made, pursuant to the Companies Winding Up Rules (1909), by originating summons; (Palmer's Company Precedents, Winding Up, 12 ed., vol. 2, pp. 838, 840, *et seq.*), and in order to avoid the expense and necessity of taking out an originating summons every time an application is to be made to the Court, the practice is to apply on the return of the first summons for an order giving liberty to apply to the Court to determine any question arising in the winding up, and thereafter the application can be made by ordinary summons.

In regard to applications to the Court in a voluntary winding up prior to the Companies Winding Up Rules, Palmer says: "The application was formerly made sometimes by petition, sometimes by motion." There is no doubt that he uses the word "motion" in the sense of an originating motion, applicable to

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RE COMPANIES WINDING UP ORDINANCE.

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the commencement of proceedings, as there is nothing in the cases cited to indicate otherwise, and the cases examined shew such to be the case.

I think that it is quite clear that under the English practice each application to the Court under sec. 193 of the Companies (Consolidated) Act, 1908, (which is similar to sec. 22 of the Winding Up Ordinance) authorising the liquidator or any contributory or creditor to apply to the Court to determine any question arising in the winding up, "is an original proceeding and as such must be commenced by originating summons unless leave to make further application upon the return of the first summons has been obtained.

I think that the same is true in the case of a voluntary winding up under the Winding Up Ordinance, and that unless leave is obtained upon the first application to make further application, each application must be by petition. I think that it would be wise for the liquidator when appointed to file a petition asking the leave of the Court on behalf of himself and any member of the company, they being the two who have the right to apply under sec. 22, to apply to the Court to determine any question arising in the winding up or any of the particular matters referred to in any of the subsections thereunder. If this is not done then such leave should be obtained at the time of the first application, whether such application be made by the liquidator or a member of the company, in order to avoid the inconvenience of proceeding unnecessarily by way of petition and to save expense. The application may include several objects and a person making separate applications for objects which might have been included in one may be ordered to pay the costs occasioned thereby. *Hawke* v. *Kemp* (1840), 3 Beav. 288, 49 E.R. 112.

There are now the two applications to which I have referred in my opening remarks, before the Court, which, in my opinion, might very well be included in one application, both having to do ultimately with the validity of the order made by the Master as to the compensation of the liquidator. If the applicant so desires, I will grant him leave, upon application, to withdraw his application to set aside the order of the Chief Justice, (Mr. Justice Scott) without costs.

In regard to this application, this being an original proceeding, no general order having been obtained in any formal proceeding granting leave to the liquidator or a member of the company to apply to the Court to determine any question arising in the winding up, the application will be dismissed with costs. If leave is necessary to renew the application by proper proceeding, such leave will be granted. *Judgment accordingly.*

LAVIOLETTE v. ETHIER.

Que.

K.B.

Quebec King's Bench, Lamothe, C.J., Martin, Dorion, Tellier and Howard, JJ. April 26, 1921.

PARTNERSHIP (§III—13)—DEATH OF PARTNER—NO NOTICE OF DISSOLUTION—CAPITAL REMAINING IN BUSINESS—CREDITORS CONTRACTING WITH FIRM SUBSEQUENTLY TO DEATH—ABANDONMENT OF PROPERTY INCLUDED.

Where on the death of one of the members of a partnership no notice of dissolution is given in conformity with art. 1900 (1) C.C. Quebec, the capital of the deceased partner remaining in the business and being treated in the same way as that of the surviving partners and the estate continuing to share in the profits, such capital is liable with that of the surviving partners, and a creditor contracting with the surviving partners subsequently to the death of such partner is entitled to demand an abandonment of property of the firm and is entitled to have the capital of the deceased partner included in such abandonment.

APPEAL from the judgment of the Superior Court, Quebec, in an action demanding a judicial abandonment of property. Reversed.

The judgment of the Superior Court for the district of Terrebonne, Robidoux, J., rendered April 26, 1920, is reversed.

Dame Georgiana Nantel, Horace Ethier and Roderigue Deschambault did business at St. Jerome, under the style of "La Caisse d'Economie des Cantons du Nord." Ethier died on January 4, 1912, and by his will instituted the respondent his universal legatee and appointed three testamentary executors with very broad powers. The executors gave to one of their number, Rodrigue Archambault, manager of the said "Caisse d'Economie," a power of attorney authorizing him to perform all necessary acts of administration and alienation concerning the execution of the will for a period of 5 years.

After Ethier's death the "Caisse d'Economie" continued to do business as before and no notice of dissolution was given. Business was carried on in the same manner, in the same place and in the names of Mrs. Nantel, Deschambault and the Estate Horace Ethier. The share of the deceased in the business, amounting to $2,500, remained with the partnership and the interests and profits were credited to the estate.

In December, 1917, the appellant, a creditor for the sum of $637.33, made a demand on the partnership for a judicial abandonment of property.

The respondent contested this demand on the ground that he never went into partnership with the other two and that he was not responsible for any of their debts. He thus denied the appellant's claim.

The Superior Court maintained the contestation and dismissed the demand of abandonment.

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LAVIOLETTE v. ETHIER.

Letourneau, Beaulieu, Morin & Mercier, for appellants.

Laflamme, Mitchell and *Callaghan*, for respondents.

Considering that at the time of the death of Horace H. Ethier, one of the 3 members of the firm known as "La Caisse d'Economie des Cantons du Nord," no notice of dissolution was given in conformity with para. 1 of art. 1900, C.C. (Que.), and that said dissolution does not affect the rights of third parties who contract subsequently with the surviving partners for the firm's account;

That the appellant Laviolette contracted with the surviving partners subsequently to the death of the said Horace H. Ethier for the account of the firm and is, therefore, a regular creditor of the said firm for a sum of $637.33 and is entitled to demand an abandonment of property;

That after the death of the said Horace H. Ethier, the testamentary executors allowed the said partnership to continue doing business as formerly; that they gave full power of attorney to one of their number, namely Rodrigue Deschambault, one of the surviving partners; that they allowed the capital of the said Horace H. Ethier to remain in the business, which capital continued to be treated in the same manner as that of the other partners and to share in the profits; that the said executors appeared in notarial deeds and declared therein that the estate of the late Horace H. Ethier was associated in business with the other surviving partners; that they made similar declarations in judicial proceedings; that in rendering account, they included the proceeds of the operations of the said partnership thus continued, during a period of 5 years;

That at the expiration of the said 5 years the said respondent was put in possession of the estate of the said late Horace H. Ethier, and that he did not then give any notice of dissolution;

That the said respondent is obliged, in the circumstances, to make an abandonment of property in the same manner as the two other partners;

That there is error in the judgment of the Court of first instance; reverses the said judgment and, proceeding to render the judgment which the said Court should have rendered, maintains the appeal, dismisses the respondent's contestation, maintains the intervention and the demand of abandonment made on said respondent and orders him to make an abandonment of property according to law, reserving to him all rights which he may have to refrain from including his personal property with that of the estate of the late Horace H. Ethier.

The respondent is condemned to pay both the costs of the Superior Court and those of the Court of Appeal.

Judgment accordingly.

MOCK v. REGINA TRADING Co. AND McGREGOR.

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C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

DAMAGES (§ III I—196)—ERECTION OF BUILDING—ANGLE IRON FALLING AND KILLING CHILD—LIABILITY OF CONTRACTOR AND OWNER—EVIDENCE —MEASURE OF COMPENSATION.

If a landowner engages a contractor to erect on his land a building of a dangerous character, the erection of which will likely cause damage to somebody, and such damage does occur from the faulty nature of the building, the landowner is liable, but if the landowner engages a contractor to erect a proper building, and in the course of the work an accident occurs through the negligence of the contractor's workmen, the contractor and not the owner is liable. Held under the circumstances that as the foreman in charge of the work took his directions from the plans and specifications furnished by the company's architect, which were followed in every particular, and when in doubt the architect's inspection was consulted, the building was under the circumstances of a dangerous character, and the owner was liable for damages for injuries caused by part of the building falling on a person lawfully on a public lane on which it was being erected, that the contractor was not an independent contractor and was not liable with the owner for such damages.

APPEAL by defendants, from the trial judgment (1921), 62 D.L.R. 696, in an action under the Fatal Accidents Act (Sask.), for the death of a child by being struck by a piece of heavy angle iron which fell from a building in course of construction. Varied.

J. A. Cross, K.C., for Regina Trading Co.

G. H. Barr, K.C., for A. W. McGregor.

J. E. Doerr, for respondent.

HAULTAIN, C.J.S. concurs with TURGEON, J.A.

LAMONT, J.A.:—I concur in the judgment of my brother Turgeon.

The damages are more than I would have allowed had I been trial Judge, but in a case of this kind the reasonable expectation of pecuniary benefit on the part of the boy's mother and the other members of his family must, as to amount, be of the most indefinite nature. The amount fixed is at best an estimate only, with nothing more definite to base it upon than the fact that in human experience most boys have, and this one, had he lived probably would have been willing to contribute to the support of the members of his family. Under these circumstances, I am unable to say that any estimate I might make would be more accurate than that of the trial Judge. (Embury, J. (1912), 62 D.L.R. 696, 15 S.L.R. 90.)

TURGEON, J.A.:—This action arose out of an accident which occurred in Regina on September 15, 1920, and caused the death of Joseph Mock, a 12-year-old boy, and was brought by the boy's mother, the respondent, as administratrix, on behalf of herself

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and other dependents. The accident occurred during the erection of a building, and the administratrix sued both appellants, the owner and contractor, jointly and in the alternative. Embury, J. delivered judgment on December 21, 1921, in favour of the respondent against both appellants. This judgment is reported at length in 62 D.L.R. 696, and it is not necessary for me to repeat all the facts here.

I agree with Embury, J., 62 D.L.R. 696, and for the reasons given by him, that the respondent is entitled to recover. This main branch of the case admits, I think, of little doubt. A building is being erected on a city lot immediately abutting on a public lane. A piece of iron used in the building operations falls from the structure and strikes a person lawfully in the lane. These circumstances cast upon the defendants the duty of showing that there was no negligence. *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 E.R. 299, 33 L.J. (Ex.) 13, 12 W.R. 279, 9 L.T. 450. They endeavour to do this by adducing expert evidence to the effect that the plans of the building and the methods of workmanship followed were the best known to the trade. Here they are met by the expert witnesses of the plaintiff (and I refer particularly to McKay, an experienced builder), who show that a much safer method might and should have been adopted, and is, in fact, adopted in practice. This evidence is of the clearest kind and is accepted by Embury, J., and, indeed, it is difficult for me to see how he could have rejected it. On such a state of facts the plaintiff is undoubtedly entitled to a verdict.

A question does arise, however, as to whether both appellants are liable, as found by Embury, J., or whether one of them only is liable. It will have to be determined also whether the amount awarded for damages is excessive, as submitted by the appellants.

Upon the first point, the appellants, Regina Trading Co. contend that the appellant McGregor was an independent contractor, and that, if there was any negligence causing the accident, such negligence was that of his employee or employees, and that they, as owners of the land and the building, are not responsible.

I take the rule to be that if a landowner engages a contractor to erect on his land a building of a dangerous character, the erection of which will likely cause damage to somebody, and such damage does occur from the faulty nature of the building, the landowner is liable, because in ordering the construction of the building, he has ordered the doing of the very thing which has caused the accident. (*Bower* v. *Peate* (1876), 1 Q.B.D. 321, 45 L.J. (Q.B.) 446). But if, on the other hand, a landowner engages a contractor to erect a proper building on his land and in the course of the work an accident occurs through the negligence

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of one of the contractor's workmen, the landowner is not liable, although the contractor is, because then the maxim *qui facit per alium facit per se*, upon which the liability of one party for the wrongful act of another is founded, will extend from the workman to the contractor, who is his employer, but not further so as to reach the landowner. *Reedie* v. *London & N. W. R. Co.* (1849), 4 Ex. 244, 154 E.R. 1201, 20 L.J. (Ex.) 65, 13 Jur. 659.

It will be well to proceed, I think, by determining in the first place, as accurately as the evidence will allow, just how the accident occurred which caused the boy's death. A piece of iron of great weight fell from the third story of this building, which was in course of erection, and struck the deceased, who was upon a public lane adjoining the building. This iron, called an angle iron, had been placed, about 6 hours previously, across the top of a group of three windows on this third storey. It was placed in position by the mechanics and workmen, and was supported on its outside by certain brick and mortar work. After being installed in this manner, the iron was allowed to remain untouched until a few minutes before the accident occurred, (a space, as I have said, of about 6 hours), in order to allow the brick work time to dry and so to hold the iron secure before the work of building up the lintel was resumed. Sufficient time, or what was deemed to be sufficient time for the purpose, having elapsed, further work on the lintel was proceeded with. This work consisted of pouring liquid cement in a groove behind and against the angle iron. While the workman was engaged in pouring in this cement with a pail, and, according to his own evidence, after the height of the layer of cement at its north end had reached above the top of the iron and lay against the brick-work, iron and bricks gave way, the breach beginning apparently at this north end, and the iron fell over and out into the lane.

There is no evidence to show that this accident was due to any carelessness on the part of the workman who was filling in the cement. The trial Judge has found, and I see no reason to differ from him in this regard, that the iron fell because it had not been secured in position sufficiently to prevent it from falling under pressure of the work to be done behind and about it. Evidence was adduced, and accepted by him, to show that it would have been possible to secure it in such a manner as to enable it to withstand the pressure and thus to prevent the accident. I agree with him also in this respect. Now the evidence shows that the first step in the work about the lintel consisted in building up the brick-work and laying the angle iron in place. Then there was a pause of several hours until the brick-work was dry, after which the carpenters would put in the wooden planking to hold

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the concrete, and finally the work would be taken up by those whose duty it was to pour the concrete into the form. When, therefore, the brick wall was run up and the angle iron installed, everything should have been left, and according to the evidence it might have been left, in such a position that, once the brick-work had dried, the structure would withstand the pressure necessitated by the work of filling in the concrete. It was not left in such a position, and this neglect was the cause of the accident. The work of putting up the brick and laying the angle iron was done under the supervision of Robert Foster, the foreman bricklayer, and Foster took his directions from the plans and specifications furnished by the company's architect, which he says he followed in every particular. When in doubt as to the execution of any part of his work, Foster consulted one Campbell, the architect's inspector, and followed his instructions. He does not say that he had occasion to consult Campbell about anything concerning the work on this particular lintel, but it cannot be doubted, I think, in view of all the evidence, that he did his part, which was the important part, of the work in full compliance with the design of the structure. This structure itself was, therefore, under the circumstances, of a dangerous nature, and the happening of the accident was due to that fact. Such being the case, the appellant company is liable. Even if the appellant McGregor was an "independent contractor," and the foremen and workmen his employees, the accident cannot, in my opinion, be said to be due to the casual or collateral negligence of McGregor or his servants, so as to relieve the company of liability. (21 Hals. sec. 795 and cases cited; see also *Ilford Gas Co.* v. *Ilford Urban Dist. Council* (1903), 67 J.P. 365).

We have next to determine whether there is any liability at all attaching to the appellant McGregor. This branch of the case requires careful investigation, as the facts are not entirely clear and free from contradiction. A contractor is, of course, liable for accidents resulting from his own negligence or that of his employees, and this liability may be his alone or may attach both to himself and his employer, according to the circumstances of the case. What then was McGregor's status in regard to these building operations? The trial Judge has found that he was an independent contractor and jointly liable with the owner. Without determining whether or not he would have been liable if he had, in fact, been an independent contractor, that is, a contractor to whom the entire control of the work is entrusted, (Hudson on Building Contracts, 4th ed., vol. 1, p. 802), I have come to the conclusion after a careful consideration of the evidence that he was not an independent contractor, but that by his agreement

with the company he contracted for a fixed remuneration to furnish what is described as the "plant" required for the erection of the building, and to act as the company's agent to employ men on the company's behalf and to purchase all material, subject in each instance to the company's approval as to price. This agreement is embodied in correspondence set out in the appeal book on pp. 252-3 and 4. Despite some attempt to show the contrary, I think the evidence proves that the actual supervision and control of the building operations was, in fact, carried on by the company's architect and the architect's inspector, Campbell, each foreman taking his directions, not from McGregor or any agent of McGregor's, but from Campbell. I think, therefore, with deference, that the Judge is in error in this part of his judgment, and that the appellant McGregor should be exonerated from liability towards the plaintiff.

With regard to the damages, I do not think any variation should be made in the award made by the trial Judge. In these cases under the Fatal Accidents Act, 1920, (Sask.) ch. 29, great perplexity must always prevail from the very nature of the matter. Many probabilities and possibilities must be weighed and considered regarding the deceased himself and each of the beneficiaries. When a Judge of King's Bench has arrived at a conclusion on the different elements involved, it is not my duty, I take it, to substitute my judgment for his, unless I am convinced that he has acted upon some wrong principal or that the amount fixed by him is unreasonably excessive. I have no such conviction in this case, and I think the award should be allowed to stand and judgment entered accordingly, with costs against the appellants, the Regina Trading Co.

There remains the question of costs. Before issuing his writ of summons in this action, the plaintiff obtained leave, on *ex parte* application, to join both appellants as defendants under the provisions of R. 38 of the King's Bench Rules, and I think this was a proper case for such a joinder. The appellant company pleaded, in addition to a general denial of negligence, a further plea to the effect that the responsibility, if any existed, for the accident lay entirely with McGregor, as an independent contractor, and not with the company. At the close of the plaintiff's case, counsel for the company moved to have the action against the company dismissed on the ground that the plaintiff's evidence disclosed that McGregor was an independent contractor and solely responsible and that the nature of the work was such as to relieve the company from all liability. In these circumstances, I think the defendant company should pay the costs of action both of the plaintiff and of the defendant McGregor. I

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think, however, that the plaintiff should pay the defendant McGregor's costs of appeal. (*Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K.B. 533, 19 Times L.R. 660, 52 W.R. 33, 72 L.J. (K.B.) 761.)

The appeal of the Regina Trading Co. should be dismissed with costs and that of the appellant McGregor should be allowed with costs as provided above.

MCKAY, J.A., concurs with TURGEON, J.A.

Judgment varied.

BENNETT v. PERRAULT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. July 10, 1922.

APPEAL (§ VII I—369a)—FINDINGS OF FACT OF TRIAL JUDGE—EVIDENCE IMPROBABLE AND CONTRADICTED—REVERSAL BY COURT OF APPEAL.

While the Court of Appeal is reluctant to interfere with the finding of the trial Judge who has had the advantage of seeing the witnesses and observing their demeanor there may be other circumstances quite apart from manner and demeanor which may shew whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

Held also that the evidence of the defendant as to an alleged guarantee of horses sold to him by the plaintiff was so improbable and was contradicted on so many points by defendant's own witnesses that the trial Judge was not justified in finding that this guarantee had been given.

[See Annotation, 58 D.L.R. 188.]

APPEAL by plaintiff from a judgment in the County Court in an action to recover the amount of a lien note. Reversed.

E. D. Honeyman and *J. E. Bissett*, for appellant.

L. P. Roy, for respondent.

PERDUE, C.J.M.:—This is an appeal from the County Court of St. Boniface. The suit is brought on a promissory note for $315 and interest, dated October 27, 1919, and payable on or before November 1, 1920. The note contains a lien agreement declaring that it was given for a brown mare, a bay gelding, a harrow and a set of double harness, and that the title and ownership of the property should remain in the payee until the note and interest should be paid, with the usual provisions for retaking the property if the maker of the note should make default in payment. The defence relied on is that the note "was given in part for two horses sold by plaintiff to defendant and fully guaranteed by plaintiff to be in good health, sound and good for any work on the farm;" that the horses were at the time of the sale sick and absolutely unfit for work and incapable of doing any work; that defendant took good care of them but they died shortly after the sale. This is a defence of partial failure of consideration for the giving of the

note and should be set up by way of counterclaim: Maclaren on Bills and Notes, 5th ed., pp. 178-179. The defendant has set up a counterclaim, but it is confined to breach of warranty as to the condition of the horses and a claim for expenses for their care and feed. The evidence shews that the mare died in May, 1920, and the horse in November, 1920.

The County Court Judge made the following finding:—

"I find that the plaintiff guaranteed that the horses had no sickness and that if defendant found they were not as guaranteed he need not pay the notes. Defendant was afraid to buy the horses as they did not look well. Plaintiff told defendant that he need not be afraid as the horses were O.K. I find that the plain meaning of this conversation was to the effect that if the horses were sick, or not in good condition that defendant could return the horses and plaintiff would return the note given, and that this conversation amounts to a condition and not a warranty."

The Judge finds that both horses were sick at the time.

Counsel for plaintiff objected to the reception of evidence relating to the alleged warranty or condition sought to be attached to the promissory note in question. The note contains an unconditional promise to pay a certain sum of money on or before a certain date. Evidence of an oral agreement or condition in direct conflict with the promise to pay should not be received: Taylor on Evidence, 11th ed., para. 1132. Parol evidence of a verbal agreement made at the time of signing a promissory note contradicting the terms of payment contained in the note is not admissible: *Imperial Bank* v. *Brydon* (1885), 2 Man. L.R. 117; *Young* v. *Austen* (1869), L.R. 4 C.P. 553, 38 L.J. (C.P.) 233; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487, 67 L.J. (Q.B.) 825; *Wilton* v. *Manitoba Independent Oil Co.* (1915), 25 D.L.R. 243, 25 Man. L.R. 628.

The warranty sought to be proved is an alleged collateral agreement not in writing varying the terms of the contract set out in the lien note. In giving judgment in the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, at p. 47: (82 L.J. (K.B.) 245), Lord Moulton said:—

"Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would

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have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

Viscount Haldane, L.C. [1913] A.C. at p. 38, stated that he entirely agreed with Lord Moulton's observations.

When we come to examine the evidence relating to the collateral agreement or warranty set up by the defendant, we find the greatest uncertainty surrounding it. The defendant himself states it in many different ways. His first account is:—

"Before I signed the note I told Mr. Bennett 'I am afraid to buy the team of horses, I think it looks bad.' I said 'I will sign the note if you guarantee the horses and if they are good for work.' I said 'If I find something wrong about that team of horses, if I find any sickness and if I cannot use the horses I will not pay you.' I told him that three times. . . . He said 'I guarantee my horses are good, Joe, good working horses, sound horses, no sickness'."

The note was not signed at defendant's farm. It was drawn up and signed in the store at Haywood to which place the parties went after arranging the sale. The horses had already been delivered to defendant.

In cross-examination defendant said:—

"I told him three times. 'I will buy your team if you guarantee same to me.' He said, 'I guarantee the horses to be in good condition.' I said, 'If I find something wrong with your horses I will not pay you.' Q. This is all that was said? A. He said. 'I guarantee my horses, don't be afraid, they are O.K.' Q. This is your guarantee that they were O.K.? A. He guaranteed the horses to do any kind of work on the farm. Q. When did this happen? A. He said, 'The horses are O.K., you can do anything with them.' Q. This is all that was said? A. I think it is enough. Q. This is all you know about it? A. Yes."

Later on defendant gave the following answers as to the words plaintiff used in giving the guarantee:—"I told you before he guaranteed the horses to be O.K." "He told me the horses were right." "He told me the horses were all right." He said, "I guarantee my horses are O.K." "He said two or four times, 'they are O.K.' and 'right'."

Mrs. Perrault, the wife of the defendant, was present when the bargain was made. She states Bennett's words were, "I guarantee the horses are good for work and everything." He said, "They are O.K."

Later on she stated:—"Mr. Bennett said, 'You don't need to be afraid as I guarantee the horses.' He said that three times."

Now keeping in mind Lord Moulton's statement of the law, we may well ask, what guarantee, if any, was given by the plaintiff? The plaintiff denies that he gave any guarantee. There are other facts which have an important bearing on this phase of the case. The father and brothers of the defendant knew the horses in question. The defendant knew the horses. Plaintiff owned the land adjoining the farm on which the Perraults lived and used the horses in cultivating his land. Thurit Perrault, the brother of the defendant, who was present when the latter purchased them, says that they examined the horses and did not find anything wrong with them. The lien note sued upon was drawn up and signed in the store at Haywood after the sale had been made at defendant's farm. Defendant's evidence might give the impression that his request for a guarantee was made when he was about to sign the note. If that is the case, it would be a different conversation from the one which Mrs. Perrault heard at her house.

The plaintiff states that at the time of the sale the horses were in good condition. He had been working them through the spring, summer and fall. Hamilton, for whom he had been working with the team, knew them and speaks of them as a good working team. He noticed nothing wrong with them. The horse had a slight rupture which Dr. Martin, the veterinary surgeon, thinks would not affect it. The horse had a slight sore on the hind foot which Hamilton called a rope scald. He saw nothing wrong with the mare. The plaintiff states that he pointed out the rupture to defendant before the sale. The plaintiff positively denies that he gave any guarantee. He states that defendant looked the horses over and noticed the sore on the horse's foot and said he would soon fix that, that was nothing.

Thurit Perrault says that about eight days after the purchase they noticed the sore foot. They then commenced treating it. The defendant says that the morning after the sale he found out there was something wrong with the horse's foot, that he detected it by the smell. It is strange that he did not detect it the day before. He then examined the mare and found her back covered with pimples. They commenced to doctor the horse themselves. They did not consult a veterinary. The treatment they applied to the horse would, in the opinion of Dr. Martin, aggravate the wound and cause sloughing. He diagnoses the mare's disease as urticaria, or nettle-rash, caused by injudicious feeding, and not dangerous. He says there would be no smell from the sore in the horse's foot. It is most likely that if a veterinary had been called in both horses could have been cured.

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Perdue, C.J.M.

The evidence of the defendant is a mass of contradictions. It would be dangerous to base any finding of fact upon it. His conduct also is most suspicious. After discovering the serious condition of the horse (according to his story), he did not bring it to the plaintiff's attention, although the latter was in the neighborhood until December 30. Plaintiff then took a trip to Scotland, returning in April, 1920. The defendant says he went to Hamilton's to see plaintiff about the horses soon after the sale. Hamilton denies this. It is quite clear that if defendant really wished to complain of the condition of the horses or to make a demand on plaintiff before the latter left for Scotland, he could easily have found him.

On the other hand, plaintiff states that he saw the horses after the sale about December 20 or 23 in defendant's stable. Plaintiff then asked defendant how the horses were getting along and the latter said they were getting along all right. Plaintiff looked at the horses and they were both in pretty good shape. He looked at the sore on the horse's foot and it appeared to be no worse than it was before. Defendant made no complaint at that time. Defendant denies this interview. Hamilton saw the horses once or twice during the winter after the sale and they appeared to be in fair shape. He saw them at Haywood hitched to a sleigh with rack.

The defendant left his farm in April, 1920. He asked his father, who lived on the adjoining farm, to look after the horses. The latter says he turned them out to pasture where they remained until they died. No witness outside the Perrault family was called by defendant to testify as to the condition of the horses. The evidence of defendant, his father and brother as to the stench from both horses' sores, which, imperceptible before, manifested itself almost immediately after the sale, is incredible. The Judge, in the passage from his judgment quoted above, finds that the plain meaning of the conversation between the parties was "to the effect that if the horses were sick, or not in good condition, that defendant could return the horses and plaintiff would return the note."

There is no evidence that the plaintiff agreed to such a condition. The defendant himself says nothing about returning the horses and getting back the note. What he said was that if he found something wrong with the team he would not pay the plaintiff. Mrs. Perrault's evidence as to defendant's statement is, "my husband said if your horses are no good I won't pay you."

This Court is reluctant to interfere with the finding of the trial Judge who has had the advantage of seeing the witnesses and

observing their demeanour, but as pointed out by Lindley, M.R., in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704 at p. 705, 67 L.J. (Ch.) 402,

"There may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibiilty of witnesses whom the Court has not seen."

In *Smith* v. *Chadwick*, (1884), 9 App. Cas. 187, at p. 194, 53 L.J. (Ch.) 873, Lord Blackburn said:—

"The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the Judge who tried the cause, and saw the witnesses and their demeanour. . . . But still, though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way."

See also *Creighton* v. *Pacific Coast Lumber Co.* (1899), 12 Man. L.R. 546.

I think the County Court Judge should not have found on the evidences that the horses were sold on the guarantee or condition mentioned in the judgment. With respect, I think the evidence did not justify the finding. I would set aside the judgment entered for the defendant and enter judgment for the plaintiff for $315 with interest at 7% per annum up to November 1, 1920, and 5% from the last-mentioned date until judgment. The plaintiff is entitled to costs in the County Court and the Court of Appeal.

CAMERON, J.A.:—This action was brought to recover the amount of a lien note given for a team of horses. The County Court Judge before whom the case was tried found for the defendant. The following extract from his judgment gives the ground of his decision: [See judgment of Perdue, C.J.M., p. 165.]

He further says:—

"It is evident that the defendant had a right according to the terms of the agreement to return the horses and get his note back as the horses were far from being O.K. or in good condition and able to work."

We have here a finding of fact which is directly challenged. This Court is reluctant to interfere in such cases as a trial Judge has an unquestionable advantage, not available to an Appellate Court, in dealing with the facts. But this Court can and does exercise its appellate jurisdiction in such cases on principles

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which have frequently been laid down. An authoritative decision on the subject is to be found in *Creighton* v. *Pacific Coast Lumber Co.*, 12 Man. L.R. 546, followed in *Chalmers* v. *Machray* (1916), 26 D.L.R. 529, 26 Man. L.R. 105, affirmed (1917), 39 D.L.R. 396, 55 Can. S.C.R. 612. This Court is a Court of Appeal from a single Judge of the King's Bench upon questions of fact as well as questions of law. As to appeals from the County Court this Court has by sec. 343 of the County Courts Act, R.S. M., 1913, ch. 44, power to draw inferences of fact and to decide all questions of fact as well as of law.

It has been repeatedly held that the evidence of a contemporaneous oral agreement is not admissible to vary the effect of a promissory note or bill of exchange. This is not a case where the instrument is merely delivered as an escrow when the evidence is properly receivable. See *Wilton* v. *Manitoba Independent Oil Co.*, 25 D.L.R. 243, 25 Man. L.R. 628, and the authorities there cited. On these principles the evidence on which the Judge bases his finding that there was a guarantee and if the defendant found the horses were not as guaranteed he need not pay the notes, should be excluded.

Apart from these considerations I am unable to agree with the County Court Judge in his findings of fact and in the inferences he has drawn from the evidence. It is to be noticed that he passes over the evidence of Hamilton, a disinterested witness. Nor does the trial Judge refer to the significant conflict between the evidence of the defendant and that of Thurit Perrault, his brother and partner. Moreover, the story told by the defendant plainly invites criticism and is suggestive of afterthought on his part. I have read the judgment of Fullerton, J.A., and agree with his reasoning and conclusions and would allow the appeal.

FULLERTON, J.A.:—The defendant is sued as the maker of a lien note for the sum of $315, given for the price of one brown mare, one bay gelding, one five-section drag harrow and one set of double working harness. The defendant counterclaims for a breach of warranty of the horses.

The sale was made at the defendant's farm near Haywood, on October 27, 1919. Defendant says he saw nothing wrong with the horses on the day he bought them, but that the next morning he discovered that the horse had his right hind foot cut very badly between the hoof and the fetlock joint and that the mare had pimples on her back, that for some time he treated them but without success and that early in April, 1920, he gave up his farm and left the horses in charge of his father who lived on an adjoining farm. The mare died in May, 1920, and the horse in

the following November. Defendant says the horses were never able to work.

The warranty alleged is that the horses were in good health, sound, and fit for any work on the farm.

The County Court Judge has found "that the plaintiff guaranteed that the said horses had no sickness and that if defendant found they were not as guaranteed he need not pay the notes."

He further found that this guarantee amounted to a condition and not a warranty and gave judgment for the defendant.

In *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 67 L.J. (Ch.) 402, Lindley, M.R., delivering the judgment of the Court of Appeal, after pointing out that when the question arises which witness is to be believed rather than another and that question turns on manner and demeanour the Court of Appeal always is guided by the impression made on the Judge who saw the witnesses, goes on to say: [See judgment of Perdue, C.J.M., p. 169]. I think this case is one to which the remarks of Lindley, M.R. strictly apply. The evidence of the defendant as to the alleged warranty is not only improbable but he is also contradicted on material points by his own witnesses. The plaintiff swears that no warranty was given. The defendant's evidence on the point is as follows:—

"Before I sign the note I told Mr. Bennett 'I am afraid to buy the team of horses. I think it looks bad.' I said 'I will sign the note if you guarantee the horses and if they are good for work.' I said 'If I find something wrong about the team of horses, if I find any sickness and if I cannot use the horses I will not pay you.' I told him that three times. Q. What did he say to that? A. He said 'I guarantee my horses are good, Joe, good working horses, sound horses, no sickness.' Q. Did you look at the horses? A. I did not look very much at the horses. He came on a day there was snow, a wet day; the feet of the horses were wet and you could not see much."

On cross-examination:—"Q. What did he say? He said, 'Joe, do you want to buy a team of horses?' I said, 'Yes, if it is good.' Q. You were thinking of buying the team? A. I intended to buy them, but I was afraid they looked bad. Q. Did you look them over? A. No, I just looked around and took his word. They had long hair. Q. You said you thought the horses looked bad? A. They were looking bad to me, and I was afraid to buy them. Q. You never inspected them? I looked the horses around. Q. What looked bad to you? A. They had long hair. The long hair should be taken off the last week in February or March. Q. There was nothing else then? A. I could not see the feet they had long hair. Q. The long hair made you afraid? A. Sometimes the long

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hair make somebody blind. Q. You looked over the horses? A. No, I asked him if they were alright, he said they were alright. Q. What happened in the house? A. . . . I said, 'Mr. Bennett, I will buy that team of horses if you guarantee that team to me.' I asked him three times. Q. What did you ask him three times? A. I told him three times, 'I will buy your team if you guarantee same to me.' He said, 'I guarantee the horses to be in good condition.' Q. This is all that was said? A. He said, 'I guarantee my horses, don't be afraid, they are O.K.' Q. This is your guarantee that they were O.K.? A. He guaranteed the horses to do any kind of work on the farm. Q. When did this happen? A. He said, 'The horses are O.K. You can do anything with them.'''

Now, to my mind, this story on the face of it does not ring true. In the first place, he admits he could see nothing wrong with the horses, but insists that he was afraid of them because they were looking bad and presumably for that reason wanted a guarantee. When pressed on cross-examination as to what he meant by saying the horses looked bad, his only explanation was that they had long hair. The proposition that long hair on a horse would indicate to anyone defects, inability to work and the possession of the seeds of future sickness is certainly a new one. It seems somewhat extraordinary that without any reason for thinking there was anything wrong with the horses he should have made such careful provision against sickness and inability to work.

Again, he seeks to give the impression that he only made a cursory examination of the horses as he relied entirely on the plaintiff's warranty although the plaintiff was practically a stranger to him and he knew that he had sold his farm and was shortly to leave for the Old Country.

Admittedly there was a sore on the right hind leg of the horse at the time of the sale. Plaintiff says it was the size of a fifty-cent piece, but not deep enough for a scab to grow on it. Plaintiff further says that defendant saw this and said "he would soon fix that, that was nothing." Hamilton, an independent witness, describes the sore as "a little kind of like a scald; it might have been a rope scald at one time."

The defendant says that he did not notice this sore on the day of the sale and he gives two explanations for his failure to see it, (1) that the horse was wet, (2) that he had long hair. These explanations are too ridiculous to be entitled to any serious consideration. Hamilton evidently had no difficulty in seeing it and the defendant's father, who saw the horse the same week, noticed it at once. The defendant's story of how he came to discover

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the sore is also on a par with the rest of his story. Although he admits he was in the stable where the horse was the day of the sale he says the next morning he noticed a bad smell and on investigation discovered the sore. He also says the mare smelled so badly he examined her and found pimples on her back. His sense of smell must have been extraordinary, as Dr. Martin says there would be no smell to such a sore as the defendant described.

The story told by the defendant, if it stood alone, is to my mind so full of improbabilities and absurdities as to be unworthy of belief. He is, however, in direct conflict with his brother, Thurit, who was called as a witness on his behalf.

Thurit Perrault, who was a partner of the defendant, worked with him on the farm and appears to have had the most to do with the care of the horses, says that it was eight days after the sale before they noticed the sore on the horse's foot, and from fifteen days to a month after the sale before they noticed the lumps on the mare's back. The defendant says that three days after the sale he and his brother drove over to Hamilton's place looking for the plaintiff to get him to take the horses back and two days later he visited Winnipeg in search of the plaintiff. It is clear from the above that the story of the defendant and his brother are in direct conflict.

For the above reasons, I find that the plaintiff gave no warranty or guarantee of the said horses.

The appeal must be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for the amount claimed together with the costs of the action.

DENNISTOUN and PRENDERGAST, JJA. concurred with FULLERTON, J.A. *Appeal allowed.*

HERBERT v. SCHOOL COMMISSIONERS OF ST. FELICIEN.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

SCHOOLS (§ IV—77)—PURCHASE OF BUILDING FOR SCHOOL PURPOSES—APPROVAL OF LIEUTENANT-GOVERNOR IN COUNCIL—R.S.Q. 1909, ARTICLES 2723, 2724—CONSTRUCTION.

Article 2723 R.S.Q. 1909, which authorises the school boards in each municipality to purchase property for school purposes is not conditioned by article 2724 in such fashion as to require the school authorities to obtain the sanction of the Lieutenant-Governor in Council before making such purchase.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1921), 31 Que. K.B. 458, reversing the judgment of the Superior Court sitting in review (1920), 59 Que. S.C. 119, and affirming the judgment of the trial Court. Affirmed.

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HEBERT v. SCHOOL COMMISSIONERS OF ST. FELICIEN.

Idington, J.

Belcourt, K.C., for the appellants.

G Barclay, for respondents.

IDINGTON, J.:—This appeal arises out of proceedings taken to quash and annul the resolution of respondent, which reads as follows:—

"It was proposed by Mr. Philippe Tremblay and unanimously resolved that the Commission buy the Chibougamou Hotel and the land adjoining the said hotel for the price of $26,000 on the following conditions: $1,500 cash, and the balance at $500 per annum without interest; it is agreed with the vendors to make the cash payment within a delay of 5 years, bearing interest at 7% and that the president and secretary-treasurer be authorized to sign the contract after said resolution comes into force."

I have great doubts of our jurisdiction to hear this appeal.

The case of *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.* (1912), 4 D.L.R. 502, 45 Can. S.C.R. 585, relied upon was differently constituted, for there the action was brought not only against the municipality but also the company that had contracted with the said municipality and that contract was impeached by a ratepayer as plaintiff and an injunction was sought restraining the carrying out of such an *ultra vires* contract, as that was, for several reasons. See that case as reported (1910), 43 Can. S.C.R. 650, on motion to quash.

Here the vendor is not a party and what we are asked to interfere with is a mere resolution of the council which may be executed by the adoption of proper methods even if there is anything objectionable in the initial step.

It may be quite competent for the Courts below acting under sec. 50 C.C.P. (Que.), or other like legislation giving a superintending power to deal with such a resolution, yet be quite incompetent for us, who are not given the right to hear appeals in that regard, to attempt to do so.

The whole matter involved is, as Allard, J., 31 Que. K.B. 458, in the reasons he assigns in support of the judgment appealed from says, purely a matter of administration.

Passing that objection I made to hearing the appeal, but for which I got no support, and therefore to the merits of the appeal, I am unable to see how the express terms of sec. 2723, R.S.Q. 1909, can be overruled.

Sections 2 and 3 thereof are as follows:—

"2. To acquire and hold for the corporation all moveable, immoveable property, moneys or income, and to apply the same for the purposes for which they are intended.

3. To select and acquire the land necessary for school sites; to build, repair, and keep in order all school-houses and their de-

pendencies; to purchase or repair school furniture; to lease temporarily or accept the gratuitous use of houses and other buildings, fulfilling the conditions required by the regulations of the committees, for the purpose of keeping school therein."

There is no such restriction upon these express powers as to entitle us to interfere.

The implications sought in other sections do not seem to me available.

And when we find counsel for appellant driven to the resort of submitting that the credit given for a term of years must be read as if a loan, I cannot follow him.

It might well be that legislation declaring that to be the effect or implication of such a bargain as before us would be wise, but to so read the Act seems to me would be to legislate, and that is not within our province.

I am unable either to read these subsections as implying that land bought for such a purpose must be free from buildings or structures of any kind, either useful or useless.

It is quite conceivable that the draftsman of the Act never contemplated such a good bargain chance as this possibly is. But that surmise does not help us for where we are to draw the line.

The other objections, certainly at this stage of the litigation, are not such as would entitle us to reverse the Court below.

In the *Shawinigan* case, 4 D.L.R. 502, 45 Can. S.C.R. 585, relied upon, there were involved such express statutory restrictions upon both the nature of the bargain and the term of credit, as are not to be found in the legislation invoked by the appellants to help out their contentions, so far as we are entitled to consider them.

I am of the opinion that this appeal should be dismissed with costs.

DUFF, J.:—I concur with the view of the Court of King's Bench, 31 Que. K.B. 458, that the authority given by the third sub-section of sec. 2723, R.S.Q., 1909, is not conditioned by sec. 2724 in such fashion as to require the school authorities to obtain the sanction of the Lieutenant-Governor in Council before exercising it. Section 2724 confers, in my opinion, supplementary powers.

The appeal should be dismissed with costs.

ANGLIN, J.:—Allard, J., has dealt so satisfactorily with the several objections taken by the appellant to the validity and legality of the resolution in question in this action, that I feel I cannot do better than adopt his reasons for holding those objections ill founded.

It may be that a transaction such as that before us in one

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which the law might very properly make subject to the approval of the Lieutenant-Governor in Council, or, at least, to that of the Superintendent of Public Instruction, in order that School Commissioners may not find themselves loaded with a costly building which may not be approved of as suitable for school purposes. But the law has not so provided. On the contrary, it has entrusted the acquisition of immovables for their purposes to the discretion of the School Commissioners.

There may also be some ground for suspecting the wisdom or even the singleness of purpose of the acquisition of a hotel property for school purposes. The appellant would invoke in that connection the supervisory power conferred by sec. 50 C.C.P. on the Superior Court. But since the Court of King's Bench did not regard this as a case calling for intervention under that extraordinary jurisdiction, I cannot but think it would be a mistake for this Court to attempt to exercise it even were there in the record evidence of facts from which indiscretion or a lack of good faith on the part of the Commissioners might be inferred. No such facts are shewn and not a single witness has deposed to his belief either that the projected purchase is improvident, or that the Commissioners in undertaking it were actuated by any motive other than a desire to discharge their duty to those whom they represent.

BRODEUR, J.:—The plaintiffs sue the School Commissioners of St. Félicien to quash a resolution passed by the latter on October 12, 1919. This resolution provided for the purchase of the Chibougamou Hotel at a cost of $26,000, of which $1,500 was to be payable during the next 5 years, and the balance at $500 per annum without interest. It was thoroughly understood that this property was bought in order that it might be converted into a school house.

Section 2610, R.S.Q. 1909, imposed upon the Commissioners the duty of maintaining a school in each district.

Now as the school house in the district in question was in a bad state of repair and no longer fulfilled the requirements of the law, having been condemned by the sanitary authorities, and being furthermore built upon land which did not belong to the Commissioners, it became necessary for the latter to build a new one; so they thought of this hotel and decided to acquire it.

The public notice required by sec. 2787, R.S.Q. 1909, was duly given on November 2, 1919. The ratepayers interested had 30 days to appeal to the Circuit Court from this decision of the Commissioners (secs. 2981-2982 R.S.Q. 1909), but they did nothing of the kind. This right of appeal gives the Circuit Court the right to render the decisions which the Commissioners should

have rendered and, consequently, gives the Court the powers necessary to prevent any illegality or injustice of which the Commissioners might be guilty (sec. 2988). So long as judgment is not rendered on this appeal, the decision of the Commissioners is suspended (sec. 2990, R.S.Q. 1909).

No appeal was taken by the appellants Hébert et al or by other ratepayers. The plaintiffs preferred to proceed by way of an action before the Superior Court and they asked that the resolution be quashed and annulled, "as being illegal, unjust and *ultra vires.*"

The Superior Court is not a Court of Appeal from decisions of School Commissioners. The jurisdiction of the Superior Court in school matters is derived from sec. 50 C.C.P. It has the power of control and supervision only, very different from the powers of a Court of Appeal. A Court of Appeal substitutes its opinion on the merits of the case for that of the Court which rendered the original judgment, while the Superior Court, under the authority of sec. 50 C.C.P., has not the right to encroach upon the functions which belong exclusively to the scholastic authorities and to substitute its opinion for that of such authorities on the merits of resolutions irregularly passed by the latter, and within the limits of their powers. (*Thériault* v. *Corporation of St. Alexander* (1900), 8 Rev. de Jur. 526).

Thus in the present case the Circuit Court had full jurisdiction to inquire into the injustice of the resolution that is attacked, but the Superior Court can at the very most inquire if the School Corporation acted in excess of its powers, if it committed an illegal act, or if the resolution attacked constitutes an absolute denial of justice. *Brunelle* v. *Corporation of Princeville* (1907), 17 Que. K.B. 99; *Corporation of Saint Pierre* v. *Marcoux* (1908), 17 Que. K.B. 172; *Giguére* v. *Corporation of Beauce* (1910), 19 Que. K.B. 353; *Corporation of Ste. Julie* v. *Massue* (1904), 13 Que. K.B. 228; *Thériault* v. *Corporation of St. Alexander, supra.* We have, therefore, to decide, first of all,if the purchase of the ground in question was *ultra vires.*

As I have already said the Commissioners are required to maintain a school in each district (art. 2610). They must see that the rules concerning hygiene are observed in connection therewith (secs. 2707-9). Now it has been proved that the place where the school was held had become unhealthy. It was, therefore, their bounden duty to build a new schoolhouse. The land upon which the old schoolhouse was situated did not belong to them; and, therefore, they considered it advisable to buy the Chibougamou Hotel which could probably be converted into a schoolhouse.

Had they the right to buy this property? Article 2723 of the

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School Code has been much discussed, but, in my opinion, it is not to this article that we must look to find the power of school corporations. This art. 2723 is, in fact, included under the heading "Of the powers of Commissioners and trustees relative to school properties." It would be more to the point to look for the enumerating of the powers of school corporations; and this is found in sec. 2635, R.S.Q. 1909. This sec. 2635, after declaring that the Commissioners form a corporation adds:—

"They shall have perpetual succession, may sue and be sued, and shall generally have the same powers which any other corporation has with regard to the purposes for which they were constituted."

We see by the sec. 358, C.C. (Que.) that a corporation can exercise all the rights necessary to enable it to fill the purpose for which it is destined. Thus, it may acquire, alienate and possess goods, it may contract, bind itself and obligate others towards it. If, by the general laws applicable in any particular case, these powers of buying or alienating were restricted, the corporation would naturally be obliged to respect such laws. Similarly, if duties were imposed upon it by the law to which it was subject, it would have to respect them.

As for school corporations, they have power to purchase land for school purposes, as I have just explained. We have now to see if there are any articles among the school laws which might restrain this right.

Section 2723, which is invoked by the appellant, far from restricting its powers, imposes, on the contrary, a duty upon the School Commissioners to acquire lands necessary for the erection of their schools. The law requires further that their school-houses be built in conformity with the plans and specifications furnished by the superintendent, but there is nothing to restrict the power of the Commissioners to buy a piece of land with a house upon it. They could not, however, convert this house into a school unless it were built in such a way as to meet the requirements imposed by the departmental authorities (sec. 2746 R.S. Q., 1909). But these dispositions cannot affect the right of the Commissioners to buy the house. It has not been proved in this case that the house which was bought could not be converted into an excellent school. Consequently, there is nothing in the case to justify our saying that the sale was not even desirable.

Section 2724, R.S.Q. 1909, has also been invoked in support of the contention that the resolution is *ultra vires*. This article declares that:—

"With the authorisation of the Lieutenant-Governor in Council, given upon the recommendation of the superintendent, school

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boards may enter into agreements for school purposes with any person, institution or corporation."

This article is, perhaps, not as clear as one could wish. Literally interpreted it might mean that the Commissioners were, practically, unable to adopt a resolution without going before the Lieutenant-Governor in Council to have it authorised. This article, evidently, refers, as other Judges in the inferior Courts have said that it does, to a restriction imposed upon the Commissioners to refrain from making agreements with educational establishments for the tuition of their children for a period of several years without having obtained the required authorisation. This shows a desire to see that instruction given in schools is of a proper moral and religious character; so, the departmental authorities reserve to themselves the right to advise the Commissioners before they become involved and bind the school corporation. That is the object of sec. 2724.

The resolution is, therefore, not *ultra vires*.

It is also said that the resolution is illegal because the purchase was made on credit, that this constitutes a loan and that school corporations cannot borrow without the authorisation of the Lieutenant-Governor in Council (sec. 2727, R.S.Q. 1909).

This is not a contract of loan, but a contract of sale on credit. These are two very different things. What is a loan? It is a contract by which the lender gives the borrower a certain quantity of things under an obligation by the latter to return a like quantity of things of the same kind and quality (sec. 1777, C.C.) Sale is a contract whereby one person gives a thing to another for a price in money (sec. 1472, C.C.) The purchaser may obtain a delay for the payment of the price (sec. 1533, C.C.) The contract of sale gives rise to rights which do not exist in the case of a loan (sec. 2008-9, C.C.)

Loan at interest and sale on credit with a stipulation for interest are, I admit, very similar, but they must not be confused one with another, especially when it is a question of *ultra vires* or illegality. If the law forbids a person to borrow, it does not necessarily follow that that person is also unable to buy, on the contrary, if he has been given specifically the power to purchase, he does not commit an act in excess of his powers if he enters into a contract of purchase.

The appellants also pretend that the resolution should have provided for the mode of payment either by taxation, loan, or a bond issue.

Section 2903, R.S.Q. 1909, seems to admit that a debt can be contracted without the formality of a loan. The Commissioners

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can acquire a property by sale on credit and, in consequence of such fact, the school municipality may become indebted.

A decision to this effect was rendered in 1881 by the Court of Appeal in a case of *La Corporation du Village de L'Assomption* v. *Baker* (1881), 4 Leg. News (Que.) 370. This jurisprudence appears to have been accepted and the legislature has never intervened to set it aside, at least as far as school corporations are concerned.

As for the question of injustice raised by the appellant, I think that is a question which can only be decided by the Circuit Court as a Court of Appeal. There is nothing in the case which induces us to declare that there was an absolute denial of justice.

For all these reasons, the appeal should be dismissed with costs.

MIGNAULT, J.:—This case, in which a demand is made for the annulment by reason of illegality of a resolution of the respondents providing for the purchase of a hotel to be converted into a schoolhouse, reaches this Court after having been decided already by three Courts. The Superior Court and the Court of Appeal decided in favour of the respondents; the Court of Review, on the contrary, upheld the appellants, and there were dissenting opinions both in the Court of Review and the Court of Appeal. It seems to me that when all the Courts of the Province of Quebec have been called upon to pronounce on the validity of administrative or other acts of a municipal or school corporation, the dispute should be exhausted and, unless there is ground under the law governing the right of appeal to this Court at the time of the institution of the present action for throwing doubt upon our jurisdiction to make a decision of the dispute between the parties, I regard with regret the persistence of the parties in thus ruining themselves with costs in order to decide a question which is of very minor local importance. I cannot refrain from thinking that the dispute has arisen out of a village quarrel. At all events the School Commissioners for the municipality of St. Félicien seem to me to have sought in good faith to procure a more suitable building than that which is at present used as a school in district No. 1 of that municipality, which latter building has been condemned by competent authority as being unhealthy.

I have read the whole record and I have no hesitation in dismissing the appeal for the reasons given by Allard, J., in which I entirely concur.

Appeal dismissed.

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*STANDARD MARINE INS. Co. v. WHALEN PULP & PAPER MILLS Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. January 10, 1922.

INSURANCE (§ IIIE—109)—SEAWORTHINESS OF VESSEL—KNOWLEDGE OF ASSURED—FLOATING POLICY.

Where in marine insurance the vessel is covered by a floating policy, non-disclosure on the part of the assured of matters as to its unseaworthiness arising after the execution of the policy *of marine insurance* or of his prior knowledge that the vessel was once refused insurance, does not affect the liability of the insurer.

APPEAL by defendant from judgment of Murphy, J. Reversed.

E. C. Mayers and *A. H. Douglas*, for appellant.

E. P. Davis, K.C. and *Ghent Davis*, for respondent.

MACDONALD, C.J.A.:—The plaintiffs issued to the defendants a floating policy of marine insurance to cover wood pulp to be transported from Mill Creek near Vancouver, "in the ship or vessel called the Steamers approved, including risk of North Bend barge and 2 scows."

The defendants chartered a barge or scow called the "Baramba" from the Kingsley Navigation Co. of Vancouver, and sent her to Mill Creek to be loaded and while in the course of being loaded she sank at defendant's wharf. The claim for insurance was paid and after proceedings had been commenced against the Kingsley Navigation Co. by the plaintiffs, who had been subrogated to defendant's rights, for damages, the plaintiffs allege that they discovered that the defendants were aware of the unseaworthiness of the "Baramba" prior to loading and had not communicated this fact to the plaintiffs. They, therefore, discontinued that action and sued the defendants to recover the insurance money paid to them.

Mr. Davis, in his argument at the trial submitted his case in these words:—

"We were asked to insure the cargoes and we undertook to admit seaworthiness of any vessel that was used; therefore, if the vessel was unseaworthy and defendants didn't know about it, we were liable. And although we knew when we paid that she was unseaworthy, we didn't know that the defendant had been aware of that and he hadn't told us and that is our whole cause of action."

Mr. Mayers argued that there was no such duty; that the policy being a floating one no subsequent non-disclosure could invalidate it. Had it been a ship contract and not a ship or ships contract, he admits his clients would have been liable.

"The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared, is that he will insure any

*Affirmed by the Supreme Court of Canada, 68 D.L.R. 269.

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goods of the description specified which may be shipped on any vessel answering the description, if any there be in the policy, on the voyages specified in the policy to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this for he has no option to reject any vessel which the assured may select." (Lord Blackburn in *Ionides* v. *Pacific Insurance Co.* (1871), L.R. 6 Q.B. 674 at p. 682).

Now what defendants did know was that the "Baramba" was refused insurance. They had been told that she had been overhauled and was in good condition, they, therefore, undertook to insure her themselves by agreeing to return her to her owners in good condition. The letters of Brennan, the defendants' manager at Mill Creek, were written after the event and are based on statements of the captain of the tug which brought the "Baramba" to Mill Creek, made after the event. That they were not accepted as admissions, that the defendants knew of the unseaworthiness of the "Baramba" before the loss, is apparent from the Judge's finding. He found, and he bases his judgment on that finding, that the defendants knew that insurance could not be got on the "Baramba". He finds her to have been unseaworthy but that the defendants did not consider her so. It appears from the argument at the trial, which is contained in the appeal book, that counsel did not call to the attention of the Judge the fact that this was a floating policy and that while the absence of full disclosure of all material facts before the contract was executed would vitiate it, that that rule does not at all events in all its strictness, apply to non-disclosure of matters arising after execution of the policy. Here the contract had already been made before the facts came into existence which the defendants contend ought to have been disclosed. The company was already bound and in the absence of evidence of knowledge of unseaworthiness on the part of the defendants, (and perhaps with such knowledge, though I do not decide this) they cannot resist payment.

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

MARTIN, J.A., would allow the appeal.

MCPHILLIPS, J.A. (dissenting):—This appeal brings up for consideration a point of very considerable nicety in marine insurance law.

Mr. Mayers the counsel for the appellant, in a careful and able argument, develops the appeal upon the postulation that the trial Judge had misconceived the principle of law upon which the case must necessarily be decided, that is, that the insurance was

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in its nature a floating policy, and all goods on whatever ships carried were insured and fell automatically under the policy once the insurance was effected.

The counsel for the appellant strongly relied upon *Ionides* v. *Pacific Fire & Marine Insurance Co.* (1871), L.R. 6 Q.B. 674; (1872), L.R. 7 Q.B. 517, 41 L.J. (Q.B.) 190, 21 W.R. 22; *Cory* v. *Patton* (1872), L.R. 7 Q.B. 304, 41 L.J. (Q.B.) 195n, 20 W.R. 364; *Lishman* v. *Northern Maritime Ins. Co.* (1873), L.R. 8 C.P. 216; (1875) L.R. 10 C.P. 179, 44 L.J. (C.P.) 185, 23 W.R. 733—might also be referred to—these cases are certainly forceful upon a similar state of facts—but here the fact is and it is so found by the trial Judge, that the ship upon which the goods were to be carried was uninsurable to the knowledge of the assured. If a ship be uninsurable surely that is a material matter and should be made known to the insurer, it in my opinion is cogent evidence of unseaworthiness. In the Marine Insurance Act, 1906, ch. 41, which of course is not governing statute law with us, the enactment as to what is material may be said to be the effect of the cases which are binding upon us, reads as follows:—

"Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." (See *Ionides* v. *Pender* (1874), L.R. 9 Q.B. 531, 43 L.J. (Q.B.) 227, 22 W.R. 884; *Rivaz* v. *Gerussi* (1880), 6 Q.B.D. 222, 50 L.J. (Q.B.) 176; *Thames and Mersey Mar. Ins. Co.* v. *"Gunford" Ship Co.*, [1911] A.C. 529, 80 L.J. (P.C.) 146; *Seaman* v. *Fonnereau* (1743), 2 Stra. 1183).

Lynch v. *Hamilton* (1810), 3 Taunt. 37, 128 E.R. 15, and *Lynch* v. *Dunsford* (1811), 14 East. 494, 104 E.R. 691, exemplify to what extent disclosure is requisite; there, the policy was effected on goods on board "ship or ships", the assured did not inform the insurer that the "President" upon which the goods were, had been reported at Lloyd's as at sea deep and leaky—the suppression of the fact avoided the policy, although it turned out that the intelligence at Lloyd's was unfounded, the "President" never having been deep or leaky. Further, there are facts in the present case which establish, reasonably, that the assured was aware of the unseaworthiness of the ship, besides the uninsurability thereof, and see—Lord Macnaghten in *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531, at p. 543.

The result of the cases would appear to conclusively show that every concealment of a material circumstance, whether it should be by design or mistake, would result in the avoidance of the policy. It follows that the only safe course is to declare all that is known; then, it will be for the underwriter to determine what he will do. The peril in any other course of procedure is that

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a Judge or jury may determine that to be material which has not been disclosed and the policy avoided, and this may occur even where the concealment was without fraudulent intent, but only an error of judgment. (See *Shirley* v. *Wilkinson* (1781), 1 Dougl. 306, n.) Of course, if fraud entered into the contract it would make no difference whether that concealed was material or not. It has been said that no minute disclosure is necessary (see *Asfar* v. *Blundell*, [1896] 1 Q.B. 123, 65 L.J. (Q.B.) 138, 44 W.R. 130; *Cantiere Meccanico Brindisino* v. *Janson*, [1912] 3 K.B. 452, 81 L.J. (K.B.) 1043), but can it reasonably be said that it was not material to make the disclosure that no insurance was obtainable upon the ship upon which the goods were to be carried, which is the present case? I am of opinion that there can be only one answer, and that is, that there was here the concealment of material facts, these being uninsurability and facts going to establish if not demonstrating the unseaworthiness of the ship, which facts should have been disclosed by the assured to the insurer.

No doubt, there is some conflicting evidence as to the unseaworthiness, but it is not unreasonable to say upon the evidence that there was knowledge in the assured as to the state of the ship which should have been made known by the assured to the insurer.

Mr. Davis, the counsel for the respondent in his very able argument, laid great stress upon the point that this was a case of the loading of goods upon an unseaworthy ship, known to be unseaworthy by the assured and the insistence upon the insurance placed thereon. I cannot say that the counsel upon the facts has stated the case at all too broadly. When there was known unseaworthiness in the assured, it matters not that unseaworthiness was admitted by the insurer. (See Buckley, L.J., in the *Cantiere* case, *supra*, at p. 469.) It is true that under a floating policy it may be that the name of the ship is not known to the insurer, but that does not mean that the ship may be unseaworthy and that nevertheless the insurer is liable. (See per Mansfield, C.J., *Lynch* v. *Hamilton* (1810), 3 Taunt. 37, 128 E.R. 15; *Knight* v. *Cotesworth* (1883), 1 Cab. & El. 48; *Thames & Mersey Ins. Co.* v. *"Gunford" Ship Co.*, [1911] A.C. 529). The insurance here was on "ship or ships" and is an exception to the general rule, and the insurance is *bonâ fide* when the assured is ignorant of the name of the ship by which the goods insured have been consigned. That was not the present case, and withholding the name with the knowledge of the assured vitiated the policy, (see Arnould on Marine Insurance, 10th ed. (1921) at pp. 254, 255).

For the foregoing reasons, I am of the opinion that the appeal should be dismissed.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

THE KING v. CARON.

Exchequer Court of Canada, Audette, J. June 27, 1921.

TAXES (§ I B—10)—INCOME WAR TAX ACT—CONSTITUTIONALITY—B.N.A. ACT—DIRECT TAXATION—MINISTER OF PROVINCIAL CROWN.

The right of the Dominion of Canada under art. 3 of sec. 91 of the B.N.A. Act to raise a revenue by "any mode or system of taxation," namely by direct or indirect taxation, in no way conflicts with the right granted to the provinces by sec. 92, art. 2 to raise a revenue by direct taxation for provincial purposes. The Dominion Crown has independent power to raise revenue by direct taxation upon the income of persons residing within its territorial jurisdiction, and the income of a provincial minister is not immune from such taxation.

[*John Deere Plow Co.* v. *Wharton*, (Annotated), 18 D.L.R. 353, [1915] A.C. 330, referred to.]

INFORMATION by the Dominion Crown to recover from defendant the sum of $210 income tax.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for plaintiff.

Aimé Geoffrion, K.C., and *Charles Lanctot*, K.C., for defendant.

AUDETTE, J.:—This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the defendant is the Minister of Agriculture for the Province of Quebec, receiving as such, a salary (R.S.Q., 1909, sec. 574), of $6,000, and an indemnity of $1,500 as a member of the Legislature, and that in computing the amount of income tax for which the defendant is claimed to be liable for the year 1917, the said sums have been taken into consideration and account, showing in the result a liability to the Crown, for such income tax, of the sum of $210.

By his amended statement of defence the defendant denies, among other things, that he is "a person liable to taxation under the Income War Tax Act, 1917, ch. 28, and amendments thereof," alleging that the said Acts are unconstitutional and *ultra vires* of the powers of the Parliament of the Dominion of Canada, in so far as they intend to apply to the defendant, who is a Minister of the Crown for the Province of Quebec.

The defence rests upon paras. 6a and 7 thereof, which respectively read as follows, viz.:—

"6a. The Income War Tax Act, 1917, and amendments thereto, are unconstitutional and *ultra vires* of the powers of the Parliament of Canada.

7. The Income War Tax Act, 1917, and amendments thereof are unconstitutional and *ultra vires* of the Parliament of the

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Dominion of Canada, in so far as they intend to apply to the defendant, who is a Minister of the Crown for the Province of Quebec."

By sec. 2 (1) of (1919), sub.-sec. 1 of sec. 3 of the Income War Tax Act, 1917, was amended by including in the term "income" the salaries and indemnities or other remuneration of members of provincial legislative councils and assemblies, whether such salaries or indemnities are paid out of the revenues of His Majesty in respect of any province. And by sec. 10 of the Act this amendment is deemed construed to have come into operation on and from the date upon which the Income War Tax Act, 1917, came into operation.

The parties hereto have filed the following admission of facts, viz.:—

"It is admitted for all purposes of this action that the Minister of Finance determined the amount payable for the tax by the defendant herein pursuant to the requirements of the Income War Tax Act, 1917, and amendments thereto, as being the sum of $210, and thereupon, November 21, 1918, sent by registered mail a notice of the said assessment in the form prescribed by the Minister to the defendant, notifying him of the aforesaid amount as payable by him for the tax; also it is admitted that of the income in respect of which such tax was determined $6,000 is defendant's salary as Minister of Agriculture of Quebec, under art. 574 of the Revised Statutes, 1909."

The whole controversy rests upon art. 3 of sec. 91 of the B.N.A. Act, 1867, and art. 2 of sec. 92 thereof, which respectively read as follows:—

"Sec. 91, art. 3.—*The raising of money by any mode or system of taxation.*

Sec. 92, art. 2.—Direct taxation within the Province in order to the raising of a revenue for provincial purposes."

It is a sound rule of statutory construction that every word ought to be construed in its ordinary or primary sense, unless a second or more limited sense is required by the subject-matter of the context.

There is no conflict between these two sections, and taking them in their plain and ordinary meaning it is beyond cavil that the plenary power of "raising money by any mode or system of taxation"—either direct or indirect—is vested in the Dominion; and it is equally true that the Province has plenary power to raise money by "direct taxation," but for provincial purposes exclusively. This is the proper meaning that judicial interpretation arising out of decided cases attaches to these two sections.

"Each class is allowed full scope to which upon the natural import of language used it is entitled, the jurisdictions must inevitably overlap, or to use Lord Watson's expression, 'interlace.' . . . The federal classes are to be viewed as confined to matters of common Canadian concern and the provincial as covering matters of local provincial concern, and after applying further the great cardinal rule of interpretation laid down by the Privy Council in the *Parsons'* case (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 26, that the two secs. 91 and 92 must be read together and the language of the one *interpreted and where necessary*, modified by that of the other, it will appear that there are domains in which *intra vires* federal legislation will meet *intra vires* provincial legislation." Clement's Canadian Constitution, 464. See also Lefroy's Canada's Federal System, 166, 265, 279 and 281.

But there is more. The powers of the Dominion, given by the opening enactment of sec. 91, makes it lawful to make laws for the peace, order and good Government of Canada, in relation to all matters *not coming* within the classes of subjects assigned to the provinces. And it adds:—"And for greater certainty, but not so as to restrict the generality of the foregoing terms of this section—as above mentioned—it is hereby declared that (*notwithstanding anything in the Act*) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." And there follows the several articles, among which art. 3 is found which gives the Dominion the right to raise a revenue by direct taxation, *notwithstanding anything in the Act. Intra vires* federal legislation must override, if necessary, inconsistent *intra vires* provincial legislation; because when such authority is so given to the Dominion, it has paramount authorty, and the plenary operation assured by the *non obstante* clause with which the class enumeration opens. *Tennant's* case, [1894] A.C. 31, 63 L.J. (P.C.) 25; *The Fisheries* case, [1898] A.C. 700, 67 L.J. (P.C.) 90. By the very language of the opening clause of sec. 91 the rule of federal paramountcy must obtain.

However, is there in this case actual conflict? There is nothing repugnant in either enactment in finding that the Dominion has full authority, etc., and that it is acting within the full scope of its powers and with respect to matters of common Canadian concern or of the body politic of the Dominion, in enacting the Income Tax Act and that the Province has the power, in raising revenues for provincial purposes, to raise revenue by direct taxation.

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The Dominion has a right, under sec. 91, to raise revenue, for matters of common Canadian concern—and for peace, order and good government—by direct and indirect taxation, whilst the province, for provincial purposes can only raise by direct taxation. There is no repugnancy or conflict between these respective powers. The exercise by the Dominion of the authority to raise revenue by direct and indirect taxation for federal purposes does not trench upon the authority of the Province to raise revenue for provincial purpose by direct taxation.

Finding otherwise would, without justification, interfere with the revenues of the Dominion when there is no text in the Act, or possible construction thereof, to justify such course.

In the interpretation of a self-governing constitution founded upon a written organic instrument, such as the B.N.A Act, if the text is explicit, the text is conclusive. But, when the words establish two mutually exclusive jurisdictions, recourse must be had to the general context of the Act. *Reference* case, 3 D.L.R. 509, [1912] A.C. 571.

Dealing with the proviso at the end of sec. 91, the case of the *Att'y.-Gen'y. of Ontario* v. *Att'y.-Gen'l. for Dominion*, [1896] A.C. 348, 65 L.J. (P.C.) 26, settles and correctly describes all the classes enumerated in sec. 92 as being from a provincial point of view of a local or private nature. It is to be read, therefore, as a limiting proviso to sec. 92. In other words, as put by Clement, J.'s Canadian Constitution: "Provincial jurisdiction extends to all matters in a provincial sense, local or private within the province; subject, however, to this proviso, that any matter really falling within any of the class enumerations of sec. 91, is to be deemed of common Canadian concern and not in any sense a matter local or private within any province." And at p. 366 he adds: "It has been frequently recognized by this Board, and it may be regarded as settled law, that according to the scheme of the B.N.A. Act, the enactments of the Parliament of Canada, in so far as they are within its competency must override provincial legislation."

In *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 51 L.J. (P.C.) 26, cited by plaintiff's counsel at Bar, Sir Montague Smith, L.J., referring to the apparent conflict of powers between secs. 91 and 92, by way of illustration of the principle that the powers exclusively assigned to the Provincial Legislatures were not to be absorbed in those given the Dominion Government, said at pp. 108, 109:—"So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sec. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province in

order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sec. 92, it obviously could not have been intended that in this instance also the general power should override the particular one."

Continuing, Sir Montague Smith says:—"With regard to certain classes of subjects, therefore, generally described in sec. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist, and in order to prevent such a result, *the two sections must be read together, and the language of one interpreted, and where necessary, modified by that of the other.*"

And that is the principle of construction which I have sought to apply to this case.

Part of the passage last cited has been referred to by Lord Hobhouse in the *Lambe* case (1887), 12 App. Cas. 575, 56 L.J. (P.C.) 87, and relied upon by defendant's counsel at Bar, but in my opinion nothing can be gathered from it which would justify the contention that the Dominion could in any way be deprived of its power of direct taxation.

Then we have a recent expression of opinion touching the respective powers of legislation granted by secs. 91 and 92, by their Lordships of the Judicial Committee in the *John Deere Plow Co's.* case (annotated) 18 D.L.R. 353 at 357-8, [1915] A.C. 330, 84 L.J. (P.C.) 64, to the following effect: "The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec. . . . To these resolutions and the sections on them, the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case *Att'y.-Gen'l. for Australia Commonwealth* v. *Colonist Sugar Refining Co.*, [1914] A.C. 237, 83 L.J. (P.C.) 154, that if *there is at points obscurity in language, this may be taken to be due, not to uncertainty* about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been

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placed side by side, shews that those who passed the Confederation Act, intended to leave the working out and interpretation of these provisions to practice and to judicial decision."

There is an early case which deserves mention if only for the clarity of its language touching the matter in controversy between the parties in the case now before the Court. I refer to *Dow* v. *Black* (1875), L.R. 6 P.C. 272, 44 L.J. (P.C.) 52, 23 W.R. 637, where Lord Colvile says at p. 282: "They (their Lordships) conceive that the third article of sec. 91 is to be reconciled with the 2nd article of sec. 92 by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes."

Now, passing to the other contention of the defence respecting property and civil rights, counsel asserts, *inter alia*, that an outside authority over which the Provincial Legislature has no control cannot deprive its members of part of the monies voted actually to them as members, compensating them in the discharge of their duties as representatives of the people of the Province, or voted as salaries to members of the Provincial Government. And he asks that if this tax is lawfully imposed what is then to prevent the Parliament of Canada imposing a direct tax and to *any amount* expressly on members of the Provincial Legislature? And he adds that the revenues, and duties, under sec. 126, raised by the Legislature form a consolidated revenue fund.

The reply to this purely suppositious case is that the proper time to deal with it will be when it arises. The Courts do not concern themselves with or forestall difficulties that may be imagined but which do not exist in the facts before them; nor are they disposed to answer hypothetical questions. See per Lord Mansfield in *The King* v. *Inhabitants of West Riding of Yorkshire* (1773), Lofft 238, and *Dyson* v. *Att'y-Gen'l*, [1911] 1 K.B. 410, 80 L.J. (K.B.) 531.

The Dominion in raising this tax does not in any manner attempt to interfere with the exercise of provincial powers, but merely asserts that when the power is exercised the recipient of the indemnity and the salary shall be answerable to federal legislation in the same manner as other persons or residents, irrespective of the source from which the individual's income is derived.

In the *Lambe* case 12 App. Cas. 575 at 587, their Lordships make the following observation in respect of oppression or *ad convenienti* argument: "If they find that on the due construction of the Act a legislative power falls within sec. 92, *it would be quite wrong of them to deny its existence because by some*

possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament." And per Lord Loreburn L.C. in *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l for Canada,* 3 D.L.R. 509 at 513, "It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power."

And, as said, *inter alia,* in Clement's Canadian Constitution, 3rd ed., p. 482: "In the case from which this finding is taken, the right of the provinces to tax objects and institutions over which the federal parliament has legislative jurisdiction was affirmed in the *Lambe* case (*ubi supra*) . . . Dominion excise laws may be rendered nugatory by provincial prohibition. A province may sell its timber on terms prohibiting exports . . . As has been said, lawful legislation does not become unlawful because it cannot be separated from its inevitable consequences."

As a further answer to the defence's contention in this respect, the observations of Lord Hobhouse in the same case are very apposite. He said at p. 586: "Their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries, such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes."

The well-known cases of *Webb* v. *Outrim,* [1907] A.C. 81, 76 L.J. (P.C.) 25, and *Abbott* v. *City of St. John* (1908), 40 Can. S.C.R. 597, were much discussed at the argument.

In the case of *Railroad Co.* v. *Paniston* (1873), 18 Wall. (85 U.S.) 5, Strong, J., is reported as saying, at p. 36: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax,* that is upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

The stock argument of interference with property and civil rights in the province needs only a passing observation. In the

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case of *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 49 L.J. (P.C.) 63, their Lordships offered, *inter alia*, the following observations: "It is therefore to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*" Thereby reserving to the sovereign legislature its plenary power in relation to all matters coming within the classes of subjects mentioned in sec. 91, as the Act expressly states. See also *Tennant* v. *Union Bank, supra; Att'y-Gen'l* v. *Queen Insurance Co.* (1878), 3 App. Cas. 1090; *Bourgoin* v. *Montreal, Ottawa and Occidental R. Co.* (1880), 5 App. Cas. 381, 49 L.J. (P.C.) 68.

Again in the *Russell's* case (1882), 7 App. Cas. 829, at p. 839-840, 51 L.J. (P.C.) 77, is found the following language: "Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instances under discussion must always be determined in order to ascertain the class of subject to which it really belongs."

And again per Anglin, J., in *Re Insurance Act (1910)*, (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260 at p. 310:—"when a matter primarily of civil rights has attained such dimensions that it 'affects the body politic of the Dominion' and has become 'of national concern,' it has, in that aspect of it, not only ceased to be 'local and provincial,' but has also lost its character as a matter of 'civil rights *in the province*' and has thus so far ceased to be subject to provincial jurisdiction that Dominion Legislation upon it under the 'peace, order and good government,' provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.'

On the whole I fail to see any ground upon which the defendant should be treated with discrimination as regards the other citizens or public of Canada in relation to liability for a tax of the nature here in question. See *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428, 85 L.J. (P.C.) 60.

I have come to the conclusion that the Dominion has, under the several provisions of sec. 91 of the B.N.A. Act, 1867, independent plenary power within its own proper legislative domain,

and disparate from and unrelated to any provincial right of taxation, to raise revenue by direct taxation upon the income of persons residing within its territorial jurisdiction, and that the immunity or exemption claimed by the defendant cannot avail.

There will be judgment against the defendant, as prayed, for the sum of $210, with interest thereon at the rate of seven per centum per annum (as provided by 1917, sec. 10 of ch. 28) from November 21, 1918, to the date hereof and with costs.

Judgment accordingly.

MEN'S ATTIRE REGISTERED v. HART.

Quebec Superior Court in Bankruptcy, Panneton, J. June 24, 1922.

BANKRUPTCY (§ IV—40)—PROPOSED COMPROMISE—AUTHORISED TRUSTEES' FEES FIXED BY—JURISDICTION OF COURT TO GRANT ORDER FOR PAYMENT.

The Superior Court in Bankruptcy has no jurisdiction to dispose of a petition of the authorised trustee for an order against a debtor for the immediate payment of a sum fixed as the amount of his fees under a proposed compromise. The trustee's costs must be taxed by the Registrar and if not satisfactory an appeal lies to the Bankruptcy Court.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by authorised trustee for an order for immediate payment of his fees fixed by a proposal of compromise by which his fees were to be paid in cash. Refused.

P. Ledieu, for debtor.

S. G. Tritt, for trustee contestant.

PANNETON, J.:—The authorised trustee petitions the Court for an order against the debtor for the immediate payment of $1,136.14 to him for his fees as trustee, in this bankruptcy matter. He claims this under the proposal of compromise by which the trustee's fees were to be paid in cash. He also asks that, in any event, the Court do proceed to fix his remuneration.

The Court has no jurisdiction to dispose of said petition, the trustee's costs must be taxed by the Registrar, and if not satisfactory, an appeal lies before this Court. The only case where the trustee's remuneration is fixed by the Court is mentioned in sec. 40 of ch. 36, 1919, (Can.), as amended by ch. 17, 1921, sec. 33.

The Court declares that it has no jurisdiction and as this want of jurisdiction has not been raised by the party contesting the petition, the petition is dismissed without costs.

Petition dismissed.

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SCALES v. GRAYSON, EMERSON & McTAGGART.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

SOLICITORS (§ IIA—22)—NEGLIGENCE—LOSS TO CLIENT—LIABILITY.

Solicitors who, misinterpreting their client's instructions bid more at a sale of land than they have been authorised to do, and after learning of their mistake neglect to take steps which are in their power to give effect to those instructions, but proceed to obtain a transfer and have the sale confirmed and thus involve their client in a loss, must make good the loss sustained through their negligence.

APPEAL from a judgment in favour of plaintiff in an action for damages for loss sustained through the negligence of the defendants, his solicitors. Affirmed.

J. F. Frame, K.C., for appellants.

F. L. Bastedo, for respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from a judgment in favour of the plaintiff for damages for loss sustained through the negligence of the defendants. The defendants were solicitors for the plaintiff, who resided in Prince Edward Island. In their capacity as solicitors, they brought on behalf of the plaintiff an action against H. R. Sugden and H. J. Hawthorne upon an agreement for the sale of land. In the course of that action the defendants obtained an order for the sale of the land set out in the agreement in case the amount found due thereunder was not paid within the time fixed by the Court, which was January 14, 1920. The land was subject to a mortgage to the Trust & Loan Co. of Canada for $800, which Sugden and Hawthorne had agreed to assume in addition to the amount mentioned in the agreement. Sugden and Hawthorne did not pay. On January 31, 1920, the plaintiff wrote a letter to the defendants, which letter, in part, reads as follows:—

"Advertise the property subject to mortgage, or otherwise, as you consider best. At the sale of this property I want you to bid for me, but do not bid above $2,600."

On February 17, 1920, the plaintiff again wrote to the defendants from Phoenix, Arizona, as follows:—

"Kindly forward to me at Summerside, P.E.I., copy of the advertisement re S.W. 18-13-7/3rd. I assume you are bringing this land to sale as quickly as possible. I assume, too, that in bidding for me you will buy the land as cheaply as possible—that is should it not go above my outside price of $2,600."

This letter the defendants acknowledged on February 25, but sent their reply to Pheonix, Arizona. On March 22, 1920, the said land was offered for sale by Sheriff Rutherford, the officer appointed by the Court to sell. The land was offered subject to

the mortgage above referred to, and taxes. Two bids were made. One of $2,400, by a Mr. Ross, and one of $2,450, on behalf of the plaintiff by a student-at-law from the defendants' office, who, in the absence of the member of the firm who had charge of the matter, attended the sale. The land was knocked down to the plaintiff at that price. On March 25, the defendants notified the plaintiff of the sale, and on April 3, he replied as follows:—

"I am in receipt of your letter dated March 25 and note contents. I note, too, that the land has been sold subject to mortgage and taxes. I am assuming that the price of $2,450 is the net cost of the land to me, not this amount over and above the mortgage, taxes, etc."

On June 26, the defendants obtained from Sheriff Rutherford a transfer of the land in favour of the plaintiff, subject to the mortgage and taxes, and on August 26 they obtained an order from the Local Master confirming the sale. On September 1 the plaintiff wrote protesting that the mortgage and taxes should have been paid out of his $2,450 bid, and that his judgment against Hawthorne and Sugden for the deficiency should have been the amount of the mortgage and taxes over and above what it actually was. At the time of the sale there was unpaid under the mortgage the sum of $659.64, and there were due for taxes $69.30. These sums, together with the $2,450 which the defendants had bid, amounted to $3,178.94, which was the price of the land to the plaintiff; who contends that under his instructions the defendants were only authorised to bid $2,600 for the land, free of encumbrance. The trial Judge upheld the plaintiff's contention, and gave him judgment for the difference between $3,178.94 and the $2,600 which he had authorised the defendants to bid. The defendants now appeal.

In my opinion the trial Judge was right. The instructions in the plaintiff's letter of January 31, authorising the defendants to sell subject to the mortgage or otherwise as they considered best, followed by authority to bid for him $2,600, make it reasonably clear that $2,600 was the price the plaintiff was willing to pay for a clear title. If the defendants had considered it best to sell the land free of all encumbrances, it is clear that they were authorised to bid only up to $2,600. That being so, I fail to see how they could interpret their instructions as authorising a bid of $2,600, subject to the encumbrances. But even if their instructions had been less clear than they were, the defendants knew on April 3 that they had misinterpreted the plaintiff's intention. As the plaintiff had the leave of the Court to bid at the sale, and as he was the purchaser, all the defendants had to do was to abandon the sale of March 22 and advertise the land

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for sale again. At that time they did not have transfer from Rutherford and the sale had not been confirmed. Instead of taking these steps to give effect to their client's intention, they proceeded to obtain a transfer and have the sale confirmed. In bidding $2,600 for the land subject to the encumbrances, the defendants, in my opinion, acted contrary to their instructions, and involved their client in a loss. This loss they must make good. At the trial evidence was adduced to shew that the value of the land was $1,600, cash, or $2,000, on time.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

CALHOUN v. LAMSON & HUBBARD CANADIAN CO.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

MASTER AND SERVANT (§ IC—10)—EVIDENCE SHEWING EMPLOYMENT—INTENTION OF PARTIES—SERVICES NOT TO BE GRATUITOUS—REASONABLE ALLOWANCE—QUANTUM MERUIT.

Where the evidence shews that a plaintiff was employed by the defendant and that he rendered very considerable services to his employer, and it being also clear that he did not intend to give his services without compensation, and that this was understood by the employer, the Court will allow him a reasonable allowance for his services, on a *quantum meruit*, according to the evidence and circumstances of the case.

APPEAL by plaintiff from the trial judgment in an action to recover payment for services. Reversed.

N. D. Maclean, K.C., for appellant.

S. B. Woods, K.C., for respondent.

SCOTT, C.J., concurred with BECK, J.A.

STUART, J.A.:—It is perfectly obvious that there has been bad blood between the parties in this case from the very beginning and before the litigation began and it very probably extended to their solicitors.

The plaintiff made extravagant claims, which, considering the meagre evidence put forward by him to show what services he had actually performed, or to show any valid agreement to give him stock, the defendants were, I think, perfectly justified in resisting. I observe, though, that at one point in the evidence where the plaintiff was describing what he had done the trial Judge complained of his going into such detail. It is just the absence of specific detail, particularly with reference to the operations of 1920 that stands especially in the plaintiff's way so far as any even moral claim to any very large sum is concerned.

But, on reading the whole evidence, I cannot but conclude

that the plaintiff did perform considerable services for the defendant company and that he did so at the request of authorized agents of the company. Undoubtedly, Bryan was in full control of the company's affairs in Canada, and requested the plaintiff to do many things on its behalf. He was also, undoubtedly, given an official name as manager or superintendent of transportation.

The plaintiff may have been self-contradictory and inconsistent in many of the details of his evidence, but he was not alone in this respect. For instance, Lane, on his own admission, used him as a secret agent to purchase the boat "The Slave River" and got him to buy it, really for the defendant, in the name of a company of which the plaintiff was an officer, and yet he turned around and endeavored to make out that he was a mere messenger to convey an offer.

With respect to the pure point of law upon which the trial Judge decided the case I am of opinion, with much respect, that he took too narrow a view. The plaintiff performed many services for the defendant company at the request of their authorised agents, Bryan and (with respect at least to the purchase of the boat) Lane. I have no doubt upon the evidence that it was thoroughly understood between Bryan and the plaintiff that he should get some remuneration for those services. It is true, of course, that the plaintiff refused to accept a salary. I interpret what was said to mean that he did not want to appear as getting so much a month or a year as a salaried officer, but he wanted to be given something in a lump and he suggested a block of stock in the company. No valid bargain to give him stock was ever proven.

But when services, certainly of some considerable value, were, in fact, performed at the defendant's request, I think the Court should place an interpretation on what was said as favourable as possible to the plaintiff's right to be paid for them. If he spoke of not wanting money I think he meant merely that he did not want to become a salaried servant receiving a monthly stipend, but that if he could not be given stock in the company he should never get anything at all is more than I am prepared upon the evidence to hold that Bryan and he intended.

I am of opinion, therefore, that the Court should allow him a reasonable lump sum of money as remuneration. There is grave danger, of course, in accepting Bryan's estimate of what his services were worth in view of Bryan's disagreement with the directors.

I think that $3,000 in all would be a reasonable allowance and

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I would allow the appeal with costs and direct judgment to be entered for the plaintiff for that sum with costs of the action.

BECK, J.A.:—Counsel for the plaintiff opened his evidence by reading from the depositions taken on examination for discovery of Pike, the treasurer of the defendant company, as the representative of the company.

From his evidence, the following facts appear. I have put in some details from other sources. The present directors are Harper, Cochrane, Hart, Morgan, Bowditch and himself, and perhaps one or two others. The company was incorporated in October, 1918; the business had been going on before for about 2 years under the name of Lamson-Hubbard Corporation, as a joint venture by Lamson junior and Bryan. Bryan was appointed general manager and managing director, soon after the incorporation. He continued in this office till September, 1920. He was also vice-president. It was part of his duties to run the business in Alberta and the Northwest Territories, including the hiring of any men he thought fit to hire. The company was aware that Calhoun was doing some work for the company; that he was doing some work in 1919; that he was looking after the interests of the company in the absence of Bryan. This is indicated by a letter from Bryan to Calhoun, dated August 20, 1919, reading:—

"This is to advise you that you have full authority to act for me and in my place as manager of the Lamson-Hubbard Canadian Co., Ltd., during my absence in any capacity whatever," and by a letter dated October 27, 1919, from Bryan to Morgan, then president of the company and residing at Boston, in which occurs this passage:—

"Mr. Calhoun has agreed with me to give me his assistance next season and with him as a transport man, who knows his business, I am very confident of satisfactory results."

The company "in any case in the fall of 1919 knew that Calhoun had agreed to give Bryan his assistance next season." Pike admitted that it was an established fact—within the company's knowledge—that Calhoun did go to Smith Portage in 1919 and was assisting in the company's business there.

Pike also says that the company was willing to pay Calhoun $1,000.

The first witness called was Bryan. I note points from his evidence.

Bryan was in the earlier organisation as manager. The company was incorporated in November, 1918. From that date on, he was in charge of the business of the company in this country —their business of fur trading and transportation. The com-

pany had nine trading posts—Fond du Lac, Portage la Lac, Fort Chipewyan, Fort Rae, Fort Resolution, Fort Providence, Fort Simpson, Poplar Point, Fort Good Hope. Before the incorporation of the company they had nothing in the way of a transportation system except some scows and a small gas boat. Captain Lane was sent up from Boston in the fall of 1918 to go into the question of transportation. Lane, having consulted Calhoun and discussed with him—"spending a good many days together,"—the matter of transportation decided that the season was then too far advanced to make it advisable to go north then to Fort Smith, as he had contemplated, and, consequently, returned to Boston.

About this time a prospectus was issued. Several copies were sent from the head office at Boston without a covering letter. Two copies were produced to the witness on his examination in chief. He said one of the copies was one of those sent to him. It was marked for identification; but its admission as evidence was objected to as not shown to have been authorised by the company, and the objection was sustained. In my opinion, there was sufficient *primâ facie* evidence of authorisation to entitle the plaintiff's counsel to have the prospectus filed; whether the authorisation could be negatived or put in doubt and what bearing it would have on the points in issue are other questions. Being of this opinion, I have looked at the prospectus. It purports to be a prospectus of the defendant company. It puts Bryan and Lane as managers. It purports to be signed by the defendant company.

Captain Lane was in this country in 1919. He was located at Cache 24, near the end of steel, for the greater portion of the year. He built two gas boats there for the company and received the merchandise going into the north country—that is the merchandise for the posts for trading purposes of the company.

In the autumn of 1918 when Lane had returned to Boston, Bryan put himself into communication with Calhoun. His evidence is as follows:—

[The Judge here cited a portion of the evidence and continued]:—

I have set out so much of the evidence to show that there is ample evidence of the employment of Calhoun and of the fact that he rendered very considerable services to the defendant company, especially in the years 1919 and 1920. There is, in addition to this, though, much evidence tending to minimise the value of his services, but much to support him.

As to the evidence of the engagement with regard to remuneration, it is absolutely clear, to my mind, that Calhoun did not

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intend to give his services without compensation and that no representative of the company so understood it.

Calhoun in saying that he did not want to go on the payroll was quite obviously not saying that he did not want any compensation, for in the same breath he was saying that he wanted stock. Had he been put on the payroll, his monthly wage would have been fixed and he did not wish a regular wage to be fixed but wished, after his services had been performed, to be compensated on the basis of a *quantum meruit* in stock, and obviously if he were not eventually given stock, there was no intimation that he wanted nothing. The various expressions used inadvertently—sometimes even by himself—in relating conversations are all quite easily reconcilable with this intention which, and which alone, is consistent with justice and, in my opinion, common sense.

The cases usually cited to show that a person rendering services is or is not entitled to remuneration because there was or was not an implied agreement to remuneration, such as *Taylor* v. *Brewer* (1813), 1 M. & S. 290, 105 E.R. 108; *Bryant* v. *Flight* (1839) (5 M. & W. 114, 151 E.R. 49, 8 L.J. (Ex.) 189, are all cited and discussed in the text books and encyclopedias under the title of "Master and Servant." It is useless to discuss them in detail. None of them is binding. None of them is precisely the present case. Each case must depend upon its own circumstances and is essentially a question of inference of fact. To hold that, under the circumstances of this case, the plaintiff is entitled to nothing, is to draw an utterly wrong inference from the facts and circumstances and one leading to a great injustice.

As to the amount the plaintiff is entitled to, there is evidence which would justify a jury in awarding the amount he claims, $12,000. He was ready at one time—it is true, if paid at once—to accept $6,000.

I would give him judgment for $4,000 and costs, allowing the appeal with costs.

HYNDMAN, J.A., concurs with BECK, J.A.

CLARKE, J.A., (dissenting):—If the rendering of services of one person for another is sufficient to create a legal liability to pay for the value of the services then the plaintiff should recover, for, admittedly, his services were of considerable value to the company, but as, in my opinion, something more is required, namely a promise either express or implied, to pay, it is necessary to consider whether upon the facts of the case there has been such a promise.

As the trial Judge has found against the plaintiff I have examined the evidence very carefully in the hope of being able

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to find some solid ground for giving the plaintiff relief. There is no useful purpose in discussing the evidence, and I shall content myself with saying that, in my opinion, the trial judgment cannot consistently with the law and the evidence be interfered with.

Regarding the complaint that the trial Judge refused to examine the reports of Sullivan and Pike, I cannot say that he was wrong, but, in any event, having regard to the circumstances of the case, I cannot see that the plaintiff has been prejudiced. The respondent's counsel has produced Pike's report for perusal by this Court. I find nothing in it of any assistance to the plaintiff beyond the extract contained in the evidence. Nor can I see that he has been prejudiced by failure to have the prospectus produced at the trial, even if sufficient foundation was laid for its reception.

I see no error in the rulings as to statements alleged to have been made by Lane, and if I am wrong in this, having regard to all the evidence, I do not see that any additional evidence which could have been given of such statements would affect the result, nor do I think the hearsay evidence complained of is important.

I would dismiss the appeal, with costs.

Appeal allowed.

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*KENNEDY v. VICTORY LAND & TIMBER Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 10, 1922.

BROKERS (§ II B—5)—RIGHT TO COMMISSIONS—EMPLOYMENT OF BROKER—AUTHORITY OF DIRECTORS.

The evidence shewing employment of a broker, and a sale of the land effected by him, his right to commission cannot be attacked because of the lack of director's authority to enter into the contract of employment.

[See Annotation 4 D.L.R. 531.]

APPEAL (§ VII—485)—REVIEW OF FINDINGS OF FACT—WEIGHT OF EVIDENCE.

The judgment of the trial Court on findings of fact is reviewable on appeal if it appears to have been rendered against the weight of evidence.

APPEAL by plaintiff from the judgment of Clement, J. Reversed.

Stuart Livingston, for appellant.

A. D. Macfarlane, for respondent.

MACDONALD, C.J.A. (dissenting):—I would dismiss the appeal. The evidence discloses no antecedent agreement on the part of the defendants to employ the plaintiff as agent to sell the property. Even if I were convinced that the sale was made by reason of the plaintiff having brought the property to the attention of Rayner, or Connor, that, in itself, is not sufficient. To entitle him to commission he must have been employed to procure a pur-

*Appeal to the Supreme Court of Canada pending.

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chaser, and while he swears to some loose expressions of Miller and Duncan, which might, if they were authorised to employ him, constitute such an agreement, yet Colpman and Cook did not concur. There was no corporate agreement and no assent of all the directors to the employment of the plaintiff, but on the contrary, there was decided objection on the part of Colpman and Cook. At most, the agreement to pay him a commission on the Whalen sale if it went through, shews no more than this, that they were willing to pay him a commission on that particular sale, but rebuts the idea of a general agency.

MARTIN, J.A., would allow the appeal.

GALLIHER, J.A. (dissenting):—I have read the Appeal Book throughout, and am unable to find on plaintiff's own showing, that he has established any antecedent agreement.

I also find on the evidence that he had no authority from the defendant company to deal with the Puget Sound Co. in this transaction, nor did the company in any way ratify his acts, on the contrary, Colpman distinctly told him to keep out of it.

On the whole evidence, the plaintiff fails to convince me that he was the efficient cause of the sale, or that he was an agent at large.

I might, (though I think it would be of little value) advert to different phases of the evidence in detail, so will content myself with saying that, in my opinion, the appeal should be dismissed.

MCPHILLIPS, J.A.:—This appeal brings up for consideration—what evidence is sufficient to establish the right to a commission upon the sale of land, the extent of the authority given, or whether, without express authority, the dealings between the parties bring about such a state of affairs as entitles a commission to be allowed upon the basis of a *quantum meruit* where the benefit of the services rendered have been accepted and a sale is made. Here we have the case of the sale of very valuable timber lands, the profit on the sale thereof by the vendors, the Victory Land & Timber Co., Ltd., the defendant, being no less than $100,000.

The plaintiff admittedly had special and peculiar knowledge of the property sold and its potentialities and advantage that would accrue to the vendees if acquired by that company. All these features were brought to the notice of Connor and Rayner, who were acting for the vendees, the Puget Sound Timber and Lumber Co., Ltd. Connor was the president of the Puget Sound Co., and Rayner was the manager. Rayner, to whom Connor looked largely for the details of the matter, states in the most positive terms, that the first information as to the property and that it could be purchased, came from the plaintiff Kennedy, and

Connor also agrees in this. The sale was difficult of accomplishment and it called for a great amount of application upon the part of the plaintiff to interest the Puget Sound Co.; and Connor was not at first at all interested in the property. One illustration of what took place amongst many others was the luncheon given by the plaintiff at the Empress Hotel to Connor. It was arranged that Connor should then meet Duncan and Miller, two of the directors of the Victory Land & Timber Co., the vendors. The luncheon took place; Duncan was present but not Miller, and the question of the sale of the property was taken up and resulted in Connor agreeing to go and look at the property and Connor did go and look at the property, *i.e.*, looked over the location and went to some extent into the timber. Colpman, the president of the Victory company, accompanied Connor. Kennedy was not present at this time, and the contention is that the sale was really made by Colpman, not Kennedy, after Connor's return to Victoria, Kennedy saw him and discussion took place about the property and what had been seen. Connor was not very enthusiastic at this time about the property, but admits that Kennedy kept impressing upon him very strongly that the timber was suitable for the Puget Sound Co. Unquestionably, Kennedy had authority to make a sale of the property when the negotiations with Whalen and James were under way, and if a sale had been effected in the case of Whalen it is admitted that Kennedy would have been entitled to a commission of $3,000. Further, it is clear from the evidence that Colpman was aware throughout that Kennedy was bestirring himself to obtain a purchaser for the property and failing, effecting a sale to Whalen and James, was continuing his activity in this regard.

I do not intend to, in detail, refer to the parts of the evidence bearing upon the culmination of matters and the sale finally made—save to say—that the evidence makes it clear to me that when it was reasonably certain that a sale would be effected to the Puget Sound Co., then steps were taken by Colpman to carry out the sale without the intervention of Kennedy. One statement made is that after the Whalen deal fell through, the property was withdrawn from sale so that a cruise could be made, but this was never made known to Connor or Rayner. On the contrary, negotiations still proceeded and Duncan was particularly active throughout the time when it is stated the property was withdrawn, in negotiations with Connor,—with a sale in view, and the luncheon took place during the time it is contended the property was withdrawn from sale. It is sufficient that, when the question of Kennedy being entitled to a commission came up

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with Colpman, who denied Kennedy's right to it—that Duncan made the remark: "The labourer was worthy of his hire."

Further, Duncan, a director of the vendors, admits that at the luncheon Kennedy was urging the sale on Connor, and it was Kennedy who had the particular knowledge to discuss the property and point out its suitability and value to the Puget Sound Co. Then we have Miller, another director of the vendors, admitting that Kennedy was treated with as being entitled to bring the property to Connor's and Rayner's notice. It is evident that here is a case of a sale being made behind the back of the broker (Kennedy) and that which prompted it being done was the evident fact that Connor had become so interested in the property—(and this was Kennedy's work) that a sale was certain—and the attempt was to oust Kennedy from getting any commission. I am loath to have to say this—but it is a case which has all the earmarks of this being the moving cause of the directors and officers of the Victory Land & Timber Co.,—before this vista of a certain sale—was present to the minds of the directors, namely—Colpman, Duncan and Miller, every encouragement was given to Kennedy to enlarge upon the value of the timber, its suitability and even necessity to the Puget Sound Co. in the carrying on of its timber operations in the neighbourhood. It is patent that Kennedy busied himself greatly about effecting a sale and spent a great deal of time and, no doubt, went to considerable expense to draw to the attention of possible purchasers this particular timber property, and as I have already pointed out, admittedly, a commission would have been earned had the Whalen or James negotiations gone through, but with all this work when a sale is effected, and effected through his agency—as Connor and Rayner say he was the person who first brought the property to their attention,—the effort is made to deprive Kennedy of what appears to me to be remuneration which he is rightly entitled to. That Kennedy did bestir himself in the matter is well indicated in the reasons for judgment of the trial Judge, which read as follows:—

"I think I must dismiss the action with costs. I am sorry because there is no doubt that Kennedy did a lot of work. But I do not think he has established any legal liability and if the defendants choose to be ungenerous, I cannot help it, they are entitled to take that stand. I think I must dismiss the action with costs."

It is apparent that the trial Judge was impressed upon the evidence—that the plaintiff had rendered services which the defendants, although not legally called upon to pay for, were morally called upon to recognize. However, of course the duty

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was upon the plaintiff to make out his case and that, with great respect to the Judge, I consider was done.

The extent to which the Court of Appeal may go in differing from the trial Judge is well indicated in the case of *Coghlan* v. *Cumberland*, [1898] I Ch. 704, 67 L.J. (Ch.) 402—[See Lindley, M.R. at pp. 704, 705.]

Now, bearing in mind what the Master of the Rolls said, the present case is one which, in my opinion, calls for reconsideration and weighing the evidence before the Judge,—and bearing in mind the surrounding circumstances, it is a case which calls for a different conclusion than that arrived at by the trial Judge. The evidence, as I read it, amply supports the establishment of a cause of action in favour of the broker (Kennedy) upon the sale of the property by the defendant to the Puget Sound Co. The sale price in the present case was well known. That had been made known to Kennedy in connection with the Whalen and James negotiations, and as we have seen the price was $165,000 and a profit of $100,000 was made by the defendant. *Singer* v. *Russell* (1912, 1 D.L.R. 646, 25 O.L.R. 444, is a case much in point in considering the present case. [See Boyd, C., 1 D.L.R. at pp. 650, 651.]

The language of the Chancellor is exceedingly apposite and fitting as applied to the facts of the present case.

I would also refer to a portion of the judgment of Sutherland, J. in the *Singer* case, pp. 658, 659, which may be said to be equally applicable to the facts of the present case; and the Judge refers to some of the controlling cases governing actions for commissions.

(Also see *Calloway* v. *Stobart* (1904, 35 Can. S.C.R. 301 at pp. 305, 306, 307.)

Greer v. *Godson* (1920), 52 D.L.R. 374, 28 B.C.R. 175, is a late case wherein this Court passed upon the law as affecting the broker's right to a commission and the implied promise of remuneration where there was the acceptance of the broker's services. This case went to the Supreme Court of Canada, and the judgment was affirmed. I took the view in that case as I do in this, that the broker was the effective cause of the sale, and without repeating my reasons here, consider that they are equally applicable to the present case. Upon the appeal to the Supreme Court of Canada, a short statement only appears of the result of the appeal, (see *Godson* v. *Greer* (1920), 56 D.L.R. 696, 60 Can. S.C.R. 653).

The counsel for the respondent relied greatly upon *Picard* v. *Revelstoke Saw Mill Co.* (1913), 9 D.L.R. 580; 12 D.L.R. 685, 18 B.C.R. 416, as an authority supporting his contention that, in

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any case, no liability could be fixed upon the company,—the defendant in the action. With deference, the present case is not one at all similar to the *Picard* case. There, there was clear absence of authority to bind the company upon the part of Lindmark, and he was not the managing director of one of the companies concerned in the transaction. No question of want of authority upon the part of the directors can come up for consideration in the present case, nor can I see that any defence upon this ground is open upon the evidence adduced at the trial. Now, the question which remains is: What amount the plaintiff is entitled to for the effective services rendered and the bringing about of the sale?

There is evidence that in this Province upon sales of timber lands, as much as 10% is paid. The plaintiff, however, only claims 5%, and, upon full consideration of the case, I am of the opinion that the plaintiff has established his right to a commission, and that it should be allowed at 5% on the sale price of the property sold. It follows that, in my opinion, for the foregoing reasons, the judgment of the trial Judge should be reversed and judgment entered for the plaintiff in accordance with the claim made in the statement of claim. The appeal to be allowed.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

WHITBY v. WIDEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 29, 1922.

DAMAGES (§ IIIA—53)—PARTNERSHIP AGREEMENT—CONSTRUCTION—INTENTION OF PARTIES—BREACH—MEASURE OF COMPENSATION.

Where parties have entered into a partnership agreement by which they undertake to carry on jointly a hotel business from a certain date, the date being fixed because the parties expect to obtain possession of the hotel on that date, the contract does not lapse on that date if the hotel is not then available, and possession of the hotel being taken by one of the parties within two months of the time originally expected, the partnership will commence from the date of possession.

The partner deprived of possession is entitled to damages for loss suffered on account of such deprivation for the period during which the partnership was to run before it could be terminated by notice according to the agreement.

APPEAL by defendant from the trial judgment in an action for damages for breach of a partnership agreement.

J. F. Frame, K.C., and *L. McK. Robinson*, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The parties in this case entered into a partnership agreement in writing on August 11, 1920, by which they undertook to carry on jointly an hotel business at Kamsack, for a period to begin on September 1, 1920. The parties expected to be in a position to enter into possession of the hotel in question on September 1, hence the fixing of that date for the beginning of their partnership. Some litigation concerning this hotel, which was then being carried on between the appellant and a third party, caused a delay to occur and as a result the hotel was not free to be occupied by them until November 19, 1920. The appellant contends that as the parties could not begin business on September 1, the contract between them never became effective, but lapsed on that date. I agree with the trial Judge that this contention cannot prevail, and that November 19, 1920, should be taken as the date for the beginning of the proposed partnership. On that date the appellant took possession of the hotel and proceeded to conduct the business thereof without the respondent, having notified him by letter, dated October 30, of his intention to repudiate the partnership agreement. The actions of both parties before and after September 1, and the letters of the appellant to the respondent, of October 8 and October 14, corroborate the testimony of the respondent, that the intention of the parties all along was that the contract should really become effective when the hotel in question became ready for occupancy by them. In my opinion the appeal must fail upon this ground.

The appellant appeals also against the ruling of the trial Judge on the question of damages, and on this point I think he is entitled to some relief. The judgment awards damages to the respondent under the following heads: (1) $600, for what is termed general damages, and which I gather from the language of the judgment to mean the loss which the respondent suffered by reason of selling his home and disposing of the business which he had been conducting as an accountant, in anticipation of the partnership, and his inability to secure other occupation until about January 15, 1921; (2) the amount of the respondent's living expenses from November 19 to January 15; (3) a half share of the profits of the hotel business from November 19, 1920, to the date of trial, which was June 18, 1921; and (4) the sums expended by the respondent for travelling, hotel and other expenses in trying to get the appellant to admit him into partnership; the amount of these last three items to be ascertained upon a reference to the Local Registrar.

Regarding items No. 1 and No. 2, the respondent gave cer-

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tain evidence at the trial by which I think we should be guided in ascertaining whether the allowance made by the trial Judge is reasonable. In my opinion this allowance is excessive, and upon the figures shewn should be reduced. The respondent says that in some years he earned $50 or $75 a week, and sometimes more. At the rate of $50 per week he would have earned $400 for the two months in question, and at $75 per week, $600; but, on the other hand, he would have had to deduct his living expenses from his earnings. Here he is allowed $600, and his living expenses besides. Of course it is impossible, from the evidence, to fix the respondent's earning power with precision. I think it would not be unreasonable to eliminate the allowance made to him under item No. 2 above, and to fix the sum of $600 as the total damages, in substitution for the general damages and living expenses allowed by the trial Judge. This disposition of the matter will, I think, place the damages upon a more reasonable basis, and will also reduce the inconvenience and the difficulty of the reference to the Local Registrar. As to item No. 3, I can see no reason for allowing the respondent a share of the profits up to June 18, 1921. According to the terms of the agreement, either party had the right to terminate the partnership at any time after December 31, 1920, by giving 3 months' notice to the other. In an award for damages for breach of contract, I do not see how the respondent can claim the right to be placed in a better position than if the appellant had put an end to the contract in a legal manner. The award for the half share of the profits should stand, but the period to be covered by it should end on April 1, 1921, as the appellant might have given notice on January 1, 1921, of a dissolution to become effective upon that date. I think the respondent is entitled to be recouped for the expenses he incurred, and to which he referred in his evidence, in endeavouring to induce the appellant to assume the partnership relations which had been agreed to between them. The award as to this item should stand.

The judgment should be varied as above, and the reference to the Local Registrar should be limited to ascertaining the half share of profits due to the respondent and his expenses under the last mentioned item above referred to. As the appellant has succeeded in part only, but in a substantial part of this appeal, I think there should be no costs allowed to either party on the appeal. The costs in the Court below should stand as ordered by the trial Judge.

Judgment below varied.

MYERSON v. GREEN AND HOMES.

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Quebec Superior Court in Bankruptcy, Panneton, J. June 23, 1922.

BANKRUPTCY (§ I—6)—ACTION COMMENCED BY PLAINTIFF PREVIOUS TO BANKRUPTCY—TRUSTEE ORDERED TO CONTEST ACTION AFTER INSOLVENCY—JUDGMENT AGAINST TRUSTEE—COSTS BEFORE AND AFTER BANKRUPTCY.

Costs of an action previous to the insolvency of the plaintiff are not privileged and are to be paid at the same rate as other ordinary creditors but after the insolvency, upon the case being resumed on a judgment of the Court ordering the trustee of the estate to continue the contestation, the costs are privileged and upon judgment being rendered against the trustee, such costs must be paid out of the estate and are payable immediately.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION for the purpose of obtaining a judgment ordering the trustee of a bankrupt to pay the petitioner the costs of an action. Petition granted.

I. Popliger, for petitioner.

S. G. Tritt, for trustee.

PANNETON, J.:—On April 1, plaintiff obtained judgment against the defendant for $2,192.42 by default, and also a judgment against Homes, the garnishee by default; this judgment against the garnishee affecting an auto alleged to be in his possession and to be the property of the defendant.

On April 29, 1920, a petition was made by Bonnier, trustee, for the International Ladies' Wear, claiming the auto and the nullity of the above mentioned judgment in so far as the garnishee was concerned.

Myerson, the plaintiff, contested said petition of Bonnier, issue was joined in the case, when plaintiff became insolvent and the trustee Alan J. Hart, was appointed to the estate of said insolvent;

On September 1, 1921, Bonnier made a petition asking that the trustee Hart be ordered to take up the instance; on September 26, 1921, judgment was rendered, calling upon Hart, the trustee of the estate of Myerson, to continue the instance of the contestation;

It is proved that Hart did not want to continue the instance, and he gave a copy of his petition to P. Ryan, K.C., stating that he did not want the contestation to continue, but whether he wanted the proceedings to continue or not, Bonnier, the trustee of the International Ladies' Wear, wanted a judgment rendered in his favour on his petition, claiming the auto, and unless Hart, the trustee, formerly withdrew the contestation made by Myerson, whose estate he represented, Bonnier was forced to proceed against him which he did and he was obliged to make all the subsequent proceedings to obtain judgment, which judgment was

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rendered on January 31, 1922, in his favour with costs, which were fixed at $398.05, and he, I. Popliger, attorney for Bonnier, was entitled to be paid out of the estate, the part of said costs previous to the insolvency of Myerson, are not privileged and are to be paid at the same rate as other ordinary creditors, but the cause following the *reprise d'instance* are privileged against the trustee Hart in his quality, and said costs have been taxed to the sum of $304.05. The trustee Hart paid $87 for the costs of the *reprise d'instance*.

Upon the refusal of the trustee Hart to pay the costs, the present petition was presented by I. Popliger, attorney for Bonnier, trustee of the International Ladies' Wear, for the purpose of obtaining a judgment ordering the said trustee Hart to pay him all his costs on his petition contested.

The Court orders the said trustee Hart, in his quality, to pay to the petitioner, Popliger, the sum of $304.05 within a delay of 15 days from this date, with costs of the present petition against the estate of W. Myerson. *Judgment accordingly.*

POTTER v. McNEILL.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

SALE (§ IB—11)—OF GOODS—CONTRACT—CONSTRUCTION—TIME OF DELIVERY—FINDING OF FACT OF TRIAL JUDGE—INTERFERENCE WITH BY APPELLATE COURT.

A finding of fact of the trial Judge, who has seen and heard the witnesses, and is in the best position to judge of the truth of the evidence on a crucial point, will not be disturbed by the Appellate Court, where there is evidence to support it.

APPEAL by defendant from the judgment of Simmons, J., awarding plaintiff damages for breach of defendant's agreement to purchase 6 carloads of hay. Affirmed.

C. C. McCaul, K.C., and *G. C. Valens*, for appellant.

A. U. G. Bury, for respondent.

SCOTT, C.J. concurs with CLARKE, J.A.

STUART, J.A. (dissenting):—I am sorry to have to say that what I now believe, after careful consideration, to be an essential point in this case did not occur to me during the argument and that that essential point was not discussed or mentioned by counsel. We were, I think, too much absorbed in the consideration of the question of the contradictory accounts given by the parties of what the bargain was to perceive at the moment what the real obligation of the plaintiff was, even assuming the account of the bargain given by her agents to be the true one.

If we accept Albert Potter's account of the terms and conditions of the bargain of purchase and sale which was arrived at on April 13, and assume that the bargain was that the plaintiff

agreed to sell and the defendant to buy 6 carloads of hay at $64 a ton, but that it was understood that this hay was to be shipped from, or from near Montreal, without any stipulation as to the time of shipment, and that the defendant was to be content with the ordinary period of time which would be required for the carrying of the hay by the transportation company or companies from Montreal or from near Montreal to Edmonton, then the question of the time of shipment becomes far more important than it appeared to be considered on the argument.

But the essential point which I think has been overlooked is this, that there was admittedly not a word said in the conversation which made the contract about the plaintiff merely having the hay on order from someone else in Montreal. There was no mention whatever of Baillargeon & Co., who turn out to have been the plaintiff's vendors. Under the terms of the contract, even as stated by Albert Potter, McNeill was entirely entitled to assume that at that moment, that is on April 13, the plaintiff had hay of her own in her own possession or under her control at or near Montreal. The plaintiff's agent, Albert Potter, said in substance to McNeill, on April 13: "I have 6 carloads of hay at or near Montreal which I will sell you and deliver to you in Edmonton as soon as it can get here by rail shipment." And this hay the defendant agreed to buy. In such circumstances, what was the obligation of the plaintiff? I think that obligation was to put her hay on the cars, to ship it at or near Montreal, either forthwith or within a reasonable time. She had no right to treat her vendor's obligation to her as the measure of her obligation to McNeill. McNeill knew nothing, for he was in no wise informed, of the existence of any such a relationship and he was not bound to be concerned in it in any way.

Therefore, I think that an essential question is, not when the hay arrived in Edmonton, or whether it arrived there within a reasonable time, but when did the plaintiff ship the hay from Montreal, or near that place, and did she do so within a reasonable time after she had sold it to the defendant, so that, as far as her acts were concerned, there would be no unreasonable delay in its arrival at Edmonton?

In my opinion it is very important in the interest of commercial men that the true obligation of the plaintiff under such a contract as was held by the trial Judge to have been entered into between the parties to this action should be plainly declared, and in my opinion, that obligation was such as I have just indicated.

There are very many cases in the reports dealing with contracts for the sale of goods "to be shipped." But it is very difficult to find a case where the time of shipment from the named port was not specified. Usually it is specified that the

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shipment is to be before a certain date or during a certain month or months. In such a case the time of shipment is treated as a condition or as part of the description of the goods. But in the present case, if we accept the plaintiff's account of the bargain, there can be no question of a condition or a description of the goods. She was bound only to ship within a reasonable time.

As to the facts it appears that 1 car had been already shipped on the 13th and about this there can be no question. Then 3 carloads were shipped on the 17th—a delay of 4 days, and 2 were shipped on the 20th, a delay of 1 week.

Now, whatever may be said of the delay of 4 days, my opinion is, that considering the time of the year and the circumstances well known to both parties a delay of a whole week was unreasonable. What would have been thought if the shipment had had to be from Leduc to Edmonton, if a vendor at Leduc had under such a contract delayed a week before putting his hay on the cars? And the greater the distance from Edmonton the more reason there would be for promptness and we should not, I think, fall into the error of extending the measure of reasonable time to make it proportionate to the increased distance.

Nor is it any answer to say that even at Leduc the vendor might have to gather up his hay from neighbouring farmers. We know now, of course, that the plaintiff was depending on her vendor to deliver hay to her, but I think it is erroneous to decide upon the extent of her obligation in the light of knowledge of facts which we now have, but which McNeill did not have. Her obligation arises from the contract and the contract was an agreement of the parties. There is not a word revealed in Potter's account, of the conversation to suggest anything else than that the plaintiff at the time of the contract had the hay in her possession or control at or near Montreal, and, therefore, nothing whatever to shew that McNeill took the risk of some vendor of the plaintiff making a delay in delivery to her. If the plaintiff had shewn an inability to secure cars for loading at any earlier period than a week I think McNeill might perhaps have been bound to submit to that delay, but nothing of that kind was suggested.

I have proceeded thus far upon the assumption that the plaintiff's account of the conversation was the true one and I think what I have said has at least some bearing upon the probability of the two accounts given. I cannot understand, if the defendant did not receive an assurance that the hay was already shipped and if the time of shipment was left unspecified, why he never enquired of the plaintiff if it had been shipped. He is shewn to have made some enquiries as to whether it had arrived in Ed-

monton or not, but never any inquiry as to whether it had been shipped from Montreal. I think he would have been certain to make such an enquiry if he had bought knowing that it had not yet been shipped or without any assurance that it had.

Then if we look at the alleged contract sued upon there arises the same suggestion. The plaintiff alleges that "on April 13, 1920, the defendant contracted with the plaintiff for the purchase and acceptance by the defendant, of 6 railway carloads of hay to be delivered by the plaintiff to the defendant as soon as the said carloads of hay should arrive at Edmonton, or in the alternative, within a reasonable time from the said 13th day of April, 1920."

Now I cannot help asking what such allegations mean if they do not mean that the defendant bought 6 carloads of hay *then on their way to Edmonton?* I see no reasonable sense to the words unless they mean this, because surely it was not suggested, that the defendant had agreed to take delivery whenever they arrived at Edmonton, no matter where or in what condition they were at the time of the contract. There is no allegation in the statement of claim that it was understood and agreed that the hay was still to be shipped from near Montreal. And even if it would be proper, as perhaps it would, to allow that allegation to be inserted in view of the evidence, yet when that allegation constitutes the whole difference between the contradictory accounts of the parties it seems to me strongly confirmatory of the defendant's story that the only sensible meaning of the words used by the plaintiff in her original statement of claim coincides practically with that story.

The trial Judge treats the defendant's allegation that it was agreed that the hay was already on the way as an allegation of a representation, the burden of proving which lay upon the defendant. He says: "The onus is upon the defendant to establish the representations alleged. I have his statement and the denial of Bert Potter. I am unable to find that he has established preponderance of weight in favour of his allegation."

With much respect I think the Judge permitted himself to be led into error by the mistaken form of the defendant's defence wherein misrepresentations were alleged. It is there stated that "the defendant was induced to enter into the contract because of the representations made by the plaintiff on April 13, that the said carloads of hay were all en route to Edmonton, &c."

What the defendant was there in substance alleging, was a term of the contract amounting to a description of the goods sold. The plaintiff had indeed, as I think, practically said the same thing in her statement of claim, if it is to be given any reasonably

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sensible meaning. But in her evidence she attempted to prove, not a sale of goods already in Edmonton, nor of goods on the way to Edmonton, which is what her alternative allegations really mean, but of goods *that to the knowledge of the defendant, were yet to be shipped from near Montreal*, and that without any stipulation as to time of shipment. The plaintiff was suing for damages for breach of that contract. That contract it was her burden to prove. In my humble opinion therefore the trial Judge misapprehended the obligations as to burden of proof which lay upon the parties. If there had been a jury I think there would have been a plain misdirection and a new trial must have been ordered.

But there was no jury. We are entitled to give our own judgment. In the circumstances I do not feel particularly bound by the finding of the trial Judge. It is contrary to the plain allegation of the statement of claim because, as I say, an allegation without more, that goods sold are to be delivered as soon as they arrive in Edmonton is either senseless or unreasonable or else it means that the goods were on the way at the date of sale. I am not proposing exactly to hold the plaintiff to her statement of claim but the way it was drawn in the first place is very corroborative of the defendant's account.

And the complete omission of the defendant to make any enquiry as to whether the goods had been yet shipped is in my opinion strongly confirmatory of his statement that he was told that they were already on the way. As they were not, in fact, then all on the way they were not the goods described in the contract as stated by the defendant.

As compared with these general considerations I place little weight upon minor points of evidence or upon what happened on April 14, which in any case was after the contract was made and has very little bearing upon the real problem.

If the contract had been as the plaintiff alleged and even although she did fail to ship within what I think was a reasonable time, I am inclined to the view that the conduct of the defendant assuming him, as we must, to have known what the real contract was, would probably be such as to constitute a waiver of any delay in shipping from Montreal.

But upon the ground that I think the plaintiff failed to prove the contract set up in her evidence, though not set up in her pleadings I would allow the appeal with costs and dismiss the action with costs and give judgment for the defendant on the counterclaim for $100 without costs.

I may add that I am confident that either the view I have taken is the right one, or else the parties never really understood each

other, were never *ad idem*, and so there was no contract at all in which case also the plaintiff would fail. From my observation of the casual and careless methods unfortunately very prevalent among many business men and particularly exemplified in this case, I think it very probable indeed that a real misunderstanding was at the bottom of the trouble.

BECK, J.A. concurs with HYNDMAN, J.A.

HYNDMAN, J.A.:—I concur in the result arrived at by Clarke, J.A., who reviews the facts very fully and carefully.

I only wish to say that I do not entirely agree with him when he states that the probabilities are more on the side of the plaintiff. I would think it rather otherwise, and had I tried the action I am inclined to think I would have decided in favour of the defendant.

The trial Judge, however, having seen and heard all the witnesses is in the best position to judge of the truth of the evidence on the crucial point, that is, whether or not a representation was made as to the location of the hay at the time of the bargain, and I am not prepared to say he was in error in his conclusion.

CLARKE, J.A.:—This is an appeal by the defendant from the judgment of Simmons, J., awarding the plaintiff damages for breach of the defendant's agreement to purchase 6 carloads of hay. The dispute arises over the time for delivery.

The negotiations arose out of the following advertisement by the plaintiff in the issue of the *Edmonton Journal* of April 10, 1920:—

"Timothy Hay—Necessity forced our hand to secure our requirements. In order to get what we wanted we were forced to buy 6 carloads more than we needed. Therefore this amount is for sale. Orders will be received and booked in consecutive order. First come first served. No order considered except accompanied by cash, 25% of requirements. First cars will land about April 18, and temporary supplies handed out from them pending arrival of others. Book your order now."

On March 29, 1920, plaintiff ordered 3 carloads of hay by wire from Baillargeon of Montreal.

On April 6, Baillargeon wired plaintiff: "One car shipped, quotation 5 cars in few days."

On April 8, Baillargeon wired plaintiff: "Another carload shipped yesterday . . . can ship 5 or 6 cars at once . . . cars loaded quick, wire reply."

On April 9, plaintiff wired Baillargeon: "Yours eighth, ship 6 cars No. 2 timothy . . ."

On April 13, Baillargeon wired plaintiff: "Another car left;

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others loading, O.K. for 6 cars as per your wire of ninth, making 9 cars in all. . . ."

On April 13, Bert Potter, acting on behalf of the plaintiff, agreed to sell to the defendant, 6 carloads of hay, and the defendant paid a deposit and received the following receipt of that date: "Received from John McNeill, Twin City Transfer Company, one hundred dollars, deposit on six cars of hay (timothy.) Price per ton, $64, Edmonton, Alta."

It was known to both parties that the plaintiff intended to fulfil his contract by the delivery of 6 carloads which she was having shipped from the vicinity of Montreal. At the time, hay was very scarce in Alberta and prices were high.

Bert Potter says (and it is not denied) that it was arranged the defendant should get the first 6 cars to arrive after the first, which the plaintiff was taking for her own use.

The first of the 9 carloads ordered by the plaintiff was shipped *via* C.P.R. from Delson, Quebec, on April 5, and arrived in Edmonton, April 21. This car was not taken by the plaintiff but turned over to the defendant and paid for. The 2 carloads referred to by the telegrams of April 8 and 13, as having been shipped, do not appear to have reached Edmonton, and it does not appear that the plaintiff received more than 6 of the 9 carloads ordered by her. Of the remaining 5, 2 were shipped from Delson, *via* C.P.R., and one from Lacadie, *via* C.N.R., on April 17, and 2 more shipped from Grand Ligne *via* C.N.R., on April 20. The 5 reached Edmonton on May 3 and 4 and were refused by the defendant as being too late. It is admitted that after shipment the cars came through in unusually good time.

On April 30, the defendant being told on inquiry at the C.P.R. that no cars were *en route* West of Fort William, wrote the plaintiff as follows:—

"Referring to the 6 cars of hay bought from you on April 13th and of which only 1 car has been delivered, I wish to remind you that when I bought this hay, Mr. Bert Potter led me to understand that this hay had been shipped and on the way for some considerable time and was expected to arrive in Edmonton within the next few days.

According to the information received from your office this morning, this hay is not yet in sight, and as you are unable to give me any idea as to when it may arrive, I hereby intimate to you that I now cancel my order.

Owing to the delay in delivery of this hay some of my customers have cancelled their orders with me and bought elsewhere, others I have managed to supply from other sources. When your

hay arrives in Edmonton, let me know and I will yet do my best to help you out with it."

At this time the price of hay was falling.

The defendant alleges in his defence that it was a term of the contract, that the hay would be delivered as soon as the carloads should arrive in Edmonton, or in the alternative, within a reasonable time from April 13, 1920, and states that it was a condition of the contract that all of the hay would be delivered to the defendant on or before April 17, 1920, and in the further alternative that the defendant was induced to enter into the contract because of the representation by the plaintiff on April 13, that the carloads of hay were all *en route* to Edmonton, and actually travelling towards Edmonton on the railway which was false.

Upon the trial, the defendant stated in his evidence that on April 13 (Tuesday), Bert Potter said in answer to his inquiry: "It is shipped and on the way 10 or 12 days and will be here at the end of the week," and that on the following day (14th), he repeated this statement at the defendant's office, and in this he is corroborated by his employees, Barnes and Johnson. Bert Potter denies having made this statement. The trial Judge, in his reasons for judgment says: "I am not able to find that he (defendant) has established preponderance of weight in favour of his allegation, and in the matter of reasonable time I think the plaintiff has done so."

The appellant asks to have this finding of fact reversed and argues that the inherent probability is in favor of the defendant. The evidence of Bert Potter is corroborated to some extent by the witness Marskell.

I do not think the finding of the trial Judge should be disturbed. The probability seems to be in favour of the plaintiff. Bert Potter was not aware of the telegram of April 13, confirming the purchase of 6 cars and it does not appear that he was aware of the telegram of April 9, ordering them, although it would be a fair inference that he knew in some way that the additional 6 cars were being procured, otherwise he would not have agreed to sell them. There was nothing in any of the telegrams that would warrant Bert Potter in saying the cars were on the way 10 or 12 days and would arrive at the end of the week, for according to the telegrams the first was not shipped till April 5. Had he seen the telegram of April 9 he would have known the 6 cars then ordered had not been shipped and he would have been guilty of a gross fabrication had he made the statement alleged by the defendant, and there does not appear to have been at the time any reason for his making it. I do not think a statement which would have been fraudulent, should be attributed to him.

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Had the defendant's evidence been that he simply stated the cars were on the way there would be more probability of its correctness, but no witness swears to such a statement. On his examination for discovery he appears to have said: "I believe I told him I thought the hay was on the road." If that is what he, in fact, said it would not be a misrepresentation, for the telegram would justify such a belief; but on the trial he said he did not mean that all the hay was on the road, and that what he said was: "I thought some of the hay was on the road." This was true; one car had been shipped on April 5, and according to the telegram of April 8, it was stated another carload was shipped the previous day. It would not have been surprising if he had stated that 2 were on the way, but he says that although he believed 2 were on the way he did not so state, and no witness says he did. It is true the advertisement stated: "First cars will land about April 18." I do not think that helps the defendant. He does not profess to have acted upon it, and even if he did I think it refers to the first cars of the 9. He was not entitled to the first and the delivery of it to him removes any complaint he could possibly make on this ground, for the arrival of 2 would satisfy the representation. He would only be entitled to 1 and that he received.

I think the finding that the delivery was offered within a reasonable time cannot be disturbed.

I would dismiss the appeal with costs.

Appeal dismissed.

Re LAND REGISTRY ACT AND McMULLEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and Eberts, JJ.A. January 10, 1922.

LAND TITLES (§ I—1)—REGISTRATION FEE—MARKET VALUE OF LAND—RAILWAY TUNNEL.

A railway tunnel, being part of the railway system as a going concern, is not to be considered in connection with the market value of the land through which it passes, in computing the registration fee under the Land Registry Act (R.S.B.C. 1911, ch. 127, sec. 175) based upon the market value of the land.

APPEAL by the District Registrar from the judgment of Morrison, J.

W. D. Carter, K.C., for appellant.

J. E. McMullen, for respondent.

MACDONALD, C.J.A. (dissenting):—An application was made to register 2 conveyances of land from the Crown to the Canadian Pacific Railway Co. by Mr. McMullen, the company's solicitor, respondent in this appeal. The District Registrar refused to register the conveyances on the ground that the applica-

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tions did not disclose the value of a tunnel constructed by the railway company through the lands mentioned in the conveyances.

The facts stated in the case are meagre, but the point in dispute is not in doubt. It is not disputed that the lands form part of the railway company's right-of-way, and that it constructed a tunnel through them which it is today using as part of its railway. The Land Registry Act, ch. 127, R.S.B.C. 1911, secs. 174 and 175, provide for the payment to the Registrar, on application to register a conveyance, of a fee calculated upon the market value of the land for which registration is applied for, and that, in case of dispute, the value shall be settled by the Registrar upon such proof as he may deem to be sufficient.

The petition to the Judge against the refusal of the District Registrar to register the conveyances, and the affidavit supporting the same, shew no more than this, that, in the opinion of the deponents, the tunnel is of no market value. It was conceded in the argument that the tunnel is a part of the railway, and cost the railway a large sum of money to construct. The sole question argued was, had it a *market value* in the sense in which those words are used in the statute?

Respondent's counsel relied upon *Bell Telephone Co., and City of Hamilton* (1898), 25 A.R. (Ont.) 351, an Ontario decision, which was the foundation of several others which followed it, while the appellant's counsel relied upon several English decisions, amongst others, *London County Council* v. *Church Wardens of the Parish of Erith*, [1893] A.C. 562, 63 L.J. (M.C.) 9, 42 W.R. 330.

In the Ontario case, Burton, C.J., brushed aside the English decisions as being inapplicable, on the ground that they were decisions upon a statute essentially different from the statute of Ontario then under consideration, and, in this opinion, the other members of the Court of Appeal seem to have acquiesced.

It is essential to examine the English statute and our own to see whether there is any distinction in principle between them. Market value is the value which a purchaser might reasonably be expected to pay for the lands. In the *Erith* case, *supra*, Lord Hershell, L.C., delivering the judgment of the House of Lords, interpreting the statute there in question said at p. 588:—

"The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament, is the same thing as the 'rent at which the same might reasonably be expected to let from year to year.'"

The question there was one of annual value, but the point decided was whether or not the owner might be regarded as a hypo-

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thetical tenant, and therefore one who might want premises which might be of no use to any one else. The submission here is that no matter what sum of money it cost to construct the tunnel, no matter how necessary it may be to the railway company, yet because if the road were abandoned, no one would pay more for the land than if the tunnel were not in it, therefore, the tunnel is of no market value. In others words, that the land as land has not been improved by the construction of the tunnel.

Now, it seems to me that if we adopt the principle adopted in the *Erith* case, and regard the railway company as a possible purchaser if the land were offered for sale, the land has a value beyond its ordinary value by reason of the existence of the tunnel. Counsel for the respondent argued that a bridge or a railway station did not enhance the value of the land beyond the value of the material when taken down, and this appears to have been the view adopted in *Re Queenston Heights Bridge* (1901), 1 O.L.R. 114. There is a difference in words between our statute and the Ontario statute which may account for the conclusion arrived at there, but, in my opinion, there is no distinction between the principle to be applied here and that applied in England.

It will be noticed that Lord Hershell, emphatically affirms *Reg.* v. *School Board for London* (1886), 17 Q.B.D. 738, 55 L.J. (M.C.) 169, 34 W.R. 583. In the statement of that case, it is admitted that, if the schools were then in the market to be let to a tenant as schools, a tenant could not be found who would be willing to take them, yet the Court held that the School Board ought to be treated as a hypothetical tenant and that the annual value of the property would be the rent which the Board might reasonably be expected to pay for the premises for use as schools.

It was contended that to put a value upon the tunnel would be to tax the franchise of the railway company. This contention seems to me to be baseless. The value of the land in question is not to be ascertained by estimating the value of the tunnel as part of the railway system, nor yet on its actual cost; it might have cost more than its worth to the railway company, or it may be worth more than its cost. Either method of estimating its value would be erroneous. No doubt the cost may be looked at for the purpose of ascertaining the value, but, if circumstances should appear which would either take from or add to the value of the tunnel, that would be a matter for the person making the valuation. With that we are not asked to deal in this appeal, but only to fix the principle upon which the valuation is to be made. That principle is the one adopted in *London County Council* v. *Erith, supra.* It is the sum which the railway com-

pany might reasonably be expected to pay for the land for the purpose for which it is being used.

The appeal should be allowed.

GALLIHER, J.A.:—I would dismiss the appeal.

The English cases we have been referred to by Mr. Carter, counsel for the respondent-appellant, the District Registrar of Titles at Nelson, are all in respect of the construction of English Acts dealing with the levy of poor rates and are, as I view it, of little use to us in dealing with the provisions of our Land Registry Act, ch. 127, of R.S.B.C., 1911.

The question to be decided here is: What fee, if any, should be paid the Registrar in respect of a tunnel constructed under lands of the C.P.R. Co., and through which a portion of their line runs, upon an application to register such lands in fee.

The section of our Act dealing with the question (sec. 175) is as follows:—

"The percentage to be paid on the registration of a fee, shall be calculated on the market value of the land at the time of application for registration. . . ."

The tunnel in question is run under a mountain, and is an integral part of the company's system with no possibility of connection with any other enterprise, absolutely useless and valueless except for the purpose for which it is now used in connection with the railway. It is merely a hole in the ground. It has absolutely no market value to any one, except the company and only to them as a part of their system.

In the Appeal Court of Ontario, in *Bell Telephone Co. and City of Hamilton*, 25 A.R. Ont., at 351, in determining the proper mode of assessing telephone poles and wires within certain assessment divisions, the headnote in that case which is borne out in the judgment, is:—

"In assessing for purposes of taxation, the poles, wires, conduits and cables of a telephone company, the cost of construction or the value as part of a going concern, is not the test—they must be valued in the assessment division in which they happen to be, just as materials which if sold or taken in payment of a just debt from a solvent debtor would have to be removed and taken away by the purchaser or creditor."

Burton, C.J.O., at p. 354, puts it thus:—

"I am of opinion that as real property the poles, etc., are simply to be valued as they would sell irrespective of the fact that they form part of a going concern."

And Osler, J., at p. 356:—

"It is the property itself, whether real or personal, which is to bear the burden of taxation and circumstances which may

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make it of an adventitious value to its possessor only, but which must necessarily cease to attach to it if it passes into other hands, must be excluded in estimating its cash value."

Now, while the tunnel here is a part of the land owned by the company and cannot be detached from it as could the telephone poles, etc., in the Ontario case cited above and other cases in Ontario adopting the principle there laid down, as an adjunct to the land as land it has no value. Its value is in connection with the railway as a going concern and as in the Ontario cases it is said that it is not the proper method to apply in assessing, to that extent I make those cases applicable here, and say the percentage to be paid on the market value here is, not the market value as applied to and in connection with a going concern, but the market value of the land which includes the tunnel as it would be if detached from the railway system. In other words, if the road bed was switched so as not to go through the tunnel, and therefore land including the tunnel formed no part of the system, would the tunnel construction increase the value of the land one iota, no matter what it cost? And there can only be one answer, it would not.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

MORRIS v. KLINE; DEMERS ET AL, GARNISHEES.

Quebec Superior Court, in Bankruptcy, Panneton, J. June 29, 1922.

BANKRUPTCY (§ II—14)—ARREST OF INSOLVENT FOR DEFRAUDING CREDITORS —MONEY BORROWED AND DEPOSITED AS BAIL PENDING TRIAL—SEIZURE OF BY TRUSTEE.

Money borrowed by an insolvent debtor who is under arrest for defrauding his creditors, and deposited by him, as bail to secure his liberty pending the trial, is not the property of the insolvent and cannot be legally seized by the trustee, for payment over to the creditors.

[See also 66 D.L.R. 330. See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

ACTION to determine the validity of a seizure, of money paid in as bail to secure the release of a bankrupt under arrest for defrauding his creditors.

I. Popliger, for plaintiff.

Jacobs & Phillips, for defendant.

PANNETON, J.:—On January 2, 1922, a seizure before judgment was issued in the Superior Court in this district by W. R. Morris in his quality of trustee to the estate of Hyman Kline against said Hyman Kline, in the hands of J. N. A. Demers, A. E. Corriveau and J. B. A. Ladouceur, clerks of the Crown and Peace for the District of Montreal.

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The garnishees declared on January 10, that they had in their hands a cheque for $2,500 payable to cash or bearer on the Bank of Nova Scotia, signed by C. Chessler, and deposited with them by the defendant Kline, as security for his appearance.

The debts due by defendant to his creditors amount to $18,000 for the payment of which defendant has assets of the value of $4,000.

The facts alleged in support of said seizure are that defendant is under arrest for defrauding his creditors and has deposited the sum of $2,500 of money, as above stated, which belongs to his creditors and which he should have turned to his creditors with the assignment made of his property and that if he is liberated there is danger of his appropriating that money.

Defendant pleads that plaintiff was not authorized to take this seizure, denying all allegations charging him with fraud, and adds that the above named cheque was not drawn on money which belonged to him, but was drawn by one B. Chessler, his brother-in-law, upon the bank in which said Chessler had money at his credit which cheque was so made and handed to defendant expressly for the purpose of supplying the necessary bail in order to effect his liberation pending the outcome of the above mentioned criminal prosecution, that the money always belonged to said Chessler.

W. R. Morris having been replaced as trustee by David Sommer, this took up the instance, and the Superior Court transmitted the record to the Court of Bankruptcy in adjudication.

During the contestation, Benjamin Chessler intervened claiming the said sum of $2,500 as belonging to him and advanced to defendant, to take the place of a bail as above mentioned.

Issue was also joined, and the main action as well as the intervention are submitted at the same time to this Court.

The proof establishes fully all the allegations of defendant's plea as above stated, the money which the cheque represents never was the property of the insolvent, and as the trustee is invested under a voluntary assignment only with the property of the assignor at the date of the assignment, it would a grave injustice to make the creditors benefit of money which never belonged to their debtor.

There was no ground for the seizure made and the action and seizure are dismissed with costs.

The facts proved in the case, and the reasons and law stated in the above judgment apply to the intervention, which the Court maintains with costs.

Judgment accordingly.

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CANADIAN PACIFIC R. Co. v. S.S. "BELRIDGE."

Exchequer Court of Canada, B. C. Admiralty District, Martin, L.J.A. September 21, 1921.

COLLISION (§ I—3)—SHIPPING—EXCESSIVE SPEED IN SNOW STORM—LIABILITY—APPORTIONMENT OF DAMAGES.

A ship has no right to run through fog and snow at a speed safe for herself but dangerous for others, in violation of art. 16 requiring moderate speed" in a snow storm; where the evidence does not disclose preponderate culpability upon one ship, the damages should be apportioned equally between the two vessels.

ACTION by the plaintiff, as owner of the steamship "Empress of Japan" for $30,000 damages, against the steamship "Belridge" occasioned by a collision which took place off Trial Island, near Vancouver Island, B.C., on January 31, 1917.

J. E. McMullen, for plaintiff.

E. C. Mayers, for defendant.

MARTIN, L.J.A.:—On January 31, 1917, about half-past four (Victoria time) in the afternoon, the British twin-screw steamship "Empress of Japan" (W. Dixon Hopcraft, Master), length 455 feet, gross tonnage 5,940, collided with the Norwegian steamship "Belridge" (Nels Olsen, Master), length 450 feet, gross tonnage 7,020, in the Strait of Juan de Fuca, between Trial and Discovery Islands, the "Empress of Japan" being inward bound for Vancouver pursuing a course from Trial Island to round Discovery Island, and the "Belridge" outward bound pursuing a course from Discovery Island to round Trial Island, which are about 3 miles and 6 cables apart. The tide was at slack and the state of the weather, according to the preliminary act filed by the "Belridge", was heavy snow-storm, very thick," with a varying north-westerly wind about 20-25 miles, and according to the "Japan", a "snow-squall," with a "northerly moderate wind"; the latter vessel admits she was going at a speed of 12 knots and her best speed, her pilot says, was 16¼, while the former alleges, erroneously, I find, that her speed was only "about 3 or 4 knots." The "Japan" alleges she first saw the "Belridge" "about half a mile distant ahead," and the "Belridge" first saw the "Japan" "2 to 3 ship lengths about one point on the port bow." The ships came together about amidships on their port sides and both sustained damage.

For some time before as well as the time of collision both vessels had been sounding fog signals, as had also the lighthouse at Trial and Discovery Islands.

So far as the "Japan" is concerned the case is very simple. She was on her own shewing clearly violating art. 16 by not going at a "moderate speed" in the snow-storm (which speed was maintained till the "Belridge" came in sight) within the prin-

ciples fully considered by me in *The "Tariar"* v. *The "Charmer"* (1907), Mayers' Admiralty Law and Practice, p. 536; and *Pallen* v. *The Iroquois* (1913), 11 D.L.R. 41, 18 B.C.R. 76, 17 Can. Ex. 185, to which I refer, and also to *The Counsellor*, [1913] P. 70, 82 L.J. (Adm.) 72. In the second case the contention that ship is entitled to run through fog or snow at a speed which is safe for herself but immoderate and dangerous for others is disposed of.

Then as to the "Belridge". She, after passing Discovery Island, continued to go, I find, through the snow-storm at a speed of upwards of 11 knots, but upon hearing a ship's fog signal to the south-west, apparently forward of her beam in the direction of Trial Island, reduced her speed to half, making at the least 6 knots, and shortly thereafter, upon hearing the same whistle repeated almost ahead, changed her course one point to the westward, but did not for 3 or 4 minutes after half speed reduce to "slow," not till after she had heard two more whistles from what she then knew was the "Japan," and after going "slow" for 2 or 3 minutes sighted the "Japan," and put her helm hard aport and engine full speed astern, but too late to avert the impact. This is putting the matter in as favourable light as possible for the "Belridge," based on admissions of her pilot and officers, and yet it clearly shews that she also violated art. 16 in two respects, not going at a moderate speed at 11 knots, and not having stopped her engines and navigated with caution when she heard the signal of another vessel, apparently forward of her beam, whose position was not ascertained. No satisfactory reason was given for her failure to comply with the requirements of the article, and at the very least I cannot understand why she did not reduce her speed to "slow" earlier than she did, especially in that frequented locality. Her case, therefore, is also covered by the two authorities already cited. I have only to add that it seems an unaccountable thing that none of the witnesses for the "Japan" will admit that he heard any fog signal from the "Belridge," though the independent witness, H. J. Austin, who was waiting for her in his launch off Brotchie Ledge and saw the "Japan" pass him, says, and I believe him, that he heard her signals for some considerable time, nearly an hour, approaching from about Ten Mile Point, passing Discovery and Trial Islands on her course past the Ledge, about 3 miles from Trial Island.

It remains, then, to consider the application of the Maritime Conventions Act, 1914, (Dom.), 1914, ch. 13, sec. 2, which came into force on July 1, of that year: Canada Gazette, June 6, 1914. The relevant portions of the section follow:—

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"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and . . . ."

This is the first time, I may say, that I have found it necessary to consider the effect of this section, but it has been considered several times in England, beginning with *The "Rosalia"*, [1912] P. 109, 81 L.J. (Adm.) 79, 12 Asp. M.C. 166, where the degree of liability was apportioned at 60 and 40 per cent; *The "Bravo"*, [1912] 12 Asp. M.C. 311, 29 Times L.R. 122, at four-fifths and one-fifth; *The "Counsellor"*, [1913] P. 70, 82 L.J. (Adm.) 72, at two-thirds and one-third; *The "Cairnbahn"*, [1914] P. 25, 12 Asp. M.C. 455, 83 L.J. (Adm.) 11, 110 L.T. 230, equally apportioned; *The "Llanelly"*, [1914] P. 40, 83 L.J. (Adm.) 37, 110 L.T. 269, 12 Asp. M.C. 485, and *The "Umona"*, [1914] P. 141, 83 L.J. (Adm.) 106, 111 L.T. 415, 12 Asp. M.C. 527, at three-fourths and one-fourth; *The "Ancona"*, [1915] P. 200, 84 L.J. (Adm.) 183, at two-thirds and one-third; *The "Kaiser Wilhelm II."*, [1915] 31 Times L.R. 615, 85 L.J. (Adm.) 26, equally apportioned; and *The "Peter Benoit"*, [1915] 13 Asp. M.C. 203, 85 L.J. (Adm.) 12, equally apportioned. There is a discussion of the question in this last and leading case, in the House of Lords, and it is there laid down, (13 Asp. M.C., at p. 207) by Lord Atkinson, that where "the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of the damages should be half and half."

How the apportionment should be arrived at is thus viewed by Lord Sumner, p. 208:—

"The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do; a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, 'having regard to all the circumstances of the case.' Attention must be paid not only to the actual time of the collision and the manœuvres of the ships when about to collide, but to their prior

movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by but a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J., observes: 'The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' That must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration."

I feel that I should say in this case, as Lord Atkinson said in that (p. 207):—

"There is not, in my opinion, any such preponderance proved in this case. Both vessels were to blame; and, in my view, the evidence leaves it very uncertain which was most to blame."

There will be a reference to the registrar, with merchants, if necessary, to assess the damage. As both ships are to blame, each will bear her own costs, in accordance with the rule laid down in *The "Bravo"* case, *supra*.

Let judgment be entered accordingly.

Judgment accordingly.

WENTWORTH ORCHARD Co. v. MERCHANTS CONSOLIDATED, Ltd.

Manitoba King's Bench, Curran, J. January 9, 1922.

SALE (§ IIIC—72)—CONTRACT FOR SALE OF JAM—LABEL ON JARS NOT IN COMPLIANCE WITH WRITTEN ORDER—RIGHT OF PURCHASER TO REJECT—FRAUD—MEAT AND CANNED FOODS ACT—1907 DOM. CH. 27—REQUIREMENT AS TO LABELS—TRADE CUSTOM TO SHEW ACT NOT COMPLIED WITH—ADMISSIBILITY OF EVIDENCE AS TO.

A written order or contract which calls for the delivery of certain quantities of jam designated respectively in the written order as "Strawberry and apple," and "Raspberry and apple," is not complied with by delivery of jam labeled "Apple and strawberry," and "Apple and raspberry." The purchaser has a right to rely on the labels as naming the fruit which is present in the largest amount first as required by the Order in Council passed pursuant to the Meat and Canned Foods Act 1907 Dom. ch. 27, and no trade custom can be set up to shew that this Order in Council is not being complied with.

[See Annotation 58 D.L.R. 188.]

ACTION to recover the price of goods sold to the defendant acceptance of which had been refused. Action dismissed.

A. E. Hoskin, K.C., for plaintiff.

H. V. Hudson, for defendant.

CURRAN, J.:—I have considered the evidence submitted with care and given due weight to the arguments of counsel and have reached the conclusion that the plaintiff has failed to make out its case.

The crux of the matter is simply this: The written order or

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WENTWORTH ORCHARD CO. v. MERCHANTS CONSOLIDATED, LTD.

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contract calls for the delivery in part by the plaintiff company to the defendant company of certain quantities of jam designated respectively in the written order, "Strawberry and Apple," "Raspberry and Apple," and "Assorted and Apple." The plaintiff company attempted to fill this part of the order by delivering the designated quantities of jam in tins labeled "Apple and Strawberry," "Apple and Raspberry," and "Apple and Assorted," contending that both designations mean in the trade the same thing. The defendant company on learning how the tins of mixed jam were labeled rejected them and refused to take delivery. Of course if the plaintiff's contention is correct such rejection and refusal was wrongful and the defendant company must pay the contract price sued for. If the goods delivered were not in compliance with the contract the refusal to accept was legally justified and the plaintiff cannot recover.

In my judgment, the goods delivered were not in accordance with the contract and the defendant company was justified in refusing to accept and take delivery. No trade usage such as claimed by the plaintiff company in justification of its action in shipping the goods it did ship in alleged fulfilment of the contract has been pleaded and the defendant's counsel argued strongly against the reception of any such evidence. The question of practice seems doubtful and I decided not to reject this evidence which mainly was commission evidence taken in Ontario and consisting of the testimony of certain manufacturers of jams in that province, all of whom had western connections and did business in this province. I do not think effect can be given to their contentions for an alleged usage of trade which was directly in conflict with the Order in Council of 1918, and furthermore because, in my opinion, this alleged usage does not seem to me to be founded upon principles of honest and fair dealing; at all events, as it affects the consuming public. Whatever the manufacturer and wholesaler may have understood of the matter, the buying public and perhaps retail dealers as well had to depend upon the labels affixed to the containers of mixed jams as the only means of knowledge as to what they were getting. I have no doubt the practice prevailed amongst certain Canadian manufacturers of jams, and perhaps among all of them, prior to June 15, 1918, of labeling mixed or compound jams containing a very large percentage of apple juice and apple pulp and a very small percentage of pure fruit juice, prepared with glucose or corn syrup instead of granulated sugar with the content least in proportion named first on the label, e.g., "Strawberry and Apple," "Raspberry and Apple," when in fact such mixed jams had little in their constituent elements to justify

such a misnomer. Anyone not in the trade secret of the manufacturer looking at such label would, I think, not unnaturally or unreasonably conclude that he was getting a jam in which the fruit first named on the label if it did not actually predominate would be at least in equal or nearly equal proportion to the second named, which was apple. In short, according to the alleged trade usage, the manufacturer was imposing on the buying public through the medium of a label, a jam which was in reality nothing but a preparation of apples with a small percentage, stated by some of the manufacturers, called by the plaintiff, to be as low as 8 to 12% of fruit juice used merely for flavouring the composition. How such mixture could, with any degree of truth or fairness to the public, be called a fruit and apple jam and so labeled, I cannot conceive, and yet this is what was being done right along by some manufacturers of jams in Canada, prior to June 15, 1918, when the Order in Council (ex. 19A) was passed by the Governor-General in Council pursuant to the provisions and powers contained in the Meat and Canned Foods Act, 1907, ch. 27, of the Dominion of Canada.

This Order in Council had from the date of its enactment or passage the full force and effect of statutory law and as such was entitled to respect and obedience from all affected by its provisions. Clause 13 on p. 6 of this exhibit reads:—

"13. When jam, jelly, marmalade, etc., are prepared from two or more sorts of fruits the first named fruit on the label shall be that which is present in largest amount, thus a jam made from strawberries and apples or apple pulp or apple jelly shall be labeled as "Strawberry and Apple Jam," only if the weight of strawberries used exceeds the weight of apples or apple pulp or apple jelly in the product; where the weight of apples or apple pulp or apple jelly exceeds the weight of strawberries used the label shall read "Apple and Strawberry Jam" or "Apple Jam flavoured with Strawberries," or otherwise in such a way as to make clear the fact that strawberries are not the chief constituent."

Can any one doubt that this provision was made to put an end to the practice I have just adverted to and protect the buying public? On September 4, 1920, the foregoing Order in Council was rescinded and a new Order in Council passed (ex. 21) which contains among others the following recital:—

"Whereas it is desirable and in the public interest to amend the Regulations governing the inspection of preserved fruits, vegetables, and milk, established by Order in Council of June 15, 1918; such changes being principally in definitions of quality

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WENTWORTH ORCHARD CO. v. MERCHANTS CONSOLIDATED, LTD.

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and grade, involving detailed explanation rather than actual change in policy."

It also contains said clause 13 in identical language so the law as to labeling mixed jams has remained unchanged since June 15, 1918, and applied to the contract or order for the jam in question.

An attempt has been made to show that the first named Order in Council was never enforced or was, in fact, suspended in its operation as to the labeling clause I have quoted. The evidence of this is from the manufacturers examined in Ontario, who say the Government inspectors mentioned in the Order in Council called upon them and told them they could continue to use the labels they had in stock which contained the legend "Strawberry and Apple, etc.," until such stocks of labels were exhausted, and further by the putting in evidence of a letter signed by F. Torrance, veterinary director general, dated July 2, 1918, received by the plaintiff company. It will be noted that this letter which encloses a copy of the new regulations in the Order in Council and undoubtedly is authentic, calls attention to sec. 13, dealing with labeling of goods covered by the regulations of the Order in Council and contains the following:—

"Please read this section carefully and comply with its requirements. Reasonable latitude will be exercised by this office in connection with such labels as may be on hand at the present time."

Just what this means I do not know, but it seems beyond reason to suppose that this official ever meant to give the manufacturers of jam in Canada *carte blanche* to disregard this law, or that he had the power to do it even if he had meant to, and much less had the inspectors referred to any power to render nugatory a law passed for the public benefit and in the public interest as this law undoubtedly was. No such understanding or agreement if made by these officials with the manufacturers either tacit or otherwise could deprive the public generally of the benefits and protection conferred by this Order in Council and I refuse to give any effect to these alleged sanctions.

The defendant's officer, C. H. Sly, who negotiated the order or contract in question with Caldwell, the plaintiff's managing director, says that he knew of the existence of the first Order in Council in February, 1920, prior to placing the defendant's order with the plaintiff and also that he had no notice or knowledge of the letter of the veterinary director general (ex. 20) or that the operation of the Order in Council had in any way been affected or suspended by government authority. I accept his statement on these points and have no doubt that whatever may have been his former knowledge as to the practice of labeling

mixed or blended jams he honestly believed that the order he was giving the plaintiff would be governed by the new law and that it would be quite sufficient to describe in the order the mixed blended jams about to be purchased as the same should be described on the labels in conformity with that law. It appears from the evidence of the manufacturers submitted by the plaintiff that no change whatever in the formula of mixed or compound jams was made in consequence of the Order in Council of June, 1918, and no attempt to comply with its provisions as to labels but that they all went merrily on in the old way, making and selling a cheap apple-filled jam with a small percentage of fruit for flavouring and labeling that product in express contravention of the Order in Council as being something which it was not. It is true they contend that price was the main factor in connection with these mixed or compound jams and that it would be impossible to manufacture a jam that complied with the Order in Council and sell it at anything like the prices that had been usually quoted for mixed jams. It seems to me that this is no excuse for disobeying the law which in no way constrained them to alter their formula or their prices but only to truthfully label their products so that the buying public might know what it was paying its money for. If a mixed jam made in agreement with the provisions of the Order in Council could not be manufactured and sold at the old prices for the inferior commodity the remedy was to raise the price or else use a truthful label. We are not left in doubt as to the proportions of and the constituent elements in the mixed or blended jams made by the plaintiff company in 1920, and prior to that year. Caldwell tells about these in his evidence of the trial. In a batch of jam weighing 118 lbs. the plaintiff company used, in 1920, 15 lbs. fruit, 50 lbs. of apple juice and pulp, balance sugar and corn syrup. Prior to 1920 they used only 8 lbs. of fruit as against 15 in the 1920 formula. Certainly an improvement. Henry Billington, a commission witness for the plaintiff, was their jam boiler in 1920, when the jam in question was made and he gives the following formula as that used in making this jam: Sugar, 38 lbs., glucose 30 lbs., apple pulp 30 lbs., apple juice 25 lbs., and fruit 15 lbs. This compound was very properly labeled in conformity with the law "Apple and, etc.," and it was what the plaintiff shipped to the defendant as fulfilling the order which called for in part, 300 cases "Strawberry and Apple Jam," 225 cases "Raspberry and Apple Jam," and 50 cases "Assorted fruits and Apple Jam."

It is significant that the plaintiff did not bill or invoice these goods to the defendant as described in the order but called them "Strawberry Blend Jam," "Assorted Blend Jam," and "Rasp-

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berry Blend Jam" in the invoices sent to the defendant company (see exs. 46 and 47.) Why were they not billed as what they really were and in accordance with the label which correctly described the goods? No explanation of this has been offered.

I find that the defendant company never made any examination of any of the mixed or compound jams made by the plaintiff prior to the order in question being placed and did not rely upon any knowledge possessed by it or its servants or agents as to what the composition of such jams was. I also find that the plaintiff had no ground for asserting or assuming that the defendant had any such knowledge, or was or ever expressed itself satisfied with the quality of such mixed jams but that having ascertained from a reliable source that the plaintiff company was a reputable and reliable manufacturer of jams, relied on getting goods which would at least conform to the standards required by law to satisfy the description of the goods as contained in the order. An attempt by the defendant to compromise the difficulty by payment of a lower price for the goods having failed, by reason of the plaintiff's refusal to accept the lower price offered, I think the defendant was entirely within its rights in refusing to accept or take delivery of the jam.

I, therefore, dismiss the plaintiff's action with costs, which will include costs of examinations for discovery and the commission evidence taken in Ontario.

Judgment accordingly.

MOSIMAN v. CARVETH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

ASSIGNMENT (§ I—14)—CONTRACT TO PURCHASE LAND—STIPULATION AGAINST TRANSFER WITHOUT CONSENT—CONSTRUCTION.

Covenants in agreements for sale of land that no assignment of the agreement shall be valid unless it shall be approved and countersigned by the vendor are designed to protect a vendor from annoying entanglements, but as between others are of no consequence, and until the vendor sets up for his own protection such a stipulation in case of a claim made against or through him, no subpurchaser has a right to do so in an action against him for specific performance.

[*McKillop* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551; *Re Green Caveat* (1912), 9 D.L.R. 301, 6 S.L.R. 6; *Landes* v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32 followed.]

APPEAL by plaintiff from the trial judgment (1921), 60 D.L.R. 222, dismissing an action for specific performance of an agreement for the sale and purchase of lands. Reversed.

F. L. Bastedo, and *J. L. McDougall*, for appellants.

F. A. Sheppard, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This was an action for the specific performance of an agreement for the sale of a certain section of land by the plaintiffs to the defendant.

At the time the agreement was made, the plaintiffs held the north half of the section under agreement with Mike and Martha Rowan, and the south half under agreement with one Shantz. By the agreements the defendant assumed the obligations of the plaintiffs to the Rowans and Shantz for the balance due to them respectively in respect of the said lands. The Rowan agreement contained the following clause:—

"No assignment of this agreement shall be valid unless it shall be for the entire interest of the purchasers and be approved and countersigned by the vendors or their agent."

The Shantz agreement contained the following clause:—

"It is further understood and agreed that no sale, transfer or pledge of this contract or any interest therein or of all or any of the premises herein described shall be in any manner binding on the vendor unless the said vendor shall consent thereto in writing hereon."

The question of title was raised by the statement of defence, and at the trial the trial Judge (1921), 60 D.L.R. 222, 14 S.L.R. 286, made a reference to the Local Registrar. By his report, the Local Registrar found that Samuel Shantz was the registered owner of the south half of the section, clear of all incumberances, and that the plaintiffs were in a position to make title thereto under their agreement with Shantz. He also found that the Rowans were the registered owners of the north half of the section, and that the plaintiffs were in a position to make title thereto under their agreement with the Rowans. It appeared from the report that the sale of the south half of the section by the plaintiffs to the defendant was consented to and approved in writing, under seal, by Shantz, and the sale of the north half was consented to and approved in writing, under seal, by the Rowans. These agreements are dated, respectively, February 16, 1921, and December 23, 1920, both dates being later than the date of the commencement of this action. The consent and approval in each case was by a separate document.

The trial Judge on these facts dismissed the action, on the ground that "the plaintiffs had failed to make title." He held that the consent and approval of the original vendors given in the manner provided in the original agreements were necessary before the plaintiffs could require payment from the defendant, and that the plaintiffs were not in a position to give title, or "to compel title to themselves," at the time the defendant repudiated

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Haultain, C.J.S.

the contract. In support of these findings the Judge relies on the cases of *McKillop* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551; *Atlantic Realty Co.* v. *Jackson* (1913), 14 D.L.R. 552, 18 B.C.R. 657; *Re Green* (1912), 9 D.L.R. 301, 6 S.L. R. 6; and *Landes* v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32.

The first mentioned case seems to me to lead to an exactly opposite conclusion. The covenants relating to assignment of the original agreements with Shantz and the Rowans do not impose any limitation on the right or power of the plaintiffs to sell the land in question. While the covenant would justify the original vendors in refusing to recognise the defendant, they could not interfere with the right of the plaintiffs to compel title to themselves upon the completion of their part of the agreements. Covenants of that sort are "as between others of no consequence," and "are designed to protect a vendor from annoying entanglements and unless and until the vendor sets up for his own protection any of such stipulations in case of a claim made against or through him, no one else has a right to do so," per Idington, J., in *McKillopp* v. *Alexander, supra,* at p. 590. See also remarks of Anglin, J., in the same case at pp. 606-7. So long as the plaintiffs are in a position to compel Shantz and the Rowans to transfer to them, it can make no difference to the defendant whether he gets the transfer directly from them or from the plaintiffs. In that case there is no question of title at all, it is only a question of conveyancing. See *Gregory* v. *Fetrie* (1910), 3 S.L.R. 191.

There is no doubt that in the absence of the necessary consent and approval of the original vendors the defendant had no right which he could compel them to recognise, and could not, for instance, have filed a caveat against the land. *McKillop* v. *Alexander, supra,* per Duff, J., at pp. 592-602, and that is all that was decided in *Atlantic Realty* v. *Jackson* and in *Re Green, supra.*

As to the other branch of the case, I must confess that a careful consideration of the evidence does not, in my opinion, disclose any foundation for an action of deceit by the defendant against the plaintiffs, with one exception to be referred to later. So far as the statement regarding the nature of the soil is concerned, the evidence does not establish that it was false; or, if it was false, that it was known to be false by the plaintiffs. On the contrary, the plaintiffs seem to me to have acted in good faith in describing the land as chocolate loam. There is a great deal of evidence with regard to the meaning of the words "loam" and "chocolate loam." Both plaintiffs testify that they used the word "loam" in their advertisement of the land after con-

sulting Webster's dictionary. This work defines loam as "a mixture of clay, sand and silt," and the expert evidence shows that the land in question was properly described as "loam," according to that definition. Hanson, an expert witness called by the defendant, testified that the word "chocolate" has no significance as to quality or texture, but refers purely to color. Hanson also testified that the sample of soil taken from the land was chocolate in colour.

Another false representation alleged in the particulars was, that all the land was under cultivation. This statement was made in the plaintiffs' advertisement, but in the correspondence between the parties—after the advertisement and before the sale was completed—the defendant was informed that 40 acres were fenced for pasture and 10 acres for hog pasture. It does, however, appear from the evidence that there are a number of sloughs on the farm, which produce a certain amount of hay, but are not fit for cultivation. There is no evidence to establish the number of acres included in these sloughs or the difference in value. Strictly speaking, the defendant should have put in evidence on this branch of his case, and as no damage was alleged or proved there was no actionable wrong pleaded. I would send this branch of the case back to the trial Judge to determine the amount of damage (if any) sustained by the defendant by reason of the representation mentioned.

The trial Judge also dismissed the plaintiffs' action for an accounting for the crops grown on a certain quarter section leased by the plaintiffs to the defendant in accordance with the provisions of the agreement made between them. I can find no evidence whatever shewing that any representations of any kind were made by the plaintiffs to the defendant with regard to this quarter section, or to justify the inference that, because representations were made with regard to the other land, they were also made with regard to the leased land.

The plaintiffs are, therefore, entitled to an accounting as asked for in the statement of claim, and judgment should be entered therefor accordingly.

I would, therefore, allow the appeal with costs, and set aside the judgment below with costs of the action to the plaintiffs. The plaintiffs should also have their costs of all the issues raised by the counterclaim, other than the one above mentioned. I would not allow the defendant any costs of counterclaim, and would leave the question of the costs of the further proceedings to the trial Judge.

The plaintiffs will be entitled to judgment for the amount of

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their claim and costs, including costs of appeal, less the amount of damages and costs (if any) allowed by the trial Judge, who will settle the terms of the judgment.

Appeal allowed.

BESSEY v. LIVINGSTONE.
(Annotated)

Ontario Supreme Court, Sutherland, J. January 24, 1922.

GAMING (§I—4)—RACE-TRACK BETTING—ACTION FOR MONEY LENT FOR PARI-MUTUEL BETTING—CR. CODE SEC. 235, AS AMENDED 1920 CAN. CH. 43—PROVINCIAL GAMING LAW—ONTARIO GAMING ACT, R.S.O. 1914, CH. 43.

The Gaming Act R.S.O. 1914 ch. 43, is a bar to the recovery in a civil action in Ontario of money advanced or lent to another for pari-mutuel betting on horse races run on a licensed race track in Ontario although the maintenance of the pari-mutuel machines by the race track association during the racing was not criminal by reason of sec. 235 of the Criminal Code as amended 1920 Can. ch. 43, sec. 6.

[See Annotation on Gaming and Betting Debts in Ontario, which follows at the end of this case.]

MOTION by the defendant for a judgment dismissing the action, on the ground that the plaintiff's examination for discovery disclosed that he had no cause of action.

The motion was heard in the Weekly Court, Toronto.

W. K. Murphy, for the plaintiff.

G. C. Thomson, for the defendant.

SUTHERLAND, J.:—The plaintiff's claim in the action is for money lent to and used for the defendant at his request. Upon examination for discovery, the defendant admitted that the money was either betted by the plaintiff for the defendant or advanced by the plaintiff for the defendant to some one to bet on the races for the defendant. The races were run on a licensed race-track in Ontario. The betting was on horses chosen by the defendant and in the manner directed by him, by means of pari-mutuel machines.

Under the provisions of the Act of 1920, 10 & 11 Geo. V. ch. 43, sec. 6, amending the Criminal Code [sec. 235] betting upon the racecourse of any association duly incorporated, through the agency of a pari-mutuel system, is not in itself illegal. It was contended for the defendant, however, that under the provisions of the Gaming Act, R.S.O. 1914 ch. 217, a contract to lend money for the purpose of betting is deemed to be made for an illegal consideration. The word "game," as used in sec. 2 of that Act, includes "horse racing:" Halsbury's Laws of England, vol. 15, p. 280.

By reason of the provisions of secs. 2 and 6 of the Gaming

Act (Ont.) the plaintiff, who advanced or lent money to the defendant for the purpose mentioned, cannot maintain an action to recover the money: *Saffery* v. *Mayer*, [1900] 1 Q.B. 11; *In re O'Shea*, [1911] 2 K.B. 981, 985; *Keen* v. *Price*, [1914] 2 Ch. 98, 101, 102. Annotation.

There should be a judgment dismissing the action, but without costs.

Action dismissed.

ANNOTATION
on
GAMING AND BETTING DEBTS IN ONTARIO.

The present Gaming Act, R.S.O. 1914, ch. 217, is a consolidation of the Ontario Statute of 1912, 2 Geo. V., ch. 56. It embodies some of the features of the English Gaming Acts of 1835, 1845 and 1892, which of their own force would not extend to the Province of Ontario, in which the adoption of English law was as of October 15, 1792.

By the Property and Civil Rights Act, R.S.O. 1914, ch. 101 (consolidated from 10 Edw. VII., Ont., ch. 45, and previous statutes), it is enacted (with an exception as to laws relating to maintenance of the poor) that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of England as they stood on October 15, 1792, as the rule for the decision of the same, except so far as such laws have been since repealed or altered by statutes having the force of law in Ontario. Under the same section, similar provision is made in respect of the English rules governing testimony and legal proof.

Legislative power upon the subjection of "bills of exchange and promissory notes" was reserved at Confederation to the Federal Parliament by the terms of the B.N.A. Act, 1867 Imp. So also was the general subject of "Criminal Law."

The Ontario Gaming Act is evidently intended to deal with the subject of gaming and betting debts without entrenching upon the domain of Dominion legislative powers either with regard to criminal law or to bills of exchange and promissory notes, though it may be classed as ancillary legislation in respect of both.

As to gaming and betting offences under the Criminal Code of Canada, see Code secs. 226-235, 442, 442A (1921 Can., ch. 25).

The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 53, enacts that "valuable consideration for a bill may be constituted by—

(*a*) Any consideration sufficient to support a simple contract;

(*b*) Any antecedent debt or liability."

And by sec. 53 (2), such a debt or liability is deemed valuable

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consideration whether the bill is payable on demand or at a future time.

Under sec. 186 of the Bills of Exchange Act this provision applies also to promissory notes.

A cheque is a "bill of exchange" drawn on a bank payable on demand, and except as otherwise provided in the sections of the Bills of Exchange Act dealing with cheques (secs. 165-175) the provisions of that Act applicable to a bill of exchange payable on demand apply to a cheque. Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 165.

The Ontario Gaming Act provides that "Every agreement, note, bill, bond, confession of judgment, *cognovit actionem*, warrant of attorney to confess judgment, mortgage or other security, or conveyance, the consideration for which, or any part of it, is money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game, or by betting on the sides or hands of the players, or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent or advanced at the time and place of such game or play to any person so gaming, playing or betting, or who during such game or play, so plays, games or bets, shall be deemed to have been made, drawn, accepted, given or executed for any illegal consideration." The Gaming Act, R.S.O. 1914, ch. 217, sec. 2; 2 Geo. V., Ont., ch. 56, sec. 2 adapted from 9 Anne, ch. 19 (ch. 14 Ruff ed.), sec. 1, as amended 1892, 2 Edw. VII., Imp., ch. 1, sec. 8.

The Ontario Gaming Act further provides that:—"If any person makes, draws, gives or executes any note, bill or mortgage for any consideration which is hereinbefore [by R.S.O. 1914, ch. 217, sec. 2] declared to be illegal, and actually pays to any endorsee, holder or assignee of such note, bill or mortgage the amount of the money thereby secured or any part thereof, such money shall be deemed to have been paid for and on account of the person to whom such note, bill or mortgage was originally given and to be a debt due and owing from such last named person to the person who paid such money and shall accordingly be recoverable by action." Gaming Act, R.S.O. 1914, ch. 217, sec. 3; 2 Geo. V., ch. 56, sec. 3 (adapted from English Gaming Act, 1835, 5 & 6 Will. 4, ch. 41, sec. 2).

It appears that this section creates a statutory debt and that the action thereby authorized is not founded on any promise to pay, either express or implied. *Cohen* v. *Hall*, [1922], 3 K.B. 37.

Another provision of the Ontario Gaming Act reads as follows:—"Any person who at any time or sitting, by playing at cards, dice, tables or other game, or by betting on the sides, or

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hands of the players loses to any person so playing or betting, in the whole the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered." Gaming Act, R.S.O. 1914, ch. 217, sec. 4; 2 Geo. V., Ont., ch. 56, sec. 4 adapted from 9 Anne, ch. 19 (ch. 14 Ruff ed.), sec. 2.

A consideration of some of the English cases and of the English common and statute law prior to the year 1792, the date of adoption of English law in Ontario, will assist in determining the scope and effect of the present Ontario Gaming Act, R.S.O. 1914, ch. 217.

Under the English Gaming Acts betting debts are not legally recoverable, but betting (apart from restrictions of place, time and manner of conducting the bet) is not illegal or forbidden by statute. *Ford* v. *Radford* (1920), 36 Times L.R. 658; 64 Sol. Jo. 571.

Playing card games for money is gaming not necessarily unlawful, but it is unlawful when played in a common gaming house. *R.* v. *Charles Hendrick* (1921), 15 Cr. App. Rep. 149.

Horse racing is not expressly referred to either in the statute of 1710, 9 Anne, ch. 14 or in the English Gaming Act, 1835, but by a series of decisions culminating in the decision of the English Court of Appeal in *Woolf* v. *Hamilton*, [1898] 2 Q.B. 337, it has been settled that horse-racing is within these statutes and that a cheque given for a bet upon a horse race is therefore to be deemed to have been given "for an illegal consideration." *Hyams* v. *Stuart-King*, [1908] 2 K.B. 696, at 715.

As early as 1710, the statute 9 Anne, ch. 14, provided, amongst other things, that bills (a word which includes cheques) given by any person where the whole or any part of the consideration shall be for money won at gaming shall be utterly void. This was amended by the Gaming Act 1835 (Imp.) which enacted that such cheques, instead of being void, should be deemed to have been given for an illegal consideration. This amendment of the law protected innocent purchasers for value.

As early as 1821 the intention of the Act of 9 Anne had been recognised as being to prevent a winner from obtaining money by way of gaming, and to disable him from keeping money won at play, even though indirectly obtained. "No person, who derives his title through the winner, can make the loser pay"—Abbott, C.J., in *Edwards* v. *Dick* (4 B. & Ald. 212 at p. 215), and also Holroyd, J., at pp. 216, 217. The idea of the amending Act of 1835 seems to be to encourage the unsuccessful gamester to pay third parties by enabling him to pass his payment on to

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the winner if he does. He has gambled and lost, and has not paid anybody. He has merely parted with paper which turns up in third parties' hands. The Legislature imposes the test of liability to be brought into Court and put to the possibly unpleasant necessity of pleading this Gaming Act. The section makes it worth his while to pay and save his credit, and gives him the satisfaction of recovering the money from the winner, and so getting even with him. *Sutters* v. *Briggs* (1921), 91 L.J.K.B. 1 at p. 10, per Lord Sumner.

Under English law before the Gaming Act of 1835, a man who lost and paid a bet of 10 pounds or upwards could recover from the winner the sum so paid. By 9 Anne, c. 14, s. 2, a loser who lost at one time or sitting 10 pounds, and paid the sum lost or any part of it, could recover the amount so paid. This provision was reinforced by the power given to the Courts of Chancery by the Act, 18 Geo. II., c. 34, s. 3, not merely to grant discovery in aid of an action at law to recover such an amount, but even to decree payment of the same. Moreover, the Act of Anne, s. 8, made it an indictable offence to win or lose 10 pounds at any one sitting, or 20 pounds within twenty-four hours. After the passing of the Gaming Act of 1835 these severe provisions remained law for a further ten years, until they were repealed by the Gaming Act, 1845 (8 & 9 Vict. c. 109). It may be inferred that the intention of Parliament, expressed in section 2 of the Act of 1835, was to make it clear that the amendment of the law effected by section 1 was without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto. *Sutters* v. *Briggs* (1921), 91 L.J.K.B. 1.

Section 2 of the Gaming Act, 1835 (Eng.) was designed to preserve the right of the loser of a bet to recover the amount, even when it was paid by means of a cheque thenceforth made enforceable in the hands of a third party under the conditions stated in section 1. And in a recent decision of the House of Lords it is said that there is no reason for limiting the natural and ordinary meaning of the word used. The term "holders or indorsees" means any holder and any indorsee, whether the holder be the original payee or a mere agent for him; and the rights of the drawer must be construed accordingly. The circumstance that the law, apart from the section in question, was repealed in 1845 [1845 Imp. ch. 109] without any repeal of the section itself may lead to anomalies, but cannot have weight in construing the section. *Sutters* v. *Briggs* (1921), 91 L.J.K.B. 1, at p. 8; *Cf. Dey* v. *Mayo*, [1920] 2 K.B. 346, 89 L.J.K.B. 241.

The words "knowingly lent or advanced for gaming or bet-

Annotation.

ting," 5 and 6 Will. 4, ch. 41 (1835), refer to money lent to carry out the illegal purpose of gaming or betting, not to money advanced to enable the borrower to pay the bets which he had already made and lost. *Ex Parte Pyke, In re Lister* (1878), 8 Ch. D. 754, 757; *Alcinbrook* v. *Hall* (1766), 2 Wils. 309; *In re O'Shea, ex parte Lancaster*, [1911] 2 K.B. 981, 984.

In *Applegarth* v. *Colley* (1842), 10 M. & W. 723, it was held that the English Parliament had by the Act of 1835 rendered the consideration for a cheque given in payment of a racing bet, an "illegal consideration." In *Hymans* v. *Stuart-King*, [1908] 2 K. B. 696, 24 Times L.R. 675 (C.A.) Farwell, L.J., said: "Any lawful act done or forborne by the plaintiff at the request and for the benefit of the defendant is a sufficient consideration to support a promise to pay by the defendant. All betting is not illegal because in certain places and under certain considerations it is made an offence by Act of Parliament, nor because bets which were enforceable as contracts at common law have been made by statute unenforceable as void or on an illegal consideration. There is nothing illegal in paying or receiving payment of a lost bet; it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word . . . . . Although the law will not enforce payment of a bet, it will not restrain the winner from putting in force such extra legal remedies as he may have by posting the defaulter or otherwise," [1908] 2 K.B. at 725-6. Continuing (at p. 728), Farwell, L.J., said: "The agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter; the sum of money may be equal to or less than the lost bet, but it is not payment of *the bet*, because that was payable on settling day and non-payment on that day made the loser a defaulter and liable to be posted. The day of payment is most material, for non-payment may involve the winner in a similar default; the *contract not to post* is a new contract quite distinct from the contract of wager and is sufficient to support a promise to pay money, which, though equal to the amount of the bet is not, in fact, the bet, but is compensation for its non-payment, and the action cannot be said to be brought for recovering any sum alleged to have been won on any wager within 8 and 9 Viet. Imp. (1845), ch. 109. If betting is to be made illegal, it is for the Legislature to make it so in express terms, not for the courts to strain the letter of Acts passed for a different purpose, to effectuate what we may consider a beneficial purpose. . . ."

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Sir Gorell-Barnes, President of the Court, pointed out in *Hyams v. Stuart-King, supra,* that the promise relied upon in that case was made in consideration that the plaintiff should not for a time proceed to endeavour to enforce his claim and should not, if the defendant paid the amount thereof within the agreed time, take any steps to inform the defendant's customers and others of the defendant's failure to meet his void engagements, because, if the plaintiff did so, it would injure the defendant's betting business. The *mere giving of time* to pay that which cannot be enforced does not amount to consideration; but apart from questions of illegality and unlawfulness the second part of the alleged consideration moving from the plaintiff would be within the ordinary definition of good consideration sufficient to ground an action, [1908] 2 K.B. at 708. An agreement suggested by the defaulter to keep confidential the failure to pay the debt may, it seems, support the new promise, although there had been no previous threat of exposure. *Wilson* v. *Connolly* (1910), 104 L.T. 94 (C.A.) For other cases see *Hodgkins* v. *Simpson* (1908), 25 Times L.R. 53; *In re Comar, ex parte Ronald* (1908), 52 Sol. Jo. 642; *Cohen* v. *Ulph* (1909), 26 Times L.R. 128.

For cases dependent upon the English Gaming Act of 1892, 55 and 56 Vict., ch. 9, see *Keen* v. *Price,* [1914] 2 Ch. 98; *Saffery* v. *Mayer,* [1901] 1 K.B. 11, applying *Tatam* v. *Reeve,* [1893] 1 Q.B. 44; *In re O'Shea,* [1911] 2 K.B. 981, (in which a loan made to pay a lost bet to another was held not to be one for an illegal consideration and therefore could be recovered).

BULLICK v. BULLICK.

Alberta Supreme Court, Simmons, J. July 28, 1922.

DIVORCE AND SEPARATION (§ VIII A—82b)—SEPARATION AGREEMENT—MISREPRESENTATION AS TO TERMS OF—LACK OF INDEPENDENT LEGAL ADVICE—DURESS—ACTION TO RESCIND—DELAY IN BRINGING ACTION.

Absence of independent advice, and misrepresentation as to the terms of an insurance policy assigned by the husband to the wife, under the terms of a separation agreement and a threat by the husband that if she did not accept the terms of the agreement she would get nothing, are sufficient to entitle the wife to an order rescinding the agreement, notwithstanding delay in bringing the action, the Court being of opinion that she had brought herself within the rule that length of time should not be allowed to operate against the title to relief where there has been a continuance of the circumstances under which the transaction took place, such as the distress of the parties, or improper influence used, or some other circumstances.

[*Gregory* v. *Gregory* (1815), Coop. G. 201, 35 E.R. 530; *Roberts* v. *Tunstall* (1845), 4 Hare 257, 67 E.R. 645, referred to. See Annotations 48 D.L.R. 7, 62 D.L.R. 1.]

ACTION by wife to rescind a separation agreement.

C. F. Adams, K.C., for plaintiff.

P. L. Stanford, for defendant.

SIMMONS, J.:—Plaintiff and defendant were married in 1906 and lived together from then until 1912, near Indian Head, in the Province of Saskatchewan. In the winter of 1912, the plaintiff made an extended visit with her mother in Regina and returned to her husband at Rose Valley near Indian Head in April 1912. Susan Brewett had recently arrived from England and was in the employment of the defendant as a domestic when the plaintiff came home in April, 1912. Differences arose and the plaintiff voluntarily left the defendant and lived separate from him since then. In January, 1915, the plaintiff and defendant met fortuitously at Indian Head and the defendant proposed to the plaintiff that they enter into a separation agreement. Defendant asked plaintiff if she needed money and she said she did. He offered her $200—$100 in cash and $100 in a promissory note, payable in one year and an assignment of an insurance policy for $1,000 in the Dominion Life Insurance Co.

Plaintiff maintained that this was not enough, but that she would think it over. Defendant said he would not give her anything unless she would sign a separation agreement. Plaintiff agreed to meet defendant in Indian Head and discuss further the proposed separation agreement and next afternoon met on the street in Indian Head, and defendant asked plaintiff to go to the office of Mr. Welch, a notary public, to execute an agreement. Defendant had, in the meantime, given instructions to Welch to prepare an agreement which is the one in question and which was prepared and ready for signature by the parties when they came to his office. Plaintiff says she told defendant she would like to consult a lawyer and was told by defendant that Welch was the only lawyer in town.

They went into Welch's office and the prepared agreement was presented to plaintiff and she executed it. In her statement of claim she says she was induced to sign the agreement by the representation by the defendant that the policy was a 20 year endowment policy, which would entitle her to $1,000.00 in cash when the policy had run 20 years, whereas the policy does not provide for payment of the $1,000 till the death of the insured defendant. In addition, plaintiff says she was induced to sign the separation agreement by the representation by the defendant that he was not then cohabiting with Susan Brewett and the plaintiff also claims relief on the ground that she had no independent advice.

At the trial I allowed plaintiff to amend her pleadings by alleging duress.

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I am not satisfied that there was wilful misrepresentation as to the policy, but after hearing the evidence of Fred Brason, an employee of the insurance company, at Calgary, I am satisfied that neither the plaintiff nor the defendant understood the terms or the real value of the policy, nor was it explained to them and the parties were not *ad idem* as to this material part of the contract. There are four options that can be selected by the insured at the end of the 20 year term dealing with accumulated dividends, cash, paid up value, reserve, and purchase of an annuity.

It would require legal knowledge, or in the alternative expert knowledge in insurance for the party to understand the value of the policy. As to the defendant's relations with Miss Brewett, I am not able to conclude that the plaintiff made this a condition precedent to entering into the agreement. One child had been born to the defendant and Miss Brewett when the agreement was executed and the defendant was living and cohabiting with her and representing her as his lawful wife in the neighborhood where the defendant then lived. He had moved to Alberta in the meantime. It is hardly probable that he would make such an untrue representation a condition to the agreement when the untruth was so palpable and so likely to be ascertained. Three more children have been born to defendant and Miss Brewett since the date of the agreement.

I am satisfied, however, that the plaintiff was entitled to independent advice and that one inducement to sign the agreement was the threat that if she did not do so she would get nothing. Either the misapprehension of the parties as to the contents of the insurance contract or the duress exercised by defendant would be sufficient grounds for setting aside the agreement if the plaintiff used reasonable diligence in applying for a remedy. The lapse of time in applying raises a difficult question.

The plaintiff was living with her mother when the agreement was made and was supporting herself. She says she was able to earn from $15 to $30 per month.

The agreement provides that the defendant pay the yearly premiums on the policy. In one case, he allowed these to fall in arrears so that the plaintiff found it necessary to tender the premium to protect the policy, but the defendant did subsequently pay this premium.

The plaintiff has received $200 and the benefit of the premiums paid by the defendant since 1915. The payment of these premiums did not directly contribute to her support although the policy was a valuable asset. The defendant is the owner of considerable property and is now able and was in a position at the

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time the agreement was signed to contribute in a much greater degree to the support of his wife.

His relations with Miss Brewett suggest that he was desirous of obtaining a release from the obligation of supporting his wife if she should offer to return to his bed and board. I am satisfied that, at least, he concealed from his wife his real relations with Miss Brewett and his consequent real reasons for the separation agreement. His wife has reached middle age and her earning capacity will naturally decrease.

I conclude she has brought herself within the rule which will excuse her delay in bringing the action. In all cases where length of time has not been allowed to operate against the title to relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place, as the distress of the parties, or, the improper influence used or some other circumstances.

Where a transaction of this kind has been brought about by misrepresentation, *concealment* or *undue influence*, or where the vendor is dependent on the bounty of the purchaser, the Court considers the right of the vendor to rescind the sale without the imputation of laches until such time as it is shown that he was released from the position in which he was placed by these circumstances. *Gregory* v. *Gregory* (1815), Coop. G. 201, 35 E.R. 530, cited by the Vice Chancellor in *Roberts* v. *Tunstall*, (1845), 4 Hare 257, 67 E.R. 645.

The plaintiff asks for no other relief, and the judgment will be a declaration rescinding said agreement. Plaintiff to have costs of the action in col. 3.

Judgment accordingly.

McDOUGALL v. MACKAY.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. May 2, 1922.

VENDOR AND PURCHASER (§ III—35)—PRIORITIES—VERBAL AGREEMENT—STATUTE OF FRAUDS—CHANGE OF TERMS—CAVEAT.

Where land has been sold under a verbal agreement, which was the next day reduced to writing sufficient to satisfy the Statute of Frauds, and later a caveat lodged by the purchaser, a sale of the land to another purchaser subsequent to the verbal agreement but prior to the writing does not give the subsequent purchaser a prior equity; the fact that the terms as to possession and payment were varied by the written agreement did not affect the priority of the first purchaser.

APPEAL from a judgment of the Court of Appeal of Saskatchewan (1921), 63 D.L.R. 247, 15 S.L.R. 24. Affirmed.

P. G. Hodges, for appellant.

A. R. Tingley, K.C., for respondent.

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MCDOUGALL v. MACKAY.

Anglin, J.

DAVIES, C.J.:—For the reasons stated by Lamont, J.A., when delivering the unanimous judgment of the Court of Appeal, Saskatchewan (1921), 63 D.L.R. 247, 15 S.L.R. 24, I am of the opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—For the reasons assigned in the judgment of Lamont, J.A., speaking on behalf of the Court of Appeal, I think the prior equity of respondent ought to prevail and hence this appeal should be dismissed with costs.

ANGLIN, J.:—One McClellan, the registered owner of the property in question, sold it to the defendants, the McDougalls, in October 1919, the contract containing a provision that no assignment of it should be valid unless approved and countersigned by the vendor.

The plaintiff, MacKay, became the purchaser, by oral agreement, of the equitable interest of the McDougalls on June 21, 1920, paying $100 on account of the purchase price of $6,500. Subject to a question as to discrepancies, this oral agreement was reduced into writing on the evening of June 22. The plaintiff lodged a caveat to protect his interests on June 30.

About noon on June 22, the McDougalls agreed orally to sell the property to the defendant Rusconi for $6,550. Subject, likewise, to some discrepancies, this agreement was also put into writing and on June 23 Rusconi then paid $1,550 on account of the purchase price. His agent immediately prepared and sent to McClellan, for execution by him, a transfer of the property to Rusconi. McClellan executed his transfer and on June 26 sent it to his bankers with instructions to hand it to Rusconi on receipt of the balance due McClellan on his agreement with the McDougalls. On June 29 McClellan wrote the McDougalls that he had accepted Rusconi's cash offer and would "not accept Mr. MacKay on contract." On July 6, Rusconi paid the balance of the purchase price to McClellan's bankers and obtained the transfer, and on July 8, had it registered subject to MacKay's caveat.

The trial Judge (MacDonald, J.,) took the view that because his written contract of June 22 differed in two particulars from the oral agreement of the 21st, MacKay had no enforceable contract until the evening of the 22nd. These two differences are thus stated in the judgment of the Court of Appeal, delivered by Lamont, J.A., 63 D.L.R. 247 at p. 248:

"(1) that under the oral agreement possession was to be given on July 15, while in his written agreement it was to be given on July 10, or sooner if possible, and (2) that under the oral agreement the price was stated to be $6,500, while in the written agreement the plaintiff, although he was to pay $6,500 in all, was to

pay the McDougalls their equity in cash and pay the balance to McClellan, in accordance with the terms of the agreement with the McDougalls, which was to be assigned to him." The trial Judge, therefore, held that Rusconi had the prior equity under his verbal agreement made at noon on June 22, and on that ground dismissed MacKay's action against the McDougalls and Rusconi for specific performance. He also took the view that, because MacKay's caveat referred only to the agreement in writing dated June 22, the interest thereby protected must be taken to have originated when that agreement was executed.

In the Court of Appeal the view prevailed that the written agreement with MacKay of June 22 sufficiently embodied the terms of the oral agreement of the 21st to warrant its being taken as a memorandum of the latter which satisfied the Statute of Frauds and that MacKay, therefore, had the prior equity, dating from the making of his oral agreement on the 21st, and was on that ground entitled to succeed.

On this question, I am inclined to accept the conclusion reached by the Court of Appeal.

On the first point:—There was nothing to prevent the parties, who had agreed on June 21, that possession would be given on July 15, changing that arrangement on the following day and providing, as they did, for possession on July 10, or sooner if possible. Did that change make of the document of June 22 a new contract in substitution for that of the 21st so as to prevent its being regarded as a memorandum thereof? That would seem to depend on whether the provision as to the date of possession should be deemed a material term of the agreement, or either an immaterial term or a collateral arrangement only. Fry on Specific Performance, 6th ed., para. 368. An arrangement as to date of possession may be of the latter character, *McKenzie* v. *Walsh* (1920), 53 D.L.R. 234, 54 N.S.R. 26; reversed by (1920), 57 D.L.R. 24, 61 Can. S.C.R. 312; *Anderson* v. *Douglas* (1908), 18 Man. L.R. 254. On the whole case I incline to the opinion that the provision as to the date of possession was not such an essential term of the oral agreement of June 21 that the change made in respect to it precludes the view taken in the Court of Appeal that the document of the 22nd was really a formulation of the oral contract of the 21st and not a new contract. As put by Lamont, J.A.,: "The difference as to the time when possession was to be given is not material."

On the other point:—The evidence detailed by Lamont, J.A., seems to make it clear that the terms as to payment set forth in the written agreement of the 22nd did not differ from those discussed and agreed to orally on the 21st.

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McDOUGALL v. MacKAY.

Anglin, J.

The three following objections raised by the defendants call for consideration:—1. That the MacKay caveat protects only such interest as he acquired by the written agreement of June 22, and, therefore, cannot be invoked to protect rights acquired under the oral contract of the 21st; 2. In view of what has since transpired, specific performance of the MacKay agreement has been rendered impossible; 3. The defendant Rusconi by his diligence acquired the better right to call for a conveyance of the legal estate held by McClellan.

1. As is pointed out in the respondent's factum, the caveator claimed an interest as purchaser under the agreement in writing dated June 22. This "agreement in writing" is the formal embodiment of the oral agreement of June 21. I think the caveat sufficiently indicated the claim of the plaintiff as purchaser under the oral agreement of June 21, evidenced by the writing of the 22nd, and, therefore, protected his equity under the oral agreement. Whatever rights MacKay had in or to the land in question covered by the caveat registered on June 30, were thereby preserved to him. *McKillop & Benjafield* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 55.

2. Nothing had occurred prior to such registration which would prevent the McDougalls transferring their equitable interest to MacKay. All that was done after the caveat was lodged was subject to MacKay's rights as they then existed and cannot interfere with the enforcement of them. For that purpose, Rusconi has assumed McClellan's position. This ground of appeal cannot be maintained.

3. Although impressed with the contention that by what he had procured to be done—the execution of the conveyance to him by the holder of the legal estate and the depositing of it with his bankers for delivery on payment to them of the balance of the purchase money and the writing of the letter by McClellan to the McDougalls—Rusconi had acquired a better right than MacKay to call for the conveyance of the legal estate, on further consideration I am satisfied that this is not the case. In dealing with an equitable estate in land the doctrine of obtaining priority by notice to the holder of the legal estate does not prevail: *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347, at 351, 67 L.J. (Ch.) 526, 47 W.R. 26. Rusconi did not obtain anything from McClellan which was tantamount to a declaration of trust in his favour or an undertaking to hold the land for him. Until delivery the deed sent to the bankers was wholly inoperative. Whatever might have been the effect of a similar letter from McClellan to Rusconi, McClellan's letter to the McDougalls carried no right to Rusconi. In what took place prior to the lodging of MacKay's caveat,

there was nothing to displace the original priority of his equitable claim. The uncompleted steps taken to obtain the legal estate had not that effect. *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, 55 L.J. (Q.B.) 169, 34 W.R. 662. McClellan's intention to convey the legal estate to Rusconi remained unexecuted on June 30. Whatever rights were conveyed by the delivery of the transfer on July 6 and its subsequent registration were acquired subject to MacKay's prior equity.

I fully recognise that a Court of equity will not prefer one equity to another on the mere ground of priority of time until it has found by examination of their relative merits that there is no other sufficient ground of preference between them; that such examination must cover the conduct of the parties and all the circumstances; and that the test of preference is the broad principle of right and justice which Courts of equity apply universally—(*Rice* v. *Rice* (1853), 2 Drew. 73, 61 E.R. 646, 23 L.J. (Ch.) 289, 2 W.R. 139). Here, after most careful consideration, I find nothing prior to the registration of MacKay's caveat which disturbed the equality between the two equities in all respects other than priority of time, which is, therefore, effective and entitles MacKay's equity to prevail.

The provision of the McClellan-McDougall agreement that no assignment of it should be valid unless approved and countersigned by McClellan is a stipulation for his benefit and can be invoked only by him. It did not prevent MacKay acquiring an equitable interest in the property goods as against the McDougalls and the subsequent purchaser, Rusconi. *McKillop & Benjafield* v. *Alexander* 1 D.L.R. 586, 45 Can. S.C.R. 551; *Sawyer & Massey Co.* v. *Bennett* (1909), 2 S.L.R. 516; reversed (1910), 46 Can. S.C.R. 622.

I would for these reasons affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

BRODEUR, J.:—I concur in the result.

MIGNAULT, J.:—It is necessary to consider what was the legal position of MacKay and Rusconi respectively on June 30, 1920, when MacKay registered his caveat. If on that date neither of these parties had more than an equitable right, MacKay being prior in time, should be preferred. And any title to the legal estate which Rusconi obtained and registered after that date would be subject to MacKay's caveat.

As matters stood on June 30, 1920, both MacKay and Rusconi had verbal agreements from the equitable owner for the sale of the property, which agreements had been reduced to writing. Rusconi, at that date, had not obtained the legal estate from McClellan, the legal and registered owner. It is true that on

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June 26, McClellan signed in favour of Rusconi a transfer of his estate and interest in the property, but this transfer was sent to the bank to be delivered to Rusconi on full payment of the price, and it was delivered to him after June 30. He, therefore, took the legal estate subject to MacKay's caveat.

Did Rusconi, on June 30, have a better right to call for the legal estate than MacKay? I think not. As matters then stood both MacKay and Rusconi had made an agreement of sale with the equitable owner, but MacKay was first in time. McClellan was then the registered owner of the property. He apparently objected to the sale to MacKay, and was willing to transfer the property to Rusconi, but no transfer had then been delivered to the latter. McClellan is not a party to these proceedings and MacKay and Rusconi must stand on the rights they had acquired from the McDougalls up to June 30. These were purely equitable rights and the equities being equal, MacKay is entitled to preference, for he was first in time. I would, therefore, agree with the Court of Appeal which decided in his favour.

The defence based on the Statute of Frauds, in my opinion, fails.

I would dismiss the appeal with costs.

Appeal dismissed.

PRESCOTT v. CROSBY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. June 13, 1922.

EXECUTORS AND ADMINISTRATORS (§ VI—130)—FOREIGN ADMINISTRATOR—RIGHT TO SUE ON PROMISSORY NOTE HELD BY HIM.

An executor appointed by a United States Court to administer the estate of a person domiciled there at the time of death may sue on promissory notes made by a person living in the Province of Manitoba, in favour of such deceased person, and which have come into his hands as such executor, without taking out administration in that Province.

[*Browns* v. *Browns* (1919), 48 D.L.R. 72, 15 Alta. L.R. 77; followed.]

APPEAL by plaintiff from the trial judgment in an action to recover payment of a promissory note. Reversed.

The judgment appealed from is as follows:—

Macdonald, J.—The action is brought for payment of promissory notes made by the defendant in favour of Mary Louise Crosby.

At the time of incurring the liability for which the notes sued on were given and at the time of her decease and for many years previously, Mary Louise Crosby was a resident of and domiciled in the State of Massachusetts, one of the United States of America, and the defendant was at the time resident of and domiciled in the Province of Manitoba.

The promissory notes sued are payable to the order of Mary Louise Crosby and were not endorsed by her in her lifetime and are not now endorsed by the plaintiffs and are the property of the estate. Why the plaintiff George A. Campbell is made a party does not appear.

The defence to the action is that the plaintiff's administrator has no *locus standi* in our Courts as administration has not been taken out in this Province.

Counsel for plaintiff contends that administration in this Province is not necessary to entitle the administrator in Massachusetts to bring action in our Courts, and cites in support of his contention: *Browns* v. *Browns* (1919), 48 D.L.R. 72, 15 Alta. L.R. 77. In that case at the time of the death of the deceased and of the grant of letters of administration by the Colorado Courts, where the deceased was domiciled, the defendant was also resident and domiciled within the Court's jurisdiction but subsequently removed to Alberta where he resided at the time of action being brought.

The action was stayed upon the ground that the plaintiff had no grant of administration from an Alberta Court and on an appeal to the Appellate Division it was held that the Colorado administrator could maintain the action without any local grant.

I take this judgment, however, to be arrived at from the fact that at the time of the death of the deceased, moneys were owing to him by a debtor then and at the time of the appointment of the administrator, a resident of and domiciled in the same State as the deceased, the title of the administrator had been established through his grant. Harvey, C.J., says (48 D.L.R. at p. 75):

"The contention of the defendant is that under the rule just expressed the property in the notes sued on, which are only choses in action, is in Alberta and therefore the plaintiff should obtain letters of administration before suing here, but it is clear that the property was not here at the time of the death of the deceased."

In *Thomson* v. *Her Majesty's Advocate-General* (1845), 12 Cl. & F. 1, 8 E.R. 1294, the House of Lords held that personal property having no situs of its own follows the domicile of its owner, but in *Rex* v. *Lovitt*, [1912] A.C. 212, 81 L.J. (P.C.) 140, it is pointed out that while that principle applies for the purpose of succession and enjoyment, yet for the purposes of legal representation of collection and of administration the law of the locality of the chattels applies, and the locality to be ascribed to choses in action is the locality of the debtor where the assets to satisfy them would probably be.

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In *Rex* v. *Sutton* (1682), 1 Wm. Saund. 273, 85 E.R. 331, the editor's note says at p. 275: "But where only *simple contract debts* are due to the deceased these are *bona notabilia* in that diocese where the *debtor* inhabits at the time of his creditor's death."

In *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171, 150 E.R. 1390, 7 L.J. (Ex.) 297, 1 H. & H. 319, Lord Abinger, C.B., in delivering judgment says (150 E.R. at p. 1398):—

"As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death; and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found.

These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad or with respect to shares or interests in foreign funds payable abroad and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. . . .

Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform here would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration, (for even if there were a foreign administration it is an established rule that an administration is necessary in the country where the suit is instituted)."

"An administrator is entitled to those assets of which the ordinary had jurisdiction and to none others." *Brodie* v. *Bickley* (1830), 2 Rawle (Penn.) 431; *Selectmen of Boston* v. *Boyl-*

ston (1807), 2 Mass. 384; *Schultz* v. *Pulver* (1833), 11 Wend. 361.

Jurisdiction or the right of administration in respect of debts due a deceased person never follows the residence of the creditor. They are always *bona notabilia* unless they happen to fall within the jurisdiction where he resided: Judgments are *bona notabilia* where the record is, specialties where they are at the time of the creditor's decease, and simple contract debts where the debtor resides: *Vaughn* v. *Barret* (1833), 5 Verm. 333.

It seems clear that the claim against this defendant was an asset of the estate in the Province of Manitoba and such being the case the foreign administrator is not entitled to realize on that claim and only an administrator appointed by our Courts can do so.

Story on Conflict of Laws, 8th ed. p. 713, says:—

"It has hence become a general doctrine of the common law, recognised both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the Courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary, or the letters of administration there granted to him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration, and give new security according to the general rules of law prescribed in that country, before the suit is brought."

And in a footnote at p. 714 he says: "The authorities to this point are now exceedingly numerous and entirely conclusive."

Williams on Executors, 10th ed. vol. 1, p. 273:

"Again, if a will be made here and proved in the Court of Probate here, the probate will not extend to property in the colonies."

And at p. 338:—"If the intestate was domiciled in a foreign country, or within the King's dominions out of England, and left assets in this country, administration must be taken out here as well as in the country of domicile."

Westlake's Private International Law, 5th ed. at p. 115 para. 63:—

"Whatever the domicile or political nationality of the deceased, his personal property situate in England cannot be lawfully possessed, or if recoverable in England cannot be sued for, without an English grant of probate or administration."

Finding as I do that the promissory notes sued on are the property of the estate in Manitoba, administration must be taken out here to entitle the plaintiff to bring action.

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The action must, therefore, be dismissed with costs.

W. Hollands, for plaintiff, appellant.

J. H. Chalmers, for defendant, respondent.

PERDUE, C.J.M.:—This action is brought to recover the principal and interest due on three promissory notes made by defendant to Mary Louise Crosby. The notes were given by defendant to Miss Crosby to secure money loaned by her to him. The notes were made at Elkhorn, Manitoba, then and still the place of residence of the defendant. Miss Crosby was a relative of the defendant residing in the State of Massachusetts where she died in April, 1918. On November 29, 1918, Miss Crosby's will was proved in the Probate Court of the County of Middlesex in the State of Massachusetts, and letters of administration with the will annexed were issued by that Court to the plaintiff, Charles O. Prescott. The notes in question came into his hands as part of the estate of the deceased. They have not been endorsed either by the deceased or by the administrator. By the will, Miss Crosby left all her property to her sister Annie Isabella Campbell, who died in the testatrix's lifetime. Annie Isabella Campbell left a will which was duly admitted to probate in the Massachusetts Court and the plaintiff Prescott is executor of the will and administrator of her estate. The plaintiff George A. Campbell is a son of Annie Isabella Campbell and claims to be her heir and to be the executor of her other son who died in 1919. I fail to find any reason why George A. Campbell was made a plaintiff in this action.

The question involved in this case is, can Miss Crosby's administrator appointed by the Massachusetts Court sue on the notes in Manitoba without taking out administration in that Province?

Macdonald, J., *supra*, held that the promissory notes sued on are property of the estate in Manitoba, and that administration must be taken out in this Province to entitle the plaintiff to bring the action.

These notes were the property of Miss Crosby who was domiciled in the State of Massachusetts and were in her possession there at the time of her death. The notes passed into the possession of the plaintiff, Prescott, as the administrator of her estate. He was entitled, as such, to sell the notes or to collect the moneys due upon them. He was, in fact, the holder of the notes and was the only person who could give title to them. In *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K.B. 677, 74 L.J. (K.B.) 326, it was held by the Court of Appeal, affirming Walton, J., that the ordinary rule as to the transfer of chattels applied to a bill of exchange or other negotiable instrument. This rule as stated

in Dicey's Conflict of Laws, 2nd ed. p. 519, r. 143, and specially approved in the *Embiricos* case, is as follows:

"An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*) is valid.

In the *Embiricos* case a cheque on a London bank was drawn in Roumania in favour of the plaintiffs who specially endorsed it to a firm in London and placed it with a letter in an envelope addressed to the firm in London. It was stolen from the envelope, the name of the London firm as endorsers was forged upon it and it was presented to a bank in Vienna for payment. The bank acting in good faith cashed the cheque and endorsed it to the defendants, who cashed it at the London bank on which it was drawn. Plaintiffs sued defendants for damages for wrongful conversion of the cheque. By the Austrian law defendants had a good title to the cheque. It was held, following *Alcock* v. *Smith*, [1892] 1 Ch. 238, 61 L.J. (Ch.) 161, that the Austrian law must prevail, the transfer of the cheque having been made in that country.

In *Alcock* v. *Smith*, *supra*, a bill of exchange drawn and accepted by English firms and payable in England to the order of X. & Co., was endorsed in Norway by X. & Co. to the order of M. who endorsed it in blank to S., as agent for A., an Englishman residing in London and an English firm of A. & Co. in which A. and J. were partners. While the bill was in the hands of S. and still current it was seized in execution under a judgment obtained in Norway by a creditor of J., and after it became overdue was sold by public auction to M. The sale took place under the ordinary course of Norwegian law under which a perfect title was conferred on M. It was held by Romer, J., and by the Court of Appeal that the effect of the transactions in Norway must be determined by Norwegian law.

Under the law of the State of Massachusetts the property in the notes has been vested in the plaintiff Prescott as administrator. This Court must, I think, regard him as the lawful holder of the notes.

Cameron, J.A., has discussed *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171, 150 E.R. 1390, 7 L.J. (Ex.) 297. The decision in that case was on a question of probate duty payable on foreign bonds saleable and transferable by delivery in England. They were treated as being of a chattel nature and, therefore, subject to probate duty.

In Westlake on Private International Law, 5th ed., p. 132, para. 95a, the author gives the general rule that in whatever

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jurisdiction the circumstances of the case point out that a debt ought to be or may be sued for, the administrator who has obtained a grant in that jurisdiction, or the heir who is entitled under its law, and he only, can sue for it therein, or, if the debt is assignable, assign the right of suing for it therein. But, he points out at p. 132:—

"The debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant."

On p. 133 the same author says:—

"That an administrator who becomes lawfully possessed in one state of a negotiable note of the deceased need not take out administration in the state where the debtor resides, in order to sue on it, is laid down by Story: Conflict of Laws, sec. 517."

It is true that in the extract cited from Story the principle seems to be applied only to negotiable notes which are payable to bearer, but I think it must be extended to promissory notes which are payable to the order of the deceased and not endorsed by him; because no one except his administrator could lawfully endorse the notes, and when once they became the property of the administrator by virtue of the grant of administration, endorsement is unnecessary if he brings suit in his own name.

A grant of administration of the estate of the deceased has been issued to the plaintiff Prescott by the proper Court of the State in which she was domiciled at the time of her death. The notes in question came into his hands as such administrator, and he is the lawful holder of them. He has brought suit upon them against the maker who resides in this Province. I think he is entitled to recover upon them.

I would refer to *Browns* v. *Browns* (1919), 48 D.L.R. 72, 15 Alta. L.R. 77, which is fully discussed in the judgment of my brother Cameron. In that case it was held that a foreign administrator who had come into possession of negotiable instruments might sue upon them without taking out administration in Alberta.

I would allow the appeal and enter judgment for the plaintiff Prescott for the amount of the notes and interest subject to any

deduction to which defendant may be entitled. If the parties cannot agree on the amount the matter may be spoken to again in this Court. The defendant must pay the costs of the plaintiff Prescott, both in this Court and in the Court of King's Bench.

CAMERON, J.A.:—This action was brought on certain promissory notes made by the defendant to the order of Mary Louise Crosby, at the time of her death and previously thereto a resident of the State of Massachusetts, by the plaintiff, who had taken out letters of administration to her estate in that state. The defence is that no letters of administration have been taken out in this province. Macdonald, J., (*supra*, at p. 250) before whom the action was tried, dismissed it on this ground.

There is no doubt the Court can consider the words, "executor and administrator of Mary Louise Crosby" in the style of cause and other similar allegations in the statement of claim as descriptive merely. They can be nothing else than that. The question then arises, can the plaintiff sue in this action in his personal capacity without taking out a further grant?

In *Browns* v. *Browns*, 48 D.L.R. 72, 15 Alta. L.R. 77, it was decided by the Supreme Court of Alberta that a foreign administratrix who by virtue of the foreign grant had come into possession of negotiable instruments may sue thereon without obtaining a grant of administration in that jurisdiction. In that case the plaintiff sued as administratrix on two promissory notes given by the defendant, one payable to the order of the deceased alone and the other to the order of the deceased and another, who assigned his interest to the plaintiff. At the time of the death of the deceased and of the grant of administration by the Court of the State of Colorado, where the deceased was domiciled, the defendant was also resident and domiciled, but subsequently removed to Alberta where he resided at the time of the bringing of the action. In the present case the defendant resided within the Province at the time of the testator's death and subsequently thereto. What difference, if any, can that make in the rights of the plaintiff to bring the action?

Harvey, C.J., who delivered the judgment of the Court in *Browns* v. *Browns*, *supra*, on the authority of *Attorney-General* v. *Bouwens*, *supra*, and *Attorney-General* v. *Dimond* (1831), 1 Cr. & J. 356, 148 E.R. 1488, 1 Tyr. 243, 9 L.J. (Ex.) (o.s.) 90, seems inclined to the view that there would be no jurisdiction in the Alberta Courts to grant administration in respect of the promissory notes there in question.

He points out, however, that Dicey, in his Conflict of Laws, 2nd ed. at p. 307 holds that there is jurisdiction to make a grant in respect of property when it has become locally situate in England

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at any time since the death of the deceased person. The Chief Justice decides the point on the wording of the District Courts Act 1907 (Alta.) ch. 4, which declares that the jurisdiction of those Courts extends only to cases where the deceased was resident within the jurisdiction. No such limitation appears in our Surrogate Courts Act, R.S.M. 1913, ch. 47.

Harvey, C.J. thus finds that as the plaintiff could not obtain a grant of administration in the Province, she would be in a difficulty if unable to maintain an action without it. He held that as to her claim as assignee, as she derived that not from the deceased but in her own right, he has no doubt that her action is maintainable on the authority of *Vanquelin* v. *Bouard* (1863), 15 C.B. (N.S.) 341, 143 E.R. 817, 33 L.J. (C.P.) 78, 12 W.R. 128, he thus discusses her right as to the balance of her claim, and quotes from Dicey, p. 447, r. 120. (See 48 D.L.R. at pp. 77-78):

"A foreign personal representative has a good title in England to any movables of the deceased which—(1) if they are movables which can be touched, *i.e.*, goods, he has in any foreign country acquired a good title to under the *lex situs* [and has reduced into possession]; (2) if they are movables which cannot be touched, *i.e.*, debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession."

Harvey, C.J., refers to Westlake, 5th ed., p. 132, para. 96, and quotes:—

"Negotiable instruments . . . . can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant."

The Chief Justice appeared to regard this passage from a work of high authority and of long standing (the first edition of Westlake on Private International Law was published in 1858) as direct authority in support of the plaintiff's right in the Alberta action, and followed it.

Amongst the cases cited by Westlake in support of his view is *Attorney-General* v. *Bouwens*, 4 M.&W. 171, 150 E.R. 1390, which must be further examined. It was an information for non-payment of probate duties, tried before Lord Abinger, C.B., in which a special verdict taken by consent sets out the facts. The testa-

trix was the holder of certain Russian, Danish and Dutch bonds transferable by delivery. There was always an agent of the Russian and Danish Governments in England to pay the dividends, but the dividends on the Dutch bonds were payable at Amsterdam. The obligations to pay were, of course, those of the respective foreign governments. The contention was that such securities, being evidence only of debts from debtors without the jurisdiction of the Spiritual Court, were not dutiable within the statute, 55 Geo. III., ch. 184. In his judgment on the hearing before the Court of Exchequer, Lord Abinger pointed out that by the special verdict the securities were incorrectly termed bonds, that they were marketable securities transferable by delivery only and that it was not necessary to do any act out of England to make their transfer valid. The executors had in fact sold them without doing any act out of the jurisdiction of the Prerogative Court.

Lord Abinger, C.B., deals with the statute and states the questions to be decided, whether those securities are to be considered as assets locally situate within the province of Canterbury at the time of the testatrix's death. He distinguishes the facts from those present in two previous cases *of Attorney-General* v. *Dimond, supra*; and *Attorney-General* v. *Hope* (1834), 6 E.R. 1087, 2 Cl. & F. 84.

Lord Abinger, C.B., (150 E.R. at p. 1398), then goes on to deal with the rules that had been laid down by the ordinaries to prevent conflicting jurisdiction between them, that it was by them established that judgment debts were assets where the judgment is recorded; leases, where the land lies; specialties, where the instrument is; simple contract debts, where the debtor resides.

"And it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts on these instruments were assets where the debtor lived, and not where the instrument was found."

He points out that the only act of administration that could be performed by the ordinary would be to recover or receive payment of the debt.

From these premises it would, he says, seem to follow that no duty would be payable on the probate of the securities in question. But he does not accept the statement of the law on which this contention was based. He says (150 E.R. at 1398):—

"But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why

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the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a salable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate."

His conclusion was that the instruments were of the nature of valuable chattels, salable and transferable in England and therefor liable to duty.

It is, therefore, evidently a mistake to assume that Lord Abinger, C.B., approved and accepted the regulation of the ordinaries that bills and notes are "merely evidences of title" and to be regarded as assets where the debtor lives and not where they are found. His actual decision is quite the opposite; otherwise the securities would not have been held taxable. That is to say, he refused to follow the rule of the Spiritual Courts that bills and notes are merely evidences of title and their locality is where the debtor on them resides. In view of the nature and importance of those commercial instruments the ecclesiastical rule was obsolete even in Lord Abinger's time and their value and negotiability have since then been greatly fortified by legislation and judicial decisions.

Lord Abinger further says in his judgment (150 E.R. 1398-1399):—

"Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform here would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration (for even if there were a foreign administration, it is an established rule that an administration is necessary in the country where the suit is instituted) (Story on the Conflict of Laws, 421): and that these letters of administration must be stamped with a duty according to the salable value of the bills, the case of *Hunt* v. *Stevens* (1810), 3 Taunt. 113, 128 E.R. 46, is an express authority."

It is plain that the hypothetical case so stated is wholly different from that before this Court. This is not a case of a person dying out of Manitoba with property in this province consisting of bills or notes, for the notes in question here are situate in Massachusetts. The above passage may have relevance to the present case if we substitute Massachusetts for England in it. Then in the case of a person dying outside of Massachusetts

leaving bills, payable to order, in that state it would be in Massachusetts that administration of that person's estate would have to be taken out in order that the administrator could make title to the bills or sue in trover for them if need arose. An administration granted outside Massachusetts would be ineffective for those purposes. But here the testatrix had been domiciled and died in Massachusetts, and there, where the promissory notes in question, her property, were situate, administration of her estate was taken out, thus enabling the administrator to make title to the notes and otherwise deal with them according to the laws of that state. Having thus become entitled to the notes, to their possession and ownership, the administrator's right to sue thereon in his personal capacity is not open to question.

It follows that the decision in *Attorney-General* v. *Bouwens* is authority to the extent for which it is cited in the note in Westlake, at p. 133, *viz.*, that the instruments there in question were of a chattel nature, transferable by acts done solely in England. Westlake further says in the note at p. 133: "An administrator who becomes lawfully possessed in one state of a negotiable note of the deceased need not take out administration in the state where the debtor resides, in order to sue on it."

Citing Story, Conflict of Laws, p. 736, para. 517, which is as follows:—

"Negotiable securities.—The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name; and he need not take out letters of administration in the state where the debtor resides, in order to maintain a suit against him. And for a like reason it would seem that negotiable paper of the deceased, payable to order, actually held and indorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such indorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country as the legal indorsee, and allowed to sue thereon accordingly, in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situate in such foreign country."

In the note in Westlake, other authorities are cited. I wish to refer to *Stern* v. *The Queen*, [1896] 1 Q.B. 211, 65 L.J. (Q.B.) 240, where the doctrine of *Attorney-General* v. *Bouwens* was applied to certificates of shares, not to bearer, but operative, though not completely operative, to pass the title.

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I refer to the further authorities cited by Harvey, C.J., Wharton, Conflict of Laws, 3rd ed. p. 1371, "A foreign administrator, also, has a right to sue, without local authorisation, on negotiable paper held by him"; *Currie* v. *Bircham* (1822), 1 D. & R. 35, 24 R.R. 634, where an Indian administrator was held entitled in England to sue for certain effects of the estate of the testator transmitted there; and to *Young* v. *Cashion* (1909), 19 O.L.R. 491, where it was held that the California administrator as against the Ontario administrator was entitled to the proceeds of the drafts in question, he having become the owner of them (and of the money represented by them) in the legal and mercantile sense.

Dicey, Conflict of Laws, says, at p. 311:—

"When bonds, again, or other securities, *e.g.*, bills of exchange, forming part of the property of a deceased person, are in fact in England, and are marketable securities in England, salable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England. The reason manifestly is that the bonds or bills, though they may from one point of view be looked upon as mere evidence of debts which, being due from persons resident abroad, should be considered situate in a foreign country, are in reality chattels of which the representative of the deceased owner can obtain the full value in England, and this without doing any act in a foreign country."

Dicey refers, at pp. 312, *et seq.*, to the fact that most of the decisions with regard to the local situation of a deceased person's personalty have relation not to jurisdiction but to the liability for probate duties, such as *Attorney-General* v. *Bouwens*, *supra*. The subjects are closely connected, but the distinction is important. There may be a grant in cases where there can be no probate duty and one of the reasons for that distinction is that probate duty was chargeable only on property situate in England at the time of the deceased's death, a most important consideration to be kept in mind in reading the cases.

There seems no question, however, that a grant would lie in case of property that becomes locally situate in England any time since the death of the deceased person.

So that these notes were not in Massachusetts mere evidences of debt but were and are marketable securities salable and transferable there by delivery only and without any further act out-

side of Massachusetts being necessary to render the transfer valid.

It seems to me, therefore, that the position of the plaintiff in the present case is amply supported by authority, and that on principle, his right to sue without further grant is clear. The notes came properly into the hands and were "reduced into possession" by him, as administrator under the laws of Massachusetts, where they were locally situate and the right and title to them are thus there effectually vested in him. It is true his legal ownership is affected with a fiduciary relation to the beneficiaries of the estate, but that does not impair his position as plaintiff in the slightest. He has in fact become the holder of the notes and as such is entitled to sue on them in any jurisdiction, without any further grant. Everything necessary to give the plaintiff the right to sue was done in Massachusetts, where the locality of the notes was and his right is complete and perfect. He is in much the same position as a foreign administrator who has recovered judgment and in such a case no further grant is necessary: 24 Corp. Jur. 1131. The reason is that such an action is brought by him in his personal capacity.

It is to be noted that in this second branch of his judgment Harvey, C.J., places no importance on the fact that the defendant in the case before him was resident in Colorado at the time of the testator's death and afterwards. If he had been then resident in Alberta I can see no reason in law why it should make any difference. If we get away from the idea that promissory notes are merely evidences of debts, as we must, the point can have no possible application. The residence of the defendant has nothing whatver to do with the acquisition of title by the administrator to negotiable instruments, and that is governed by the law of the place where they are in fact found.

The notes in question are not endorsed by the administrator as such or in any way. But that is not important. The fact is he is their owner and holder and is really an indorsee. In *M'Neilage* v. *Holloway* (1818), 1 B. & Ald. 218, 106 E.R. 80, where a bill of exchange was payable to a *feme sole* who intermarried before the same was due, it was held the husband might sue in his own name without joining the wife though she had not endorsed the bill. Lord Ellenborough, C.J., says (106 E.R. at p. 82):—

"He is virtually an indorsee. . . . . The marriage has in fact given him all the rights of an indorsee, and it, therefore, seems to me unnecessary for us to go through the formal derivation of title by indorsement."

It is all a matter of substance and not of form.

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In my opinion, the plaintiff in this action is entitled to sue without further grant. This seems clear to me on the authority of *Browns* v. *Browns*, 48 D.L.R. 72, 15 Alta. L.R. 77, and that of Westlake, and the other authorities cited. It also seems clear on the well-established principles of private international law especially when negotiable instruments are in question.

The appeal, in my opinion, must be allowed. Judgment will be entered for the amount of the notes and interest, less the amounts for which credit must be given. If the parties cannot agree upon the amount due the matter may be again brought before the Court to be determined. The plaintiff is entitled to the costs of this appeal and of the trial.

FULLERTON, J.A. (dissenting):—There were two main questions discussed in this appeal: (1) Whether the legal representative of a deceased resident of the state of Massachusetts duly appointed by the Courts of that state can sue a resident of this province on a promissory note made by him payable to the order of the deceased without taking out administration here; (2) Whether such legal representative either by endorsement or any other act can pass to any person a title to such promissory note which will enable the latter to sue here.

I purpose to deal only with the first question because I think on the facts the second question does not arise.

In the case of *Whyte* v. *Rose* (1842), 3 Q.B. 493, 114 E.R. 596, 11 L.J. (Ex.) 457, it was held by the Court of Queen's Bench that a foreign representative must take out administration in England to enable him to maintain an action to recover a debt due to his testator. Tindal, C.J., who delivered the judgment of the Court, said (114 E.R. at p. 602):—

"It is also well established that, in order to sue in any Court of this country, whether of law or equity, in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper Spiritual Court of this country. See the judgment of Sir John Nicholl in *Spratt* v. *Harris* (1883), 4 Hagg. Ecc. Rep. 405; and see also the judgment of the Lord Chancellor in *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76, 41 E.R. 30, 8 L.J. (Ch.) 57. So that, if the plaintiff in the case now before us had in the first instance taken out administration in the proper Spiritual Court in Ireland, for the purpose of administering this bond which was found in Ireland, . . . he could not have sued in England upon such letters of administration, but must have also taken out administration in England from the proper Spiritual Court there. This latter point was expressly decided in *Carter* v. *Crost's* case, (1585) Godb. 33, 78

E.R. 21, where the Court says that an administrator made by an Irish bishop could not bring an action here, as administrator."

Vanquelin v. *Bouard*, 15 C.B. (N.S.) 341, 143 E.R. 817, 33 L.J. (C.P.) 78, 12 W.R. 128.

Williams on Executors, 11th ed., vol. 1, p. 264:—

"But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the will here also, or a personal representative must be constituted by the Probate Division here to administer *ad litem*."

And at pp. 265-266:—

"And it may be stated, as a fully established rule, that in order to sue in any Court of this country, whether of law or equity, in respect of the rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the Court of Probate of this country."

In support of the above proposition of law the author cites the case of *Whyte* v. *Rose*, *supra*, and *Enohin* v. *Wylie* (1862), 10 H.L. Cas. 1, 11 E.R. 924, 31 L.J. (Ch.) 402, in which Lord Cranworth said (11 E.R. at p. 931):—

"The rules of law applicable to such a case are, as I conceive, well established; personal property in this country belonging to a foreigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, administration will be granted here, limited to the personal estate in this country. If he has left a will, valid by the law of his domicile, and has thereby appointed executors, probate of that will must be obtained here."

At p. 267-268, Williams on Executors, appears the following:—

"It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them, so as to give the executor the legal right to recover them abroad. For the probate was never granted except for goods which at the time of the death were within the jurisdiction of the Ordinary who made the grant; though if it should become necessary that the Courts of the foreign country where the assets are situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such Courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of domicile."

It appears, therefore, to have been established by the authorities that a foreign executor or administrator cannot maintain

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an action here by virtue of letters testamentary or administration granted to him in the country where the deceased died.

It is contended, however, that in the case of bills of exchange and promissory notes the rule does not apply. While it is admitted that if the foreign executor were suing here on an ordinary simple contract debt he could not succeed, it is said that bills of exchange and promissory notes stand on a different footing, that they are of a chattel nature, capable of being transferred by acts done in the foreign country and sold for money there, and that the debts due on them can be sufficiently reduced into possession by means of the paper which represents them.

The only English authority that was cited for the position that bills of exchange and promissory notes stand on a different footing as regards administration from ordinary simple contract debts is a passage in Westlake's Private International Law, at p. 132. After laying down the proposition in par. 95a, that with regard to debts belonging to the deceased.

"In whatever jurisdiction the circumstances of the case point out that a debt ought to be or may be sued for, the administrator who has obtained a grant in that jurisdiction, or the heir who is entitled under its law, and he only, can sue for it therein."

He proceeds in par. 96 to state the following exception:—

"96. But to the rule in par. 95a the debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order and *he* or his indorsee can sue on them in any other jurisdiction without any other grant."

The Probate Court of this Province undoubtedly has jurisdiction over all assets of a deceased situate within the Province. The difficulty sometimes is to say whether some particular species of property is within or without the jurisdiction, and in order to determine this the Courts were compelled in certain cases to lay down artificial rules. In the well-known case of *Attorney-General* v. *Bouwens*, 4 M. & W. 171, 150 E.R. 1390, 7 L.J. (Ex.) 297, a case which has since been followed and referred to with approval in the House of Lords in *Winans* v. *Att'y.-Gen'l.*, [1910] A.C. 27, at p. 38, 79 L.J. (K.B.) 156, Lord Abinger, C.B., delivering the judgment of the Exchequer Court, said, 150 E.R. at p. 1398:—

"Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must, therefore, have been so situated as that he could have disposed of them in *pios usus*. As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resided at the time of the testator's death; and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."

Under the authority of this case the local situation of the debts represented by the promissory notes sued on in this case is in Manitoba, and an administrator of the deceased appointed by the Probate Court here would be entitled to collect them.

Under the proposition laid down by Westlake, quoted above, the local situation of the promissory notes is in Massachusetts, where they were at the time of the testator's decease and where they were taken possession of by the plaintiff executor.

I have carefully examined all the authorities cited by Westlake in support of his proposition and, in my judgment, not only do they not support his proposition but one of them at least distinctly holds the contrary. Without exception they are all cases in which the question of the liability of bonds or certificates for stock in foreign companies to pay estate or probate duty in England was in question. The first case cited, *Att'y.-Gen'l.* v. *Bouwens, supra*, holds the direct contrary of the proposition laid down by Westlake. There the question was whether probate duty was payable in respect of bonds of a foreign government of which a testator, dying in England, was the holder at the time of his death, and which had come to the hands of the executor in England. The bonds in this case were marketable securities transferable by delivery only, and the Court held that they had a

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Fullerton, J.A.

locality in England, inasmuch as they were instruments in the nature of valuable chattels, salable in England and capable of administration there.

Lord Abinger, C.B., who delivered the judgment of the Court, specifically pointed out that debts due on bills of exchange and promissory notes were assets where the debtor lived and not where the instrument was found.

The other cases cited by Westlake follow *Att'y.-Gen'l.* v. *Bouwens*. Westlake also relies on a passage in Story on Conflict of Laws, sec. 517, which states that:—

"Where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are *payable to bearer* . . . then becomes the legal owner and bearer by virtue of his administration and may sue thereon in his own name; and he need not take out letters of administration in the state where the debtor resides, in order to maintain a suit against him."

It will be noted that Story only speaks of a note payable to *bearer*. The only case cited by him in support is *Robinson* v. *Crandall* (1832), 9 Wend. 425. There, the plaintiffs declared as the bearers of two promissory notes. Delivering the judgment of the Supreme Court of New York, Sutherland, J., said, at p. 426:—

"As administrators they could not sue here. Letters testamentary, or of administration, granted abroad, give no authority to sue here; we take no notice of them. . . . . But being the real owners of the notes, they had a right to declare as bearers and recover in that character."

Apart, therefore, from the statement in Westlake, there seems to be no authority supporting the right of the plaintiff suing as "executor and administrator of the estate of Mary Louise Crosby" to maintain this action.

Now as to the right of the plaintiff George A. Campbell to recover in this action.

He resides in Manitoba, and under the laws of Massachusetts he is the sole beneficiary of the estate of Mary Louise Crosby. The executor handed the promissory notes in question to Frederick A. Fisher, an attorney practising in Massachusetts. In the latter's evidence taken under commission, the following appears:

"Q. Will you examine exhibits marked 5, 6 and 7; state if you have ever seen them before and give us, if possible, any information that you can in connection with the same? A. Yes; these are three notes that I received by the hand of Mr. Charles O. Prescott, at the time that an inventory was made of the estate of said Mary Louise Crosby. The notes remained in my posses-

sion for a number of months and were finally sent by me to George A. Campbell on or about January 16, 1920, to his address, Macklin."

The notes were not endorsed by the executor to Campbell, but counsel contends that there was an equitable assignment of them to Campbell. The only evidence of an equitable assignment is the fact that they were sent by the solicitor Fisher to Campbell. I hold that this is entirely insufficient to establish an equitable assignment.

I would dismiss the appeal with costs.

DENNISTOUN, J.A., concurred with PERDUE, C.J.M.

Appeal allowed.

STANDARD MARINE INSURANCE Co. v. WHALEN PULP AND PAPER Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

INSURANCE (§ III E—109)—WARRANTY AS TO SEAWORTHINESS—UNINSURABILITY—NON-DISCLOSURE.

The uninsurability of a vessel has no connection with her seaworthiness. Knowledge of an assured that a vessel, warranted to be seaworthy, was uninsurable, which he failed to disclose to the insurer, does not vitiate the policy as entitling the latter to recover the insurance money paid under the policy.

APPEAL from the judgment of the Court of Appeal of British Columbia (1922), 68 D.L.R. 181, reversing the judgment of the trial Court in favour of plaintiff in an action by an insurance company to recover insurance money paid to defendant. Affirmed.

E. P. Davis, K.C., and *E. F. Newcombe*, for appellant.

A. H. Douglas, for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, J., with which I fully concur, I am of the opinion that this appeal must be dismissed with costs.

IDINGTON, J.:—I think for the reasons respectively assigned by Macdonald, C.J.A., and Martin, J.A., in the Court of Appeal (1922), 68 D.L.R. 181, (taken as a whole, for each covers different ground) with which I entirely agree, that this appeal should be dismissed with costs throughout.

I desire, however, in deference to the argument of counsel presented here, to add a few words.

The action is in principle founded upon a mistake of fact and, if well founded, might as well have been brought by resorting to the simple old-fashioned count of a case for money had and received. That was long ago declared by Lord Mansfield, in the case of *Moses* v. *Macferlan* (1760), 2 Burr. 1005 at p. 1010, 97 E.R. 676, to be a form of action in which the question raised is

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whether or not it is inequitable that the defendant should retain the money he has been paid.

The facts presented here fall far short of fulfilling such a condition and hence the money should remain where it is. The policy was specifically amended so as to avert any reliance upon an implied warranty of seaworthiness in the vessel that might be in question. Hence the appellant's counsel frankly admits that even if unseaworthy he could not rely upon that alone.

Yet he tries to induce us to believe that if the facts come to the knowledge of the respondent that the owner of the vessel had said something tending to shew the vessel was uninsurable though in good condition and fitted for the service she was to be put to in quiet inland or almost inland waters, that if the appellant had been told this same story, its agents, would, beyond doubt, have rejected the risk so to be taken.

I am quite sure that he consistently stated his proposition quite so broadly for at times and for the most part he put it as if connected with the fact of undoubted unseaworthiness.

I do think, however, that unless the story can be relied on as ground of relief quite independently of that question, there is nothing to stand upon unless fraud which is not either argued for.

I fail to see how its connection with either seaworthiness or unseaworthiness is at all material in this case where it is not contended that respondent knew it was so and if it is so put the evidence contradicts it.

He in effect asks us to assume that appellant would, beyond doubt, have, if told the story in question, rejected the declaration made by the respondent. I certainly cannot accept that as proven.

Nor, in face of the overwhelming evidence that such barges and scows as in the service this one was engaged for, would not be insured by a large part of the insurers in the Vancouver district, and by the other part only when induced by the chance of obtaining thereby other large and important business, can I believe that the appellant, doubtless well aware of that condition of the insurance business there, would have paid any attention to such a story as of any significance, any more than respondent did.

It is shewn that a very large part of the business handled by the respondent was for the long time the appellant was its insurer of pulp so carried by what were practically uninsurable scows and barges. Yet not a word of inquiry as to whether these vessels were insured or insurable in that district.

Surely, if faith is to be kept by business men, these now laying stress upon an omission which had consistently been observed

throughout, as if quite permissible, cannot be permitted to be thus treacherously set up.

The only difference (if it is one, which is not clear from the evidence) in this case would seem to be that the owner of this barge, now in question, refused to accept the risk and insisted and had its way that respondent become its own insurer by agreeing to return the "Baramba" in same good condition as got.

The "Baramba" was, twice before the occasion now in question, used under more onerous conditions than existed at the loading under which she sank. The mystery has not been solved.

The appellant got Cullington, an expert, to try to solve it. He did not. Of course he tells us how it was possible for water to have got in through certain holes, but these holes were there for all the prior trips and under as heavy loading as had taken place when she began to sink.

The "Baramba" had been duly declared to the appellant by respondent, and the accident duly reported on February 25, and Cullington immediately summoned by the appellant to investigate, which he did, twice, yet no solution that appeals to one's common sense in light of the immediately preceding history or its carrying powers.

The appellant was not surprised nor did it ask any questions of the respondent as to past history or relation between the owner and respondent, and yet it agreed to pay on April 14, six weeks after the curious accident, the amount found due, and nearly 2 years later the balance of same arising out of general average.

It seems asking too much to try to make of a most equitable principle of our law the basis for a most inequitable operation of the law.

I am, therefore, not surprised to find that the appellant has been unable to cite to us any case in which anything like what it asks us to decide was ever decided, much less decided its way of presenting the law.

It cites cases of actions by insured against insurer in which were set up a variety of defences of failure to disclose something material.

What might be material and have weight in such a case is very far from being the same as setting it up by way of founding an action to recover back money voluntarily paid.

The only case it cites of that kind is the case of *Kelly* v. *Solari* (1841), 9 M. & W. 54, 152 E.R. 24, 11 L.J. (Ex.) 10, where, through the clearest inadvertence the insurance company had,

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DUFF, J.

when paying life insurance included the amount of a policy which had not only expired, but been marked so.

Yet in so clear a case of mistake of fact, which is the only basis for this action, as it was for that, the Court had to give a second trial.

I fail to see the semblance between the two cases if we have any regard to the principles to be observed.

A mere voluntary payment as this may have been for aught we ought to care, is not recoverable whatever the motives behind it on the part of appellant so paying.

Having referred to all the cases cited by the appellant and then turned to respondent's citations, I imagine the decisions in the judgments, especially that of Willes, J., in the case of *Thompson* v. *Hopper* (1858), E.B. & E. 1038, 120 E.R. 796, 27 L.J. (Q.B.) 441, 6 W.R. 857, sets forth what is still good law and a safe guide.

DUFF, J.:—This action is brought to recover moneys paid to the respondent by the appellant company under an insurance policy covering pulp, the policy having been issued by the appellant to the respondent.

The insurance was on "wood pulp shipped or to be shipped per steamer approved or held covered from Howe Sound to Vancouver (including risk per scows) and or North Bend barge and or Seattle, and thence per steamer approved or held covered to a direct port in Jauan." On the policy there was endorsed a memorandum by the appellant that "seaworthiness of the vessel as between the assured and the assurers is hereby admitted."

In February, 1919, the defendant hired a craft named the "Baramba", and on the 25th of that month, while the "Baramba" was being loaded with pulp which the respondent company intended to ship to Japan by way of Vancouver, she sank and the pulp was lost. The defendant declared the cargo under the policy and on March 31, 1919, paid the premium according to rates provided by the policy, and on April 14, 1919, it paid to the defendant the sum of $12,715.20, the amount of the respondent company's loss.

The appellant company having first sued the owners of the "Baramba" for breach of a warranty of seaworthiness under an assignment to them by the defendant of the defendant's rights, and the action having been discontinued upon the discovery that no such warranty could be established, the appellant company brought the action out of which the present appeal arises, alleging that at the time the insurance was effected, that is to say, when the premium was paid and accepted by the appellant, the respondent company was aware of the fact that the "Bar-

amba" was an uninsurable craft and that this fact ought to have been disclosed to the appellant company when the cargo was declared under the policy, and that for default in this duty of disclosure the contract of insurance affected by declaration and the acceptance of the premium was voidable at the option of the appellant company. The payment of the loss in April was, the appellant company alleges, a payment in ignorance of facts entitling them to avoid the policy and a payment consequently which they are entitled to revoke as made under a mistake of fact.

The appellant company relied also upon another ground. It was contended that the "Baramba" when she sank was in such a state as to be utterly unfit for the carriage of cargo even from Mill Creek to Vancouver; that the respondent company was aware of this and that the loading of the cargo in such circumstances was a wrongful act, which was the real cause of the respondent company's loss, a loss for which upon the sound principle that a plaintiff is not entitled to recover reparation for damages resulting from his own wrongful act, the appellant company was not obliged to make good under its policy. As to this, I think the appeal fails, because I think the evidence does not establish that the officials of the respondent company can have seriously doubted that the "Baramba" was in a fit state to carry a cargo from Howe Sound to Vancouver.

The conditions of the appellant company's right to recover are of course, first: That the moneys paid in April were paid under a mistake of fact and, second, that this mistake arose from the supposition of the defendant company of the existence of a state of facts which did not exist but which if it had existed would have disentitled the respondent company to the moneys paid.

In the view I take of the appeal, the question of substance is: Were the moneys paid under a mistake of fact which was relevant in the sense above indicated? I think it sufficiently appears that the defendant company was not aware of the fact that the respondent company knew the "Baramba" to be uninsurable, although the evidence does not convince me that the respondent company did not know the condition of the "Baramba" and the probable state of the respondent company's knowledge with respect to her condition at the time the loss was paid.

But was the plaintiff company's ignorance of the respondent company's non-disclosure of the uninsurability of the craft a relevant mistake—a mistake within the meaning of the rule? That depends upon the answer to this question: Did the fact of non-disclosure absolve them from the obligation to pay in execution of which the moneys were paid?

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Now the obligation to pay under which they acted was undoubtedly the obligation of the policy. The cargo was declared under this policy: the premium was paid and accepted under the policy: the insurance moneys were paid as moneys due under the policy. That this was so in fact is on the evidence incontrovertible.

The cargo was treated as a cargo covered by the policy, notwithstanding the fact that the appellant company was fully aware of the character of the "Baramba."

It is now said indeed that the policy did not contemplate shipment from Howe Sound in barges but only in scows, except in the case of the barge "North Bend" and that, consequently a shipment by the "Baramba" which it is said was a barge and not a scow was not covered by the policy.

But it is to be observed not only that the character of the "Baramba" herself was known when the insurance moneys were paid, but as the appellant company admits: the appellant company had acquiesced in the use by the defendant company of barges other than the "North Bend" for shipment from Howe Sound, and that the cargoes so shipped had been treated as cargoes under the policy.

If, therefore, there was any mistake in this connection, there was no mistake of fact. It could only be a mistake as to the construction of the policy and a mistake in this sense that in point of law the policy is incapable of a construction such as would cover shipment by a craft like the "Baramba."

Now in construing a commercial contract such as this policy, it is unquestionably open to the parties to show that in the locality in which the contract is made and is to operate a word such as the word "scow" is commonly used and understood to denote craft of a particular kind. The word "scow" is not a word of fixed legal significance and therefore such evidence would be admissible. And when one reads the evidence, noting the application of the words "scow" and "barge" by witnesses, who must be familiar with the uses of such terms in Vancouver and Seattle, and indeed when one refers to the pleadings, one is left without a doubt that had the contention been put forward at the early stages of the litigation it would inevitably have raised a contest on the meaning of the word "barge" in such a contract and it is, therefore, too late now to rely upon it.

Such being the scope of the policy, was there any legal duty of disclosure resting on the respondent company? I think there was no such duty. The contract of insurance had been effected, the subject matter had been ascertained, the seaworthiness had been admitted of all craft within the contemplation of it; and

the risk attached as soon as the conditions of the policy were complied with. Mr. Davis' contention as to the premium must, I think, be rejected; the premium was fixed by the policy itself. The case cited by the Chief Justice in the Court below, *Ionides* v. *Pacific Fire, etc., Ins. Co.* (1871), L.R. 6 Q.B. 674 at p. 682, seems to be in point and is conclusive.

I think the appeal fails and should be dismissed with costs.

ANGLIN, J.:—The floating insurance in question covered any and all "declared" cargoes of pulp belonging to the respondent during transportation (including loading) between certain termini. The respondent was bound to "declare" all such shipments and to pay premiums thereon at rates fixed by a schedule to the policy and, as I read the policy, the appellant was obliged to insure the respondent, at the appropriate rate so fixed, against loss of, or injury to, any such cargo so declared. In the absence of fraud upon the policy in the making of the declaration (as there would have been in declaring the shipment by the "Baramba" if the respondent had known of her unseaworthiness, *Thompson* v. *Hopper* (1856), 6 El. & Bl. 172 and 937, 119 E.R. 828 and 1113, 25 L.J. (Q.B.) 240: E. B. & E. 1038, 120 E.R. 796, 27 L.J. (Q.B.) 441, 6 W.R. 857), the appellant could not reject the insurance of any declared shipment however unseaworthy the craft on which it was, or was to be, transported from Mill Creek to an "approved" steamship either at Vancouver or Seattle, as the case might be, provided such craft was a scow or the "North Bend" barge, *Ionides* v. *Pacific Ins. Co.*, L.R. 6 Q.B. 674 at p. 682; L.R. 7 Q.B. 517, 41 L.J. (Q.B.) 190, 21 W.R. 22. The practice of allowing the plaintiff to use any scow or barge it chose for the transportation from Mill Creek to the steamship's side seems to have been well established.

The shipment in respect of which the loss occurred was, undoubtedly, to be carried by the "Baramba" from Mill Creek to Vancouver. The rate of premium for pulp shipped via Vancouver was fixed in the schedule to the policy at $\frac{5}{8}\%$ from Howe Sound to Japan whether a scow or the barge "North Bend"—or, according to the practice, any other barge—was employed to transport the cargo from Mill Creek to Vancouver. By some error—probably due to the date having been given as February 17, instead of the 25th—the shipment was treated by the appellant as having been intended to be carried via Seattle instead of via Vancouver and consequently the rate of premium was inserted by it at $1\ \frac{1}{8}\%$ instead of $\frac{5}{8}\%$. If, as I think, the appellant had no option to reject the insurance of the cargo in question because of any exception that it might have taken when the respondent's declaration was communicated to the use

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of the "Baramba," the rate of premium being also fixed, as it was, it is difficult to appreciate the materiality of non-disclosure of the fact that the "Baramba" could not be insured. *Ionides* v. *Pender* (1874), L.R. 9 Q.B. 531, 43 L.J. (Q.B.) 227, 22 W.R. 884, 2 Asp. M.C. 266; *Ionides* v. *Pacific Insurance Co., supra.*

The evidence fully warranted the findings of the trial Judge that the "Baramba" was unseaworthy, but that that fact was not known to the respondent, and also that the respondent was aware that the "Baramba" could not be insured when it was last hired. That her unseaworthiness was the cause of her sinking was, I think, the only inference reasonably open on the evidence. The voyage from Mill Creek to Vancouver on inland waters involved very slight risk to the "Baramba." The respondent readily assumed that risk and itself became the insurer of it to her owners. It was no doubt believed that the "Baramba" would make the trip in perfect safety.

Upon this state of facts the declaration of the cargo intended to be sent by the "Baramba" from Mill Creek to Vancouver was not such a fraud on the policy as would avoid the risk, *Thompson* v. *Hopper, supra.*

The loss was not paid by the plaintiff under mistake as to any facts which, if known, would have afforded it a valid defence to the respondent's claim under the policy. The existence of such facts has not been shown.

I would for these reasons uphold the judgment appealed from and dismiss this appeal with costs.

BRODEUR, J.:—I concur with my brother Idington.

MIGNAULT, J.:—I concur in the judgment dismissing this appeal.

The appellant had insured the defendant's shipments under a floating policy. While a shipment of pulp was being loaded on a barge called the "Baramba," the barge sank and the loss was incurred. In due time the appellant paid this loss to the respondent, but subsequently took an action to recover back the money paid, alleging that the payment had been made in error on substantially two grounds: 1, that the barge was unseaworthy to the knowledge of the respondent. 2. That no insurance could be obtained on this barge and that the respondent, although aware of this fact, had failed to disclose it to the appellant.

The trial Judge found that the barge was unseaworthy, but that the respondent had no knowledge of its unseaworthiness. He, however, came to the conclusion that the respondent company knew that the barge could not be insured and for that reason he rendered judgment in favour of the appellant.

The Court of Appeal set aside this judgment agreeing with

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the trial Court that although the barge was unseaworthy, the respondent was not aware of it, which was shewn by the fact that the respondent had undertaken to return the barge in good condition to its owners. And as to the non-disclosure of the fact that the barge had been refused insurance, the Chief Justice of British Columbia did not consider that non-disclosure of such a fact coming to the knowledge of the insured only after a policy of this description, i.e. a ship or ships policy, was issued, would vitiate the contract. McPhillips, J.A., dissented from the judgment of the Court of Appeal.

Had the respondent been aware of the unseaworthiness of the "Baramba," the concealment of this fact, when the respondent declared its shipment to the appellant, would have amounted to fraud. But no such knowledge is proved. No doubt the respondent was aware that the barge had been refused insurance. It is, however, suggested that insurance companies as a rule refuse to insure barges. And unless refusal of insurance on this barge brought home to the respondent the knowledge that it was unseaworthy, and that has not been shown, I do not think that refusal of insurance for other reasons than unseaworthiness, for instance because barges in general are not considered by insurers as desirable risks (a fact which the appellant company must have known), was something which, under the policy in question, should have been disclosed to the insurer under pain of forfeiture of the right to claim the insurance.

On the question whether the "Baramba" came within the description of the policy, this was a fact which could have been ascertained by the appellant before it paid the insurance. I am, therefore, not impressed by the contention that it was not a "scow" within the meaning of the policy.

I would not disturb the judgment appealed from.

Appeal dismissed.

DALEY & MORIN v. FOGEL.

Quebec Superior Court in Bankruptcy, Panneton, J. June 29, 1922.

BANKRUPTCY (§ IV—20)—RIGHTS OF SECURED CREDITOR—"DOES NOT REALISE"—COMPOSITION.

A secured creditor failing to file his claim in compliance with sec. 46 of the Bankruptcy Act cannot, after a composition has been confirmed, proceed against the insolvent under sec. 13 of the Act, to enforce payment of the composition dividend for the balance of the secured debt not realized. The section makes it obligatory on such creditor who "does not realise" his security to file his claim within 30 days, in order to prove for the balance; the fact that he was engaged in doing so is not sufficient.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

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DALEY & MORIN v. FOGEL.

Panneton, J.

APPLICATION that insolvent be ordered to pay $234.10, or be adjudged a bankrupt. Dismissed.

I. Popliger, for insolvent.

Décary & Décary, for petitioner.

PANNETON, J.:—The petitioner asks that the debtor Maurice Fogel be ordered to pay it $234.10 and that in default by him to make payment, he be declared bankrupt.

The claim is based on the following facts:—The debtor made an assignment of his goods on May 9, 1921, to an authorised trustee and included the petitioner's name on the list of secured creditors. The petitioner obtained judgment against the debtor and another defendant on the 25th of the same month. On May 20, the debtor made an offer of a composition, notice of which was given to certain of his creditors, but not to the petitioner. On June 10 the creditors accepted the offer of a composition at 30 cents on the dollar to ordinary creditors. The Court approved the composition on June 22nd.

During the course of these insolvency proceedings the petitioner caused the goods which were in its possession to be seized as security for its claim. The goods were sold and the sale realised $290. The total of the judgment and costs amounted to $1,070.35, leaving a balance of $780.35 due by the insolvent. The sum of $234.10 is 30% of the debt, the amount of the composition. The petitioner never filed its claim in the hands of the trustee, and the present motion is the first proceeding it has taken.

According to sec. 46 of the Bankruptcy Act 1919 (Can.) ch. 36, a secured creditor must proceed as follows:—

"(1) If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) If a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove for his whole debt.

(3) If a secured creditor does not either realise or surrender his security, he shall within thirty days of the date of the receiving order, or of the making of the authorised assignment, or within such further time as may be allowed by the inspectors, or in case they shall refuse, then within such further time as may be allowed by the Court, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given, and the value at which he assesses each thereof. He shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value."

Sub-section 10 of the same section says:—

"(10) If a secured creditor does not comply with the foregoing subsections he shall be excluded from all share in any dividend."

In the present case, the petitioner did not realise its security within 30 days. It did absolutely nothing, and in the action which it took completely ignored the fact that the debtor was insolvent, as though it were satisfied with its security. It wishes to benefit by proceedings which it has neglected, notwithstanding the obligations imposed upon it by law if it wished to avail itself thereof.

Section 13, sub-sec. 12, reads as follows:—

"(12) A composition, extension or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable under this Act, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order or for alimony, or under a judgment against him as co-respondent in a matrimonial case or for necessaries of life or alimentary debts, except to such an extent and under such conditions as the Court expressly orders in respect of such liability."

The petitioner bases its petition on sub-sec. 14 of sec. 13 which is to the effect that, if payment is not made in accordance with the terms of the composition, any creditor may ask and obtain from the Court a receiving order against the debtor.

The difficulty arises from the meaning to be given to the words, "does not realise" in sub-sec. 3 of this sec. 46, which begins as follows: "If a secured creditor does not either realise or surrender his security, he shall within thirty days of the date of the receiving order, or of the making of the authorised assignment, or within such further time as may be allowed, . . . file . . . a statutory declaration stating . . . particulars of his security, etc.," but is not entitled to a dividend except for the excess of the value so assessed.

The petitioner was taking steps to realise its security within the 30 days above mentioned, through its attorneys, in the Superior Court, without reference to the Bankruptcy Act, but did not even realise its security until November and, having omitted to file its claim, it allowed the delay to expire.

It is of the very greatest importance that all creditors who wish to take advantage of the provisions of the Bankruptcy Act should file their claims, both secured and unsecured, so that the

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creditors who have filed their claims, the trustee and the inspectors, may be able to wind up the estate with a knowledge of all the assets of which it is composed. When a creditor has goods belonging to the insolvent in his possession and says nothing about them in so far as the insolvency is concerned, it must naturally be supposed that he intends to keep these goods in satisfaction of his claim, for, if he were of opinion that the security was insufficient, he could protect himself by valuing it and obtaining collocation for the difference. If he has not had time to realise his security within 30 days, he has only to ask the inspectors or the Court to extend the delay. But the petitioner did nothing. It did not even file its claim with the trustee, but appeals to the Court directly to obtain payment.

It is, therefore, a question of deciding if a creditor who has not yet realised his security, but who is engaged in doing so, is included in the words, "does not realise." According to the text of this section and of the Act as a whole, the creditor must realise his security within this delay of 30 days, or any additional delay that may have been granted.

Before presenting its motion, the petitioner should have filed its claim with the trustee, and should then have appealed from his decision if it were not accepted.

Section 13, sub-sec. 12, states that a composition approved by a Court shall be binding upon all the creditors for all debts due and provable under the Bankruptcy Act, excepting certain debts of a special nature, and the petitioner's claim is not one of these.

The Court is of opinion that the present motion cannot be granted, and it is dismissed with costs, which are limited as regards the attorney for the contestant to $85 plus disbursements.

Application dismissed.

CITY OF QUEBEC v. UNITED TYPEWRITER CO.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

MUNICIPAL CORPORATIONS (§ II G—260)—LIABILITY FOR DAMAGE BY MOB OR RIOT—STATUTE—CHARTER—LIMITATIONS—NOTICE OF ACTION.

Statutory liability imposed upon a city for "injury to property by any mob or during riots in said city" is not incompatible with similar provisions contained in the city charter, and the city is liable for damages to property by a mob even without any fault or negligence on its part. The provisions of the city charter as to notice of action and limitations thereof do not apply to a liability of this kind.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1920), 30 Que. K.B. 281, reversing

the judgment of Lemieux, C.J., at the trial (1919), 57 Que. S.C. 216, and maintaining the respondent's action. Affirmed.

F. Roy, K.C., for appellant.

L. St.-Laurent, K.C., for respondent.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

DUFF, J.:—The decision of this appeal turns upon two points: 1. Was 1853 (Can.) ch. 233, repealed by sub-sec. 16, sec. 29 of 1865 (Can.) ch. 57? The answer to this question depends upon whether or not sub-sec. 3 of sec. 39 is "inconsistent" with the provisions of the former Act. It seems beyond argument that the later provision can stand and be read together with the earlier Act without any sort of incompatibility. This question must be answered in the negative.

2. Is the present Act within sec. 11, 1916 (Que.) ch. 43, which is in the following words:—

"11. Section 8 of the Act 55-56 Vict. ch. 50, as replaced by sec. 45 of the Act 7 Ed. VII, ch. 62, is again replaced by the following:—

8. Every action, suit or claim against the city for damages is prescribed by six months, counting from the day when the right of action arose, any article or provision of the Civil Code to the contrary notwithstanding. But no such action, suit or claim can be instituted unless a notice containing the particulars of such claim and the address of the domicile of the claimant, be previously given to the said city within thirty days from the date on which the cause of the damage happened, and no such action or suit can be taken before the expiration of thirty days from the date of such notice.

The failure to give the above notice shall not deprive the claimants of their right of action, if they prove that they were prevented from giving such notice by irresistible force or other reasons deemed valid by the Judge or the Court, subject to the Act 29 Vict., ch. 57, sec. 39, par. 35."

It seems improbable that the legislature could have intended to require notice of action before a cause of action has arisen and that part of the enactment which relates to notice of claim seems to apply only to cases where the cause of action arises upon the happening of the "cause of damage." This probability is strengthened by the circumstance that in the French version "fait dommageable" in the first sentence is evidently regarded as the equivalent of "right of action."

My conclusion is that a right of action arising under the special statute upon which the plaintiff relies in this case does not fall within the class of cases contemplated by this section.

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Brodeur, J.

ANGLIN, J.:—After giving to this case careful consideration I find myself driven to the conclusion that neither the prescriptive provision nor the provision for notice of sec. 561 of the charter of the City of Quebec, 1916 (Que.) ch. 43, sec. 11, applies to a case in which the plaintiff's right to claim damages from the city can arise only 6 months after the happening of the injurious act for the consequences of which damages are sought.

As first enacted by 1892 (Que.) ch. 50, sec. 8, this provision probably did not extend to actions for damages caused by rioters. As it now stands the prescriptive clause cannot be meant to apply to a cause of action which only arises on the expiry of the prescriptive period. The provision for notice because found in the same section and introduced by the words "no such action" is almost certainly restricted in its application to actions that are subject to the prescription. It is unlikely that the Legislature meant to require notice to be given containing particulars of a claim in respect of which a cause of action may never arise and cannot, in any event, come into existence until the expiry of 5 months from the period within which the notice is required to be given. The application of art. 561 of the charter must, I think, be confined to cases in which the right to claim and sue for the damages sustained arises immediately upon their being incurred. I find nothing in this provision inconsistent with or repugnant to the provision of the statute, 1865 (Can.) ch. 57, by which the right of action originally conferred by the statute, 1853 (Can.) ch. 233, in circumstances such as exist in the case at bar appears to be reaffirmed.

The appeal fails and must be dismissed with costs.

BRODEUR, J.:—The facts of the case are as follows:—The United Typewriter Co. leased to the federal Government a certain number of typewriters for the use of the office of the Registrar at Quebec. On March 29, 1918, disturbances took place in that city and rioters sacked and pillaged the Registrar's office and destroyed or damaged several of the machines. The company which owned the machines sued the City of Quebec to recover the loss it had sustained at the hands of the rioters.

The City of Quebec, by virtue of the special Acts which govern it, and particularly art. 310 of its charter, has the right to make by-laws to pay damages caused to the property of victims of riots, and it is declared that if such a by-law is not passed within 6 months from the day when the damage was done, the aggrieved person has a right of action against the corporation.

I believe that this disposition of art. 310 is sufficiently explicit to hold the City of Quebec responsible for damage caused to property in case of rioting. If there were any doubt in this

respect, it would only be necessary to consult the sources of the charter, and particularly the Act 1853 (Can.) ch. 233, which shows clearly the intention of the Legislature.

But the City of Quebec says that the action should be dismissed because notice of claim was not given in sufficient time and because the action was not instituted within the six months following the occurence which caused the damage; and in support of this contention it invokes art. 561 of its charter 1916 (Que.) ch. 43, sec. 11.

This section reads as follows:—

"Every action, suit or claim against the city for damages is prescribed by 6 months, counting from the day when the right of action arose, any article or provision of the Civil Code to the contrary notwithstanding. But no such action, suit or claim can be instituted unless a notice containing the particulars of such claim and the address of the domicile of the claimant, be previously given to the said city within 30 days from the date on which the cause of the damage happened, and no such action or suit can be taken before the expiration of 30 days from the date of such notice.

The failure to give the above notice shall not deprive the claimants of their rights of action, if they prove that they were prevented from giving such notice by irresistible force or for other reasons deemed valid by the Judge or the Court."

Can this provision of the charter be applied to a case like the present? I do not think so.

The city's obligation to pay for damages suffered as a result of riots is imposed by law. By virtue of the ordinary principles concerning delicts, the city could not be held responsible for such damages for the very good reason that there was no fault on its part.

The notice which claimants must give in accordance with sec. 561 of the charter does not apply to those who wish to avail themselves of delictual fault on the part of the city. It is even possible that such notice might be required in case of contractual fault, as Mr. Roy has told us; but this latter point is not in issue in the present case and it is, therefore, not necessary to decide it..

But notice is certainly not necessary in cases when the claim is based on an obligation imposed by law. The jurisprudence is to the effect that these notices constitute an exception to the ordinary rules governing persons in their relations with one another, so they do not have to be given except in cases which come clearly within the dispositions of the statute. *Robin* v. *City of Montreal* (1914), 54 Que. S.C. 2; *Newman* v. *City of Montreal*

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(1912), 53 Que. S.C. 481; *Del Sole* v. *City of Montreal* (1915), 24 Que. K.B. 550; *Quebec* v. *Bastien* (1916), 32 D.L.R. 499, 25 Que. K.B. 539 affirmed, 54 D.L.R. 327, [1921] 1 A.C. 265, 28 Rev. Leg. 1.

But when must default to give notice be alleged? By plea to the merits, as was done in the present case, or by preliminary plea?

Section 177 C.C.P. states that the defendant may stay the proceedings by dilatory exception if he has the right to demand the execution of some obligation which causes a prejudice. Does the notice which must precede the exercise of a right constitute a prejudicial obligation?

This question was raised in a case of *Mattice* v. *Montreal St. R. Co.* (1901), 20 Que. S.C. 222, where it was held that default to give the notice which is required to be given to the Montreal Street Railway Co. by the victims of an accident before they take action is a prejudicial obligation and that failure to do so must be alleged by way of dilatory exception.

Belanger, J., in the case of *Kelly* v. *Montreal St. R. Co.* (1898), 13 Que. S.C. 385, also held that default to give notice of action must be alleged by way of preliminary exception.

In the present case notice was given, it is true, not by the plaintiff itself, but by the person who had the machines in his possession and who could be held responsible as lessee for deterioration and loss of the thing leased. Notice was given within the delay fixed by the charter. Four months later, the plaintiff produced a sworn declaration setting out the exact nature of the damages sustained. The circumstances of the case permit us, in the exercise of the discretion which the law leaves to the Court, to declare that the notice required by law was given within the prescribed delay (sec. 561 of the charter).

Now, is the action prescribed by 6 months? The prescription by 6 months invoked by the City of Quebec, under sec. 561 of its charter cannot prevent the plaintiff from succeeding. Indeed, according to sec. 561, prescription would begin to run from the day when the riot occurred. But sec. 310 of the same charter says that the right of action can only be exercised after 6 months from the date of the riot. It is true that there is a difference between the French and English versions of this sec. 561. In the English version mention is made of a prescription that would be acquired from the day when the right of action might have been exercised. The French version, on the contrary, speaks of a prescription which would run from the day when the damaging act occurred. The two texts differ. Every law of prescription must be strictly applied. Even if sec. 561 applied to the present

case, I would be obliged to say that the action was commenced in good time, for 6 months had not yet elapsed between the time when the right of action accrued and the time when it was exercised.

It has been argued that since municipal law is derived from English and American law we should be guided by the decisions of those countries.

I must say that I do not share this opinion. The English and American authorities may be of great assistance to us in interpreting our Municipal Code, for the Code is largely a reproduction of English and American law; but that does not justify the conclusion that all the rules of English law on the subject are applicable here, and particularly that questions concerning delicts and quasi-delicts are to be decided in accordance with English or American legal principles. Our Civil Code contains specific dispositions on the subject and there are also provisions in our statutes which tend to determine such responsibility. In my opinion, we must turn to the Civil Code and the statutes to determine the question of responsibility, for it is always dangerous to have recourse to decisions which very often violate elementary principles of our own law as stated in our civil and municipal codes.

The judgment *a quo* should be confirmed with costs.

MIGNAULT, J.:—The respondent in this case relies upon an obligation imposed by statute upon the City of Quebec to indemnify persons who suffer damages as a result of a riot.

It is a question of the Act 1853 (Can.) ch. 233, which has never been expressly repealed and which, with the object of providing a means of assessing the citizens of the City of Quebec for damages resulting from injuries caused to property by assemblies or during riots, gives the council of that city power to make by-laws imposing a special tax to meet and defray the expense of indemnifying the owners of all buildings or other property whatsoever, that may be demolished, destroyed or damaged by any assembly, disorderly gathering or riot whatsoever, in the said city, and that Act, of which I reproduce the exact phraseology, adds:—

(Translation). "Provided that in the event of demolition or destruction of or injury or damage to any property in the said city by any mob, tumultuous assembly of rioters, disorderly gathering or riot, then if the said council omit to provide, by such special assessment to defray the expense of indemnifying the proprietor hereof within 6 months after the destruction or injury of the said property, the corporation of the mayor and councillors of the city of Quebec shall be liable to pay the same; and the

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proprietor of the property destroyed or injured, may recover the amount of damages sustained by the destruction or injury hereof, by action against the said corporation."

This Act imposes upon the City of Quebec an obligation derived from the law solely (sec. 983 C.C.), and the conditions which give rise to that obligation (to express myself more briefly than does the Act in question) are: (1) Damage caused to property by mobs or during riots. (2) Failure on the part of the City of Quebec to provide for defraying the expenses necessary in order to indemnify the owner by means of a special assessment within 6 months from the time the damage was done.

So the owner's action does not lie until the municipal council has allowed 6 months to pass without making this assessment.

In defence of the action of the company respondent, which suffered damages in consequence of the destruction of certain typewriters belonging to it during a riot that occurred on March 27, 1918, when a disorderly mob of rioters broke into the offices of the Registrar, appointed at Quebec under the Military Service Act, to whom the machines had been leased, the appellant pleads (1) prescription by 6 months, (2) default to give notice of an action in damages within 30 days from the time when the damage was sustained.

The appellant relies upon sec. 561 of its charter, as enacted by the Act 1916 (Que.) ch. 43, sec. 11, which reads as follows:—

"Every action, suit or claim against the city for damages is prescribed by 6 months, counting from the day when the right of action arose, any article or provision of the Civil Code to the contrary notwithstanding. But no such action, suit or claim can be instituted unless a notice containing the particulars of such claim and the address of the domicile of the claimant, be previously given to the said city within 30 days from the date on which the cause of the damage happened, and no such action or suit can be taken before the expiration of 30 days from the date of such notice.

The failure to give the above notice shall not deprive the claimants of their right of action, if they prove that they were prevented from giving such notice by irresistible force or for other reasons deemed valid by the Judge or the Court, subject to the Act 29 Vict., ch. 57, sec. 36, par. 35."

The appellant draws our attention to the fact that the English version of this section, instead of the words "à compter du jour où s'est produit le fait dommageable", says:—"Counting from the day when the right of action arose"; and in place of the words of the French version concerning notice of action:—"Dans les trente jours à compter de celui où le fait dommageable

est arrivé", we read in the English version:—"Within thirty days from the date on which the cause of the damage happened."

Before the Act 1916 (Que.) ch. 43, sec. 561, or rather sec. 8 of the Act 1892 (Que.) ch. 50 (which is the source of sec. 561), as it reads in the Act 1907 (Que.) ch. 62, sec. 45, said, in its French version, speaking of the notice of action:—"Dans les trente jours à compter de celui où l'accident est arrivé"; and in the English version:—"Within thirty days from the date on which the accident happened."

The principal change relied upon is the replacement of the word "accident" by the phrase "fait dommageable".

This latter expression is, undoubtedly, more general and would probably include—but for the purposes of this case it is not necessary to decide the point definitely—a cause of damages which might be distinguished from a pure accident.

However, without wasting time on distinctions, though they may be of great theoretical interest, between the cause of an obligation generally speaking and the conditions required in order to give rise to a responsibility imposed by law, I would say—and this is sufficient for the purposes of the case—that the law which imposes the obligation with which we are here concerned, viz., the Act 1853 (Can.) ch. 233, did not establish a short prescription having the effect of extinguishing the legal obligation which it created, and does not require that notice of action be given.

It would be absurd to apply to an action such as respondent's a prescription of 6 months counting from the day when the damage was caused, for the right of action does not accrue until 6 months have elapsed since the damage was caused, unless the City of Quebec has provided by a special assessment for defraying the expenses necessary in order to indemnify the owner. If the appellant is correct, the right of action would accrue at the very moment when the delay for prescription expired, and the right of action would be still-born. That is sufficient to dispose of the plea of prescription.

As for the notice of action, it might be said—and this would be a very strong argument—that if sec. 561 of the charter of Quebec does not apply to a claim like the respondent's to determine the period of prescription, it should not be applied in order to deny the right of action by reason of default to give notice. Furthermore, the very terms of art. 561 show that it does not apply to the legal obligation created by the Act 1853 (Can.) ch. 233, for notice of action must be given within 30 days after the event, and at that time the respondent's right of action, based on the city's failure to make an assessment within 6 months

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from the time when the damage was caused, had not yet accrued. Again, according to sec. 561, absolute nullity does not take place, but the Court may, according to the second paragraph of that article, hold that notice was not indispensable in the circumstances.

However, the Act 1853 (Can.) ch. 233, does not require notice of action, and that is more than sufficient for the purposes of the present case. Of course, that implies that the injured owner advised the city of the amount of damages he had sustained, because it was for the council to raise that amount by special assessment, and such advice was given in the present case. But there is no question of a notice of action within any delay whatsoever.

I, therefore, reach the conclusion that the defence of prescription and default of notice of action is unfounded.

The appellant has not proved the implied abrogation of the Act 1853 (Can.) ch. 233, as a consequence of subsequent dispositions incompatible with that Act, and there has been no express abrogation.

The appeal should be dismissed with costs.

Appeal dismissed.

FREEDMAN v. HART: Re BAITTLE.

Quebec Superior Court in Bankruptcy, Panneton, J. June 19, 1922.

BANKRUPTCY (§ III—15)—RIGHTS OF TRUSTEE—ACTIONS—JUDGMENT—INTERESTED PARTY—COLLATERAL SECURITY.

A trustee in bankruptcy has a sufficient interest in an action commenced by the insolvent in which, though before insolvency the judgment was transferred as collateral security, a judgment has been obtained but from which an appeal was taken to continue the action in the interest of the estate.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by trustee to resume action commenced by insolvent. Granted.

Bercovitch, Calder & Gardner, for petitioners.

L. E. Bernard, K.C., for contestant.

PANNETON, J.:—The petitioner in his quality presented a petition praying that he be permitted to resume the instance in case bearing No. 3717 of the records of the Superior Court, wherein C. J. Baittle, the insolvent, is plaintiff and Joseph Freedman is defendant.

He alleges that on November 24, 1920, the said Baittle made an assignment of his property for the benefit of his creditors, the petitioner who was appointed trustee, and that a resolution of inspectors has been passed, authorising him to resume said instance—

The said Joseph Freedman contests the petition alleging that in the said case No. 3717, the plaintiff insolvent has obtained judgment against him for $500 on January 15, 1920 and that on January 22, 1920, he appealed from that judgment to the Court of Review where the said suit is still pending.

He further alleges that on February 22, 1922, the said Court of Review whose name was changed in the Court of Appeal, rendered a judgment ordering the suspension of proceedings in that case until the party interested be authorised to resume the instance and further he alleges that the present petitioner has no interest in the said cause, and cannot demand to resume the instance.

The reason given why the petitioner has no interest, is because before the assignment made by the insolvent, this last had transferred his claim and the said judgment to Pollock Co., Ltd., which last company itself transferred said claim to some other persons, and that at the time of the said assignment, that claim was no more a part of the assets of the insolvent and that the petitioner was never seized of the said claim that the resolution of inspectors referred to in said petition was passed erroneously and fraudulently.

The contestant concludes that the said resolution of the inspectors be declared illegal and null and that the petition on *reprise d'instance* be rejected with costs. Issue was joined on said contestation.

The following facts are proved:—Baittle the plaintiff transferred his claim against Freedman the contestant to Pollock Co., Ltd., as collateral security for a debt which he was owing the company; this security was given on October 23, 1920.

On November 24, Baittle made his assignment to petitioner.

On May 2, 1921, Pollock Co., Ltd., transferred said claim to one Isaacs; on May 12, 1921, both transfers were signified to Freedman.

On January 28, 1922, motion was made by the defendant Freedman, in said case, No. 3717, before the Court of Appeal, praying for the suspension of proceeding in that case until a party interested specially the said Hart, petitioner, has resumed the instance, and has given defendant, the information necessary to know with whom the defendant was pleading.

On February 22, 1922, the judgment was rendered on that motion ordering the suspension of proceedings until the trustee respondent has taken up the instance, which he is demanding to do.

The assignment of property made by said Baittle to petitioner is admitted.

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Under art. 77 of the Code of Civil Procedure, any person may bring an action at law, who is interested therein, even if such interest be merely eventual.

By sec. 10 of the Bankruptcy Act, ch. 36, 1919, an assignment vests in the trustee all the property of the assignor at the time of the assignment, excepting such as is held by the assignor in trust for any other person and excepting such property as is exempt from seizure.

Petitioner is interested in having said judgment in favour of Baittle the insolvent maintained by the Court of Appeal, as the transfer was made merely as collateral security for the payment of a debt, and in addition is interested in having his said judgment confirmed as a reversal of the same would entail a responsibility for the costs of the attorneys of both parties.

Petitioner's quality as trustee being admitted, and petitioner having an interest in the instance which he has to resume; the Court has to consider whether the fact of the claim was transferred, but the transfer not signified to the defendant before the assignment, can be urged against the petitioner; the argument held against the petitioner in support of that pretension does not seem to distinguish between the existence of an instance and the merit of the instance itself.

The insolvency of plaintiff Baittle did not put an end to the instance; nor the transfer of plaintiff's claim not signified before the insolvency, but these facts are subsequent to the institution of the action which, if sufficient to repel an action, must be urged by a plea of *puis darein continuance* after the instance has been taken up by the petitioner. 3 Garsonnet, pages 154 and 155:—"And the taking up of an instance which has been extinguished by the death of one of the parties is only valid if some subsidiary question remains to be decided, such as an adjudication as to costs."

"The right to take up the instance may be contested in two cases: (1) If the petitioner has not the necessary quality; (2) if the action has been so completely extinguished as to leave no question open for adjudication."

Pigeau, Comm. vol. 1, p. 614:—"The party summoned in *reprise d'instance* may contest: (1) On the ground of lack of quality; (2) if the case is extinguished by prescription or some other cause."

Rousseau: Laisné:—"The instance cannot be taken up if the action on which it is based is extinguished by prescription in the interval, or if prescription has been asked for."

Glasson, p. 12:—"Contestation: That he is not the heir, that

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the action is extinguished by prescription, desistment, transaction."

All these authorities shew that if petitioner by *reprise d'instance* has the quality which in this case is admitted, the other reasons which could be urged against the petition are such as to establish, that the instance is extinguished, but the merit of the case has nothing to do on the issue raised on the petition.

The insolvency of plaintiff in any case does not destroy the instance but leaves it to be taken by any body interested.

Considering that petitioner is interested in continuing said instance, the said instance being stopped by judgment of the Court until the trustee has taken it up and said judgment being granted, upon the demand of the defendant.

The Court grants the said petition, and allows petitioner to resume the instance in this case, and seeing that the costs of the *reprise d'instance* must be borne by the *reprenant d'instance*, and that the contestation is dismissed mainly for reasons not argued before this Court each party will pay its own costs.

Petition granted.

JEFFREY v. AAGAARD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. July 10, 1922.

FRAUDULENT CONVEYANCES (§ VI—30)—CREDITORS—WITHDRAWAL OF ASSETS FROM REACH OF—FRAUD—VALIDITY—STATUTE 13 ELIZ. CH. 45—CONSTRUCTION.

The voluntary withdrawal of all available assets from the reach of creditors shortly before engaging in a hazardous business, the effect of which is to delay and defraud such creditors makes it incumbent upon the Courts to infer statutory fraud and such transaction will be set aside as being within the statute 13 Eliz. 1570 (Imp.) ch. 5.

APPEAL by defendant from the trial judgment in an action to set aside certain conveyances as being fraudulent and void as against creditors. Affirmed.

C. Blake, for appellant.

G. R. Coldwell, K.C., for respondent.

PERDUE, C.J.M. concurred in dismissing appeal.

CAMERON, J.A.:—This is a creditor's action to set aside certain transfers of real estate and bills of sale of personal property in the City of Brandon, as being fraudulent and void as against the plaintiffs and other creditors of the defendant, Walter Aagaard. The transfers and bills of sale purported, through the medium of a trustee, to vest the property in question in Louisa W. Aagaard, the wife of Walter Aagaard. Both the defendants filed statements of defence denying, *inter alia*, that the said transfers and bills of sale were made for the purpose of defeating,

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delaying or defrauding the plaintiffs. Curran, J., before whom the action was tried, gave judgment for the plaintiffs in the terms of the relief asked for in their statement of claim and the defendants now appeal from that judgment.

In his reasons for judgment the trial Judge fully and carefully reviews the facts as brought out in the evidence and his findings thereon were not in any material particular effectively questioned or indeed really challenged except that in which he declines to impute to Walter Aagaard a fraudulent intention in voluntarily settling the property in question on his wife. He bases his decision on his findings that Walter Aagaard, in so voluntarily settling all his property on his wife and in being in trade in which the incurring of debts in the ordinary course of business was inevitable, was taking away the only property that would be available for creditors because the partnership had no tangible assets to which creditors could resort. He cites *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106, 41 L.J. (Ch.) 539; *Buckland* v. *Rose* (1859), 7 Gr. 440; *Ware* v. *Gardner* (1869), L.R. 7 Eq. 317, 38 L.J. (Ch.) 348; and *Sun Life Ass'ce Co.* v. *Elliott* (1900), 31 Can. S.C.R. 91, and held the conveyances in question came within these authorities. That is to say, although no fraudulent intent was, in his opinion, established, the effect of the conveyances was to bring them within the statute 13 Eliz. Looking at the transactions from that point of view, I think Curran, J. was wholly justified in his conclusion. The true test in such cases is as stated in Kerr on Fraud and Mistake, 5th ed. at pp. 219-220.

"Whether from all the circumstances the Court can infer that the settlement was made with the intent, actual or constructive, of delaying or defeating existing or subsequent creditors."

Aside from that consideration, which is sufficient to dispose of this appeal, I am strongly inclined to the view that the intent to defeat or defraud was established on the evidence. Armour, C.J., in *Rice* v. *Rice* (1899), 31 O.R. 59, at p. 69; affirmed (1900), 27 A.R. (Ont.) 121, made this pregnant remark:—

"If we are to believe implicitly what the parties to a fraudulent transaction swear in regard to it, any further attempt to set aside fraudulent transactions might as well be abandoned."

I have read Dennistoun, J.A.'s, judgment and agreed with it. In my opinion, the appeal must be dismissed with costs.

FULLERTON, J.A.:—For the reasons given by the trial Judge, with which I entirely agree, I would dismiss this appeal with costs.

DENNISTOUN, J.A.:—This is an appeal from Curran, J., who gave judgment in favour of the plaintiff, setting aside voluntary

conveyances by the defendant Walter Aagaard to his wife, as void under 13 Eliz., 1570 (Imp.) ch. 5. The property transferred was valued by the instruments of transfer at $47,000—$32,000 for land and $15,000 for chattels, and there can be no question as to the voluntary character of these conveyances.

In my view the trial Judge has rightly disposed of the case and I would dismiss this appeal.

13 Eliz. ch. 5, provides, in effect, that all conveyances and dispositions of property, real or personal, made with the intention of delaying, hindering, or defrauding creditors, shall be null and void as against them, their heirs and assigns, and in considering whether a conveyance is void under the statute the *intent* or *purpose* of the donor in making the gift is alone to be regarded.

"The question of intent to delay, hinder, or defraud creditors is always one of fact, which the Court has to decide on the merits of each particular case after taking all the circumstances surrounding the making of the alienation into account."

See 15 Hals., p. 83, para. 172, *Davies* v. *Dandy* (1920), 54 D.L.R. 134, at p. 138, 30 Man. L.R. 306.

In *Ex parte Mercer; Re Wise* (1886), 17 Q.B.D. 290, at p. 292, 55 L.J. (Q.B.) 558, Cave, J. says:—

"The question we have to decide is one of fact, whether this settlement was made with intent to defeat or delay creditors. There is no case which lays down that, when it is not the necessary consequences of a settlement that creditors should be defrauded, the Court is obliged to come to the conclusion that the settlor intended to defraud them where it is satisfied he did not."

And in the same case at p. 298, Lord Esher, M.R., declares it to be a monstrous proposition that a tribunal should be bound to infer an intent to defeat and delay creditors by reason of certain acts of the bankrupt, when other circumstances make one believe that the bankrupt did not intend anything of the kind, and to find that he did, is to find that as a fact which one really believes to be untrue.

In Kerr on Fraud and Mistake, at p. 215, we find the following summary of cases in which it was held that in the absence of proof of an actual and express intent to defeat creditors, it is enough if the facts are such as to show that the settlement would *necessarily* have that effect:—

"If at the date of the settlement the person making the settlement was not in a position actually to pay creditors, the law will infer that he intended by making the voluntary settlement to defeat and delay them. Again the same inference will be made by the law, if after deducting the property which is the subject of the settlement, sufficient assets are not left for the payment of

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the settlor's debts. But a *bona fide* settlement by a person having ample means outside the settlement to pay present debts is not void because afterwards the effect proves to be to defeat future creditors. And the mere fact that a debt exists which existed at the date of the settlement will not make a deed fraudulent. But where the intention to defraud is manifest, and no other purpose appears, this is sufficient to bring the case within the statute and to override all circumstances whatever."

Re Holland; Gregg v. *Holland*, [1902] 2 Ch. 360, 71 L.J. (Ch.) 518; *Freeman* v. *Pope* (1870), L.R. 5 Ch. App. 538, 39 L.J. (Ch.) 689; *Re Lane-Fox; Ex parte Gimblett*, [1900] 2 Q.B. 508, 69 L.J. (Q.B.) 722.

I need make only a brief reference to the history leading up to the case at bar, for that has been fully dealt with by the trial Judge. Aagaard's restaurant began as a small undertaking in 1903. The father, the mother and the sons, working together, made it prosperous, so that in 1911, the sons having grown to manhood, it was decided to leave them in charge of the business, while the father and mother retired to Minneapolis, where they have since resided. A partnership agreement was entered into between the father and two sons—but one son only—Tenny W. Aagaard—took an active part in the business, the other son appears to have dropped out by mutual consent.

The father during the many years he was in control of the business made it a rule to pay cash for all supplies purchased. He never permitted any accounts to remain unpaid. If a tradesman did not render his bill with delivery of the goods, he was notified to do so, or to expect no more orders. These prudent tactics aided by the united and industrious efforts of the whole family made the business a success.

In 1911 the withdrawal of the father, mother and the son Walter from participation in the business threw the whole burden upon the son Tenny. This meant the hiring of others to do the work; moreover, the partnership agreement called for the payment of $250 per month by the firm to the father, for the use of the chattel equipment, all of which he retained as his personal property. It never became an asset of the partnership. The burden assumed by the son Tenny was so heavy that he immediately abandoned his father's successful business methods, and instead of paying cash, he arranged for monthly credits; and applied to the Bank of Hamilton for accommodation amounting to $2,500. The monthly statements which according to the terms of the partnership agreement were to be regularly sent to the father, were never sent. The father made a yearly visit to Brandon in 1911, 1912, 1913, to attend the fair, and undoubtedly as-

certained how things were going. He must have been seriously alarmed. It was his duty as a partner to know what was going on, and he admits that he knew in 1912 that the cash system had been abandoned. He admits he never got any profits from the business, and never inquired if there were any. He was drawing his rent, and was satisfied with that. On May 31, 1913, the first statement of the partnership business was issued. It showed that Tenny had incurred debts amounting to $5,061.81 on trade accounts, wages $602.56, taxes $59.37, meal tickets outstanding $349.95, against which there were no bad debts, and that all supplies on hand could be readily sold. Mr. Coldwell argues forcibly that this statement shows bankruptcy in May, 1913, and to my mind it was sufficient to make the father apprehensive of financial difficulties so soon as he saw it. He lost little time in taking action, and in November, 1913, by transfer and bill of sale, he conveyed to his wife all his real property in Brandon, and all the chattels and equipment contained in Aagaard's restaurant,—which included, as he put it in his evidence, everything he had in the world of any value. The conveyances to his wife were made to an intermediary who immediately conveyed to her.

In 1914 and 1915, the business revived owing to war conditions and the military camps in the neighbourhood of Brandon, but in 1917 business was so bad that more money was required, and Tenny went to Minneapolis to arrange for assistance from his mother, to enable him to carry on.

Counsel argues that the business was going behind at the rate of about $3,000 per year. In 1920 when the final crash came, there were liabilities of $22,430.39 with assets amounting to $845.45. A perusal of the whole case leads to the conclusion that this hopeless position was reached by a gradual process of decline, dating from 1911 when the young son was placed in charge, and left to struggle with overhead charges which were more than the business was able to sustain.

I have no doubt the father knew when he conveyed away "all that he had in the world" that financial ruin was threatening the business, and it is clear that the subsequent bankruptcy was the necessary result of what he did. The trial Judge hesitated to find an intent to delay or defeat creditors, but having had the advantage of a careful examination of the printed record and the documents filed, I draw the inference that the defendant Walter Aagaard did convey his property with the intent prohibited by 13 Eliz.

The creditors who sue in this action base their claim on debts incurred so late as 1920, some seven years after the conveyances

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were made, but the words of the statute as elucidated by many Judges are wide enough to give them a right of action.

Mackay v. *Douglas*, L.R. 14 Eq. 106, 41 L.J. Ch. 539, is an authority which manifestly applies. The headnote is as follows: —(See the Equity Report):

"A voluntary settlement whereby the settlor takes the bulk of his property out of reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect.

In order to set aside a voluntary settlement as being void against creditors, it is not necessary to shew that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency."

Malins, V.C., says at p. 120 (L.R. 14 Eq.):—

"I dare say Mr. Douglas had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this statute, committed a fraudulent act, because going into trade, he was taking away the only property which would be available for his creditors."

And at p. 122:—

"In the present case Mr. Douglas made the settlement, as I am perfectly satisfied, with the view that he was going into partnership in which he might become bankrupt or insolvent and utterly ruined; and therefore he did it with the view that he might be indebted, and the settlement in my opinion was fraudulent and void against creditors. The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations."

The defendant Aagaard was actually engaged in trading operations when he made this settlement, so that the words of the Vice-Chancellor apply with greater force than in the case of Douglas, who was only contemplating business relations.

The restaurant business is a hazardous business inasmuch as it depends very largely upon the character of the management. Aagaard's business in Brandon after 1911 was of a hazardous character, for the skilled managers had been withdrawn, and a

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young son installed to carry a load which was altogether too heavy for the business to bear.

Aagaard, Sr, knew this, and took what he conceived to be prudent measures to secure his wife against the losses which he anticipated correctly were sooner or later to occur.

I refer to *McGuire* v. *Ottawa Wine Vaults Co.* (1913), 13 D.L.R. 81, 48 Can. S.C.R. 44; *Sun Life Ass'ce of Canada* v. *Elliott* (1900), 31 Can. S.C.R. 91; *Ware* v. *Gardner*, L.R. 9 Eq. 317, 38 L.J. (Ch.) 348.

In my view these conveyances should be set aside upon two grounds: (1) The withdrawal of all available assets from the reach of creditors, the necessary effect of which was to delay and defraud them, makes it incumbent upon the Courts to infer statutory fraud; (2) The defendant Walter Aagaard intended to benefit his wife and to save what he could from the disaster which he saw approaching as early as 1913. He had the claims of future creditors in mind and his intent to defeat them is clearly established.

I would dismiss this appeal with costs.

PRENDERGAST, J.A., concurred in dismissing appeal.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

TAXES (§ V A—180)—SUCCESSION DUTIES—APPOINTMENT OF COMMISSIONER TO ENQUIRE INTO AMOUNT—VALUATION OF EXECUTOR TAKEN—POWER OF COURT TO INTERFERE WITH—SUCCESSION DUTY ACT, R.S.B.C. 1911, CH. 217, SECS. 23-33.

The Finance Minister of British Columbia being dissatisfied with the valuation of property given by the executor for succession duty purposes appointed a Commissioner to enquire into the value. The Commissioner made a valuation somewhat lower than that of the executor. The Auditor-General then fixed the amount of succession duty on the valuation given by the executor without any protest on his part, and the defendant became a surety for the payment of the amount so fixed under sec. 23 of the Succession Duty Act, R.S.B.C. 1911, ch. 217. In an action upon the bond, the Court held that the property had been very greatly over-valued, but that the only jurisdiction of the Court to interfere with the values as fixed, was by the Court of Appeal under sec. 33 of the Statute, when there was an appeal from the report of the Commissioner, and in this case there had been none. That the succession duty was payable, notwithstanding that neither the deceased nor her executor was the registered owner of the legal estate. The executor being the owner of all the equity and the only person entitled to be registered as owner of the legal estate, and having full control of the property it being unnecessary to decide whether his dealing with the property was in his capacity of executor or devisee. The property had "come into his hands" within the meaning of the bond, having failed to pay the amount of the succession duty, the surety was liable.

APPEAL by defendant from the judgment of the British Col-

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umbia Court of Appeal (1922), 63 D.L.R. 469, which affirmed the trial judgment (1921), 60 D.L.R. 372, in an action on a bond given to secure payment to the Crown of succession duties, the appellant being surety for the executor. Affirmed by an equally divided Court.

H. B. Robertson, K.C., and *Campbell*, for appellant.

E. Lafleur, K.C., for respondent.

DAVIES, C.J.:—I am to dismiss this appeal for the reasons stated by Galliher, J., when delivering the judgment of the Court of Appeal (1922) 63 D.L.R. 469, and with which reasons I fully concur.

IDINGTON, J.:—This is an action brought by the respondent under sec. 42 of the Succession Duty Act R.S.B.C. 1911, ch. 217, upon a bond given July 29, 1912, by the defendant, Quagliotti, the executor and sole devisee of the estate of his late wife, and the appellant as his surety for the payment to the respondent of the succession duties under the said Act.

The bond was given by them in the penal sum of $88,575, and the condition thereof is as follows:—

"The condition of this obligation is such that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti, late of the City of Victoria, in the Province of British Columbia, deceased, who died on or about the 20th day of May, 1913, do well and truly pay or cause to be paid to the Minister of Finance of the Province of British Columbia for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act, within 2 years from the date of the death of the said Petronilla Quagliotti, or such further time as may be given for payment thereof under the provisions of said Act, or such further time as he may be entitled to otherwise by law for the payment thereof, then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue."

The said Quagliotti applied to the Supreme Court of British Columbia for a grant of letters of probate of the will of his said late wife, and, as required by the said Act and the Administration Act R.S.B.C. 1911, ch. 4 and rules made thereunder, made the required affidavit estimating the value of the property of deceased at the date of her death on May 29, 1913, at the sum of $886,000 as set forth in the statutory inventory annexed thereto.

That was referred by the Registrar of the Court to the Minister of Finance who duly authorised the Auditor General to determine the amount of the succession duty thereon.

The duty of verifying same was assigned to one Burdick who reported thereupon a slightly less value than the said sum. And thereupon the Auditor General accepted the said valuation of Quagliotti and determined that the succession duties should be the sum of $44,287.50, and directed the said Registrar to collect the said sum as provided by sec. 23 of the Act, and sent him his consent to the issue of letters of probate.

The said Quagliotti not having the cash availed himself of the privilege given by sec. 23 and 24 of the said Succession Duty Act R.S.B.C. 1911, ch. 217, allowing the authorities to be satisfied by such a guarantee bond as was given as set forth above.

Thereupon, the probate of said will was granted as prayed for in consideration of the said bond having been given, but no payment having been made of the Succession Duty, as above determined to be the proper amount; hence this action.

The several defences set up may be briefly condensed to the one that the property had fallen in value and, in fact never had the extreme value the executor had set up, and the Auditor General has assented to, and, no doubt with the knowledge of the appellant.

The trial Judge, Gregory, held (1921), 60 D.L.R. 372, and I think rightly, that the appellant is clearly liable upon its bond, and this has been upheld by the Court of Appeal.

A great deal of unnecessary confusion has been brought into the case both here and in the Courts below by the appellant's contentions, first, that the amount had not been finally determined by what had transpired as related above, because there was no commissioner appointed to determine same, and next, that the said Quagliotti was only executor and that it was only what came to his hands as such upon or in respect of which the appellant is liable. In short, as the entire estate (except a trifling $500 of personalty) consisted of real estate, the appellant was not liable at all, according to that contention.

If we apply a little general knowledge of the world and the business therein, we must assume that the appellant was paid on the basis of the amount involved to join in this bond as guarantor, and not otherwise, and that it certainly did not intend to be taking the money paid it for doing nothing but writing out the bond and application therefor, which would be the case if its present contention that there never was any liability incurred be correct.

I hold that all parties concerned by their conduct towards each other, agreed that the amount determined by the Auditor General was to be and consequently remained the correct amount of succession duty as intended by the Act that it should, unless

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and until otherwise determined by one or other proceeding which the Act furnishes as a means of substituting another amount.

In the first place, the Crown is sometimes imposed upon by a fraudulent or mistaken estimate leading up to the consent of granting of probate.

There is given by sec. 29 *et seq* of the Succession Duty Act a means of rectifying this by appointment of a commissioner to inquire and proceed as directed under the Public Inquiries Act R.S.B.C. 1911, ch. 110, and the relevant sections of the Succession Duty Act R.S.B.C. 1911, ch. 217.

No occasion has arisen therefor herein, hence all argument based thereon is, I respectfully submit, but idle confusion.

It matters not whether the party called in to assist the Auditor General is, in the ordinary speech of those concerned, called a commissioner or agent, or aught else. That furnishes no excuse for the pretension that the power of the Crown to so investigate must be invoked and exercised by it as a necessary preliminary to any liability upon the bond in question herein.

The converse case of an executor or administrator having been misled into an over estimate, or having misunderstood the operation of the Act or of any other person concerned being erroneously held by the executor, or others concerned, the proper party to pay any part of the duty, is amply provided for by sec. 43 of the Act, R.S.B.C. 1911, ch. 217, which reads as follows:—

"43. A Judge of the Supreme Court shall also have jurisdiction, upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sec. 29 to 31, both inclusive, of this Act are conferred upon any officer or person."

This never was invoked by the parties concerned herein and though it was the proper remedy if any unjustifiable mistake made as against the executor or his surety the appellant.

If there is anything in the pretension set up in the defence, that seems to have been the proper and only mode of relief, and enables the resort to all the powers conferred on the Crown as already pointed out when it has ground of complaint.

Independently of either of these proceedings, the respondent is enabled by sec. 42 to sue as has been done herein. And in the event of doing so the proceedings authorised by secs. 29 to 32 seem to be excluded from operation by the latter part of the section, which reads as follows:—

"42. Any sum payable under this Act shall be recoverable with full costs of suit as a debt due to His Majesty from any person liable therefor by action in the Supreme Court, and it

shall not in any case be necessary to take the proceedings authorised by secs. 29 to 32, both inclusive, of this Act."

Unless and until the amount determined by the Auditor General and in compliance therewith made the condition upon which probate was granted had been displaced by either of the said proceedings provided by the Act, I hold it is conclusively established:

The contention that the executor as such, or his surety, is not liable because the executor has as such, only to deal with personalty, seems wholly unfounded in face of the express language of the bond and manifold provisions in the Administration Act R.S.B.C. 1911, ch. 4, extending his powers and duties beyond those originally devolving on him, and especially secs. 74 and 75 cited in illustration of what he can do as pointed out by Mr. Lafleur in relation to the law created by the Succession Duty Act.

I am, however, of the opinion that the plain meaning of the bond in question made it the duty of the executor to exercise his powers of devisee and meet thereby the obligations he entered into and that the appellant surety could at any time have insisted upon his furnishing the means thereby to relieve it.

I do not think it necessary or indeed quite proper to express herein any opinion as to the rights of the Crown to assert at any time and stage the lien declared by the Act.

If the contention made in that regard be correct, the right of subrogation given by the judgment appealed from can be attempted by appellant thereunder.

I think this appeal should be dismissed with costs.

DUFF, J.:—The bond is the bond required by the statute. The Registrar has no authority to exact and the applicant was under no obligation to give a security of wider limits than required by the law. I agree with the view of the Court of Appeal 63 D.L.R. 469, that sec. 24 (amended 1915 (B.C.) ch. 58, sec. 7) in prescribing that the bond shall be "conditioned for the due payment to His Majesty of any duty to which the property coming into the hands of the said applicant . . may be found liable" is imposing a condition which must be observed before the application is to be granted and since that is the subject of this provision the words "coming into the hands of the . . . applicant" must be read as coming into his hands under the authority with which he is petitioning the Court to clothe him. The condition of the bond is that as regards property acquired by him under the authority vested in him by the probate of the letters of administration, as the case may be, he is to be responsible for the payment of all duty to which that property is liable under the Act.

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The sole remaining question is that arising under the contention of the respondent that this property "came into the hands" of the executor within the meaning of the condition.

Now, it is quite clear that as executor he acquired no title to the testatrix' real estate. In that sense it did not come into his hands. But there is, it is contended, an authority conferred upon him—an authority (under sec. 37) to sell the real estate of the testatrix for the purpose of paying the duty to which the property itself is liable—and that circumstance, it is argued, is sufficient to bring that property within the category of property to which the condition applies.

The construction of sec. 37 of the Act is not, I think, free from doubt. But for the purpose of deciding the question now raised I shall assume that it has the scope ascribed to it by the judgment of the Court of Appeal, 63 D.L.R. 469. It does then, we may assume, give authority to the executor to sell for the purpose mentioned. But it is surely a non-natural construction of the language to hold that property has "come into the hands of" an official or a person charged with the performance of duties merely because by statutory enactment he has been endowed with authority to sell for the purpose of paying a public charge upon it—an authority which has never been exercised. I think this construction is not an admissible one.

The appeal should be allowed and the action dismissed with costs.

ANGLIN, J.:—Having regard to the terms in which the statute R.S.B.C. 1911, ch. 217, sec. 24, directs that the bond (to be furnished by the personal representative applying for probate or letters of administration) to secure payment of succession duties shall be conditioned, I agree with the interpretation put upon the bond of the appellant by the Court of Appeal 63 D.L.R. 469, namely, that it secures payment of succession duties only upon property which came into the hands of its co-obliger in his quality as executor of his deceased wife. As real estate, the property in question came into the hands of Quagliotti not as executor but only as devisee of his wife. In interpreting the statute and the bond, in my opinion, the adventitious circumstance that Quagliotti was both executor and devisee must be put aside and the position of the executor and his surety considered as if the devise of the property had been to another person.

I incline to accept the contention of counsel for appellant that the words "the said duty" in sec. 37 of the statute refer to the duty which a personal representative or trustee is by sec. 36 required to deduct, i.e. duty on any estate, legacy or property in

his "charge or trust" which is subject to duty. I am, moreover, with great respect, unable to assent to the view that because the power to sell conferred on the executor by sec. 37 (assuming its applicability) would empower him to sell so much of the real estate devised as would enable him to pay the duty on it, that property can be said to have come in (or into) his hands as executor within the meaning of the bond sued upon and sec. 24 of the statute. *Ianson* v. *Clyde* (1900), 31 O.R. 579, cited by Galliher, J., in 63 D.L.R. at 471, seems to me to be clearly distinguishable. Although only for the purpose of enabling the personal representative to sell it to pay the debts of the *de cujus*, the effect of the Ontario legislation there dealt with was to vest in him the title to the decedent's real estate *ad interim* and to postpone the vesting of it in the devisees or next-of-kin until the right of personal representative thereto was determined. Section 37 of the B. C. Succession Duty Act has no such effect.

There is no doubt force in the contention that secs. 23 and 24 prescribe that the security to be given shall be "in a penal sum equal to ten *per centum* of the sworn value of the property of the deceased person" including real estate. *Primâ facie* the object would seem to be to secure payment of succession duties on the real estate as well as on the personal property of the decedent. But we are here dealing with the obligation of the executor and his surety and it is trite law that the surety is entitled to the benefit of the most favourable construction of its obligation which the instrument embodying it reasonably admits of. Section 24 of the statute and the terms of the bond itself, as already indicated, in my opinion, entitle the appellant to maintain that its obligation is restricted to the satisfaction of the respondent's claim for unpaid succession duties in respect of such of the property of the *de cujus* as came into the hands of Quagliotti in his capacity as executor of his deceased wife. The real estate devised to him did not come into his hands in that quality.

I would, therefore, allow this appeal with costs here and in the Court of Appeal (63 D.L.R. 469) and would direct the entry of judgment dismissing the action with costs.

BRODEUR, J.:—This is an appeal concerning a bond given under the provisions of sec. 23 of the Succession Duty Act R.S.B.C. 1911, ch. 217, as security for the payment of succession duty.

Mrs. Quagliotti died in 1913, and by her will she gave all her real and personal estate to her husband and she appointed him her executor.

Having applied for letters of probate, Quagliotti filed an affi-

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davit of value and relationship required by the Succession Duty Act in which it is shewn that the succession was estimated at nearly a million dollars and was, with the exception of $500 of personal estate composed of lands situate in the City of Victoria.

This inventory was accepted by the Provincial authorities and Quagliotti gave bond of the United States Fidelity and Guarantee Co. as security for the payment of the Succession duty to which the property of the deceased might become liable.

The condition of the bond was that Quagliotti "the executor of all the property of Petronilla Quagliotti . . . . do well and truly pay . . . . to the Minister of Finance of the Province of British Columbia for the time being representing His Majesty the King in that behalf any and all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act."

It is contended by the appellant company that the real estate never came into the hands of L. J. Quagliotti as executor, but was in his hands as devisee.

The bond given was made according to the provisions of the Act. It is true that at first the bond describes Quagliotti as executor; but the condition is that payment be made of all duty to which the property, estate and effects of the deceased coming into the hands of her husband may be found liable. Whether this estate came into the hands of L.J. Quagliotti as executor or devisee does not make any difference, because the intention of the Act is that the security should cover all succession duties to which the estate might be liable.

Besides, by sec. 37 of the Succession Duty Act it is formally enacted that an executor has the power to sell so much of the property of the deceased as will enable him to pay the duty, and by sec. 2 the word *property* is defined as including real property of every description. Some similar powers are to be found in secs. 74 and 75 of the Administration Act R.S.B.C. 1911, ch. 4, and show that the executors exercise authority with regard to both personal and real estate. If the executor Quagliotti had been only liable for succession duty on $500 for the personal estate, why should he and the appellant company give a bond for nearly $100,000?

The appellant also contended that the trial Judge (See judgment of Gregory, J., 60 D.L.R. 372) should have revalued the assets.

The value of those assets was declared by the affidavit of value and relationship filed by the applicants for letters of probate. The Government authorities have been satisfied with such a value

and the bond was given in conformity with the decision of the authorities. In these circumstances, there was virtually an agreement which dispenses us from reconsidering this question of value.

It is to be expected, however, that the Provincial authorities, when they come to consider the case, will not forget the suggestion which has been made by the Court below as to the advisability, in view of the peculiar circumstances of the case, of reducing the amount for which they obtained judgment.

The appeal should be dismissed with costs.

MIGNAULT, J.:—The action of the respondent is on a bond for succession duties given by the defendant, now appellant, and by one Lorenzo Joseph Quagliotti, who was also a defendant. The respondent sets up the bond and alleges that the succession duties have not been paid and asks for judgment for $44,287.50, being the succession duties due the Province of British Columbia on an estate of which Quagliotti was sole devisee and testamentary executor under the will of his wife, and which estate Quagliotti, in his affidavit accompanying his application for probate, valued at $885,750. Among other defences, the appellant alleges that the property never came into the hands of Quagliotti as executor of his wife's estate, and further in the alternative, that the valuation was made by Quagliotti by mistake and inadvertence, that the property was valueless or its value was grossly exaggerated, and asks that the amount of the duty be ascertained by the Court.

As briefly as possible, I will say that the Succession Duty Act of British Columbia requires that an applicant for probate shall make and file with the Registrar of the Court two duplicate original affidavits of value and relationship with inventories annexed. One of these originals is sent by the Registrar to the Minister of Finance at Victoria, who authorises the Auditor General to determine the amount of succession duty and forwards a statement of the same to the Registrar. The latter then requires immediate payment of the amount due or security therefor to be given by bond. This bond, as stated by sec. 24 of the Act, is in a penal sum equal to 10% of the sworn value of the property of the deceased liable to succession duty; it must be executed by the applicant or applicants and two or more sureties to be approved by the Registrar, and is conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant or applicants may be found liable.

The bond sued on is by its terms a promise to pay $88,575 which is 10% of $885,750, the valuation mentioned in the affidavit and the condition of the obligation is that if Lorenzo Joseph

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UNITED STATES FIDELITY CO. v. THE KING.

Mignault, J.

Quagliotti, the executor of all the property of Petronilla Quagliotti, pays to the Minister of Finance the duty to which the property, estate and effects of the said Petronilla Quagliotti coming to the hands of the said Lorenzo J. Quagliotti may be found liable under the provisions of the Succession Duty Act R.S.B.C. 1911, ch. 217, within 2 years from the death of Petronilla Quagliotti, or such further time as may be given, the obligation shall be void and of no effect, otherwise the same to remain in full force and virtue. This bond follows the statutory form.

Although the non-payment of succession duty by Quagliotti, by the terms of the bond, renders the sum of $88,575 payable, the claim of the Crown is for $44,287.50, the alleged amount of the succession duty, with interest, the respondent stating, in the endorsement on the writ, that the bond was entered into to secure the succession duty. This construction of the bond carries out the intention of the statute which, when the applicant for probate does not immediately pay the succession duty, requires this security as to all property coming to the hands of the applicant liable for the payment of the succession duty. I will, therefore, treat this bond as being security for the payment of the succession duty. This payment, as I have said, is all that the respondent demands.

The main ground of defence of the defendant is that Quagliotti, as executor of his wife's estate, was the applicant for probate, that this bond was given by him and the appellant to secure the payment of any duty to which the property coming to the hands of the applicant, i.e. Quagliotti as executor might be found liable, that none of this property came to the hands of Quagliotti, as executor and, consequently, the condition of the bond was not fulfilled.

The Court of Appeal 63 D.L.R. 469, construed the bond as being conditioned on the property coming to the hands of Quagliotti as executor. The trial Judge 60 D.L.R. 372, found that Quagliotti, who was devisee of the property, which principally consists in real estate, took possession of the property, managed it and received the profits. He was, however, not registered as owner. The question is whether, assuming, as I think we must assume, that the condition of the bond was that the property should come to the hands of Quagliotti *qua* executor, this possession by Quagliotti as devisee fulfils this condition.

Undoubtedly the appellant, being a surety under this bond, is entitled to the most favourable construction which can be placed on its bond. The construction which I adopt conforms strictly to sec. 24 of the statute which must govern the interpretation of the bond it requires from the applicant, and it is only when the

property comes to the hands of the applicant that the amount of the bond becomes payable. Here it never came to the hands of the applicant, the executor, for, as Galliher, J., who rendered the judgment for the Court of Appeal, states 63 D.L.R. at p. 470: "Under our law in British Columbia, real estate did not at the time of Mrs. Quagliotti's death, devolve upon the executor."

The possession taken by Quagliotti, therefore, was and could not be as devisee under the will. It is true the executor and the devisee were in fact the same person but, in law, the situation is the same as if the devisee and the executor were different persons. And although, as Galliher, J., observes, the executor had the power to sell the lands of the testator to pay the succession duty, I do not think that the mere existence of this power would warrant us in saying that this property came to his hands. Galliher, J., cites the case of *Ianson* v. *Clyde* (1899), 31 O.R. 579 at p. 585, where Boyd, C., explains the meaning of the words "in the hands of the executors." But the Chancellor was not construing a statute like the one in question but merely discussing the effect of a judgment which had been rendered by the County Court against the property in the hands of the executors, and I do not feel bound by his definition.

I may add that were I convinced that any obligation arises under this bond, I would not grant the respondent the amount of succession duty demanded. The trial Judge 60 D.L.R. 372, found that the gross value of the property was $500,000, the valuation in the affidavit being the result of the boom in the real estate prevailing in 1913. The Judge, if the bond was obligatory on the appellant, should, in my opinion, have based the amount of the succession duty on this value and not on the value stated by obvious mistakes by Qaugliotti's affidavit. Both Courts were under the erroneous impression that a commissioner was appointed under the Act to value this property and that Quagliotti had failed to appeal from his award. No commissioner, the parties admit, was ever named. Under all the circumstances, I think the trial Judge could fix the valuation of the property, notwithstanding the valuation in the affidavit, and the least that can be said is that no higher valuation should have been considered than $500,000.

But, in my opinion, no obligation exists under the bond and I would allow the appeal with costs throughout and dismiss the respondent's action.

Affirmed by an equally divided Court.

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MARSHALL v. HOUGHTON.

Manitoba King's Bench, Dysart, J. July 20, 1922.

JUDGMENT (§ III A—220)—ASSIGNMENT OF LEASE OF LAND IN ENGLAND—COVENANT TO INDEMNIFY IN REGARD TO DILAPIDATIONS—SETTLEMENT BY ASSIGNOR—ACTION AGAINST DEFENDANT IN MANITOBA ON INDEMNITY CLAUSE—JUDGMENT OF ENGLISH COURT—JURISDICTION—ACTION ON JUDGMENT IN MANITOBA COURT—KING'S BENCH ACT R.S.M. 1913, CH. 46, SEC. 25 (1)—CONSTRUCTION.

An English Court has jurisdiction over the person of a British subject residing in Manitoba in an action on an assignment of a lease of certain premises in England, whereby the defendant covenanted to indemnify the assignor from liability in regard to dilapidations during the terms of the lease, the original cause of action being founded upon facts which made it a "local" action, and the judgment of the English Court being that of a competent Court is *primâ facie* proof of the debt, in an action, on the judgment in a Manitoba Court, notwithstanding that the defendant is by sec. 25 (1) of the King's Bench Act, R.S.M. 1913, ch. 46, enabled to plead afresh to the original cause of action. Held also that the defendant was estopped from disputing the settlement made by his assignor with the lessor, and his own obligation to indemnify against it.

ACTION upon a foreign judgment and alternatively upon the original cause of action arising out of a lessee's covenant to repair. Judgment for plaintiff.

F. J. Sutton, for plaintiff.

M. G. Macneil, for defendant.

DYSART, J.:—The action upon which the judgment was obtained was brought by the plaintiff, as original lessee of certain premises in England, to recover from the defendant as assignee of the term a sum of money which the plaintiff paid to the lessor in respect of certain dilapidations occurring during the tenancy of the defendant.

The premises in question are known as Slyne's Oaks, near London. In 1905 the plaintiff took a lessee of them for 14 years and occupied them until 1914, when he assigned the lease to the defendant, who thereupon entered into possession and so remained until the expiration of the lease in March, 1919.

The lease contained covenants to repair and to deliver up the premises at the expiration of the lease in a state of repair equally as good as, but not necessarily better than, existed at the beginning of the lease. In the assignment of the lease the defendant covenanted to perform all the lessee's covenants as contained in the lease, and to indemnify the lessee, and keep him indemnified, from and against all actions, costs, expenses, claims and demands in respect of any past, present or future breach of said covenants.

Upon the expiration of the lease the defendant left England and returned to Canada. Shortly after the lessor's agent, J. C. King, made an exhaustive inspection and survey of the premises and drew up a somewhat lengthy and minute list of dilapidations,

the cost of which he estimated in a lump sum at £486. This list he sent to the defendant in Winnipeg with a request for payment. The defendant, however, repudiated the list as being "trumped up" and while admitting dilapidations to the extent of £75, refused to pay the sum demanded. The lessor took no further notice of defendant but called upon the plaintiff for payment. The plaintiff instructed a Mr. Keough to check over the claim and settle it. Keough had made a careful survey of the premises for the plaintiff when the lease was entered into, and having preserved his original data was in an excellent position to compare the state of repair of 1919 with that of 1905. As a result of his independent survey Keough found that King's estimate was rather excessive but compromises the claim at £450. This sum the plaintiff demanded from the defendant under his covenant of indemnity, but the defendant repeated substantially what he had told King and added some information to justify his refusal to pay what he termed an excessive and unreasonable demand. The plaintiff, thereupon, paid the sum and sued in England for the amount so paid with his incidental costs, reaching a total of £467. The writ was served on the defendant while in the State of Minnesota, U.S.A., and judgment for default of appearance was duly entered for the amount of the claim, with costs of action, taxed at £23.4.0. Failing to get satisfaction of this judgment, plaintiff brought the present action in this Court.

The statement of claim herein sets out the English judgment and asks for payment thereof, amounting in Canadian currency to $2,385.62, with interest at 5% per annum from date of judgment. In the alternative, it sets out the original lease with its essential covenants, the assignment of the lease from the plaintiff to the defendant, the covenant of the defendant to perform the terms of the lease and to indemnify the plaintiff, the breach of the covenant to repair, the various demands made for payment, and the payment by the plaintiff, and concludes by claiming the sum so paid, amounting in Canadian currency to $2,272.73, with interest at 5% per annum from time of payment. The statement of defence, besides sweeping denials, specifically denies jurisdiction of English Courts to pronounce judgment in question; sets up that the surveys were unfair and the estimated cost grossly excessive; alleges that the defendant notified the plaintiff that the lessor's default in supplying materials for fencing was responsible for the greater part of the alleged damage; and concludes by claiming that if the plaintiff made payment he did so after notice, and voluntarily, and is therefore not entitled to indemnity. To this statement of defence, the plaintiff replies setting up estoppel.

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The first question to be determined, therefore, is whether the English Court had jurisdiction. If it had, the judgment is valid, and imposes upon the defendant such a duty or obligation to pay as will be recognized by all Courts. The jurisdiction in question here is not that over the subject-matter but over the person of the defendant. The plaintiff contends that the English Court had jurisdiction over the defendant because: (1) When the cause of action arose the defendant was resident in England; (2) When the action was commenced he was domiciled in England; (3) When the judgment was pronounced he was a British subject. The defendant was born in England and still retains his domicile of origin in England. He is, of course, a British subject but has not resided in England since the expiration of the lease. The first ground of jurisdiction mentioned, however, was not pressed, and, in any case, is untenable. As to domicile, it is conceded by all authoirties that residence—even temporary presence—in a country, gives the Courts of that country jurisdiction over the person, because his presence within the given territory entitles a man to the protection of the laws, and the use of the Courts, and co-relatively demands from him obedience to those laws and Courts. If domicile is the equivalent of residence or presence then domicile is a ground for jurisdiction because at common law the only ground of jurisdiction was personal service of the King's writ effected upon defendant while personally present in the realm.

There is no reported case in which our Courts have gone this length. While *dicta* is to be found in some of them—*dicta* in some instances of great weight—the most that can be said is that the question is still undecided. In the recent case of *Gavin Gibson & Co.* v. *Gibson*, [1913] 3 K.B. 379, 82 L.J. (K.B.) 1315, 29 Times L.R. 665, the question is raised but the presiding Judge disposes of it by expressing his doubt. Writers of highest repute on international law either doubt such ground of jurisdiction or deny it: Dicey Conflict of Laws, 3rd ed., p. 401. From the best examination that I have been able to make of the authorities, I feel that, as the term was used in Roman law domicile is a ground for jurisdiction, but as it is used in common law it is not such a ground. In Roman law domicile means the place of a man's residence, usually his permanent or chief residence, but it must be residence in fact. Under the law, a person may have more than one domicile. One domicile, however, he must have, and if he does not select one the law selects one for him and imposes it upon him, even against his wishes. This domicile is a fiction or idea of law. Of course it generally corresponds with his residence, but not necessarily so. Suppose, for instance, the defendant having

left his domicile of origin in England with a fixed intention never to return to England, but to establish a home elsewhere, still his English domicile remains with him until he acquires a new domicile of choice. For some purposes the retention of his domicile of origin would create no hardship as for instance in matters affecting his status and situs of personal property. But why should he be bound to obey the laws and Courts of England in purely personal actions if he has left the country and done everything that he humanly can do to free himself from that obedience? Why should he, thereafter, be subject to English judgments which were obtained against him on the ground of domicile, and which by international law would be conclusive proof against him of the claims litigated. In my opinion, therefore, until the matter is otherwise settled by decisions, domicile is not and ought not to be accepted as a ground of jurisdiction.

Then, did the English Court have jurisdiction on the ground that the defendant was a British subject. The subjects of a Sovereign nation owe allegiance to the Sovereign of that nation, to its laws and its Courts, and are under duty to obey them. This is involved in the idea of nationality, and is universally recognised. But this doctrine does not and cannot apply to British subjects, because the allegiance which the British subjects owe to their Sovereign, they owe to the Sovereign of the Empire; while the allegiance which they owe to their laws and Courts, they owe to the laws and Courts of some particular Dominion. A Canadian owes allegiance to the King, but not the laws or Courts of England, any more than to the laws or the Courts of Australia. There is no English nationality as distinct from British nationality. This is discussed in the case of *Gibson & Co.* v. *Gibson, supra.* The plaintiff, however, urges that in this case that because the defendant was served with process in the state of Minnesota, U.S.A., the Courts of that state would recognize British nationality as giving the English Courts jurisdiction. And the plaintiff also suggests that it would be anomalous if our Canadian Courts refused to English judgments, a recognition extended to them by the Courts of the United States. This does not follow. I do not think that any Court in the United States would or should recognise British nationality as the sole ground of jurisdiction over the Courts either of England or of Canada.

There is further ground, however, of a different nature upon which jurisdiction might have been obtained over the defendant, that is, if the cause of action can be said to have arisen out of land in England in the sense of being "local." Where the cause of action could not have occurred elsewhere than where it did occur, and where facts relied upon as the foundation of the

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action have necessarily connection with the particular place or locality, the action is said to be "local" as opposed to "transitory." For general discussion on the distinction between these forms of action see Lord Cairns in 1 C.P.D., at p. 52, and Lord Herschell, L.C., [1893] A.C. at p. 618. The broad rule has been laid down in *Whitaker* v. *Forbes* (1876), 1 C.P.D. 51, 45 L.J. (C.P.) 140, 24 W.R. 241, that where the liability arises by reason of privity of estate, the action though for debt is local; but where it arises from privity of contract, even if relating to land, it is transitory: See Piggott on Foreign Judgments, p. 121.

By the assignment of the lease of Slyne's Oaks, the defendant received more than a mere assignment of contract, he received a leasehold estate in the land, and when he took possession he was in privity of estate with the lessor and became obligated to discharge all the terms of the lease, not merely to his assignor, but to the original lessor. This obligation is implied in the assignment, and is quite distinct from any covenants between the defendant and his immediate assignor: *Moule* v. *Garrett* (1872), L.R. 7 Ex. 101, 41 L.J. (Ex.) 62, 20 W.R. 416, 26 L.T. 367. Actions for trespass to land have always been regarded as local: *British South Africa Co.* v. *Companhia de Moçambique,* [1893] A.C. 602, 63 L.J. (Q.B.) 70, 69 L.T. 604; and so also an action on a rent charge, *Whitaker* v. *Forbes, supra;* and in an action for a breach of covenant to repair it has been held the action was based on a liability affecting land: *Tassell* v. *Hallen,* [1892] 1 Q.B. 321, 61 L.J. (Q.B.) 159, 40 W.R. 221, 66 L.T. 196. In view of these authorities, I feel constrained to hold that the original cause of action was founded upon facts which were so closely connected with Slyne's Oaks that the action was "local" and that the English Court, therefore, had jurisdiction and was competent to deal with the matter.

What then is the effect in the Courts of this Province of that judgment pronounced by a competent foreign Court? Such a judgment is in general conclusive proof of the claim decided by it, but at any rate ought to be received as *primâ-facie* proof of the debt: Westlake on International Law, pp. 409-411. The obligation imposed by a judgment is in the nature of a contract of record in which the judgment debtor is presumed to have promised to pay the sum. Section 25 (1) of the King's Bench Act, R.S.M., 1913, ch. 46, enables the defendant to plead afresh to the original cause of action, and the defendant contends that this leaves the question of onus exactly where it would be if judgment had not been obtained. But, is this correct? Nothing like the provision of this section is to be found in any other jurisdiction. The provision was apparently introduced to afford a sanc-

tuary for debtors who cared to resort hither, by placing at their disposal, for the determination of their rights, the laws, Courts and juries of this Province. But does this right to have their claims litigated afresh in this jurisdiction deprive the plaintiff of all evidential value of the judgment obtained by him in a foreign jurisdiction on that original cause of action? In my opinion, it does not. In this case, the plaintiff might have pleaded the foreign judgment without setting up his alternative and allowed the defendant to plead the original cause of action, after which the plaintiff might have replied. That would be the logical course. The plaintiff, however, in his statement of claim, has pleaded both the foreign judgment and the original cause of action. This removed the necessity of the defendant invoking R.S.M., 1913, ch. 46, sec. 25 (1). The situation, therefore, is that if the plaintiff at the trial after proving his foreign judgment had rested his case, he would, without more, be entitled to judgment, unless defendant came forward and either disproved or overcame the strength of the *primâ-facie* case. While the general onus of proving his case is always on the plaintiff, there are times at certain stages of a trial when the duty of coming forward may be shifted to the defendant, and this is so after the plaintiff has established a *primâ-facie* case. This foreign judgment, therefore, having been once proved, casts upon the defendant the onus of impeaching the judgment or breaking it down.

The question of onus is important in this case in two respects: (1) As regards the right of the plaintiff to settle with the lessor; (2) The reasonableness of the amount paid on that settlement. The second branch of this question involves peculiar difficulties, because, while the list of reparations has set out in detail the items of repair or damage, no corresponding items of cost are furnished, but the entire cost of repair is estimated at one figure. It would be difficult, therefore, to say how much reduction should be made from the aggregate cost by the elimination of any set of items of repair.

The further consideration of this troublesome problem, however, becomes unnecessary, in the view I take of the first branch of the question. In my opinion, the defendant is estopped from disputing the settlement and his own obligation to indemnify against it.

In coming to this conclusion, I have done so not without difficulty. I have considered that it is more than probable that the plaintiff saw the letter the defendant wrote to King, and that his instructions to his agent Keough, to settle were given after notice of defendant's attitude; that he obligated himself to pay

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the £450 before he communicated with the defendant; that after learning from the defendant something of his side of the controversy, he nevertheless paid the amount. Nor have I overlooked the bargain between the plaintiff and the defendant at the time of the assignment whereby the defendant in consideration of some trifling sum undertook for the plaintiff to make all repairs then necessary, which repairs were not ascertained and probably amounted to much more than was indicated to the defendant. I have kept in view the fact that the amount paid by the plaintiff was, in my opinion, upon the evidence furnished, greatly in excess of the amount that the lessor could have proved against the defendant.

As against these considerations, we have to weigh the facts that the plaintiff had a covenant of indemnity from the defendant and was under no obligation to wait the embarrassment of suit; that he called upon the defendant and the duty was on the defendant to step in between the plaintiff and the lessor. The defences to the lessor's claims were peculiarly within the knowledge of the defendant and the defendant should have come forward with them. His duty as indemnifier was to protect the plaintiff. He did not do so. In my opinion, he had defences that would have served for a complete answer to a very large portion of the claim, but he did not use them. The settlement made by the plaintiff, while perhaps hastily made and excessive, was, in my opinion, made in good faith, and the plaintiff ought not to suffer for it in the circumstances.

The defendant has not discharged the onus of impeaching or breaking down the judgment of the settlement.

Judgment will, therefore, be for the plaintiff for the amount expressed in Canadian money of the English judgment at the date of the judgment, with costs, including interest at the English rate of 4% per annum. The plaintiff will have costs of this action.

Judgment for plaintiff.

CROMBIE v. CANADIAN GOVERNMENT MERCHANT MARINE.

Exchequer Court of Canada, B. C. Admiralty District, Martin, L. J. A. August 31, 1921.

SEAMEN (§ I—4)—ARTICLES OF AGREEMENT TO SERVE ON SHIP—CONSTRUCTION—SEAMAN UNLAWFULLY LEAVING SHIP—RECOVERY OF WAGES.

The plaintiff signed articles agreeing to serve on board a certain ship "on a voyage from Halifax, N.S., to New York, U.S.A., thence to any port or ports between the limits of 75 degrees north and 65 degrees south latitude to and fro as required for a period not to exceed twelve months, final port of discharge to be in the Dominion of Canada." The couver, that being the first Canadian port touched at since leaving plaintiff contended that he was justified in leaving the vessel at Van-

Canada at the beginning of the voyage. The Court held that under the articles the Master could fix the point in Canada at which the voyage was to terminate, and he having fixed Montreal, as that point and having taken on cargo for that point and sailed for there by way of Panama, where the ship arrived within the time, contemplated in the articles, the plaintiff was not justified in leaving the ship at Vancouver and was not entitled to the wages which he claimed.

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ACTION by plaintiff against the defendant company for wages claimed to be owing under certain articles by which the plaintiff agreed to serve on defendant's ship.

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

J. Milton Price, for plaintiff.

E. C. Mayers and *A. R. McLeod*, for defendant.

MARTIN, L.J.A.:—According to the articles signed at Halifax, N.S., on February 2, 1921, the plaintiff agreed to serve on board the S.S. "Canadian Carrier" . . . . on a voyage from Halifax, N.S., to New York, U.S.A., thence to any port or ports between the limits of 75 degrees north, and 65 degrees south latitude to and fro as required for a period not to exceed 12 months. Final port of discharge to be in the Dominion of Canada.

The ship, which is registered at Montreal, sailed from Halifax on March 4, for New York, where she loaded part of her cargo for Callao, completing her cargo at Baltimore, and sailing on March 17 for Callao via the Panama Canal, arriving at Callao on April 2, where she discharged cargo and left for Iquique, (via Arica) arriving on 19th, where she loaded cargo for Honolulu, arriving there on May 15, where she discharged cargo, and took on cargo for Vancouver, arriving there on June 3, and discharged cargo; left Vancouver on June 5, for Nanoose Bay, V.I., loaded part of cargo there and returned to Vancouver on June 14, where she completed cargo for Montreal and sailed on 20th for Montreal, via Panama, and arrived there on August 7 ,1921, when she finally discharged cargo and paid off her crew, which according to the evidence of the Captain, was the final discharge and "termination" of the voyage.

The plaintiff was the boatswain and claimed the right to be paid off after the ship first reached Vancouver, though only about 4½ months of the 12 months' time specified in the articles had expired, on the ground that the voyage was at an end there, that port being, he contended, the "final port of discharge" in Canada, but after discussion his claim was eventually refused by the Master, upon instructions from his owners, and so the plaintiff left the ship against the Master's orders before June 18, when she was on the point of sailing for Montreal.

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The main question is, was he right in his contention, and, therefore, entitled to the wages he claims? The answer depends upon the true construction of the articles applied to the particular facts and I have been referred to several authorities more or less applicable but, as might be expected, based upon circumstances more or less varying. It is difficult to apply to such a vast country as Canada, fronting upon two oceans thousands of miles apart, the separated coasts of which are most readily reached through a canal owned by another nation, some of the reasons upon which English decisions are based which apply to an island having relatively only a small and all-enveloping, accessible coast line. In *Quinn* v. *Leathem*, [1901] A.C. 495, at 506, 70 L.J. (P.C.) 76, 50 W.R. 139, Halsbury, L.C., emphasized the point that decisions must be interpreted by the facts upon which they are pronounced, and in the very instructive recent case upon fixtures of *Travis-Barker* v. *Reed* (1921), 66 D.L.R. 426, 17 Alta. L.R. 319, the Alberta Court of Appeal drew attention to the care that must be taken in "adopting the decisions of the English Courts on the question of fixtures in view of the very different conditions of this new country and the very different manners and methods of construction of buildings and the very different customs and habits of the people living here, especially their readiness to move from one place to another, and, the not infrequent removal even of large buildings, pointing out that what might be considered a very serious injury on the soil in England, might well be regarded here as quite trivial and negligible." Per Beck, J. A., 66 D.L.R., at p. 435, and see also Stuart, J. A., at pp. 429, 431.

Considering these articles, then, upon the geographical and nautical facts before me, I am of opinion that the voyage contemplated was a 12 months' "tramp," one "to and fro" within certain latitudes as "required", *i.e.*, by the Master. The articles do not, in essentials, differ from those which were under consideration in the *Board of Trade* v. *Baxter, The Scarsdale*, [1907] A.C. 373, 76 L.J. (P.) 147, 10 Asp. M.C. 525, which, when carefully examined, supports the defendant's submission though invoked by the plaintiff in support of the view that the voyage ended upon arrival at Vancouver, being the first Canadian port touched at since leaving Canada at the beginning of the voyage. But I am unable to see why the plaintiff was not under these articles called upon to go on to Montreal as "required" by the Master just as the fireman was called upon to go on to Cardiff, as required by the Master in the *Scarsdale* case; indeed, this case is if anything a stronger one against the plaintiff because in the *Scarsdale*, after the cargo had been discharged at Southampton,

the ship went on in ballast only to Cardiff as the loading port for the next cargo, whereas here the ship took on a cargo from Vancouver to Montreal, the Master fixing that point as the "termination" of the voyage, and the leaving of that discretion to the Master was declared to be legal in the *Scarsdale* case, *supra*. I refer particularly to the judgment of Lord Collins on that point, and cite his observations from [1907] A.C. at pp. 384-5:—

"Now it is not disputed that the adventure contemplated by this agreement is properly described as a voyage (see per Bargrave Dean, J., Vaughan Williams and Stirling, L.JJ.), though it covers many possible distinct subordinate adventures involving the discharging and receiving of cargoes at many different points 'trading in any rotation.' The maximum period, *viz.*, one year, is named, and the places or parts of the world to which the voyage or engagement is not to extend are defined. Nor was exception taken to the provision giving discretion to the Master to name the port within home trade limits at which the voyage, treating that word as concerned with the transit and delivery of cargo only, was to end. How, then, was the suggested element of illegality introduced into the discussion? With the greatest deference to the eminent counsel who argued for the appellants, be it said, simply by begging the question. On the assumption that the voyage ended at the port where the last cargo was delivered, a provision that the Master might order the ship on to a fresh destination might involve the commencement of a new voyage and so sin against the statute; but if the voyage did not end till the ship had reached her destination at the home port required by the Master, there is nothing upon which to found an implication of illegality. I agree with the contention of Mr. Hamilton, which was adopted by the Court of Appeal, that the voyage contemplated for the cargo need not be co-extensive with that contemplated for the ship, though it very often is. I think it is very much to be deprecated that the Court should be subtle to find implications of illegality having the effect of hampering freedom of contract in business matters where no express prohibition can be found."

And these observations have added force in favour of the defendant in view of the geographical differences between Canada and England, already referred to.

Being of this opinion it is unnecessary to consider the other questions raised and, therefore, the action must be dismissed with costs, and it follows that the defendant is entitled to judgment upon the counterclaim, the small amount of which is not disputed. *Judgment accordingly.*

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BRUNIE AND MATURIE v. ROYAL BANK OF CANADA.

District Court of Peace River, Alberta, Tweedie, J. August 18, 1922.

INJUNCTION (§ I I—72)—TO RESTRAIN LEGAL PROCEEDINGS—DEFENCES AVAILABLE IN ACTION—NO SPECIAL CIRCUMSTANCES.

The Court will not issue an injunction to restrain a plaintiff from enforcing payment of a promissory note or from realising on security which plaintiffs had hypothecated with it at the time the note was given where there are no special circumstances which would make it inequitable to refuse to grant such injunction.

CONTRACTS (§ IV F—370)—LOAN—REPAYMENT CONDITIONAL ON CONTINGENCY—FAILURE OF CONTINGENCY WITHIN REASONABLE TIME—ACTION TO RECOVER—INTENTION OF PARTIES—CONSTRUCTION OF AGREEMENT.

Where the repayment of a loan is made contingent upon the happening of an event which may never occur, if it does not happen within a reasonable time the loan becomes due and payable after the expiration of such reasonable time unless it is very clear that the intention of the parties is that the liability is conditional only upon the happening of the particular event.

ACTION to restrain defendant from enforcing payment of a promissory note, and from realizing on security which was given at the time the note was made.

W. P. Dundon, for plaintiffs.

H. H. Hyndman, for defendants.

TWEEDIE, J.:—This was an action brought by the plaintiffs against the defendant to restrain the defendant pursuant to an agreement alleged to have been entered into on December 12, 1919, from enforcing payment of a promissory note given by the plaintiffs to the defendant payable on demand dated December 10, 1919, for the sum of $4,000 with interest at 9% per annum, until paid, and also to restrain the defendant from realizing on security which the plaintiffs had hypothecated to the defendant at that time. The defendant denies the alleged agreement and alleges in the alternative that the note was to be paid within a reasonable time or in any event within one year; that the security was to be realized upon when default was made in payment of the note; that the local manager of the defendant, through whom the loan was procured, had no authority to make a loan upon such terms and finally that it was *ultra vires* of the bank itself to make a loan, the repayment for which was conditional upon contingency which might never happen. The defendant counterclaims and asks for judgment on the note. There was no reply to the defence and no defence to the counterclaim was filed.

The facts are as follows:—In the month of August, 1919, the plaintiffs became customers of the Royal Bank of Canada through its branch at Peace River, in this Province. They had on deposit in Paris, France, some 33,000 francs which they anticipated

having transferred later on in the fall to the branch of the bank with which they were to do business, and in view of this fact, commenced negotiations for a loan from the defendant bank. The transfer was subsequently made, the net proceeds by reason of the high rate of exchange, at Peace River, being only $4,195 or over $2,000 less than they would have realized if the exchange had been normal. In an endeavour to recoup themselves, they negotiated for a loan from the defendants for the purpose of discharging their present indebtedness to the defendant of two notes, due on January 24, 1920, for $661 and $616.55 respectively in addition to placing them in funds to carry on their business, so that the $4,193 might be re-invested in francs and deposited with the Royal Bank of Canada (France) at Paris, France, to await a more favourable time to re-transfer their money to this country. As a result of the negotiations they were enabled to purchase, 40,923.68 francs, which were sent to the Royal Bank of Canada, Paris, France, for deposit and a deposit receipt for that amount issued in the name of A. Brunie, both plaintiffs, however, being, as appears from the evidence, equally interested in the deposit. In order to enable these purposes to be accomplished the defendant agreed on December 10, 1919, to advance to the plaintiff by way of a loan $4,000, for which it was to take this demand note and security on the deposit in France.

This note was signed on the same day by A. Brunie, one of the plaintiffs, and taken by him to procure the signature of Maturie, which was done. On December 12, the note was returned to the defendant the proceeds thereof placed to the plaintiffs' credit and the two notes above referred to charged against the account, and the balance left available on current account for the purpose of their business. The note payable on demand was absolute and unconditional on its face. Concurrently with the signing of the note, in consideration of the advance and to secure the indebtedness, both present and future, of the plaintiffs, A. Brunie, one of the plaintiffs, hypothecated to the bank a "savings bank withdrawal form on the Royal Bank of Canada (France) Paris, France," which consisted of a signed receipt for the full amount of the deposit which upon presentation would entitle the defendant to reserve the money on presentation, and a cheque for the full amount on deposit. No question as to the security or the form in which it was taken has been raised. The hypothecation reads in part as follows:—

"The above mentioned security and any renewals thereof and substitution therefore and proceeds thereof are hereby assigned to and are to be held by the Royal Bank of Canada as a general and continuing collateral security for payment of the present

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and future indebtedness and liability of the above named customer and any ultimate unpaid balance thereof and the same may be realized by the bank in such manner as may seem to it advisable, and without notice to the undersigned, in the event of any default in such payment."

It was quite evident that the bank would not have made the advance against the demand note without the hypothecation of this security. There was some negotiation between the parties prior to and at the time the advance was made in regard to the time when the holder of the note would demand payment, the plaintiff contending that the payment of the note was not to be demanded until the value of the franc in this country had appreciated in value and that the bank was bound to hold it until that time. The plaintiffs requested from the bank a letter confirming this agreement which it received December 12, 1919, which reads as follows:—

December 12th, 1919.

"Messrs. Brunie & Maturie, Peace River, Alta.

With reference to the conversation of this date between the writer and your Mr. Brunie, we have to-day credited your account with $4,000, being proceeds of the demand note signed by you both and have charged up to your account the two notes amounting to $661 and $616.65 due on January 24, and have recredited your account with $14.50 rebate of interest.

For the $4,193 received from the Credit Lyonais, Paris, through our Edmonton branch we have made out a draft in favour of A. Brunie on our Paris branch, for 40,923 fcs. and have sent his draft by mail to the Royal Bank of Canada, Paris, with instructions to place the amount to the credit of Armand Brunie in savings department, that is on interest. We have taken from Mr. Brunie his signed savings bank withdrawal form for 40,923 fcs. as security for the advance of $4,000, the form having been hypothecated to us on our form 110, the withdrawal form we have sent to our Paris branch for acknowledgement and return. Our understanding is that the money will be transferred to this branch and the note here repaid when exchange has dropped to a more normal rate, any profit accruing will of course be credited to your account."

(Sgd.) J. D. Hamilton, manager.

The plaintiffs made three payments on account of interest, January 31, 1920, $49.30; February 29, 1920, $29, and May 31, 1920, $92.50, in all $170.80 which paid the interest at 9% in full up to May 31, 1920. Nothing on account of principal or interest has since been paid. The defendant demanded payment of the note on several occasions prior to the commencement of this

action, but payment was not made, the plaintiffs relying on the alleged agreement, contending that the defendants had no right to demand payment until the rate of exchange became more normal.

The plaintiffs in their statement of claim allege the promissory note and also "an agreement making the payment of the note conditional but they do not aver that the agreement was in writing." Such an averment should now, it seems, be always made. No objection, however, was taken to this and it will be considered as if he had so averred.

At the trial, evidence of what took place prior to and at the time of the transaction was admitted to prove an oral agreement entered into between the parties at the time to the effect that demand would not be made for the repayment of the note until such time as the exchange would become more normal. There was also placed in evidence the letter written by the manager of the defendant bank to the plaintiff on December 12. While the oral evidence was admitted at the trial subject to the objection of counsel for the defendant bank, I am of the opinion that as evidence of a contemporaneous oral agreement to vary the terms of a bill of exchange it was inadmissible, and its effect would be to vary the terms of a written instrument and was, therefore, improperly admitted and should not now be taken into consideration.

It is contended by counsel for the plaintiffs that the note, the hypothecation and the letter should be read together as constituting one agreement and that the effect when so read is that the note absolute and unconditional on its face, payable on demand, is not so, but is subject to the terms and conditions set out in the letter, which he construes to be an agreement not to demand payment of the note until the rate of exchange became more normal and when payable it should be paid out of the proceeds of the security hypothecated, or in other words, out of a particular fund.

As to the note itself, that is, as I have already pointed out unconditional on its face and the holder, and payee, the defendant is entitled to demand payment at any time and in default of payment entitled to maintain an action to recover the amount due thereon unless the character of the note has been altered or it has deprived itself of that right by some agreement.

As to the hypothecation, the securities thereunder were assigned to the defendant as a general and continuing collateral security for the payment of the present and future indebtedness of the plaintiffs to the defendant, and no doubt was given in consideration of the advance of $4,000. There is, however, no limit-

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ation in the document as to the time when the security might be realized upon other than that the plaintiffs should make default in payment of their indebtedness. There is nothing in the pleadings or the evidence to indicate that the defendant desires to realize on its security in connection with any other indebtedness than that for which the note was given. The plaintiffs contend that by reason of the letter (Dec. 12, 1919), the defendant is not entitled to demand payment of the note and consequently that no default has occurred entitling it to realise on the security.

As to the letter, is it a collateral agreement or is it a contemporaneous agreement in writing sufficient to vary or control the absolute contract apparent on the fact of the note or to limit the authority set forth in the hypothecation?

The circumstances surrounding the writing of the letter are as follows:—Preliminary negotiations in regard to the procuring of a loan had been carried on between the parties for some considerable time prior to December 10, 1919. On that date, both the note and the hypothecation were signed by Brunie, one of the plaintiffs. The hypothecation did not require Maturie's signature, the deposit being in Brunie's name, although both were equally interested in it. At the time Brunie signed the note a discussion took place between him and the manager of the defendant bank as to when it should be payable and Brunie insisted that they be given a letter setting forth the terms of the arrangement, which the manager then agreed to give him and which he did on the 12th. The note for the purpose of having Maturie's signature affixed to it was taken away by Brunie and returned to the defendant on December 12, two days later, duly signed by both parties.

On the 12th the note was completed and delivered, discounted and the proceeds placed to the credit of the plaintiffs, the two notes for $661.00 and $616.65 maturing on January 24, 1920, were retired and the letter setting forth the terms of the arrangement written and mailed or delivered to the plaintiffs. The letter contained the following clause: "Our understanding is that the money will be transferred to this branch and the note here repaid when the exchange has dropped to a more normal rate, any profit accruing will, of course, be credited to your account."

In my opinion, this is not a collateral agreement but is a contemporaneous agreement in writing and forms part of the transaction.

See *Maillard* v. *Page* (1870), L.R. 5 Ex. 312. The plaintiffs contend that this letter makes the payment of the note contingent upon two events, namely, as he sets out in his statement of

claim, that it "was agreed . . . . . it should be repaid from the said monies" and secondly, that it was payable when the rate of exchange became more normal. As to the former, I cannot agree with his contention. The latter simply says that it shall be repaid when exchange drops to a more normal rate but does not limit the liability to pay, to those funds only. The letter in this respect does nothing more than reaffirm the right given under the hypothecation to apply the proceeds of that security in payment of the plaintiff's indebtedness on the note. It does not limit the payment from a particular fund or place any condition on the absolute and unconditional obligation apparent on the face of the note.

The second contention that it was agreed that the note would be payable when the rate of exchange became more normal must, I think, be given effect to.

"If the memorandum make the payment contingent it will be incorporated in the instrument." Byles on Bills of Exchange, 17th ed. p. 120.

In support of this proposition, he cites cases in which the memoranda were endorsed on the back of notes but there are many cases in which a note has been controlled or varied by a memorandum on a separate piece of paper.

See: *Bowerbank* v. *Monteiro* (1813), 4 Taunt. 844, 128 E.R. 564; *Maillard* v. *Page, supra; Salmon* v. *Webb* (1852), 3 H.L.C. 510, 10 E.R. 201; Falconbridge, Banking and Bills of Exchange, 2nd ed. 534, Daniel's Negotiable Instruments, sec. 156.

The words of the letter "our understanding is that the money will be transferred to this branch and the note here repaid when the exchange had dropped to a more normal rate" must be read into the note with the result that the promise to pay becomes conditional upon the happening of a contingency. The instrument then forfeits its character as a promissory note and becomes an ordinary obligation to pay $4,000 upon the terms and conditions set forth in the agreement. It becomes necessary then to examine the form of the action and to interpret the agreement. As a result of repeated demands terminating in a letter from the defendant's solicitors on September 9, 1921, the plaintiffs issued a statement of claim in which he set forth the facts herein before referred to and asked by way of relief for "an injunction restraining the defendant bank from enforcing payment of the said note and from realising upon the hypothecation held by it . . . . . ," and on October 26, obtained an interim injunction which is still in force. There is nothing in the statement of claim to indicate any special circumstances why an injunction should be granted, nor is there anything to indicate that the

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plaintiffs will suffer irreparable damage. They rely solely on a threatened breach of an agreement.

Under our Judicature Act (Con. Ord. N.W.T. 1898, ch. 21, sec. 10, repealed 1919, (Alta.) ch. 3), no cause or proceeding pending in Court by prohibition or injunction but matters which will entitle them to equitable relief must be relied on as a defence.

Kerr on Injunction 5th ed. p. 13, says: "Although the Court has no longer jurisdiction to restrain a pending action, an injunction may be granted to restrain the institution of proceedings in the High Court of Justice."

In support of this proposition he cites a number of cases but they all contain special circumstances and are cases in which it would be inequitable to refuse the injunction. In the case of *Niger Merchants Co.* v. *Capper* (1877), 18 Ch. D. 557 (see note 1) at p. 558 Jessel, M.R., says: "Vice Chancellor Malins a few days later granted a similar injunction . . . . . on the ground that it was the object of the Court to restrain the assertion of doubtful rights in a manner productive of irreparable damage." In my opinion, there are no special circumstances in this case which warrant the granting of an injunction. No irreparable damage would have been done to the plaintiff if the action had been brought. This action, I think, was improperly brought. All the facts alleged as grounds for the injunction would have been available by way of defence. If the defendant had brought his action on the note as such it would have been a good defence under the earlier practice to have denied the making of the note as alleged, although perhaps under our rules he should set out all the facts upon which he relied and, in my opinion, it would have been a complete answer. If, on the other hand, the plaintiffs had brought their action on the agreement, if the Court gave effect to the contentions of the plaintiffs as to the interpretation of the agreement, he would be equally successful. If their views did not prevail, the plaintiffs would clearly not be entitled to an injunction to restrain the defendant from enforcing their legal rights in the Courts.

There is also another reason why, in my opinion, the plaintiffs are not entitled to the relief they claim, which has to do with the interpretation of the agreement. What does "more normal" mean? At what point between 9.76 cents, the value of the franc at the time it was entered into, and 20 cents, its par value, would the defendant be entitled to demand payment. One of the plaintiffs says that an appreciation of one one hundredth of a cent in value of the franc would be more normal and that the defendant would be entitled to payment. But I cannot accept that as his understanding of the term as used in the agreement. He admits that he had information concerning some financial arrangements

to be made by the French Government whereby exchange would be much more favourable for transmitting money from France, of which he wished to take advantage. The defendant's manager, Hamilton, must have considered it to be a point at which the funds could be transferred to the branch at Peace River discharging the indebtedness and leave a surplus. He says in his letter after making provision for the payment of the note "any profit accruing will of course be credited to your account." I think that the words "more normal" are too indefinite upon which to base an injunction so as to give effect to the true intention of the parties.

As to the use of an indefinite word "development" where equitable relief is sought in an order for specific performance and refused, see *Douglas* v. *Baynes*, [1908] A.C. 477.

The claim for the plaintiff must be dismissed and the injunction which was granted on October 26, 1921, until further order, dissolved.

The defendants counterclaim for the payment of the note. To this counterclaim no defence was filed and ordinarily they would be entitled to judgment for the amount of the note. They do not, in their counterclaim, allege in the alternative, as perhaps they should have done, the agreement, (Leake on Contracts, 6th ed. 456) and claim the sum of $4,000 thereunder, but all the facts are set forth fully in the statement of claim and the defence and I think that no injustice will be done if we consider the counterclaim as having been amended to set forth the facts and alleging that it is an agreement to pay $4,000, within a reasonable time and that the manager of the defendant had no authority to make a loan upon such terms as is done in its defence, para. 11, and the plaintiff's statement of claim, transposed to the position of a defence to the counterclaim which it properly is. With the contention that the indebtedness was to be paid out of the proceeds of the security I have already dealt. To this I have only to add that while a person's liability may be limited to the extent of a particular fund (*Williams* v. *Hathaway* (1877), 6 Ch. D. 544), the intention to so limit it must be clear and definite and set forth in express terms. The plaintiffs contend that under the terms of the agreement it is payable only when the rate of exchange becomes more normal. The defendant contends that it is payable in a reasonable time. Construing the words "when the rate of exchange becomes more normal" strictly, it simply means that it is payable upon a contingency, which may or may never happen, that is that the defendant's agent lent out his principal money upon such terms as might relieve the plaintiffs from all liability to repay it. The agent,

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in my opinion, had no authority to make a loan upon such condition as that. The plaintiffs admit that they knew he had no authority to make the loan. On October 24, 1919, he applied to defendant's head office for authority to make a loan of $4,500 on the security of French funds and said in his letter that the "advance was to be repaid from this source when the rate has become more reasonable." He never got the authority to advance the amount. He was authorised on October 30 to advance $3,500 against cheque on Paris bank, properly hypothecated for 33,000 francs. On December 12 he advanced $4,000 and on December 18 advised his head office that he had done so, stating that he had their note for the amount and an hypothecation covering 40,923 francs. He said nothing about having given a letter extending the time for payment of the note or making it payable upon a contingency. This loan was approved without knowledge of the letter on February 18, 1920, in which he put date of revision December 1, 1920. The manager explains that date of revision is time until which they were to carry it and then if account and security were satisfactory they might continue the credit on the note for a longer period. There was clearly no express authority to make the loan upon those terms nor was it in the apparent scope of his authority. His authority would be to make it for a reasonable time and upon their absolute undertaking to repay. This letter does not seem to have come to the attention of the defendant until after the refusal of the plaintiffs to pay their note. As soon as they became aware of it they could have, in my opinion, ignored the agreement altogether and brought an action for money had and received to their use. In regard to the payment of money on a contingency which may never happen, see: *Nunez* v. *Dautel* (1873), 19 Wallace 560. This was a case in the Supreme Court of the United States. The defendant acknowledged that he owed the plaintiff a certain sum of money and promised to pay it as soon as the crop should be sold or the money could be raised from any other source. It was held that the money was due within a reasonable time. Swayne, J., said at p. 562:—"No time having been specified within which the crops should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternative mentioned."

In considering the possibility of the conditions upon which payment should be made, never happening, Swayne, J., continued:—

"It could not have been the intention of the parties that if the crops were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

Payment in this case is not conditional to the extent of depending wholly and finally upon the alternative of the rate of exchange becoming more normal. It was not the intention of the parties that if the rate of exchange did not become more normal they were not to repay the loan. I think that their real intention was to borrow the money for a reasonable time in the hope that they would be benefited by a more favourable rate of exchange before they were called upon to pay off the loan. The law will, I think, annex as an incident to an agreement for the repayment of a loan contingent upon the happening of an event which may never occur that if it does not happen within a reasonable time then the money shall become due and payable after the expiration of such reasonable time, unless it is very clear that the intention of the parties is that the liability is conditional only upon the happening of the particular event.

A reasonable time elapsed between the advance and the demand for repayment. It was clearly the intention of the parties that the plaintiffs should be liable for repayment in any event and the defendants are, therefore, entitled to be paid and to maintain their action under the agreement. The amount claimed is $4,000 with interest at 9% per annum from December 10, 1919. The rate of interest claimed, 9%, is illegal. The Bank Act, 1913 (Dom.), ch. 9, sec. 91; *McHugh* v. *Union Bank of Canada* 10 D.L.R. 562, [1913] A.C. 299; *Standard Bank of Canada* v. *Faber & Heeney* (1916), 27 D.L.R. 707, 11 Alta. L.R. 96; see also (1917) 33 D.L.R. 542. In both the above cases the rate was reduced to 5% to which the rate in this case will be reduced.

The plaintiffs paid $170.80 in settlement of interest at the rate of 9% up to May 31, 1920. As regards past payments of interest at a rate not authorised by the Bank Act, the plaintiffs are not entitled to recover back the excess which they have voluntarily paid. *McHugh* v. *Union Bank, supra.*

The defendant will, therefore, be entitled to judgment on its counterclaim for the sum of $4,000, with interest thereon at the rate of 5% per annum from May 31, 1920.

In view of the fact that the defendant is largely responsible for the difficulty which arose by reason of its agent having written the letter of December 12, the plaintiff's claim will be dismissed without costs to the defendant. The defendant to have the costs of the counterclaim, Rule 27 to apply.

Judgment accordingly.

B.C.

C.A.

ROYAL EXCHANGE ASSURANCE Co. v. THE KINGSLEY NAVIGATION Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 6, 1922.

CARRIERS (§ IIIC—386)—LOSS OF CARGO BY FIRE—UNSEAWORTHINESS OF BARGE—FIRE RESULTING FROM UNSEAWORTHINESS—ONUS OF PROOF—LIABILITY OF SHIP OWNER—WATER-CARRIAGE OF GOODS ACT, 1910 (CAN.) CH. 61 SEC. 7—CANADIAN MERCHANTS' SHIPPING ACT R.S.C. 1906 CH. 113—CONSTRUCTION.

In order to fix the owner of a barge with liability for the loss of a cargo by fire, the consignee having proven that the barge was unseaworthy, the onus is also on him of proving that the fire resulted from such unseaworthiness. Held by McPhillips, J.A., that the statute law of Canada extends absolute immunity to the ship owner for loss by reason of fire or arising from fire.

["*The Europa*," [1908] P. 84; *Kish* v. *Taylor*, [1912] A.C. 604, applied; *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.*, [1915] A.C. 705; distinguished.]

APPEAL by defendants from the trial judgment in an action to recover the value of a cargo lost by fire on defendant's barge. Reversed.

L. G. McPhillips, K.C., and *W. C. Brown*, K.C., for appellant.

E. C. Mayers and *Robert Smith*, for respondent.

MACDONALD, C.J.A.:—The action was brought to recover the value of 3,000 barrels of lime lost on board the barge "Queen City" by fire. In my view of the case, it is unnecessary to consider the point raised as to the plaintiffs' right of action. My opinion is founded upon the fact that while the plaintiffs have proven the unseaworthiness of the barge, they have not proven that the fire resulted from such unseaworthiness. This is a question of fact upon which a great deal of evidence was adduced. The learned Judge came to the conclusion that the barge was in fact unseaworthy, and I am unable to say that on this issue he was in error. He found also that the burden of proving that the fire did not arise because of this unseaworthiness was upon the defendants. He thought the defendants had not discharged that onus. He states that if he were convinced that this burden was upon the plaintiffs he would find that the plaintiffs had failed to satisfy it.

It was argued for the defendants that ship owners' exemption from liability for goods on board, lost by fire is absolute, and secondly, that if not the onus is on the plaintiffs to prove negligence.

Section 7 of the Water-Carriage of Goods Act 1910 (Can.) ch. 61, reads as follows:—

"The ship, the owner, charterer, agent or master, shall not be held liable for loss arising from fire, dangers of the sea, or other navigable waters, acts of God or public enemies, or inherent

defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants, or employees."

There is a similar section in the Canadian Merchants Shipping Act, R.S.C. 1906, ch. 113. The Imperial Merchants Shipping Act, 1894 ch. 60, sec. 502, reads differently. It provides that the owner of a British seagoing ship shall not be liable to make good any loss or damage happening *without his actual fault or privity* in the following, among other circumstances, namely:—

"(1) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Under the English Act, it is quite clear that when the goods are destroyed by a cause attributable to the actual fault or privity of the owner of the ship, the section does not exempt him from liability. The Canadian section does not in the like clear words qualify the several exceptions to liability. By sec. 7 the exceptions are made without the antecedent qualifications, but at the end of the section and without in terms qualifying the exceptions preceding it, it declares that the shipowner, his servants or agents, shall not be liable for loss arising without their actual fault or privity.

At common law, the shipowner was not liable for the acts of God or public enemies, or for inherent defect, or insufficiency of packing, yet it was held that if the loss were contributed to by the negligence of the shipowner, he could not claim the benefit of the exception. See Carver's Carriage by Sea, 6th ed. p. 19. Section 7 merely enacts what was, in respect of many of these exceptions, the law independently of the statute. To construe the section as contended for by the appellants' counsel would be to give a meaning to these exceptions different to that given to them at common law and to hold that the shipowner is absolved from responsibility for say, acts of God or the King's enemies, or inherent defect, notwithstanding that the loss was contributed to by his own negligence or that of his servants or agents. I think all these exceptions must be read in accordance with the qualifications to which those which were, prior to the statute, common law exceptions, were subject.

The next question is, where does the burden of proof of negligence rest; is it on the plaintiffs, or is the burden on the defend-

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ants to negative actual fault or privity? The cause of the fire is unknown but the plaintiffs rely upon the unseaworthiness of the ship, and contend that the inference to be drawn from that, in the circumstances of this case, is that the fire was the result of such unseaworthiness.

In *"The Europa,"* [1908] P. 84, 11 L.J. (P.) 26 it was held that the onus of proving that the damage was caused by the unseaworthiness of the ship was on the plaintiff, and this was approved by the House of Lords in *Kish* v. *Taylor*, [1912] A.C. 604, 81 L.J. (K.B.) 1027. In *"The Europa,"* [1908] P. at pp. 97-98, Bucknill, J., said:—

"It appears to us, therefore, that whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy and therefore that he was entitled to recover the loss, although there was no relation between unseaworthiness and the damage."

The trial Judge appears to have relied upon the language of Lord Dunedin, in *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.*, [1915] A.C. 705, 84 L.J. (K.B.) 1281, as if it were to the contrary. The question there was whether or not the owners of the ship had absolved themselves from fault or privity in relation to the ship's condition. It was contended that there was no actual fault or privity of the owner of the ship apart from that of the servants or agents of the owner. That question does not arise in this case, because of the broader language of our statute. Lord Dunedin said [1915] A.C. at 715:—

"It appears clearly from the facts, and indeed eventually was admitted by appellant's counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers, which constituted the unseaworthiness."

In other words, it was not disputed in that case that the fire resulted from the unseaworthiness of the ship, but it was contended that the unseaworthiness was not known to the owner and was, therefore, without his fault or privity. It decides that given an unseaworthy ship, the onus of proving that it was unseaworthy *without his actual fault or privity*, is on the owner, but that is a very different burden to that of shewing that the fire did not originate because of the unseaworthiness. In the one case, it is personal fault which is to be negatived, in the other, proximate cause is to be proved by him who alleges it.

A vigorous argument was made by counsel for the respondents,

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founded upon a theory that vapours ascending from the bilge water in the hold of the ship, causing dampness in the lime resulted in spontaneous combustion, but I cannot give effect to that argument. That such vapours, if they existed, which was not proven, caused the fire is not an inevitable inference. There must be something more tangible than that to found liability upon.

I agree with the trial Judge that on the assumption of the onus aforesaid being upon the plaintiffs, they have not discharged it.

The appeal should be allowed.

MARTIN, J.A.:—I agree that this appeal should be allowed.

GALLIHER, J.A.:—I agree with the Chief Justice.

MCPHILLIPS, J.A.:—This appeal has reference to the liability which is upon the shipowner under the Water-Carriage of Goods Act, 1910 (Can.) ch. 61. The action is brought by the consignee, the Pacific Mills Limited, and as well by the Corporation of the Royal Exchange Assurance (of London)—entitled to claim, by reason of the alleged breach of contract of carriage, by way of subrogation, the Corporation of the Royal Exchange Assurance (of London) having insured the goods which were destroyed by fire, being the property of the Pacific Mills Limited. The loss for which damages were claimed and which were allowed in the Court below was occasioned by fire, for which the defendant was responsible in the opinion of the trial Judge, or as it may be more properly put, the trial Judge thought that the *onus probandi* was upon the carrier, the defendant, and that that onus was not discharged. If, however, the *onus probandi* was upon the plaintiffs, then the trial Judge would not have been satisfied that it was satisfactorily established that there was liability upon the defendant upon the evidence adduced at the trial. The goods contracted to be carried by sea consisted of 3,000 barrels of lime shipped on board the barge "Queen City" for carriage from Blubber Bay to Ocean Falls, in British Columbia, and in the course of the voyage at Beaver Cove, the barge took fire and the barge and cargo were completely destroyed and the lime was lost to the plaintiffs, the Pacific Mills Limited. The insurance upon the lime was paid, *viz.*, $5,891, and this was the amount claimed in the action from the carrier, The Kingsley Navigation Co., Ltd., the defendant.

The submission put forward at this Bar was that in any case quite irrespective of whether there was negligence, which of course was denied, there was no liability where the loss of the goods arose from fire, and it was pressed strongly that sec. 7 of the Water-Carriage of Goods Act, 1910 (Can.) ch. 61, could

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only be construed in that way, coupled with sec. 964 of the Canada Shipping Act, R.S.C., 1906, ch. 113. The section reads as follows:—

"7. The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or negelct of their agents, servants or employees."

Section 964 of the Canada Shipping Act R.S.C. 1906, ch. 113, reads as follows:—

"964. Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens:—

(a) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees."

(b) by reason of fire or the dangers of navigation; or,

(c) from any defect in or from the nature of the goods themselves; or,

(d) from armed robbery or other irresistible force.

The section in the Merchant Shipping Act, 1894 (Imp.) ch. 60 having reference to loss by reason of fire, reads as follows:—

"502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. . . . . ."

After full and careful consideration of sec. 7 of the Water-Carriage of Goods Act—and sec. 964 of the Canada Shipping Act, I am satisfied that Parliament intended to relieve the carriers from liability for loss by fire. That is, in my opinion, the statute law read together as it must be, demonstrates the intention of Parliament to absolve from liability in cases of fire, *i.e.*, an absolute immunity in case of loss by fire. The situation is an intractable one upon the true reading and application of the canons of construction of statute law.

In this connection and by way of analogy, I would refer to the law of England as it exists to-day granting exemption from lia-

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bility for loss or damage by fire where the fire is caused by the unseaworthiness of the ship. In *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229, 81 L.J. (K.B.) 129, Kennedy, L.J., says 81 L.J. (K.B.) at pp. 138-139:—

"This first question is, I think, the more doubtful part of the case. There is, in my judgment, a great deal to be said for the view that the Legislature did not lose sight of the law which, unquestionably, had been settled before the date of the passing of the Act of 1894, that there is, in every contract with regard to the carriage of goods in a ship, an absolute warranty that the vessel must, at the time of sailing with the goods, have that degree of fitness, as regards both the safety of the ship and also the safe carriage of the cargo, which an ordinarily careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the nature and probable circumstances of that voyage. It is possible—and I think, Mr. Justice Bray had that fully in mind when he used the language that he did in giving his decision on this first question—that one might quite reasonably come to the conclusion that the implied warranty was not intended to be abrogated by sec. 502 in regard to damage by fire, and that the exemption from liability given by that section was mainly intended to relate to those instances in which the owner is either the captain on board, or perhaps, as in the case of small ships, the actual fitter-out of the ship, if not the master, for the voyage. If that view were taken, and the section were read subject to that implication, there could, of course, be no further contest on behalf of the defendants. I am not, however, prepared to differ from Mr. Justice Bray. Upon the whole, I think that the conclusion to which he has come is both the more correct from the lawyer's point of view and also the safer on general grounds—for one good reason, among others, that the words of the section are unqualified in their terms, and, as has been pointed out by Lord Justice Vaughan-Williams, and by Lord Justice Buckley, and also by Mr. Justice Bray, if we accept the implication of seaworthiness, we are virtually reading into the section the word "sea-worthy," in addition to the word "sea-going" as an epithet applying to the ship. I hold, therefore,—because on the whole I think it is the better conclusion—that the section is to be read without any qualification that the vesssel should be seaworthy at the commencement of the voyage; or, in other words, that where a loss happens by reason of fire, on board the ship, which is not proved to have originated and been directly caused by the actual fault or with the privity of the shipowner, he is exempt from liability under that section."

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This case is clear authority as applied to the statute law of England that the owner of a sea-going ship is relieved from liability for loss by fire on board the ship if the happening is without his actual fault or privity and this is quite irrespective of whether there has been a breach of the warranty of seaworthiness. The state of the statute law of Canada differs. The "actual fault or privity" is not attachable to loss "by reason of fire" —"arising from fire" (sec. 964, R.S.C. 1906 ch. 113—and sec. 7, 1910 (Can.) ch. 61.)

The plaintiffs support the judgment of the Court below upon the ground, and it is submitted that the evidence supports it, that the "Queen City" was unseaworthy, and that there is no statutory exemption for loss by reason of fire or arising from fire, upon the proper reading of the statute law, and that the fire being consequent upon that unseaworthiness there was fault upon the part of the defendant, the carrier, for which it is liable. In this connection sec. 4, (b) of the Water-Carriage of Goods Act 1910 (Can.) ch. 61, is particularly relied upon—the whole section reads as follows:—

"4. Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby

(a) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship; or

(b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided; or

(c) the obligations of the master, officers, agents or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened or avoided;

such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act."

It is further submitted that seaworthy means seaworthy to carry goods, apart from the dangers of the sea. This may well be, but it still has to be shewn that there is liability upon the defendant because of the fire, and I fail to see that there is any clause in the bill of lading that makes the carrier liable in case

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of fire or any intention upon the part of the carrier to contract out of the statutory exemption from fire loss—(See *Ingram & Royle* v. *Services Maritimes Du Tréport*, [1914] 1 K.B. 541, 83 L.J. (K.B.) 382, 30 Times L.R. 79). If the question of whether the ship was seaworthy is open and available to the plaintiffs, then the further question would arise, was unseaworthiness the proximate cause of the happening, and where lies the onus of proof? This onus would appear to be on the shipper when, as here, it is claimed, but as I consider not proven, that unseaworthiness was the cause of the loss—that is the cause of the fire—which destroyed the lime (*Lindsay* v. *Klein*, *"The Tatjena,"* [1911] A.C. 194, 80 L.J. (P.C.) 161). Further, it is a well known principle in shipping law that a ship is *primâ facie* deemed seaworthy (*Parker* v. *Potts* (1815), 3 Dow. 23, 3 E.R. 977). The facts in the present case are not such as warrant it being said that the burden of proving seaworthiness was shifted upon the shipowner. The amount of water that entered the barge was really negligible, and in my opinion, neither the water nor any claimed rotteness of timbers had any relation to the happening, that is *the fire* which took place and destroyed the lime—(*Watson* v. *Clark* (1813), 1 Dow. 336, 3 E.R. 720; *Pickup* v. *Thames Ins. Co.* (1878), 3 Q.B.D. 594, 47 L.J. (Q.B.) 749; *Parker* v. *Potts*, *supra*; *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.*, *Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A.C. 362, 70 L.J. (P.C.) 34; *Lindsay* v. *Klein*, *"The Tatjana,"* *supra*).

Lord Shaw in *Lindsay* v. *Klein*, *supra*, (as reported in 80 L.J. (P.C.) 161, at p. 165) says:—

"In the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine and it is none the less sound, although the vessel break down, or sink shortly after putting to sea. That is the principle of law."

The trial Judge arrived at the conclusion in the present case, that the allegation of unseaworthiness as put forward in the statement of claim was proved "that the barge through its unseaworthiness leaked and admitted water which combined with the lime created such a development of heat as to set the fire and cause the loss."

The trial Judge, of course, as previously stated, proceeded upon the view that the onus of proof as to seaworthiness was upon the defendant, and in his reasons for judgment he further said:—

"In my opinion the onus rested upon the defendant company to satisfy the Court that the fire was not due to the cause thus

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suggested by the plaintiffs. I am free to admit that were the onus upon the plaintiffs to prove that the fire did occur in the manner alleged, I could not see my way clear to thus find in their favour. If I am right, however, in my opinion that the onus rests upon the defendant company, then, as I have mentioned, it has failed to satisfy this burden—the result is that not only has the probable cause suggested by the plaintiffs not been met by any other suggested cause on the part of the defendant company but the defendant company has failed to obtain relief under sec. 7 of the Water-Carriage of Goods Act. I find that the defendant company is liable for the loss that ensued to the goods in question. The amount claimed, for which judgment will be entered, is $5,981."

It is clear that the trial Judge did not really find as a fact that any of the claimed items of unseaworthiness was the proximate cause of the fire, or more precisely that, because of the leakage and presence of water the fire ensued, but in that the defendant had not established any other cause, the cause alleged by the plaintiffs should be accepted. With great respect, I cannot agree with the conclusions of the trial Judge. In the first place, it was error in law to impose the burden of proof upon the defendant company of the unseaworthiness, and even were he right in that, it would not follow that there would be liability, (and this is leaving out of consideration the absolute statutory immunity that in my opinion exists) unless the unseaworthiness was the effective cause of the fire which occasioned the loss. In *Kish* v. *Taylor*, [1912] A.C. 604, 81 L.J. (K.B.) 1027, Lord Atkinson, at pp. 1030-1031, says (as reported in 81 L.J. (K.B.)):—

"Neither in *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72, 37 L.T. 333, nor in *Gilroy Sons & Co.* v. *Price & Co.*, [1893] A.C. 56, 68 L.T. 302, was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment, and relegated the shipowner to his rights as a common carrier by sea. On the contrary, the observations of Lord Blackburn seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage, and he used these words:—'So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas, would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it'; and later he said, 'I have no doubt what the result will be; it will be a question

taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit,' which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment so far as it dealt with that liability."

Apart from all other questions and upon the point of unseaworthiness alone, even if that were established—the plaintiffs would not be entitled to succeed in the present case—with sec. 964 of the Canada Shipping Act, R.S.C. 1906 ch. 113, and sec. 7 of the Water-Carriage of Goods Act, 1910 (Can.) ch. 61 in the way, (Merchant Shipping Act, 1894, (Imp.) ch. 60, part VIII, sec. 502), that was the decision in *Virginia Carolina Chemical Co.* v. *Norfolk and North American etc. Co.*, [1912] 1 K.B. 229, 81 L.J. (K.B.) 129; [1913] A.C. 52, 82 L.J. (K.B.) 389;—it being held that a shipowner is not deprived of the protection of sec. 502 (and sec. 964 of the Canada Shipping Act and sec. 7 of the Water-Carriage of Goods Act—Canada, are in terms analogous, but more extensive in according absolute protection to the shipowner) merely by reason of the fact that the fire is caused by the unseaworthiness of the ship, and I cannot see, as previously stated, that there is anything in the bill of lading in the present case that prevents the application of the statutory protection to the defendant, the shipowner. In *Ingram & Royle* v. *Services Maritimes Du Tréport, supra*, Vaughan-Williams, L.J., is reported to have said (30 Times L.R. at pp. 80, 81):—

"Lord Justice Vaughan-Williams, in delivering judgment, said that in his opinion the appeal succeeded. He had heard a great deal of argument with reference to the warranty of seaworthiness and as to whether it continued notwithstanding the fact that the case was one which fell within sec. 502 of the Merchant Shipping Act, 1894. He thought that the decision of the Court of Appeal in *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steamship Co.*, was conclusive on this point, and he could not do better than read the headnote in that case, which was as follows:—'Section 502 of the Merchant Shipping Act, 1894, provides that 'the owner of a British sea-going ship' shall not be liable for 'any loss or damage happening without his actual fault or privity,' where goods on board his ship are lost or damaged by reason of fire on board the ship.' Stopping there, he thought it was perfectly plain that the fire in this case did occur without the actual fault or privity of the owner; in his opinion, there was no evidence of any fault or privity on the part of the owner. That being so, the question might be raised on

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the construction of sec. 502 as to the onus of proof of fault. In his judgment, having regard to the words of the section, (his Lordship then read the section), it was not on the shipowner to prove a negative and to show that he was not guilty of any fault or privity, but on those who set it up to prove affirmatively. He was of opinion that the goods on board had been damaged by fire within the meaning of the section, and he did not trouble to ascertain whether the fire was the ultimate cause of the loss or only a step in the causation. It was sufficient to say that the loss was a loss by reason of fire on board the ship. The head-note then continued thus:—'A bill of lading contained a clause providing that the shipowner was not responsible for any loss of, or damage to the goods received thereunder for carriage occasioned by (*inter alia*) fire, or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness. Held by Mr. Justice Bray, and by the Court of Appeal, that a shipowner is not deprived of the protection of sec. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship, but that the effect of a bill of lading containing the above clause, is to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods, shipped under the bill of lading, by reason of fire on board the ship, caused by the unseaworthiness of the ship.' *Primâ facie*, until something to the contrary was proved the shipowner was entitled to the protection of sec. 502."

Lennard's Carrying Co. v. *Asiatic Petroleum*, [1915] A.C. 705, 84 L.J. (K.B.) 1281, would at first sight seem to present some difficulty—as to the onus of proof, as to unseaworthiness, but in the end possibly not, as it is directed rather to the onus of proof of actual fault or privity and that the owner did not know of the unseaworthy condition of the ship, (and see Lord Shaw at p. 165, in *Lindsay* v. *Klein*, *supra*). What is contended here is that vapourisation took place consequent upon the presence of water, and that an inflammable condition of things was produced. The water proved to be in the ship was, as I have previously stated, negligible in amount, never reached the lime and could not be said to be more than would be present in any seaworthy ship, and I fail to see that there is evidence sufficient to warrant the holding that the water or any condition of unseaworthiness was the proximate cause of the fire. The whole case would seem to be met by considering and applying the language of Kennedy, L.J., in *Virginia Carolina Chemical Co.* v. *Norfolk etc. Co.* (as reported 81 L.J. (K.B.) at p. 138):

"I hold, therefore, because on the whole I think it is the better conclusion, that the section is to be read *without any qual-*

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ification that the *vessel should be seaworthy* at the commencement of the voyage, or, in other words, that where a loss happened by reason of fire on board the ship which is not proved to have originated and been directly caused by the actual fault or with the privity of the shipowner, he is exempt from liability under that section, (502, Merchant Shipping Act, 1894 (Imp.)).

In the present case, there is an entire absence of any evidence that the fire originated or was directly caused by the actual fault or with the privity of the defendant, the shipowner, and that being the situation, it must follow that the defendant is exempt from liability, even if the law of Canada can be held to be similar to the law of England today. Upon the whole, I am of the opinion that the law of Canada extends absolute immunity from loss, by reason of fire or arising from fire, and if I am correct in that view, that ends the case, but I have taken pains to pursue the matter along the lines of whether in England today there would be liability upon the particular facts of this case, and also to cover the situation, if I should be found to be in error in my construction and application of the statute law of Canada.

Appeal allowed.

NATIONAL TRUST Co. v. TAYLOR.

Manitoba King's Bench, Mathers, C.J.K.B. June 9, 1922.

WILLS (§ ID—35)—TESTAMENTARY CAPACITY—DISEASE—AGE—UNDUE INFLUENCE—NURSE.

Suffering from an aggravated state of arteriosclerosis, whereby the mental and physical state of a testator have been reduced below normal, does not affect his testamentary capacity; the mind and memory, though impaired by age or disease, may be sufficiently sound to enable him to understand the nature of his act. The fact that the will has been obtained by a nurse attending the testator in his illness, who has been made the principal beneficiary, even if obtained under her threat to leave the testator, would not be sufficient to constitute undue influence.

PROCEEDINGS to establish the validity of a will and for its admission to probate.

J. W. E. Armstrong, and *H. M. Hughes*, for the National Trust Co.

J. Chalmers, for the Canadian Guarantee Trust Co.

P. J. Montague, for Miss Taylor.

H. V. Hudson, for Mrs. Bushe and Mrs. Stockdale.

MATHERS, C.J.K.B.:—On February 2, 1921, the late Colonel Hosmer executed an instrument, hereinafter referred to as the first will, by which a legacy of $200 was left to the defendant Edith Taylor; $500 to each of the children of his sister Mrs. Bushe, and the remainder of his estate, real and personal, to his late wife's sister Mrs. Fraser, and in the event of her decease to

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her son Ronald, and he appointed the Canadian Guarantee Trust Co. executor.

Three days later, on February 5, he executed another instrument, hereinafter referred to as the second will, revoking all former wills, giving a legacy of $100 to the wife of his nephew Cheam Bushe, and all the rest of his real and personal estate to the defendant Taylor, and he appointed the plaintiff the National Trust Co. executor of this will. He died on February 12, 1921, the immediate cause of his death being pneumonia, the result of a chill received about the 24th of the previous month of January. He was then 68 years of age.

An application was made to the Surrogate Court at Brandon by the plaintiff for probate of the second will. A caveat was entered by the Canadian Guarantee Trust Company, the executor under the first will. Thereupon an order was made transferring the proceedings to this Court.

The plaintiff asks for the establishment of the second will and that it be admitted to probate. Mrs. Fraser ,the chief beneficiary under the first will, denies that the document referred to as the second will is the will of the late Colonel Hosmer, but that if he did execute it that it was obtained by the undue influence of the defendant Taylor, and she asks for the establishment of the first will.

The defendants Mrs. Stockdale and Mrs. Bushe, the sisters and next-of-kin of Colonel Hosmer, deny that either of the documents is a valid will. They allege that at the time they purport to have been executed he was not of sound and disposing mind, memory and understanding, and that the second will was obtained by the undue influence of the defendant Edith Taylor. The defendant the Canadian Guarantee Trust Co. propounds for probate the first will in the event of the Court holding against the document alleged to be the second will.

The fact that the late Colonel Hosmer signed each of the documents with the formalities required by law for the execution of a will is not denied. But that he had the necessary testamentary capacity when either instrument was made, and particularly the second, is seriously contested by some of the defendants, while by others the issue is raised that the instrument called the second will was procured to be executed by the undue influence of the defendant Taylor.

The English law concedes to the owner of property the unfettered right of determining by his will to whom it shall pass upon his decease. In so disposing of it he has a right to be eccentric, capricious, absurd and even unjust, because none of these in the dispositions made prove lack of capacity: *Pilkington* v. *Gray*,

[1899] A.C. 401, 68 L.J. (P.C.) 63; *Lloyd* v. *Robertson* (1916), 27 D.L.R. 745, 35 O.L.R. 264; (reversed) 28 D.L.R. 192, 37 O.L.R. 498; *Pare* v. *Cusson* (1921), 60 D.L.R. 105, 31 Man. L.R. 197, though they may cast some light upon the question. Old age often ceases to excite interest and the control which the law gives to a person over the disposal of his or her property is one of the most efficient means of commanding respect and attention. Upon the exercise of this power the law, however, imposes the condition that at the time of its exercise the testator be of sound and disposing mind, memory and understanding.

"If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." [Per Cockburn, C.J., in *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565, 39 L.J. (Q.B.) 237.]

In an earlier passage on the same page he lays down what is essential to the constitution of testamentary capacity with what Sir James Hannen, in *Boughton* v. *Knight* (1873), L.R. 3 P. & D. 64, at p. 74, 42 L.J. (P.) 25, refers to as "singular accuracy." He said:—

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

In *Banks* v. *Goodfellow*, *supra*, Cockburn, C. J., quotes from several United States cases in which he says the law respecting enfeebled mentality from age and disease is extremely well treated. From *Den* v. *Vancleve* (1819), 2 South (N.J.) 589, at 660, he quotes:—

"By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly

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done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things and all those circumstances, which enter into the nature of the rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

And again from *Stevens* v. *Vancleve* (1822), 4 Wash. C.C. 262, at p. 267:—

"But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life . . . The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

In *Wilson* v. *Wilson* (1875), 22 Gr. 39, at p. 78, Blake, V. C., adopts the following passage from Redfield on Wills as "a very learned conclusion from the decisions":—

"If one be able to transact the ordinary affairs of life he may, of course, execute a valid will. The testator must have something more than mere passive memory. He must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in regard to them. The elements of such a judgment should be the number of those who are the proper objects of his bounty, their deserts, with reference to conduct, capacity, and need, and what he had before done for them, and the amount and condition of his property. It will be obvious that even this amount of capacity may often be more or less clouded and obscured, and still the will be established, where it possesses no inherent incongruities or defects, and is in strict accordance with the testator's previously declared purposes and intentions."

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In the leading case of *Harwood* v. *Baker* (1840), 3 Moo. P.C. 282, at p. 290, 13 E.R. 117, Erskine, J., delivering the opinion of the Judicial Committee of the Privy Council, said:—

"Their Lordships are of the opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property."

He adds:—

"That the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition though the justice or injustice might cast some light upon the question as to his capacity."

See also *Wright* v. *Jewell* (1894), 9 Man. L.R. 607, at p. 616.

The concrete question which it seems to me I have to decide with respect to the second will is very similar to the one with which their Lordships had to deal in *Harwood* v. *Baker, supra,* and it is not whether the testator knew when he was giving all his property with the trifling exception of $100 to his nurse and excluding all his relations from any share in it, with the trifling exception mentioned, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

It was not disputed that the *onus probandi* lies upon those who propound a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. That was stated by Parke, B., in *Barry* v. *Butlin*

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(1838), 2 Moo. P.C. 480, 12 E.R. 1089, to be the first of two rules of law according to which cases of this nature are to be decided. The second rule he said is that if a party who writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. A few months earlier the same learned Baron, in *Baker* v. *Batt* (1838), 2 Moo. P.C. 317, 12 E.R. 1026, expressed the same principle in but slightly different language. He first referred to the onus upon the person propounding a will as expressed in the first rule, and proceeded at p. 321:—

"There is also another principle upon which the Court below has acted, and which has long prevailed in the Ecclesiastical Courts, which is this—that if the person benefited by a Will, himself writes or procures it to be written, the Will is not void, as it would have been by the Civil Law; but the circumstance forms a just ground of suspicion, and calls upon the Court to be vigilant and jealous, and requires clear and satisfactory proof, that the instrument contains the real intention of the Testator."

Barry v. *Butlin* was followed in *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, 44 L.J. (P.) 17, and in *Brown* v. *Fisher* (1890), 63 L.T. 465. In the latter case the testator made a will on June 7, 1887, largely in favour of the defendant, a woman with whom he had lived as his wife for forty years but to whom he was not married. The plaintiff, who was the testator's brother, propounded for probate an instrument purporting to be a will dated November 7, 1887, in the plaintiff's favour. This latter instrument had been prepared by a solicitor employed by the plaintiff but who had no access to the testator and took his instructions entirely from the plaintiff. The dispositions made by this latter will were contrary to all previous testamentary instruments signed by the testator as well as to his expressed testamentary intention. The only evidence in its favour was that of the plaintiff and a witness who added nothing to his evidence. Sir James Hannen refused probate of the later will and granted probate to the earlier will. He had at the beginning of his judgment quoted the above passage from *Barry* v. *Butlin* and he now continues 63 L.T., at p. 467:—

"On the whole of the evidence, I find that the doubt and suspicion with which I was bound to watch this case, in accordance with the passage I have read, have not been removed; and it has not been affirmatively established, as the plaintiff was bound

to establish it, that the deceased man knew and approved of the contents of this document."

Neither of the wills in question here was written or prepared by those named as beneficiaries, but the rule is not confined to cases of that nature. In *Tyrrell* v. *Painton*, [1894] P. 151, at p. 157, 42 W.R. 343, 70 L.T. 453, Lindley, L.J., laid it down that the rule was not confined:—

"To the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

That statement of the law was expressly approved by the Ontario Court of Appeal in *Wannamaker* v. *Livingston* (1917), 43 O.L.R. 243, at p. 261.

There was nothing decided in *Craig* v. *Lamoureux* (1919), 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306, 89 L.J. (P.C.) 22, at all in conflict with this doctrine. In both *Barry* v. *Butlin*, *supra*, and *Craig* v. *Lamoureux*, *supra*, it is held that there is no rule of law which casts upon a person who prepares a will under which he takes a benefit any heavier onus than that which rests upon any other legatee, but as pointed out by Parke, B., it is a circumstance of more or less weight according to the facts of each particular case—in some of no weight at all—varying according to the circumstances, for instance, the quantum of the legacy in proportion to the property disposed of and numerous other contingencies, but in no case amounting to more than a circumstance of suspicion demanding the circumspection of the Court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument does express the real intention of the deceased.

There have undoubtedly been cases since *Fulton* v. *Andrew*, *supra*, which have been decided upon the assumption that the law placed upon a person who prepared a will under which he took a benefit "the onus of showing the righteousness of the transaction." That was the ground upon which the majority of the Supreme Court proceeded when *Craig* v. *Lamoureux* was before that tribunal *sub nom.*, *Lamoureux* v. *Craig* (1914), 17 D.L.R. 422, 49 Can. S.C.R. 305, and was the basis of the decision

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in *Wright* v. *Jewell*, 9 Man. L.R. 607. *Fulton* v. *Andrew*, L.R. 7, H.L., did not, however, so decide, and the statement derives its authority solely from an unguarded dictum of Lord Hatherley at p. 472, in that case to the effect that those who take for their own benefit after having been instrumental in preparing or obtaining a will "have thrown upon them the onus of showing the righteousness of the transaction." The Canadian Courts adopted this dictum but as pointed out in *Re Simpson Estate* (1919), 51 D.L.R. 143, 53 N.S.R. 285, the effect of *Craig* v. *Lamoureux*, *supra*, is to correct the misconception of the law created by it.

The testator was a retired army officer who took up a homestead near Virden, in 1886. His wife was a sister of Sir Henry Juta, Chief Justice of South Africa. They had been married about thirty-five years and there was no issue. The homestead was sold, part in 1911 and the balance in 1914, in which latter year the testator and his wife moved into a dwelling house which they had erected in Virden. The title to the lot on which the house was built was taken in the testator's name but the purchase-money, amounting to $700, was supplied by the wife, and she also paid for the erection of the house, at a cost of over $5,000. She was in receipt of a considerable independent income during the last fifteen years from her mother's estate, from which source she received upwards of £5,300. Her income was paid monthly by her brother in Cape Town and when her health began to fail an arrangement was made whereby it should continue to the testator during his life, should he survive her.

While in health the testator was physically and mentally vigorous, and a fluent talker. A few years before his death he became afflicted with arteriosclerosis, and in June, 1918, the disease had made such progress that one of his legs became gangrenous and had to be amputated. The operation was performed in the Winnipeg General Hospital and the defendant Taylor nursed him while there and returned to Virden with him in July, and remained with him two or three months. In December, 1918, gangrene had developed in the other leg and he returned to Winnipeg to have it amputated also. The operation took place in January or February, 1919, and the defendant Taylor again nursed him through it and returned with him to Virden in April, 1919. She continued as his nurse until December of that year when she went to California for the winter and Nurse Bannatyne took her place. There appears to have been a good deal of tension between Nurse Taylor and Mrs. Hosmer and it was because of this tension that she then left. It is due to Miss Taylor to say that Mrs. Hosmer seems to have been somewhat hard to get along with amicably. Dr. Clinghan, who was the testator's attending physi-

cian from April, 1919, to October, 1920, believed that this tension between the patient's wife and his nurse produced an unfavourable atmosphere for him. Mrs. Hosmer was ill and also required the services of a nurse but Miss Taylor did not deem it her duty to look after both. The relations between Miss Bannatyne and Mrs. Hosmer were cordial but on the other hand she did not suit the Colonel as well as Miss Taylor did. It was finally agreed that Miss Bannatyne should continue as nurse until the Hosmers went to Winnipeg, as they expected to do early in October, 1920, and that nurse Taylor should then go to Virden and bring them down, and this arrangement was carried out. A suite of rooms was secured on Grosvenor Avenue, Winnipeg, and they left Virden on September 30, 1920, and thereafter lived in Winnipeg.

Mrs. Hosmer became worse after coming to this city and died on January 19 following. She had some time before made a will leaving everything to her husband but had later added a holograph codocil which purports to give her money and personal property to her husband but after his death to go to her sister, Mrs. Fraser, or her son Ronald, should she pre-decease the testator. The house in Virden was left to Mary Sellars, now Mary Simpson, and there were other bequests of certain specific chattels. The Colonel himself died on February 12, twenty-four days after his wife's death.

In view of the issues raised in this contest, it is important to ascertain from the evidence as far as possible what the mental and physical condition of the testator was at various times subsequent to his second operation. All witnesses agree that up until that time his mind was quite normal, but there is considerable diversity amongst them as to his mental condition subsequent to that time.

Dr. George Clinghan had been the testator's family physician since 1901. He went overseas in 1916 and did not return until about the time of the second operation in January or February, 1919. He attended the Colonel professionally from the latter's return to Virden in April of that year until he left for Winnipeg, in September of the following year. As to his physical condition he says the second wound had healed fairly well but that his blood-pressure was very low, below 100, and he had to give him stimulants to strengthen his heart action. He says:—

"His mental condition was very much changed from 1916. He was then an ordinarily vigorous minded man, but in April, 1919, his mind was in a dilapidated condition. He could not hold conversation. That was still his mental condition when he left for Winnipeg, in October, 1920. There were times when he was less bad than at other times, but there was no improvement. He

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was suffering from arteriosclerosis, which is a progressive disease, gradually eating away. I would not have thought him capable of doing any business during the period I treated him; I had never thought of his making a will or tested him out on that line, but from memory of his condition I do not know how he could make a will."

Dr. Clinghan saw him twice in Winnipeg, the first time two or three weeks before his wife's death. His opinion is that the Colonel's mental condition had not improved at that time. He next saw him less than a week before he died. He was then in a semi-comatose condition.

Nurse Bannatyne knew both Colonel and Mrs. Hosmer for 10 years and nursed for them on three different occasions, first about 6 years ago during an illness of Mrs. Hosmer, next from May 17, 1918, for the Colonel. She took him to Winnipeg on May 24 for his first operation and remained there with him for some time afterwards but she returned to Virden before he came. She next was engaged on December 24, 1919, after his second operation, and remained with him until he went to Winnipeg, in October, 1920. She says that when she went back on December 24, 1919, she found the Colonel very much changed.

"He was then a helpless old man, could do nothing for himself, and was not interested in anything. He spoke quite thickly at times, always thick but sometimes worse than others. He never carried on a conversation so long as I was there. He would start a conversation and then forget what he was going to say and have to be helped out. He used to cry without apparent reason. Would wake up in the morning and cry, and again in the afternoon. He liked me to read to him and used to remark to Mrs. Hosmer that he was getting intelligent, not jocularly but quite seriously."

She says he never could remember her name; always called her nurse. He always called Mary Sellars "Anna," that being the name of a previous nurse. In August, 1919, he became unconscious for a short time when being wheeled in the park at Virden. Dr. Clinghan, who happened to be there at the time, attributes it to lack of blood supply to the brain. About March, 1920, he had another unconscious spell and Dr. Friar was called. His head dropped over and he vomited. Miss Bannatyne says that Miss Taylor told her of fainting spells the Colonel had, one in August, 1919, which she referred to as a "clot," and also that he had other unconscious spells both before and after the August attack.

"In December, 1919, the Colonel seemed to me to be very childish and not able to connect up things; at times he was dull. His

mental condition in September, 1920, was much the same as in December, 1919, but he was then more interested in things and liked to have the papers read to him. His physical condition was better then, the doctors thought. At that time Mrs. Hosmer had almost recovered. While in Virden the Colonel had visitors and liked to see people, and there was no trouble about his doing so. He never talked connectedly; he would get off the subject and Mrs. Hosmer, when there, would prompt him. He quite often sang nursery rhymes at which times I thought he was just a little childish and it did not worry me."

The next witness who can speak of his condition before coming to Winnipeg, was Mary Simpson, formerly Mary Sellars. She had occupied the position of a sort of privileged domestic from 1914 until after the death of both. She says that the testator was never the same after the amputations. Back in 1914 and 1915, she said he was active and did not sleep in the daytime, but by October, 1920, he slept a great deal in the daytime and also at night. He got up in the morning and sometimes dozed off in his chair. If not feeling well he went to bed after lunch and slept until four o'clock. Before 1916, she never saw him crying, but often saw him crying after his second operation over almost nothing. This occurred quite often. Prior to his amputations he talked like any person else. It was different in October, 1920. He could not remember anything when talking, would stop and start on something else, some days he was better than others. After the first operation and before the second he was unconscious on one occasion for several hours.

Dr. Montgomery attended the Colonel while in Winnipeg, during both his operations. After his second operation he saw him almost daily, so long as he was in the hospital and until he returned to Virden. In his opinion the Colonel's mental condition was then quite normal. He saw him again in December, 1920, and found him in much the same condition as when he left the hospital, both mentally and physically. In his opinion the Colonel's ability to transact business was then as good as it ever was since he knew him, and his ability to make a will was then normal. He gave him no memory test but they spoke of things that had occurred in the summer, and he was surprised to see him so well.

The defendant Nurse Taylor says that when she left in December, 1919, both the Colonel's physical and mental condition was very good and that when she went back to take charge of him in September, 1920, she thought he had improved. Mentally she thought he was in good shape, and "I thought better than in December, 1919," and that condition was maintained until the death of his wife.

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Mrs. Gyles, an old resident of Virden, and intimate friend of the Hosmers, says that she visited the Colonel very frequently in Virden, until he left in the fall of 1920, and she was nearly always allowed to see him, although he had bad attacks when no person was allowed in. She says he changed very much after his second operation mentally.

"Up to that time there was not much change, but after his second operation the change was very marked. He could not speak plainly, nor form sentences. He was just like a person who had had a stroke. He would start sentences and get stuck and the nurse or Mrs. Hosmer would finish. He forgot people's names. He would forget my name. His condition improved but never altogether cleared up. When a visitor went in he was bright, had a gay greeting, but after a time that passed and he became dull."

She never saw him inclined to cry or "well-up" until after the second operation. It was when he noticed his own helplessness, sort of self-pity, she thought, which made him cry.

Mr. H. H. Goulter, barrister and solicitor of Virden, knew the Colonel and his wife intimately from the time they first came to that locality in 1886. He had been his solicitor for a considerable portion of that time but in later years, prior to 1918, business had been transacted by Mr. Agnew. In the fall of 1918, at Mrs. Hosmer's request, he again took charge of their legal business. During the subsequent period until they left for Winnipeg, he saw the Colonel very frequently, both socially and on business. He says that after the first operation he seemed to lose his power of speech. It was difficult to talk to him. If a question was addressed to him he would try to answer it but lose the sentence, and if you completed his answer he seemed pleased, or dissented by a movement of his head. His wife tried to shield him from worry but he was jealous of his own affairs and would not let any business be done unless in his presence. After the second operation any business of his was transacted in his presence by Mrs. Hosmer and he assented or dissented. He says on one occasion, in November, 1919, the question of pre-payment of a mortgage payable to him arose and he expressed very decided views.

There is a special agreement amongst all the witnesses that no great change took place in either the testator's physical or mental condition from the time of his removal to Winnipeg, in October, 1920, and the time of his wife's funeral, on January 24, 1921.

Dr. Blanchard, an old friend of the Colonel, made two social calls before Mrs. Hosmer's death. He noted a marked change in his mental condition from what it had been while in health. He

noticed the same inability to conduct a conversation as other witnesses have spoken of, and his tendency to forget the subject of discourse and say something irrelevant. But he did take part in the conversation. He remained only ten or fifteen minutes and went sooner than he would have done if the Colonel had been normal. He didn't think there was much use in talking to him because he appeared to be rather stupid. In his opinion the Colonel was in a condition approaching second childhood. There were indications he thought of mental decay, symptoms of senile dementia. At the same time he declines to offer a confident opinion because he is not an expert on mental diseases and because of a lack of sufficient opportunity for observation. His remarks were not insane, but he would say things you did not expect him to say. He would make remarks which indicated that he did not understand what had been said previously. His condition would indicate a weakening of mind rather than a break and approaching the point where he would be insane. His physical condition was relatively better, he thought, than his mental condition. He had not seen the Colonel from his second operation until two weeks before his wife's death, and his mental change from normal was then very marked. He says he formed no definite opinion as to his mental condition. Such opinion as he did form was that the Colonel's condition was very unsatisfactory, and in short that he was "all off."

James G. Monroe had lived in Virden in 1908 until 1911, and there made the acquaintance of the Hosmers and was a frequent visitor in their house. In health the Colonel was a very active man and mentally normal. After the war he saw the Colonel in December, 1920, and found that he had changed considerably in appearance. He did not seem to be so fluent in speech or prompt in his conversation; was apt to be forgetful and start on something that had no bearing upon the conversation at all. He would forget altogether the thread and start on some other topic. Mr. Monroe thought the Colonel in his dotage the end of 1920. He frequently called upon him up to the time of his wife's death and more frequently afterwards. His voice and his articulation were changed; there was a thickness and a halt in his speech rather than a stutter or stammer.

Dr Matheson knew the Colonel for a great many years and was medical officer of the regiment of which the Colonel was officer commanding. He was overseas for four years and did not see the Colonel again before May, 1919. From October, 1920, he attended both the Colonel and his wife professionally while they lived, visiting her fifty times and the Colonel thirty times. Although he had not seen the Colonel for four years he noticed

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no change in him except he was thinner and more aged. His first visits to the Colonel were only friendly, but were professional and more frequent towards the end. He says the Colonel talked of military affairs and ordinary matters, and that he had no trouble in understanding him. He talked of the war, of his old regiment, or incidents of camp life, and he was quite clear and wide awake. That his condition was as normal as 10 years before, and that condition continued until about 48 hours before his death. At the time of his wife's death he may have been a little weaker but nothing more; nothing to affect him mentally. He, however, admits that a man who starts to say something and halts in the middle, the idea having gone, is not normal, and that when the brain has become affected by arteriosclerosis the patient could not be regarded as 100% normal. He also admits dizziness, sleepiness, fainting, convulsion, forgetfulness, loss of memory, outbursts of weeping or emotion, childishness, thickness of speech and vomiting are indications that the disease has reached the brain; that the disease is a progressive one, and that senile dementia may eventually result. He knew there were times when he had become unconscious for several hours. That probably due to the congested condition of the brain, might be due to arteriosclerosis. Arteriosclerosis, he says, affects all parts of the body, resulting in a general slowing up of the part affected, and reduced energy. The same thing occurs when it reaches the brain. It is manifested by loss of mental initiative, a failure of judgment, and no adequate grasp of the situation at all. Difficult to say what the first symptoms are; tiring is one of the first. May go on for 10 or 15 years. People may be afflicted with this disease for 25 to 30 years, living to old age, and still have full mental vigor, but such people do not show childish symptoms, the explanation being that the disease had not developed in the brain. Once the disease has reached the brain the patient could not be said to be 100% normal. Physically, he was a good deal under par. From October the Colonel had lost quite a bit and was thinner. He did not think that the Colonel had senile dementia.

These are the outside witnesses who speak of the condition between the Colonel's arrival in Winnipeg and his wife's funeral on January 23 or 24. During that period there seems to have been no marked change in the condition as it was before. The Colonel had probably grown a little thinner, but his mentality was about the same as it had been when he came to Winnipeg.

We are now to the crucial time, from his wife's death until February 5. Some light is thrown upon his condition during this period in a letter written by the defendant Taylor to a Miss

Kennedy, dated the first day of February. She says in that letter:—

"I have thought so often of writing to you but my mind has been in such a whirl lately and I am so worried about the Colonel, as he is not at all well. But I must first of all tell you about Mrs. Hosmer."

She then goes on to tell about Mrs. Hosmer's last illness. She took the Colonel to the door of his wife's room at seven o'clck in the evening to bid her good-night and that was the last occasion on which he saw her. He was asleep at ten o'clock when she died and the undertakers came about 11.30 and took her, and the Colonel did not hear a sound.

"At six o'clock in the morning, however, he asked me how Mrs. Hosmer was but my heart failed me. I felt I was not equal to the task of breaking the news. The doctor thought I could do it better. I can't tell you how I went through misleading him for three hours. It was the most harrowing thing I've ever had to do. I made several attempts but really found it was too much for me so I then 'phoned for Rev. Captain Robinson and Mr. Monroe, old friends as you know. They went into the Colonel's room together and broke the news to him about ten o'clock in the morning. The poor old thing kept up wonderfully well but he was confined to the house, would not go out until after the funeral, which was five days. I think the air must have been too dry for him, however, he became very hoarse and then developed a cough, a slight bronchitis which is almost better now but it has pulled him down terribly. I feel that he is gradually failing. My heart aches for him Miss Kennedy, it is so pathetic to see him helpless, childish, and without his legs. Of course you realize that I have been with the Colonel so long that he seems so dependent on me. To see him losing strength is almost more than I can bear. He may pick up but I am so afraid that this is the beginning of the end with him."

The Rev. Captain Robinson [Robertson] gave the Colonel communion on the 26th, two days after his wife's funeral. He says that on that day he seemed to be suffering from a very heavy cold and he was not impressed with his condition. He asked the nurse if the Colonel had made a will, and she said no. He then talked to him about making a will and the witness says the Colonel "was favourable."

"I asked if he had anyone in particular in mind and he said 'no,' and I suggested Mr. Goulter. Don't know if I named Mr. Craig or not; I asked if I would write to Goulter, and he said 'yes.' I told the nurse I was going to write Goulter and she ap-

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proved. I expected that the shock and heavy cold might cause his death at any time."

He further says that with Mr. Monroe he broke the news of his wife's death to the Colonel and that he took it very hard and broke down, but in a while he became more reconciled. The witness did write a letter to Mr. Goulter of that date but in it he makes no mention of a will or the Colonel's desire that Goulter should come to Winnipeg—all he says is:—

"I spoke to him in general about matters and Mary has promised to write you today, asking if you can manage to come down as early as possible next week, then you can fix things up with the Colonel. I will be very glad if you can do this."

Mary Simpson, nee Sellars, on January 26, wrote a letter to Mr. Goulter, but she makes no mention of a will. She writes:—

"The Colonel feels he would like you to come down if you possibly could very soon. Mr. Robertson talked the matter over between them this morning so the Colonel thinks he ought to see you himself." And she adds:—"I think the Colonel is wonderful, he is just fine in his spirits. But today he has a slight cold."

Her account of the reason for wanting Mr. Goulter to come is that he had received a copy of his wife's will but he could not understand it and he wanted Goulter to come down and explain it to him. That was, she thinks, after he had received Mr. Goulter's letter telling him about his wife's will. Between that time and the second of February, when Mr. Goulter arrived, the Colonel was expecting him. The Colonel knew that Mr. Goulter had left Virden on the first and would call upon him on February 2. He did not want his sister, Mrs. Bushe, about while Goulter was there and he asked Mrs. Simpson to telephone Mrs. Bushe not to come on the second as he was going to be busy doing business. "He said to me he didn't want her around when Mr. Goulter was there. That same morning he also told me he was going to make a will." Mrs. Simpson accordingly 'phoned Mrs. Bushe as requested. She says Mr. Goulter came in the forenoon and was there until about four in the afternoon. She says:—

"I knew what business was going on through Miss Taylor. The day before Goulter came Miss Taylor said to me: 'The Colonel may as well make a will when he is so bright and so well.' That is all that was said then so far as I can remember. For the first two or three days after Mrs. Hosmer's death the Colonel was exceptionally bright. After Mr. Goulter left I had no conversation with the Colonel. He was tired. I know because I asked him and he said 'yes.' Otherwise he appeared all right."

Miss Taylor received no request from the Colonel to either telephone or write for Mr. Goulter, but she 'phoned him on Feb-

ruary 1, urging him to come, because Mrs. Agnew had suggested that what business had to be done had better be done. The business which Miss Taylor had in mind was the making of a will.

J. G. Monroe went with Captain Robertson to break the news to him of his wife's death. He says when Rev. Captain Robertson broke the news the Colonel did not seem to grasp it instantly. Mr. Robertson then mentioned it in a simpler way and he fell over with a cry but calmed down in half an hour and discussed the disposal of the body and the arrangements for the service. He appeared to be disappointed he had not seen her and he knew she was not in the house. He went to see him again the day of the funeral and gave him a list of those sending floral wreaths. He seemed pleased, and then he would sob. The witness did not stay long as he was afraid of upsetting the Colonel. After that he tried to visit him every day. The cold which he had contracted seemed to be taking effect and he was getting weaker, he was on the down grade more rapidly than before. He says he noticed a change in his physical condition very shortly after his wife's funeral. He had got a chill and troublesome cough. On occasions he got quite childish, sobbing and crying for a moment or so. Witness could not understand it at all. There was nothing in the conversation to give rise to it. Witness tried to get away from all personal topics but nevertheless the Colonel would sob or cry without apparent cause. He noticed this first about a week after the funeral, that was when he first noticed the crying. He says he thought when he met him in the end of 1920, that he was in his dotage and that condition increased towards his death. He says that Nurse Taylor told him when he was called to break the news of his wife's death that she was afraid to do it because he might have another stroke and pass away. On Tuesday, February 1, he saw the Colonel. He says he appeared to be bright under the circumstances and he did not notice much change physically since the Saturday before. He called every day after and most days saw the Colonel. The cold appeared to be taking a firmer grip as days went on. It never cleared up and continued to the end. He was getting weaker, "I could see that myself." The first time he saw him after the funeral the Colonel was in his chair, but after that he was always in bed. The Colonel mentioned Goulter two or three times and was anxious to know when he was coming down. Both he and Miss Taylor spoke of it.

"I was there the day that Goulter was there. I met Mrs. Gyles coming out about 5.30 p.m. I didn't see the Colonel, because Miss Taylor told me the Colonel was tired and better not see him. The Colonel and I discussed the funeral first time I

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called after. I tried to keep away from personal matters and we talked generally of conditions of the times and of the world and politics, such as I would discuss with any person. I could not say that he was interested. He was not much interested as it was I who did the talking."

Mrs. Gyles saw him on January 31, about 4:30 in the afternoon. She had last seen him in October before. On January 31 his sister, Mrs. Bushe, was there with Mrs. Gyles. The Colonel was in bed. He was then suffering from a bad bronchial cold, was wheezy and very emotional, and physically poorly. Mentally he seemed brighter. He was able to form sentences with occasional loss of a word. He asked Mrs. Gyles about her son who had had an operation, naming him. He asked a lot of intelligent questions as to how the Women's Association meetings were going on, etc., to which Mrs. Gyles was a delegate. He complained about his arms and how thin they were, and he complained of nausea. Mrs. Gyles suggested that perhaps the medicine was the cause of the nausea and he said perhaps it was. From time to time, while she was there, on the 31st, he cried. His eyes would fill up. When he spoke of going home to Virden he cried. After his second operation he was very emotional. She says:—

"I never saw him when he did not cry. I thought he had lots to cry about but did not know why. I thought that the Colonel was cranky and impatient with his sister, Mrs. Bushe, when there on the 31st. He said something about her being there—"Oh! She's always here"—to which Mrs. Bushe replied that if she thought he really meant that she would not come near him for 10 days. Mrs. Bushe said that in rather a joking way."

This witness called again on February 2, between four and five in the afternoon. When she went in she first saw the defendant Taylor, who took her into the sitting room and said—"These men have been smoking here." Mrs. Gyles asked what men and she said—"Goulter, and your boy." I said—"Which one"—and she said "Harry." She said Goulter came down to make the Colonel's will and that he and the Colonel had fixed it up to suit themselves but it was no affair of hers. Mrs. Gyles asked how the Colonel was and Miss Taylor said:—

"Goulter says he is remarkably bright, but he need not tell me about his condition, I know. I know he said that for a purpose. Nobody knows his condition as well as I do."

Mrs. Gyles suggested that perhaps the Colonel was too tired for her to see him but Miss Taylor said: "Oh, no! Goulter went out and wrote and the Colonel had a good sleep." She told her they tried to get Dr. Matheson as a witness but could

not and that Goulter had phoned for Mrs. Gyles' son. Mrs. Gyles then went in to see the Colonel.

"He was sitting up in bed with his glasses on, reading. He knew me and seemed pleased to see me. On Monday I had worn a new coat and the Colonel had asked me where I got it. On this occasion I had taken if off and when I came in he said—'Where did you leave your blunderbuss?' I said—'You mean my coat?' —and he said—'Yes.' We talked of many matters. He said Mrs. Agnew came every day. He said he just had a letter from Mrs. Agnew and handed it to me, but the letter was to Miss Taylor from Mrs. Hamilton, her daughter, but I did not put him right. I don't think he was childish—he was ill and it would have worried him. He said, 'Harry was here,' and asked how he was getting on, and I said 'Very well.' I don't think he mentioned anyone else. He suddenly said—'She got all the wife's dresses and that is enough for her.' I said—'Who?' and he said, 'Mrs. Bushe.' I did not say anything as I thought they were not friendly. He did not mention a will and that statement was made without anything leading up to it. Then he suddenly said —'Why doesn't Goulter go away and give his wife a good time?' I said—'I think she has all she wants,' and he said, 'No, she doesn't.'—On the 31st January I asked if he had got a letter from me at Christmas and he said—'I got one from Willie (that is Mr. Gyles) but none from you.' I said, 'That is strange because they were in the same envelope,' and then Mrs. Bushe whispered to me that he doesn't remember. On February 2 there was a beautiful rose on the dresser and I asked him where he got it and he said the lady and her daughter had brought it but could not remember their names. I asked if the nurse was coming to Virden with him and he said, 'yes, she has promised the wife to stay with me while I live.' I said, 'What will Dr. Clinghan think of that?' and he said, 'I do not know why he does not like her, queer mix-up.' He asked me when I would come again and I said, 'Friday.' Just as I left Mr. Monroe came in."

Mrs. Gyles could not pay the promised visit on Friday but went on Saturday, February 5, about 11:30 a.m. The nurse told her then that the Colonel was very weak and tired. Upon witness suggesting that she had better not go in to see him Miss Taylor said he would be mad if she did not, but to only stay a few minutes. She found him very tired and listless and not inclined to say much, and she remained only about 10 minutes.

"He asked me why I had not come on Friday and said I had to see Teddy. I said, ' see you have the flowers,' and he said, 'Yes, the boys sent them.' I said, 'No, I did,' and he said, 'Oh!' and thanked me. He again complained of nausea and the doctor

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had told him he need not take the medicine, but it made no difference. He said he slept a lot. His condition was different from what it was three days before. He was very grave when I left and asked me when I would be in Winnipeg again and I said I did not know and asked him when he was coming to Virden and he said when it gets warmer; said he had drawn money enough for two months. I said, you are very comfortable, and he said yes, he would be comfortable if it were not for the kids upstairs. He seemed to mumble the word 'comfortable.' I heard a voice and noticed that he was listening, and I said, 'That is Miss Taylor's sister,' and he said, 'Yes, she has come down to see the chickens,' referring to the poultry show."

Mrs. Gyles says that on February 2 she thought he was bright but on the fifth there was a distinct change for the worse physically.

"I thought he was physically very ill and liable to die at any time. He was wheezing as though his bronchial tubes were filled up; his breathing was impeded and his strength seemed to be ebbing away. When I left I don't think he said good-bye. He watched me out of the room. He was not as emotional that day as before; just listless."

Mrs. Agnew, another old family friend who knew the testator well before his health became impaired, says he had a bright way of talking and was very friendly. After the Hosmers came to Winnipeg in October, 1920, she visited them every week or 10 days until Mrs. Hosmer's death, and either visited the Colonel or asked for him by telephone daily thereafter. She had not seen him for some months before October, 1920, and she says his condition after he came to Winnipeg was not at all the same as before.

"He could not speak or remember as before. He was bright in his greetings when I went in, but had not much more to say. If you suggested anything he would answer but I don't think he ever suggested anything himself. After Mrs. Hosmer's death I asked him for Mrs. Fraser's address but he only would say, 'I don't remember—I can't remember.' I have seen him cry without any particular reason; I put it down to weakness. Tears were quite foreign to his nature when well. His general condition was weak and miserable. He could not carry on a general conversation. I would say that after he came to Winnipeg he was rather childish. When I 'phoned to Miss Taylor to ask for the Colonel she always said he was gradually getting weaker. He always knew me when I went in and remembered my name. I did not expect his death but would not have been surprised if it had occurred any day. After his greeting he had little to

say—one had to suggest something. I could see he was growing weaker."

Mrs. Bushe, the testator's sister, who was a frequent, though it appears a not very welcome, visitor, expresses the opinion that the testator had not for years been in possession of his full mental powers and that he was not in a fit state to make a will when either of the documents propounded as wills was executed. She is, however, interested in having both wills declared against, and besides she had a conversation with Mr. Goulter the morning of February 2, before he had gone to see the Colonel on the subject of the Colonel's health and his capacity to make a will. Mr. Goulter then appears to have had some doubt about the Colonel's testable capacity and before going to see him asked Mrs. Bushe how he was. There is some difference between the account of this conversation given by Mrs. Bushe and that given by Mr. Goulter. The latter says Mrs. Bushe told him in reply to his question that she thought the Colonel was able to do business. She says that what she said was that he was as able as he ever would be. She, however, knew that Mr. Goulter expected to draw the Colonel's will that day and she raised no objection to his doing so but asked Mr. Goulter not to influence the Colonel against her.

We now come to the evidence of Mr. Goulter respecting the preparation and execution of the document referred to as the first will. When Mrs. Hosmer died on January 19, he had her will in his possession, with the holograph codicil before referred to. Mr. Goulter wrote a letter to the Colonel setting out the condition of the estate and enclosed a copy of the will and codicil. A short time afterwards he got letters from Capt. Robertson and Miss Sellers, asking him to come down. He wrote a reply on January 31, saying he would be down on Wednesday. On the morning of February 1 he received a telephone message from Miss Taylor enquiring when he was coming down and asking him to come as soon as possible. He asked her if the Colonel was fit to transact business and she said he was quite all right, and added he was brighter since Mrs. Hosmer's death. He came down on the afternoon of the first, bringing with him the probate papers for Mrs. Hosmer's will, and he saw the Colonel on the morning of the second, between 10 and 10.30 a.m., having seen Mrs. Bushe in the meantime. Miss Taylor was at the suite when he called, also Mary Sellars and the Colonel.

"The Colonel evidently expected me. The first business I transacted was to read over the probate papers. I explained to him that by the effect of the holograph codicil he had a life interest in all the property except one mortgage. I read all the

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papers carefully, he stopping me from time to time. Nurse Taylor was sometimes in, sometimes out, looking after him, watchful that I did not overtire him. I think he understood the papers. He was remarkably bright and could make sentences. I had not seen him so bright since December 1918, and I was satisfied as to his capacity. His questions were quite intelligent and he appeared to have an intelligent appreciation of what he was doing. I inferred I was sent for really to make his will and I said—'Colonel, do you want me to make your will?' and he said—'Why, certainly.' I asked Miss Taylor to leave me alone with the Colonel and she went out. I said—'Colonel, whom do you wish to benefit?' and he replied, 'The wife's sister.' I said, 'Do you mean Mrs. Fraser?' and he said, 'Yes.' I said, 'If Mrs. Fraser dies before you, who do you wish to have the estate?' He seemed surprised by the question, but then said 'Ronald.' (We had been discussing the codicil to Mrs. Hosmer's will). I then said, 'Suppose Ronald dies first?' I had to do considerable explaining and finally he decided upon Ronald's issue. I said, 'Any legacies?' and he said, 'Something for the nurse.' I said, 'How much?' He hesitated, and I said, 'One hundred dollars?' Still he hesitated. I said, 'Two hundred dollars?' and he said, 'Yes, I think that is about right.' I said, 'Over and above the salary?' and he said, 'Yes.' I said, 'Anything else,' and he said, 'Something for the children.' I said, 'You mean Mrs. Bushe's children?' and he said, 'Yes.' I said, 'How much?' and he said, 'Five hundred dollars each.' I said, 'Anything for Mrs. Bushe?' and he said, very decidedly, 'Nothing, just for the children.' I then said, 'It will be necessary to appoint an executor,' and he asked my advice and I told him as most of his old friends were up in years, he had better have a trust company, and I suggested the National Trust Co., or the Canadian Guarantee Trust Co., in which he had shares, and he said, 'Put it in my own company.' I said, 'Colonel, I will have to add some powers to the executors,' and went to the front room to rough draft the will, and came back and read it to him, and he said, 'That is all right.' Just then lunch was announced and I was out about half an hour. I think he slept in the meantime. The Colonel was not in bed but sitting up in a room in the middle of the flat, not the dining-room or parlour. There was no discussion when I read the draft, he said 'All right.' I think after completing a fair copy I destroyed the draft. The Colonel was not at table for lunch. After lunch I completed the fair copy and asked Miss Taylor to 'phone Dr. Matheson to come and witness the will. I knew he was the medical attendant. She reported that she could not get him. Miss Taylor and I discussed who was the next best, and I, knowing

that it would require a commissioner to take the affidavits to the probate papers, suggested Harry Gyles, barrister, an old Virden boy and friend of the family. I 'phoned to him and he came up. I showed him first the will and asked him to read it over and asked him to find from the Colonel if he thought it was all right, and I asked him to take the probate papers and the will and see if the Colonel understood them. He went into the Colonel's room, was there 20 or 30 minutes, and came out and said he understood them all right. We both went in and the Colonel signed all the papers. We were both present and saw him sign the will. I read the will to the Colonel before Gyles came and I saw the Colonel sign both pages. I signed as a witness and so did Gyles, both in the Colonel's presence and in the presence of each other. I do not recall any further conversation as to the will. I asked the Colonel if he desired me to write to Sir Henry Juta and tell him the contents of the will and he said, 'Oh yes; I wish you would,' and I wrote to Sir Henry as promised."

In cross-examination by Mr. Hudson, Mr. Goulter says that:—

"The Colonel was when in health a fluent conversationalist, no lagging, and that continued up to the time of his first operation, and afterwards until the 'clot' formed sometime in 1918. After that there was an impediment in his speech, in the Fall of 1918, or early in 1919. He never lost his speech but he lost the power to complete sentences. Sometimes he would initiate a subject but seemed glad if a subject was mentioned, and he would discuss it, but sometimes got stuck for a word and could not go on. Sometimes he would initiate by asking a question and would sometimes lose a word and could not go on. This continued until he went to Winnipeg. He was undoubtedly brighter after his wife's death, on the 2nd February. I thought the impediment was in his mind rather than in the vocal organs. Sometimes he could express himself quite forcibly. On the second February the suggestion of the will came from me. He made no suggestions. He answered questions put by me. I wanted to make it as easy for him as possible. I think the suggestion as to the Bushe children came from him; not in reply to a question from me. He said, 'Something to the sister's children,' but didn't name the amount until I asked him."

Harry Gyles, barrister of this city and an old friend of the family, in response to a telephone call from Mr. Goulter, went to the Colonel's suite on February 2, 1921, and found Mr. Goulter and Nurse Taylor there.

"I went in and saw the Colonel first with Mr. Goulter. I spoke to him and he spoke back. He usually called me by name but he did not this time. Goulter said I had come to witness the

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will and asked me to explain it to the Colonel and he would go out and talk to the nurse. I read the will over to the Colonel and asked him if he understood it and he said, 'Yes.' He wanted to know if any part would go to Mrs. Bushe particularly. I said, 'No.' He asked me if Mrs. Fraser dies where would it go, and I said, 'To Ronald,' and he then asked if both die then what, and I said, 'To the next of kin,' and he asked if that would be Mrs. Bushe and I said, 'Yes,' and he expressed a strong wish that that should not happen, that both should not die. He expressed himself as satisfied with the will and I then called in Mr. Goulter and he came in and we had some discussion but don't remember what. Goulter then took the will and handed it to the Colonel and he signed. I do not remember if it was read over or not. The Colonel signed and Goulter and I witnessed it. There could be no doubt the Colonel knew he was signing a will."

This witness had seen the Colonel 2 or 3 weeks before his wife's death. His condition was not as good then, he said, as when he signed the will of February 2. It was an effort to speak but if he focused his mind he could speak. He appeared to understand what was read to him and asked intelligent questions. In cross-examination he said: "It was quite an effort for him to write. He only wrote his own name."

So far as the evidence discloses, no person saw the Colonel on February 3 except defendant Taylor. Mrs. Bushe called on that day but did not see him. She, however, heard him being violently ill in his room. His condition on the fourth is spoken of by Mary Simpson and Mr. Craig. On that day, according to Mary Simpson, he was much in the same condition as he had been on the second when Mr. Goulter was there. Mr. Craig is very definite about his condition on the fourth when he went. He had known the Colonel 20 or 25 years. The latter was a client of Mr. Agnew, since deceased, and Mr. Craig joined Mr. Agnew in 1906. From that time on he saw a great deal of the Colonel and did some legal business for him. He had not seen the Colonel for some years until just before Chirstmas in 1920, after he came to Winnipeg. On that occasion he saw both him and his wife at their apartments to which he had been called by Mrs. Hosmer on business, and the Colonel also wanted to see him. He says: "I thought he was remarkably well; he seemed to be normal; so very natural." When he called on the fourth he says:—

"The Colonel seemed to be very glad to see me. I did not know what he wanted to see me about and sat down to cheer him up. We discussed his own health and politics and general conditions in Manitoba. We talked of some properties which were handled

in our office in which he had acquired an interest in Mr. Agnew's time, and we discussed the prospects at some length. One of the properties was in Kootenay Lake District and we discussed British Columbia fruit lands. We talked quite a time with no mention of what he wanted to see me about. He discussed Mrs. Hosmer's will and seemed quite hurt. He seemed to think that she had disposed of what was not hers and he seemed to resent the will in favour of her sister. He thought she should not have made such a will until he died. He shed tears but excused her on the ground that she expected he would die first. He talked of the house at Virden. Said he had been told by Goulter that he only had a life interest in it. He said Goulter had been to see him on February 2 and that he talked with him about his wife's affairs. During the interview he mentioned the nurse and said she had been very kind to him. Finally he said he wanted to give everything he had to the nurse. He said he was not sure what he would get from his wife's will as it was all mixed-up. He told me he had Fort William and Kootenay property, some cash in the bank and some bonds. Death was not an immediate prospect for either of us. He spoke of the money and said it would be used up before his death and he wanted the nurse to have the balance. I suggested that the best plan would be to make a will and I asked if a will had been made when Goulter was there and he said he didn't think he had made a will when Goulter was down. He had discussed principally then Mrs. Hosmer's estate. I discussed other objects of bounty, or he did. He mentioned his sister Mrs. Bushe and her children. He said his wife did not like Mrs. Bushe, 'and I don't like her either. We have both done enough for her and family.' He mentioned Mrs. Fraser and said he had no interest in her. He became quite affected when speaking of Mrs. Hosmer and her will. He was also affected when he spoke of the nurse, he seemed to have a great affection for her. He said she was very kind and he wanted her to stay to the end. He said that he had no one dependent on him and no relations in which he had any special interest and he wanted the nurse to have all when he died. I asked him where the cash and bonds were and he said he didn't know but could get the particulars from the nurse."

Mr. Craig says he then left and went and had a talk with the nurse and suggested to her that the Colonel wanted to leave her his property. He says she rather demurred at that. She said he would rather do something for Mrs. Bushe and her family. As to his condition Mr. Craig says he was a little weaker than he had been but not otherwise different.

"I had no trouble at all getting instructions. The instructions

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seemed to have been considered by the Colonel. He mentioned his pension of $170 per month. I spoke about the possibility of the holograph codicil to his wife's will not being a will at all. He seemed interested in the possibility of setting it aside and said Mr. Goulter should not have gone ahead to probate it. I said I would write to Goulter to see if he had considered that, and the Colonel approved."

Mr. Craig then left, and the following day he returned with Mr. Bartholemew and the will was executed. He found the Colonel sitting up in bed and introduced Mr. Bartholemew as his office manager. He told him Mr. Bartholemew had been overseas and the Colonel asked about his battalion and length of service, and they discussed general topics.

"There was no difference in the Colonel's condition then and the day before. He was more emphatic if possible. His condition was no different. His mentality the same as when he used to come to my office."

The will that Mr. Craig had drawn was then read over and explained. He was told that it did away with all previous wills.

"Either then or the day before I went over all the people named in Mrs. Hosmer's will to see whether he wanted to leave anything to any of them, name by name, and he said 'No.' I mentioned Mrs. Bushe. I said, 'Colonel, you are leaving all to the nurse and nothing to your sister,' and asked if he had thought of it, and if he didn't want to leave something to Mrs. Bushe, and he said, 'I will be hanged if I do.' As to Mary Simpson, he said she had the Virden house in his wife's will. As to Mrs. Fraser, he said she was nothing to him. As to the Bushe children, he said he had done enough for them. After some further conversation he suggested he would like to leave something to the girl in Saskatchewan, and after some thought said, 'Give her $100,' but he didn't know her name."

Mr. Craig supposed that the person referred to was a daughter of Mrs. Bushe but was informed by Mary Simpson that Mrs. Bushe had no daughter in Saskatchewan and the girl was not a daughter but the wife of Cheam Bushe, a son. Again Mr. Craig asked if he had made a will when Mr. Goulter was down and says the Colonel apparently thought he had not made a will when Goulter was down, that he had to do only with his wife's estate. He says:—"I did not press him on this point because this will would wipe it out if he had made it." Mr. Craig expresses the very confident opinion that the Colonel had full testamentary capacity and understood perfectly well what he was doing. In

this respect he is corroborated by Mr. Bartholemew, who also says that the Colonel understood exactly what he was doing.

Miss Taylor says that when she went back in September, 1920, the Colonel was better than when she left in December, 1918. "Mentally I thought he was in good shape; I thought better than in 1919 because Mrs. Hosmer was better." The same condition she says continued until after the death of his wife.

"After that he was surprisingly better—he asserted himself—he had to in a way—for say a week after his wife's death. Then he went into the old routine; his physical and mental condition just the same as before her death."

She says there was no change until after February 5, with the exception of 15 minutes on that morning when he was hysterical. After that he was the same as before and in her view quite capable of doing business. She says she first noticed a change about the tenth, but in her examination for discovery she said the change took place on the seventh. He then began to sleep more; was getting weaker, and ceased to take the same interest in things. She says that before that,

"I found his memory very good on things that mattered. He never forgot his shaving and hair cut. He used to remind me of it. From September 1920 the Colonel used to read the morning paper and the London Times. The War or Irish question interested him and he used to mention any matter as he read. I used to understand him perfectly. He talked intelligently."

She then goes on to deny practically all the evidence of Mary Simpson relating to conversations between them. She says it was after Mr. Craig left that the Colonel said to her that they were engaged.

"I said, 'In what,' and he started to laugh. I said, 'You did not say that to Mr. Craig,' and he laughed and I went out of the room. I treated it as a joke. I think the Colonel was joking and I spoke of it to Mary."

She swears she did not exercise any influence over the Colonel as to his will, or ever interfered outside her professional duties. She says Mr. Craig was called to talk about the Kootenay and Fort William lands so far as she knows, that she had 'phoned to him by the Colonel's instructions; that the Colonel did not then but afterwards did tell her that he wanted her to have the Kootenay and Fort William lands.

The events which led up to Mr. Craig being called in are very material. Here we have a man who on February 2 makes a will in which the claims of his kindred were recognised, somewhat capriciously it may be, still, not disinherited in favour of strangers. Two days afterwards he either has forgotten that he

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ever made a will or misstates the fact. In any event he denies having made a will and gives instructions for another of an almost completely, to use the term of the civilians, inefficious character, that is to say, one in which natural affection and the claims of near relationship have been disregarded. Where it has been shown that the mind of the testator was in some measure disordered, the inefficious character of the will is a circumstance which strengthens the presumption against the will.

Miss Taylor says that "the Colonel did not act as though satisfied in his mind after Goulter left but did not express himself." When Mrs. Bushe called the next day she asked Miss Taylor if her brother seemed satisfied and the latter replied that he did not seem quite satisfied. She added that she did not know what was in the will because it "had been made behind closed doors." Why Mr. Craig was sent for, she tells us, was that the day that Goulter had been there the Colonel told her he wanted her to have his Kootenay and Fort William lands, and asked her to tell Mr. Craig he wanted to see him. The natural thing to do in order to carry out such a design if formed would be to send for Mr. Goulter, by whom the will had been drawn, to make the change; but Miss Taylor says no such request was made and apparently she did not suggest the adoption of that course. For some reason Miss Taylor had taken a sudden dislike to Mr. Goulter. To use her own expression, she felt "cattish" towards him. I think it a fair conclusion from the evidence that her dislike had its origin in the fact that she was left but $200 in the will which he had drawn. Quite evidently the Colonel had talked with her about the will he had made on the day that Mr. Goulter was there, because that evening she mentioned the matter to Mary Simpson, then Mary Sellars. The following is Mary Simpson's account of this conversation:—

"After Goulter had left, about tea-time, Miss Taylor said to me that Mr. Goulter had made his own will to suit his own purposes. I do not think she knew all that was in the will. She said the Colonel could not remember all he had said in the will himself. She told me that he did not know what was in the will; did not know what he had written. That same night Miss Taylor told me the Colonel was not satisfied the way the will was drawn but wished her to have everything. She said he wished her to have the house in town and that everything be left to her, as she was going to be his wife. She told me she said to the Colonel, 'You didn't say that to Mr. Goulter, did you?' and the Colonel said he did. I think that conversation was that night and partly the next morning. She said she didn't think that Mr. Goulter had mentioned the Kootenay lands, nor had the Colonel. She said

now that Mr. Goulter had made the will she would not get a thing and the Colonel wanted her to get everything. Her exact words were:—'I won't get a darn cent now and will be lucky if I get my wages.' Mr. Craig's name was mentioned by Miss Taylor when speaking of the Kootenay lands. The next day when speaking of the Kootenay lands I mentioned Mr. Craig as having had something to do with them."

In cross-examination she said:—

"Before Goulter came Miss Taylor said that now that the Colonel is in such good condition he might as well make his will. She spoke of the will once or twice the afternoon Mr. Goulter was there, I cannot recall what she said. Miss Taylor and I were wondering what the Colonel would say in his will. We had a conversation about the will that night. She, either that night or the following morning, said the Colonel had told her several things, and about Goulter leaving her $200, I am sure it was that night or the next morning. I may possibly be mistaken but am pretty nearly certain that conversation was that night or the following morning. It was the same occasion that she told me the Colonel had said to her that he wanted something left to his wife, and he said, 'We are engaged are we not?' and she said, 'For what?' and he said, 'To be married.' I think the mention of property was the next morning. Miss Taylor was talking about the Kootenay lands or the Port Arthur lands and the discussion about these came up at the same time, but I do not know how. We talked of these at no other time. I thought the Port Arthur lands had been sold; It was that which led to the mention of Mr. Craig's name. I cannot remember if I mentioned Mr. Craig's name first. I knew the Kootenay lands were mentioned, and I may have done so but can't remember. On the morning of the third Miss Taylor told me the Colonel had written a letter to Goulter and I saw a letter in his handwriting beginning, 'Dear Goulter,' and asking him to send a copy of his will."

Further on she says:—

"Miss Taylor told me of the bequest of $200 to her the night the Goulter will was made. Mr. Goulter had come out of the room that day in the afternoon and asked me what the nurse's full name was. Very likely I told her Goulter had asked for her name. I think I did. I do not recollect if she made any reply; she may have said that very little would be left to her if Goulter had his way. I gathered that Miss Taylor was being left something, but not sure. It was Miss Taylor who told me of her bequest, but I am not sure if it was that night or the following morning."

Again she says:—

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"I was in the kitchen when she used the words 'darn cent;' I was clearing away the supper table in the dining room between six and seven o'clock and she came to the kitchen and started telling me what the Colonel had told her, that he did not know what he had put in the will and had written to get a copy. It was a surprise to me that the Colonel should want to marry Miss Taylor so shortly after his wife's death; I had known the Hosmers so long. She said the Colonel said he left everything to his wife. 'We are engaged, aren't we?' Miss Taylor said, 'You didn't tell Goulter that, did you?' and the Colonel said, 'Yes.' She said she hoped he had not said that and we both laughed about it. It was Goulter and not Craig or Gyles she mentioned, and it was not on the fourth or fifth February this conversation took place."

Miss Taylor denies practically every statement which Mary Simpson swears she did make. As Mary Simpson was an entirely disinterested witness, I accept her evidence as the more reliable.

Not only was Mr. Goulter not sent for to make the change which Miss Taylor says the Colonel desired to make in the disposition of his property, but for some reason she did not want to communicate with Mr. Craig until after Mr. Goulter had returned to Virden. In order to find out whether or not he had left the city, she telephoned to his sister-in-law Mrs. McAndliss under the pretext of enquiring about his daughter, who had accompanied him to the city. In this way she ascertained that Mr. Goulter was leaving for Virden that afternoon, viz., the third, and that same afternoon she went to Mr. Craig's office. Not finding him in she telephoned in the evening with the result that Mr. Craig came the next morning.

What occurred the morning of the fourth, when Mr. Craig came, has already been stated in the extracts from his evidence. According to Mary Simpson the Colonel's condition that day was pretty much the same as it had been on the second. On the morning of the fifth he was for a time out of his mind. When Mary Simpson went into his room that morning, as she usually did, to ask how he was, he was singing "High-diddle-diddle, &c." When she asked how he was, he merely stared at her and said, "The cow jumped over the moon," and kept on repeating these words. Miss Taylor and Mary Simpson speak of the testator as being on this occasion hysterical. This hysteria lasted, according to the lowest estimate, 15 minutes. Mr. Gyles saw him, as already related, between 11 and 12 that day and has described his condition. That afternoon he executed the second will.

If on the fourth when he gave Mr. Craig instructions the testator had a disposing mind, his condition on the fifth would

be immaterial so long as he was able on that day to follow the reading of the will and to realise that his instructions had been carried out: *Faulkner* v. *Faulkner* (1920), 54 D.L.R. 145, 60 Can. S.C.R. 386; *Manges* v. *Mills* (1921), 64 D.L.R. 305, 50 O.L.R. 175.

I have not set as fully and as accurately as possible all the evidence bearing upon the mental and physical condition of the testator when both the documents referred to as wills were executed. As very often happens in cases of this kind there is a wide difference of opinion between the witnesses as to his then testamentary capacity. The solicitors, by whom the respective documents were prepared, are men of the highest respectability against whom there could be no shadow of suspicion. The same may be said of the gentlemen called in to witness each of the alleged wills, and indeed with respect to all the witnesses. Both Mr. Goulter and Mr. Gyles were of opinion that the document propounded as the first will expresses the true intention of the deceased, and that he had then the necessary testamentary capacity, and Mr. Craig and Mr. Bartholemew are even more emphatic on both points with respect to the document referred to as the second will.

Dr. Clinghan on the other hand, who attended the testator from April, 1919, until October, 1920, thinks that at no time during that period was he competent to make a will. Dr. Blanchard, who knew the testator well in health, made two social calls at his suite in January, 1921. He formed no definite opinion as to his mental condition. The opinion he did form was that he was approaching the point where he would be insane, and in short that he was "all off." Dr. Montgomery attended the testator at the Winnipeg General Hospital during both operations and until his return to Virden after the second operation. In his opinion the testator's mental condition was then normal. He next saw him in Winnipeg in December, 1920, and examined him professionally. He found him in much the same condition as when he had seen him a year and a half before. He thought his ability to do business was as good as ever it was and his ability to make a will then normal. He admits he did not subject him to any memory test. Dr. Matheson had made thirty professional visits to the testator between October, 1920, and the time of his death—these visits being more frequent towards the last. He says he observed no difference in his mental condition in October, 1920, from what it was 4 years before in 1916, when he had last seen him, and, in his opinion, the testator was as normal up to 48 hours before his death as he had been 10 years before. I do not think that Dr. Matheson could possibly have meant that the testator had not

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suffered some degree of mental impairment because the evidence that he had is overwhelming.

The facts concerning which there is no dispute are that both his legs had been amputated because they had become gangrenous as a result of arteriosclerosis; that as long ago as August, 1919, he had been unconscious for a couple of hours, and that subsequent to that time he had on several occasions lapsed into unconsciousness; that his blood-pressure was below one hundred and his heart action required stimulating; that after his second operation in January, 1919, his speech and his memory were affected, that he had to a considerable extent lost the power of speech; that he could not carry on a connected conversation beyond making short sentences; that occasionally he would start a sentence relating to a subject and suddenly break off into something else; that if a question were addressed to him he would try to answer but lose the sentence and have to be helped out; that sometimes his memory would fail in the middle of a sentence and he could not go on without prompting; that he frequently forgot the names of people and events; that he sometimes miscalled people or things, as for instance calling Mrs. Gyles' coat a "blunderbuss;" that he was liable to make irrelevant and unexpected remarks having no relation to the subject-matter of conversation. This tendency is noted by both Dr. Blanchard and Mrs. Gyles. That he lacked power of initiative and scarcely ever introduced a subject of conversation; that when a visitor came in he would brighten up but in a short time lapse into dullness; that after his second operation and before he left Virden business was not transacted by him but by his wife in his presence, and he would assent or dissent by a movement of his head; that he slept a great deal both day and night, and that he was childish and frequently wept without any apparent cause; that he frequently during the last two years sang silly nursery rhymes, and that on the morning of February 5, while doing so, he was for a time completely out of his mind; that both on February 2 and 5 he was suffering from nausea, and there is evidence that after being unconscious he would vomit; that about January 23 or 24 he contracted a heavy cold and cough which developed into pneumonia from which he died on February 12.

It is argued that arteriosclerosis is a progressive disease ranging from normal to total incapacity and death for which there is no known cure. It may exist without loss of mental power, the reason being that in such a case the disease has not spread to the brain. In the case of the testator there were many indications that it had reached that organ. Nearly all the symptoms above enumerated point to that conclusion. That he was from

that cause a good deal below normal mentally admits of no doubt. But that does not conclude the question, because a man's mind may have been in some degree debilitated and his memory impaired by age or disease and yet his mind and memory sufficiently sound to enable him to know and understand the business he was engaged in. A mere flickering remnant of memory is not enough. It must be something more than a mere passive memory.

"He must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in regard to them." [per Blake, V.C., in *Wilson* v. *Wilson* (1875), 22 Gr. 39, at p. 78].

Sir James Hannen, in addressing a jury in *Boughton* v. *Knight*, L.R. 3 P. & D. 64, at p. 72, after explaining to them the degree of mental soundness necessary to make a man responsible for crime, make a contract, contract marriage, or give evidence as a witness, said:—

"But, gentlemen, whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness,—I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention."

In a subsequent case of *Burdett* v. *Thompson*, reported in L.R. 3 P.D. at p. 72 in a note to *Boughton* v. *Knight*, the same Judge said:—

"Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will."

Referring to what he had previously said in *Boughton* v. *Knight*, he continued, L.R. 3 P.D. at p. 73:—

"It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a

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will . . . . From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants."

I have mentioned the testator's lack of initiative. The idea of making a will at all was not initiated by him. It first appears to have been mentioned to him by Rev. Captain Robertson on January 26. Even then the Colonel does not appear to have taken any very keen interest in the subject because all Captain Robertson says is that "he was favourable." In neither of the letters written to Mr. Goulter was the making of a will referred to and it appears quite evident that the chief reason for wanting Mr. Goulter to come down had nothing to do with making a will, although Mr. Goulter quite naturally assumed the contrary. When Mr. Goulter did arrive the Colonel said nothing whatever about making a will until Mr. Goulter asked him if he would do so and he then said, "Why certainly." Even then he did not proceed to tell what dispositions he wanted to make or whom he desired to benefit—all the instructions received were elicited by question and suggestions. The only voluntary suggestion by the Colonel was that there should be "something for the children."

Mr. Craig was not called in to make a will but to make a gift *inter vivos* of the Kootenay and Fort William lands. The suggestion of a will came from him and not from the Colonel. Mr. Craig says the Colonel told him he wanted to give everything to the nurse, but at the same time spoke of using the money and bonds for living expenses. He inferred that the Colonel did not mean to make an immediate gift of the money and bonds, as clearly he did not. He had not to the nurse expressed any desire that she should have anything but the Kootenay and Fort William lands and the latter understood that Mr. Craig was sent for to make a transfer to her of these alone.

Those who oppose the probate of the instrument referred to as the second will invoke the principle stated by Lindley, L.J., in *Tyrell* v. *Painton*, [1894] P. 151, 42 W.R. 343, 70 L.T. 453, that whenever circumstances exist which excite the suspicion of the Court it is for those who propound the will to remove them and to prove affirmatively that the testator knew and approved of the contents of the document. As circumstances which ought to excite suspicion they point to the logical and rational character of the first will and sudden and total reversal of the testators' pre-

viously expressed testamentary intention revealed in the second, as well as to its almost completely inefficious character. They point to the fact that the testator had received the bulk of his property through his late wife; that she had made a will largely in favour of her own sister Mrs. Fraser, with a bequest over in the event of her decease to her son Ronald, and the Colonel in his first will followed closely the dispositions made by her, apparently in recognition of the fact that as the property largely came from his wife's people it was reasonable that it should go back to them. For some inexplicable reason he did not like his own sister Mrs. Bushe and leaves nothing to her. He, however, did like her children and he gives them $500 each. To the defendant Taylor, his nurse, who was faithful and efficient in the discharge of her duties, he gives $200. He is equally logical in the selection of an executor. He happened to be a shareholder in the Canadian Guarantee Trust Co., and when it and other trust companies were mentioned he said at once "put it in my own company." They then contrast with this disposition that made in the second will. All of his relations who received benefits under his first will are entirely cut off. A trifling legacy of $100 is left to the wife of one of his nephews, and the defendant Taylor, who only received $200, now takes the whole balance of the estate, estimated at about $20,000. On the second he expressed a preference for the Canadian Guarantee Trust Co., to which he referred as "my own company," as executor, on the fourth he said that any company but it would be acceptable.

Other circumstances relied upon are that the testator had arrived at a stage in his illness described by Miss Taylor as "the beginning of the end"; that the idea of a will did not originate with him, and that Mr. Craig had been called in only to transfer the Kootenay and Fort William lands; that Miss Taylor was angry when she learned that only $200 had been left her in the first will; that she it was who brought Mr. Craig there, and that the Colonel denied having made a will.

All these circumstances are cogent and demand from the Court a close and jealous scrutiny of the evidence in favour of the testator's capacity when the instrument was made, and that it refrain from pronouncing in its favour unless judicially satisfied that the testator knew and approved of the contents of the document. If he was of sound mind, memory and understanding, and if he knew and approved of its contents, the fact that he thereby cut off his own kindred is immaterial.

Then what evidence is there that he was of sound mind and understood and approved of this document? There is abundant evidence that the nurse was efficient and faithful in the discharge

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of her duties. She had been very kind to him and he had contracted an affection for her. He was utterly helpless and had to depend upon either Nurse Taylor or some person else, and he was very anxious that she should remain to the end. He did not know how long he might live because Mr. Craig says death was not an immediate prospect. Because of the character of his wife's will he did not know exactly what property he had to dispose of. For a man under such circumstances to make a will in favour of the nurse, who had been kind and attentive to him and on whom he was absolutely dependent and who had promised to remain with him during life, is not an unheard of circumstance, particularly as he had no children of his own and he did not like his nearest blood relation.

The fact that he denied to Mr. Craig the making of the first will is relied upon as conclusive proof that his memory was gone. The conclusion I draw from the evidence is that he had not forgotten the first will but that he deliberately deceived Mr. Craig concerning it for some reason of his own. What that reason was I can only conjecture, but it might be the fear that otherwise Mr. Craig might ask embarrassing questions respecting his sudden change of intention. The same may be said respecting his rejection of the Canadian Guarantee Trust Co. as executor. The very emphasis with which he refused to accept that company shows that he did remember the first will and that it was named therein as executor. If I am right in this conclusion, then the incident tends to show capacity rather than a lack of it.

On the whole case, and notwithstanding the circumstances I have above enumerated, I have come to the conclusion that the testator had, when he executed the second will, the necessary testamentary capacity. To arrive at any other conclusion I would have to reject not only the evidence of Mr. Craig and Mr. Bartholemew but to a large extent that of Mr. Goulter and Mr. Gyles, as well as that of Dr. Matheson. It cannot be said that the testator's memory had become extinct, or that it had been reduced to a mere flickering remnant. Impaired and seriously impaired it unquestionably was, and yet I think there was sufficient left to enable him to recollect the property he was about to bequeath, the manner of distributing it and the objects of his bounty, in short, that he had a disposing memory.

Then comes the question, was he induced to execute it through the undue influence of the defendant Taylor? What is, and what is not, undue influence of a nature to invalidate a will has been the subject of discussion in numerous cases, and its meaning is now fairly well defined and may be expressed in two words — coercion or fraud. The leading authority upon the question is

Cranworth, L.C.'s judgment in *Boyse* v. *Rossborough* (1857), 6 H.L. Cas. 2, 10 E.R. 1192, 26 L.J. (Ch.) 256. He there said, 6 H.L. Cas., at p. 48:—

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

In *Hall* v. *Hall* (1868), L.R. 1 P. & D. 481, at p. 482, 37 L.J. (P.) 40, Sir J. P. Wilde says:—

"Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and, not the record of someone else's."

In *Wingrove* v. *Wingrove* (1885), 11 P.D. 81, at p. 82, Sir

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James Hannen explains it in much the same way:—

"To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. The coercion may of course be of different kinds; it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced for quietness' sake, to do anything. This would equally be coercion, though not actual violence."

Sir James Hannen's statement was approved by the Privy Council in *Baudains* v. *Richardson*, [1906] A.C. 169, 75 L.J. (P.C.) 57.

The extent to which the testator must be controlled is stated in a recent case of *Craig* v. *Lamoureux*, 50 D.L.R. 10, [1920] A.C. 349, 26 Rev. Leg. 306, by Viscount Haldane, delivering the opinion of the Judicial Committee. He there says, 50 D.L.R. at p. 15:—

"Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean."

The law, therefore, is settled that to constitute undue influence there must be coercion in some form. Cranworth, L.C., in *Boyse* v. *Rossborough*, *supra*, spoke of fraud as also a species of undue influence but nothing in the nature of fraud is suggested in the case at bar and may be left out of consideration.

It thus appears that undue influence in law means something very different from its meaning according to its popular acceptance: Cranworth, L.C. says 6 H.L. Cas. at pp. 47-48:—

"In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make

a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence."

Pres. Hannen, in *Wingrove* v. *Wingrove*, says 11 P.D. at p. 82:—

"We are all familiar with the use of the word 'influence'; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has an unbounded influence over another that, therefore, when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word."

He goes on to illustrate his meaning by instancing the case of a young man caught in the toils of a harlot who makes use of her influence to induce him to make a will in her favour to the exclusion of his relatives which would nevertheless not be subject to attack on the ground of undue influence. Lord Macnaghten in *Baudains* v. *Richardson, supra*, mentioned Sir James Hannen's illustration and says, [1906] A.C. at p. 184:—"However shocking the case may be, however cruel to his nearest relatives, that is not undue influence."

Another point which seems to be settled is that mere solicitation or importunity not carried to the extent of depriving the testator of power of free volition will not constitute undue influence. Cranworth, L.C., in *Boyse* v. *Rossborough*, referring to the illustration given by him, and referred to above, of a young man making a will in favour of an older companion under whose evil influence he had fallen, says 6 H.L. Cas. at p. 48:—

"Nor would the case be altered merely because the companion had urged or even importuned the young man so to dispose of his property; provided only that in making such a will the young man was really carrying into effect his own intention, formed without either coercion or fraud."

In *Hall* v. *Hall*, Sir J. P. Wilde said, at p. 482 (L.R. 1 P. & D.):—

"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator."

Lord Penzance says in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462, 41 L.J. (P.) 68:—

"The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing,

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and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another."

Sir James Hannen in *Wingrove* v. *Wingrove*, and in *Baudains* v. *Richardson*, and Lord Haldane in *Craig* v. *Lamoureux*, express the same idea. Sir James Hannen points out that even very immoral considerations either on the part of the testator or of some one offering them do not amount to undue influence unless the testator is in such a condition that if he could speak his wishes to the last he would say, "this is not my wish but I must do it."

"If, therefore, the act is shewn to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view—still it is not undue influence." (See *Wingrove* v. *Wingrove*, 11 P.D. at p. 83).

Upon the question of onus of proof the authorities are equally explicit. In *Boyse* v. *Rossborough*, Cranworth, L.C., says 6 H.L. Cas. at p. 49:—

"One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence, is on the party who alleges it. Undue influence cannot be presumed."

This principle was applied in *Parfitt* v. *Lawless*, *supra*, where the testatrix had made the plaintiff, a Roman Catholic priest, her residuary legatee. He had for years resided in the house with testatrix and her husband as domestic chaplain and was at the time of the will her confessor. The plaintiff had nothing to do with the making of the will but it was contended that proof of his relationship to the testatrix raised a presumption of undue influence which the plaintiff was bound to displace. It was held, however, that the presumption which arises with respect to a gift *inter vivos* when the parties stand in certain relation to each other as parent and child, etc., does not arise in the case of wills. Lord Penzance points out that mere suspicion is not proof. It is of course not necesssary to prove every conclusion of fact by direct evidence. From every fact that is proved legitimate and

reasonable inferences may be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima-facie* case as if it had been proved directly. The propositions which those alleging undue influence were bound in this way to prove were, he said, L.R. 2 P. & D. at pp. 472-474:—

"That the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal) but by some coercion or dominion exercised over the testatrix against her will, or by importunity so strong that it could not be resisted. . . . (p. 472). No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail according to the existing law to set aside this will so long as the free volition of the testatrix to accept or reject that advice was not invaded (p. 474)."

The law respecting the onus of proof was conclusively established in *Craig* v. *Lamoureux, supra.* That case also makes it clear that the burden of proof of undue influence is upon the party alleging it and is not satisfied by showing that the person who received the benefit under the will had the power to unduly overbear the will of the testator. It must be shown that in the particular case the power was exercised and that it was by means of the exercise of that power that the will was obtained. That principle was first laid down by Sir James Hannen in *Wingrove* v. *Wingrove, supra,* and was later approved in *Baudains* v. *Richardson, supra.*

Neither is the burden of proof satisfied by showing that the circumstances attending the execution of the will are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis: per Cranworth, L.C., in *Boyse* v. *Rossborough,* 6 H.L. Cas. at p. 51, and adopted by Viscount Haldane in *Craig* v. *Lamoureux,* 50 D.L.R. at p. 15; *Adams* v. *McBeath* (1897), 27 Can. S.C.R. 13.

There is no evidence of any direct pressure or of influence brought to bear by the nurse upon the Colonel to induce him to change the disposition made in his will of the second. None of those who were present in the Colonel's room when Miss Taylor was there, observed any attempt on her part to influence or coerce him. They saw nothing in her conduct or demeanour inconsistent with the proper discharge of her duties as nurse, and if undue influence is to be found, it must be inferred from the surrounding circumstances.

I have mentioned the fact of the Colonel's helpless condition and of his utter dependence upon the nurse, and the nurse's ap-

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proval of Goulter being sent for; of her hopes or expectations that she would be remembered in the Colonel's will; of her sudden and unexplained resentment when told that all she got was a bequest of $200; of her scheming to find out whether or not Goulter had left town before communicating with Mr. Craig; of the fact that she was the instrument alone employed to bring Mr. Craig there. When Mrs. Gyles visited the Colonel on the second, after the will of that date was executed, she found the Colonel perfectly easy in mind with respect to the nurse remaining with him. Mrs. Gyles enquired about his return to Virden and whether or not the nurse was going to go with him, and he assured her that the nurse was, because she had promised his wife she would remain with him as long as he lived. There was no anxiety in the Colonel's mind upon that score at that time. When Mr. Craig came, however, there was a difference. The Colonel's mind seemed to be filled with doubt as to whether or not she would do so. Mr. Craig sounded Miss Taylor on that subject and she at first expressed some hesitation but ultimately promised she would not desert him. It is argued that she must have in the meantime threatened to leave and by use of the weapon of fear had forced the Colonel to revoke the former will and make one in her favour. Assume the fact to be that she entertained hopes of receiving a substantial benefit under his will, however baseless the hope was, and in a fit of pique on learning that her hopes were not to be fulfilled she gave notice of an intention to quit; assume further that in dread of her leaving and in order to induce her to remain he decided to and did make her his sole legatee—could it be said that a legacy so procured had been obtained by undue influence? She was employed by the day and had a right to leave at any time and it does not seem to me that a will made to induce her to refrain from doing that which she had a right to do constitutes undue influence. Coercion of a kind it undoubtedly is, but it is the same kind of coercion as that of a son who threatens to leave the homestead unless his father make a will in his favour.

I can see no evidence of coercive methods being used, and no witness has deposed any. The Colonel undoubtedly entertained a very strong affection for the nurse, and had proposed marriage to her. It is extremely improbable that he would entertain such feeling towards a woman who had coerced him into doing something which he did not want to do. It is argued that she occupied a situation in which she might very easily exercise influence over the testator, but that is not enough. It is not sufficient to show that the opportunity for exercising undue influence existed. It must be shewn that the opportunity had been made use

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of. Neither is it sufficient to show that the circumstances are consistent with the hypothesis that the execution of the will had been procured by undue influence. It must be shewn that they are inconsistent with a contrary hypothesis: *Craig* v. *Lamoureux, supra.* This in my opinion has not been done.

There will be judgment declaring the instrument executed on February 5, 1921, to be the last will and testament of the testator, and admitting it to probate.

In testamentary cases the ordinary rule that the loser pays costs may be deviated from in certain cases. If the conduct of the testator or that of the principal beneficiaries has been the cause of the contention, all costs may be imposed on the estate, even when the will is supported: *Momberg* v. *Jones* (1915), 25 D.L.R. 766. In this case the testator, by making two wills so closely following each other, invited litigation and besides that the conduct of the defendant Taylor, the chief beneficiary, was such as to excite suspicion that she had interfered in procuring the second will. Further directions and costs reserved.

Judgment accordingly.

CHAMBERS AND CAMPBELL ET AL v. MERCHANTS BANK OF CANADA.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. February 3, 1922.

VENDOR AND PURCHASER (§IB—5)—RECOVERY OF DEPOSIT—RIGHT TO.

A purchaser in default has no right to recover a deposit paid under the agreement of purchase.

APPEAL by plaintiffs from the judgment of Simmons, J. Affirmed.

G. B. O'Connor, K.C., for appellants.

J. F. Lymburn, for respondent.

STUART, J.A. (dissenting):—I would allow this appeal.

When the $1,500 belonging to Chambers and Campbell was handed over to the defendant's manager Shields, there had been no contract made. Shields merely insisted that he should have some money in his hands before he would even go to the trouble of seeking authority from head office for reducing the cash payment.

I doubt very much whether, in view of the way the thing was done, it is proper to infer from the evidence that there was an agreement by Brown that the $1,500 deposited should be treated as a deposit as an evidence of good faith with respect to a concluded agreement. Rather do I think the proper inference is that Brown handed Shields the money just to prove that there was money available and as a guarantee, if it was as a guarantee

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of anything, that Brown was negotiating and going to continue to negotiate in good faith.

At any rate, even if it was intended as a deposit or part payment on a contract to be made, can it be inferred that Brown intended it as a deposit on any kind of a contract that by new offers and counter offers might eventually be arrived at? If it was at the time of payment (and that is the only material time in the absence of any specific reference to the subject subsequently) intended as a deposit on the contract, which would be brought about by the acceptance of the option, it is sufficient to say that, even if there was an oral acceptance of the option and a contract thereby created, the bank did not stand by that contract. It proceeded to draw up a more elaborate one. It varied in one important particular the terms of the option and it added additional important terms. So that it was undoubtedly by mutual consent that any contract, that may have been arrived at by an oral acceptance of the option, was treated as not binding, that is, as really rescinded, and new negotiations were entered upon. In those negotiations a great number of stipulations were made which would never have been held to be included in the option agreement. These were discussed pro and con in the presence of the bank's solicitor. But all these discussions were with a view not to an oral agreement but a written one. In spite of the findings of fact by the trial Judge in favour of the account given by the defendant's witnesses of that discussion, I, with much respect, feel compelled to hold that the parties always then intended to have a written agreement drawn up and that Brown never intended to be bound until he assented to the terms of the written agreement as presented to him. It was not denied by any of the defendant's witnesses that the written agreement contained clauses dealing with subjects not discussed at the meeting, notably the forfeiture clause. There is no evidence that Brown ever assented to that and yet that was an offer of a term, made by the bank, which had never been spoken of or conveyed to Brown until the written agreement was sent to him. I find nothing to justify a conclusion that Brown ever assented to that and to other clauses in the same position. He did tell Shields over the telephone that his solicitor had approved of it but that was not enough. One witness did say that Brown "seemed to be satisfied with it." But that is not enough.

The inference which I draw from all the facts, even accepting the whole account given by the defendant's witnesses as true, is that Brown never intended to bind himself until he signed the written agreement. He intended that that, not the oral dis-

cussion leading up to it, should be the agreement. And I think too that such was the intention of the bank as to its obligation. I cannot bring myself to conclude that Brown as agent for the Brown Investment Co. or Shields as agent for the bank ever even dreamt during the negotiations that he was creating a contractual relationship binding on his principal by mere oral speech rather than merely agreeing upon what paragraphs should go into a proposed written document which, when executed, by him and then alone should be binding on the principal. Why, it may be asked, did the bank never even sign the agreement in its own hands? And recurring to the option agreement I would like to add that I should have been very much surprised if the bank would ever have admitted that by the payment of $1,500 Brown had ever accepted the option so as to make the agreement in force in his favour as against it. The bank would have contended, and I think rightly, that it was entitled to the cash payment of $7,500 before the option agreement could have been turned into a sale agreement as against them. (See *Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555.)

So that I am, with respect, of the opinion that no agreement was ever concluded at all and that, therefore, the bank held the money without consideration merely as money had and received. Certainly, it was never contended that it had been paid as the price of writing a letter to head office or of agreeing merely to negotiate further. The real fact was, in my opinion, that Shields wanted to see some money in sight and Brown put it in his hands so that he could see that it was there and that was all.

So that I think the Brown Investment Co. were entitled to recover the money. I do not perceive any reason for thinking that Brown, as against the bank, acted improperly. Many a man enters into negotiations which he is compelled for lack of necessary financial strength, to drop. And if Shields had not insisted prematurely on seeing some money, if he had got head office to say whether they would stand by the $10,000 cash provision or reduce it to $7,500, Brown would not have been led to produce and deposit the money. Yet he was led to do so. But that it was, or ever became, a deposit on a concluded agreement, I am, for myself, quite unable to conclude.

And in coming to this conclusion, I wish to emphasise the fact that I assume everything told by the defendant's witnesses to be true.

But the Brown Investment Co., one of the plaintiffs, do not appeal. This does not, however, in my opinion, present any real difficulty. The plaintiffs Chambers and Campbell, who handed

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this money to the Brown Investment Co., as well, it will be noted, as this very Brown Investment Co. itself, come into Court as plaintiffs and in a joint statement of claim it is alleged, and, therefore, alleged and admitted by the Brown Investment Co., that the latter got the money from its co-plaintiffs by fraud. So long, therefore, as it is not necessary to connect the defendant bank with the fraud I can see no reason for enquiring whether there was in fact fraud or not. So long as the bank is bound to return the money to the Brown Investment, plaintiff, I do not see how they are concerned with the other matter.

The Brown Investment Co., come into Court and say, "We have sinned, we have got money by fraud from our co-plaintiffs, we want to return it. But it has got into the hands of the defendants under circumstances which entitle us to get it back from them. We want to recover it back from them but merely that we may restore it to the persons from whom we fraudulently obtained it."

Now, of course, it is very wrong to defraud. But it is certainly not wrong, but eminently proper, to do one's best to remedy the wrong.

The only question is as to the right of Chambers and Campbell to get a judgment directly against the bank. The money was trust money in the hands of the Brown Investment Co. in view of the admitted fraud. If the bank is bound, as I hold it is, to return the money to the Brown Investment Co., if it received it without valuable consideration from that company, and I think it did, why should Chambers and Campbell not be entitled to follow it in their hands and get a judgment directly in their own favour for it? My opinion is that they are entitled to do so. In *Morley* v. *Loughnan*, [1893] 1 Ch. 736, 62 L.J. (Ch.) 515, Wright, J., held that money which had been obtained by fraud and undue influence could be recovered from the hands of innocent third persons who had given no consideration for it. And in that case the third party had a right to retain the money as against the wrongdoer, it being apparently a gift. And I do not doubt that other precedents can be found because it is simply in accord with the general rules of equity as to trust moneys.

I think Chambers and Campbell are entitled to take advantage for their own direct benefit of the rights of the Brown Investment Co. against the bank. I would, therefore, allow the appeal with costs, set aside the judgment appealed from, and direct judgment to be entered for the appellants for $1,500.

But as in the statement of claim fraud, or at any rate "false

representation" which strongly suggests fraud as alleged against the bank in para. 6 of the statement of claim, which was a joint one, and as this charge was not withdrawn till the very opening of the trial, I would give no costs of the action.

BECK, J.A. (dissenting):—I would allow the appeal with costs to the extent and substantially for the reasons given by my brother Stuart without however, depriving, as he does, the plaintiffs of their costs. Although it is said to be the general rule that a party, setting up fraud but failing to prove it, though succeeding nevertheless, ought to be deprived of costs, I think the rule ought not to be given effect to, unless the fraud alleged is glaring and likely to injure the reputation of the party against whom it is alleged. The inference I think that one would naturally draw from the character of the transaction and the parties involved would be that the fraud proposed to be established was more or less technical and not seriously reprehensible from the moral point of view.

I am furthermore of the opinion that the plaintiffs Chambers and Campbell are entitled to succeed on the additional ground, namely, that, while it was Brown who initiated the negotiations yet in the course of those negotiations and while they retained their character of mere negotiations, and before the handing over of the personal individual cheques of these two plaintiffs —the amount being thereby distinctly earmarked as their money —the bank knew that these two plaintiffs were principals in the negotiations as much as Brown—though in different proportions—and that Brown's acts could not bind them, unless he had actual authority from them for such acts. With such knowledge, the fact that the contract, if concluded, was to be in the name of Brown or of his company, made, in my opinion, no difference. In this view it was the bank's duty if it chose to carry on its negotiations with Brown only and to settle the final terms of the agreement with him to see, *if they proposed to bind his two associates,* that Brown's final word carried with it their actual approval. On the evidence, it is clear that that, even assuming Brown did finally approve, was not the fact.

IVES, J.A.:—This action was originally brought by Brown Investment Co. and when it came to trial the plaintiff moved to add the appellants and amend the claim. This was allowed and the action came on for trial before Simmons, J., at a later date and was dismissed. From his judgment the plaintiffs added now appeal but the Brown Investment Co. do not appeal.

The facts pertinent would seem to be that on February 24, 1920, the defendant granted an option to purchase to Brown In-

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vestment Co., good for a period of 60 days from March 1, 1920. The subject of the option was a brewery property. The option names the purchase price of $75,000 and of this the down payment is fixed at $10,000.

Between February 24 and March 18, 1920, Brown, an officer of the Brown Investment Co., had negotiated with the appellants to the extent that they conditionally agreed to take between them a three-quarter interest with Brown's company in the purchase. They saw the option which I have referred to. The appellants at no time saw or dealt with the defendant. They insist they were dealing exclusively with Brown. Some time before March 18, Brown had an interview with Shields, the officer of the respondent with whom he had been dealing, with the object of inducing the bank to reduce the cash payment from $10,000 to $7,500. Shields refused to consider the matter or consult his head office unless a substantial deposit was first made by Brown. Brown, thereupon, paid over to the bank $1,500 made up by two cheques dated March 18, one made by the appellant Chambers for $500 and the other by the appellant Campbell for $1,000 both payable to the Brown Investment Co. These cheques were endorsed and handed over by Brown as cash, and as the owner of them.

Shields thereupon obtained authority from his head office to reduce the down payment to $7,500 and so notified Brown who thereupon attended the bank's office where a formal agreement was fully discussed and the provisions to be incorporated agreed to. This agreement was prepared and submitted to Brown for approval who in turn submitted it to his solicitor and later advised the bank of his solicitor's approval.

This formal agreement was not executed but was exhibited at trial and nowhere in this document is there any mention made of the names of these appellants. It is simply an agreement for sale of the property from the bank to Brown Investment Co. It should also be noted that in this document the down payment is fixed at $7,500.

Then, there is a receipt given by Brown to these appellants—undated—for the money represented by their two cheques. This reads:—"Received from Walter Campbell and Garnett Chambers the sum of $1,500 as deposit for the Strathcona Brewery machinery and property. Balance of $6,000 to be paid on or before May 1 and the additional payments as outlined on the letter of option."

Then there is the evidence of the appellant Campbell in cross-examination:

"Q. You were going to purchase from the Brown Investment? A. Yes. Q. Not from the bank? A. No. Q. You had nothing to do with the bank? A. Nothing at all."

And the evidence of appellant Chambers:

"Q. You never had any dealings whatever of any description with the bank or any of its employees? A. No, never had any dealings with them."

There is no doubt the appellants were deceived by Brown but I cannot find anything upon which the relationship of agency between these appellants and Brown Investment Co., can be satisfactorily established, so as to fix the bank with liability. Certainly, the appellants can recover from the Brown Co., but not from the defendant unless the Brown Co. can do so.

The trial Judge finds as a fact that Brown Investment Co. conditionally accepted the option. The condition was the reduction of the down payment, which was met. The payment of $1,500 under the circumstances shown must be treated as a deposit to be taken into account when the balance of the down payment was paid. The deposit is a guarantee for performance of the contract.

In *Howe* v. *Smith* (1884), 53 L.J. (Ch.) 1055, 32 W.R. 802, 27 Ch. D. 89 at p. 98, Bowen, L.J., says:—"A deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase." Failure to perform prevents the purchaser recovering his deposit.

If a deposit is made without terms then I think it must be implied that the deposit will be taken in account of the purchase money on performance. See *Howe* v. *Smith*. See also *Whitely* v. *Richards* (1920), 57 D.L.R. 728, 48 O.L.R. 537.

These appellants must, I think, under the strong findings of fact by the trial Judge, be left to their remedies against the Brown Investment Co.

I would dismiss the appeal with costs.

HYNDMAN, J.A.:—This is an appeal by the plaintiffs Chambers and Campbell from the judgment of Simmons, J., who gave judgment at the trial dismissing the action of all the plaintiffs with costs.

The history of the case material to the issues involved may be summarized thus: The defendant bank owned or controlled a property known as the Strathcona Brewery in the City of Edmonton. As a result of lengthy negotiations between it and one George Brown, president and manager of the Brown Investment Co. on February 24, 1920, the bank gave to the said

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company an option to purchase said brewery in the following terms:—

"The Merchants Bank of Canada Letter Head.

Edmonton, Alta,, February 24th, 1920

The Brown Investment Company, Limited,

Edmonton, Alta.

We beg to advise that our general manager has authorised granting you option for 60 days from March 1, 1920, to purchase property known as the Strathcona Brewing & Malting Company, Limited, site, plant and equipment, on the following terms: Consideration net to the bank payable as follows: $75,000, cash $10,000 net to the bank, $5,000 at the expiration of one year, and the balance in annual payments of $10,000 each with interest at 7% per annum on all deferred payments, payable semi-annually.

The bank reserves all right and title to all machinery, equipment and contents of the brewery premises, but grants the purchasers under this option the privilege of disposing of the contents, machinery and so forth by sale on the understanding that the proceeds shall be applied upon the purchase price in addition to the cash payment above mentioned, or used to improve or remodel the building, and any sale of the contents and so forth is to be approved jointly by the purchasers and the bank.

Sgd. W. A. Shields, inspector."

Subsequently, about March 20, 1920, Brown requested the bank to grant easier terms, namely, a reduction of the cash payment of $10,000 to $7,500. The agent of the bank pointed out that the head office alone could make such alteration in the option, but at the same time advised Brown that he would not go to the trouble of communicating with Head Office or put them to further inconvenience in the matter, unless a substantial cash payment was made by way of deposit, as an evidence of his good faith and ability and intention to carry out any agreement which the bank might consent to. At this time, Brown informed Shields, the bank's local inspector, that he was negotiating with the appellants Chambers and Campbell to sell a part interest to them. Later in the same day, Brown returned to the bank with two cheques of Chambers and Campbell for $500 and $1,000 respectively which he handed over to the bank in pursuance of the former arrangement that the bank would refer the question of a reduction of the cash payment to its head office.

No communication of any kind took place between the ap-

pellants and respondent bank at this or any other time in connection with the option or purchase of the premises.

In due course the head office advised its branch here that they would agree to the reduction asked for and this information was communicated to Brown. Eventually, a formal agreement was prepared and submitted to Brown and verbally assented to, though never signed by him, although he had several times been requested to do so. Various excuses were offered: that an officer of the company was not available; that the appellants were making certain inquiries; that he had extended the time for Chambers and Campbell until May 1. Progress became very unsatisfactory and eventually Brown informed the bank that appellants wished to withdraw, but that his company would carry on alone. During all this time, no exception was taken to the terms of the formal agreement or option. No further moneys were ever paid the bank and no other steps taken by Brown to carry out the purchase.

On May 20, 1920, however, the Brown Investment Co., commenced action against the bank for a return of the said deposit of $1,500 on the ground that the same had been paid as an evidence of good faith pending the settlement of the terms of the proposed sale, and that the terms had never been agreed upon or reduced to writing. The action was set down for trial for September 29, 1920, on which date an adjournment was moved for by Brown Investment Co., and also for leave to amend the statement of claim by adding the names of the two appellants as co-plaintiffs, and an order was made accordingly by Scott, J.

The appellants' claim is founded on an alleged false representation made by Brown Investment Co., as to the completeness of the brewing machinery; the amount of money necessary to commence brewing operations; that the Brown Investment Co. had obtained, or made arrangements to obtain, the necessary Dominion license entitling them to carry on a brewing business.

It is, I think, common ground that Brown did mislead the appellants. It is further alleged that Brown was induced to deliver the said cheques of the appellants by the bank making to Brown the false representations above mentioned. The appellants further say that at the time of the giving of the said option to Brown Investment Co., the bank agreed to pay an amount up to $400 on account of Brown's expenses if he should go to the United States with the object of endeavoring to sell the said property and that this fact was not disclosed to the appellants.

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The trial Judge dismissed the action of all the plaintiffs; with respect to Brown he held the $1,500 was not recoverable on the ground that the deposit was paid by him on account of an agreement which failed to be performed owing to the withdrawal or inability of Brown and not because of any act or omission on the part of the bank. The trial Judge also held, and I think rightly, that although the formal agreement was never signed, all its details had been agreed to; but that in any event Brown had an agreement (that is the original one) enforceable against the company.

The law seems to be well settled that the return of a money deposit made by the purchaser, with a view or upon a contract for the sale and purchase of land, is ordered only in cases when the purchaser seeks specific performance and is ready and willing to carry out his contract and the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money. The repayment in such cases is decreed as a form of equitable relief against forfeiture.

See *Dobbin* v. *Niebergall* (1920), 56 D.L.R. 510, 48 O.L.R. 343; *Whitely* v. *Richards* (1920), 57 D.L.R. 728, 48 O.L.R. 537; *Walsh* v. *Willaughan* (1918), 42 D.L.R. 581, 42 O.L.R. 455.

In the decision last cited Mulock, C.J. Ex. at p. 587 says:—"In his judgment, Cotton, L.J. quotes with approval from the judgment of James, L.J. in *Ex. p. Barrell* (1875), L.R. 10 Ch. 512. The purchaser had become bankrupt, and the trustee in bankruptcy disclaimed the contract under which he sought to recover the deposit, and James, L.J. said (p. 514):—'The trustee in the case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refused to perform the contract and then says, 'Give me back the deposit.' There is no ground for such a claim.' Quoting these words Cotton, L.J., proceeds (27 Ch. D. at p. 95):—'The deposit . . . is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract it goes in part payment of the purchase money, for which it is deposited; but if on the default of the purchase the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit.'"

The said Chief Justice also distinguishes *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, and points out that in that case the purchaser sued for specific performance. He also quotes the words of Lord Hershell in *Soper* v. *Arnold* (1889),

14 App. Cas. 429, 434, 59 L.J., (Ch.) 214, 38 W.R. 449:—"It seems to me that he was in default, that the contract went off owing to his default, and that, under those circumstances, he cannot recover the deposit."

These decisions seem to me to be entirely consistent with sound reason and justice for as Riddell, J., in the same case (*Walsh* v. *Willaughan*) at p. 591, says "But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. In the language of Kekewich, J. 'That would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely take advantage of his own wrong. I mean wrong, not in the moral sense, but in the sense that he could not perform his contract;' " *Soper* v. *Arnold* (*supra*).

The Judge found in the case at Bar, that the contract went off, due entirely to the fault of the plaintiff Brown. That being the case, applying the law as laid down in the decisions referred to, the conclusion must be that the plaintiff Brown is not entitled to a return of the deposit of $1,500.

But the appellants contend that notwithstanding their co-plaintiff is disentitled to a return of the deposit, nevertheless, because the bank placed Brown in the position to make these false representations by giving him the option; entitling him to the increase over the $7,500; and by agreeing to pay his expenses in connection with finding a purchaser, that they should be allowed to claim the moneys which they furnished him with which to make such deposit.

The evidence given by the plaintiff Brown and the bank officials was very conflicting on the important issues, and the trial Judge found in effect, that the appellants were not dealing with the bank in any way directly or indirectly; that they were dealing solely with the Brown company, relying entirely upon Brown, and not upon any understanding that Brown's representations were made on behalf of the bank. He finds expressly that there were no mispresentations made by the bank which would give them any ground for asking relief. The trial Judge generally accepts the evidence of the defendant bank's witnesses as against Brown, the consequences of which, after a careful perusal of the evidence, is that there was no authority given Brown to act in any way for the bank, and no misrepresentations whatever were made by the bank with the object of inducing either Brown or the appellants to enter into a contract of pur-

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chase. The appellants themselves admit quite frankly that there was no privity at all between them and the bank. Their cheques were made payable to Brown who endorsed them to the respondent.

It would seem then that the only possible ground upon which appellants might hope to succeed would be that of fraud or conspiracy. To my mind, there is not a scintilla of evidence in support of either. If they have any claim at all, it must be against the only party with whom they negotiated or had any business relations in respect of the property, namely Brown or his company.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A.:—I can see no way to give relief to the appellants. There was no privity between them and the bank. I do not think the Brown Investment Co. was agent for the bank nor was there any relationship of trust established.

I think the bank was a holder in due course of the appellant's cheques and had all the rights of such a holder as stated in sec. 74 R.S.C. 1906, ch. 119, of the Bills of Exchange Act.

I see no reason to question the finding of the trial Judge that the bank took the cheques in good faith.

The only question that has given me any anxiety relates to the consideration for the payment. The trial Judge found that there was a good consideration and his finding stands not appealed from so far as the Brown company is concerned. Under such circumstances, it would be rather anomalous to hold in the same action that there was no consideration, but apart from that after a careful perusal of the evidence I am unable to say the finding was not justified.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

REX ex rel STONEBERG v. PERRON.

British Columbia County Court, Thompson, Co. Ct. J. January 6, 1922.

INDICTMENT INFORMATION AND COMPLAINT (§ II E—30)—CONVICTION UNDER B. C. FISHERY REGULATIONS—INFORMATION DISCLOSING NO OFFENCE—POWER OF COUNTY JUDGE TO AMEND.

Where an information discloses no offence the only power a Justice has is to direct that a new information be sworn, or that the old information be amended and re-sworn. In either case a new charge is laid. Where no offence is disclosed in the information the proceedings taken thereunder are not an irregularity but a nullity. The defect is fundamental and irremediable and an Appellate Court cannot amend such defect.

A conviction that the three accused, did on . . . . unlawfully take more than 25 trout in one day contrary to sec. 1(e) of the Fishery Regulations of B. C. held to be invalid as disclosing no offence under the section.

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REX EX REL STONEBERG v. PERRON.

Thompson, Co.Ct.J.

APPEAL from a conviction by a Justice of the Peace for a breach of the Fishery Regulations of British Columbia sec. 1 (e). Quashed.

G. J. Spreull, for appellants.

W. A. Nisbet, for respondents.

THOMPSON, C.C.J.:—This is an appeal from a conviction made by Louis Perron, Esq., a Justice of the Peace in and for the county of Kootenay, whereby the appellants, Oscar Stoneberg, John Moe and Thomas Gustafson, were convicted that they did on October 27, 1921, at or near Glenlily, in the county of Kootenay, unlawfully take more than 25 trout in one day contrary to sec. 1 (*e*) of the Fishery Regulations of British Columbia.

The facts are that the three appellants were seen starting out to fish and later in the day were found by Constable Kelf of the Royal Canadian Mounted Police with a bag, or sack, full of fish, which were subsequently counted and found to be 137 in number, of which about 124 were found to be trout coming within the classes mentioned in the section of the fishery regulations. The accused did not deny that they had caught the fish, and the number largely exceeded the aggregate which the three of them could lawfully catch. There is no doubt but that the appellants caught more than the allotted number of fish, and I would hold that the onus was cast upon each individual accused to show that he himself did not catch more than the allotted number.

Mr. Spreull made several objections to the conviction, but the only one upon which I feel called upon to make a finding is that the information charges that the three men took more than 25 trout in one day.

It is clearly within the regulations for three men to take more than 25 trout; they can take 75 provided each man takes 25 only. Not only the information, therefore, but the conviction is clearly wrong on the fact. They should have been charged that they each took more than 25 trout in one day. The question, therefore, for me to consider is whether I can amend the information and conviction to bring them within the words of the regulations.

Section 754 of the Code allows me to amend any defect which the Justice could have amended by reason of secs. 723, 724 and 725, but I can go no further; or I may ignore any defect mentioned in these sections. I have the same power that the Justice had, but where no offence whatsoever is disclosed in the information the Justice has no power to amend the information to disclose an offence and proceed with the hearing. As stated in Tremeear's annotated Criminal Code under sec. 710, at p. 956;—

"There is no express power to amend an information which is

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subject to Part XV; but after an amendment is made, it may be treated as a new information. Certain defects and variances are declared by the Code not to be material; secs. 723-725; and the Justice may order particulars. Sec. 723 (2). If the Justice allows an amendment of a sworn information, it is a preferable practice in all cases to have the information re-sworn. But an information will not be invalidated by failure to have it re-sworn if it does not charge a new offence."

Where the information discloses no offence the only power a Justice has is to direct that a new information be sworn, or that the old information be amended and re-sworn. In either case a new charge is laid. Where no offence is disclosed in the information the proceedings taken thereunder are not an irregularity but a nullity. The defect is fundamental and irremediable, *Rex* v. *Little* (1915), 27 Can. Cr. Cas. 422. The Appellate Court cannot amend where the defect is fundamental and irremediable, *Rex* v. *Dunlap* (1914), 22 Can. Cr. Cas. 245. In that case no date whatsoever was mentioned of the commission of the offence. I held in that case that I had not the power to amend so as to insert a date. Had the wrong date been mentioned I would probably have had the power to insert the proper one by virtue of sec. 724.

The latest case I have been able to find affecting the facts in this appeal is that of *Rex* v. *Saunderson* (1920), 34 Can. Cr. Cas. 81. That case was very similar to the present one. The accused was charged that he did unlawfully sell liquor contrary to The Saskatchewan Temperance Act, 1917, ch. 23, and on that charge convicted. He appealed, and the appeal was heard in the Court of King's Bench, Saskatchewan, by Taylor, J. He found as a matter of fact (as I do here) that the accused was guilty. He found that the only offence of which he could be guilty was under sec. 24 of the Saskatchewan Temperance Act. He cites a great many authorities as to the description of the offence both from the Ontario reports and the English reports, all of which had come up on *certiorari*. The case before him, however, was an appeal just as this one is. He cited also sec. 65 sub-secs. 1-2 of the Saskatchewan Temperance Act 1917, ch. 23, which, eliminating the parts not applicable, provides that:—

"No conviction . . or proceeding under this Act shall be held insufficient or invalid . . by reason of any other defect in form or substance, provided it can be understood from such conviction . . . or proceeding that the same was made for an offence against some provision of this Act . . . and there is evidence to prove such offence.

Upon any application to quash such conviction . . . in appeal

. . . the Court or Judge to whom such appeal is made . . . shall dispose of such appeal . . . upon the merits, notwithstanding any such . . . defect as aforesaid; and in all cases where it appears that the merits have been tried, and that the conviction . . or proceeding is sufficient, and valid under this section or otherwise, such conviction . . or proceeding shall be affirmed or shall not be quashed (as the case may be); and such Court or Judge may in any case amend the same if necessary."

He based his decision principally upon that of *Rex* v. *Crane*, [1920] 3 K.B. 236, 89 L.J. (K.B.) 813, in which it was held that the proceedings were to be treated not as a trial in which some irregularity occurred but as not being a trial at all. He quotes *Johnson* v. *Needham*, [1909] 1 K.B. 626, 78 L.J. (K.B.) 412, in which it was held that the offence charged must be a single, distinct, positive and definite charge.

If, therefore, the omission to lay out a "single, distinct, positive and definite charge" makes the proceedings not an irregularity but a nullity, I cannot help but arrive at the conclusion that where the charge as laid is no offence at all I cannot amend.

While it is unnecessary for me to do so, still as counsel for the respondents has requested me to suggest any deficiencies in the regulations I would point out one way in which, to my mind, the regulation is defective. The regulation reads as follows:—

"Section 1 (*e*): No one shall take in one day by angling or trolling or by both means more than twenty-five Cut-throat, Rainbow or Dolly Varden Trout, Salmon Trout or Rocky Mountain Whitefish, or of the different species than will in the aggregate amount to more than twenty-five fish."

It is manifestly impossible that the Crown would be able to prove that the fish in the possession of an accused person were all taken in one day or that they were taken by angling or trolling. Where two or more persons are found together, as in this case, with an aggregate of more than 25 fish each it is manifestly impossible for the Crown to prove that each man is guilty. It may only be one or two. While I might be prepared to go to the extent of placing the onus upon the accused under such circumstances, I would suggest that the mere fact of the possession of a greater number of fish than the law allows to be caught should cast upon the accused the onus of proving his right to their possession, in other words follow the procedure that is followed in the Game Act, 1914 (B.C.) ch. 33.

For the reasons I have given I am reluctantly compelled to quash the conviction. Under the circumstances, however, there will be no costs.

Conviction quashed.

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S.C.

Re STANDARD IMPORTS Ltd., Ex parte CANADIAN EXPRESS CO.

Quebec Superior Court in Bankruptcy, Maclennan, J. January 11, 1922.

BANKRUPTCY (§ III—26)—EXPRESS COMPANY'S MONEY ORDER CONTRACT—TRUST FUNDS—PRIORITY—BANKRUPTCY ACT 1919 (CAN.) CH. 36.

The money paid in to a company for money orders, under a trust agreement, with an express company whereby the treasurer of the debtor company was appointed an agent for the express company for the purpose of issuing such money orders and agreed that the funds representing each money order should be the property of the express company and should be kept in a separate trust account, is payable to the express company, on an assignment of the debtor company under the Bankruptcy Act 1919 (Can.) ch. 36, in preference and priority to the claims of other creditors.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

APPEAL from a ruling of the authorised trustee, that the appellants claim must rank as an ordinary creditor and share rateably with the other creditors. Reversed.

MACLENNAN, J.:—The claim of the creditor arose in the following manner: On March 26, 1910, Margaret H. Cooney, the secretary and treasurer of the Standard Imports Ltd., was appointed by the Canadian Express Co., as agent for the sale of its signed money orders and entered into a written agreement to account for each money order and the proceeds thereof and to hold in trust such proceeds and every part thereof entirely separate from other funds in her hands and to pay over the whole of said proceeds from time to time to the express company as required after deducting her lawful commission, said agreement further stating "all papers, moneys, vouchers and documents used in connection with this agreement and the business thereunder or incidental thereto shall be the property of the Canadian Express Co.," and, concurrently therewith, the Standard Imports Ltd., having approved of the appointment of Cooney for the issue of money orders while in its employ by an agreement in writing, covenanted with and guaranteed to the Canadian Express Co., that Cooney would duly perform the terms of her contract and would from time to time, as desired by the express company, pay over to it the proceeds in her hands resulting from the sale of money orders.

On March 18, 1921, the Standard Imports, Ltd., made an authorised assignment under the Bankruptcy Act, 1919 (Can.) ch. 36. At that date Cooney was indebted to the express company for money orders issued by her amounting to $633.05. On March 29, 1921, the Standard Imports Ltd., filed its sworn statement of affairs in which the Canadian Express Co. is stated to be a preferential creditor for $595.06. The express company filed a claim for $633.05, and on August 3, 1921, the authorised trustee

notified the express company that its claim must rank as an ordinary claim. From this decision of the authorised trustee the creditor has appealed to the Court and asks that the decision of the authorised trustee be reversed and that he be ordered to pay the claim in full by privilege.

Cooney, the secretary and treasurer of the debtor, was appointed agent for the sale of the express company's money orders as a matter of convenience to the debtor. She was supplied with a book of blank money orders by the express company and from time to time issued money orders in connection with the business of the debtor. She never issued any money order for any one else. The express company was in the habit of sending a collector, usually weekly, for the purpose of collecting the amount of any money orders which had been issued since his last visit. Cooney did not keep the money representing the orders which she issued separate from other funds in her hands, but allowed the money to remain in the hands of the debtor and when the express company's collector called he received a cheque from the debtor. This method of settlements was carried on apparently with the consent and approval of the express company, the debtor and Cooney, who were all parties to the written agreement providing that the money representing each money order was held in trust separate from other funds and was the property of the express company. Cooney, when examined at the hearing, testified that when she issued these money orders for the debtor she did not get the money in her own hands at the time as she should have done under her agreement, but that the money was in the possession of the debtor for the purpose of paying the express company when its collector called. It appears by the sworn statement of affairs that at the date of the assignment the debtor had $187.33 to its credit in two banks, and $160.09 cash on hand, forming a total of $347.42. The balance of its assets consisted of stock in trade, fixtures, book debts, machinery and real estate. Under sec. 10 of the Bankruptcy Act, 1919 (Can.) ch. 36, anything held in trust by the assignor for any other person would not become vested in the trustee as part of the property of the assignor. By her written agreement Cooney undertook to hold in trust for the express company a sum equal to the amount of each money order issued by her and to pay that sum over to the express company. The debtor by its undertaking guaranteed that while Cooney was in its employ she would duly perform the terms of her contract and pay over the proceeds in her hands resulting from the sale of money orders. This was clearly a trust agreement to which the debtor was a party, and when Cooney and the debtor agreed

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RE STANDARD IMPORTS LTD., EX PARTE CANADIAN EXPRESS CO.

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to allow the money representing each money order to remain in the hands of the debtor, that money which under the contract was stated to be the property of the express company, was affected by the fiduciary relationship which existed between the express company on one side, and the debtor and its employee, Cooney, on the other side. Until very shortly before the assignment the debtor apparently treated the moneys which represented money orders issued by its treasurer and which were allowed to remain in its hands as trust funds belonging to the express company and issued its own cheque therefor direct to the express company. As the debtor became financially embarrassed it did not during the last few days preceding the assignment set aside or retain sufficient cash to pay for the money orders issued on its behalf as, at the date of its assignment, the total cash on hand and in the bank was only $347.42 instead of $633.05.

There was a fiduciary relation between the debtor its treasurer and the express company, and the money on hand and in the bank was charged in favour of the trust for the express company and the latter, as the beneficial owner has a right to claim its own property, or any property affected by the trust wherever it finds and identifies it. As long as it is not held by a *bona fide* holder, the trust attaches to the property and the right to follow it ceases only when the means of ascertainment fail. While the money can be identified it is free from the claims of general creditors. These are the principles which result from such cases as *In re Hallett's Estate; Knatchbull* v. *Hallett* (1879), 13 Ch. D. 696, 49 L.J. (Ch.) 415, 28 W.R. 732: *In re Oatway; Hertslet* v. *Oatway*, [1903] 2 Ch. 356, 72 L.J. (Ch.) 575, 88 L.T. 622: *Roscoe Ltd.* v. *Winder*, [1915] 1 Ch. 62, 84 L.J. (Ch.) 286; *Sweeney* v. *Bank of Montreal* (1885), 12 Can. S.C.R. 661; affirmed (1887), 12 App. Cas. 617, 56 L.J. (P.C.) 79, C.R. (9) A.C. 340, and *Raphael* v. *McFarlane* (1890), 18 Can. S.C.R. 183.

As the express company has a charge resulting from the trust on the cash on hand and in the banks which came into the possession of the authorised trustee, the claim of the express company is not affected by the bankruptcy. These moneys were trust funds, the assignment did not vest them in the authorised trustee and the general creditors are not entitled to rank upon them. The evidence does not disclose what became of the balance of the moneys which should have been set aside or reserved for the express company. The trust does not extend to the other assets of the estate in the absence of evidence connecting them with moneys retained for the express company. In these circumstances the Canadian Express Co. is entitled to receive from the authorised trustee $347.42 as trust funds held by the debtor

for it and to rank as an ordinary creditor for the balance of its claim $285.96. The costs of these proceedings will be paid by the authorised trustee out of the estate. *Appeal allowed.*

SHAW v. THE SHIP "FIELDWOOD"

Exchequer Court of Canada, Nova Scotia Admiralty District, Mellish, L.J.A. February 22, 1922.

SEAMEN (§I—4)—ARTICLES SIGNED FOR CERTAIN PERIOD AS SHIP'S COOK—DESERTION—RIGHT TO WAGES FOR TIME SERVED—CANADA SHIPPING ACT, R.S.C. 1906, CH. 113, SECS. 287 AND 297.

Where a seaman signs articles to serve as cook on a ship for a certain period and leaves the ship before the expiration of the time without being justified in doing so, the Local Judge in Admiralty has jurisdiction under sec. 297, of the Canada Shipping Act, R.S.C. 1906, ch. 113, to determine the amount of wages due to such sailor for the time he served with the ship, notwithstanding that in criminal proceedings imprisonment as well as forfeiture might be awarded under sec. 287 of the Act.

[See *Shelford* v. *Mosey*, [1917] 1 K.B. 154, 86 L.J. (K.B.) 289, 115 L.T. 685; *Button* v. *Thompson* (1869), L.R. 4 C.P. 330, 38 L.J. (C.P.) 225, 17 W.R. 1067.]

ACTION *in rem* to recover wages alleged to be due to the plaintiff as cook on board the ship "Fieldwood."

The facts of the case are as follows:—

The plaintiff on September 22, 1920, signed articles at Weymouth, N.S., agreeing to serve as cook and steward on defendant ship at $120 per month for a voyage from Weymouth, N.S., thence to any ports or places in the British or Foreign West Indies (and) or any ports or places between the limits of 65 degrees north (and) or 65 degrees south latitude, trading to and fro as required, for a term not exceeding 24 months, final port of discharge to be in the Dominion of Canada; that he so served from September 22, 1920, to May 26, 1921, a period of 8 months and 4 days, at $120 a month, amounting to the sum of $976, and that he had received at various times credits or cash to the amount of $685, leaving a balance claimed as due him of $291.

The ship sailed from Weymouth, N.S., to Mobile, Alabama, U. S. A., thence to Bilbao, Spain, back to Terra Vigo in the Mediterranean, and from there to Providence, Rhode Island, where the plaintiff left her and returned on another ship as a passenger to Nova Scotia. The defendant ship, after the plaintiff left her, sailed for New York, and from New York to Lunenburg, Nova Scotia. The evidence also shewed that whilst at Providence the captain had told the plaintiff what he would do to him if he were not a cripple, and that the plaintiff visited the British Consul and in the presence of the captain, had asked that he be paid off and discharged which the captain refused. They had also had words

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on the voyage across the Atlantic. The plaintiff left the ship at Providence and remained there until after the ship sailed for New York, visiting the vessel several times before she sailed and was standing on the wharf when she put out. His clothes were left on board and were brought home by the ship. No action was taken against the plaintiff as a deserter or for being absent without leave. A new man was shipped at Providence at $35 a month to replace plaintiff, who acted as cook for the balance of the voyage. There was also evidence that the captain, who was a part owner of the ship, had reduced the wages of some of the crew at Providence and intended to reduce those of the plaintiff.

V. B. Fullerton, for plaintiff.

W. C. McDonald, for defendant.

MELLISH, L.J.A.:—The plaintiff was engaged under articles to serve as cook and steward on the "Fieldwood" on September 22, 1920, monthly wages, $120. He left the ship on May 26, 1921, at Providence. Up to that date, if he had been regularly discharged, his wages then would have been $291, the amount sued for herein. There is some evidence that on account of exchange, this would be somewhat larger, but it is too indefinite for me to give effect to it. The evidence, including the plaintiff's letters, lead me to the conclusion that he was not justified in leaving the vessel, although the master's conduct was not such as would be likely to keep the crew together. The owners, however, lost nothing, but on the contrary profited by his so doing. The only defence is that the wages have been forfeited by desertion.

The Canada Shipping Act R.S.C. 1906, ch. 113, sec. 287, provides that a seaman on summary conviction may for desertion be punished by imprisonment and forfeiture of clothes and effects left on board and of all or any part of the wages he has earned.

Section 297 provides that any question concerning the forfeiture of wages may be determined in any proceedings with respect to such wages in such a ship as this, notwithstanding that in criminal proceedings imprisonment as well as forfeiture might be awarded.

I think the justice of the case will be met by reducing the plaintiff's claim by the amount of wages for the days which he served during the month in which he left the ship—the month for the purpose of computation running from the 23rd of one month to the 22nd of the next, inclusive of such dates. This makes 4 days, and the plaintiff was paid at the rate of about $4 per day.

The reductions accordingly will be $16, and the plaintiff will have judgment for the balance of his claim, $275 and costs.

Judgment accordingly.

SCHWARTZ v. GUERIN

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Alberta Supreme Court, Appellate Division, Scott, C.J., Beck, Hyndman and Clarke, JJ.A. June 21, 1922.

COSTS (§ II—37)—TAXATION—CONSIDERATION OF CIRCUMSTANCES BY TAXING OFFICER.

Where the pleadings in three actions shew that there were, in fact, several distinct allegations of fact made as distinct grounds upon which the cancellation of certain mortgages should be granted, and the trial Judge dismisses all the actions with costs, thus finding all the issues of fact against the plaintiffs, and the finding of the trial Judge on the main issue of fact is not interfered with on appeals which succeed as to two of the actions merely on one general ground, the taxing officer should take into consideration all the surrounding circumstances of the actions and that in the action of the unsuccessful plaintiff every issue was raised against the defendant that was raised by the successful plaintiffs in their actions, except the one on which they eventually succeeded and that all those issues were decided in favour of the defendant and should consider the costs of those other issues as having been already taxed to the defendant against the unsuccessful plaintiff and he should tax to the successful plaintiffs only such costs of the trial as were properly attributable to the one contest upon which they eventually succeeded.

[See also 65 D.L.R. 415.]

APPEAL from the taxing officer referred to the Appellate Division by a Judge in Chambers.

A. C. MacWilliams, for appellant.

W. S. Gray, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal from the taxing officer referred to this Court by a Judge at Chambers.

There were originally three separate actions, viz: *Joseph Schwartz* v. *Guerin*, *Anni R. Schwartz* v. *Guerin* and *William Schwartz* v. *Guerin*. The three actions were of the same general character and concerned the same matters. Joseph Schwartz, the principal debtor, sued to have a certain mortgage given by him on his own property, set aside. Anni R. Schwartz and William Schwartz did the same with respect to distinct mortgages given by each of them on their respective properties. But all three mortgages related to the indebtedness of Joseph Schwartz and had all been signed at the same time.

For this reason, the actions were tried all together and the trial lasted 16 days. The trial Judge dismissed all the actions with costs. The plaintiffs, Anni R. Schwartz and William Schwartz appealed and their appeals succeeded. The formal judgment of this Court, with respect to costs, reads as follows:—

"This Court did further order and adjudge that the said respondent should and do pay to the said appellants the costs incurred by the said appeal, the same to be taxed as one bill of costs under col. 4 of the schedule of costs.

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This Court did further order and adjudge that the defendant do pay the costs of action of the plaintiff Anni Reichsfeld Schwartz, down to the trial under col. 3 of the schedule of costs and do pay the costs of the action of William Schwartz down to the trial under col. 3 of the schedule of costs and do pay to the plaintiffs Anni Reichsfeld Schwartz and William Schwartz, one bill of costs of the trial, the said bill of costs to be under col. 4 of the schedule of costs and the said costs of trial to be divided equally between the bills of costs of the plaintiffs Anni Reichsfeld Schwartz and William Schwartz, and that Rule 27 as to costs do not apply to any of said bills of costs, and that the said plaintiffs and each of them have judgment accordingly."

This is quite in accordance with the reasons for judgment given for the Court by Walsh, J. (1922), 65 D.L.R. 415.

Pursuant to this judgment the two plaintiffs in question, proceeded to tax their costs of the action and of the appeal. Objections were taken by the defendant to the allowance made by the taxing officer and these are now before us. With respect to the action the main items objected to are these:—Counsel fee with brief at trial, $1,131; Second counsel, $459.35; Witness fees, $578.15; Anni Schwartz' witness fees and expenses, $106; William Schwartz' witness fees and expenses, $123.70.

The grounds of objection are (1) that the plaintiffs did not succeed in the issues raised in their statement of claim to which they directed practically all their evidence and, their success being confined to one issue which could have been quickly disposed of and did not require summoning of any witnesses and payment of their fees and expenses, the Clerk should not have allowed to the plaintiffs counsel fees covering the whole period the trial lasted. (2) That the witnesses whose witness fees and expenses were taxed and allowed by the clerk gave no evidence on the issue on which the plaintiffs succeeded but their evidence was wholly confined to issues on which the defendant succeeded and the clerk erred in allowing the plaintiffs to tax these witness fees and expenses.

A reference to the pleadings in the two actions shews that there were, in fact, several issues raised, that is, there were distinct allegations of fact made as distinct grounds upon which the one relief asked for *i.e.*, the cancellation of the mortgages should be granted. It was not the case of several causes of action being joined in one action with different prayers for relief with respect to each. The plaintiff, Anni Schwartz, in her pleading after alleging the execution of the mortgage which she was seeking to avoid stated (1) that the mortgage (for $1,000) was executed and delivered at Milk River, Alberta, and upon the defendant's

promise to pay her $1,000. (2) That the defendant fraudulently procured one Boyce, to make an affidavit in Montana, that he had been present at Sweet Grass, Montana, when the mortgage was executed at that place and that, he, Boyce, was the subscribing witness thereto, all of which was false, and that the defendant also procured one, Dunblazier, a notary public of Montana, to sign a false certificate as to an affidavit made by the plaintiff. (3) That it was agreed that the mortgage should not be registered until the defendant had advanced to the plaintiff the sum of $1,000, but that the plaintiff had never received that sum and that, notwithstanding this, the defendant, upon the strength of the false affidavit of Boyce and the false notarial certificate of Dunblazier, had got the mortgage registered. (4) That defendant had procured the plaintiff's husband, Joseph Schwartz, by threats, intimidation and undue influence to exercise his will and dominion and influence upon the plaintiff, his wife, to induce her to execute the mortgage for the purpose of securing an advance to be made by the defendant to the husband for purposes of his own. (5) That the plaintiff never received any consideration for executing the mortgage, that she had no independent advice, and was induced to execute the same solely through her husband's exercise of will, dominion and influence over her. (6) That she was at the time of signing, an illiterate woman unable to read English, and the mortgage was never explained to her or read over to her or that if any explanation was given it was that the mortgage was to enable her husband to raise money to pay his creditors and that the mortgage was never used for that purpose but was used for other purposes.

The statement of claim in the action of William Schwartz also contained the same allegation of subornation of perjury, and the same allegation that the amount of the mortgage ($3,000) was to be advanced to the plaintiff upon registration, but that the false affidavit and notarial certificate had been used to obtain registration and no sum had been, in fact, advanced and then went on to allege in the alternative that the plaintiff was at the time of the execution of the mortgage of the age of 21 years, the son of Joseph Schwartz, residing with his father and completely under the parental dominion, influence and control, and that the defendant had procured the father by threats, intimidation and undue influence to exercise his will, dominion and influence on the plaintiff to induce him to execute the mortgage in order to secure an advance to be made by the defendant to the father for the latter's own purposes, that the plaintiff never received any consideration for the mortgage and never had any independent advice regarding the same.

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In his two statements of defence, the defendant denied all these allegations. The only affirmative allegations made in the defences were that the mortgages were, in fact, signed at Sweet Grass, that the affidavits of Boyce and the certificate of Dunblazier were true and that the mortgages were given to the defendant as trustee for the Farmers & Merchants Bank of Montana to secure a past indebtedness of the father, Joseph Schwartz, to that bank.

Concurrently with the trial of these issues, the issues raised in the action of Joseph Schwartz were also tried. He also contended that his mortgage was given to secure a future loan which was never made and not to secure a past debt as the defendant alleged, and he also alleged the fraud and subornation of perjury.

The trial Judge, at the close of the trial, gave an oral judgment dismissing all the actions with costs, thus finding all the issues of fact against the plaintiffs. One main issue in all the actions was whether the defendant had agreed to advance the sums mentioned in the three mortgages $1,000, $3,000, and $16,000 as new loans to pay the creditors of Joseph Schwartz and had failed to do so or whether the mortgages had been given to secure his past debts. The finding of the trial Judge in favour of the defendant on this issue was not interfered with on the appeals which were brought by Anni and William Schwartz so far as the intention and agreement of the defendant was concerned. Neither did the judgment on appeal interfere with the finding of the trial Judge as to the subornation of perjury and fraud.

The reasons for judgment on the appeal reported in 65 D.L.R. 415, shew that the appeals succeeded merely upon one general ground; viz:—that the mortgages appeared upon their face to be for a future loan, that the defendant had failed to shew that the plaintiffs had been fully informed as to the real purpose of the mortgages or that this real purpose had ever been properly explained to *and agreed to* by them; and that, owing to the relationship of the parties as merely sureties for the husband and father, the obligation lay upon the defendant to shew that there had been such full and complete explanation and full and free assent to the real purpose of the mortgages and that in this he had failed.

The appellant in the present appeal, therefore, contends that, upon a taxation of the costs of the actions and the trial under the above quoted judgment, the taxing officer had the power to refuse and should have refused to allow the plaintiffs any costs

except such as could properly be held referable to the one issue upon which the plaintiffs eventually succeeded.

The defendant was, by the judgment at the trial, given judgment for his cost of the three actions and for the costs of the trial but the trial Judge divided the costs of the trial and directed that the defendant should recover twelve-sixteenths of these from the plaintiff Joseph Schwartz, three-sixteenths from the plaintiff William Schwartz and one-sixteenth from the plaintiff Anni R. Schwartz. By the judgment in appeal, the judgment against Joseph Schwartz was not interfered with as he was not an appellant. The defendant, therefore, now has judgment against Joseph Schwartz for all his costs of the Joseph Schwartz action up to trial and for twelve-sixteenths of the costs of the trial. This still stands. But the judgments against Anni R. Schwartz and William Schwartz have been set aside and these plaintiffs now have judgments as above quoted against the defendant giving them the one ultimate relief which they ever claimed viz: the setting aside of their respective mortgages and giving them the costs of their respective actions up to trial and giving each of them judgment for one-half of one general bill of costs of the trial. If Anni R. Schwartz and William Schwatrz had appeared by different solicitors and different counsel at the trial, such an order as to the costs of the trial would doubtless have been improper. But inasmuch as the same counsel acted for both of them, it was obviously only just that they should not each be given a full set of costs of the trial. Accordingly one was given a half and the other a half.

The position is, therefore, just the same as if there were only one plaintiff in one action, who had been given a judgment for his costs of the action (which would include the trial) where the trial had been held at the same time as the trial of the Joseph Schwartz' action, in which some of the same issues were raised. The distinction made in the formal judgment between the costs of the action up to trial and the costs of the trial does not involve, as I interpret it, anything special as between the plaintiffs and the defendant, with regard to the costs of the trial but only some thing special as between the two plaintiffs.

What, then, would have been the position if there had been only one plaintiff besides Joseph Schwartz and that plaintiff had been given a judgment, for the reasons set forth in the reasons for judgment, against the defendant that his mortgage be set aside and that the plaintiff should recover from the defendant "his costs of the action?"

The chief cause of difficulty in the matter is that we are not now at liberty to deal with the question as it might have been

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dealt with before the formal judgment was entered and while the case was still *sub judice*. It is not now solely a question of what the Court has power to order or ought to order but of what is the meaning and result as to costs of the judgment which has been entered.

But in construing the judgment, the taxing master and the Court ought to take into consideration all the surrounding circumstances of the actions. The judgment does not refer in any way whatever to the trial of the action of Joseph Schwartz, but the facts are there and were known to the Court and all parties, that the action of Joseph Schwartz was tried at the same time, that in that action every issue was raised against the defendant that was raised by the two successful plaintiffs in their actions except the one on which they eventually succeeded and that all those issues were decided in favour of the defendant and he was given judgment against Joseph Schwartz for twelve-sixteenths of the costs of the joint trial. The judgment entered in the Appellate Division should be construed in the light of those facts. It would be a strange result indeed if after the defendant had been given his costs against Joseph Schwartz of contesting all those other issues the two plaintiffs, who were eventually successful on the additional issue only, were to be given against the defendant the costs of the trial of those other issues upon which they also had failed.

I do not think it necessary to give any such interpretation to the judgment. The only reasonable interpretation of the judgment in the light of all the known facts is that the taxing officer should consider the costs of all those other issues as having been already taxed to the defendant against Joseph Schwartz, and thereby disposed of and ended and that he should tax to the plaintiffs only such costs of the trial as were properly attributable to the one contest upon which they succeeded viz:—the existence or non-existence of proper information and explanation as to the real purpose of the mortgages. The plaintiffs asserted that Guerin had promised to loan them money on the security of the mortgages and that he not having done so the mortgages should be cancelled but they failed on that ground in itself and even if they might be looked upon as having succeeded because the face of the mortgages put it that way and no money was advanced, yet there was no real trial at all upon any issue of that kind because Guerin never contended that he had advanced the new loans. He contended and was upheld in his contention, that the real purpose of the mortgages was to secure past debts of Joseph Schwartz and he only failed in retaining them because

the information and explanation necessary to sustain them had not been given.

It is indeed extremely difficult to separate the matter into separate issues except as to the charges of subornation of perjury and fraud.

But if the plaintiff had omitted these charges, had omitted the claims that they were to get a new loan, had admitted that Guerin's intention in taking the mortgages was to secure past debts of Joseph Schwartz and had alleged such purpose and intention was never properly explained to or agreed to by them as required by their special relationship to Joseph Schwartz, they would have alleged all that they succeeded upon and would have no concern whatever with the major part of the contest at the trial.

This view of the matter makes it really unnecessary to consider the application of the concluding words of Rule 730 as to costs where it says that, in the absence of an order "the costs shall follow the event" and of the provisions of Rule 742, as to the case where two or more issues of law and fact are raised upon the pleadings as there has been divided success.

I am inclined to the opinion, however, where there are several issues of law and fact even though only one relief can be secured by the plaintiff and the Judge simply gives the plaintiff judgment with costs but does not exercise the power given under Rule 742, that there is still room left for the operation of the concluding words of 730 as to the costs following the event. The Judge has indeed made an order but he has not dealt with the distributive events of the different issues and it seems well settled that the word "event" should be read distributively. This is my impression and this view would actually lead to the same practical result as the other ground I have mentioned. But, I do not think it necessary to express any definite opinion upon this rather intricate point or to discuss the applicability of the decision in *Reid Hewitt & Co.* v. *Joseph*, [1918] A.C. 717, 88 L.J. (K.B.) 1, to our somewhat differently worded rules.

In my opinion it was open to the taxing officer to act under Rule 745, which reads so far as relevant as follows:—

"If upon any taxation it shall appear . . . that from any other cause the amount of the costs is excessive having regard to the nature of the business transacted or the interests involved or the money or value of property to which the costs relate *or to the other circumstances of the case the taxing officer shall allow only such an amount of costs as may be reasonable and proper.*"

This rule obviously directs the taxing officer in express words to act as I have already indicated that he should viz: to take

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into consideration "the circumstances of the case." I think, therefore, it was his plain duty, when proceeding to tax the one bill of costs of the trial in favour of the two plaintiffs Anni and William Schwartz, to take into account the facts that that trial was held along with the trial of the Joseph Schwartz case and that the defendant succeeded against Joseph Schwartz on the very same issues that the present plaintiffs failed against the defendant and that the evidence was all the same on all those issues.

For these reasons I think that, with respect to counsel fees, it would be reasonable and proper to allow the plaintiffs only one-fourth of the counsel fees of the two counsel, that is, $282.75 for the first counsel and $114.84 for the second counsel.

With respect to witness fees, I think the plaintiffs are entitled to all their own witness fees without other deduction than that made by the taxing officer. Possibly, in strictness, something more might be deducted but, in all the circumstances, I do not think anything more should be taken off.

As to the other witness fees there is more difficulty, or rather, perhaps I should say, more trouble. It is merely a matter of examining their evidence and seeing whether it had anything to do with the grounds upon which the plaintiffs succeeded. Upon this principle I think the result will be that the only witness in addition to the plaintiff, whose fees should be allowed, is the witness, Graham, who came from the Land Titles Office. The evidence of none of the other witnesses had anything whatever to do with the matters of fact upon which the plaintiffs succeeded. Their fees should all be disallowed. If the plaintiffs had not raised the issues upon which they failed and upon which alone the evidence of those witnesses was relevant, these witnesses would not have been needed at all.

With respect to the costs of the action, there were two minor objections but the nature of these was not made very clear to us nor do the documents left with us throw much light upon them. As the items were relatively small I do not think we should in these circumstances, interfere.

The defendant also objects to the amount allowed in the taxation of the costs of the appeal, for the typewriting of the appeal book. In the notice of appeal the appellants raised again all the questions upon which they had failed below except, perhaps, the charges of fraud and perjury. In these circumstances the respondent could not be expected to consent to a reduction of the contents of the appeal book. On the other hand, the ground upon which the appellants succeeded was that the defendant had *not* given evidence proving certain things. Just how the appel-

lants could shew this conclusively to the Court without having all the evidence there in order to shew that such sufficient evidence was *not* given, is perhaps a little difficult to see. But there can be no doubt that but for the contents of the notice of appeal an opportunity for negotiation and agreement as to minimizing the extent of the appeal book would have been presented, and that an arrangement could certainly have been arrived at which would, at least, have cut the cost of the appeal book in two. I think, therefore, the further sum of $800 should be taken off the costs of the appeal book. Rule 745 is wide enough to give the taxing officer and a Judge upon review, power to do this.

Of course, in so voluminous and involved a case, the taxing officers could scarcely be expected to study the whole matter and find out all that we learned about it upon the argument of the appeal. But I think, nevertheless, that, strictly speaking, it was their duty to do so and that the power given them under Rule 745 ought to be exercised more frequently and more stringently than it has been in the past.

The appeals from the taxing officer will, therefore, be allowed without costs, as we understand was agreed, and the bills of costs will be remitted to the respective taxing officers with directions to amend the different allocaturs in accordance with what has been said.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. June 6, 1922.

MINES AND MINERALS (§ I C—21)—CONFLICTING CLAIMS—FAILURE TO HAVE RIGHTS RECORDED—ABANDONMENT—LOCATION BY ANOTHER—TITLE ISSUED—ABSENCE OF FRAUD—RIGHT OF FIRST PARTY TO ASSERT CLAIM AGAINST—R.S.B.C. 1911, CH. 157, SECS. 12, 27, AND 85.—CONSTRUCTION.

Under the Mineral Act R.S.B.C. 1911 ch. 157, the Record office is the place where the rights of locators and holders of mineral claims are to be searched for, and a person who fails, not wholly through the fault of the official to get his rights recorded cannot be allowed, long afterwards, to assert them against a subsequent recorded owner who has obtained his title without fraud.

APPEAL by plaintiffs from the judgment of Clement, J., in an action claiming the ownership of certain mineral claims. Affirmed.

E. C. Mayers, for appellant; *R. Symes*, for respondent.

MACDONALD, C.J.A.:—The defendant Fraser, is the administrator with will annexed of James Alexander, deceased, and the other defendants are the beneficiaries under the said will.

The Engineer Mining Co. is a foreign company incorporated

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in Alaska, and was registered in this Province on June 4, 1900. The company claims to have acquired ownership of the several mineral claims in question in this action, and to have applied in the year 1906, for a certificate of improvements thereto. The interest of the company in the said claims is alleged to have been acquired through the acquisition by it of the several interests of the partners in a mining partnership known as "The Aga Gold Mining Co., Limited Liability", which was not a corporate body. The plaintiff company claims that it had got in all the partnership interests and had complied with all the conditions to its right to have issued to it by the Mining Recorder, certificates of improvements under the Mineral Act, R.S.B.C. 1911, ch. 157.

The company had procured assignments from several of the individuals composing the partnership of their respective interests in the claims and had forwarded these to the Mining Recorder, but it appears by the evidence before us that these assignments embraced only twenty-two twenty-fourths of the total of the interests in the claims. The claim of the company, however, now is, that apart from these assignments it was the owner of all the claims through its purchase of the partnership assets and that the Mining Recorder ought to have complied with the company's application for certificates of improvements, even though the fact were that only twenty-two twenty-fourths of the interests in the claims were covered by the assignments deposited with him. The applicants for the certificates who represented the company and the Mining Recorder were on the most friendly terms, both he and they appeared to have thought that the assignments were necessary to complete the company's title, but owing to the late partners being scattered, the final two twenty-fourths were not obtained and as the time was at hand when the certificates must be issued for further representation work done on the claims, to avoid the lapse thereof, it was decided that the applications should be withdrawn, the claims allowed to lapse, and re-locations made of the same ground by the applicants and others interested in the company.

This decision was come to as I have just said, by those acting on behalf of the company and, doubtless, with the advice and on the suggestion of the Mining Recorder, which advice or suggestion appears to have been freely concurred in by the applicants. The plan was carried out and the ground was re-located in the names of several parties representing and interested in the company. It was contended that this action was without the official authority of the company, but I think I must hold that it was taken by those who were in fact the agents of the company for making the applications for the certificates of improvements and

that they had no greater authority for that purpose than for the other purpose of withdrawing the application and re-locating the claims. However, it does not seem to me to matter whether they had authority to re-locate the claims or not, if they had authority to make application for certificates of improvement, I think they had the same authority for withdrawing them. The re-location of the claims I must assume was lawfully made since no question was raised to the contrary, except as above intimated. The locators, however, failed to do and record the requisite assessment work required to be done and recorded by the Mineral Act, and, therefore, by force of the Act itself, these re-locations expired on the efflluxion of the time for recording the work. In addition to allowing the claims to expire, the company allowed its free miner's certificate to lapse and lost its legal status as a company entitled to hold mineral claims in this Province. It did not rehabilitate itself until several years thereafter. In the meantime, Alexander, after the expiry of the said re-locations, caused the same ground to be located, obtained certificates of improvements in due course, and eventually obtained grants of the claims from the Crown. This action is brought to set these aside. Several grounds of attack were raised, but the trial Judge disposed of the case on one ground only, namely: that when Alexander applied for certificates of improvements, the plaintiff company failed to take proceedings adverse thereto pursuant to sec. 85 of the Mineral Act. It was strenuously contended by Mr. Mayers, that the Mining Recorder was in error in not issuing the certificates of improvements to the plaintiff company upon the material before him, prior to the withdrawal of the applications as aforesaid. He relies upon the equitable doctrine that that must be taken to have been done which ought to have been done and on this principle submits that the case is as if the certificates of improvements had actually been issued in 1906 to the plaintiff company. He urged upon authority that the holders of certificates of improvements are not obliged to adverse subsequent claimants, and that, therefore, sec. 85 is not a bar to the plaintiff's claim. But I cannot help but think that the Act deals with actualities and not with equitable principles. The provisions for the protection of holders of certificates of improvements are based not upon what ought to have been done, but upon what actually was done and as there were in fact no such certificates actually issued, the plaintiff company could only protect its rights against a subsequent applicant, by taking advantage of said sec. 85. The case of *Collister* v. *Reid* (1919), 47 D.L.R. 509, 27 B.C.R. 278, affirmed by the Supreme Court of Canada (1919), 50 D.L.R. 289, 59 Can. S.C.R. 275, was cited by

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Mr. Mayers as an authority in his favour, but, I think it is not such. The plaintiffs in that case were in the position which the plaintiff company claims to be in in this case. They had applied for certificates of improvements which had not been granted; subsequently, re-locators applied for certificates of improvements and the Collisters taking advantage of sec. 85, adversed their claim successfully. I think, therefore, the Judge came to the right conclusion. But apart from this answer to the action, it appears that the plaintiff company ceased to be the holder of a free miner's certificate subsequent to the withdrawal of the said applications. The Mineral Act R.S.B.C. 1911, ch. 157, sec. 12, provides:—

" . . . no person or joint-stock company shall be recognised as having any right or interest in or to any mining property unless he or it shall have a free miner's certificate unexpired."

Not only did the company fail to renew its free miner's certificate, but it appears to have abandoned all operations within the Province for some years after the withdrawal of the said applications. I do not think it necessary to deal with all of the several contentions put forward on the plaintiff's behalf, but I do think that the deliberate withdrawal of the applications, even upon the suggestion or advice of the official, is fatal to the plaintiff's success. The principle underlying the Mineral Act is certainty of and simplicity of title to rights which are essentially speculative in their nature and in most cases transitory. The innocent locator, and I hold that the deceased was innocent of any wrong-doing, was intended to be protected; the Record Office is the place where, speaking broadly, the rights of locators and holders of mineral claims are to be searched for and he who fails, not wholly through the fault of the official, to get his rights recorded, cannot be allowed long afterwards to assert them against a subsequent recorded owner, who has obtained his title without fraud. Section 27 of the Mineral Act which provides that a free miner is not to suffer from the mistakes of officials, must not be construed too widely, and was, I think, not intended to relieve a party in the position of the plaintiff company from the consequence of its actions, even if those of an official contributed in some degree to the loss.

I would, therefore, dismiss the appeal.

GALLIHER, J.A.:—After the best consideration I can give the matter, I find myself in accord with the views expressed by the Chief Justice, whose judgment I have had the advantage of perusing. So aptly do they express my own views in the matter, on the various points considered, that I deem it unnecessary to add to his reasons.

McPHILLIPS, J.A.(dissenting):—This appeal involves the determination of whether certain mineral claims, 16 in number, are valid and existing mineral claims, and whether the plaintiff company is the owner thereof, and entitled to have issued to it certificates of improvements thereto which would later entitle Crown grants being issued therefor.

It would appear that the plaintiff company was duly entitled to all the mineral claims and the procedure was followed as provided by the Mineral Act R.S.B.C. (1897), ch. 135, for the obtainance of certificates of improvements, (sec. 36). There had been expended up to that time approximately $40,000 in buildings, tunnellings and other improvements and development. The evidence is very voluminous, but, in my opinion, it cannot be successfully contended that the plaintiff company had not become possessed of all title, right and interest in all of the mineral claims, and that there was no outstanding interest. I do not purpose to, in detail, refer to the many points of evidence that all being added together establish conclusively that the complete title in the mineral claims was vested in the plaintiff company. James Allen Fraser, one of the defendants in the action was at the time of the happening of the material events called in question in the present action, the Gold Commissioner, acting under the provisions of the Mineral Act, and the administrative officer of the Crown in charge of the Atlin Mining Division of the Cassiar District of British Columbia, the Mining Division in which the mineral claims are situate, being in the northern and remote section of the Province, not far removed from the Alaska Territory of the United States of America, and the plaintiff company is an Alaskan corporation with its head office at Skagway, Alaska, duly registered and licensed as a foreign company under the Companies Act, R.S.B.C., 1911, ch. 39. The Gold Commissioner, (Fraser) when examined for discovery, upon the question of the non-issue of the certificates of improvements, duly applied for, stated that the statutory certificates of improvements failed to issue, because of the fact—that, in the opinion of the Deputy Attorney-General, the mineral claims were still vested in the Aga Gold Mining Co., Ltd.,—not a corporate company, but a partnership formed under the Mineral Act, (secs. 59 to 81). The Gold Commissioner acted upon the opinion of the Deputy Attorney-General and refused the certificates of improvements, which would have otherwise issued to the plaintiff company, as the Gold Commissioner was, on evidence adduced before him, satisfied that complete title in the mineral claims was in the plaintiff company. Admittedly, although it is true it was argued to the contrary, but I hardly

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think very seriously or with any confidence, the opinion of the Deputy Attorney-General acted upon and given effect to by the Gold Commissioner, was in error in law, owing to some misconception of the status of the Aga Gold Mining Co., Limited Liability, the same being amongst other things confounded with the status of that of a corporate company. In any case, it is plain to demonstration upon the facts, that there was absolute error in law in the opinion forwarded and acted upon of the Deputy Attorney-General, arising from whatever cause it may have, defective instructions or otherwise. Were it not for that opinion, the certificates of improvements would have undoubtedly issued, such may reasonably be said, upon a careful review of the evidence adduced at the trial, and it was the opinion of the Gold Commissioner that certificates of improvements should issue—only stayed by reason of the legal opinion of the Deputy Attorney-General. In truth and in fact as the evidence led at the trial upon the part of the appellants, amply discloses, the plaintiff company was possessed of all the interests in the mineral claims held by the individual members of the Aga Gold Mining Co. Limited Liability, *i.e.*, the property in the mineral claims of the mining partnership by assignments and lapses at the time of the application for the certificates of improvements, was wholly vested in the plaintiff company. The Gold Commissioner (Fraser) with the view of protecting the plaintiff company in its proprietorship of the mineral claims, advised the re-staking of the claims, which was done, but it cannot, upon the facts, be rightly said that the plaintiff company did so by any corporate act or took any steps that can be held to create an estoppel against the company—that was also an error upon the part of the Gold Commissioner equally with the error of the Deputy Attorney-General, both being errors of commission and within the remedial provisions of sec. 53 of the Mineral Act.

The plaintiff company would apparently have ceased to function in any corporate way from and after the denial of the certificates of improvements which, in my opinion, the plaintiff company was entitled to have issued to it and at that time the plaintiff company was clothed with the legal capacity to be accorded and granted the certificates of improvements and although some years have elapsed since then, the evidence does not, in my opinion, disclose any valid reason for the further withholding of the certificates of improvements which were statutorily earned under the provisions of the Mineral Act but which by misadventure have been so far withheld.

It would appear that the re-stakings, which, in my opinion, cannot be said upon the evidence to have been re-stakings bind-

ing upon the plaintiff company—were allowed to lapse and one, James Alexander (now deceased) following the lapsing of the re-stakings, located mineral claims over the same ground as that covered by the holdings of the plaintiff company, and for which the certificates of improvements duly applied for should have issued. The said James Alexander though—(the successors in interest by way of administration and by devise being the respondents in this appeal) had been in the employ of the surveyor of the plaintiff company when the mineral claims had been surveyed previous to the application for the certificates of improvements by the plaintiff company, acting as chainman and was affected with notice of the boundaries and improvements of the plaintiff company and took advantage of this knowledge in locating over the mineral claims of the plaintiff company, being ground at the time of the locating by Alexander, rightfully and legally held and owned by the plaintiff company then being a free miner of the Province of British Columbia under what, in my opinion, were valid and existing mineral claims. Upon the facts, it cannot be gainsaid that the locations as made by Alexander were not open for location—not being waste lands of the Crown (sec. 12) being lawfully occupied for mining purposes by the plaintiff company and all the proof made by Alexander was in its nature in effect, fraudulent and false, having regard to the provisions of the Mineral Act. Amongst other things, Alexander had not found mineral in place, but relied upon the discovery of the plaintiff company and its predecessors in title. The ground was palpably in the occupation of the plaintiff company, and it was the owner thereof to the knowledge of Alexander. He was conversant with the exact situation of affairs, that the plaintiff company had expended large sums of money upon the ground, and at the time of the location by Alexander, the plaintiff company was in actual occupation of the ground, and upon the ground were tools, provisions and machinery—the plaintiff company having merely closed down owing to the winter season, that being necessitated by climatic conditions. The fraudulent and wrongful conduct of Alexander which, in its effect it was, deceived the officers of the Crown, and following this deception, Alexander wrongfully obtained certificates of improvements and Crown grants to the ground covered by the mineral claims of the plaintiff company for which certificates of improvements should have issued to the plaintiff company. In the result, and consequent upon the false and fraudulent representations of Alexander, Crown grants improvidently issued covering the ground lawfully possessed and owned by the plaintiff company.

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Now it cannot be gainsaid upon the facts, and following upon the statute law—that is to say the Mineral Act, that the plaintiff company had achieved a position which gave it the right to the certificates of improvements, and if they had been obtained there would have followed in due course Crown grants—the position achieved was really that of being entitled to receive by virtue of the Act of Parliament, a complete title to the mineral claims. That being the situation, in what way can it be said that the plaintiff company has been exploited out of that statutory right? Is it sufficient to say that the plaintiff company has lost its right to the ground in question, because of the fact that locations made, not upon waste lands of the Crown, but upon occupied lands, has been followed up, certificates of improvements obtained and Crown grants issued when there was knowledge of the existent claims and the Crown was deceived in making the Crown grants? In my opinion, any such contention is untenable.

Section 53 R.S.B.C., 1897, ch. 135, reads as follows:—

"53. No free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven."

It is clear that the plaintiff company suffered by the conduct of the officers of the Crown and there was error within the purview of the statute law, which should be relieved against, the legislation is in its nature mandatory and the plaintiff company is entitled to be restored to its original position, a position really in fact never lost, *i.e.*, the right to have certificates of improvements issued covering the mineral claims to be followed by Crown grants. *Lawr* v. *Parker* (1900), 7 B.C.R. 418, 1 M.M.C. 456, affirmed (1901), 8 B.C.R. 223, 1 M.M.C. at 459; *Tanghe* v. *Morgan et al* (1904), 11 B.C.R. 76, 2 M.M.C. 178.

At this Bar, counsel for the respondents stated that it could not be denied that there was knowledge of the facts and circumstances relating to the ground in question, but it was contended that there was no knowledge that the plaintiff had any earned legal right to certificates of improvements or Crown grants.

In *Reid* v. *Collister* (1919), 50 D.L.R. 289, 59 Can. S.C.R. 275, it was held that pending the issue of the certificates of improvements there was no necessity of doing further work upon the claims, applying the *ratio decidendi* of that case to the present case, there being the right to the certificates of improvements, nothing further was required to be done by the plaintiff company. There was then, and there always has been the right in the plaintiff company to have issued to it the statutorily earned certificates of improvements to the mineral claims in question, which would have entitled the Crown grants to issue, and it is to

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be noted that the present action is not only in the name of the plaintiff company, but in the name of the Attorney-General representing the Crown. The position really was and is the denial of the statutory right to the certificates of improvements covering the mineral claims and that statutory right once earned cannot be taken away save by express statute law. It is idle for the respondents to come in as they do, and say, we pursuing the same general statute law, located the same ground, obtained certificates of improvements, followed by Crown grants. That position could only be attained if the ground had been waste lands of the Crown and was, at the time open for location, but it was not, and the circumstances were known to Alexander, with the statutory right in the plaintiff company, upon what authority can it be said that the statutory right has been destroyed? I fail to see that there is any authority, and nothing happened to destroy that statutory right that I can see, and nothing has been referred to, but the fact alone that Alexander proceeded to locate and obtain title to the mineral claims in defiance of the governing statute law, and by misadventure, Crown grants eventually issued to ground that the plaintiff company had and still has the statutory right to. That statutory right could only be barred by some statute, "and if there is no statute barring it, we cannot make one." See Armour, J., in *Ross* v. *G.T.R. Co.* (1886), 10 O.R. 447, at p. 453. (Also see *Essery* v. *G.T.R. Co.* (1891), 21 O.R. 224).

In *Re Baker Collins* v. *Rhodes* (1881), 20 Ch. D. 230, at p. 238, (51 L.J. (Ch.) 315, 30 W.R. 858, 45 L.T. 658.) Jessel, M.R., said:—

"There is no distinction on this point between equity and law. If the statute has run, then the debt of claim is barred; if not, then there is nothing else to be said in the case. . . . . ."

The strength of the position, as I view it, of the plaintiff company is that there was and is still in the plaintiff company, the absolute statutory right to have issued to it the certificates of improvements which had been statutorily earned by extensive and costly development work upon the mineral claims, and everything had been done to fully comply with the statute. In such a case, is it possible to say that that statutory right can be in any way displaced and in particular, can it be displaced by a title obtained by Alexander who was fully aware of all the facts —and who had proceeded fraudulently?

In *Re Maddever; Three Towns Banking Co.* v. *Maddever* (1883), 27 Ch. D. 523 at p. 531 (53 L.J. (Ch.) 998), an action under 13 Eliz. 1570 (Imp.) ch. 5 (Fraudulent Conveyance) Baggallay, L.J., said:—

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"The deed was executed on the 19th of October, 1871, and the bank became aware of it almost immediately after the death of the father, but took no proceedings to impeach it for nearly ten years. It was urged for the Defendant that, assuming the deed to have been one which ought originally to have been set aside, it ought not to be set aside now, after such delay. The bank appear from the first to have known a good deal about the facts, and if the case had been one where the Plaintiffs were coming to set aside, on equitable grounds, a deed which was good at law, I should have thought that the defence was good. But the Plaintiffs had a legal right, and I do not see how that right can be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar. Cases have been cited where Courts of Equity have refused to interfere on the ground of delay, but they have been cases where relief was sought merely on equitable grounds; here the Plaintiffs have a legal right."

And at p. 532, Cotton, L.J., said:—

"I am of opinion that in the case of a legal right we cannot refuse relief to the plaintiff on the mere ground of delay, unless there has been such delay as to create a statutory bar. The Plaintiffs have made an attempt to explain their delay; an attempt in which I am of opinion they have not succeeded, but, there having been no such delay as to bar their legal right, it is, in my judgment, immaterial that they have shewn no sufficient reason for not coming sooner."

In *Stackhouse* v. *Barnston* (1805), 10 Ves. 453, 32 E.R. 921 at p. 925, Grant, M.R., said:—

"As to a waiver, it is difficult to say precisely, what is meant by the term with reference to the legal effect. A waiver is nothing unless it amounts to a release."

There are no facts in the present case which will admit of it being said that there has been any waiver or release of the statutory right in the plaintiff company to be accorded by the Crown the mineral claims to which it has established title, and anything that stands in the way must be set aside if there be no statutory foundation to support the barrier. Here the present apparent barrier are Crown grants but founded upon fraudulent and invalid locations upon ground already in occupation, and further by one affected with notice of the statutory rights of the plaintiff company and the Crown was deceived in its grants. Further, there is the remedial or relief section—"no free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven." (Sec. 53, R.S.B.C. 1897, ch. 135). And we have here the plain error made of the denial of

certificates of improvements that should have issued being acts of omission, commission and delay which resulted in the bringing about of the present condition of matters but the title which stands in the way cannot stand in face of knowledge of the facts and being affected with fraud. In truth, the locations of already occupied ground were nullities, and foundationless, and all that followed, *viz.*, the certificates of improvements and Crown grants, should be set aside *ex debito justitiae*.

In *Cornelius* v. *Kessel* (1888), 128 U.S. Sup. Ct. Rep. 456, it was held that:—

"When an entry is made upon public land subject to entry, and the purchase money for it is paid, the United States then holds the legal title for the benefit of the purchaser, and is bound, on proper application, to issue to him a patent therefor; and if they afterwards convey that title to another, the purchaser, with notice, takes subject to the equitable claim of the first purchaser, who can compel its transfer to him."

Field, J., at p. 462, said:—

"It appeared that the residence of Lindsey was on the line which, according to the new survey, divided the quarter section he entered from an adjoining quarter section; so that in one sense it may be said that he resided on both quarter sections. The Court held that the Government was bound by the original survey; that Lindsey's residence was sufficiently on the section which he claimed; that the patent certificate was rightfully issued to him; that the act of the Commissioner in setting it aside was illegal, and did not destroy the right thus vested; that the land was not, therefore, subject to entry by Hawes; that the patent obtained by him was wrongfully and illegally issued to him; and that the heirs of Lindsey were entitled to a conveyance of the legal title from him and his co-defendants."

(Also see *Deffeback* v. *Hawke* (1885), 115 U.S. Sup. Ct. Rep. 392).

In *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.* (1891), 145 U.S. Sup. Ct. Rep. 428, it was held:—

"When the price of a mining claim has been paid to the Government, the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work in order to obtain a patent."

Brewer, J., in that case said, at p. 434:—

"There is no conflict in the rulings of this Court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and

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that no third party can acquire from the Government interests as against him. The decision of the trial Court was correct. The attempted re-location by Luttrell was void, and gave him no rights of possession or otherwise."

In *Wirth* v. *Branson* (1878), 98 U.S. Sup. Ct. Rep. 118, it was held:—

"1. Where, in ejectment, it appeared that a location of a military bounty land-warrant, duly made by A. on the demanded premises, the same being a part of the surveyed public land of the United States, had not been vacated or set aside,—*Held*, that a subsequent entry of them by B. was without authority of law, and that a patent issued to him therefor was void.

2. A party who has complied with all the terms and conditions which entitled him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof. While his entry or location remains in full force and effect, his rights thereunder will not be defeated by the issue of a patent to another party for the same tract.

3. *Branson* v. *Wirth* (1872), 17 Wall. 32, commented on and approved."

Bradley, J., in that case said, at pp. 121-122:—

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of *Lytle et al* v. *The State of Arkansas et al* (1850), 9 How. 314, and has ever since been adhered to. See *Stark* v. *Starrs*, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the case of *Stark* v. *Starrs*, (*supra*), *Frisbie* v. *Whitney* (1869), 9 Wall. 187, *The Yosemite Valley* case (1872), 15 Wall. 77, *Railway Co.* v. *McShane* (1874), 22 Wall. 444, and *Shepley et al.* v. *Cowan et al.* (1875), 91 U.S. Sup. Ct. 330, that it would be supererogation to go over the subject again.

But it is said that Giles Egerton and his grantees and all other persons are estopped from any claim under his location of the

northeast quarter of sec. 18, by his accepting a patent for the southeast quarter; and by the further fact, that his grantee, finding the southeast quarter already granted to another party, (namely to James Durney), applied to Congress for leave to make, and actually made, another location in lieu thereof. This question of estoppel was fully considered by us when the case was formerly here; and the principles which were then laid down are equally decisive of the case as it now stands. The original patent to Egerton had not then been exhibited in evidence, it is true; but we do not see that the case is materially altered by its production.

The difficulty of applying the doctrine of estoppel arises from the fact that there is no privity between the defendants and the parties who procured the act of Congress referred to. The defendants rely, and have a right to rely, on the fact that the lot in question was located in due form of law, and that it thereby became exempt from further location until the first location should be set aside. The fact that a clerical error was made in the patent issued to Egerton; that his grantees, instead of claiming the northeast quarter (as they might have done), claimed the southeast quarter, which had been previously granted to another person; and that they solicited the privilege of locating another lot in lieu thereof,—are all matters with which the defendants have nothing to do. Congress might have given to those parties a dozen lots without affecting the defendants, unless the latter were in some way bound by their acts. We are unable to see how they were or should be bound thereby. They do not claim under those parties, and have no privity with them whatever."

Then we have *Alcock* v. *Cooke* (1829), 5 Bing. 340, 130 E.R. 1092, 7 L.J. (C.P.) (O.S.) 126. In that case, Best, C.J., 130 E.R. at p. 1097, said:—

"If the king is deceived in his grant, the grant is altogether void; and it appearing by decided cases that it must be taken that the king is deceived in his grant when he grants that which he cannot give according to the terms of his grant; it appearing also, that at the time the grant of 6 Car. 1, was executed, the property was already in the possession of Livingstone, under a lease for years, and that that lease had several years to run; the grant of the 6 Car. 1, is altogether void. . . ."

In the present case, everything had been done to admit of the certificates of improvements issuing and that would have been followed in due course by Crown grants, and everything having been done, nothing more was needed to be done (*Collister* v. *Reid*, *supra*). Lord Selborne in *Great Eastern R. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927, 940, 941, 54 L.J. (Ch.) 162, 33 W.R. 81,

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referred to the *Alcock* case, and there a question of waiver came up, there having been an enquiry under a writ of *ad quod damnum*. But here nothing of the kind took place. In the report of the *Great Eastern R. Co.* v. *Goldsmid* case, as reported in 54 L.J. (Ch.) 162, at p. 169, Lord Selborne said:—

"In the case mentioned at the bar of *Gledstanes* v. *The Earl of Sandwich* (1842), 4 Man. & G. 995, 134 E.R. 407, 12 L.J. (C.P.) 41, the Court took pains to classify those cases in which it appeared that the king's grant had been held to be avoided by reason of any misdescription or mistake therein, and they were referred to three classes—one, where the king professed to give a greater estate than he had himself in the subject-matter of the grant; that can have no application here, for the king had no estate in the subject-matter of the grant, and did not profess by the charter of Edward the Third, to give one; the second, where the king had already granted the same estate—upon which the case of *Alcock v. Cooke* (1829), (5 Bing. 340), 130 E.R. 1092, was referred to; the same observation applies here—the king has granted no estate, there is at the most a promise not to make a grant; the third, where the king had been deceived in the consideration as expressed in the grant. . . ."

Now in the present case, the Crown really, according to the statute law held the mineral claims in question for the plaintiff company and was, under statutory requirement to recognize the title of the plaintiff company. Sec. 34 of the Mineral Act, R.S.B.C. 1897, ch. 135, reads:—

"34. The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest equivalent to a lease for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of this Act."

No further performance could be required, all had been done—requisite to the issuance of certificates of improvements and had they been issued as they should have been issued to the plaintiff company, then such further steps for the obtainance of Crown grants would have followed—the Crown upon the facts was disentitled at all times from doing anything which would displace the plaintiff company in the statutory right it had earned and the plaintiff company was the rightful lessee from the Crown of the mineral claims entitled to the issuance of certificates of improvements therefor and it should be so declared—that which has intervened—is altogether void. Lord FitzGerald in *Great Eastern R. Co.* v. *Goldsmid, supra*, said, 54 L.J. (Ch.) at p. 181:—

" . . . we are not here to make laws, we are not here to

legislate—we are here to administer the existing laws. We are not here to interfere with or to confiscate private right—our province is to protect it"—and in the present case the Attorney-General appears and is a plaintiff, which admits of the Court in pursuance of the statute law declaring the statutory right of the plaintiff company and a declaration that the Crown grants which have intervened and the mineral claims issued to Alexander or his predecessors in title are altogether void.

It cannot be successfully said in the present case there was waiver, all that was required to be done was done (*Collister* v. *Reid, supra*). Bowen, L.J. in *Selwyn* v. *Garfit* (1888), 38 Ch. D. 284, 59 L.T. 283, 57 L.J. (Ch.) 609, at 615, says:—"What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver." But here, all that was required to be done was done and there was no requirement in the plaintiff company to do more and Alexander was fully aware of the legal and statutory rights of the plaintiff company, it is not the case of innocent parties or purchasers without notice for valuable consideration—a search in the Mining Recorder's office would fully apprize all parties that the plaintiff company had performed all statutory requirements and had claimed and were entitled to have issued to it certificates of improvements to all of the mineral claims—all of which facts were well known to Alexander—and it is the title of Alexander only that stands in the way of the plaintiff company being accorded its statutory right to the mineral claim in question in this action, and the respondents in the appeal, of course, have no better position than Alexander would have were he living and the defendant in the action.

There is no point in the contention made that the plaintiff company, after the right to the certificates of improvements had accrued, allowed the free miner's certificates to lapse, the plaintiff company was in good standing at that time, and for a year afterwards had a free miner's certificate, and had legal corporate existence in the Province of British Columbia. The real legal position the plaintiff company is entitled to have declared, it would seem to me, is, that of being entitled to the mineral claims in question and be viewed as having had issued to it the certificates of improvements followed by the Crown grants. That was the statutory position that had been earned, after great development work and expenditure of large sums of money. See *Tanghe* v. *Morgan et al.* 11 B.C.R. 76, 2 M.M.C. 178. My brother Martin at that time sitting in the Supreme Court, when considering sec. 19 in the Placer Mining Act Amendment Act 1901—exactly similar to sec. 53 of the Mineral Act above quoted—said at 11 B.C.R., at p. 79 and 2 M.M.C. at p. 181:—

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"It was the clear right, therefore, of the plaintiff at that time to obtain his record as soon as the clerk could record it, and it was likewise the plain duty of the Gold Commissioner not to interfere to prevent its issuance, for he had no inquisitorial powers of discretion in the matter. By this interference the plaintiff has suffered a wrong in not having had promptly granted to him that record to which he was entitled, and had there been no remedial statute he might have been placed in a very serious position by the error of the Gold Commissioner. But fortunately sec. 19 of the Placer Mining Act Amendment Act, 1901, was enacted to deal with just such cases, and it is as follows:—'19. No free miner shall suffer from any act of omission or commission or delays on the part of any Government official, if such can be proven.'

It was argued that this Court could not give effect to this section, but, it may be asked, if this Court cannot give effect to it, what was the object in passing it, and by what tribunal, and when, can it be put into operation? I have no doubt whatever that the section was enacted for the purpose of enabling this or any other Court having jurisdiction in mining cases to afford relief at the trial, or whenever proper, from the unfortunate consequences of an error of a Government official, and I do not hesitate to apply it here, the result being that the plaintiff must be regarded as being in the same position as though he had actually received at the time of his application that record which was his right."

And the judgment of my brother Martin was affirmed upon appeal to the then Full Court (see 11 B.C.R., at p. 87, 2 M.M.C., at p. 188). Here we have Alexander affected with notice of all the facts and circumstances surrounding the holding of the mineral claims by the plaintiff company, in fact counsel for the respondents at this Bar so admitted, but it is contended that there was no knowledge of any earned legal right. That cannot be effectively asserted; upon the facts it is abundantly clear that Alexander knew that the plaintiff company had got in all outstanding interests and was the holder of all the mineral claims, and was only refused the certificates of improvements because of the legal opinion given by the Deputy Attorney-General. That was a matter of record in the Mining Recorder's office. In *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at pp. 105, 106, 49 L.J. (Ch.) 792, 28 W.R. 911, 43 L.T. 95), Fry, J., (afterwards Lord Justice Fry) dealt with the circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it, and I cannot persuade myself that the plaintiff company can, upon the facts, be said to be in any way precluded from assert

ing its legal right to the mineral claims, the certificates of improvements and Crown grants. That eminent and distinguished jurist said (15 Ch. D., at pp. 105-106:—

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The strength of the position of the plaintiff company is the statutorily earned legal right to have the certificates of improvements issued to it. This was in 1906 and no subsequent conduct is established upon the facts binding upon the plaintiff company which disentitle the plaintiff company asserting the statutorily earned legal right.

The respondents here do not make out that the plaintiff company knew that Alexander was acting in reliance on the acquiescense of the plaintiff company, or that there were any acts of the plaintiff company, such as would induce Alexander to reasonably believe that the plaintiff company acquiesced in his obtaining title to the mineral ground in question, in fact, there is an entire absence of any such evidence, there being no acts whatever upon the part of the plaintiff company which could have induced Alexander to form any such opinion. (See *Smith* v. *Hayes* (1867), I.R. 1 C.L. 333.)

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The Crown grants issued in respect of the Alexander locations should be cancelled as being improvidently issued and all necessary consequential relief accorded. *Howard* v. *Miller* (1914), 22 D.L.R. 75, 20 B.C.R. 227 at p. 230, [1915] A.C. 318, 84 L.J. (P.C.) 49.

I am not of the opinion that the present case is one that admits of giving effect to sec. 37 of the Mineral Act, 1897, as amended by sec. 9 of the Mineral Act Amendment Act, 1898. In that the plaintiff company having done all that it was required to do it was entitled to have the certificates of improvements issued to it, and was not called upon to adverse the claims so wrongfully and illegally located by Alexander, (see *Collister* v. *Reid*, 47 D.L.R. 509, 27 B.C.R. 278, 50 D.L.R. 289, 59 Can. S.C.R. 275; *Re the American Boy Mineral Claim* (1899), 7 B.C.R. 268, 1 M.M.C. 304, at pp. 306, 307, 308).

It is true there has been long delay in bringing this action, yet under the circumstances, the case is not one in which it can be urged that there has been such laches as disentitles relief being granted to the plaintiff company. The respondents here can have no higher position than that Alexander would have had if living, and it is clear that by reason of the acts of omission and commission of the officers of the Crown, the plaintiff company on May 31, 1907, believing that it had no further title to the mineral claims allowed its free miner's license to lapse (the members of the company had become disheartened, no doubt at the unfortunate result of things, being dispersed as they were throughout the United States of America), there was, however, no act done that could be said to be a corporate act of the company binding upon the company so as to create any estoppel, the whole facts not being known to it. The contention is that not until the year 1918 did the plaintiff company discover that the officers of the Crown were guilty of acts of omission and commission which had resulted in its being denied its statutory right to certificates of improvements to the mineral claims in question in this action, and it was not until the month of February, 1921, that the necessary information was obtained to set up the cause of action here set up. On February 21, 1921, the plaintiff company again became a free miner of the Province of British Columbia and continues to be a free miner. The circumstances as disclosed in the present case, are such that no equity can be said to exist entitling any protection being accorded to the respondents. They are not transferees of the mineral claims for value, or in the position of innocent purchasers for value, so that no difficulty exists to effectuate complete justice to the plaintiff

company, *i.e.*, vesting in the plaintiff company title to the mineral claims. Can. S.C.

I would allow the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed.

CHASSY v. MAY.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 9, 1921.

CONFLICT OF LAWS (§ I G—125)—LEX SITUS—MINERAL CLAIMS IN CANADA—TITLE—AMERICAN DECREE—JURISDICTION—BONA FIDE PURCHASER.

The interest of a free miner in his mineral claim being an interest in land, a foreign Court has no jurisdiction to make any decree affecting the ownership of or interests in such claims outside of its territorial jurisdiction. The decree of an American Court, in so far as it adjudicates upon the rights of claimants to mineral claims in Canada, is of no effect, and a company acquiring the interests of persons claiming under such decree is not a *bonâ fide* purchaser and acquires no title thereto.

MINES AND MINERALS (§ I C—15)—TRANSFER OF MINERAL CLAIMS TO COMPANY—RIGHT TO ATTACK VALIDITY—ESTOPPEL.

One having an interest in mineral claims, who consents to a transfer of the claims in their entirety to a company formed to take them over and who was to receive shares in the company as a bonus for financing it, cannot attack the validity of the transfer for the purpose of regaining, in addition to the shares, his interest in the claims. (The Court of Appeal of British Columbia holding against such right on the ground of estoppel, and inconsistency of claims, while the Supreme Court of Canada, per Anglin, J., concurred in by Macdonald, C.J.A., as being against the interests of creditors and shareholders).

APPEAL from the judgment of the Court of Appeal of British Columbia, varying the judgment of Gregory, J., in an action to determine rights in certain mineral claims. Affirmed.

The judgment appealed from is as follows:—

MACDONALD, C.J.A.:—The plaintiff Wolbert and the defendant May, entered into an agreement to acquire the mineral claims "Winthorp" and "Butte" situate in this Province.

The first written document evidencing their agreement is dated January 20, 1916. This shews an agreement on their part to share alike in the profits to be made and disbursements to be incurred in connection with the said two claims "or any other property in the Province of British Columbia." They had already agreed verbally to purchase the two claims and they appear to have contemplated the acquisition of other adjoining claims. Each retained a duplicate part of said agreement and without the knowledge of the other made changes in it. Wolbert added the words, "and said parties to be co-owners," and in this condition he recorded it in the mining recorder's office. May struck out of his duplicate part, the words first above quoted but

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did not record it. With the effect of these alterations I do not feel much concerned, because it is not in dispute that the parties were to have equal interests in the "Winthorp" and "Butte" and the like interests in after-acquired claims as appears by a subsequent written agreement of June 26, 1916.

In my opinion it was intended by the parties that all these claims should be held by them as tenants in common and not as partnership property. This view is, I think, borne out by what appears in the said agreement of June 26, wherein it is stated that Wolbert had disposed of part of his interest in the claims, an act to which May took no objection and which was inconsistent with the assumption that the claims were partnership property. I would refer also to the attitude of the parties in the foreign suit, referred to hereinafter.

Wolbert and May then borrowed $3,500 from one Chassy, now plaintiff in this action, to enable them to pay for and make other expenditures upon the original claims, the others at that time not having been acquired, and as a bonus for granting the loan they agreed to give Chassy 100,000 shares in a company which they intended to incorporate to take over the claims. Subsequently and after the new claims had been acquired, a dispute arose between Wolbert and May, whereupon Wolbert brought suit against May in the Superior Court of the State of Washington, and a decree was made therein. It adjudged that Wolbert was indebted to May in a sum of $579.65 expended by him on the claims; that each was entitled to an undivided half interest in all claims in question in this action as tenants in common and liable to Chassy in like proportion. It decreed that Wolbert should pay his said debt to May within 60 days and that May should within 30 days thereafter execute and deliver to Wolbert a "conveyance" of his said half interest, the deed to contain a "defeasance" clause to the effect that Wolbert's right to the said half interest should cease and be forfeited to May should Wolbert fail to pay his share of the Chassy obligation, in case Chassy should take proceedings to enforce same.

Wolbert did not within the time specified pay his debt to May, and May therefore was not obliged to and did not execute and deliver the conveyance. Neither has Chassy taken proceedings to enforce re-payment of his loan.

The terms of the decree not having been complied with, May assumed to regard himself as the absolute owner of the claims and without the consent of Wolbert caused the defendant company to be incorporated and on March 21, 1918, transferred the claims to it in full ownership, ignoring Wolbert's right to a half interest therein.

The plaintiff Chassy comes into the litigation in this way: He acquired one half of Wolbert's interest in the several claims on May 20, 1918, and asserts that interest in this action. He is also making a claim to 100,000 of the defendant company shares, under the terms of said loan agreement. The plaintiffs brought this action to determine their rights, which their solicitors have endeavoured to set forth in some 30 pages of pleadings in which they have exhausted in ear-marking their several prayers for relief all the letters of the alphabet except three. Shortly stated, they claim a declaration that they are entitled to their said respective interests in the claims amounting in all to an undivided moiety thereof and in the alternative an account of the consideration received or which ought to have been received by May for the transfer of the said claims to the defendant company, and the appropriate relief to which they may further be entitled on such accounting.

Plaintiff Chassy in addition makes claim to the said 100,000 shares.

The defences set up in argument were *transit-in rem judicata* by reason of the said decree; that by default under that decree plaintiff Wolbert ceased to have any interest in the claims, and that his transferee the plaintiff Chassy is in no better position than Wolbert; laches in not asserting their claims earlier than they have done; that the transfers from May to defendant company were properly made under a power of attorney given to May by Wolbert and dated January 22, 1916, which power, however, refers only to the "Winthorp" and "Butte" claims; and finally, that the defendant company having expended large sums of money and having sold shares in its capital stock to the public it would be inequitable to grant any relief except that alternatively claimed by the plaintiffs, viz., an accounting by May of the consideration received from the company for the transfers.

The defence of *res judicata* must, I think, fail. It has been decided in our Courts and has long been the law of this Province, that the interest of a free miner in his mineral claim is an interest in land. The claims in question therefore must be considered to be immovables.

A foreign Court can make no decree whereby the ownership of or an interest in immovables, outside its territorial jurisdiction, shall be taken from one person and vested in another. The general rule is referred to in Professor Dicey's Conflict of Laws, 2nd ed., pp. 357, *et seq.* There are exceptions, however, to this rule which are referred to at p. 203 of the same work. They are in respect of cases where there has been either a contract to do the particular thing ordered to be done, for instance, a contract

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between parties for the sale of land in another country, which may be ordered to be specifically performed, or where there is something in the transaction in the nature of a trust.

Now the Washington decree dealt first with the debt owing by Wolbert to May of $579.65. That subject matter was entirely within the jurisdiction of that Court and is not in question in this action. It further declared that each of said parties were tenants in common, a declaration which it is not necessary in this case to examine. . . . It further declared that each was liable equally as between themselves upon the obligation to Chassy. That again was a matter entirely within the jurisdiction of that Court, and is not in question here. Then comes the matter to which Mr. MacNeill mainly directed his argument, viz., the order respecting the conveyance and forfeiture already referred to. Whatever the effect of that order might have been had Chassy taken proceedings and Wolbert made default in paying his share of the obligation, in the absence of such proceedings and default, there could of course be no forfeiture.

It is hardly necessary in this case to say so, but in my opinion the facts do not bring the case within the exceptions to the general rule referred to above. The only default which was made by Wolbert was in the payment of his said debt to May which was not due upon a contract affecting the land or charged thereon. Moreover, a forfeiture of the land in the circumstances, for non-payment of that debt, would be contrary to our jurisprudence. As to the other obligation, it had as between these parties themselves not then arisen, and has not yet arisen.

Mr. MacNeill pressed very strongly the argument that as Wolbert had resorted to the foreign Court, he ought to be left to his remedies in that Court, but in my opinion he cannot there obtain effective relief. What he complains of in this action has occurred since the decree, his interest, then intact, has been transferred by his trustee May to the defendant company, who is applying for Crown grants to the claims. He was obliged to take proceedings here to oppose the issuing of such grants and make good his adverse claim.

That the transfers of the claims to the defendant company can be supported under the power of attorney relied upon by Mr. MacNeill, is, I think, untenable. The power of attorney was given in relation to the "Winthorp" and "Butte" only, and at a time when the title to them was in Wolbert and for the purpose, as I see it, of facilitating the borrowing of the money afterwards borrowed from Chassy as aforesaid. The power was "to do anything I might or could do were I present in all matters relating to the securing of funds for the "Winthorp" and "Butte"

mining claims . . . and to sign my name to all necessary papers and documents and in the event of a sale to give a good and sufficient deed to the property." The power to raise money is immaterial to this litigation; the power to execute deeds was superceded by the subsequent transfer of the claims by Wolbert to May. It is unnecessary to consider whether the power of attorney was wide enough to include the transfer to a purchaser, because admittedly the transfers made by May to the defendant company was on the assumption that he was the owner, and the signing of the name "Wolbert" to them *per prox* was merely to add another string to May's bow. There was a breach of trust to which both defendants were privy. May, in his evidence on discovery, admitted that the defendant company, when it entered into the transaction with him, had full knowledge of the facts relating to the title, and this fact is clearly established by the evidence generally. The company was therefore not a *bona fide* purchaser for value without notice.

The alleged laches, because of delay in taking proceedings to set the transfers to the company aside, have no existence in fact.

I find more difficulty in dealing with respondent Chassy's position. By his pleadings he claims, and his claim has been conceded, the 100,000 shares already mentioned, which must necessarily be on the footing that the defendant company is the company which Wolbert and May had agreed to incorporate, shares in the capital of which they had agreed to give him, whereas, in my opinion, it is not that company. It is a company incorporated by May and his associates in the breach of trust. Chassy further claims, *but not in the alternative*, a quarter interest in the property transferred to the defendant company. These claims are quite inconsistent with each other. The company which Wolbert and May were to have incorporated was clearly intended to have the "Winthorp" and "Butte" claims in their entirety and not a partial interest in them and some others. On the one hand Chassy in effect says, "I assent to your claim of entire ownership," on the other, "I dispute it." He cannot have the shares and the quarter interest as well. He cannot be allowed to approbate and reprobate, and as he has insisted on his right to the 100,000 shares and has obtained judgment therefor in the Court below, and as no appeal has been taken from that term of the judgment, I think he is estopped from disputing the legality of the transfers to the company.

There was some inaptitude in the frame of Wolbert's statement of claim which in places appears to father his co-plaintiff's inconsistent demands. This, I think, may be regarded as inartificial pleading, since reading the whole, it is clear that Wol-

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bert insisted on his right to his quarter interest and put forth any other claims inconsistent therewith in the alternative merely. Moreover, no point was made of this in argument.

As regards the submission that it would be inequitable to disturb the company's title in view of the expenditure of money by it in developing the property and of sales of its shares to the public, this is in reality a plea that the parties cannot be restored to their original positions and that therefore the plaintiffs ought to be left to their other remedies. This is not, in my opinion, a case to which the doctrine of *res integra* is applicable, it is the defendant who must make restitution, not the plaintiffs. The trust property is admittedly in the possession of the wrongdoer. In so far as they have expended moneys for annual assessments necessary to keep the claims in good standing, defendants should have the lien given by the Court below. They have no right to relief in respect of other money expended by them. If the plaintiff, Wolbert, is content to recover his quarter interest in the claims in their present condition, that is his affair. It may be that the money expended in exploration has either lessened or destroyed any apparent value which the property had theretofore, a result which frequently follows the exploration of prospective mines.

The result is that, in my opinion, the appeal so far as respondent Wolbert is concerned, should be dismissed with costs, that that portion of the judgment which declares that Chassy is entitled to a quarter interest in the claims should be set aside. The judgment for the 100,000 shares should not be disturbed, but Chassy, in addition thereto is entitled to one-quarter of the consideration which May received or is entitled to receive from defendant company for the transfer of the claims, after deducting therefrom the said 100,000 shares.

Chassy should pay appellant's costs of the appeal, except such as were occasioned by Wolbert being made a party thereto.

MARTIN, J.A. would allow the appeal in part.

GALLIHER, J.A.:—I am in agreement with Macdonald, C.J.A.

McPHILLIPS, J.A. (dissenting in part):—In my opinion the appeal should fail.

Elaborate arguments have been addressed to the Court from both sides upon the very intricate questions of *lex loci* and *lex domicilii* as well as the questions of *res judicata*. I do not however find it necessary to go into these questions at any length, as with deference, I do not consider they are at all of importance in arriving at a decision upon this appeal.

In this jurisdiction in the *forum rei sitae* as well as by the judgment of the Superior Court of the State of Washington, the

respondent Wolbert has been held to be entitled to an undivided half interest in the mining claims in question in this action. The appellants, however, rely upon the judgment of the Superior Court of Washington to oust the respondent Wolbert from his title, claiming that by virtue of the judgment of that Court, such is the legal position.

In passing, let me say that there could be no effective judgment in the Superior Court of Washington, which would be determinative of the actual title to land or an interest in land in British Columbia (see *Barinds* v. *Green* (1911), 16 B.C.R. 433; Dicey's Conflict of Laws, 2nd ed., pp 357, 358, 359; *British S. Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602; *Boyd* v. *Att'y.-Gen'l. for British Columbia* (1917), 36 D.L.R. 266, 54 Can. S.C.R. 532, per Duff, J.) In saying this though I do not wish to be understood as denying the jurisdiction of the Superior Court of Washington to enforce contracts respecting foreign lands as well as pass upon equities existing between residents of the State of Washington, as presumptively the same powers would be capable of exercise as the Courts of England have always exercised in this connection, it is instructive to observe what was said in the judgment of Viscount Finlay in *Brown* v. *Gregson*, [1920] A.C. 860, at pp. 875-876:—

"It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it is not contrary to the *lex situs* which, with regard to real property, must be the governing law. The law on this point was laid down by Lord Cottenham, L.C., in the case *Ex parte Pollard* (1840), Mont. & Ch. 239, 250, 251:—'It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate *in rem;* but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings *in personam*, which Courts of Equity here are constantly in the habit of doing: Not thereby in any respect interfering with the *lex loci rei sitae*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect

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of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." '

Then what is the position? Admittedly the respondent Wolbert (as held in both jurisdictions) is held to be entitled to an undivided half share in the mining claims (divided as we will see later with Chassy). The Superior Court of Washington so held on July 16, 1917, and Gregory, J., whose judgment is now under appeal, held likewise, and of course the judgment of Gregory, J. is a judgment fully effective in all respects as affecting the title, unless reversed. Now has such a case been made out upon this appeal as would warrant its reversal? My answer is unquestionably in the negative.

The defendants undertake to say that there was a forfeiture of title by Wolbert owing to his failure to pay the money he was called upon to pay under the judgment of the Superior Court of Washington, before a conveyance would be made to him by the appellant May of the undivided half interest in the mining claims—yet when the bill of sale of the mining claims was made to the appellant company, the appellant May executed the bill of sale transferring the interest of the respondent Wolbert, as the attorney in fact of Wolbert. This transaction is absolutely contradictory to any forfeiture of title; further, it is an admission of that which was the true position, namely, that Wolbert was still the owner and entitled to an undivided half interest in the mining claims.

As pointed out by the trial Judge the appellant company, through its directors and officers, was and is affected by all the facts and circumstances and cannot be said to be a purchaser for value without notice of the interest of Wolbert. It is true that some of the facts and circumstances would appear to present a situation of inequitableness against both of the respondents, in that it would appear that throughout, the incorporation of a company was contemplated and what has been called "pre-organisation stock" was sold and moneys obtained to work and develop the mining claims. This feature of things, at times, when anxiously considering this appeal, has given me difficulty, but I cannot see that it is a case for any equitable relief. The defendants adopted a course which really precludes consideration of this aspect of the matter; there was a denial throughout and a wrongful denial of any interest in the mineral claims in the respondents. It is conceivable that the respondents would have readily enough, if consulted, agreed to the incorporation of the company and would have accepted in consideration of their in-

terests in the mineral claims, their proper proportion of the share issue which went to the appellant May.

It is significant that the appellant company fully appreciated the legal position and that the respondent Wolbert was interested in the mining claims sold to it, as the agreement of sale of the properties was between it—the purchaser—and May and Wolbert—the vendors—and the consideration was $100,000 payable by delivery of one million shares of the capital stock of the appellant company to the vendors. Apparently there never was any willingness to at any time recognise the respondents' interests or right to any of these shares; they would appear to have been wholly taken by the appellant May and dealt with as his sole property. The appellant company cannot upon the facts be held to be an innocent purchaser for value when all these facts are weighed and considered. Further, there was no good and sufficient power of attorney from the respondent Wolbert to the appellant May admitting of the execution of the bill of sale and agreement of sale on Wolbert's behalf by May. It is plain that any authority that May at any time had, had relation to other properties, not those in question in this action.

Then comes the question of the relief given to the respondent Chassy by the trial Judge. It is contended that Chassy is not entitled to the quarter interest in the mining claims, derivable by contract between himself and the respondent Wolbert, (Wolbert's interest being a half interest he disposed of one half of that interest—a quarter interest in all the properties—to Chassy) and the right to the 100,000 shares of the capital stock of the appellant company as well.

I must admit that this matter gave me considerable thought at one time and would seem to offer insuperable difficulty in supporting the judgment of the Judge, that Chassy was entitled to the interest in the properties as well as the shares. In the end, though, I cannot see that there is difficulty and I say this with the greatest deference to all contrary opinion,—Chassy is entitled to the declared interest in the properties by reason of his right thereto from Wolbert; Wolbert being held by the Judge (and in this I agree) to be entitled to a half interest, it follows that Chassy's interest is a quarter interest and this interest is quite independent of the further right to the 100,000 shares—Chassy is really the loser in respect to the share interest—in this respect—that he was entitled to the 100,000 shares in a company which would have vested in it the complete estate in the mineral claims but as matters are now a half interest only is in the appellant company.

There is, it is true, some inconsistency in the position taken by

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Chassy—but nothing though that would operate to deprive him of the full benefit of the judgment in his favour. I am not of the opinion that it has been demonstrated that the trial Judge arrived at a wrong conclusion; on the contrary, I am of the opinion that the conclusion he arrived at was a correct conclusion and that the judgment should not be disturbed. No error in law has been shewn and there is ample evidence supporting the Judge in his findings of fact.

In *Ruddy* v. *Toronto Eastern R. Co.* 33 D.L.R. 193, 38 O.L.R. 556, 21 Can. Ry. Cas. 377, [1917] W.N. 34, we find Lord Buckmaster saying (33 D.L.R. at 193):—

"But upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

I see no reason here to doubt the soundness of the judgment under review. I would therefore dismiss the appeal.

Charles Wilson, K.C., for appellant.

W. A. Cantelon, for respondent.

DAVIES, C.J.:—For the reasons given by my brother Anglin, I am of the opinion that this appeal must be dismissed with costs.

IDINGTON, J.:—Under the facts as stated in the second page of this case for the purposes of appeal herein and basis thereof, I am of opinion that the judgment of the Court appealed from fits the case and hence that this appeal should be dismissed with costs.

DUFF, J.:—The material fact upon which the Courts below proceeded is before us in fragments only; and I cannot say that having regard to the state of the record I have been able to deal with the appeal in a manner quite satisfactory to myself. In view of the findings of fact there is no satsifactory ground for reversing the judgment of the Court below.

ANGLIN, J.:—Such rights as the appellant Chassy had against the defendant May personally appear to be sufficiently recognised in the judgment of the Court of Appeal. He is in my opinion not entitled as against the respondent company to the one-fourth interest which he asserts in certain mining claims held by it.

It was the basis of an agreement to which he and his co-defendant Wolbert were parties that these mining claims, then owned by Wolbert and May, should be transferred in their entirety to a company to be incorporated to acquire them. To facilitate the carrying out of that arrangement Wolbert transferred his interest in two of the claims to May and the titles to

these and the other claims in question were recorded in May's name. It is formally admitted that the defendant company is the company which the parties had in mind when that agreement was made. It was for 100,000 shares of the company to be incorporated to acquire such claims, to be given him as a bonus, that Chassy had stipulated when he advanced $3,500 to help Wolbert and May to perfect title to the claims and the incorporation of the company to acquire them, and, according to an admission in the record, those shares Chassy sued for and has been awarded by the judgment of the Supreme Court of British Columbia. May had paid off the Chassy loan out of his own resources.

Whether the judgment according Wolbert a one-quarter interest in the mining claims in dispute was well founded or is consistent with the rejection of Chassy's demand for a like interest does not now concern us. The company has not appealed against the judgment in Wolbert's favour. It may be that the defendant May, in whose name the title to the disputed mining claims stood in the recorder's office, did not when transferring them to the company protect the interests of Chassy and Wolbert as he should have done.

But I cannot think that the interests of the company's creditors and shareholders, acquired on the faith of its ownership of these claims of which the legal title is vested in it, can be prejudiced by any such breach of duty on May's part. Chassy stood by and allowed these obligations of the company to be incurred, with knowledge that it was acting and was being dealt with as sole owner of the claims in question. It expended $83,000 on their development. When he receives one-quarter of the consideration obtained by May from the company for the transfer of the claims he will have got what the arrangement between himself, Wolbert and May contemplated should come to him as assignee of a one-half interest of Wolbert's one-half share in those claims. He will have got what May should have stipulated that he should receive when the claims were transferred to the company. There is no suggestion that May did not obtain a fair consideration from the company for what he transferred to it, namely, ownership of the claims in their entirety.

I prefer to rest the dismissal of Chassy's appeal against the company on this ground rather than on estoppel arising from his acceptance of a decree establishing an inconsistent claim—the ground of the judgment of the Court of Appeal.

MIGNAULT, J. (dissenting):—From my reading of the judgment of the Court of Appeal of British Columbia and of the findings of the Judges of that Court as well as of the memoran-

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dum settled by the Chief Justice of the Court of Appeal, which memorandum is in effect a stated case concurred in by the parties for the decision of this Court, it seems clear that the respondent, Gibson Mining Co., has no title to the mining claims transferred to it by May as against Wolbert, who was declared, by the trial Judge as well as by the Court of Appeal, to be owner of one quarter interest in the said mining claims. In so far as Wolbert is concerned, this declaration is final, no appeal against the judgment of the Court of Appeal having been taken by any of the respondents.

Chassy alone now appeals and the respondent, Gibson Mining Co., takes issue with him on his appeal. The first Court, besides granting to Chassy the 100,000 shares in this company claimed by him from Wolbert and May as a bonus on the loan he had made to them, which claim was admitted by the respondents, declared that Chassy, as well as Wolbert, was owner of one quarter interest in the mining claim. This judgment left the Gibson Co. with one half interest only in these mining claims under its transfer from May, to wit all the interest which May could transfer to it, and the other half it held as trustee for Wolbert and Chassy.

On the sole ground of the inconsistency of Chassy's demand, which, I take it, was to be satisfied by Wolbert and May, for 100,000 shares in the Gibson Co., and of his assertion of ownership of one-quarter interest in the mining claims acquired by the company from May, the Court of Appeal varied the first judgment by striking out the declaration that Chassy was owner of one quarter interest in these mining claims and by substituting therefor the declaration that Chassy is entitled to receive from the respondent May, as the consideration for the transfer of his interest in the mining claims to the Gibson Co., one quarter of the consideration which May has received or is entitled to receive from the Gibson Co., for the transfer of his interest in the said mining claims.

With deference I am unable to see any inconsistency in Chassy's two demands, proceeding as they do from two separate contracts. By the first contract, entered into by Chassy, Wolbert and May, Chassy, in consideration of the advance made by him to the two latter, was entitled to a bonus of 100,000 shares in the company which Wolbert and May were to have incorporated. By the second contract between Chassy and Wolbert, the former acquired a half interest in the share of Wolbert (one half under the agreement between Wolbert and May) in the mining claims. It is now held that the transfer by May to the Gibson Co., did not convey to them Wolbert's interest in these mining claims,

the transfer being a breach of trust committed by May against Wolbert to the knowledge of the Gibson Co. Chassy acquired a half interest in Wolbert's share in the mining claims long after he had been promised the 100,000 shares, and I fail to see why he assumes any inconsistent position when he seeks to obtain what had been promised him by these two contracts. His demand for the 100,000 shares does not admit the ownership by the Gibson Co. of Wolbert's half share in the mining claims, but at the most the company's title to what it acquired, and could only acquire, under its transfer from May, to wit the half interest which the latter owned. And if Wolbert has not lost, by reason of May's transfer to the Gibson Co., his interest in the mining claims, surely Chassy, who obtained from Wolbert, after the transfer in breach of trust from May to the Gibson Co., one half of Wolbert's interest, should also be unaffected by May's transfer to the Gibson Co.

Any contention that Chassy stood by and allowed the Gibson Co. to expend money on the mining claims, would equally avail against Wolbert who also stood by, but *quoad* Wolbert, this contention was rejected by the Court of Appeal. And to force Chassy—on the mere ground, which with deference I think unsound, that his two claims are inconsistent—to accept, in lieu of his interest in the mining claims, one quarter of what May received or is entitled to receive for his transfer to the Gibson Co., is, to my mind, to render binding on him this transfer which the Court of Appeal holds is not binding on Wolbert.

I think that the judgment of the trial Judge should be restored; so my opinion is to allow Chassy's appeal with costs here and in the Court of Appeal.

Appeal dismissed.

REX v. LITMAN.

Manitoba King's Bench, Dysart, J. April 29, 1922.

CRIMINAL LAW (§ IV D—122)—SENTENCE OF IMPRISONMENT—ALTERNATIVE OF LEAVING JURISDICTION—STAY OF COMMITMENT—TERM OF IMPRISONMENT—COMMENCEMENT—PRISONS AND REFORMATORIES ACT. R.S.C. 1906 CH. 148 SEC. 3.

Under the Prisons and Reformatories Act. R.S.C. 1906, ch. 148, sec. 3, the term of imprisonment, in cases applying to common gaols and gaol sentences, commences on and from the day of passing sentence, and not from the day of actual incarceration, and so where a magistrate imposes a sentence of six months imprisonment, but directs that the warrant shall be held twenty-four hours, in order that the accused may leave the city the accused is free from arrest under that conviction upon returning to the city more than six months after the commitment might have issued.

[*Rex* v. *Fitzpatrick* (1915), 25 D.L.R. 727, 25 Can. Cr. Cas. 42, 25 Man. L.R. 627 followed. See also (1922), 65 D.L.R. 676, 37 Can. Cr. Cas. 26, 32 Man. L.R. 81.]

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REX v. LITMAN.

Dysart, J.

APPLICATION for *habeas corpus*. Application granted.

L. D. Morosnick, for accused.

John Allen, K.C., for the Crown.

DYSART, J.:—On October 26, 1921, the petitioner was convicted of vagrancy before a Police Magistrate of the city of Winnipeg, and sentenced to 6 months in the common gaol. A warrant of committment was thereupon duly signed and sealed commending

"any peace officer to take the said Joseph Litman into . . custody, and . . to convey him to the . . common gaol . . and to deliver him to the keeper thereof;"

and likewise commending

"the said keeper . . to receive . . to imprison—and keep him at hard labour for the term of 6 months."

The judgment as recorded on the records includes these words "warrant to be held 24 hours."

The object of holding the warrant was to allow Litman an opportunity to leave the city. Accordingly on being released from custody he left the city within the said 24 hours. But on February 3, 1922, being found in the city, he was taken under the said warrant and lodged in gaol in pursuance of the term thereof.

The question is—Does the sentence begin to run from the day the sentence was passed or from the day incarceration began? If on the former date the prisoner is entitled to be released as the 6 months have elapsed; if upon the latter date he has yet several months imprisonment to undergo.

There is a practice, very general in its application, of permitting certain petty offendors to leave the city as an alternative to undergoing sentence of imprisonment . The option thus granted is termed "Floater." How long the offender is expected to remain absent is not stipulated, and the Crown in this case argues that if he ever returns he may be called upon to serve his sentence. This, it is pointed out, amounts to banishment for life. Surely it is not the spirit of our law to deprive a man forever of the privilege of living in our city, perhaps with his friends or relatives, and perhaps even after complete reformation of habits, merely because for a short time he was an "idle-gaming" fellow.

In this case the petitioner claims that to spend his time in foreign parts, deprived of the attraction of Winnipeg life, is as much a hardship upon him and as much a restriction of his liberty as it would be to spend the time in gaol in the city; and that such time so spent in outer darkness should be credited upon his gaol sentence. If his contention prevails, the alternative afforded him after his conviction would amount to an option given

him to spend 6 months in gaol in Winnipeg or 6 months at liberty out of Winnipeg.

The warrant of commitment is directed to any or all peace officers and commands them "to take—into custody" the person convicted. At the time the warrant was issued the convict in this case was in actual custody under his arrest made on the previous day, and under which he was properly detained until disposition of the charge against him. That disposition was not complete until conclusion of the trial and passing of the sentence. At that moment the authority under which the convict was detained expired and although certain routine formalities had to be complied with before he secured his actual liberation, he was nevertheless in the contemplation of the law immediately at liberty. It is for that reason, therefore, that the warrant of commitment, being dated after his conviction directed the peace officer "to take" him into custody. Ordinarily he would have been taken into custody under this warrant before he had completed the formalities attending upon termination of his earlier custody. But in this case the judgment directed that the warrant should be held 24 hours. Within 24 hours the prisoner was released from the earlier custody and as contemplated took his departure from the city. Consequently the warrant of commitment was not executed upon him, but remained in full force and effect until February 3, when it was executed upon him. The point therefore raised by the prisoner's counsel that the arrest on February 3 was illegal because the prisoner had once been taken into custody under this warrant, is not well founded and I am of opinion that the arrest under this warrant was not illegal and the prisoner is not entitled to be released on that ground.

The other, and indeed the main question raised, is—When did the sentence commence to run? In *Rex* v. *Fitzpatrick* (1915), 25 D.L.R. 727, 25 Man. L.R. 627, 25 Can. Cr. Cas. 42, decided by Galt, J., of this Court, it is laid down clearly that the sentence begins to run from the day sentence is passed and not from the day of incarceration. In the Province of Quebec, the case of *Reg.* v. *Johnson* (1901), 4 Can. Cr. Cas. 178, is to the same effect. But in that case, the prisoner, who had been serving a 5 year sentence in the penitentiary, was allowed out under the licensing system and although he had not violated the conditions of his leave he was re-arrested to serve the balance of the term. The Judge referred to sec. 43 of the Penitentiary Act, R.S.C. 1906, ch. 147, which provides that, "the term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence."

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Dysart, J.

It is contended, however, that that decision applies only to sentences which involve penitentiary imprisonment. But in answer to that it is to be noted that the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 3, contains exactly the same language, and that the Act applies to common gaols and gaol sentences.

On the other hand there is the case of *Rex* v. *Gregg* (1913), 13 D.L.R. 770, 6 Alta. L.R. 234, 22 Can. Cr. Cas. 51, decided in Alberta. Beck, J., before whom the matter was tried, says 13 D.L.R. at p. 772:—

"That the period of imprisonment is to be calculated from the time of actual imprisonment is settled by decisions: *Bowdler's* case (1848), 116 E.R. 999, 12 Q.B. 612, 17 L.J. (Q.B.) 243; *Ex parte Foulkes* (1846), 15 M. & W. 612, 153 E.R. 994, 15 L.J. (Ex.) 300; *Braham* v. *Joyce* (1849), 4 Exch. 487, 154 E.R. 1305, 19 L.J. (Ex.) 1. I should, without authority, have so decided on the ground of reason and common sense."

The cases relied upon in support of that opinion, however, scarcely uphold the statement. They are old cases decided before 1850 under English Acts providing for the imprisonment of debtors in which cases the warrants were by statute to be left undated. The Courts held in those cases that the warrants should be considered as dated from the time of the incarceration of the debtor. These decisions were based upon interpretation of that special statute, and the effect of making the warrant speak not from the day sentence was passed but from the apprehension of the debtor. The decisions are therefore of very little assistance to us.

A North Carolina case has been cited, *viz.*, *In re Hinson* (1911), 156 N.C. 250, decided by a Court having jurisdiction on a par with our own. The decision is based not upon any statutory law but upon general principles and decides that the sentence begins to run from the time of incarceration even though the offender has absented himself from the jurisdiction for a time longer than that imposed by the sentence.

While these decisions are not in any complete sense binding upon this Court, still in the interests of justice we ought to harmonize our own decisions with them, or with such of them as best interpret the spirit of our laws. The opinion of Galt, J., as stated in the *Fitzpatrick* case, *supra*, appeals to me as setting forth the principle involved. That decision is consistent with *Reg.* v. *Johnson*, *supra*, and most important of all it gives effect to the language of the Prisons and Reformatories Act, which expressly enacts that unless otherwise directed the term of imprisonment shall be deemed to commence on and from the day of the

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passing of sentence. If it were not that this enactment has not been referred to in any of these Canadian decisions I would have thought that the question could not seriously be raised. However, as the *Fitzpatrick* case is in complete harmony with the language of the Act, and as it is a decision of our own Court, I will accept it and follow it.

It seems to me that on this theory may best be explained the nature of the leave which was granted to the prisoner in this case. The offender was not banished for life. Indeed there was no power in the Court to impose such a sentence. He was sentenced to a definite term of 6 months in the common gaol. As an alternative he was allowed to absent himself from the city so that the warrant of commitment might not be served upon him. That alternative is based upon wise public policy and is sanctioned by a judicial decision in the case of *Rex* v. *Fitzpatrick*, *supra*. It affords the community all the benefits that would enure from imprisonment without the burden of expense; it affords the offender the benefit of a restricted liberty but with the burden of supporting himself. And because a definite period is fixed for the term of imprisonment so it seems to me a definite and corresponding period must be attached to the contemplated banishment. If the intention were that the imprisonment should be for 6 months from the time of incarceration it would be so stated in the warrant. In the absence of any such expressed intention, we must infer that the term of banishment is coterminous with the term imposed for imprisonment. Therefore, on this theory and in my opinion, it follows that at the expiration of the term imposed, in this case 6 months, the offender, if in prison would be entitled to his liberty; and if in banishment would be entitled to return to the city.

The order will, therefore, be granted and the prisoner discharged from custody. There will be the usual protection to the magistrate, gaoler, constables and officials, in connection with the arrest or detention of the prisoner.

Application granted.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 7, 1921.

ALIENS (§ III—15)—BRITISH BORN WOMEN—GERMAN NATIONALITY BY MARRIAGE—PROPERTY VESTED IN CUSTODIAN—TREATY OF VERSAILLES 1919, ARTS. 296, 297—DEBTS—JURISDICTION.

The property rights and interests in Canada of the plaintiffs, who were British born women, who acquired German nationality only by their marriages, were vested in the defendant by virtue of the Treaty of

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Peace (Germany) Order 1920, on their application for a declaration that their said property rights and interests in Canada did not come within the provisions of art. 296 of the Treaty of Peace, and that they be relinquished. The Court held on appeal from the Exchequer Court that deposits of money with the National Trust Co. for investment in securities, repayment of which was guaranteed on dates which fell during the war, are debts payable during the war within the meaning of the above provision of the treaty and could not be relinquished; that deposits in a savings bank and moneys invested with a loan company to be withdrawn on notice and from the bank on presentment of the bank book also, are not "debts," it not being established that the right to such notice and presentment was abandoned; that moneys deposited with a trust company with instructions that all sums of capital and interest so received should be held by the company to the credit of the owner until further advice by her which was never given were not "debts payable" as provided by the treaty; that dividends and interest from investments or securities which became payable during the war were "debts."

APPEAL from the judgment of the Exchequer Court of Canada declaring that none of the debts of the respondents vested in the appellant, as custodian, were "debts payable" under the terms of the Treaty of Peace with Germany art. 296, and might be relinquished to the respondents. Varied.

The facts of the case are as follows:—These were applications to have it declared that none of the property, rights and interests of the plaintiffs which were vested in the defendant, were within the provisions of art. 296 of the Treaty of Peace with Germany, and to have the custodian relinquish the same.

Mary Peniston Wiehmayer was British-born, and in 1898 married Theodore Wiehmayer, a German, and took up residence in Germany where she was residing on August 4, 1914. By the death of her father and mother in Canada in years 1912 and 1916 respectively, she inherited certain properties, interests and rights in Canada which were held by her on the said August 4, 1914, and which, by on Order of May 20, 1919, became vested in the Minister of Finance and Receiver General as custodian of enemy property, and were later vested in defendant under the Treaty of Peace (Germany) Order 1920, together with interest, etc., accrued since.

In January, 1913, there was held for said plaintiff by one Fielding, at Toronto, mortgages upon and agreements respecting real estate in Canada, and in the said month she instructed him to remit the interest to her from time to time and to pay over any principal moneys paid thereon to the National Trust Company, to be held by it for investment. On August 22, 1914, the trust company ceased to reinvest any principal sums, but held them in cash. On August 4, 1914, they held mortgages amounting to $34,050 and on January 10, 1920, they held mortgages amounting to $16,900, and cash $14,220.

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On May 6, 1915, said Fielding handed over the balance of mortgages to the trust company, to be dealt with by the company as aforesaid and on January 10, 1920, they held investments amounting to $32,115.14 and $21,054.27 in cash. During the war the interest, and part of the capital was paid to one Louis S. McMurray, for said plaintiff who deposited the same, along with interest from other securities, to her credit in a savings account in the Bank of Toronto, except such as was remitted to said plaintiff.

The money now in the hands of the custodian as regards said plaintiff amounts to the sum of $23,285.54 under the vesting order aforesaid. Besides the above, bonds of the Wm. Davies Co., Ltd., shares of the Consumers Gas Co., Dominion Bank stock and Dominion Telegraph Co. stock, with interest accrued were vested in the Minister of Finance and Receiver General, by said vesting order, and later were vested in the defendant herein. That besides these the said company was, on January 10, 1920, the owner of the following property and interest, to wit: bonds of the Commercial Cable Co.; bonds of the Canada Locomotive Co.; shares of the MacKay Co's.; shares of the Canadian Pacific R. Co.; all of which was vested in the defendant.

The plaintiff, Lucy Hamilton Neitzke was also by birth of British nationality. In 1910 she married Leo Neitzke, a German, and has ever since resided in Germany where she was on August 4, 1914. At that time she owned certain property, rights and interests in Canada which, by an order of May 20, 1919, were vested in the Minister of Finance and Receiver General as custodian of Enemy property and were later vested in the defendant under the Treaty of Peace (Germany) Order 1920.

The property, rights and interests involved in this case are as follows: First mortgage, 15 year sinking fund of the William Davies Co., Ltd., of the par value of $10,000, bearing interest at 6%, the principal to mature July 1, 1926; $13,000 invested by National Trust Co., Ltd.; under its guaranteed trust investment receipts, dated January 16, 1912 and January 2, 1914; $30,000 invested by the Toronto General Trusts Corp'n. under its guaranteed investment receipt, dated July 9, 1913; 100 shares of the capital stock of the Canada Permanent Mortgage Corp'n of the par value of $10 each; $20,000 in the hands of the W. B. Hamilton Shoe Co., Ltd., under the terms of a receipt dated January 1, 1913; $3,456.67 on deposit with the Central Canada Loan and Savings Co.; 6 shares of the Fire Insurance Exchange Corp'n Stock and Mutual, of the par value of $60 per share, upon which $30 per share is paid up.

The special cases of the said Lucy Hamilton Neitzke and Mary

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Peniston Wiehmayer, were united for argument, being argued by the same counsel, before the President of the Exchequer Court, at Ottawa.

Both plaintiffs by their statements of claim ask for (*a*) a declaration that none of their property, rights and interests vested in the defendant, as aforesaid, are within the provisions of art. 296 of the Treaty of Peace with Germany. (*b*) An order that the said property, rights and interests be returned by the defendant to them.

The Exchequer Court held that all the property of the respondents could be relinquished as not constituting "debts payable before the war" or "debts which became payable during the war" within the terms of the treaty.

Christopher C. Robinson, for the appellant.

R. S. Robertson, K.C., for the respondent.

In re Neitzke.

DAVIES, C.J.:—After much consideration of the facts of this appeal from the Exchequer Court, I am of opinion that

1. The deposits with the National Trust Co. are debts within art. 296; 2. the deposit with the Central Canada Loan and Savings Co. is *not* a debt within the article; and 3. that the dividends and interest are debts within art. 296.

I concur in the reasoning of Anglin, J., with respect to the first and second items, but I am unable to agree with him with respect to the item concerning dividends and interest.

In re Wiehmayer.

I concur in the opinion of Anglin, J., that neither the deposits with the Bank of Toronto nor the Mary Prue Mara trust moneys are debts within the art. 296, but I am unable to agree with him as regards the dividends and interest which I hold are debts within art. 296.

IDINGTON, J.:—In each of these cases an appeal is presented from the judgment therein of Cassels, J.

It seems to me that if the final determination of either is to be undertaken it must turn, in the last analysis, upon the interpretation to be given art. 296 of the Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles June 28, 1919, and certain subsidiary provisions of said treaty.

Said art. 296, by the introductory clause and four following paragraphs, reads as follows:—

There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (*e*) hereafter the following clauses of pecuniary obligations: (1) Debts payable before the war and due by a national of one of

the contracting powers, residing within its territory, to a national of an opposing power, residing within its territory; (2) Debts which became payable during the war to nationals of one contracting power residing within its territory, and arose out of transactions or contracts with the nationals of an opposing power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war; (3) Interest which has accrued due before and during the war to a national of one of the contracting powers in respect of securities issued by an opposing power, provided that the payment of interest on such securities to the nationals of that power or to neutrals has not been suspended during the war; (4) Capital sums which have become payable before and during the war to nationals of one of the contracting powers in respect of securities issued by one of the opposing powers, provided that the payment of such capital sums to nationals of that power or to neutrals has not been suspended during the war.

It is to be observed that neither was the Exchequer Court, nor are we, deciding any cause between the parties to the said treaty.

It seems to have occurred to the appellant or the Government of Canada that under this provision certain cases of hardship were likely to arise; and by virtue of an Order in Council the possibility of a relinquishment to members of such class of persons was directed subject, however, to a reference to the Exchequer Court of Canada to declare the rights of such persons to so claim, and appellant to assent to the said relinquishment.

The Exchequer Court declared accordingly that each of the respective respondents in question is entitled to claim from appellant the relinquishment of her share of funds held by him as custodian.

It seems to me clear that the Exchequer Court must be acting in an advisory capacity and its judgment cannot be of any higher value than that may give it.

I am in doubt how such a case can be brought by way of appeal here. It is not from a final judgment within the meaning of either the Supreme Court Act R.S.C. 1906, ch. 139, or the Exchequer Court Act R.S.C. 1906, ch. 140. It is probably quite competent for the Crown to submit directly to us such a question as submitted to the Exchequer Court.

And if, passing the doubt I have as to the said right of appeal under such very peculiar circumstances, I applied my mind as I have to the arguments addressed to us, and much else bearing upon the case, I regret to say I still remain, with great respect, in grave doubt as to the correctness of the opinion of the trial Judge.

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I am quite unable to give the word "debt" in said article the narrow meaning in the sense contended for, as if restricted to what our common law Courts might classify as such.

If I resort to dictionaries, such as Stroud, and Bouvier, I find it might reasonably be given in such a document as presented a much more extended meaning.

Curiously enough, though sometimes driven by mere doubt to maintain a judgment of the Court below which I cannot satisfy myself is clearly wrong, I feel impelled, in a mere advisory judgment such as this, to hold that the appellant is entitled to rest upon such doubt and to claim he is entitled to act thereon if such be the conclusion of the majority of the Court.

In truth, however, the more I consider the meaning of the word "debt" and the relevant words in the art. 296 and the annex, the less reason I see for the restricted meaning applied below.

Since writing the foregoing I find much difference of opinion in this Court and that coupled with my own doubts as to the correctness of the opinion of Cassels, J., leads me to the conclusion that the so-called appeals should be answered by submitting that amid so much doubt and difficulty the appellant cannot on the case presented act in such a way as to give either respondent any relief at present.

In re Wiehmayer.

DUFF, J.:—I am disposed to think that the opinion or judgment of Cassels, J., is not appealable to this Court but as the questions submitted to him could be submitted directly to this Court by an Order in Council, it seems to be proper that we should treat the appeal as in the nature of a submission and give such assistance as we can for the determination of the questions involved. I think the word "debts" in art. 296 ought to receive a broad construction and I think it includes moneys held under a legal or equitable obligation to pay at any time on demand. On the other hand debts payable at a fixed date or at the expiration of notice are not, in the absence of such notice or prior to such date, within the terms of the article; and deposits in respect of which the depositee is entitled to require notice before payment are therefore not debts payable within those terms. In the result, dealing *seriatim* with the items in respect of which dispute arises:—

(a) The deposit in the Bank of Toronto does not fall within art. 296. (b) As to the cash held by the National Trust Co. for the Mary Prue Mara trust and the proceeds of the mortgages, I think that the memorandum of October 14, 1914, although it does not in terms refer to these funds, indicates the terms upon which they were in fact held and that, applying the criterion

above indicated, they fall within art. 296. (c) Speaking generally, dividends and interest being moneys which somebody was under a legal obligation to pay, were, in my opinion, debts within the meaning of art. 296. As regards interest which became payable during the war whether by contract or by statute the legal obligation to pay was one of the legal incidents of the "transaction" or "contract" the execution of which in respect of such incident was suspended on account of the war. The phrase "on account of the war" expresses in my judgment the meaning of the words "on account of the declaration of war." As respects dividends: the word "transaction" in my judgment is broad enough to embrace the acts or proceedings by which Mrs. Wiehmayer's right to the respective dividends in question became constituted and the obligation to pay dividends is under the criterion above indicated a debt within art. 296.

Some difficulty arises in respect of dividends and interest paid by McMurray into the Bank of Toronto account. I am disposed to think, not without a great deal of doubt, that as these moneys appear to have been thus dealt with by him with the authority of Mrs. Wiehmayer, they must be held to stand in the same category as the other moneys in that account; and in consequence of the term of the deposit which entitled the bank to require notice before payment, they ought not to be considered to have constituted a debt "payable" within the meaning of the article.

In re Neitzke.

Applying the criterion mentioned in Mrs. Wiehmayer's case it follows: 1st, that the deposits with the National Trust Co. are within art. 296; 2nd, that the deposit with the Central Canada Co. does not fall within art. 296.

As to interest and dividends: Interest and dividends generally are to be considered within the article, but any sum representing such interest and dividends as may have been credited by the Central Canada Co. to Mrs. Neitzke's deposit account under the terms mentioned in para. 13 of the case, is, I am disposed to think with a great deal of doubt, not to be considered as a debt payable within the article.

ANGLIN, J.:—The appeals in these two actions, which raise very similar questions, were argued together. By a special case stated in each the parties seek to have it determined whether certain property of the respondents, German subjects through marriage only, or any part of it is or is not of such a character that the Government of Canada may renounce claim to it without becoming accountable therefor to the Government of Germany. The answer depends primarily, if not entirely, on whether the several items of property in question were at the date of the

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Treaty of Peace with Germany (January 10, 1920), "debts (which had been) payable before the war" or "debts which became payable during the war" within art. 296 of that treaty, or were then not such debts but rather "property rights (or) interests . . . . belonging to German nationals" within art. 297. If they were the former they cannot be relinquished; the treaty forbids it (art. 296, paras. (a) and (b)); if the latter they may be abandoned to the respondents without accountability to Germany being incurred, the allied powers having merely "reserve (d) the right"—not undertaken responsibility—"to retain and liquidate" such property and give credit for its proceeds.

It seems abundantly clear that the liabilities to the respondents arose out of transactions of which the partial execution was suspended "on account of the declaration of war." These latter words of clause (2) of art. 296, in my opinion, clearly mean on account of the situation (i.e., the state of war) created by the declaration of war. That situation and the disabilities it entailed existed up to January 10, 1920, "on account of the declaration of war."

The heading of art. 296 is "Debts," which, if not misleading, can scarcely be termed definite or precise, (37 L.Q.R., p. 59). The article deals not with all pecuniary obligations but only with certain classes of them. In considering what pecuniary obligation it was intended to comprise within the category of debts it must first be observed that there are certain restrictions on the broad meaning of that word, viz., that which is owed or due; anything, (as money, goods or service, which one person is under obligation to pay or render another;) a sum of money or a material thing. Murray's Dict., vbo., Debt, imposed by the qualifying statements of the article that the debts dealt with are "pecuniary obligations" and that they must either have been "payable before the war" or have "become payable during the war." In the French version the word "payable" is rendered as "*exigibles*" in para. No. 1 and as "*exigibles et dues*" in para. No. 2.

The special mention made in clauses (3) and (4) of capital sums and interest payable "in respect of securities issued by an opposing power" is also significant. Such obligations are classed with "debts" due by the nationals of such power. The legitimate inference would seem to be that capital and interest payable in respect of private securities issued by such nationals, whether persons or corporations, were not meant to be within the purview of the article.

The treaty does not declare by what law its terms are to be construed. Having regard to its international character, however, it should perhaps not be too readily assumed that merely

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because English municipal law differentiates between a debt and the obligation of a trustee to account that distinction should obtain in construing the word "debts" used in art. 296. Yet when the nature of the relations of the *cestui que trust* and the trustee to trust property are carefully considered the distinction would not seem to depend upon considerations peculiar to English law but rather to be of universal application. The *cestui que trust* is not a mere creditor of his trustee in respect of trust moneys, but has a beneficial proprietary interest in them while in the trustee's hands. They are his moneys, not the trustee's. They are not exigible to satisfy a judgment for the claim of any other person who is a creditor of the trustee as they would be if the latter was merely a debtor for them to his *cestui que trust*.

"Payable" is a word susceptible of more than one shade of meaning; *Massy* v. *Lloyd* (1863), 10 H.L. Cas. 248, 11 E.R. 1021, at pp. 267-8, per Westbury L.C. Counsel for the Crown in his factum, and again at Bar took the position that a debt is "payable" only when it may be sued for without any previous demand or other act of the creditor—but not otherwise.

North, J., in *In re Tidd*, [1893] 3 Ch. 154, at p. 156, 62 L.J. (Ch.) 915, 42 W.R. 25, quotes with approval the following passage from Evans' Commentary on Pothier, vol. II, p. 126:—

"Where a man deposits money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that, upon principle, no action should be allowed in the cases without a previous demand; consequently, that no limitation should be computed further back than such demand.

The Wiehmayer Case.

Assets of three descriptions are in question in this case: (1) Moneys of Mrs. Wiehmayer deposited in a savings bank account with the Bank of Toronto. (2) Mrs. Wiehmayer's share of cash held by a trustee company at the date of her mother's death and of moneys received by it as the proceeds of mortgage securities in its hands—both covered by a trust of which Mrs. Wiehmayer and her sister, a British subject, were beneficiaries subject to a life interest in their mother. (3) Interest and dividends which became payable to Mrs. Wiehmayer while a state of war subsisted.

(1) As a "deposit . . . . . established before or after the declaration of war" the money on deposit in the Bank of Toronto seems to be a "cash asset" within clause (h) (1) of art. 297, as defined by sec. 11 of the annex to that article, rather than a "debt" within art. 296. It was payable by the terms of the

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contract of deposit only on production of the bank book, and, if required by the bank, after 15 days' notice. A demand for payment accompanied by production of the bank book and the 15 days' notice, if exacted, were conditions precedent to a cause of action to recover it arising. Until these conditions were fulfilled, if a "debt" it was not "payable." I cannot distinguish the case as to these moneys from *Atkinson* v. *Bradford Third Equitable Society* (1890), 25 Q.B.D. 377, 59 L.J. (Q.B.) 360, 38 W.R. 630, and *In re Tidd, supra.*

It is true that the special case states that it was not the practice of the bank in dealing with this account or with similar accounts to insist that requests for withdrawals were to be accompanied by the bank book.

There is no admission, however, that the bank had relinquished or abandoned its right to do so or to exact the notice and I am not prepared to draw that inference from the mere existence of the practice stated. There are no other circumstances before us pointing to an equitable right on the part of the respondent to rely on that practice as having established such an abandonment—nothing to indicate that in suing to recover the amount to the credit of her savings account it would be unnecessary for the plaintiff to aver performance of the condition precedent as to presentation of the bank book or inequitable on the part of the bank to set up against her the express stipulations of its contract with her.

Although counsel for the appellant expressly confined his appeal to such items as fall within art. 286, it has been suggested in the course of the consideration of these cases that for all "cash assets" there is a like obligation to account through the clearing office, imposed by clause (h) of art. 297 and sub-clause (1) thereof. The argument urged is that "all cash assets in general" are by clause (h) put in the same category with "net proceeds of sales of enemy property" which has been retained and liquidated, and that sub-clause (1), in the case of powers adopting sec. III (art. 296) and the annex thereto, imperatively requires that such proceeds and "cash assets" shall alike be credited to the power of which the owner is a national, through the clearing office. But that construction would impose on the allied or associated powers the obligation to "retain" all cash assets within their territories belonging to German nationals, whereas such "cash assets" form part of the "property, rights and interests," which the allied or associated powers by clause (b) merely reserved the right—impliedly refused to assume any obligation—"to retain and liquidate." Clause (b) is, in my opinion, the dominant provision, and clause (h) and sub-clause (1) thereof

must be read subject to it. The latter clauses therefore apply in the case of the allied or associated powers only to "cash assets" in respect of which such powers shall have exercised their reserved right of retention.

As to item No. 1 the appeal in my opinion fails.

(2) and (3). Because of the relations to them of the trustee and the *cestui que trust* above stated the trust funds covered by item No. 2, I also think cannot be regarded as "debts" and neither these moneys nor interest or revenues accruing from them, comprised in item No. 3, as I view them, "became payable during the war" to the plaintiff. While there is nothing in the terms of the trust instrument that would have precluded her calling upon her trustee to account to her at her mother's death for her share of the moneys covered by the trust then in its hands and afterwards for the other moneys included in the second item and for interest and revenues arising therefrom when and as they were received by it, a memorandum of instructions of October 14, 1914, that all sums, either of capital or income, received on the plaintiff's account by her trustee were to be retained by it to her credit until further advice by her, at least serves to negative the existence from that date forward of any arrangement or standing instructions that such moneys were to be remitted or paid over by the trustee on receipt, which might be tantamount to a demand. There was a further act to be done by the creditor in regard to all these moneys before a right of action to recover them from the trustee would have arisen. In my opinion they were not "debts," which "became payable during the war" to the plaintiff.

Neither are dividends "debts" within art. 296. They are the share or interest of the stockholder to whom they are payable in the distributable profits of the corporation and are his property quite as much as are the shares in the capital stock he holds. They are "cash assets" as defined by clause 11 of the annex to art. 297.

The appeal therefore also fails as to items (2) and (3).

The Neitzke Case.

There are also three distinct items involved in this appeal: (1) an amount deposited on August 4, 1914, to the credit of the plaintiff in the Central Canada Loan and Savings Co.; (2) sums represented by two guaranteed trust investment receipts issued by the National Trust Co., Ltd., to the plaintiff; (3) interest and dividends which became payable between August 4, 1914, and January 11, 1920, on property, rights and interests of the plaintiff.

(1) Item No. 1 seems to be in the same position as the corres-

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ponding item in the Wiehmayer case. The money was placed in a special deposit account bearing interest and was withdrawable only on 30 days' notice if required by the loan and savings company. This would appear to be a "deposit established before or after the declaration of war" within the purview of clause 11 of the annex, and therefore a "cash asset" within art. 297 (h) (1). No abandonment of the right to exact the 30 days' notice is alleged or shewn.

Interest which accrued due on these moneys as "assets coming from a deposit" (annex, cl. No. 11), covered by item No. 3, would be subject to the same disposition as the principal.

(2) The substance of the transactions between the plaintiff and the National Trust Co., must be considered rather than the name given by the company—"Guaranteed Trust Investments." When the trust company received each of the two sums from the plaintiff it gave her an absolute undertaking to repay the principal at the end of 5 years and to pay her interest thereon in the meantime half-yearly at the rate of 4½% per annum. The dates for payment of the principal and interest as well as the rate of the latter were fixed quite independently of the terms of any security in which the moneys might be invested by the company. The only liability to the plaintiff was that of the company. Her sole recourse was against it. No specific security was allotted to her investment or in any manner ear-marked as one on which she should have an exclusive claim. Her only right, apart from that of enforcing payment by the trust company according to the terms of the receipts given her, would be to require the company at all times before repayment of the principal to hold allocated to such "trust investments" of the plaintiff and others in like plight an amount of securities of face value equal to the total amount of moneys received by it upon similar terms. Of the sufficiency of such securities, however, the company was the sole judge. In the event of its making default in payment and going into liquidation there would, no doubt, be a mass of its securities on which all customers from whom it had obtained money on terms similar to those arranged with the plaintiff would alike have liens entitling them to share *pari passu* in their proceeds up to the amount of the company's liability to each of them respectively. But at no time was there any part of that mass of securities held by the company which was hers. Her sole recourse, so long as the company remained solvent, was to look to it for payment of the amount advanced by her with interest thereon at the rate stipulated in the receipt given her, and in the event of insolvency or liquidation to rank for that amount as a secured creditor upon the fund represented

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by the securities that had been allocated by the company to its "trust investments" of the class to which hers belonged.

In substance these transactions, in my opinion, were not deposits of money by the plaintiff in trust for investment by the company on her account but loans to the company of the amounts handed over by her to it, of which payment was to be collaterally secured by liens, held in common with other lenders in like plight as above stated, on certain assets of the company set aside for that purpose. The plaintiff was a lender and as such a creditor; the company a borrower and as such a debtor—and the sole debtor—of the plaintiff. Both the principal and the interest are "debts" of the company to the plaintiff which "became payable during the war" and as such, I think, fall within art. 296 of the Peace Treaty.

(3) The position of any dividends to which the plaintiff became entitled is the same as that of the dividends in the Wiehmayer case. Interest on investments or securities, other than the money lent to the National Trust Co., and that on deposit with the Central Canada Savings Co., which have already been dealt with, would seem to be "cash assets" within the definition of that term in the annex to art. 297.

I have assumed that we have jurisdiction to entertain these appeals from the opinion expressed by the Judge of the Exchequer Court under the jurisdiction conferred upon that Court by sec. 1 (i) (1919 (Can.) 2nd sess. ch. 14.) In the result the opinion expressed by the Judge in the Wiehmayer case should in my opinion be confirmed; that expressed in the Neitzke case should also be confirmed except as to the moneys received by the National Trust Company on "guaranteed investment receipts" and interest accrued thereon.

BRODEUR, J.:—As these two appeals have been argued together and as they raise practically the same issues, they might be both decided at the same time.

These actions have been instituted by two women who were of British nationality by birth and who married men of German nationality before the war and went to reside in Germany. They had money invested in Canada and their Canadian properties and rights were, by order of the Court, vested in the Minister of Finance under the provisions of the consolidated orders respecting trading with the enemies, 1916.

By the Treaty of Peace of 1920 all the properties and rights vested in the Minister of Finance were transferred to the Secretary of State of Canada, the appellant, as custodian. Now the respondents claim by their action that their property, rights and interests, which they possess in some investments, be returned by

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the appellant to them and that it be declared that these investments should not be considered as falling under the provisions of art. 296 of the Treaty of Peace with Germany.

The Secretary of State is willing to relinquish these properties and hand to their former owners provided such relinquishment shall not be contrary to certain provisions of the treaty which require that the payment of certain debts should be made through a clearing office to Germany itself and not to the original owners thereof.

We have then in that respect to construe the provisions of art. 296 of the treaty which determines how certain debts due by a national of one contracting power to a national of an opposite power shall be settled. The question submitted in this case is whether the word "debts" of this art. 296 would include the investments which the respondents possessed in Canada.

These investments are of three classes:

First, the investments made in the Canadian trust companies and represented by "guaranteed trust investment receipts;" secondly, the deposits in loan and savings companies, or in banks in their savings account; thirdly, interest and dividends which became due or were paid during the war.

There is also in the case of Mrs. Wiehmayer a trust investment under special agreements which will have to be dealt with.

I.

Guaranteed Trust Investments.

This is an agreement by which sums of money are received by a trust company for investment for the repayment of which this trust company becomes liable. The trust company then invests the money in its own name and no specific mortgage is allocated to the trust investment receipts but the mortgages representing the total amounts invested by the trust company are simply set apart and are held in a special account.

We are not much concerned as to the manner in which the trust company manages or invests the funds which its clients put in its hands for investment. We have in the agreement or receipt an obligation to pay or reimburse the amount which has been put in its hands. There is established then between the investor and the trust company the relation of debtor and creditor and the investor has a right to claim from the company the reimbursement of his money. It becomes an ordinary pecuniary obligation.

What is a pecuniary obligation? It is a personal engagement which gives to the person in whose favour it is contracted the right to claim a sum of money. It is a *vinculum juris* which obliges a person to give some money to another.

I am of opinion that under the treaty these trust investments should be paid through the clearing house and that the custodian, the Secretary of State, should not pay these pecuniary obligations to the respondent.

Deposits in Savings Banks in Loan Companies.

These deposits are generally made with the condition that the money will be paid after certain days' notice or when the bank book is presented. As a matter of practice, however, the amounts so deposited are reimbursed without requiring that notice or the presentation of the book.

It seems to me that any deposit in a bank constitutes a pecuniary debt by the bank from the moment of the deposit; *Pott* v. *Clegg* (1847), 16 M. & W. 321, 153 E.R. 1212, 16 L.J. (Ex.) 210. The respondent relies on the case of *Atkinson* v. *The Bradford Third Equitable Benefit Building Society, supra*, where is was decided by the Court of Appeal in England that the condition that the sum should be repayable after the lender had given notice of his intention to withdraw it and that no money would be payable except on presentation of a pass book; that the condition as to the production of the book was a condition precedent and that until it was produced, the Statute of Limitations did not begin to run against the lender. But the *Atkinson* case has reference only to the operation of the Statute of Limitations.

The treaty is in more general words and of more general application than the Statute of Limitations referred to in the *Atkinson* case. According to my view, those deposits constitute debts which under art. 296 of the treaty would have to pass through the clearing house.

I have stated before in discussing the guaranteed trust investments what is the essence of a pecuniary obligation. Nobody can say that there was not an obligation on the part of the banks, of the loan companies or of the others to pay a certain sum of money. That money could, in some cases, be claimed before the war and if it was not demanded that is not a reason to say that there was no debt. As to the money which became due during the war, if it was not claimed, that was due to the declaration of war. In each case, these debts constitute the pecuniary obligations mentioned in art. 296 of the Treaty.

Dividends and Interest.

As to the dividends and interest, they were certainly debts which became payable during the war and they arose out of agreements entered into before the war and the payment of the interest contracted for or the dividends which might have been declared was suspended on account of the declaration of the war.

There is besides in para. 22 of the annex to art. 296 a formal

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reference as to interest which shews that capital and interest should be considered as one.

Trust Investment Wiehmayer Case.

By a certain agreement, the National Trust Co. held certain mortgages in trust to pay the income to Mary Prou Mara during her life and after her death part to the respondent and part to her sister in equal shares. Upon the death of Mary Prou Mara, in June, 1913, the National Trust Co. became obliged to divide between the respondent and her sister the capital held by it under this agreement.

The question is whether that sum became a debt payable and should be considered as such under the treaty.

The trust company was not forced during the war to pay to the respondent her share of the capital, but I fail to see how these sums could not be considered as a debt.

I am of opinion that the judgment *a quo* should be reversed.

In re Neitzke.

MIGNAULT, J.:—The question under this appeal is whether certain rights or claims of the respondent, as being "debts" within the meaning of art. 296 of the Treaty of Peace signed at Versailles, on June 28, 1919, between the allied and associated powers and Germany, are subject to the provisions of the said article. Article 296 is among the economic clauses of the treaty and, as far as material to the present inquiry, provides as follows:—[See judgment of Idington, J., pp. 446-7].

Paragraphs (3) and (4) are immaterial on this appeal.

This question was submitted to the Exchequer Court by means of a special case under Rule 160. The respondent succeeded as to all the items mentioned in the schedule annexed to the case, and the appellant now asks this Court to reverse the judgment of the Court below as to three of these items, viz.:—(a) The sums represented by the two guaranteed investment receipts issued by National Trust Co., to the respondent; (b) the amount on deposit on August 4, 1914, to the credit of the respondent in the Central Canada Loan and Savings Co.; and (c) the interest and dividends which became payable between August 4, 1914, and January 11, 1920, on the property, rights and interests of the respondent.

The appellant seeks also to have it held that, if these items fall under art. 296, Canada is or may be liable to Germany for or in respect of such of them as are relinquished to the respondent.

The answer to be given depends on the construction of art. 296 of the Peace Treaty, which must be read in connection with the two following articles.

In arriving at this construction, a broad distinction must be made between "debts" referred to in art. 296 of the Treaty of Peace and "property, rights and interests" which are the subject of arts. 297 and 298. The latter expressions are wide enough to comprise any kind of "debts," and the word "debts" *lato sensu* would include any species of claim whether for money or other property to which one person is entitled as against any other. It is noticeable, however, that the "debts" referred to in art. 296 are stated to be certain classes of "pecuniary obligations," so that nothing which cannot be described as a pecuniary obligation can come within the meaning of the word "debts" as used in art. 296.

"Cash assets" are included among the "property, rights and interests" of art. 297 and are expressly mentioned in para. (h) of that article. In the annex to arts. 297 and 298, they are defined, by para. 11, as including all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but not to include sums belonging to the allied or associated powers or their component states, provinces, or municipalities.

I must confess that the reference to "cash assets" in art. 297, and in the annex to arts. 297 and 298, is more confusing than helpful. This is especially so when the different provisions of art. 297 are carefully studied. As the parties presented their case, the question was whether the property in question fell within the provisions of art. 296, pars. 1 and 2. Still it is impossible to overlook art. 297, and, as I have said, its reference to cash assets is confusing. Thus para. (h), sub-para. (1), seems to require that in general all cash assets of enemies, as regards powers adopting art. 296, shall be credited to the power of which the owner is a national, through the clearing office established under the latter article. But the collocation of the expression "cash assets" with the words "the net proceeds of sales of enemy property" sufficiently shows that what was intended was that where, under para. (b) of art. 297, an allied or associated power has elected to retain and liquidate property, rights and interests (which would include "cash assets") belonging to German nationals, the proceeds of such liquidation and all cash assets, as regards powers adopting art. 296, shall be credited to Germany through the clearing house, any credit balance being applicable to the payment of Germany's reparation obligations under art. 243. If an allied and associated power has not elected to retain and liquidate the property, rights and interests of German nationals, and Canada has not done so with respect to British born

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wives of German nationals, the only question is whether the property to be dealt with is or is not a "debt" within the meaning of art. 296.

I can now deal with the amounts claimed by the respondent in order to determine whether they should be considered as being "debts," or, I may say in contradistinction thereto, "cash assets," which term has now been sufficiently explained. And it seems entirely proper to distinguish moneys in hand or moneys recovered and deposited for safe keeping from moneys due under a pecuniary obligation, whether such obligation be created for investment purposes or otherwise. It is in the latter sense that I construe the word "debts."

Article 296 refers to debts *payable* before the war or during the war. Does this mean debts for which an action would lie without any previous demand? This seems to be the construction which the appellant places on the word "payable," for in his factum he says:—"It is further submitted that a debt 'became payable' before or during the war within the meaning of these paragraphs if at any time before or (but for the war) during the war it could have been sued for without any previous demand or other act by the the creditor."

I cannot agree with this construction, for it seems inconceivable that the negotiators of the treaty were concerned with the question whether a debt was suable without demand or only after a previous notice to the debtor. What seems entirely likely is that the debts with which they intended to deal were those of which the payment had been prevented by the war, and this payment was prevented in case of all debts between belligerents, irrespective of the question whether or not a previous demand was necessary. In my opinion, all moneys due under a pecuniary obligation of which the war prevented the payment, and which therefore had not, on that account, been recovered, are debts within the meaning of art. 296.

Applying therefore art. 296 to the items which are the subject of this appeal, my opinion is that:—

A. The sums represented by the two guaranteed trust receipts issued to the respondent by the National Trust Co., are "debts" within the meaning of art. 296. The moneys received from the respondent under these receipts, to wit, $11,000 and $2,000, were to be invested by the trust company in securities taken in its name, the surplus of interest over 5% to be retained by the company for its own benefit, and the company guaranteed the payment of the principal money, in the case of the $11,000, on January 1, 1917, and, in the case of the $2,000, on January 2, 1919. Both these days fell "during the war." See the construction of

these words in the Treaty of Peace (Germany) Order, 1920, sec. 2, sub-sec. (e). In my opinion, were it necessary to so hold, the capital sums for which these receipts were given were payable and suable without any previous demand, but it will suffice to say that they were debts of which the payment was prevented by the war and therefore they come within art. 296.

B. The amount on deposit on August 4, 1914, to the credit of the respondent in the Central Canada Loan and Savings Co., was not a debt payable before the war within the meaning of art. 296. This amount was deposited in a savings bank account and the form of the question shews that at the time of the declaration of war no order for its payment had been given by the respondent. It would further come within the expression "cash assets" as used in art. 297. The want of a demand of payment here is important only as shewing that at the date of the declaration of war there was merely an existing savings account in favour of the respondent on which, as to the sum then standing to her credit, no cheque had been issued by her.

C. In so far only as this item comprises interest or dividends on item A, I would think it would fall under art. 296 of the treaty, being an accessory of the capital sums of $11,000 and $2,000 represented by the National Trust Co's. guaranteed trust investment receipts.

The appeal also raises the question whether, if any of the said items do fall within art. 296, Canada is or may be liable to Germany for and in respect of such of them as are relinquished to the respondent.

I would answer in the affirmative. Article 296 renders it compulsory to settle through the intervention of clearing houses the classes of pecuniary obligations mentioned therein. Should Canada relinquish to the respondent any debts which come under the operation of art. 296, it would undoubtedly incur liability towards Germany for the debts so relinquished.

I would therefore allow the appeal to the extent of declaring that the capital sums of $11,000 and $2,000 represented by the guaranteed trust investment receipts of the National Trust Co., as well as all interest or dividends thereon accrued, are "debts" within the meaning of art. 296 of the treaty.

In re Weihmayer.

Inasmuch as in the case of *The Secretary of State* v. *Neitzke*, I have explained what construction should be placed on arts. 296 and 297 of the Treaty of Peace between the allied and associated powers and Germany, it will suffice to say that, in my opinion,

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none of the items which the appellant claims are "debts" within the meaning of art. 296, or should be so considered.

As a consequence the appeal should be dismissed.

Judgment varied.

EDWARDS v. CENTRAL DRAY CO.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. June 13, 1922.

NEGLIGENCE (§ 1D—70)—NEGLIGENT DRIVING OF TRUCKS—COLLISION — INJURY TO CYCLIST—JOINT LIABILITY.

Where the driver of a truck in cutting ahead of another truck, collides with the latter, who could have avoided the collision by a slight turning of his car and the lessening of its speed, it is negligence of both drivers for which the owners of the trucks are jointly liable with respect to a cyclist fatally injured by the collision.

APPEALS by defendants from judgment in an action by a widow for damages for the death of her husband. Affirmed.

C. H. Locke, G. A. Elliott, K.C., and *G. M. Graham,* for defendant.

R. D. Guy and *E. P. Garland,* for plaintiff.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—This action was brought by Jennie Belle Edwards, administratrix of the estate of her husband, Ernest William Edwards, deceased, against the Central Dray Co., Ltd., and Adel Shragge, carrying on business as the Purity Ice Cream Co., to recover damages for causing the death of her husband. She sues for her own benefit, as wife, and for the benefit of the children of herself and her husband. The facts are briefly as follows:—

On June 4, 1921, a heavy motor truck belonging to the Central Dray Co., was being driven north on Main Street, Winnipeg, by the company's servant at a speed of about 14 miles an hour. It was traveling in the space between the two street car lines and about the middle of the street. Ahead of it a much lighter truck belonging to the Purity Ice Cream Co., was being driven north in a straight course outside the east rail of the east car track at a speed of about 9 miles an hour. A few feet to the right of the Purity Co's. truck and a short distance ahead of it, the deceased was riding on a bicycle. The distance in a straight line between the last mentioned truck and the bicycle at this time is given by two independent witnesses as about 20 feet. On approaching the Purity Co's., truck, the Dray Co's., driver turned to the right in order to cut in ahead of the other. Scott, the driver of the Purity Co's., truck, states that he saw the other truck as it came alongside of him that the other driver as he turned in struck with his right hind wheel the hub

of the left front wheel of the Purity Co's., truck turning it to the right, that the blow knocked him, Scott, off his balance, affected the steering gear and sent his car in the direction of Edwards.

The result was that the Purity Co's., truck collided with Edward's bicycle, over-ran it and dragged it and the rider about 20 feet until the truck was stopped by a pile of gravel near the curb of the street. Edwards received such injuries that he died 2 days after the accident.

From the evidence of the witnesses who saw the accident it is clear that the Dray Co's., driver was negligent in cutting in as he did ahead of the other truck. But it seems clear that the Purity Co's., driver, when he saw the other truck passing him, could have avoided the collision by turning his car a few inches to the right or by lessening its speed even in a slight degree. Instead of doing so he kept straight ahead at the same speed. In excuse of this conduct he states that Edwards was close by on his right and that he could not swerve the truck in that direction. But the evidence of other witnesses shews that the deceased was 8 or 9 feet to the right of the Purity truck when the 2 trucks collided.

The trial Judge delivered a very full and carefully considered charge to the jury. The question that is really involved in these appeals—both defendants have appealed separately—is whether they are jointly liable for causing the injury, or, if not, which of them is to be held responsible.

The trial Judge instructed the jury as to what would constitute joint responsibility for the accident and as to the care the jury must exercise in considering the actions and conduct of the two truck-drivers in order to determine whether they were jointly blameable or whether the injury to the deceased was caused by the negligence of one or other of them only.

The question of joint liability of two defendants in an action founded on negligence was considered by the Supreme Court of Canada, in *Winnipeg Electric* v. *C.N.R. Co., Re Bartlett* (1919), 50 D. L. R. 194, 59 Can. S. C. R. 352. In that case one Bartlett sued both companies for causing the death of his wife by negligent operation of their cars. A street car had stopped at a railway crossing as a train was approaching. When the latter was 75 or 100 feet away the motorman, without a signal from the conductor and in direct breach of orders, started to cross the railway. When half way over the power was increased and the car went forward with a jerk. Two women at the rear end of the car either jumped off or were thrown off and falling on the diamond were killed by the train.

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This Court held the electric company liable for the negligence which caused the injury. See *Bartlett* v. *Winnipeg Elec. Ry. & C.N.R.* (1918), 43 D.L.R. 326, 29 Man. L.R. 91, 23 Can. Ry. Cas. 381 On appeal to the Supreme Court of Canada the majority of that Court held the Canadian Northern Railway Company was jointly liable with the other defendant Duff, J. was of opinion that the negligence of the electric railway company was not seriously open to dispute. As to the C.N.R. Co., he said, 50 D.L.R. at p. 204:—

"The obligation to take care, default in respect of which constituted the negligence charged, was an obligation due to the passengers in the car, and that being so, the respondent company is responsible for harm suffered by them in consequence of its default to the extent to which the damages are not, in the language of the law, too remote."

Anglin, J. said, 50 D.L.R. at p. 209:—

"The negligence of both defendants conduced to the death of the plaintiff's wife. Had that of either been absent the lamentable tragedy would not have occurred."

Mignault, J. was also of the opinion that the plaintiff was entitled to recover damages against both defendants as being jointly liable for the accident.

The Judge's charge to the jury, in the present case, sufficiently instructed the jury on the question of the liability of both or either of the defendants. The jury found both defendants guilty of negligence and returned a verdict against both. I see no sufficient ground for interfering with the verdict.

Both appeals must be dismissed with costs.

Appeals dismissed.

COUNTY of LINCOLN and TOWNSHIP of NORTH GRIMSBY v. TOWNSHIP of SOUTH GRIMSBY.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 7, 1922.

HIGHWAYS (§ III—100)—EXEMPTION FROM MAINTENANCE—WHEN CEASING —CHANGE OF SYSTEM.

An exemption granted by statute to a township from contributing towards the costs of maintaining a county road ceases with a change in the system and control of the county highways.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1921), 58 D.L.R. 407, 49 O.L.R. 315, reversing the judgment at the trial (1920), 55 D.L.R. 599, 48 O.L.R. 211, in favour of the defendants in an action to determine whether or not the exemption of the respondent from payment of rates for maintenance of the Queenston and Grimsby

road, granted by 1882, (Ont.) ch. 33, sec. 8, continued after the road became part of a system of county highways under the provisions of the Highway Improvement Act R.S.O. 1914, ch. 40. Reversed.

G. L. Staunton, K.C., and *A. W. Marquis*, for appellants.

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

DAVIES, C.J.:—For the reasons stated by Anglin, J., I am of the opinion that this appeal must be allowed with costs and the judgment of the trial Judge (55 D.L.R. 599) dismissing the action restored.

IDINGTON, J.:—The question raised herein is whether or not the Highway Improvement Act of Ontario, R.S.O. 1914, ch. 40, can be effectively executed as provided therein in counties where prior equities have been created between municipalities in relation to any part of the roads system adopted in execution of the provisions of the said enactment.

The powers given by said Act to county councils begin by the enactment contained in sec. 4 thereof, which reads as follows:—

"4.—(1) The council of any county may by by-law adopt a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways, designating the highways to be assumed and improved and intended to form or be added to such system; and in case it is impracticable to benefit all the townships in any county equitably by a system of county highways such a plan may provide for compensation to any township which by reason of the location of such highways or of the unequal distribution of the expenditure thereon may not benefit proportionately by a grant of such specific amount or annual sum or both to be expended in the improvement of the highways of such township as when so expended will make such plan equitable for the whole county."

The appellant County of Lincoln adopted by its by-law No. 600 the said system covering a road mileage of 157 miles, or more, in all.

This by-law was passed by the council February 3, 1917, and that clearly by the consent of over two-thirds of the members of council, and hence under sec. 11 of the Act R.S.O. 1914, ch. 40, did not need to be submitted to the electors; and, as admitted by counsel at the trial (55 D.L.R. 599), was assented to by the Minister of Public Works on March 26, 1917, which I presume means or implies the assent of the Lieutenant-Governor in Council required by sec. 12 of the Act as preliminary to the right to receive the provincial aid proffered as an inducement to adopt such a system of county highways.

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Indeed the plan adopted by the by-law to carry out the system under the provisions of the Act was the result of co-operation between the Department of Public Works, represented by its Minister and officials, of whom its chief engineer took the most active part, and the members of the council and some of the township councillors.

Every effort seems to have been made to satisfy if possible all the municipalities, and when entire satisfaction could not be produced that at least the scheme should be so equitable as to comply with the fundamental principle of the enactment.

Of course there will often be in any such case some one who cannot be satisfied unless getting more than he, or those he represents, is entitled to.

As part of the means of averting such an emergency the respondent was allotted 5 or 6 miles of new road more than it was entitled to under the plan and system in order to remove any ground of complaint such as now raised herein.

The above quoted sec. 4 of the Act is almost literally identical with that in the Act when first passed in 1907 (Ont.) ch. 16, but amendments had been made in almost every session intervening between that and 1917 to render the Act more clearly what it was designed to produce, *i.e.*, good roads of a kind hitherto unknown in the rural districts of the Province, or indeed in many urban; and to bring home to everyone the great expense involved, far exceeding anything hitherto attempted, and thereby to justify the provincial authorities in offering millions for the promotion of the accomplishment of such an object.

I thus bring matters of common knowledge, as well as the many provisions of the Act, in accord with same line of thought, to bear upon the question of the interpretation and construction of the Act, for the reason, which I most respectfully submit, that the Appellate Court below seems to have overlooked such considerations, as if irrelevant, and adopted the idea that the projected system was, or had something in it which must be considered as rendering it, entirely subjective to what had gone before, instead of being, as I deem it, an entirely new conception and enterprise founded thereon, designed to supersede, so far as applied, all else in the way of road making, and to finance the doing thereof, and fix or determine the obligations which would ensue, upon the adoption of the system by any municipal county council, imposing only one obligation and that was that it must be equitable.

The primary judges of what was to be found equitable were the two-thirds majority of the county council or the majority of

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the electors for the county entitled to vote on such a subject followed by the majority of the county council.

The antecedent relations of any municipality to another, springing out of impotent attempts to maintain a road in efficiency, was obviously to be forever discarded, when, where and so far as nothing new substituted therefor so long as no injustice suffered thereby.

I have read the evidence to see how the matter was dealt with by those considering the new system and the means of adopting it and am pleased to find that it seems to have been approached in a proper spirit.

Notwithstanding all that, instead of at once appealing to the Court to restrain the carrying out of the said by-law and to quash it, if in fact founded upon something which had substantially discarded the equitable treatment enjoined by the section which I quote above, and is the key to all else therein, the respondent acquired most substantial benefits from the adoption of the system and refrained from taking such steps until after the appellant had incurred very heavy responsibilities and brought forward one year after another by-laws imposing the proper rates to meet such liabilities and only then, on December 19, 1919, brings this action, having evidently meantime awaited the building of the new road within its own bounds as determined by the judgment of the county council to be an equitable basis for wiping out the past.

It is not often we meet with so unjust a demand deliberately made on the part of a municipal authority however much some of them may occasionally be wanting in due care.

The respondent rests upon the statute 1882 (Ont.), ch. 33, which created it, and which as between it and its junior North Grimsby in separating them, provided as follows:—

"Sec. 8. From and after the last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original township of Grimsby in respect or on account of the road known as the Queenston and Grimsby Road, shall be assessed, rated and taxed against the said township of North Grimsby and shall be borne and paid by the said township of North Grimsby solely, and the said township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor."

This section only deals with

"any rate, tax, liability or expenditure, whatsoever, which but for the passing of this Act, would have been assessable, ratable and taxable against the said original township of Grimsby, etc.,"

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clearly covering only that arising out of some obligation statutory or otherwise existent antecedent to the day next after the date named for no rate could be imposed upon something which had ceased to exist or, I submit, was conceivably possible by those legislating.

Yet the first Appellate Division of the Supreme Court of Ontario (58 D.L.R. 407, 49 O.L.R. 315), in effect holds that this provision is in force in relation to the matters involved herein under the new legislation enacted a quarter of a century later and in the absence of obligation of any kind ever having bound Grimsby as such, and declares as follows:—

"1. This Court doth declare that the said Municipal Corporation of the township of South Grimsby is not liable for any portion of the levy made on it by the Municipal Corporation of the county of Lincoln under by-law No. 605, of the said Municipal Corporation of the county of Lincoln, in so far as the said levy is made in respect of the Queenston and Grimsby road and doth adjudge the same accordingly.

2. And this Court doth further declare that the levy made by the said Municipal Corporation of the county of Lincoln against the Municipal Corporation of the township of South Grimsby is, in so far as the said levy is made in respect of the Queenston and Grimsby Road, illegal and void.

3. And this Court doth further declare that the said Municipal Corporation of the township of South Grimsby shall not be assessed, rated or taxed by the said Municipal Corporation of the county of Lincoln for any portion of the cost of improvements of the Queenston and Grimsby Road under the provisions of by-law No. 600 of the said Municipal Corporation of the county of Lincoln and doth adjudge the same accordingly.

4. And this Court doth further declare that the Municipal Corporation of the township of North Grimsby is liable to the Municipal Corporation of the county of Lincoln for all assessments, taxes or rates in respect of the said Queenston and Grimsby road under the said by-law No. 600 which have already been imposed or levied by the said Municipal Corporation of the county of Lincoln on the said Municipal Corporation of the township of South Grimsby in respect of the said road and doth adjudge the same accordingly.

5. And this Court doth further declare that all assessments, taxes or rates which but for the statute 1882 (Ont.) ch. 33, would be leviable against the said Municipal Corporation of the township of South Grimsby by the Municipal Corporation of the county of Lincoln in respect of the Queenston and Grimsby Road shall be levied against the Municipal Corporation of the township of North Grimsby and doth adjudge the same accordingly.

6. And this Court doth further order and adjudge that the said Municipal Corporation of the county of Lincoln be, and it is hereby perpetually restrained from assessing, levying or seeking to collect from the Municipal Corporation of the township of South Grimsby any assessment, rate or tax in respect of the Queenston and Grimsby Road under the provisions of said by-law No. 600 of the said Municipal Corporation of the county of Lincoln."

To appreciate the rather sweeping character of the foregoing I must observe that the Queenston and Grimsby road in question extends from the western frontier of the county of Lincoln to Queenston on the Niagara River, and by no means in a straight line.

By reason of the crooks and turns therein it may be 30 to 35 miles in length.

The length thereof through North Grimsby alone leaving out Grimsby Village, is, according to the scale given in the plan filed in evidence herein, not more than seven and a half miles.

The county appellant in order to carry out this new system and provide the necessary financial means of doing so, if considered as a county scheme, had no power save the levying upon the entire assessable property within its usual jurisdiction, and that (save in cases specially provided for in the way of exemption from the operation of this new system of which the respondent herein was not) was by the annual assessments made upon the whole ratable property, based upon the equalized assessment of each municipality for any year in question.

The only exceptional case of that kind under the new system was the case provided for in sec. 26 of the Highway Improvement Act, which in the case therein provided for, enabled the county council, with the approval of the Minister of Public Works, to omit from assessment any township or townships through which the road did not pass, or it might assess any township through which the road did pass for a larger or smaller amount in order to equitably assess the costs on the council of any county in which a system of roads is established under said Act, or might, upon the application of a township council and with the approval of the minister, levy a special rate upon the township for the construction, improvement or maintenance of the road within such township.

Herein is the only remedy given for the respondent if it supposed it was entitled to any special privilege under the Act. Yet it made no move in that direction and I submit should not now by the means invoked herein obtain indirectly what it might have obtained directly if the county council was treating it inequit-

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ably. And a special means having been thus given it the Courts have no power to step in and interfere on its behalf for substantially that which is referred to another tribunal.

The opportunity was open to it on the consideration of the by-law No. 600.

The township of North Grimsby brought the case from its point of view directly under the notice of the minister and evidently he was advised it had nothing to fear on that score.

The by-law No. 605, mentioned in the first of the above quoted declarations of the Appellate Court below, was a by-law to raise $50,000 by way of loan for the purposes of construction.

It recited by-law No. 600 and its adoption under the Highway Improvement Act and that by sec. 15 thereof and amendments thereto any county taking advantage of the said Act might pass by-laws to raise money on debentures payable in not more than 30 years as provided by the Municipal Act not exceeding 3% of the equalised assessment of the county, and that by 1915 (Ont.) ch. 16, sec. 4, sub-sec. (1):—

"Money raised by the issue of debentures for road construction under authority of this Act shall be applied solely for that purpose, and shall not be used in paying any part of the current or other expenditure of the corporation, or for road repair or maintenance."

I respectfully submit that such an expenditure of money cannot fall within the purview of meaning of said sec. 8, above quoted and relied upon by the Court below (58 D.L.R. 407).

Whatever the words in sec. 8 of the Act of 1882 may mean we are given the history of the road and its repair or maintenance was thenceforth all that the parties concerned in such legislation possibly had in view.

That item clearly was also excluded from the scope and purpose of this by-law No. 605 specifically dealt with by above judgment of the Appellate Court and the later county by-laws passed to raise further moneys for purposes of construction under the adoption of the new system.

In the first place all that said sec. 8 of the enactment of 1882 ever had relation to, was the 7 or 8 miles of the Queenston and Grimsby Road which fell within the bounds of North Grimsby, and in no sense as to the remainder of a road under the same name.

And in the next place by-laws Nos. 600, 605, and 620, related only to construction which related to or may have related to any part of the new system. And if purely construction in any case what was meant? Clearly not the mere repair of any part of the highway constructed after another fashion.

The parties hereto have not enlightened us as to the actual facts had in view at each step in the history of all that was in question herein, as they might usefully have done.

If, as I surmise, applying general knowledge to the whole of this new system, then the development between the passing of the Act in 1882, and the use since then of other motive powers to transportation, rendered the abandonment of such road making as had existed up to said date a necessity.

To speak of repair thereof had become an absurdity. Such repairs might be made as would answer an indictment and any other means of enforcing the obligation in contemplation by the parties concerned.

The development of the automobile and its use for travel or heavy traffic plainly demanded the construction of another kind of road than previously contemplated in 1882, and which obviously would surpass in its cost anything within the ambit of the obligation named in said Act.

To speak of the new construction needed and that which had existed as identically the same or the obligation resting upon any one to repair the old as identical with the new obligation to be undertaken to meet the modern requirements of traffic is, I most respectfully submit, quite untenable.

The tenure of the soil on which repair might be done or construction of something else needed, might remain the same, but, by the way, had not even that changed?

Are we to shut our eyes to the realities, and use but a name as a guide? I submit not.

Suppose transportation advanced a step further and its needs required the appropriation of the old road allowance to the radials to such an extent as to render the roadway useless for anything else, and an Act of the Legislature so approved and encouraged the county council that the radial practically occupied the same space and provided for the county assuming that new burden of building and running it, how would that little bit of an Act, such as sec. 8, look like as if still binding? Could it be pretended to have an operative effect such as applied by the Appellate Division (58 D.L.R. 407) to this scheme.

I put this extreme illustration, though perhaps it will not look so extreme 30 years hence, if some dreams are realised.

From the present outlook it is not so extreme as if someone in 1882 had predicted all that has happened by reason of the automobile; and sought to assign that as within the contemplation of those concerned as it clearly never was.

I submit we must have regard not only to all that has arisen but also all that had fallen into decay and the need for something

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new and read the legislation bringing with it a new system and a new road in light thereof, and then there is no difficulty in holding that it has superseded the enactment of 1882, so far as relates to giving vitality and efficacy to all that is involved in allowing this appeal and maintaining the judgment of the trial Judge herein.

Apart from all that, what right have we to assume that expenditure of the $80,000 and still larger sums under later by-laws was not properly made on the remaining part of the Queenston and Grimsby road, yet the judgment appealed from (58 D.L.R. 407) stands as a barrier to collect such debentures.

Nor do I see any means directed by the judgment appealed from to be taken to separate the expenditures on the Queenston and Grimsby road from all else in respect of the entire system in relation to which the assessment is made so far as down to and including 1918 is concerned under the heading of good roads debentures.

I repeat that the enactment relied upon for the said judgment in appeal related evidently to that part of that Queenston and Grimsby road lying within the original township of Grimsby.

The greater part of that road, so named, lies between Grimsby and the frontier town of Queenston, and forms part of the system as well as that within said original Grimsby township, and, I imagine, even whether looked at in accord with or despite the reasoning of the judgment appealed from (58 D.L.R. 407), should furnish grounds for assessment and levying of rates as to the other three-fourths of that road. Yet the express terms of the formal judgment appealed from stands as a barrier in the way of doing so and casts the burden to be borne by South Grimsby on North Grimsby.

The formal judgment well illustrates the dangers of taking a mere name as a guide instead of the actual realities contained in the legislative enactments of recent years descriptive of another creation known under the designation of a system and in relation to which there is no prohibition by statute or otherwise to which the name Queenston and Grimsby can be properly applied as a whole, though for the purposes of obeying the new legislation and identifying and tracing that which in a small part it comprehends, the name Queenston and Grimsby may have to be used.

I submit, most respectfully, that such names may be used without transgressing sec. 8, 1882 (Ont.) ch. 33.

And when we are dealing with the adoption of a system which in this instance is to cover 157 or more miles of road, of which at the utmost the mere name Queenston and Grimsby road could

only cover a fifth and at the true measure of its significance, if any at all, a twentieth part of the scheme or system as a whole.

And why should the mere name be so extensively applied? And again, when any significance it could have is reduced to such proportions, how can the old Act be invoked?

The truth seems to be, I repeat, that the new system or scheme was intentionally designed to supersede the old and ignore all therein so long as no actual injustice done of which, I repeat, the majority of the county council were to be primary judges.

The only proper remedy against their transgression thereof was an appeal to the Minister of Public Works or a motion to quash which never was made.

The by-law is now unassailable. The scheme provided by the Act in question is not part of the Municipal Act and must be viewed in same light as if it had been entrusted to some other authority named by the Act and so carried out with all its consequences regardless of the Act of 1882 which had no relevancy to such a new enterprise.

And yet this declaration of right is maintained in face of the further fact that under the Provincial Highway Act of 1917, passed two months or so after the adoption by appellants of the new system, the road in question had been adopted by the Province August 15, 1918, or a year before this action brought. That legislation seems to have superseded entirely any such mere municipal theories of obligation as raised herein.

Any one who recalls the many phases through which the question of roads and building thereof has proceeded, from provincial back to provincial, should realise that there is no difficulty in finding that this new scheme or system is not to be determined by mere ordinary legislation, but by the salient fact that the appellant was a mere agent or trustee of the Government to act in clear supersession of all that had preceded it.

Much was said in argument relative to the bargaining with respondent through its then reeve and his authority on behalf of his council which tends to confusion of thought for in fact no such bargain can be relied upon further than as a means of realising whether or not all due means were taken to enable the county council to determine whether what was proposed and done answered the equitable treatment required by the Act in adopting the new system.

In concluding, however, it seems clear that sec. 8 upon which so much reliance has been placed never was more than a precautionary measure having relation to the plan then observed between the county, then owner of the Queenston and Grimsby

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road, and some of the municipalities through which it passed, for its maintenance. That was a more temporary expedient at its best and might have been abandoned at any time by those concerned.

The county, however, was, in 1885, by ch. 39, sec. 24 of the Municipal Amendment Act of that year, which reads as follows:

"24. Section 565 of the said Act is hereby amended by adding thereto the following sub-sec.:

(7) For abandoning or otherwise disposing of the whole or any portion of a toll road owned by a county, whether situated wholly within the county or partly within the county and partly within an adjoining county or counties, and on the passing of any such by-law the clerk shall forthwith forward a certified copy thereof to the local municipality or municipalities through or along which any portion of said abandoned road shall run or border upon,"

enabled to abandon the whole road.

That amendment was again amended by the sec. 566 of the Municipal Act R.S.O. 1887, ch. 184, adding a proviso requiring the approval of the Lieutenant-Governor in Council.

And that in turn was amended in 1890 (Ont.) ch. 50, by the Municipal Amendment Act, as follows:—

"32. Sub-sec. 7 of sec. 566 of the said Act is amended by inserting after the word 'toll' in the second line thereof, the words 'or any other'."

Again that was amended in 1892 (Ont.) ch. 42, so as to require the assent of the municipalities affected.

Clearly the municipalities through which the road ran were alone supposed to be affected.

Again by 1913 (Ont.) ch. 448, now appearing in R.S.O. 1914, ch. 192, sec. 448, it was again amended as follows:—

"448.—(1) The council of any county may by by-law abandon the whole or any part of a toll road owned by the corporation of the county or of any other road owned by it, whether the road is situated wholly within the county or partly within it and partly within an adjoining county.

(2) Forthwith after the passing of the by-law the clerk shall transmit by registered post to the clerk of every local municipality through or along or on the border of which the road runs a copy of the by-law certified under his hand and the seal of the corporation to be a true copy.

(3) The by-law shall not take effect unless or until it is approved by the Municipal Board, nor shall it take effect as to the part of the road lying within or along or on the border of a local

municipality whose council does not by by-law consent to the by-law.

(4) From and after the taking effect of the by-law the council of a municipality within which any part of the road so abandoned lies shall have jurisdiction over that part of it which lies within the municipality, and where any part of a road so abandoned lies between or on the border of two or more local municipalities the councils of such municipalities shall have joint jurisdiction over that part of it.

(5) Nothing in this section shall extend or apply to a bridge which under the provisions of this Act is to be maintained wholly or partly by the corporation of the county."

What occurs to me reading these many amendments as part of the story is how the respondent seems to have been completely ignored and the meaning it seeks to attach to sec. 8 never occurred to anybody concerned in this legislation.

During the early period there was absolutely nothing but the will of the county of Lincoln appellant that need be observed.

In later years some regard was had to the possibility of how such abandonment might affect the general public.

On such a tenuous thread, in the last analysis, does the contention of respondent and the judgment appealed from now hang; that is, the non-observance by the county of its powers of abandonment in a due and orderly manner before proceeding to adopt the new system.

I have no hesitation in repeating my opinion that such like threads were all swept away and respectfully submit that they should not be considered as any obstacle in the way of the will of the Legislature enacting the legislation giving effect to the new system and that of the Lieutenant-Governor in Council approving of what has been done in the issue of the debentures now questioned herein.

By no means do I wish to ignore the force of the argument of the appellants' counsel that the respondent should be held estopped by its course of conduct from asserting its present pretensions.

I have thought it wiser to present my argument in the way of a close adherence to the basic principle of the equitable considerations which the enactment renders imperative.

The principle upon which estoppel rests may be but another mode of expressing the same idea. And I incline to think the estoppel argument may well answer the right to have at this stage any such declaratory judgment as appealed from.

And I may add that so far as relates to by-law No. 605 and

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others passed for raising money for construction, very drastic remedies were given by the enactment of 1915, (Ont.) ch. 16, sec. 4.

The appeal should be allowed with costs here and in the Appellate Division (58 D.L.R. 407, 49 O.L.R. 315) and the judgment of the trial Judge (55 D.L.R. 599, 48 O.L.R. 211) restored.

DUFF, J.:—I do not dissent from the opinion of the majority. Not without a great deal of doubt, on the whole I think the preferable view is that the situation created by the Highway Improvement Act R.S.O. 1914, ch. 40, and the responsibilities arising under that Act are not within the contemplation of the special Act of 1882; and that liability in respect of the rates in question is not within the classes of liabilities dealt with by sec. 8 of the last named enactment.

ANGLIN, J.:—I am, with very great respect, of the opinion that this appeal should be allowed and the judgment of the trial Judge (55 D.L.R. 599, 48 O.L.R. 211) dismissing the action restored.

The rates in question are imposed by the county of Lincoln for the reconstruction of the highway, formerly known as the Queenston and Grimsby macadamised road, as part of "a system of county highways" created and provided for by a by-law of the county municipality duly enacted and ratified under the Highway Improvement Act, R.S.O. 1914, ch. 40. They are rates imposed under the authority of sec. 15 of that Act and are not, as I think, rates, taxes, liabilities or expenditures contemplated by, or within the purview of, the exemption in favour of the respondent township conferred by sec. 8 of 1882 (Ont.) ch. 33. The road dealt with by that exemption provision was not "a county road" in the ordinary sense of that term as used in the Municipal Act, but a road which belonged to the County of Lincoln. Its history is detailed in *County of Lincoln* v. *St. Catharines* (1894), 21 A.R. (Ont.) 370. So long as it remained such a road to be kept up by the county council like other property owned by the county, the exemption provision of 1882 (Ont.) ch. 33 applied to all expenditure for its construction, renewal or upkeep. But when the county council determined that it should become part of a system of highways under the Highway Improvement Act and enacted the requisite by-law its character was entirely changed. It became subject to the regulations of the Public Works Department with respect to the construction and repair of highways (sec. 6) under the supervision of an engineer or other competent person as county road superintendent (sec. 7). Liability to contribute to the cost of its recon-

struction and upkeep as a highway under that system must be determined by the provisions of that Act. As put by Meredith, C.J.O., in *Village of Merritton* v. *County of Lincoln* (1917), 39 D.L.R. 328 at pp. 337-338, 41 O.L.R. 6.

"The liability to contribute to the cost of the improvement of the road under the Highway Improvement Act is, in my view, a very different one from that with which the special Act deals: it is not a liability in connection with the assumption of the road as a "county work," but a liability arising out of the provisions of the Highway Improvement Act, by reason of the road being made a part of a system of county roads for which that Act provides.

Section 15 of the Highway Improvement Act authorises a county council to pass by-laws to raise by debentures the sums necessary to meet the expenditures on highways under the Act, not exceeding two per centum of the qualified assessment of the county, or to provide the money out of county funds or by an annual county rate in the manner authorised by the Municipal Act.

This section clearly authorises the imposition of a rate to meet the debentures or an annual county rate to be imposed upon all the ratable property in the county, and is, I think, in no way in conflict with the special Act, for these expenditures are not a liability or expenditure connected with the assumption of the road by the appellant, but an entirely different liability or expenditure, incurred for the purposes of the Highway Improvement Act."

With profound respect, the distinction which the Appellate Division Court (58 D.L.R. 407) suggests between the case now before us and the *Merritton* case, *supra*, seems to me to be more apparent than real. Meredith, C.J.O., says, 58 D.L.R. at pp. 410-411:—

"I am of opinion that this case is not governed by *Village of Merritton* v. *County of Lincoln* 39 D.L.R. 328, and that the principle of that case is not applicable.

In that case, the liability from which certain municipalities were relieved was 'any liability or expenditure *connected with the assumption by the Corporation of the county of Lincoln of the Queenston and Grimsby road as a county road*'; and the *ratio decidendi* was that the liability under the Highway Improvement Act was not a liability connected with the assumption of the road as a county road, but a different liability arising out of the provisions of that Act.

What by the statute relieving the appellant it was relieved from was, 'any rate, tax, liability or expenditure whatsoever,

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which but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby in respect or on account of the road known as the Queenston and Grimsby road.'

This language is of the most comprehensive character and not, as in the Act under consideration in *Village of Merritton* v. *County of Lincoln*, limited to liability connected with the assumption of the road as a county road."

But in *Village of Merritton* v. *County of Lincoln*, 39 D.L.R. 328 at p. 337, I find this passage:

"It may be assumed for the purpose of the case at bar, that the special Act relieved the exempted municipalities not only from the cost of acquiring the road but also from the expenditure for its upkeep, but it does not follow from that that they are relieved from the expenditure to be made upon it because it is made part of the good roads system of the county; and, in my opinion, they are not relieved from it."

When the exempting statute in question in the *Merritton* case 1863 (Ont.) ch. 13 is examined we find in the preamble that maintenance of the Queenston and Grimsby road was one of the things against which relief was sought by the local municipalities then petitioning and that the Legislature deemed it expedient to grant the prayer of the petition. It would therefore seem to have been quite properly assumed by the Appellate Divisional Court in the *Merritton* case 39 D.L.R. 328, that the exemption granted extended to the expenditure for the upkeep of the road as part of that connected with (that is resulting from) its assumption. I agree in the conclusion reached in the *Merritton* case, and think the trial Judge in the present case 55 D.L.R. 599, was justified in applying the principle of that decision, as he did, and that his judgment, therefore, should not have been interfered with.

Moreover, under sec. 26 of the Highway Improvement Act, provision is made in the case of the assumption by the county council of a main or leading road, such as the Queenston and Grimsby road was, as a county road for the total or partial exemption, with the approval of the Minister, from assessment for the cost of such road of any township which is not served by it equally with the other municipalities in the county. By sec. 12 approval of the by-law establishing the county system of highways by the Lieutenant-Governor in Council is required and provision is made for hearing any dissatisfied township council. If South Grimsby thought itself equitably entitled to have the exemption provided for by 1882 (Ont.) ch. 33, extended to its liability for the reconstruction and upkeep of what had been the

Queenston and Grimsby road after it was made part of the county system of highways, its recourse was to ask the county council for relief under sec. 26 of the statute and, if refused, to apply to the Lieutenant-Governor in Council to withhold his approval of the by-law establishing the system until the county council should have made what the Lieutenant-Governor in Council should deem a fair and equitable provision in its favour under sec. 26. Not having taken that course, it cannot in my opinion now successfully invoke sec. 8 of 1882 (Ont.) ch. 33, as entitling it to refuse to pay its proportionate share of the cost of construction and upkeep of the county system of highways under the Highway Improvement Act.

It appears from the evidence, however, that the exemption of South Grimsby provided for by the statute of 1882 was brought to the attention of the county council when it was considering the by-law for the formation of a system of county highways and was considered by it to entitle the township of South Grimsby to specially favourable treatment in regard to the mileage of highways to be brought under the system so as to make the plan and the distribution of expenditure under it equitable in regard to that township as contemplated by sec. 4, rather than to an exemption, total or partial, from assessment under sec. 26, which, so far as the evidence discloses, was not claimed on its behalf. I am not at all satisfied that South Grimsby was entitled to ask for "compensation" under the provisions of subsec. 1 of sec. 4 of the Highway Improvement Act. It did not fail to "benefit proportionately" either "by reason of the location of (the) highways" to be taken into the system or "of unequal distribution of the expenditure thereon"—which are the only grounds of claim for equitable compensation mentioned in the section. The county council, however, seems to have been disposed to treat South Grimsby with absolute fairness and accordingly included in the "system of county highways," by way of making such "compensation" to it, 5 miles of highway in excess of the proportion to which it would have been entitled, with the result that it has benefited by the provincial contribution of 40% of the cost of constructing such additional 5 miles of highway provided for by the statute 1915 (Ont.) ch. 16, sec. 5, and by the amounts assessed therefor on the other municipalities.

MIGNAULT, J.:—The question to be decided in this case is whether the respondent can set up, against a by-law and a levy made by the appellant under the Highway Improvement Act R.S.O. 1914, ch. 40, an exemption from taxation in respect of

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the Queenston and Grimsby road granted in 1882 to the respondent.

The statute giving this exemption is 1882 (Ont.) ch. 33, which divided the township of Grimsby into two municipalities, respectively called North Grimsby and South Grimsby. Inasmuch as the Queenston and Grimsby road crosses the northern portion of the township of Grimsby only, sec. 8 of this statute provided as follows:

"From and after the said last Monday of December, one thousand eight hundred and eighty-two, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, rateable and taxable against the said original township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby road, shall be assessed, rated and taxed against the said township of North Grimsby, and shall be borne and paid by the said township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor."

In 1907, the Ontario Legislature adopted an Act for the improvement of public highways, called the Highway Improvement Act, which, as subsequently amended, is now ch. 40 R.S.O. 1914. Section 4 of this statute (I quote from the revision) empowers the council of any county to adopt by by-law a plan for the improvement of highways throughout the county by assuming highways in any municipality in the county in order to form or extend a system of county highways. And in case it is impracticable to benefit all the townships in any county equitably by a system of county highways, such plan may provide for compensation to any township, which by reason of the location of such highways or of unequal distribution of the expenditure thereon may not benefit proportionately, by a grant of such specific amount or annual sum to be expended in the improvement of the highways of such township as will make the plan adopted equitable for the whole county.

The statute provides for the carrying out of the purposes of the Legislature, the improvement of public highways, and gives the county council power to issue debentures or to raise money by an annual county rate in the manner authorised by the Municipal Act. Sec. 26 contains a provision somewhat on the lines of the latter portion of sec. 4 empowering the county council, with the approval of the Minister of Public Works, to omit from assessment any township through which the road assumed as a county road does not pass, or to assess the townships through which it does pass, for a larger or smaller amount, in order to equitably assess the cost.

As I have stated, the question now is whether as against the scheme authorised, by R.S.O. 1914, ch. 40, and liability for assessment thereunder, the township of South Grimsby can claim the benefit of the exemption from taxation for the Queenston and Grimsby road enacted in 1882.

It is explained that this road is part of the public highway from Hamilton to the Niagara River, and the improvement of a highway of this character would naturally come under such a scheme of improvement as R.S.O. 1914, ch. 40 establishes. The history of the Queenston and Grimsby road may be found in the report of the case of *County of Lincoln* v. *City of St. Catharines* 21 A.R. (Ont.) 370. It was originally constructed by the Provincial Government and subsequently taken over by a joint stock road company from which the county council purchased it in 1860. In *The Queen* v. *Corporation of Louth* (1863), 13 U.C.C.P. 615, it was decided that the county corporation held this road, not as a county road belonging to the county within the meaning of the statute, but as the assignee of the road company. Some of the local municipalities in the county of Lincoln through which the road did not pass obtained legislation relieving them from any liability for expenditure connected with its assumption by the county as a county road and charging therewith, among other municipalities, the township of Grimsby. When the latter township was divided in 1882 by the statute above referred to, South Grimsby was exempted from any rate, tax, liability or expenditure whatsoever, which, but for the passing of the statute, would have been assessable, ratable and taxable against the original township of Grimsby in respect or on account of the Queenston and Grimsby road, and it was declared that North Grimsby alone should bear this liability.

In *Village of Merritton* v. *County of Lincoln* 39 D.L.R. 328, 41 O.L.R. 6, the Highway Improvement Act was considered, and the Appellate Divisional Court held that assuming the statute 1863 (Ont.) ch. 13 (one of the Acts relieving some local municipalities from liability or expenditure in connection with the assumption by the county of Lincoln of the Queenston and Grimsby road as a county road), relieved the exempted municipalities from the expenditure for the upkeep of this road. they were not thereby exempted from liability for the expenditure to be made upon it in consequence of it being made part of the good roads system of the county. This decision gave to the Highway Improvement Act full effect, irrespective of the exemption from taxation of certain local municipalities by special statutes, such as the one relied on by the township of South Grimsby in the present case.

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Although the statute 1863 (Ont.) ch. 13, considered in the *Merritton* case is not in identically the same terms as sec. 8, 1882 (Ont.) ch. 33, still its general effect is similar, so that the reasons given by the Appellate Divisional Court in that case, 39 D.L.R. 328, should also apply here. But looking at the two statutes only, the Highway Improvement Act and the special Act relied on by South Grimsby, my opinion is that the exemption clause of the latter would not stand in the way of the county of Lincoln in proceeding under the former statute.

The decision in the English Court of Appeal in *Sion College* v. *London Corporation*, [1901] 1 Q.B. 617, seems to me in point. There the appellants relied on a statute of George III (7 Geo. III, ch. 37) providing that certain lands in the City of London reclaimed from the River Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever." The City of London Sewers Act, 1848, (Imp.) ch. 143, subsequently authorised the collection of a consolidated rate, some of the objects to which this rate was to be applied being of a kind for which rates were made at the time of the passing of the Act of George III, the others being new. It was held that the exemption applied only to then existing taxes and assessments or others substituted for them, and that the consolidated rate, although it included some purposes for which rates were made when the exemption was created, was substantially a new assessment, and was therefore not within the exemption.

I would allow the appeal with costs here and in the Appellate Division 58 D.L.R. 407, and restore the judgment of the trial Judge 55 D.L.R. 599.

Appeal allowed.

KUGE v. PALM.

Alberta Supreme Court, Tweedie, J. April 6, 1922.

GIFT (§ I—8)—PAYMENT OF MORTGAGE—INTENTION OF PARTY MAKING—PAYMENT OF SMALL AMOUNT OF INTEREST—DELIVERY OF CHEQUE—SUFFICIENCY OF EVIDENCE.

Where a person voluntarily and as a matter of favour donates the money to pay off a mortgage on another's farm, and the evidence shows that he did not at any time expect to be repaid the amount, the fact that the party on whose behalf the payment was made considered the payment as a loan, and paid a small rate of interest on it until the death of the person making the payment and gave a cheque which was not negotiable without his endorsement and which was not endorsed, is not sufficient to negative the conclusion that the payment was a gift and not a loan.

ACTION by administrator to recover a sum of money alleged to have been loaned to the defendant, who alleged that it was a gift. Judgment for defendant.

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KUGE v. PALM.

Tweedie, J.

J. Quigg, for plaintiff.

W. E. Payne, K.C., for defendant.

TWEEDIE, J.:—This is an action brought by the plaintiff as administrator of the estate of Frank Kuge, deceased, who died intestate on August 30, 1920. Letters of administration were granted to the plaintiff on September 20, in the same year. The action is brought to recover the sum of $638, alleged to have been advanced by way of loan by the deceased to the defendant, February 16, 1917.

The defendant relies upon practically four defences: (1) That the money was never received; (2) That the deceased was indebted to the defendant for work and labour and this sum was received as payment in satisfaction of such indebtedness; (3) That if the money was paid by the deceased to the credit of the defendant, that the making of such payment was voluntary and was made without the authority, knowledge or consent of the defendant, or of any one with authority to act on his behalf; and (4) That the money, if paid, was a gift by the deceased to the defendant.

As to the first defence: I find as a fact that the deceased, on or about the time alleged, made a payment of the sum of $638 to one Cole, at Bentley, in the province of Alberta, in discharge of a mortgage indebtedness which was owing by the defendant to Cole, but which was not due at the time of the payment.

As to the second defence: There was some evidence to the effect that Mrs. Palm, the wife of the defendant, William Palm, a minor son of the defendant, and Mrs. Solberg, a step-daughter, had rendered some services to the deceased; but there is nothing to shew that such services were not paid for by the deceased. No one was able to say whether or not he had paid the son, who was not present at the trial, for his services. The girl herself admitted that the services which she rendered were in the nature of favours for which she did not expect pay. He was in the habit of making her presents, and there is evidence of one substantial gift. As to the services rendered by the wife, the evidence shews that the farmers in that vicinity, in threshing time especially, interchange their services, and Mrs. Palm had at some time rendered services as a cook to the deceased. I have no doubt services were rendered by the deceased to the defendant in exchange for the services of Mrs. Palm. I, therefore, conclude in regard to this defence that there is no evidence before me to shew that there was anything due from the deceased to the defendant for work and labour, and that the advance cannot be regarded as payment therefor.

As to the third and fourth defences, which will be considered

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jointly, the facts seem to be as follows: The defendant was a farmer residing at Palm Bay, in the province of Alberta, his farm being a mile distant from that of the deceased, Frank Kuge. The deceased was a bachelor living there alone and had no relatives in America except a married brother, who resided in the United States, and the members of his family. A son of this brother came to Alberta after his uncle's death and took out letters of administration of the estate of the deceased. The evidence shews that Kuge, who was a German, and living in a settlement composed largely of Finlanders, was ill at ease with his neighbours, and was not intimate or even on friendly terms with any of them excepting two families, one by the name of Nietzel, and the family of the defendant, at whose home he was a frequent visitor. The defendant in the spring of 1913 or 1914 had executed a mortgage on his farm in favour of one Cole, in the sum of $600 to secure a loan for that amount. Owing to financial difficulties due to the fact that he was unable to make any money out of his farm it was necessary for him in the spring of 1916, to go to Butte, Montana, to work in the mines, where he remained for about 15 months, returning to his home in April, 1917. During the time he was there he remitted various sums of money to his family on the farm, and out of the sums which he remitted they paid an instalment of interest which became due under the mortgage, the mortgage bearing interest at the rate of 8% per annum. About February 16, 1917, and during the absence of the defendant in Butte, the deceased had a conversation with Mrs. Solberg, the step-daughter of the defendant, who was a witness at the trial. She was then unmarried and living at home with her mother, and carried the mail from Eckville to Palm Bay, a distance of some few miles. In the course of these trips she delivered the mail of the deceased, whose place it was necessary for her to pass in the course of her duty as mail carrier. On one of these trips the deceased had a conversation with her in regard to the mortgage against her step-father's place, and said that he had had a mortgage on his farm at one time and knew how hard it was to pay it off, and he wanted to know what she would think if he paid off the mortgage on her father's farm. She said she did not know how he would take it, as he was of a jealous disposition and he might not like it, and that she would talk the matter over with her mother. The deceased subsequently went to the home of the defendant where he discussed the matter with the daughter, who in turn discussed it with the mother. All three were present together but the mother did not understand the English nor the German languages, the only languages in which the deceased could converse. When he went there he

told the step-daughter that he wanted her to go with him to Bentley to pay off the mortgage, never any time intimating that he was paying it off by way of loan to the defendant nor at the defendant's request, but always suggesting that he was doing it as a matter of favour or gift to the defendant. They proceeded together to Bentley and the deceased gave her $638 which she paid to Cole in satisfaction of the mortgage and the interest up to date of payment, the mortgage at the time being in good standing as to interest, and no documents were received but the registration was evidently carried out by Cole. When the mortgage was discharged certificate of title shewing the mortgage to have been discharged, was sent through the mail to the wife of the defendant who retained it until the return home of the defendant, when she advised him what had taken place. The evidence shews that the deceased made a statement to Cole, who unfortunately was not called as a witness, to the effect that he was making the defendant a present of this money and that he was not going to get it back. When the defendant returned home he went to see the deceased and discussed the matter with him. He admits he considered the payment as a loan, and he paid interest on it for one year at 2% and for the two subsequent years at 3%, the payments of interest being made for the three years 1918, 1919 and 1920, the payment for 1920 being made in the spring of that year, the deceased dying in the fall without any further payments having been made. I am satisfied from the evidence that any payments of interest which were made, were made, not on the request or as a result of any demand made by the deceased, but they were accepted by him with some reluctance, and I attribute his acceptance of the payments of interest to the fact that he was of the impression, from the statements made by the daughter, that her step-father was of a jealous disposition, which led him to accept a small amount of interest so that any difficulty would be avoided. When the matter was first discussed, and on subsequent occasions, the defendant suggested to the deceased that he should give him a promissory note to cover the amount, but the deceased said that he did not want it, in fact refused to accept one, and none was ever given. On one occasion, however, when the defendant went to see the deceased, the deceased had drawn up a cheque, dated at Eckville, Alta., under date of February 16, 1917, as follows:—

"Eckville, Alberta, February 16th, 1917.

To the Eckville Branch of the Canadian Bank of Commerce,
Pay John Palm ..... or order, six hundred and thirty-eight & xx/100 Dollars.
$638.00 (Sgd.) John Palm."

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I am of the opinion that the deceased accepted this cheque, not as evidence of a debt, but as evidence that there was no liability on the part of the defendant to pay that sum of money to him in the event of his dying. There is no evidence to shew that Palm had any account with the Canadian Bank of Commerce in Eckville, and the fact that the cheque was made payable to Palm himself without any endorsement, would seem to indicate that there was never any intention on the part of the deceased to negotiate it; in fact it could not be negotiated by him, nor could it be negotiated by the administrator of his estate after his death. On the back of the cheque there is no endorsement other than the words, "Interest paid March 8th, 1919." The cheque itself was not negotiable without the endorsement of John Palm, as it was made payable to himself or his order. The explanation of this cheque, according to the evidence of the defendant, Palm, is that the deceased asked him to execute it so that in the event of his dying no person would be able to collect the amount from him, and although this evidence of the defendant is uncorroborated, I think there is sufficient corroboration as to the intention of the deceased never to collect this money from the defendant in the evidence of the step-daughter, Mrs. Solberg, and also the evidence of one Solberg, her father-in-law. To the evidence of Mrs. Solberg I have referred. Solberg was negotiating with Kuge for leasing his place on one occasion the deceased discussed with him the fact that he had paid off this mortgage and asked him what he thought of it. He told him that it was all right and that he would get his money back, whereupon the deceased told him that he did not want his money back.

The facts which troubled me most were the payment of the interest for three years at the rate of 2% for the first year and 3% for the other two years. Was this, coupled with the statement of the defendant that he considered it as a loan and the cheque of the debt for $638, sufficient to negative any question of a gift? After careful consideration I have come to the conclusion that such is not the case.

I was exceedingly favourably impressed with the testimony of the defendant and that of his step-daughter, Mrs. Solberg, and there seemed to be no desire on the part of either of them to conceal any fact whatsoever in connection with the transaction, whether favourable or unfavourable to the defendant.

In regard to the evidence for the plaintiff, the administrator himself had no personal knowledge of the facts, and the sum and substance of his testimony dealt only with the finding of the cheque in his uncle's papers at the bank, and a conversation between himself and the defendant at which Karjala, another wit-

ness for the plaintiff, was present. At that conversation the defendant stated to the administrator that the money was a gift. The evidence of Karjala, although unfavourable to the defendant, did not impress me very favourably as he seemed to be too eager to give evidence unfavourable to the defendant and manifested a great desire to disclose only that which was favourable to the plaintiff.

On the whole of the evidence, I am satisfied that the deceased made this payment of $638 to Cole on his own initiative and without the knowledge, authority or consent of the defendant and without any request having been made to him by any person to make such payment or to advance the money. Neither the wife of the defendant nor the step-daughter who accompanied him to Bentley and made the payment at the time nor anybody acting by or on behalf of the defendant requested him to do so. Neither the mother nor the step-daughter at the time of the transaction purported to act as agent or on behalf of the defendant and there is no act of agency on their part which the defendant subsequently ratified.

As to the payments of the interest, I think that the acceptance by the deceased of such a small annual interest of 2% and 3% was for the purpose of satisfying the defendant rather than as money which he was entitled to receive by reason of any obligation of the defendant to him. They were voluntarily made by the defendant after the gift had been completed and created no liability to repay the money advanced. In regard to the defendant's belief or the fact that he considered it a loan, I think that he was wrong in such belief and his belief was entirely different from that of the deceased. The belief on his part, while it might be some evidence against him, is not sufficient to create a legal liability.

I find that the money when paid over to Cole in discharge of the mortgage, even though it was handed to the step-daughter to make such payment, was an absolute gift by the deceased to the defendant, and that there was no obligation on the part of the defendant at any time to repay the whole or any part thereof.

There will, therefore, be judgment for the defendant with costs.

Judgment accordingly.

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SMITH v. UNION S. S. Co.

British Columbia Supreme Court, Morrison, J. September 12, 1922.

CARRIERS (§ II O—325)—LIABILITY FOR LOSS OF BAGGAGE—SHIPPING—FREIGHT-SHED.

A shipping company is liable for the loss of the baggage of a passenger after arrival at its destination, where by mistake such baggage was taken back as freight on a returning vessel and placed in a freight shed where it disappeared.

ACTION to recover for lost baggage. Judgment for plaintiff.

H. S. Wood, for plaintiff.

J. K. Macrae, for defendant.

MORRISON, J.:—The plaintiff, Mrs. Mabel Alice Smith, on January 13, 1922, bought a ticket from the defendant company for a passage from Vancouver to Hardy Bay, up the coast on their steamer "Venture," which ticket was subject to the usual specified limitations. She, at the same time, checked her trunk. She arrived in due course at Hardy Bay in the late afternoon and was landed with her trunk on a float which was moored some little distance from the beach. On this raft, or float, was a small shed into which baggage and freight of sorts was usually put by the north bound steamer and it also was used for leaving articles of freight and luggage for the steamer south bound. The only means available for passengers to get ashore was by a row-boat. The plaintiff remained on the float near her trunk until the "Venture" sailed. Then she was taken ashore but left her trunk. She went to the hotel of the place and about seven o'clock the hotel man went to fetch the truuk. The S.S. "Camosun," the south bound steamer of the defendant company, came along about the same time, and took on freight and baggage which it found on the float. What then happened was that the plaintiff's trunk was also taken along to Vancouver, the purser or check clerk assuming that all the things in the shed and on the float were intended to be taken to Vancouver.

Upon the return of the "Camosun," the plaintiff interviewed the purser who acknowledged that the trunk was back in Vancouver, and that he would bring it up, presumably the next trip. It not arriving back, she again interviewed the purser who then told her the trunk was lost. Patterson, the purser, in his evidence, stated that the trunk was taken back by them to Vancouver all right, but that they would have to go to considerable routine to take it back to Hardy Bay, hence the delay. That the trunk was in the company's freight shed at Vancouver, having come as freight and, therefore, it was not put in their "locked" room where it would have been safe. The purser knew there was an extra trunk on board on the occasion in question and he told the baggage master to send it back. The baggage master

went to lunch and when he returned the trunk had disappeared.

On this state of facts, I find that the contract of January 13, which is relied upon as a defence herein, was performed upon the arrival of the "Venture" at Hardy Bay and upon the delivery of the plaintiff's trunk. It follows the contract does not enter further into a consideration of the issues. I find that the plaintiff was not negligent in leaving her trunk for the short period between the departure of one steamer and the arrival of the other—a matter at most of a few hours. The weather was inclement and the landing facilities poor, and she was a stranger in the place. I find the company was negligent, particularly after the trunk arrived back in Vancouver and they became aware who the owner was and of the circumstances surrounding its presence there. I think they are solely responsible for its loss.

There will be judgment for $744.56 the amount sworn to be the value of the contents. I think the item of $126 respecting the title deeds is damage reasonably arising out of the loss sustained by her. There will be costs on the County Court scale.

Judgment for plaintiff.

LEMAY v. THE KING.

Exchequer Court of Canada, Audette, J. May 18, 1922.

WAR MEASURES ACT (§ I—2)—REQUISITION OF TUG—TERMINATION OF WAR—RELEASE—COMPENSATION FOR RENTAL—COSTS.

Where a tug was requisitioned by the Government but only remained under requisition for 15 days when the period of requisition was terminated by the close of the war, the Court held that, considering the size and value of the tug, $30 per day was a fair compensation for the rental of the tug. Although the Court allowed the claimant costs, it ordered that one-fourth should be deducted and borne by the claimant himself because of evidence in which the claimant swore recklessly and inconsistently with the facts, by reason of which the length of trial was increased.

REFERENCE by the Crown under the provisions of the War Measures Act 1914 (Can.) 2nd sess. ch. 2 (p. 5), of a claim of suppliant for compensation for the use of his tug requisitioned by the Crown.

A. Galipeault, K.C., for claimant.

W. Larue, for respondent.

AUDETTE, J.:—This is a reference made by the Crown, under the provisions of sec. 7 of the War Measures Act, 1914 (Can.) 2nd sess. ch. 2 (at p. 5), of the claim of Joseph Alphonse Lemay for compensation for the use of his tug "Sir Lomer" (gross tonnage 47.58 and registered tonnage 17.82) during the war, requisitioned by the Canadian Government.

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Audette, J.

The claimant, as set forth in the pleadings, seeks to recover the sum of $1,653.

The Crown, by the statement in defence, admits liability, for the tug so requisited, up to the sum of $754.25.

Therefore, the question in controversy between the parties, is that of a *quantum meruit*.

Negotiations had been started by correspondence on behalf of the Crown, at that time the tug was requisitioned, for fixing its rental value; but the parties never came together, they were never *ad idem* upon this point and the compensation must now be ascertained upon the basis of a *quantum meruit* and I will deal seriatim with each item of the claim.

1. (Para. 8 of claim)—This is an item of $250, which the respondent by para. 5 denies, but in respect of which it offers $10 by para. 11. This amount is claimed in respect of changes made in the tug, such as the removal of the deck, etc., while she was in the Crown's possession, with the object of removing the engines, boilers, etc., therefrom to ship the tug on board a transport to England. The war having come to an end in November, 1918, the officers of the Crown placed back in the tug her deck and beams supporting the same, leaving the deck in a state of leakage and in such a weak state that some works became necessary to place the tug in her former state and condition.

For this claim I will allow, notwithstanding the exaggerated and unsatisfactory evidence to the contrary, the sum of $150; 2 (Para. 9)—The second item for $365 is admitted in its entirety, by the Crown; 3 (Para. 10)—This is an item for the daily rental of the tug, alleging further that claimant has been deprived of her services for the balance of the season, notwithstanding that the tug was idle when requisitioned. I may say, as a prelude, the season was practically closed when the tug was returned to her owner and no claim could, in any case, be entertained in that respect. Under the evidence and the allegation in the statement of defence, I find the tug remained under requisition for 15 days and I hereby fix as a fair and reasonable *per diem* compensation for such a short period the sum of $30 daily, $450. The Crown is offering $300 for this item, or $20 a day. 4. Coming to the claim set forth in paras. 11 and 12 of the statement of claim, I find that the respondent tendered the tug at Portneuf, on the last day of requisition and that the claimant refused her there and asked the Crown to deliver her at Quebec and the Crown did so in compliance with such request, the vessel having been originally requisitioned from Quebec. The claimant is thereby estopped from setting up any claim for expenses incurred in afterwards taking the vessel from Quebec to Portneuf. This item also

includes the expenses the claimant yearly and usually incurred in hauling his vessel at Portneuf every season in her wintering quarters. Nothing will be allowed in respect of this claim. 4. (Para. 13)—This is an item of $100 for repainting the tug, when returned she being painted in a dark grey, as customary under Admiralty Rule. The respondent is offering $50 for this item and one of its own witnesses named a figure above $80. I will allow $85. 5. (Para. 14)—This item covers certain minor equipment of the tug which were missing when returned, namely: a hawser, valued at $80; two small axes, $1.50; one large axe $4; one large wrench $2.50 and one small one $1.50; kitchen utensils $10. One wrench was returned. The claimant Lemay testified there was at the time of delivery a hawser on board the tug of 350 to 400 feet, by 2 inches diameter, and his son testified that this hawser would be of 200 to 300 feet.

Both witnesses are testifying under great misapprehension—to say the least—since under ex. 4 filed on behalf of the claimant himself, which is a survey or inventory made at the time the Crown took possession and which is signed by the claimant himself and Captain Koenig, on his behalf and Major Oliver on behalf of the Crown—the only hawser on board the tug at the time was one of 10 fathoms. I will allow $30. The Crown offers $29.25 in respect of this item. I did not, by any means, find the demeanour of either the claimant or his son satisfactory when in the witness-box at trial; and their testimony respecting the hawser has considerably shaken my faith in the balance of their evidence, especially in connection with the repairs to the tug. True, another witness, one Gignac, spoke as to the valuation of such repairs, but he had not seen the tug at the time the government returned her, although he casually saw her this spring. However, such repairs usually run into heavy expense. It is very difficult to arrive at a satisfactory conclusion upon such evidence. 6. (Para. 15)—This item covers an expenditure which became due under the terms of the requisition and which the claimant, but for the requisition, would not have incurred. The full amount is allowed, $20. Total, $1,100.

Therefore, there will be judgment declaring that the claimant is entitled to recover from the respondent the sum of $1,100 with interest thereon from the date of the Reference, i.e., October, 31, 1919.

Coming to the question of costs it is quite obvious that the Crown should not in justice be mulcted for the payment of the cost of that part of the evidence in which the claimant and his son swore recklessly and inconsistently with the facts in respect of the hawser. Therefore, whilst I will allow costs in favour of

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the claimant I will qualify such allowance by ordering that when the total of the bill of costs is ascertained one-fourth thereof should be deducted and borne in any event by the claimant himself.

Judgment accordingly.

Re CHMELNITSKY.

Manitoba King's Bench in Bankruptcy, Macdonald, J. July 19, 1922.

BANKRUPTCY (§ II—19)—COMPOSITION WITH CREDITORS—APPROVAL OF COURT—OBJECTING CREDITOR—DISCHARGE—EFFECT ON CREDIT OBTAINED BY FRAUD.

The Court will not refuse to give its approval to an offer of compromise which the majority of the creditors believe to be calculated to benefit them and which the Court thinks will benefit them, on account of the objection of a smaller creditor who claims that credit was obtained from him by false and fraudulent representation as to the debtors' financial position. Section 61 of the Bankruptcy Act 1919 (Can.) ch. 36, provides that an order of discharge shall not release a bankrupt from any debt or liability incurred by means of fraud, and the objecting creditor, notwithstanding the discharge, can still insist on payment in full if he can establish his charges.

[See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

APPLICATION under the Bankruptcy Act, 1919 (Can.) ch. 36, sec. 13, for approval of an offer of compromise. Approved.

M. J. Finkelstein, for the trustee.

A. E. Hoskin, K.C., for Davie's Footwear, Toronto.

J. S. Hough, K.C., for Greenshields, Ltd.

R. T. Robinson, for Racine Co.

MACDONALD, J.:—This is an application for approval under sec. 13 of the Bankruptcy Act, 1919 (Can.) ch. 36, of an offer of compromise made by the debtor at a meeting of his creditors, such offer having met with approval of creditors representing upwards of $166,000 and with two creditors representing $11,400 rejecting the offer and opposing this application. Under ordinary circumstances there would be no hesitation in joining in the approval with so large a majority of creditors, particularly so as I am convinced that from the financial standpoint the compromise offered would be greatly to the advantage of the creditors. I am satisfied if the estate was wound up in the ordinary way the creditors would not receive the amount offered under the proposal made.

The objection taken is that the debtor on January 23, 1922, secured credit from Alphonse Racine, Ltd., on the sale of goods to the value of $10,344 by falsely and fraudulently representing his financial position and to substantiate his representations he presented a statement of his affairs showing a surplus of assets over liabilities as of January 1, of $151,920, whereas on February

1, by statement submitted by him, the surplus is reduced to $111,719 and in the month of May this surplus is converted into a deficit of $43,228. It is possible that there was a considerable loss between February 1 and May 29, but it is difficult to understand how there could be such a shrinkage between January 1 and February 1. On January 1, 1922, he represents his liabilities to the trade at $77,185, and on February 1, a month later, his liabilities are $102,000. On February 23, the debtor wrote to the Racine Co., stating that the statement which he gave them was only approximate and that it was made out hurriedly, and he draws attention to the fact that there was a considerable difference in the two statements, this is, the statement which he then enclosed them, being the February 1 statement and the January 1 statement which he gave when securing credit. After the receipt of this statement and letter, the Racine Co. appear to have done nothing. He says in his letter that the statement of January 1, was received by him from his accountant in Winnipeg, on a wire from him. It is difficult to understand how a business man doing such a large volume of business as this debtor, would not have a better grasp of his actual position, and it looks very like a wilfully false representation as to his actual position, although I could not on the evidence before me come definitely to that conclusion.

The chief ground of objection to the acceptance of the compromise is the moral turpitude of the debtor in securing credit on the representation of January 23, and although this attitude on the part of the objecting creditors is a very commendable one, yet, it seems to me, that as so large a body of creditors favour the proposal, it should not be subject to the control of as small a minority.

Counsel opposing the application cites *In re Bottomley* (1893), 10 Morr. 262, where it is held that on a similar application the interest of the creditors is in the first instance to prevail unless it would be contrary to commercial morality that they should be allowed to make an arrangement with the debtor, and it is held the duty of the Court to take into consideration the particular class of offence and the particular circumstances under which it is proved to have been committed and then ask itself the question whether it would be contrary to public morality for the sake of private interests to approve the scheme, and it is held that if the offences are proved and the circumstances under which they are proved to have been committed are such that the debtor, although he may have been wrong, yet need not in the interests of the estate, be treated as a person with whom the creditors ought not to be allowed to negotiate, the Court is at liberty to

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approve the scheme, notwithstanding the commission of these offences.

Under sub-sec. 7 of sec. 13 of the Bankruptcy Act, 1919 (Can.) ch. 36:—

"The Court shall, before approving the proposal, hear a report of the trustees as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor."

And under sub-sec. 8:—

"If the Court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required, where the debtor is adjudged bankrupt, to refuse his discharge the Court shall refuse to approve the proposal."

Under sub-sec. 9:—

"If any facts are proved on proof of which the Court would be required either to refuse, suspend or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal unless it provides reasonable security for payment of not less than fifty cents on the dollar on all the unsecured debts provable against the debtor's estate."

The trustee's report which is *primâ-facie* evidence of the truth of its contents shews that the debtor was originally engaged in the jobbing business and when a slump in prices came he had a large stock on hand purchased when prices were at the peak and also had a large amount outstanding in book accounts spread among retail merchants who, owing to the lack of financial strength, were compelled to deal with the debtor instead of with the large wholesalers and manufacturers direct, and such retailers were the first to feel the drop in prices and general depression which had then and does now prevail in Western Canada, and as a result the debtor has lost a great deal of money in bad book accounts; and it further finds that when the slump in prices came the debtor apparently, in an effort to save the situation, branched into retail business and opened several retail stores, but owing to the general depression this method of attempting to save the situation resulted in further complicating matters because prices were continually dropping and retail business was continually getting poorer so that apparently large losses were made in the retail establishments, as these had to be handled by managers; further that the building in which the debtor carried on his wholesale business in Winnipeg was gutted by fire and the stock and trade of the debtor was almost entirely destroyed, and the debtor states he did not carry enough insurance to cover the entire loss and although the statement of affairs

of the debtor shews that approximately $56,000 is expected from the insurance companies, it is doubtful whether this amount will be realized as the insurance companies are contesting the debtor's claim. The report finds the consensus of opinion of the committee is that the debtor is not guilty of any act which would disentitle him to a compromise but that the debtor's financial difficulties are due to the slump and depression which prevails in Western Canada and from circumstances over which he cannot be held entirely responsible, and that having regard to these facts the trustee is of opinion that the proposed composition is fair and reasonable and calculated to benefit the general body of creditors.

Now as against this evidence we have nothing but the statement of January 1, and February 1, and the letter of the debtor written upon his return to Winnipeg, advising the Racine Co. that his financial position was not as given in the statement of January 1, and explaining how such a statement was given. It is, of course, possible that there may have been considerable loss between January 1 and February 1.

The charge against the debtor is incurring of the liability to the Racine Co. by means of fraud. Sec. 61 of the Bankruptcy Act provides that an order of discharge shall not release a bankrupt from any debt or liability incurred by means of fraud or fraudulent breach of trust to which he was a party. This would seem to indicate that notwithstanding the incurring of a debt or liability by such means it would not disentitle the debtor to a discharge but that the debt would not be extinguished, and notwithstanding the discharge of the debtor the Racine Co. could still insist upon payment in full for their claim and could, if they can establish their charges against the debtor, proceed at any time to the recovery of judgment, but could not, pending the carrying out of the terms of the compromise, proceed beyond the judgment, but after the compromise was carried out they could follow the debtor for the balance of their claim. If the charge of the Racine Co. is well founded the debtor can be proceeded against under the Criminal Code.

On the grounds, therefore, of commercial integrity or business honesty the public need not be allowed to suffer by the discharge of the debtor or by the acceptance of this scheme of settlement, as a conviction against him would insure that result, and also a judgment of the Racine Co. hanging over him would prevent his entering into business activities until the judgment was paid.

After carefully considering the case I have concluded that I cannot refuse a scheme which the creditors believe to be calculated to benefit them and which I also believe to benefit them,

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and under the circumstances I approve of the scheme as one in the best interests of all concerned.

Costs of all parties out of the estate.

Offer approved.

LEMAY v. TOWN OF MEGANTIC.

Quebec Court of Revision, Archibald, A.C.J., Demers and Weir, JJ. March 19, 1921.

ARREST (§IA—4a)—MALICIOUS—LACK OF REASONABLE CAUSE—CONFIRMATION OF ACTION OF CONSTABLE BY TOWN—LIABILITY IN DAMAGES—LIABILITY OF PERSON HELPING CONSTABLE AT HIS REQUEST.

A town municipality which confirms the action of its town constable who has arrested a citizen maliciously and without proper cause, is liable in damages for such illegal arrest, but a person assisting the constable at his request in making the arrest and not knowing that reasonable and probable cause for the arrest is lacking and not being actuated by malice is not liable.

APPEAL by defendant from the judgment of the Quebec Superior Court in an action for illegal and malicious arrest. Affirmed.

Plaintiff claims damages from defendants jointly and severally by reason of having been illegally and maliciously arrested by defendants, Savard and Dostie, both in the employ of the municipality defendant, whilst in the exercise of their duty as constables.

Defendants pleaded that the arrest was justifiable.

The Superior Court granted a fraction of the damages claimed on the following grounds:

"Considering that it is established that on June 1, 1919, a Sunday, the defendant Arthur Savard, assisted by defendant Alfred Dostie, arrested the plaintiff without any reasonable or probable cause, maliciously, illegally and without right, in the presence of a great number of persons;

That the defendant Alfred Dostie assisted the defendant Savard at the latter's request;

That the defendant was at that time a constable of the defendant corporation, and that he arrested the plaintiff whilst engaged in the discharge of his duty as constable, thus involving the responsibility of the defendant corporation;

That futhermore, the defendant corporation ratified the arrest and so assumed responsibility for its consequences, by pleading justification;

That the defendant had not committed, nor was he engaged in committing, any act such as would justify his arrest, on the occasion in question;

That, in the circumstances, the arrest of the plaintiff constitutes at least a *quasi-delict*, if not a *delict*, for the consequences of which Savard, the principal author, and the defendant corporation which approved and ratified his action, are jointly and severally responsible;

That, as regards the defendant Dostie, since he acted in the circumstances at the request of a police officer in good faith, without malice and to assist the latter in the discharge of his duty, there is not ground, in the absence of proof that he knew that reasonable or probable cause for the plaintiff's arrest was lacking and the consequent absence of proof of malice on his part, to hold him liable, notwithstanding the illegality of the arrest in which he participated;

That he who assists a public officer, at the latter's request, in the discharge of his duty, even to effect an illegal arrest, is entitled, in default of proof of malice, to the protection of the Courts;

That malice on the part of the defendant Savard in the present case results from the absence of any reasonable and probable cause for making the said arrest;

That the arrest was made in the presence of a considerable number of persons and without provocation on the part of the plaintiff;

That the arrest was of such a nature as to humiliate the plaintiff and wound him in his sensibilities and honour and diminish public respect for him.

That the defendant Savard, by releasing the plaintiff a short time after arresting him, without bringing him before the competent authority, gives ground for believing that he had no serious motive or cause whatsoever for arresting the plaintiff;

That the defendant corporation, by pleading to the present action and seeking to justify Savard's conduct, has accepted full responsibility and all the consequences of said action;

That in these circumstances the plaintiff is entitled to $100 by way of damages for the injury done him by the said arrest, and should have judgment for that amount;

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For these reasons: dismisses the defendants' plea as regards Savard and the defendant corporation, maintains the plaintiff's action as regards the said corporation and Savard up to the sum of $100 which the defendant corporation and the said Savard are condemned jointly and severally to pay to the plaintiff, with interest from this date and the costs of the action as brought. But the action is dismissed as to the defendant Dostie without costs."

Nicol, Lazure & Couture, for appellant.
J. A. Gaudet, for respondent.

Confirmed in Review.

Appeal dismissed.

SUTHERLAND v. JONES.

Alberta Supreme Court, Appellate Division, Stuart, Beck, JJ.A., Simmons, J.A. (ad hoc), Hyndman and Clarke, JJ.A. May 23, 1922.

VENDOR AND PURCHASER (§IB -5)—RIGHTS OF PURCHASER IN DEFAULT—REMEDY—EQUITABLE RELIEF.

A purchaser in default is in no position to maintain an action for damages on specific performance, upon a resale of the land by the vendor; his remedy is by way of equitable relief against forfeiture of the purchase moneys paid under the agreement.

APPEAL by defendant from a judgment for plaintiff in action by a purchaser to recover under the agreement of sale. Reversed.

Frank Ford, K.C., for appellant.
H. H. Hyndman, K.C., for respondent.

STUART, J.A. concurs with SIMMONS, J.A.

BECK, J.A.:—My opinion is that the second agreement between the plaintiff and the defendant of September 1918 was a concluded agreement which the plaintiff might have enforced; that as the defendant refused to carry it out the plaintiff could rightfully revert to the agreement sued upon; that the acts and conduct of the defendant, in selling to Warren, evinced an intention no longer to be bound by the contract (2 Smiths L.C. 12th ed. p. 43) a position from which he could not withdraw (as he attempted to do by getting a reconveyance from Warren) after the plaintiff had accepted that position as he

did by bringing his action; that the fact that the plaintiff's rights under the first agreement were those of executor and his rights under the second personal is of no consequence inasmuch as, in fact, he was the sole beneficiary of the estate and the second agreement was one which dealt with the interests of the estate under the first agreement; that although the plaintiff was in default on the first agreement and had made it clear that he was not able to fulfil the first agreement by payment yet that was not equivalent to an abandonment of all interest under the agreement for he still had at least a right to be relieved from the result of the forfeiture: *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, 86 L.J. (P.C.) 22.

I think, therefore, that the plaintiff had a right to relief from the forfeiture which is never necessarily the return of the whole amount of the purchase money. His action is not expressly based upon the equitable right of relief from forfeiture but I think the action might well have been treated at the trial as brought for that purpose and the necessary amendments made with, if necessary, a reference to ascertain the proper amount of refund to which the plaintiff was entitled. As a majority of the Court are in favor of a dismissal of the action which I think is technically the correct course, I however think it is clear from the reasoning of a majority of the members of the Court, the plaintiff is at liberty to bring an action for relief from forfeiture, while at the same time I am not intending to intimate that there may not be an answer to such an action.

SIMMONS, J.A.:—The plaintiff's claim arises out of an agreement made between A. T. Sutherland, deceased, as purchaser, and the defendant as vendor for sale by the latter to the former of Sect. 33, Tp. 36, R. 11, west of the 4th meridian in the Province of Alberta, for the sum of $11520. The plaintiff claims that while said agreement was in force and effect that the defendant wrongfully converted said lands by reselling same to one Warren on May 1, 1919. The plaintiff claims return of $5,681.55 paid to defendant on the purchase-price and interest, and $6,119.90 damages, and a lien on said lands for these moneys.

At the trial the defendant admitted said sale to Warren but adduced evidence to shew that the same had been terminated and that the defendant was able, ready and willing to carry out the agreement for sale on payment by the defendant of the balance of the purchase moneys and interest there due.

The defence also sets up a quit-claim made by plaintiff as

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sole beneficiary in favour of defendant for all the interest of the deceased's estate in said lands, dated September 3, 1918.

The plaintiff replies that said quit-claim never became effective or binding upon the plaintiff because a certain agreement for resale by defendant to plaintiff of said lands was incorporated in and became a part of the agreement under which said quit-claim was executed and that since the said agreement for sale was never concluded that thereupon the quit-claim was ineffective.

The trial Judge held that the quit-claim hereinbefore referred to never became a concluded agreement, and that there was a repudiation of the original agreement for sale by the defendant when the latter resold to Warren and gave the plaintiff judgment for the return of the moneys paid under said agreement and interest on same.

From this judgment the defendant appeals. The history of the facts is somewhat involved. On July 16, 1913, the purchaser was in default in regard to the payments due and the defendant began an action for enforcement of said payments then due. A defence was filed which obviously was for the purpose of delay and subsequently the deceased enlisted and moratorium legislation in favor of enlisted soldiers prevented continuance of the action. A. T. Sutherland was killed while on active service and administration of his estate had been granted to the Trusts and Guarantee Co. Ltd.; when C. B. Sutherland returned from overseas in April, 1918. The defendant filed a claim with the Trusts and Guarantee Co. Ltd., administrator, valuing the land at $9,600 and claiming the difference between this sum and the sum of $11,663.46 then due.

Negotiations passed between the administrator and the defendant for a settlement and for the giving of a quit-claim of the interest of the estate in this land to the defendant. This was in April, 1918. Another party, Shields, had a caveat against the lands and Mr. Savary, barrister, representing the execution creditor, refused to withdraw it. The administrator was not in funds to pay this and these negotiations fell through. The Trusts and Guarantee Co. wrote J. C. Trenahan on April 17, 1918, that they had taken up with C. B. Sutherland this quit-claim and that the latter was satisfied that the Trust Company should execute the quit-claim in favor of the defendant. C. B. Sutherland does not admit the correctness of this statement made by the Trusts and Guarantee Co. However, this quit-claim deed was not executed by the Trusts and Guarantee Co. Ltd. as administrator. On August 14, 1918, C. B. Suther-

land wrote defendant advising him that he had a prospective purchaser and asking for terms of sale. He advised the defendant that the estate was insolvent and that the sheriff estimated the value of the lands in question at $9,000. He said he was prepared to obtain a quit-claim of the estates interest. C. B. Sutherland was then sole beneficiary of the estate and he does not suggest that the administrator offered any opposition to this proposition.

It is quite obvious that at this time Sutherland treated the original agreement for sale as one which the administrator could not carry out, and that he was very anxious to have the same terminated and anxious to obtain a new agreement whereby he could arrange to re-purchase. On September 4, 1918, the plaintiff wrote the defendant enclosing a quit-claim deed executed by himself as agent of and sole beneficiary for the estate, and the defendant sent this document to Trenahan, his Alberta representative, who had a power of attorney to act for the defendant.

There was a meeting between Trenahan and the plaintiff in a barrister's office in Calgary and there is a conflict of evidence between them as to the discussion at this meeting. In any case Trenahan insisted that the plaintiff must deal with him and that the defendant would not quit claim and resell to the plaintiff unless a payment of $1,000 was made in settlement of the claim which had been filed with the administrator. In the meantime Sutherland had himself substituted as administrator.

However, he gave a note to Trenahan for $1,000 and a quit-claim deed was executed by the defendant and an agreement for resale to the plaintiff. These were sent through a bank to the plaintiff and he executed them but changed the rate of interest in the agreement from 8 per cent. to 6 per cent. The agreement and quit-claim were sent back to the defendant in this altered form for acceptance and for signature by the defendant's wife. The defendant would not assent to the change of interest.

In October some discussion took place between Trenahan and the plaintiff in regard to the change of interest and the plaintiff says he agreed that the interest might be restored to 8 per cent. in the agreement for sale. He said he confirmed this in a letter. Trenahan says he received no such letter and does not remember the plaintiff consenting to restore the interest to 8 per cent. Further correspondence passed between plaintiff and Trenahan in November and December 1918 and January 1919, dealing with the completion of the new agreement for

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sale and payment of the note of $1,000 given by Sutherland to Trenahan but the defendant did not deliver to the plaintiff the documents and as far as the evidence indicates he did not change the interest to the original rate of 8 per cent.

Nothing further happened until April 23, 1919, when the sale was made by defendant of the lands to one Warren for $16,000. When the plaintiff learned of this sale he wrote the defendant on April 28, 1919, and demanded that the defendant "come through with the agreement of sale of this section to me, the terms of which agreement were agreed to in September last year." . . "Both you and your wife have already signed this agreement and unless you forward it to me immediately with your wife's signature affixed I will proceed against you with an action for damages, for breach of contract, etc."

The plaintiff on February 4, 1920, commenced action alleging the original agreement of sale to A. T. Sutherland, deceased, and breach of such by defendant on account of the sale to Warren.

Reviewing the whole circumstances it seems to me an undisputable fact that from, in or about March, 1918, until January, 1919, negotiations were carried on, upon the admitted basis that the administrator could not carry out the original agreement for sale. There was no available money to pay up the large arrears of over $11,000 outstanding in the agreement. The Trusts and Guarantee Co. Ltd., as administrators adopted this as a basis of negotiation. The plaintiff in August, 1918, as sole beneficiary adopted this view and offered to negotiate with defendant upon this basis. When somewhat later in September, 1918, the plaintiff became administrator, he carried on negotiations upon the same basis.

At the opening of the trial the defendant amended by pleading that he was ready and willing to carry out the original agreement and established that he was the registered owner free from encumbrances of said lands, and produced a quit-claim and release by Warren of all the latter's interest under the agreement of April 23, 1919. If the second agreement for purchase did not become a completed agreement and the plaintiff intended to assume a new basis of dealing which would involve the re-instatement of the original agreement he was under an obligation to make the same known to the plaintiff [defendant?]. He represented the estate of the purchaser and represented to the defendant that the estate could not make the payments that were overdue and outstanding. It is true a considerable sum had been paid on the purchase-price but the ac-

cumulated interest had so added and increased the amount that a larger sum than the original purchase-price was now due.

I am inclined to agree with the conclusion of the trial Judge that the negotiations in regard to quit-claim deeds and a new agreement for sale never did become effective. When Sutherland changed the rate of interest he was in effect making a new offer and this was never accepted by Jones, and there were other terms upon which the parties were not *ad idem*.

The real issue is then whether the conclusion of law of the trial Judge is correct that "when the defendant entered into a second binding agreement for sale of the same lands to a third party, he committed such a breach of the first agreement as would justify the plaintiff in demanding rescission and the return of the purchase moneys he has paid."

The general principle is stated very clearly by Alverstone, M.R. in *Rhymney Railway* v. *Brecon and Merthyr Tydfil Junction Railway* (1900), 69 L.J. (Ch.) 813 at p. 818, 49 W.R. 116, as follows:—

"If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may in our opinion treat the contract as at an end. See *Withers* v. *Reynolds* (1831), 1 L.J. (K.B.) 30, 2 B. & Ad. 882, *Hochster* v. *De la Tour* (1853), 22 L.J. (Q.B.) 455, 2 El. & Bl. 678, and the judgment of Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434 at p. 442. Short of such refusal we think the true principle to be deduced from all the cases is that you must ascertain whether the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions."

The plaintiff's claim is an action at law for breach of contract on the assumption that the Warren sale was a renunciation by the defendant of the original contract of sale which entitled the defendant to an action for damages.

The plaintiff has deprived himself of this right of action by his admissions prior to the Warren sale of his inability to carry out his part of the agreement, his offer to treat the defendant as an owner entitled to sell; his negotiations to re-purchase on the basis that the defendant had the right to sell. There was no waiver by the defendant and no offer to recognise the original contract as in force when the plaintiff brought his action. The plaintiff was then on his own admission unable to implement his part of the contract and, therefore, his action at law fails. The offer of the defendant at the trial to re-instate the

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original contract and treat it as still effective can not derogate from his right at the moment the action was brought to treat the plaintiff's defaults as a ground for terminating the agreement. It may be that when the plaintiff brought his action he might have asserted a right to equitable relief from forfeiture of the purchase moneys paid under the agreement.

Kilmer v. *B.C. Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, 82 L.J. (P.C.) 77, as explained in *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, 85 L.J. (P.C.) 79.

That would be claim for equitable relief which was not, however, raised in this action and no amendment has been submitted praying for relief under this head.

The plaintiff's action fails and should be dismissed with costs and the appeal allowed with costs.

HYNDMAN, J.A.:—In my opinion there was not at any time a concluded agreement between Sutherland in his private capacity, and Jones for the purchase by the former of the land in question. The second agreement and the quit-claim deed were dependent one on the other and if one failed of consummation then so did the other.

That being so the original agreement with the deceased Sutherland was still in force at the time of the sale by Jones to Warren. Jones must be held to have known that such agreement was in existence and if so the sale to Warren would have the effect of justifying the Sutherland estate in treating such act as a cancellation by Jones of the agreement with the deceased.

The plaintiff however, being in default and never at any time having offered to remedy such default, is not in a position to maintain an action for damages or specific performance but I think might invoke the equitable jurisdiction of the Court and ask to be relieved from the effect of the forfeiture of the $6,400 paid on account of the purchase-price.

The peculiar circumstances of the case I think are sufficient to justify the Court in ordering a reference to ascertain the value of the land together with the loss, costs and expenses to which the defendant has been put as a consequence of the plaintiff's default, including the costs of this action and of the appeal, and should it transpire that such value is greater than the amount owing by the plaintiff, plus said loss, costs and expenses, then to order a return to the plaintiff of the difference, not exceeding the said sum of $6,400.

The evidence as disclosed in the case however would make it appear to me that the land is not of any greater value if offered for cash (which should be the correct criterion) than the

amount owing by the plaintiff, consequently I think the plaintiff should be required, before entering upon such inquiry, to furnish security for costs thereof by paying into Court the sum of $200 within 30 days from the entry of formal judgment herein. Otherwise the action to stand dismissed.

I would allow all necessary amendments to conform to the above observations.

Subject thereto I would allow the appeal with costs and dismiss the action with costs.

CLARKE, J.A.:—After a careful consideration of the evidence I agree in the conclusion of the trial Judge that the negotiations for the purchase of the land by the plaintiff in his individual capacity from the defendant did not result in a concluded agreement but I do not agree that in the circumstances the defendant committed a breach of his original agreement with the deceased A. T. Sutherland.

The last payment under that agreement fell due on November 19, 1918, and if that payment and the instalments in arrear had been then paid the plaintiff as administrator would have been entitled to a transfer and would have received the same as the title was complete in the defendant at that time and he was ready and willing to perform the contract on his part. It is quite apparent that the plaintiff representing the estate of the deceased purchaser was not prepared to carry out the agreement on his part at any time which was common ground between the parties so that when the negotiations to sell to the plaintiff in his individual capacity failed, I think the defendant was quite justified in assuming that the plaintiff had abandoned any intention he ever may have had of fulfilling the original agreement on his part, and it was upon that assumption that he entered into the new agreement with Warren. I do not regard this transaction as a refusal on the part of the defendant to carry out the contract on his part. He was never offered the purchase money nor asked for a transfer, there was no offer on the plaintiff's part to fulfil the agreement on his part and no refusal by the defendant to accept the money and give a transfer which he was able to do notwithstanding the agreement with Warren. The Sutherland agreement being prior in time to Warren's agreement could have been enforced by the plaintiff I think even as against Warren. The defendant may have been liable in damages to Warren prior to the latter's default and quit-claim deed but that did not concern the plaintiff. If the plaintiff had any equitable claim to relief the defendant met him by offering in the pleadings and at the trial

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to transfer the property on payment of the amount owing. This, of course, the plaintiff declined as it is apparent that $9,600 or thereabouts was about the fair cash value of the property; both parties so treated it, and a considerably greater sum was owing under the agreement. I do not think that the consideration of $1,600 in the Warren agreement is a proper test of the cash value as that was payable almost wholly by crop payments spread over a long period without personal liability of the purchaser other than to deliver the share of the crop agreed upon. The plaintiff was not willing to risk a payment of $1,000 on a sale on such terms preferring to let the property go to the defendant, as appears by the plaintiff's letter to Gilchrist of April 9, 1919.

It seems fairly certain the defendant will incur a loss on the property by reason of the default of the plaintiff and of the deceased and I do not think it equitable to saddle upon him a further loss for the benefit of the party in default.

I would, therefore, allow the appeal and dismiss the action both with costs to be taxed under Column 5 of the tariff.

Appeal allowed.

Re WINNIPEG CHARTER; Re COMMUNITY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.

Manitoba King's Bench, Dysart, J. April 29, 1922.

TAXATION (§IIID—135)—SUBMISSION OF "QUESTIONS INVOLVED"—APPEAL FROM BOARD—WINNIPEG CHARTER—RECORD.

The "questions involved" within the meaning of sec. 341 of the Winnipeg Charter, when submitting a stated case from the Board of Valuation and Revision to a Judge of the Court of the King's Bench, is not limited to questions of law, but include all questions involving all the facts and circumstances, which the record must contain.

COURTS (§IA—1)—COURT OF RECORD—BOARD OF VALUATION.

The Board of Valuation and Revision under the Winnipeg Charter, being empowered by the provisions of the charter to compel the attendance of witnesses and required to keep a record of its proceedings, is a Court of Record.

TAXATION (§IIIB—125)—ASSESSMENT—"LAND"—PLAYGROUNDS—SIMILAR RESIDENTIAL PROPERTY—INCOME OF LAND.

A playground of a private school is not residential property, and cannot therefore be valued on a basis of "similar residential property," nor on an income or revenue basis, in an assessment of "land" for taxation purposes.

CASE submitted by the Board of Valuation and Revision of Winnipeg under sec. 341 of the Winnipeg Charter, 1918, ch. 120. Rehearing ordered.

T. A. Hunt, K.C., for applicant.

J. Preud'homme, for City of Winnipeg.

DYSART, J.:—This is a case submitted by the Board of Valuation and Revision of the city of Winnipeg in pursuance of sec. 341 of the Winnipeg Charter, 1918, ch. 120, in connection with the assessment of St. Mary's Academy. As originally submitted the case was inadequately stated, and in order that the opinion or decision which I am required to give might be based upon all the facts of the case rather than upon a challenged statement of them, I sent the case back for amendment under the powers given to me in sec. 343. Accordingly an amendment was made which while it does not supply all the facts required, has been supplemented by statements of counsel and together with the original statement and certified copy of the evidence supplies all the material now before me.

The original case describes in detail the property known as St. Mary's Academy, situate at the intersection of Wellington Crescent and Academy Road in the city of Winnipeg, consisting of 12.09 acres in a single block with a building thereon used as a "residence and school," but "not established or continued under the Public Schools Act," nor "affiliated with the University of Manitoba." It states that the property was assessed for the year 1922 at $295,900, and that an appeal was taken from that assessment to the Board on four grounds: (1) that the assessment was excessive; (2) that the land was not subdivided; (3) that part of the land was used only as playgrounds; and (4) that the land was of no greater value for the sisters' use than it was when purchased by them. It then relates that the appeal was heard and that "the assessment on the land was reduced from $182,300 to $156,200"; and that a notice was filed by the sisters requiring the Board to submit a case for the opinion of a Judge under sec. 341, to include three questions: (1) Is not the decision of the Board against law, evidence and the weight of evidence; (2) Are not the lands assessed at a sum much in excess of their value; and (3) Are not the lands and buildings exempt from municipal taxation under the Winnipeg Charter. The statement then concludes by submitting only one of the three questions—the last one—as "the question of law upon which the opinion of the Court is asked."

The certified copy of the evidence contains the testimony of only one witness, T. A. Hunt, who, under oath, gave information and reasons in support of the notified grounds of appeal,

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and of his opinion that the assessment on the lands should be reduced by one-half.

The amendment to the stated case is a studied attempt to justify the decision reached by the Board. It sets forth many facts and reasons upon which, we are asked to infer, the decision of the Board was reached. As many of these grounds and reasons were proceeded upon, under the erroneous view which the Board took of its own powers and duties, it will be more convenient to deal with them at the proper stages later on. In the meantime it is only necessary to say that the amendment by setting forth the elements of the amount of the assessment, supplies the very material by which that decision must necessarily be condemned.

Counsel for the Academy challenged the entire stated case on the grounds that it does not either fully or accurately "set forth the facts of the case and the questions involved" as required by sec. 341. He points out that the original statement omits two of the three questions which were asked to be included; that the certified copy of the evidence shews that the evidence of only one witness was heard before the sitting of the Board, and that evidence cannot support the Board's decision; that the amendment shews that the Board "went carefully into all the factors and circumstances influencing the decision of the valuator" although no evidence of such factors and circumstances were given in open Court as required; and that the decision was based upon those factors and circumstances as well as other alleged findings of fact which were either untrue or unreliable. He argues that the Board as constituted is a Court of Record and as such must keep records of all its proceedings and base its decisions upon evidence of which a record is kept; and complains that the Board in this instance at least acted to a large extent either without evidence or upon evidence improperly admitted.

Mr. Preud'homme for the Board boldly meets all Mr. Hunt's arguments. He stoutly maintains that the case as stated by the Board is not to be challenged but must be accepted as setting forth the only facts and question with which this Court can deal; that the Board alone has the right and duty of submitting the question, and is the sole arbiter of what shall be included in the stated case. He denies that the Board is a Court of Record and insists that it is as free to disregard any evidence produced before it as it is to seek evidence from any outside private source, or to rely upon the expert knowledge of its members. For these alleged powers of the Board he relies upon the

provisions of the Winnipeg Charter as interpreted by *Re Winnipeg Charter; Baird's* case (1916), 29 D.L.R. 464.

The opposing contentions of counsel place me in this position; If I accept the views of Mr. Hunt, I will have to explore the whole field of the powers and functions of the Board; if I adopt the stand of Mr. Preud'homme, I can readily dispose of the case but only by ignoring all the main issues raised. The easy and ready method of deciding the case would be, as Mr. Preud'homme suggests, to answer the single question submitted in the original case. Such an answer would undoubtedly have to be that the Academy property is not exempt from taxation under the provisions of the Winnipeg Charter, as it does not come within the scope of sec. 278 (3), and there is no other provision within which it could fall. But such an answer does not dispose of any of the more difficult questions raised in this lengthy and exhaustive argument and pressed upon me for decision. Besides it is intimated that this case is only one of several now pending and that it may serve as a test for the others. In view of all the circumstances it seems to me in the interests of all parties concerned that the questions raised here ought to be considered and determined. I will therefore deal with them.

Under the Winnipeg Charter a group of provisions contained in secs. 321 to 340, inclusive, under the heading "Notice of Assessment" deal with the settling of the assessment roll by the assessors and with all changes to be made therein by the Board of Revision upon complaint of parties affected. The last of these sections, 340, provides that "at any stage of the proceedings in regard to an appeal from or complaint against the assessment, the board may submit in the form of a special case for the opinion of a Judge of the Court of King's Bench any questions of law arising in connection with the appeal or complaint and shall reserve its decision in so far as it shall be affected by such question of law until the opinion of the Judge has been given when the Board shall decide the appeal in accordance with such opinion."

Then follows a distinct group of provisions set out under secs. 341 to 352, inclusive, under the heading "Appeals from the Board of Valuation and Revision in Assessment Cases." The first four sections deal with appeals such as the one in hand. Section 341 provides that "the city . . . or any person affected by the decision of the board in any appeal, may . . . require the board to submit a case for the opinion of a Judge of the Court of King's Bench, and the board shall thereupon

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set forth the facts of the case and the questions involved in writing."

And sub-secs. (a) and (b) of that section, provide that "any party . . . desiring to appeal under this section" shall furnish security for costs of his "case reserved hereunder."

Counsel for the Board maintains that secs. 340 and 341 must be read together and that the application under 341 must be restricted by 340. Let us compare these sections. In 340 "*any questions of law* arising in the appeal" may be "submitted" in the form of a "special case"; in 341 "the *facts* of the case *and* the *questions involved*" shall be "set forth" in a "case" or "case reserved." In 340 the case may, *before* but not after the decision of the Board, be submitted by the Board on its own initiative, for its own guidance, irrespective of the wishes of the person affected. In 341 the case, *after* but not before the decision of the Board, must be submitted by the Board, on the initiative of the person affected, for his own satisfaction, and in complete disregard of the wishes of the Board. The one section establishes a privilege exclusively for the Board; the other a right exclusively for the "party desiring to appeal."

It would seem from this comparison that the sections deal with things which are fundamentally different, and which, but for the *Baird* case, *supra*, we would expect to see treated as entirely separate and distinct.

The *Baird* case, however, deals with them together. That case was decided by Mathers, C.J.K.B., in June, 1916, when the provisions of the Winnipeg Charter, in so far as they relate to the matters in that case and in this, were identical in all respects, except numbers. The application there, as here, was made under the present sec. 341, and "the question submitted" was whether Baird was "entitled to have the assessment" on his lands and buildings "reduced below the amount fixed by the Board," and if so at what amount they should be "assessed." After a brief review of the charter provisions, the Chief Justice states at p. 465, that "the Board is required to set out the facts in the form of a stated case and upon the facts so stated the Judge is to give his opinion. The Judge is not to find the facts, or inferences from facts. These are to be embodied in the stated case. Then upon what is the Judge to give his opinion? Clearly upon some question of law arising upon the facts submitted;" and then at p. 466:—

"A consideration of secs. 333 *et seq.* under which an appeal may be taken to the Board of Valuation and Revision confirms the view that the application to a Judge under sec. 349 should

not be in the nature of an appeal upon questions of fact as well as law, but should be confined to obtaining his opinion upon a question or questions of law only;" and further,

"The question submitted in the case stated is a pure matter of fact, and therefore a matter with which a Judge has under these provisions of the charter no authority to deal."

It is to be noted that the question there was "a pure matter of fact." The question had been apparently agreed upon in the form submitted, and as interpreted by the Chief Justice. It is quite conceivable that such a question, framed in exactly the same terms especially the first branch of the question, might well be a matter of law or at least a matter of fact based upon a matter of law. For instance, if it appear that in fixing the amount of the assessment the Board had proceeded upon the principle of considering separate elements of value attaching to each element a specific amount, and if it appeared to the Judge that one of the elements had been applied on a mistaken view of the law, then that element of value should be eliminated, and the assessment consequently "reduced below the amount fixed by the Board." In such a case the question submitted would not be a "pure matter of fact," but would rather be a pure matter of *law*. On the same supposition the second branch of the case would call for an answer fixing the assessment at the amount named by the Board, less the amount of value attached to the eliminated element.

And so in the case before us. In the amendment to the stated case, the Board emphasises the "fact" which its members "found" by looking at the playgrounds themselves, that these playgrounds are "not unproductive," but on the contrary "considerably enhance the earning power of the institution . . . thereby producing revenue." The Board also stresses the "fact," which it learned on "inspection," that the premises are strategically situated "for serving the wealthiest portion of the city," and that it draws its "pupils from the best districts of the city." What is quite clear from these statements is that the members of the Board, in fixing the amount of the assessment on the playgrounds, were influenced by supposed revenues or earnings of these grounds. If so, they virtually levied an income tax on the property. In so far as they did that their assessment is invalid.

Assuming that the Board acted illegally in assessing this particular piece of property on the basis of income, then the question which the Board refused to submit, though requested, viz., are the lands assessed at a sum much in excess of their

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value, is a question of law rather than a question of fact, and consequently the *Baird* case, *supra*, cannot be authority in this case.

But the *Baird* case goes further. It contains language which if followed would affect the decision in this case. In interpreting the section under which the application was made, the Chief Justice considered what are now secs. 321 to 340 and concluded that "under these provisions of the charter" the Judge has no authority to deal with a pure matter of fact. But the question is not what authority the Judge derives under secs. 321 *et seq.*, but rather what authority is given him by secs. 341 *et seq.* It is under 341 that the application is made, and from the foregoing comparison of secs. 340 and 341, I can see no reason why the prior sections should be introduced at all.

However, he goes on to say the consideration of these sections merely "confirms the view that the application to a Judge" under 341 should "not be in the nature of an appeal upon questions of fact . . . but should be confined to . . . questions of law only." He clearly interprets 341 as narrowly as 340 and he looks to 340 for confirmation of that view. With the utmost respect for an opinion coming from the Chief Justice of our Court of King's Bench, I have not been able, though I have tried, to bring my mind to an acceptance of his strict interpretation of 341. I cannot persuade myself that 321 to 340 should be considered at all in an application under 341. I am convinced that the language of 341 *et seq.* means more than the Chief Justice allows to it. He says it is not "in the nature of an appeal," but 341 (a) speaks of "any party . . . desiring to appeal under this section," and 341 (b) speaks of a "case reserved" hereunder which is only another name for an appeal. The provisions call for the setting forth of all the facts and of all the questions involved, a certified copy of all the evidence given before the Board, upon which material the Judge is required to "hear and determine the question." Nothing more than that could go to the Court of Appeal. Nor is there anything in the language of this section which expressly suggests such a limitation as mentioned.

Of course, the decision in the *Baird* case applies only to the restricted facts of that case. These facts are, as we have seen, very much narrower than those before us. The statement of fact was there entirely agreed upon, there was no dispute as to the adequacy or correctness of the case as stated; here, there is a general challenge of all these matters. There the only question put was by apparent consent, one of pure fact, here sev-

eral questions are put, and even that question which corresponds in terms with the question in the *Baird* case has a different meaning. But moreover, even if the facts and questions were identical in the two cases, the decision would not be binding authority upon us. The appeal under sec. 341 is to "a judge of the Court of King's Bench." Each of the six Judges of this Court has equal authority and each is a tribunal of last appeal. While it is highly desirable that there should be uniformity in the interpretation of statutory law, it is more desirable that the interpretation should be correct. It seems to me that the Board have unwarrantedly stretched the application of the *Baird* case in seeking its shelter for their refusal to submit what in the Board's opinion are questions of fact, and I cannot conceive it to be the duty of a Judge to perpetuate the error of the Board in a matter of this kind.

I must therefore, give it as my opinion that the application under 341 is not limited to a question of law but is intended to include exactly what the statute calls for, viz., "the questions involved" whatever they might be. And further that a question may properly be said to be "involved" in the facts of the case, when it grows out of those facts, naturally, or by suggestion of a complaining party. It is for the Judge, not the Board, to determine whether or not all the questions requested should be considered and determined. It is for the Board to submit them all.

From the foregoing it will readily be seen that, in my opinion, the stated case ought to submit all the facts and circumstances. It would be desirable if such a statement were first submitted to the party affected for his approval before submission to a Judge. Such a course would bring the practice in line with the practice in other stated cases, the object of which is to have the matters before a Court without dispute. By very little straining the language of 341 might be said to contemplate such a practice and that the Board might "submit" (first for the approval of the person affected, and then) "for the opinion of a Judge." But Mr. Preud'homme insists upon what he regards as the prerogative of the Board. "It is not for the person affected," he says in effect, "but for the *Board* to set forth the facts of the case and the questions involved." True, but it is equally true that it is for the Board to "set forth *the facts of the case and the questions involved*"—not garbled facts or selected questions. And if the Board fails to do so, the case may be sent back for amendment, presumably as often as necessary, to ensure the production of all the facts. Surely the ex-

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peditious and reasonable way to meet this situation is first to submit the stated case to the interested parties.

Another question involved in this case is whether or not the Board is a Court of Record, and is bound to give its decision upon evidence adduced before it in open Court. The Board of Valuation and Revision is constituted under sec. 277 of the Winnipeg Charter, with duties among other things, "(5) (a) to consider and determine upon all matters pertaining to assessment and taxation in the said city. (5) (b) to hear and determine appeals against the assessment in accordance with the procedure hereinafter set out."

The procedure referred to is not very precisely stated but may be gathered from several sections commencing with 327. Under this section "any person . . . may apply to the board . . . by way of appeal for a revision . . . or to reduce his own assessment . . . Such application must be in writing . . . and state therein the grounds and nature of the complaint."

Section 331 provides that:—"For the purpose of revising the assessment rolls and deciding the appeals in respect thereof, the board shall meet at the time and place appointed therefor and of which notice has been given" in accordance with previous provisions. Section 332 makes it the "duty of the board to examine the said assessment rolls and to hear and determine the complaints filed," subject to certain following provisions among which we note 336:—

"Having heard the parties making the complaint . . . if they be present and if they wish to be heard, and also their witnesses, if they produce any, under oath, which may be administered by any member of the board, and also the assessors (who shall attend all sittings of the board fixed for hearing appeals), if they wish to be heard . . . the board shall maintain the assessment roll as it is or raise or lower the assessment or make any other changes in the roll . . . as shall seem just and expedient."

Section 336 (c) provides that "All evidence before the board shall be given under oath, and taken down in writing by the secretary of the board."

Section 336 (d) empowers the Board to summon witnesses who on failure to attend "shall be guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars."

The provisions constitute the Board of tribunal which must keep a record of its proceedings. In that sense it is a Court

of Record. The appeals to the Board must be brought upon a certain form of pleadings in writing. The Board is to sit after due and prescribed notice to the public; its sessions must be public; all evidence before it must be given under oath and recorded in writing; witnesses may appear and testify; any member of the Board may administer the oath; unwilling witnesses may be compelled to attend; the assessment roll may be examined but the assessors are required to be present to support the roll if they so desire. If these provisions do not make the Board a Court of Record, then it is hard to conceive that our County Court is a Court of Record. In *Kemp* v. *Neville* (1861), 10 C.B. (N.S.) 523, 31 L.J. (C.P.) 158, the Vice-Chancellor of Cambridge University had statutory authority to hear, "examine and punish" certain offenders within the precincts of the University. Though he acted informally it was held that he was a Judge of a Court of Record as the proceedings before him "could be proved or disproved by the record thereof only which might be made up at any time."

So here the provisions clearly contemplate that such a record shall be kept of the proceedings as will sufficiently prove them.

But even if the term "Court of Record" is challenged, still the fact remains that the Board is a creature of statute, empowered to decide appeals, to which a taxpayer is one party and the assessors are the others, according to forms and procedure quite clearly laid down, requiring records kept of those proceedings and of all evidence taken and the decisions reached. This is enough for present purposes. This question has this bearing upon the matter in hand. If the Board is in this sense a Court of Record then all the grounds upon which its decision was reached, ought to be found among its records. Mr. Preud'homme for the Board strongly insists that no such meaning should be attached to these provisions, and indeed it is evident that the Board itself has not so restricted its own movements. In the amendment it states that "in the exercise of the powers given the Board under the Winnipeg Charter the members of the Board . . . inspected the said premises after the said hearing . . . due use of the expert knowledge which the members of the Board have."

This would be a strange method of proceeding for a Court of Record unless clearly authorised by statute. Section 277 (7) contains what is supposed to be the authority for this exercise of power:—

"For the purpose of obtaining information and assisting the Board, in arriving at a proper basis of assessment, the members

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of the Board are authorised to enter into and upon any premises and to inspect the same" and to delegate the duty to others. This authority is exactly the same as that conferred upon the assessors by sec. 276. The duty of the assessor, however (see 276 and 284) is to assist the commissioner of taxation in making a yearly "valuation of all the rateable property in the City, after diligent inquiry," and to make assessment rolls according to their "best judgment." One of the duties of the Board above mentioned is to "consider and determine upon all matters pertaining to assessment and taxation in the said City in accordance with this Act." Is it not in connection with the discharge of this latter duty that the members of the Board are authorised to inspect premises? I think it is.

To "inspect premises" means to look at the premises, to peer into them, to examine them with the eye. The information gleaned in this visual way may be in the mind and may there be "considered," but it cannot be "heard." The duty of the Board in connection with general assessment matters is to "*consider* and determine," and therefore to consider the information it had gleaned from inspection. But the duty of the Board in appeals against the assessment is to "*hear* and determine," that is determine only upon what it *hears* on the appeal: it could not possibly make use of the information gleaned from the inspection. If we examine all the provisions of the charter governing these appeals to the Board we will be more fully satisfied that the duty of the Board is to "*hear*" all the evidence that is to be given, and "after having *heard*" it, to determine the issue. Ample provision is made for all parties to be present to testify, so that they may be heard, shewing quite conclusively that the evidence to be given before the Board must be such as may be *heard*, and that the determination of the matter must be based upon what has been heard. Nor is there any provision that suggests even in the slightest way that the Board may resort for its information to evidence other than that given openly and orally under oath in open Court. This is doubtless for the purpose of affording the appellant an opportunity to meet the evidence adduced against him, and to subject opposing witnesses to reasonable cross-examination.

There is the further question of the value. In this connection the Board states in the amendment that, from an "examination of the assessment roll it found as a fact" that the "assessor took into consideration" in assessing this property "that the lands were used as playgrounds—and valued it accordingly—at about 80% of similar surrounding residential property."

In finding this from examination of the assessment roll the Board exceeded its legal authority, and, I am afraid, its human powers. The statement is a tissue of error, both of law and fact. The information could not possibly be secured from the assessment roll because it is not given there. If it were secured from the assessor it was secured privately and therefore improperly. The information, from whatever source obtained, is inaccurate, inconsistent and wholly unreliable. There is no recognised uniform basis upon which to assess "playgrounds," and therefore they could not be valued "accordingly." If there were such a basis it could not be "80% of similar residential property" because surrounding residential property would not be similar, that is, it would not be playgrounds. But even if the playgrounds were put upon the basis of residential property, the assessment was admitted on argument not to have been on the basis of 80% but upon some other percentage which was not computed.

Then, later in the statement, the Board state that the playgrounds are "not unproductive" but that they produce "revenue." Therefore, if they were valued "accordingly" they must have been valued on an income, or revenue basis. If so they were not treated as "similar" to the "surrounding residential property" because the residential property was not treated as revenue producing. Again a playground is not "residential property" and should not be treated as "similar."

But apart from these self-destructive inconsistencies, what has the value of "surrounding" lands to do with the value of this particular parcel? There is no warrant or authority for basing it on this. Section 294 of the charter provides that "land, as distinguished from buildings thereon, shall be assessed at its value at the time of the assessment." What meaning is to be attached to "value" is not stated, but no suggestion is made that the value of any one parcel is to be determined by the use of the surrounding lands. Whether value is to be determined from the price at which land might be sold, or by the revenues which might be secured from it, or from any other producing power, we cannot determine, but one thing is certain and that is the value must be fixed at the time of the assessment. This would seem to exclude the supposed value that sometimes attaches to land based upon the prospective price which it might bring at some distant time. Whether or not a recognised system of fixing values had been determined upon by the assessors does not appear. If the basis were followed in this case of harmonising it with surrounding land no great injustice

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would perhaps be done, but the amendment to the stated case would indicate that the Board have not followed any clearly defined principle in fixing the assessment in this case.

In answer, therefore, to one of the questions which although "involved" the Board improperly refused to submit, I am clearly of the opinion that the decision of the Board was "against law, evidence and the weight of evidence." I have shewn I think that the decision was reached upon principles which violated the charter provisions and was therefore against law. It was reached either in spite of the only evidence which was properly admitted, or upon evidence which was either not heard at all, or if heard, heard privately and therefore improperly. The decision was therefore reached against evidence and the weight of evidence.

In answer to the remaining question, which likewise involved was likewise improperly withheld from submission, I am of the opinion that the sum at which the said land was assessed is in excess of the value thereof. Just what the measure of excess is I cannot say, except that one of the elements of value relied upon by the Board in fixing the amount was wrongful and unjustifiably considered; and in so far as that ingredient of value is concerned at least the assessment is in excess of the value of the land. Besides that the only evidence of value heard by the Board fixed the value at one-half the assessment, that is, at the sum of $91,150, and therefore if I look only at the records of the Board I am driven to the decision that the land has been assessed at twice its value.

But that does not satisfactorily settle the amount of the assessment nor entirely dispose of the difficulties. I have no doubt, whatever that the Board, throughout the hearing of the appeal, acted in this case far beyond its powers and largely in disregard of its duties, but did so from an entire misconception of what its powers, duties and functions really are. I am persuaded that had the Board been properly seized of sound notions of the provisions of the Winnipeg Charter governing its activities, that it would have acted quite differently on this appeal, would have heard all the evidence and decided upon evidence heard. I believe, therefore, that the ends of justice require that the Board be afforded an opportunity of rehearing this appeal in a way in which such appeal ought to be heard.

My decision, therefore, is that the Board rehear this appeal,

and if for any reason it fails to do so the assessment be reduced to $91,150.

The costs of and incidental to this application shall be costs to the applicant.

Rehearing ordered.

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*MORAN v. HAMMMOND LUMBER Co.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., Crocket and Grimmer, JJ. April 21, 1922.

CONTRACTS (§IE—70)—STATUTE OF FRAUDS—DEBT OF ANOTHER—LOGGING AGREEMENT—GUARANTY—CONSIDERATION—NOVATION.

A verbal agreement to pay the plaintiff, in consideration of his driving logs, the money due him under a written contract with a third party for the cutting and driving of the logs, which had not been completed, the logs having been cut but not driven, is a promise to answer the debt of another within the Statute of Frauds, C.S.N.B. (1903), ch. 140, sec. 1, and unenforceable unless in writing, nor is such agreement supported by any consideration, nor amounting to a novation.

APPEAL from the judgment of Barry, J. and motion by plaintiff to set aside verdict entered for defendant and enter a verdict for plaintiff, or for a new trial. Affirmed.

P. J. Hughes, for plaintiff.

J. M. Stevens, K.C., for defendant.

HAZEN, C.J.:—This action was tried at the Madawaska Circuit in October last before Barry, J., and a jury. Certain questions were submitted and after they had been answered the Judge took time to consider and later on delivered a written judgment ordering a verdict to be entered in favour of the defendant and dismissing the action with costs. It is from this judgment that an appeal is now taken.

The action was brought for the breach of an alleged verbal agreement between the plaintiff and defendant, whereby in consideration that the plaintiff would drive certain logs of the defendant's he (the defendant) would assume the liability of one Grand-Maison to pay the plaintiff the sums of money agreed to be paid to him by the said Grand-Maison under a written contract for the cutting and driving of the logs, which logs at the time of the said alleged verbal agreement had been cut by the plaintiff in virtue of the written contract with Grand-Maison, but had not been driven. The defendant pleaded the Statute of Frauds, and contended that a novation has not been established. The substantial facts set forth in the judgment of the trial Judge are as follows.

*Ed. Note.—Appeal to Supreme Court of Canada pending.

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MORAN v. HAMMOND LUMBER CO.

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Grand-Maison contracted with the defendant to cut and haul off of lands under lease to the defendant 5,000,000 superficial feet of logs and deliver the same to the defendant in the spring 1921 at the mouth of Green River, or at the option of the defendant from above the dam in Green River in the County of Madawaska. Payment at the prices stipulated was to be made after June 1, 1921, but cash, supplies and equipment to the estimated value of the work done might be advanced as the operation progressed, if necessary to carry out the option under the contract. The property and the logs which were to be cut upon the defendant's permit remained in the defendant from the stump. Authority was given the defendant to stop the operation at any time if Grand-Maison failed to fulfill any of the conditions of the contract, and in case of such default Grand-Maison bound himself to cease operations and vacate the location when called upon by the company to do so, and to turn over to the company the plants, rigging, supplies and cash unused, which had been furnished and supplied in connection with the operation. For the purpose of carrying out this contract Grand-Maison contracted with other lumber operators to get out part of his cut, and on October 6 entered into a written contract with the plaintiff Moran for the cutting and hauling of 1,000,000 superficial feet. Under this contract the plaintiff claims to have cut and delivered ready for driving 1,270,400 superficial feet of logs and that Grand-Maison owes him on the contract $13,664, and the costs of driving which the defendant paid would reduce the amount owing from Grand-Maison to the plaintiff to approximately $10,900, and at this sum the jury have assessed the damages.

April 1, 1921, the defendant advanced Grand-Maison $12,000 for driving, but he did not apply this money towards the purpose for which it was intended but on the contrary absconded with it, leaving the Province in the night-time, and deposited part of the money in his son's name in a bank in Quebec. This act was treated by the Hammond Company as a breach in violation of the terms of Grand-Maison's contract, and it accordingly took charge of the operation, taking possession of all the logs cut under the contract, as well as those cut by the plaintiff and his jobbers as those cut by other sub-contractors of Grand-Maison, and proceeded to make the necessary arrangements for the driving of the same as soon as driving conditions permitted. It appears from the evidence of Grand-Maison that he sublet most of his total cut, he himself cutting only 825,000 superficial feet, costing him he says $45 to $50 a thousand. At the time he

absconded and left the Province he owed his sub-contractors about $40,000 and he says he absconded with the $12,000, that had been advanced him by defendant for driving because he owed so much that he could not pay all. This $12,000 was subsequently as a result of criminal proceedings recovered back by the company at an expense of $1,500, the $10,500 balance being expended in driving the Moran logs and paying woodman who had filed liens against the lumber for wages, and the balance was credited back to Grand-Maison's account. The agreement for which this action is brought is a verbal one, and was made on April 5 between the plaintiff, Moran, and the defendants. The plaintiff alleges that on that day in company with three of his sub-contractors or after he obtained the contract from Grand-Maison for he had sublet part of it, he went to Van Buren, Maine, where A. E. Hammond, the President and Managing Director of the defendant company resides, and had a conversation with him, and that Hammond told him that if he would drive his own logs and carry out his contract with Grand-Maison the defendant company would not only pay for the driving but would put itself in the place of Grand-Maison and pay the amount then due and owing by him to the plaintiffs for the work that had already been performed under the contract for the cutting and hauling of the logs, and it is on this agreement that the plaintiff seeks to recover.

The evidence of Hammond on the other hand was entirely different, and he says that the agreement made by him with the plaintiff on April 5th was to drive his (Moran's) own cut, and that he hired him at $5 a day to boss the drive, and authorised him to hire men at from $2.50 to $3 a day, which on behalf of the defendant company he undertook to pay. He also says he advanced him $400 on account of driving, and took from him a receipt which expresses on its face that it was an "advance on Green River drive, logs of Jos. Grand-Maison." He denies that he told Moran that the company would put itself in Grand-Maison's place and pay his debts, and when Moran produced a contract with Grand-Maison he told him to put it in his pocket, as it did not concern the defendant company.

The defendant alleges that the contract made with plaintiff was solely in respect of driving, and had nothing whatever to do with the cutting and hauling or payment for the cutting and hauling of the logs which were at that time in the possession of the defendant and browed on the landings awaiting the time for driving. The evidence shews that the defendant company did in fact pay the costs of the driving including, according

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to the defendant $50 to the plaintiff on account of the 16 days' driving which he himself did at $5 a day; the balance of $30 due him for his work was held in abeyance until he accounted for the $400 which had been advanced to him on April 5 on account of driving.

At the conclusion of the plaintiff's case counsel for the defendant moved for the withdrawal of the case from the jury, and that the action be dismissed, on the grounds: 1. that there was no novation; 2. that the contract set up was a verbal one and being in the nature of a guarantee to pay the debt owing from Grand-Maison to Moran could not be enforced without a writing to satisfy the Statute of Frauds; 3. no consideration for the alleged promise.

The Judge however thought it preferable to submit to the jury for their consideration the disputed questions of fact arising in the case, rather than to withdraw it from them, and the evidence having been concluded, the following questions were submitted, which they answered as follows:—

1. Q. Has the debt from Grand-Maison arising from their logging contract ever been paid or discharged? A. No. 2. Q. If so, when and by whom? A. (Not answered). 3. Q. Or does Grand-Maison still owe Moran the balance unpaid on the contract? A. No. 4. Q. Was the verbal agreement which was entered into between the parties on April 5 last in the terms stated by the plaintiff or was it in the terms stated by Mr. Hammond? A. Plaintiff. 5. Q. If you find the agreement was in the terms stated by the plaintiff, then did the defendant company by its president promise to pay the debt owing by Grand-Maison to Moran? A. Yes. 6. Q. And if you answer the last preceding question in the affirmative then what was the consideration for such promise, that is, what loss did Moran suffer or what did the Hammond Company gain? A. It enabled the Hammond Lumber Co. to get the lumber out this year. 7. Q. Was the $400 which was paid by the defendant company to the plaintiff on April 5 last year solely as an advance for driving the Moran logs or was it paid generally on account of driving and the indebtedness of Grand-Maison to Moran? A. Paid as advance for driving Moran logs. 8. Q. Was there a breach by defendant of the agreement entered into by the parties to the action? A. Yes. 9. Q. If so at what sum do you assess the damages for the breach? A. $10,000.

In addition to these questions which were left by the Court, the following were left at the request of the plaintiff:—

10. Q. Did the defendant company on April 5 last, pay to

Joseph P. Moran, the plaintiff, $400 on his contract with Joseph Grand-Maison? A. Yes. 11. Q. If the defendant did, was it in pursuance of the contract which had been entered into that day between the plaintiff, Joseph P. Moran, and the defendant company? A. Yes.

The following questions were put at the request of the defendant:—

12. (A). Was the Moran contract with Grand-Maison broken? A. Yes. (B). If so by whom? A. Hammond Lumber Co. (C.) When? A. 5th April, 1921. (D). In what manner? A. The moment the Hammond Company said to the plaintiff to continue his contract same as he had it with Grand-Maison.

It is impossible to reconcile these different answers, I entirely agree with the trial Judge that they are conflicting, contradictory and entirely irreconcilable, and that some of them are absurd. I quote what Barry, J. says on the subject:—

"While by their answer to the first question they say that the debt owing by Grand-Maison to Moran arising under the contract has never been paid or discharged, by their answer to the third question they say that Grand-Maison no longer owes it. If the debt has never been paid or discharged it must remain an unsolvable problem by what manner of reasoning or what evidence the jury came to the conclusion that it had been extinguished.

On the question of what account the $400 had been paid to the plaintiff, the jury have answered in two directly divergent ways. By their answer to Q. 7 they say that it was paid solely as an advance for driving the Moran logs, and unquestionably the evidence sustains that view, but by their answer to Q. 10 they say the $400 was paid to Moran on his contract with Grand-Maison, which is directly contrary to the documentary evidence produced at the trial.

In their answer to Q. 12 the jury say it was a third party, the Hammond Lumber Co., that broke the written contract which had been entered into between Moran and Grand-Maison, and that it was broken the moment the company said to the plaintiff to contract same as he had it with Grand-Maison.

While it is difficult to conceive or conjecture how in point of fact the third party unauthorised and unsought could break a written contract entered into between two other parties, at the same time it may be observed that even if a third party possessed such a power to tell one of the parties to the contract that he is to continue the contract same as he had it with

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his co-director, which would be in fact to tell him to carry out the terms of his written contract, it cannot in my opinion having regard to the literary meaning of the language employed be construed as a breach of the contract or as an endeavor to break it."

In my opinion the conflicting and contradictory character of the answers would have afforded sufficient ground for a new trial, had the verdict been for the plaintiff. See *Le Blanc* v. *Moncton Tramway Co.* (1920), 53 D.L.R. 68, 47 N.B.R. 291; *Fredericton Motor Sales* v. *Earl of Ashburnham* (1920), 55 D.L.R. 453, 48 N.B.R. 171. The trial Judge, however, ordered the verdict to be entered for the defendant on the ground that the agreement relied upon being a promise to answer for the debt of another and not being in writing could not be enforced at law. The jury by their answer to Q. 5 found that the defendant company on April 5 promised to pay the debt owing by Grand-Maison to Moran, and there is no evidence of any such promise having been in writing. It seems to me clear that the jury were justified in this finding, and that the promise if any was a promise to answer for the debts of another. Barry, J., in dealing with this phase of the matter says:—

"By their answer to the fifth question the jury have found that by the agreement entered into by the parties to the suit on April 5 the defendant promised to pay the plaintiff the debt then owing to him by Grand-Maison. No authority is required to be cited in order to shew that such a promise to be binding and enforceable must be evidenced by a writing to satisfy sec. 1 of ch. 140 Con. Stats. N.B. 1903, and there was no writing."

It was contended by counsel for the appellant that the facts in connection with this case did not bring it within the Statute of Frauds, as the Hammond Lumber Co. had a primary interest, but I think the evidence clearly shews that Moran understood that Hammond agreed to pay what Grand-Maison owed to Moran, which is undoubtedly a direct promise to pay the debt of another, and while a number of cases were cited on behalf of the appellant in support of the contention that because the Hammond Lumber Co. had a primary interest the agreement did not fall within the statute, yet all these cases proceeded on the idea that there was a novation or else that there was a promise to assume something that was to be incurred in the future and not the payment of a past debt.

The trial Judge as I understand his judgment not only held that there was a promise to answer for the debt of another,

and that therefore the same must be in writing, but also held that there was no consideration for any such promise. He points out that the jury were bound, in case they found an affirmative answer to Q. 5, which they did, and which was to the effect that the defendant company by its president promised to pay the debt owing by Grand-Maison to Moran, to state what was the consideration for the defendant's promise to pay Moran the difference owed to him by Grand-Maison, and they stated that it enabled the defendant company to get the lumber out this year (1921).

I agree with the Judge in thinking that it is extremely doubtful whether that could be regarded, as consideration at all for the plaintiff, for the plaintiff lost nothing by it and the defendant gained nothing by it. As pointed out by Barry, J. there was no evidence that the plaintiff possessed any special qualification for the work or any expert knowledge in regard to driving not possessed by other woodsmen and river drivers in the vicinity of the operation; that scores of men were doubtless obtainable in that lumber country who would do the work as well as and some perhaps better than he could, and there does not seem to be any reason why the defendant company should itself incur a liability of over $10,000 simply in order to have Moran take charge of a short 16 day drive.

I entirely concur in Barry, J's statement to the effect that the consideration would be so entirely inadequate to the promise made that no one but a madman would make such a promise for such a consideration.

It seems to me that the finding of the jury in answer to Q. 5 was right, and if the company agreed to pay the debt owed by Grand-Maison to Moran it was a collateral and not an original promise. Grand-Maison's evidence is to the effect that the amount he owed the plaintiff upon their contract has never been discharged but is still subsisting and that he still owes it, and it seems to me under the evidence that the plaintiff could still maintain an action against Grand-Maison for the recovery of the amount due, and that there is no justification for the finding of the jury that Grand-Maison no longer owes the plaintiff the balance unpaid on the contract. Barry, J., has very carefully considered the matter, and I quote from the closing part of his judgment as follows:—

"The fair result of the authorities seems to be that the question whether each particular case comes within the statute or not depends not on the consideration for the promise but on the fact of the original party remaining liable, coupled with

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the absence of any liability on the part of the defendant or his property except such as arises from his expressed promise. According to the plaintiff's version of the agreement which the jury have found to be the true one, the promise was an entire one, that is, that the defendant company promised not only to put itself in Grand-Maison's place and pay the amount then due to the plaintiff for cutting and hauling the logs under the contract, which had already been done, but also to pay the plaintiff for the driving of them which was yet to be done and for the doing of which a new contract was made on April 5. Taking this to have been the contract of the parties then the promise though entire was partly within and partly not within the statute, and in such case the whole contract was unenforceable unless the requirements of the statute are complied with. If the promise were divisible, so that there were two distinct agreements, one for the payment by the defendant company of the debt owing by Grand-Maison to the plaintiff for the cutting and hauling of the logs, which would be a promise to pay the debt of another, and thus be within the statute, and the other an agreement by the defendant company to pay for the driving of the logs which would not be within the statute, the portion of the promise which is not within the statute may be enforced, though there is no evidence in writing. If the promise be regarded as a divisible one, no question can arise with regard to the enforcement of the latter part of it, for that part has been fully performed on both sides. The plaintiff has driven the logs and the defendant company has paid him for his services and has also paid all the other costs and expenses in connection with the Grand-Maison logs incurred after the defendant took possession of the operation for violation of the terms of the contract, so that in the circumstances of this case, whether the promise was entire or divisible really makes no difference. If divisible the part that would be enforceable, that is payment for the driving, has been fully performed and no cause of action exists in respect to it, but the promise to pay the still existing debt due by Grand-Maison to the plaintiff was one which to be enforceable should have been evidenced by writing, and there being no writing the plaintiff cannot recover in this action."

I entirely concur in these views of the trial Judge.

In my opinion the facts in this case do not warrant the contention that there was a novation. No agreement was shewn between Grand-Maison and the defendant whereby the defendant with the consent of the plaintiff agreed to assume the

Grand-Maison contract, and the only agreement as between plaintiff and defendant set up by the plaintiff was the alleged verbal promise to the defendant to take over the Grand-Maison-Moran contract or assume Grand-Maison's liability there under to the plaintiff in consideration for which the plaintiff agreed to drive certain logs of the defendant's which had then been cut ready for driving by the plaintiff under the Grand-Maison contract, and which according to the terms of the contract the plaintiff was obliged to cut and drive. Grand-Maison was not a party to this verbal agreement and was not present at the time it was made. As a matter of fact he had absconded some days before and his whereabouts were unknown to either the plaintiff or defendant, and there was no evidence to connect him in any way with the agreement of April 5 and I think it is clear his liability to the plaintiff has never been extinguished. In his own evidence he stated that he was still indebted to Moran, and that the latter had not discharged the indebtedness, and the jury found in answer to the first question that the debt due from Grand-Maison to Moran had never been paid or discharged.

In our own Court in the case of *Jones* v. *Burgess* (1910), 39 N.B.R. 603 in which the question of novation was raised. White, J., in his judgment said at p. 624:—

"In order to succeed, the plaintiffs must establish that the company took over and adopted this agreement, . . . with the consent of the plaintiffs, and under circumstances amounting to a novation whereby the original contract with Matthew Burgess was extinguished, and a new like one was substituted between the plaintiffs and defendants."

And in the same case Landry, J., said at p. 641:—

"The matter of novation is clearly one of intention shared by both parties when it is between the same parties, and by the three parties when the debtors or creditors are different from the original."

No new contract was substituted for that in existence between Grand-Maison and Moran, either between themselves or between Hammond and Moran, the consideration for which was the discharge of the old contract. In 7 Hals., p. 505 para. 1026, novation is thus defined:—

"Novation is a form of assignment in which by the consent of all parties a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract and some person who was party to the old contract is discharged from further liability."

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I do not think it can be successfully argued that the elements that constitute a novation were present in this case, and the appeal so far as it relies on such a contention must fail. In my opinion the judgment of Barry, J. is right. The verdict entered in favor of the defendant must stand, and this appeal be dismissed with costs.

CROCKET, J. (dissenting):—This appeal raises the question as to whether the verbal agreement sued on falls within the provisions of the fourth section of the Statute of Frauds as being a special promise to answer for the debt, default or miscarriage of another.

The question, therefore, is whether in these circumstances the defendant's promise as deposed to by the plaintiff was a promise to answer for the debt, default or miscarriage of another within the meaning of sec. 4 of the Statute of Frauds. There is no doubt, I think, that the defendant's promise as it was found by the jury was founded upon a good consideration. The original contract had been rescinded by the act of the defendant in taking over the operation under the provisions of the contract agreed to between the defendant and Grand-Maison. The plaintiff had thereby been prevented from completing his contract with Grand-Maison and had in consequence been discharged from his obligation to drive the logs and deliver them to Grand-Maison at Little Forks. His only right against Grand-Maison was a right to recover upon a *quantum meruit* for the work and labour which he had performed under the contract, the completion of which by him had thus been rendered impossible, or a right of action for damages for its breach. His promise, therefore, to Hammond to keep on with the work just exactly the same as he was to do with Grand-Maison and to finish his contract was a perfectly good and valid consideration for the defendant's promise to pay him his contract as Grand-Maison was supposed to pay him at the mouth of the brook. In this sense it was "a new consideration distinct from the demand that the plaintiff had against the third person", which Lord Tenterden, C.J., pointed out in *Thomas* v. *Williams* (1830), 10 B. & C. 664 at p. 670, 109 E.R. 597, 8 L.J. (K.B.) O.S. 314, was the ground of the decisions in *Edwards* v. *Kelly* (1817), 6 M. & S. 204, 105 E.R. 1219, and *Castling* v. *Aubert* (1802), 2 East 325, 102 E.R. 393, that the agreements there involved were not within sec. 4 of the Statute of Frauds. It is well settled that the clause of the section in question applies only to promises which are guarantees, but there has been more or less obscurity as to what the true test is in determining

whether a promise is or is not a guarantee within the meaning of the clause. For instance it is stated in Chitty on Contracts, 12th. ed. at p. 595 that the real question in such cases would now appear to be, not whether the promise of the guarantor was given on a new consideration, but whether by accepting his liability, the party to whom the promise was given has relinquished his claim on the party originally liable, and that it follows from the above principle that where the original demand is destroyed or discharged by the new verbal agreement the statute does not apply. In support of these propositions the case of *Green* v. *Cresswell* (1839), 10 Ad. & El. 453, 113 E.R. 172, 9 L.J. (Q.B.) 63, and 1 Wm. Saund. 211, note (d) 85 E.R. 220, and the comment of the Court in *Lehain* v. *Philpott* (1875), L.R. 10 Ex. 242 at p. 247, upon *Edwards* v. *Kelly*, *supra*, are cited. When the note to 1 Wm. Saund. is examined however, it is found to contain this passage at p. 211 (1), (85 E.R. at 224): "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question, whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, *coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.*" Cockburn, C.J., in *Fitzgerald* v. *Dressler* (1859), 7 C.B. (N.S.) 374, 141 E.R. 861, 5 Jur. (N.S.) 598, 29 L.J. (C.P.) 113, expressly confirmed the above quoted passage as a correct statement of the law and called especial attention to the importance of the concluding words which I have italicised, and which words, according to the report of the case as it appears in 5 Jur. (N.S.) 598, he said were commonly overlooked by those arguing these cases. As reported in 7 C.B. (N.S.), at 392, (141 E.R. at 868) he said:—"I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes him responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, *viz.*, an absence of prior liability on the part of the defendant or his property,—it being, as I think, truly stated there as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving

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up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provisions of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

The question as to what is the true test in determining whether a promise is or is not a guarantee within the statute is fully discussed by Lord Esher, M.R., in *Sutton & Co.* v. *Grey*, [1894] 1 Q.B. 285, 63 L.J. (Q.B.) 633, 42 W.R. 195. He says that the principal case in English law which affords such a guide is *Couturier* v. *Hastie* (1852), 8 Ex. 40, 155 E.R. 1250, 22 L.J. (Ex.) 97, where Parke, B., laid down the rule as to the effect of the promisor having an interest in or being connected with the transaction in question in taking his promise out of the statute notwithstanding that it involves the liability to pay the debt of another. Lord Esher, after quoting the words of Parke, B., says at p. 288:—

"There the test given is whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and sec. 4 does not apply."

He then states that the rule thus laid down has been adopted as a test in subsequent cases, and proceeds to quote the note from 1 Wm. Saund., and the comment of Cockburn, C.J., thereupon as above set forth, and points out that the latter used the words "has himself no interest in the property which is the subject of the undertaking" because he is dealing with a case of property, but that if his words were read, as he (Lord Esher) thought they should be, "has no interest in the transaction" Cockburn, C.J., was adopting the interpretation of *Couturier* v. *Hastie, supra,* which he (Lord Esher) thought was the right one. His conclusion was that the promise in question came within the rule laid down in *Couturier* v. *Hastie* and adopted by Cockburn, C.J., in *Fitzgerald* v. *Dressler, supra,* and that "the contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in

which the defendant has an interest equally with the plaintiffs," [1894] 1 Q.B. at 290.

Lopes, L.J., in concurring in the opinion of Lord Esher said at p. 290:—

"The true test, as derived from the cases, is, as the Master of the Rolls has already said, to see whether the person, who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise." Lord Halsbury also in his Laws of England (vol. 15, p. 462) gives the rule in these words.

In *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778 at p. 793, 71 L.J. (K.B.) 529, 50 W.R. 449, it is said by Cozens-Hardy, L.J., that "if the Court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within sec. 4, even though incidentally it may result in a liability to answer for the debt of another." The same rule is recognised in the United States. See *Davies* v. *Patrick* (1891), 141 U.S.S.C. 479 at 488, where it is said that "whenever the main purpose and object of the promisor is not to answer for another but to sub serve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form of a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

It is not enough, therefore, under the rule as declared in the English cases to which I have referred, to bring a case within sec. 4 of the Statute of Frauds that the promise on which the action is brought does not itself extinguish the liability of the third person and that his liability remains; there must also be an absence of any liability on the part of the defendant or his property except such as arises from his express promise. The statute must be taken to relate, as Lord Esher puts it in *Sutton* v. *Grey*, *supra*, to a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee.

It is not pretended that the defendant had no interest in the transaction here involved apart from the liability attaching to it by reason of its promise. On the contrary it is admitted that it owned the logs which the plaintiff had cut and browed under his contract with Grand-Maison, and which he was prevented from delivering to Grand-Maison at Little Forks by the

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defendant's act in taking over the operation and the possession of the logs. The defendant had already, and quite apart from the terms of the verbal agreement, practically put itself in Grand-Maison's shoes for the purpose of completing Grand-Maison's undertaking for its own benefit. It is admitted also that woodsmen had filed liens against these logs under the Woodsmen's Lien Act C.S.N.B. 1903, ch. 148. If, therefore, the defendant requested the plaintiff to keep on with his work after it had rescinded its contract with Grand-Maison under the terms of that contract as agreed to between them exactly the same as he was to do with Grand-Maison, and to finish his contract, and promised, if he should do so, that it would pay him his contract as Grand-Maison was supposed to pay him at the mouth of the brook, as the jury has found it did, and the plaintiff did drive the logs to Little Forks, as to which there is no dispute apart from the question as to whether in doing so he was acting as a foreman at a daily wage or under the contract as he alleged, and as the jury have found, the defendant's promise in my judgment, with all respect to the trial Judge, was not such a promise as the statute requires to be in writing; and the plaintiff is entitled to recover from it $16.25 per thousand for the logs proved to have been cut and driven, less the $7,000 advances he had received from Grand-Maison and the amounts paid by the defendant on account of the driving. This sum, it is conceded in the respondent's factum, would amount approximately to $10,900, the amount at which the jury assessed the damages and to which assessment no objection is taken.

I am not prepared to hold in view of the admitted and undisputed facts as to the situation of the parties at the time that the jury's finding upon the question of the terms of the verbal agreement was one which could not reasonably have been made upon the evidence. It was essentially a question of fact for the jury's determination. It does not seem to me that the receipt for the $400 was necessarily inconsistent with the plaintiff's version of the agreement. It might, I think, be said to be quite as inconsistent with Hammond's version that he only hired the plaintiff at $5 a day to boss the drive and told him that he might hire men at from $2.50 to $3 a day, which the defendant would pay. In order to set aside the jury's finding upon this essential question this Court must reject the testimony of the witnesses, whom the jury, which had them under observation, believed, and this I do not feel the Court is justified in doing.

As to the alleged inconsistency of the jury's findings upon the questions relating to the discharge of Grand-Maison's liability to the plaintiff, the payment of the $400 on account, and the breach of the Moran contract, I do not take the same view as the trial Judge that they or any of them are irreconcilable with its finding that the verbal agreement was in the terms stated by the plaintiff. All that the jury meant, I think, by its answer to Q. 1, that the debt due from Grand-Maison to Moran arising under their logging contract had not been paid or discharged, was that Moran had not been fully paid either by Grand-Maison or by the defendant. There is clearly no inconsistency between this answer and its answer to Q. 4 that the verbal agreement was in the terms stated by the plaintiff. Neither do I think it is irreconcilable with its answer to Q. 3 that Grand-Maison does not still owe the plaintiff the balance unpaid on the contract which answer, I am disposed to think, was probably based upon the view that the unpaid balance was to be paid by the defendant under the terms of the verbal agreement. With regard to the answer to Q. 5 that the defendant promised to pay the debt owing by Grand-Maison to Moran I am likewise unable to see that this in any way negatives its finding that the verbal contract was in the terms stated by the plaintiff, for the defendant's promise, as stated by the plaintiff, as above set out, was that if the plaintiff would keep on with the work and finish his contract, put his wood where he expected to put it with Grand-Maison and make his drive it would pay him his contract as Grand-Maison was supposed to pay him at the mouth of the brook, and this promise obviously would include all and any debts or liabilities which had arisen under the Grand-Maison-Moran contract or which would have accrued thereunder had Moran completed the performance of that contract. Similarly I am unable to see that the answer to Q. 7 that the $400 was paid in advance for driving the Moran logs is irreconcilable with the verbal agreement as found by the jury. The money may have been, and I think in point of fact, was advanced for the purpose of driving the logs, for that was practically all that remained to be done by the plaintiff to complete his contract but that does not seem to me to in any way discredit the jury's finding, that the defendant had agreed to pay the plaintiff his contract as Grand-Maison was supposed to pay him at the mouth of the brook, if he would finish his work and make the drive. Under the terms of the Grand-Maison-Moran contract Moran was entitled to his $16.25 per M. only when the logs were delivered to Grand-Maison at

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Little Forks. Until then he was entitled only to such advances as should be necessary for carrying on the operation. The defendant, having taken over the whole operation under the terms of its contract with Grand-Maison after the cutting and hauling and browing of the Moran logs had been completed, and entered into a new arrangement with the plaintiff, doubtless advanced the $400 for the purpose of driving and for the purpose of driving only, but surely this fact cannot fairly be relied upon as proof that it had not promised the plaintiff to pay him his contract as Grand-Maison was supposed to do if he would finish the contract and make the drive. Neither, for the same reason, do I think it altogether irreconcilable with the jury's answers to Qs. 1 and 2, submitted by the plaintiff, that the $400 was paid on his contract with Grand-Maison in pursuance of the verbal agreement entered into on April 5, for the money might well be paid as an advance for the purpose and on account of the driving of the logs, and none the less be a payment on the verbal contract as sworn to by the plaintiff, in the same way that all previous advances, which had been made to assist in the carrying on of the operations were payments on account of the principal contract. With respect to the answers to Qs. 1 and 2, submitted by the defendant, that the Moran contract with Grand-Maison had been broken by the Hammond Lumber Co. when the company said to the plaintiff to continue his contract the same as he had it with Grand-Maison, the answers may not be strictly accurate from a legal view point, but they convey none the less the belief of the jury that the Grand-Maison-Moran contract was put an end to and that the defendant took it over and made a new contract with the plaintiff for its completion, and these findings, far from being irreconcilable with the jury's answer upon the principal question, are absolutely consistent with it. In the absence of some finding which negatives or contradicts the finding which the jury made upon Q. 4, which was the principal and only material question in dispute between the parties, I think it must be accepted by this Court as conclusive of the fact so found, unless, as I have already said, the Court is of the opinion that it was one which could not reasonably have been made by the jury upon the evidence. There being nothing in the other findings which negatives or contradicts it, and no justification for rejecting it as unreasonable, I am of the opinion that this finding and the admitted, undisputed facts, entitled the plaintiff to a verdict for $10,900 the amount at which the jury assessed the damages.

I would therefore, allow the appeal with costs and direct a verdict to be entered for the plaintiff for this amount.

GRIMMER, J. agrees with HAZEN, C.J.

Appeal dismissed.

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LOCZKA v. RUTHENIAN FARMERS CO-OPERATIVE CO.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. June 13, 1922.

BILLS AND NOTES (§ID—32)—BILLS OF EXCHANGE ACT, R.S.C. 1906, CH. 119, SEC. 5—PROMISSORY NOTE OF COMPANY—SEAL AS SUFFICIENT SIGNATURE—SIGNATURE BY PRESIDENT AND MANAGER—NO WORDS TO INDICATE THAT SIGNATURES WERE ON BEHALF OF COMPANY—PERSONAL LIABILITY.

By section 5 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, the corporate seal of a company is sufficient as a signature of the company. The signatures of the president and manager are, therefore, unnecessary in so far as the liability of the company is concerned, and where such officers sign the note without adding words to their signatures indicating that they signed for and on behalf of the company they are liable personally on the note. The words "President" and "Mgr." written after their names are descriptive only and are insufficient to exempt them from such personal liability.

[*Crane* v. *Lavoie* (1912), 4 D.L.R. 175, applied.]

APPEAL by plaintiff from the trial judgment in an action on a promissory note. Reversed.

F. Heap, for appellant.

W. R. Sexsmith, and *J. C. Miller*, for respondents.

PERDUE, C.J.M.:—This is an action on a promissory note of which the following is a copy:—

"$908.30. May 11th, 1921.

Seven months after date we promise to pay to the order of Wasyl Loczka at the Sterling Bank here nine hundred and eight.....30/100 dollars.

Witness: 9% Ruthenian Farmer Co-op. Co. Ltd. Glenella.

Value received J. O. Kroske, presedent.

Mike Puhach. W. Isaryk, mgr."

The company's seal is also impressed on the face of the note. The company, Kroske and Isaryk are sued as joint makers.

The action was tried before Galt, J., who entered judgment against the company and dismissed the action against the other two defendants. From this dismissal the plaintiff appeals.

Section 5 of the Bills of Exchange Act, R.S.C., 1906, ch. 119, is as follows:—

"5. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate

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seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal."

The seal of the corporation in the present case was impressed on the note and it fixes the corporation with liability as a maker.

Section 52 (1) of the Act declares that:—

"Where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character, does not exempt him from personal liability."

The question involved in the present case was before this Court in *Crane* v. *Lavoie* (1912), 4 D.L.R. 175, 22 Man. L.R. 330. That was an action on six promissory notes all in similar form, the only difference being the time of maturity. They all contained the words, "We promise" in the body of the note and were signed:—The Fournier Co. Ltd., F. X. Lavoie, president, D. Fournier, manager.

The decision really turned on the point that "The Fournier Co. Limited" had not been incorporated at the time of the making of the notes. Defendants were, therefore, held liable as makers because there being no principal they had not signed in a representative character or as agents. There were, however, expressions of opinion by members of the Court that the bare words "pres." and "manager" were not sufficient to exempt the persons signing the note from liability under sec. 52.

Galt, J., discusses the above case at length but quite properly considers that it is not binding upon him in the present case. He appears to rely upon *Chapman* v. *Smethurst,* [1909] 1 K.B. 927, 78 L.J. (K.B.) 654, a decision of the Court of Appeal in England, but, with great respect, has not given due prominence to the principal point on which that case was decided. The note there in question had the words, "I promise to pay" and was signed "J. H. Smethurst's Laundry and Dye Works, Limited; J. H. Smethurst, managing director." But the circumstance on which the case turned was that the words, "J. H. Smethurst's Laundry and Dye Works, Limited," and the words "managing director" were stamped on the note by means of rubber stamps, being the signature of the company ordinarily used in its business. The actual signature "J. H. Smethurst," was in writing. It was upon this circumstance that the case turned. Kennedy and Joyce, L.JJ., agreed with Vaughan Wil-

liams, L.J. and the appeal from Channell, J., who had decided against defendant, was allowed.

The fact that the seal of the company is affixed to a note does not relieve from liability directors who have put their signatures upon it without using terms to exclude their personal liability: *Dutton* v. *Marsh* (1871), L.R. 6 Q.B. 361, 40 L.J. (Q.B.) 175.

In *Chapman* v. *Smethurst*, *supra*, Vaughan Williams, L.J. and Kennedy, L.J., attached importance to the fact that the form of the note appeared to exclude the question of joint liability. But "where a note runs 'I promise to pay' and is signed by two or more persons, it is deemed to be their joint and several note:" Bills of Exchange Act R.S.C. 1906, ch. 119, sec. 179 (English Act 1882 (Imp.) ch. 61, sec. 85). In the same case Joyce, J. found the only difficulty, raising a doubt in his mind, to be the use of "I," instead of "we" which latter pronoun would be more suitable for a company to use.

In the case at Bar there was not a rubber stamp used for the signature of the company, as in the *Smethurst* case, *supra*, but we find at the foot of the note in the place for the signature of the maker the name "Ruthenian Farmer Co-op. Co. Ltd. Glenella." The evidence shews that this was written by W. Isaryk, the same person who signs the note as manager, and that he had authority to sign for the company. It was admitted that Kroske and Isaryk, the persons who have placed their signatures on the note under the name of the company were respectively the president and manager of the company when the note was made. There is also the evidence that the note was given in renewal of a previous note given to the plaintiff to secure money loaned and paid by him to the company. The previous note was signed:—

Ruthenian Farmer Co-op. Co.
Hery Zdou — P.O. Address, Glenella.
Witness — Wasyl Isaryk, manager.

The company's seal was also impressed at the foot of the note. The above facts were either put in by the plaintiff's counsel or admitted by him. In their defence Kroske and Isaryk deny their personal liability and plead that the note was signed by them as the official representatives and officers of the company and that the note so signed was accepted by the plaintiff as the note of the company and not the note of the individual defendants or of either of them. But they did not attempt to put in evidence to establish this defence.

In *Union Bank of Canada* v. *Cross* (1909), 5 Alta. L.R. 489,

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the leading authorities were considered by Harvey, J., who delivered the judgment of the Court. The note in that case contained the words, "we promise to pay" and was signed:—"The Alberta Brick Co., Ltd., W. C. Harris, dir., Wm. M. Cross, mgr., F. C. Everard."

Evidence had been admitted at the trial shewing the circumstances under which the note had been made. It was shewn that the bank, the payees of the note, required the note of the company secured by the directors personally. Scott, J., who tried the case ((1909), 2 Alta. L.R. 3) gave judgment for the defendants, following *Lindus* v. *Melrose* (1858), 3 H. & N. 177, 27 L.J. (Ex.) 326, 157 E.R. 435, 6 W.R. 441, and *Fairchild* v. *Ferguson* (1892), 21 Can. S.C.R. 484. The Court *en banc* allowed the appeal and entered judgment for the plaintiffs. Harvey, J. considered that the case of *Dutton* v. *Marsh, supra,* was in point. There the note commenced, "We, the directors of the Isle of Man Slate and Flag Co. Limited, do promise to pay" and was signed "Richard J. Marsh, chairman," followed by three other names without any words indicating the capacity in which they were signed. The seal with the name of a witness was placed to the left of the names of the signers. The directors were held liable. It would seem quite clear that the promise contained in the note was made by the directors and not by the company.

I find much difficulty in distinguishing the present case from *Chapman* v. *Smethurst, supra.* In giving judgment in that case Vaughan Williams, L.J. said ([1909] 1 K.B. at p. 929):—

"It is true that in the present case the promissory note does not profess to be signed "for" or "on account of" the company, but we have that which is equally strong to shew that the company intended to be bound by the note, that is, the stamped signature of the company at the foot of the note and placed over the written signature of the defendant."

In the case at Bar we find the name of the company written at the foot of the note and underneath it the signature of Kroske, with the word "president" following the signature, and also the signature of Isaryk, with "mgr." (plainly a contraction for manager) written after it. Then we have the seal of the company impressed on the face of the note. It appears to me that these are circumstances equally as strong as those in the *Smethurst* case, *supra,* to shew that the note was that of the company and that the other defendants were adding their names merely as officials to verify the execution of the

document by the company. But as the other members of the Court take an opposite view, I defer to their opinion.

CAMERON, J.A.:—The individual defendants in this case have added no words to their signatures to the promissory note sued upon indicating that they signed for or on behalf of the Ruthenian Farmers Co-operative Co. They have added words descriptive of themselves as agents or as filling representative capacities, the one as president, the other as manager, but nothing more than that. Such being the case, they have not exempted themselves from personal liability under sec. 52 of the Bills of Exchange Act, R.S.C., 1906, ch. 119. It does seem to me really unnecessary to go beyond the section to decide the question of their liability which is fixed by its express words.

The affixing of the seal cannot be taken as an indication that the directors signed for, or on behalf of, the company. See *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, 40 L.J. (Q.B.) 175, and *Union Bank of Canada* v. *Cross*, 5 Alta. L.R. 489. The case of *Chapman* v. *Smethurst*, [1909] 1 K.B. 927, 78 L.J. (K.B.) 654, is distinguishable, where the note was so drawn as to bind the company and the form of the note was such that no question of joint liability arose and the company alone was, therefore, held liable. It was impossible to say that the note there in question was the promise of both. As pointed out by Kennedy, L.J., the case was argued on the basis that it was not a joint or a joint and several promissory note but was the note of one party only, and the only question was whether the company or the defendant was liable upon it as promisor. On the promissory note in this case the company and the individual defendants purport to be and appear on the face of the instrument as joint makers. The additions "president" and "Mgr." must be regarded as descriptive only.

It is the fact that no valid reason can be assigned for these individual defendants signing except their intention to make themselves liable for the company's liability is fixed by the affixing of the seal and the writing of the company's name by one authorised to write it. This point was taken in *Union Bank of Canada* v. *Cross*, *supra*, by Harvey, J.

The authorities on the subject were fully discussed by the members of this Court in *Crane* v. *Lavoie*, 4 D.L.R. 175, 22 Man. L.R. 330. The decision in that case was, however, based upon the non-existence of the alleged corporation.

I would allow the appeal. The plaintiff is entitled to judgment against the individual defendants with costs here and in the Court below.

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Fullerton, J.A.

FULLERTON, J.A.:—This case raises a legal question of considerable commercial importance. The two individual defendants, together with the defendant company, are sued as the makers of a promissory note. It is admitted that the consideration for the note was money advanced to the company and the liability of the company is not denied. The individual defendants were admittedly, at the time the promissory note was signed, respectively the president and manager of the company. The promissory note is signed as follows:—

"Ruthenian Farmers Co-op. Co. Ltd. Glenella.
[L.S.] J. O. Kroske, presedent, W. Isaryk, mgr."

The individual defendants say they signed merely in a representative capacity as officers of the company and for the sole purpose of verifying the signature of the company and never intended to assume any personal liability.

Promissory notes are signed in this way every day by officials of companies who would be surprised indeed to learn that, contrary to their intention and understanding, they were making themselves personally liable on such notes. The question of liability in such cases depends on sec. 52 of the Bills of Exchange Act, R.S.C., 1906, ch. 119 which reads as follows: [For sub-sec. 1 of sec. 52 see judgment of Perdue, C.J.M., p. 536.]

"2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

The question then to be determined is whether or not the individual defendants have added words to their signatures indicating that they signed for and on behalf of a principal or in a representative capacity. The only added words in the promissory note sued on are "presedent" and "mgr.," which the section says are insufficient to exempt them from personal liability. Even before the codification of the law relating to bills of exchange and promissory notes was necessary, in order to escape liability, that a person signing in a representative capacity, should, in addition to the words "director," or some similar form of description, use words indicating that he signed in a representative capacity.

In *Dutton* v. *Marsh*, L.R. 6 Q.B. 361, at p. 364 (40 L.J. (Q.B.) 175), Cockburn, C.J., delivering the judgment of the Court, said:—

"The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description,

but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing,—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,—they are individually liable."

The case of *Union Bank of Canada* v. *Cross*, 5 Alta. L.R. 489, a decision of the Full Court of Alberta, is on all fours with the present case. The promissory note there sued on was signed:—

"The Alberta Brick Co. Ltd., W. C. Harris, dir., Wm. M. Cross, mgr., F. C. Everard."

Harvey, J., who delivered the judgment of the Court, reviewed the authorities at length and held the individual defendants liable. With the opinion expressed by him in that case I am in entire agreement.

The appeal must be allowed with costs, the judgment below entered for the individual defendants must be set aside and judgment entered for the plaintiff with costs.

DENNISTOUN, J.A.:—This is an appeal from Galt, J., who gave judgment in favour of the plaintiff upon a promissory note against the defendant company but dismissed the action against the individual defendants, at the same time expressing some doubt and a desire that the matter might be considered in appeal. The plaintiff has accordingly appealed.

Formal evidence only was given at the trial. The signatures to the note were proved and the consideration. The question of liability depends upon the construction which the Court puts upon the contract disclosed by the note itself.

It is the form following: [See judgment of Perdue, C.J.M., p. 535.]

The note bears the corporate seal of the company where marked "L.S.," which by sec. 5 of the Bills of Exchange Act, R.S.C., 1906, ch. 119, is sufficient as a signature by the company.

The signatures of the president and manager are therefore unnecessary in so far as the liability of the company is concerned. They did not sign as witnesses for Mike Puhach signs in that capacity on the left-hand side of the note.

Section 52 of the Bills of Exchange Act is as follows [See *ante*, pp. 536, 540.]

By sec. 186 the provisions of the Act relating to bills of exchange in these particulars, apply to promissory notes.

There are here no words added to the signatures of Kroske and Isaryk to indicate that they are signing for or on behalf of a principal or in a representative character. There appear the words after their signatures "presedent" and "mgr." re-

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spectively, indicating that they do fill a representative character which the statute says does not exempt them from personal liability.

In the case of *Union Bank of Canada* v. *Cross*, 5 Alta. L.R. 489, the promissory note was in these words:—

"$1,000.00 Medicine Hat, Aug. 17, 1907.

Two months after date we promise to pay to the order of and at the Union Bank of Canada, Medicine Hat, the sum of one thousand dollars with interest at the rate of 8 per cent. per annum until due and 8 per cent. per annum after due until paid. Value received.

The Alberta Brick Co., Ltd., W. C. Harris, dir., Wm. M. Cross, mgr., F. C. Everard."

It was held by the Court *en banc*, Sifton, C.J., Harvey, Stuart and Beck, JJ., after careful examination of numerous authorities, that there was nothing on the face of the note to indicate that the individual signers of it were not to be personally liable, and that, therefore, they must be held liable, and they reversed the judgment of Scott, J., reported in 2 Alta. L.R. 3. It may be remarked that in Maclaren on Bills, Notes and Cheques, 5th. ed. at p. 165, and in the judgment of Elwood, J., in *Northern Electric & Mfg. Co.* v. *Kasow* (1914), 29 W.L.R. 582, where *Union Bank of Canada* v. *Cross, supra,* is referred to as an authority, it is the judgment of the trial Judge which is indicated, the fact that it had been reversed on appeal being apparently overlooked.

The cases of *Chapman* v. *Smethurst,* [1909] 1 K.B. 73, 78 L.J. (K.B.) 84; [1909] 1 K.B. 927, 78 L.J. (K.B.) 654; and the case of *Northern Electric & Mfg. Co.* v. *Kasow, supra,* were relied on by the defendants. These were cases in which a rubber stamp was used and it was by reason of that fact that the Courts were able to declare upon scrutiny of the notes themselves, that the signatures of the individuals written in the spaces included within the bounds of the stamp formed part and parcel of the signatures of the companies and were not, and did not purport to be signatures made in an individual capacity.

There is nothing of the kind in this case. Moreover there was no attempt made at the trial to shew that this was not the personal note of Kroske and Isaryk.

It was open to them by some such pleading as that dealt with in *Wake* v. *Harrop* (1862), 1 H. & C. 202, 158 E.R. 859, 31 L.J. (Ex.) 451, 10 W.R. 626; *Haskins* v. *Thomson,* 10 N.S. Wales W.N. 58; *Thomson* v. *Feeley* (1877), 41 U.C.Q.B. 229,

at p. 236, and *Crane* v. *Lavoie*, 4 D.L.R. 175, 22 Man. L.R. 330, to allege, and in support of it to establish, that it was the common intention of both parties to give and accept a note made by the company alone, that the note was given and accepted as the company's note, and not as a joint note of the company, Kroske and Isaryk; that in attempting to assert the contrary the plaintiff was committing a fraud upon the defendants and that the note should be reformed by inserting words to shew that they signed in a representative character on behalf of the company and not as individual makers, and that the form of the note was due to a mutual mistake.

This action being between the original parties to the note, it was open to them to shew, and to the Court to give effect to, the real contract and by means of its equitable jurisdiction to reform the legal contract which appears on the face of the note. Had the note been negotiated so as to bring in holders in due course, without notice of such equities, it would no doubt be too late to do this, for in such case the statutory and common-law rights of the holders would prevail. There was no attempt made to plead or prove anything of the kind. Kroske and Isaryk did not suggest in evidence that they were not liable. They are content to have their liability determined by a strict adjudication upon the legal contract set forth in the written document.

That being so, the Court must deduce the intention of the parties from what appears on the face of the note, and in order to ascertain whether it is a joint note or the note of the company alone, the question should be asked—Is this a composite signature or are there here several signatures? If intended to be a composite signature something more than is here found is necessary. The coupling of the signatures by a bracket or rubber stamp, or the introduction of the words "on behalf of," "for," "by," "per," "per proc" or words of the like import, would indicate that the signatures were in reality but one signature and that the signers were mere scribes on behalf of the company. In the absence of any indication that they intended to absolve themselves from personal liability the statute quoted, which codifies the common law, clearly applies, and in my judgment Kroske and Isaryk have made themselves parties to this note in their individual capacity.

The fact that the highest Appellate Court of a neighbouring Province has given a decision on a point of commercial law relating to the validity of negotiable instruments makes it desirable that there should be uniformity of decision when the

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same point arises in this province, and in my view, and with respect, I think *Union Bank of Canada* v. *Cross, supra,* was rightly decided by the Full Court of Alberta, and is not distinguishable from the case at Bar.

I would allow the appeal with costs.

Appeal allowed.

CANADIAN GOVERNMENT MERCHANT MARINE v. CANADIAN TRADING Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 17, 1922.

CONTRACTS (§IVB—330)—AFFREIGHTMENT — SHIPS TO BE SUPPLIED—SHIPS UNDER CONSTRUCTION—FAILURE TO DELIVER—CONTRACT CONDITIONAL ON SERVICE AND SAILINGS OF STEAMERS—CONSTRUCTION—DELAY WITHIN CONTEMPLATION OF PARTIES — NECESSITY OF GUARDING AGAINST IN CONTRACT—LIABILITY.

A contract whereby the defendant was to provide two vessels in which it was to carry lumber of the plaintiff from Vancouver, B.C., to Australian ports, contained a provision that "This contract . . . is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named herein"; owing to delay on the part of the contractor who was constructing the ships at the time the contract was entered into, the defendant was unable to provide the two vessels named or either of them to receive the lumber.

The Court held, affirming the judgment of the British Columbia Court of Appeal (1922), 67 D.L.R. 485, that the defendant was not freed from liability by this clause, which only covered the abandonment of the company's undertaking and a complete cessation of its service and did not cover a merely temporary interruption in the service, and as it was known to the parties that the vessels were still under construction, although merely completed, when the contract was made, that the delay should have been anticipated and guarded against in the contract in order to relieve the defendant from liability.

[*Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, distinguished; *Bailey* v. *De Crespigny* (1869), L.R. 4 Q.B. 180; *Lazarus* v. *Cairn Line Steamships* (1912), 28 Times L.R. 244; *Hamlyn* v. *Wood,* [1891] 2 Q.B. 488, applied.]

APPEAL by defendant from the judgment of the British Columbia Court of Appeal (1922), 67 D.L.R. 485, reversing the trial judgment in an action for damages for breach of an affreightment contract. Affirmed.

D. L. McCarthy, K.C., for appellant.

E. P. Davis, K.C., for respondent.

IDINGTON, J.:—The respondent sued to recover damages for breaches of two contracts which were respectively made on the 19th and 24th of March, 1920, by the appellant to carry lumber from Vancouver to Australia; of which that quantity named in the earlier contract was to be received early in April of said

year; and that in the later contract was to be received in April or May of same year.

The respondent incurred considerable expense preparatory to transforming its part of the contract, by assembling the lumber to be re-loaded, and lost part of a bargain it had made for the sale and delivery of said lumber in Australia, but the appellant failed to produce the vessels named, or either of them, to receive the said lumber.

The defence set up is that the vessels were not finished in time and that the respondent knew when these contracts were entered into that they had not been quite finished.

It relies on the following clause in each of the contracts:—

"This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named herein. If, at any time, in the judgment of the steamship company, or its authorised agents, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company shall be taken, sold, or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company may discontinue or curtail its service; and in that event the steamship company shall be relieved from any liability hereunder, except that if its service be only curtailed the shipper shall be entitled to the carriage of a proportionate part of this contract."

It contends that under the first sentence I quote it was, under the circumstances, discharged from all liability.

I cannot so construe the said conditions, nor can I read the first sentence as at all intended to excuse the appellant unless the failure to produce either of the vessels named was the result of its having fallen within some one or other of the conditions set forth in the second sentence above quoted, which is not pretended to have been the case.

On the contrary, the only excuse given at the trial was the failure, through a petty squabble between the contractor who had the contract, and those who had let the contract to him, about something in regard to which he ultimately yielded.

A further pretence is set up that a strike, or threatened strike, was to blame in part for the delay.

Resting upon this failure of the contractor the appellant invokes the doctrine of impossibility upon which the case of *Tay-*

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lor v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, 32 L.J. (Q.B.) 164, 11 W.R. 726, was decided.

I do not think that can be made applicable herein unless we are to so extend the operation of the doctrine as to render almost any and every conceivable contract of little value.

And especially so does that appear to me to be the case when each of the contracts here does absolutely and imperatively provide the implied undertaking on the part of said appellant that unless upon the happening of any of the said events named the vessel named would be available at the time named. And yet at the same time that it provides for its protection the conditions above set forth, it fails to anticipate the possibility of so common a condition of things as a strike against which it is usual to provide if such protection desired.

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

But I see the Chief Justice and Galliher, J.A., seem to think assessment of damages needed, yet the formal judgment indicates the contrary. (67 D.L.R. 485).

If any error that better be spoken to.

DUFF, J.:—I think the contention of the respondent company as to the construction of the contract must be given effect to. It is a commercial contract. Any plain man reading the second paragraph would read the first and second sentences together and treat the first as subject to the qualifications contained in the second. The distinction between constitutive conditions and resolutory conditions upon which the appellant relies is sadly out of place here. In a practical business sense, if the sweeping scope which the appellant gives to the first sentence is conceded, then the second sentence, or nearly the whole of it, is useless and out of place. In such circumstances, it is legitimate to restrict the generality of the first sentence by reading the two together. And it is sufficient to reach the conclusion that such may be the proper construction of the document. An ambiguous document is no protection, as Lord Loreburn, L.C., said. *Nelson Line* (*Liverpool*) v. *Nelson*, [1908] A.C. 16, at p. 20, 77 L.J. (K.B.) 82, 97 L.T. 812, 24 Times L.R. 114.

The second ground of appeal relied upon is that the principle of *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 E.R. 309, and analogous cases applies and that, in conformity with this principle, the contracts should have been held to be subject to an implied condition that the ships should be in existence and fit for sailing at the time when the date of sailing arrived, and if that should fail through no part of the appellants the appellants were to be excused from performance.

The principle of *Taylor* v. *Caldwell* has unquestionably been extended to cases in which parties having entered into a contract in terms unqualified, it is found when the time for performance arrives, that the state of things contemplated by both parties as essential to performance according to the true intent of both of them fails to exist: *Krell* v. *Henry*, [1903] 2 K.B. 740, 72 L.J. (K.B.) 794, 19 Times L.R. 711; *Chandler* v. *Webster*, [1904] 1 K.B. 493, 73 L.J. (K.B.) 401, 52 W.R. 290, 20 Times L.R. 222. For the purpose of deciding whether a particular case falls within the principle you must consider the nature of the contract and the circumstances in which it was made in order to see from the nature of the contract whether the parties must have made their bargain on the footing that a particular thing or state of facts should be in existence when the time for performance should occur. *Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum*, [1916] 2 A.C. 397, and if reasonable persons situated as the parties were must have agreed that the promissor's contractual obligations should come to an end if that state of circumstances should not exist then a term to that effect may be implied: *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 at p. 59, 50 L.J. (Ch.) 411, 29 W.R. 543, 44 L.T. 381. But it is most important to remember that no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they, in fact, proved to be when the time for performance arrived: *Scottish Navigation Co.'s* case, (*Scottish Navigation* v. *Souter; Admiral Shipping* v. *Weidner, et al*), [1917] 1 K.B. 222, 86 L.J. (K.B.) 336, 33 Times L.R. 71, 115 L.T. 812.

The doctrine of English law is that generally a promissor, except to the extent to which his promise is qualified, warrants his ability to perform it, and this notwithstanding he may thereby make himself answerable for the conduct of other persons.

The seeming rigour of this doctrine is mitigated in the case of commercial contracts by the application of the principle above referred to, which rests upon the assumption, as Lord Watson said in *Dahl* v. *Nelson*, 6 App. Case. at 59, that, in relation to possibilities in the contemplation of the contract but not actually present to the minds of the parties, the parties intending to stipulate for what would be fair and reasonable, having regard to their mutual interests and to the main objects of the contract.

The contracts were made on March 19 and provided for shipment at the end of April or the beginning of May. Is there

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anything in the circumstances affording a ground for saying that the appellants and respondents as reasonable men could not have contracted on the footing that the appellants should assume the risk of what subsequently happened?

It is important to remember that there is no evidence to indicate that the delay was due to any extraordinary occurrence, to anything outside the ordinary course of events. There is a suggestion of a strike and there is a suggestion of a dispute between the Government and the contractors who were building the ships. The respondents were not aware of the precise relations between the appellant and the contractors and were entitled to assume that the contractors in entering into the contract were duly taking into account the possibilities incidental to these relations. There was nothing in the facts known to them making it unreasonable from the respondents' point of view that they should expect an undertaking as touching the date of sailing unqualified, at all events, in respect of any of the matters which have been suggested as accounting for the appellants' default. Real impossibility of performance, arising from destruction of the ships by fire, for example, would have presented a different case. There is nothing in the evidence inconsistent with the hypothesis that the impossibility which no doubt did arise at the last moment was due to lack of energy on part of the Government or to supineness or indifference on part of the appellants. Impossibility arising from such causes is not the impossibility contemplated by the case of *Taylor* v. *Caldwell, supra,* see *Hick* v. *Raymond and Reid,* [1893] A.C. 22 at p. 37, 62 L.J. (Q.B.) 98, 41 W.R. 384, 68 L.T. 175.

The appeal should be dismissed with costs.

ANGLIN, J.:—The Court of Appeal, reversing the judgment of Gregory, J., who dismissed the action, awarded the plaintiff $7,701.93 for breach of a contract of affreightment. (67 D.L.R. 485).

The defendant failed to provide two vessels in which it had contracted to carry lumber of the plaintiff from British Columbian to Australian ports. The contractor for the construction of the vessels delayed delivery of them to the owner — the Dominion Government—which was consequently unable to turn them over to the defendant, an operating company.

Two distinct defences and grounds of appeal are preferred:—(a) that by an express term of each of the two contracts of affreightment, performance of it by the defendant is made contingent upon the named ship sailing on the contract voyage; (b) that, if performance was not excused by the express term

relied upon, it was an implied condition of the defendant's obligation that the named vessels should be available for the service.

(a) The express provision on which the defendant relies reads as follows:—

"This contract . . . is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named herein."

I agree with the construction put on this clause by Mr. Davis. "Conditional upon the continuance of the steamship company's service" covers the possibility of the abandonment of the company's undertaking and the complete cessation of its service. If the word "service" be qualified by the phrase "between the ports named herein," it would mean the cessation of such service between those ports. I incline, however, to the former construction. This member of the clause, in my opinion, is not open to the view that it covers any merely temporary interruption of the service such as that which actually occurred. The word used is "continuance" and not "continuity," which the construction urged by the defendant would require. "Conditional upon the continuance . . . of the sailings of its steamers between the ports named" provides, I think, for the service between these ports being abandoned although the company's vessels should be placed on other routes. The phrase "between the ports named" gives the cue to the scope and purpose of this member of the provision. Galliher, J.A., very succinctly states the purview of the two members of the clause now under consideration in these words:—"I think it simply means that if the company went out of business or ceased sailing vessels between these ports, then the contract was off."

Neither member of the clause relates merely to an interruption in the continuity of the company's service between Canada and Australia due to the vessel named in either contract being temporarily unavailable. I am quite satisfied that an omission of a schedule trip or trips due to that fact is not within the purview of the express provision of the contracts on which the defendant relies.

(b) Neither, in my opinion, do the circumstances admit of the implication of a term excusing performance because the Government failed to deliver to the defendant the two ships for carriage by which the contracts were made.

In addition to the stipulation already mentioned, each of the contracts expressly provides that performance by the defendant shall be excused in several events—loss of, or damage to, its

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vessels, suspension of service owing to hostilities actual or threatened, and requisition of its vessels by the government. It may be that the parties should be held in this enumeration to have exhausted the conditions on which the defendant was to be excused for not fulfilling its contract: *Horlock* v. *Beal*, [1916] 1 A.C. 486, at p. 506, 85 L.J. (K.B.) 602, 32 Times L.R. 251, 114 L.T. 193; but see *Nickoll & Knight* v. *Ashton, Eldridge & Co.*, [1901] 2 K.B. 126 at pp. 134, 140, 70 L.J. (K.B.) 600, 49 W.R. 513, 17 Times L.R. 467.

It was known to the contracting parties that the vessels in question were still under construction, although nearly completed when the contracts were made. The following statement of the law by Hannen, J., in *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180, at p. 185, 38 L.J. (Q.B.) 98, 17 W.R. 494, is generally recognised as authoritative:—

"We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which, subsequently, become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor."

Subject to certain expressed conditions, none of which covers this case, the defendant bound itself by contracts absolute in form to transport the plaintiff's goods by named vessels at a stated time. I am not disposed to take the view that this should be regarded as a case of "impossibility arising from any act or default of the promissor." But I find it difficult to conceive that delay in the delivery of the vessels was not a contingency which "was or might have been anticipated and guarded against in the contract"—that it was an event that cannot reasonably be said to have been in the contemplation of the parties at the date of the contract: *Krell* v. *Henry*, [1903] 2 K.B. 740, at p. 751. If it was, having failed to provide for it, a term containing an additional qualification of the defendant's contractual obligation, in order to cover default due to non-availability of the vessels due to this cause, should not be implied. Such a term will not be implied merely because the Court may think it reasonable, but only if the Court think it necessarily implied in the nature of the contract the parties have made. *Lazarus* v. *Cairn Line of Steamships* (1912), 28

Times L.R. 244, 106 L.T. 378; *Hamlyn & Co.* v. *Wood*, [1891] 2 Q.B. 488, at pp. 491-2, 60 L.J. (Q.B.) 734, 40 W.R. 24.

If, on the other hand, delay in delivery of the vessels was a contingency which neither was in fact, nor might have been, anticipated, the Court should not imply the term that the contracts will thereby be put an end to without enquiring what the parties, as reasonable men, would presumably have agreed upon had that contingency been present to their minds: *Dahl* v. *Nelson, Donkin & Co*, 6 App. Cas. 38, at p. 59; *Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum*, [1916] 2 A.C. 397, at p. 404, 85 L.J. (K.B.) 1389, 32 Times L.R. 677. I find it difficult to believe that the plaintiff would have assented or could have been expected to assent to such a term as the defendant asks to have implied. Why should the plaintiff be expected to assume the entire risk of the consequences of the defendant's default, however innocent? The case, in my opinion, is not one for the application of the doctrine of *Taylor* v. *Caldwell*, 3 B. & S. 326, 122 E.R. 309, and kindred authorities relied upon.

I would for these reasons dismiss this appeal.

BRODEUR, J.:—The Canadian Trading Co., in March, 1920, entered into two contracts of affreightment with the Canadian Government Marine for loading with timber two ships of the latter called the "Inventor" and the "Prospector" and plying between Canada and Australia. The shipment was to be made in early April, 1920, on the "Inventor" and in April or May, 1920, on the "Prospector."

When the contracts were made, the ships were under construction and should have been nearly completed. But for reasons which are not clearly shewn in the evidence, they were not delivered to the appellant company to permit the Canadian Trading Co. to load its timber at the time stipulated in the contracts.

The Canadian Trading Co. now claims damages from the Canadian Merchant Marine for not having fulfilled its obligation.

The defendant company pleaded that the contracts were not absolute; that it was not bound to produce the ships in any event; but that its obligation was made with the express or implied condition that the actual sailing of the contract ships should take place.

The defendant appellant company relies on a clause in the contract which declares that "This contract is not transferable and is entered into conditional upon the continuance of the

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steamship company's service and the sailing of its steamers between the ports named therein."

These provisions of the contract were embodied in the defendant's own form and they are evidently put in for its own protection. They should not be extended and should be construed in their ordinary meaning.

The breach of contract which is charged upon the company defendant has reference to delays in sailing. The contracts contemplated in the condition above quoted a cessation of the service and the discontinuance of the sailing. No such thing has occurred. The company continued its service and the sailings went on without any real interruption.

The condition which I quoted is formed of two sentences which should be read together. They carry out the same idea, viz., a cessation of the appellant's service and not a merely temporary one: *Elderslie S.S. Co.* v. *Borthwick*, [1905] A.C. 93, 74 L.J. (K.B.) 338, 53 W.R. 401, 21 Times L.R. 277.

The appellant company contends that there was impossibility on its part to carry out its contract and that there was an implied condition relieving it from responsibility for the performing of the contract.

This defence of impossibility rests upon an implied condition. The case of *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 E.R. 309, is to the effect that if the impossibility arises subsequently to the making of the contract, it will be no excuse if in its nature the performance might have been possible. In this case, there is no evidence that the performance was impossible. The vessel could have been delivered on time and nothing in the evidence shews the impossibility to which reference is made in the *Taylor* v. *Caldwell* case.

Besides the circumstances causing the impossibility could have been very easily foreseen when the contract was made. Many conditions were stipulated and the strike which is alleged likely existed at the time the contract was made and so provision could have been made in the contract. The ships at the time the contract was made were already late in delivery, and in the light of the following decisions: *Lebeaupin* v. *Crispin & Co.*, [1920] 2 K.B. 714, 89 L.J. (K.B.) 1024, 36 Times L.R. 739; *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; *Krell* v. *Henry*, [1903] 2 K.B. 740, I come to the conclusion there was no implied condition which would relieve the appellant company from liability.

Under those circumstances the appeal should be dismissed with costs.

MIGNAULT, J.:—The two contracts in question, for the breach of which the appellant was declared liable by the Court of Appeal of British Columbia (67 D.L.R. 485) were for the shipment of lumber by two named ships, the "Canadian Inventor" and the "Canadian Prospector," then, to the knowledge of the parties, under construction for the Canadian Government. At the time of the contracts, the vessels were nearing completion, and no doubt the parties thought that they would be ready to take on their cargo and sail at the time mentioned in the contracts. However, trouble ensued between the Government and the ship builders and the vessels were not ready in time. The respondent sues to recover damages by reason of the appellant's failure to have these ships ready for loading.

The defence was that the appellant was relieved from liability under the conditions of the contracts. These conditions were that the contracts were conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named. The contracts also stated that if, at any time, in the judgment of the steamship company, or its authorised agents, conditions of war or hostilities, actual or threatened, were such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company should be taken, sold or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company might discontinue or curtail its service; and in that event the company should be free from liability, except that if its service were only curtailed, the shipper would be entitled to the carriage of a proportional part of the contract.

The appellant relies on the first condition as to the continuance of the steamship company's service and the sailing of its steamers between the ports named, and, in the alternative, on an alleged implied condition that if, without any default on its part, the contract ships were not in existence when the date arrived for the performance of the contract, then the appellant was to be excused from performance.

As to the express condition, the trial Judge was of opinion that it relieved the appellant from liability, but his judgment was set aside by the Court of Appeal. After much consideration, I do not think that this condition can be said to apply to the contingency which happened. It expressly refers to a discontinuance of the company's service and sailing of its steamers between the ports named. This would not comprise a tem-

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porary suspension of sailing other than one caused by one of the contingencies mentioned in the rest of the clause, conditions of war, etc. Much less would it include the failure under these contracts to have the ship ready at the sailing time, for if it was known to both parties that it was nearing completion, the appellant certainly considered that it would be completed in time, and the non-completion of the ship or its failure to be ready was surely not meant by the parties to be guarded against by the general clause as to discontinuance of service. Such a contingency as happened could have been specially provided for, and I do not think that it is now open to the appellant to say that it was covered by a general clause like the one in question. And it certainly does not come within the language of this clause reasonably construed.

Whether the implied condition relied on by the appellant relieves it from liability is a question of much nicety. Blackburn, J., in *Taylor* v. *Caldwell*, laid down a rule which is accepted as settled law. He said (3 B. & S. at pp. 833-834):—

"Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Blackburn, J., it is interesting to note, referred to the civil law and to Pothier, *Obligations*, No. 668, partie 3, ch. 6, art. 3, as laying down the rule that the debtor *corporis certi* is freed from the obligation when the thing has perished neither by his act, nor by his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

It seems to me—and that is certainly the rule of the civil law as I understand it—that the contingency which relieves a party from performing a contract on the ground of impossibility of performance, is an unforeseen event. I take it that this is the rule laid down by Hannen, J., in *Baily* v. *DeCrespigny*, L.R. 4 Q.B. 180 at p. 185.

"There can be no doubt that a man may by an absolute con-

tract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But, where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

So that if the event which causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened.

The case of *Nickoll & Knight* v. *Ashton, Eldridge & Co.*, [1901] 2 K.B. 126, is an interesting one, and I have derived much benefit from the consideration I have given to it. There, a cargo had been sold to be shipped by the steamship "Orlando" at an Egyptian port during January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of the prohibition of export, blockade or hostilities preventing shipment, the contract or any unfulfilled part should be cancelled. In December, 1899, the "Orlando" was stranded through perils of the sea without default on the defendant's part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during January. It was held by A. L. Smith, M.R., and Romer, L.J., Vaughan Williams, L.J., dissenting, that the contract should be construed as subject to an implied condition that, if at the time for its performance the "Orlando" should, without default on the defendant's part, have ceased to exist as a ship fit for the purpose of shipping the cargo, the contract should be treated as at an end.

This case may be distinguished from the one at Bar in that the stranding of a particular ship can reasonably be said to be an unforeseen event, for although any ship is exposed to the perils of the sea the stranding of a particular ship mentioned in a contract, so as to prevent it from taking on its cargo at the specified time, is certainly something which can be said to be unforeseen. But here the appellant undertook to carry a cargo on a ship nearing completion. It could certainly have been foreseen that something might occur in the ship yard, especial-

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ly in these days of labour troubles, to delay completion, and by making an absolute contract without providing against the contingency of non-completion in time, the appellant, in my opinion, assumed the risk of this contingency. The respondent prepared all its cargo for the ship in time, and would be subject to considerable loss if the appellant were relieved from the consequences of non-performance. Such a condition, if it had been stipulated, might not have been accepted by the respondent, which possibly would have preferred to ship its lumber through another steamship company. And I think that the risk of such a contingency cannot be imposed on the respondent as an implied condition now that the loss has occurred.

I would dismiss the appeal with costs.

Appeal dismissed.

O'NEAL v. VERNON FRUIT UNION.

Yale County Court, British Columbia, Swanson, Co. Ct. J. May 27, 1922.

SALE (§IV—91)—SALE OF WHEAT — BOTH PARTIES IN IGNORANCE OF WHEAT BOARD REGULATIONS — COMPLETION OF CONTRACT—VENDOR SATISFIED WITH PRICE—SUBSEQUENT ACTION FOR ADDITIONAL SUM ON GROUND THAT WHEAT BOARD REGULATIONS NOT COMPLIED WITH.

A plaintiff who has sold wheat to a union of which he is a member, and which has never had a license under the Canadian Wheat Board regulations, although subsequently to the sale of the wheat, an interim permit was issued; the vendor being perfectly satisfied at the time of sale with the price received, will not afterwards be allowed an additional sum on the ground that the purchaser had not complied with the Order in Council and the regulations of the Wheat Board framed thereunder, and that had it done so he would have received more for his wheat.

ACTION to recover an additional sum for wheat sold by the plaintiff to the defendant union on the ground that he would have been entitled to this sum if the Wheat Board regulations had been complied with. Action dismissed.

The facts are fully set out in the judgment delivered.

H. C. DeBeck, for plaintiff; *W. H. D. Ladner*, for defendant.

SWANSON, Co. Ct. J.:—This is a very novel case to decide. Broadly speaking, I am not impressed with the justice of the plaintiff's claim. The plaintiff sold 439 sacks of wheat September 8, 1919, 53,930 lbs. at $65 per ton—$1,752.70 to defendant union, of which plaintiff is a member. The deal was made by

Editor's Note.—This is the first case of its kind to come before the Courts of British Columbia, and it is believed that no such case has arisen in the Prairie Provinces.

plaintiff with Piper representing the union. Everything was straight and above board. The plaintiff was entirely satisfied with the price which was paid to him by defendant. O'Neal says there was not much conversation between him and Piper at time of first sale of wheat. O'Neal says there was some conversation about the Wheat Board apparently of a general nature. Plaintiff states that he said to Piper that he had seen in the *Vancouver Province* that the price of wheat would be $2.10½ per bushel delivered at elevator in Vancouver, B.C. Piper (he states) said "I am giving you more than the Government price," that he had been paying $72 per ton, and the Government had "yanked him up on it." Plaintiff says that he said to Piper, "How in the world can the Canada Wheat Board run this thing if they declare a dividend, and everyone is buying all over the Dominion?" and that Piper said he didn't know. O'Neal said he knew there was such a thing in existence then as a Wheat Board; apparently he had no knowledge whatever then of such a thing as a "participation certificate." The defendant union never had a license under the Canadian Wheat Board regulations.

Shortly afterwards (O'Neal says) he was in defendant's premises and Piper said to him "I might have to call on you for some of that money back." There is one clause in this Order in Council that he was basing his claim on, and that he had written a letter to the party to whom he had sold the wheat at the coast. Later on O'Neal made a further sale of wheat to defendant union, October 11, 1919, 138 sacks—16,440 lbs. wheat at $67 per ton—$550.75. Nothing was said then as to the quality of the wheat. It was No. 1 Northern (O'Neal says). O'Neal was paid in full for his wheat at above rates, $65 and $67 per ton, and was apparently perfectly satisfied with the deal. He received total amount of $2,303.46 for his wheat.

Plaintiff never received any "participation certificates" on sale of his wheat. He says that when he was laid up in the Vancouver Hospital that following winter he read in the Vancouver papers about these "participation certificates." When the plaintiff went to Vernon in the spring he went to see Piper and told him about this. Piper said to him that there wasn't anything coming to him, "as they hadn't joined up" (presumably meaning that defendant had not taken out a license under the Wheat Board). Apparently on September 29, 1919, an "interim permit" was issued by the Canadian Wheat Board to Vernon Fruit Union (but *never* a license). This

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"permit" was signed by someone as secretary, but no one signing on behalf of the "chairman" or "ass't chairman."

The whole transaction was a straightforward sale of wheat by O'Neal to the union, apparently in substantial ignorance of the Canadian Wheat Board regulations on both sides.

Now plaintiff comes into this Court on his plaint bearing date November 17, 1921, and demands payment of a sum largely in excess of what he was perfectly satisfied at the time to accept. He claims $775.19. He claims that had the defendant complied with the Order in Council, the regulations of the Wheat Board framed thereunder, he would have received more for his wheat. He claims he would have been paid throughout at the rate of $68.50 per ton, making an additional sum claimed as now owing in that particular alone of $106.70; in addition he says that he would have been entitled to an allowance for sacks fixed by the Board of $3 per ton, $105.55; and in particular (and chiefly) he claims that he would have been entitled to "participation certificates" at 48c per bushel, $562.94, making a total of $775.19.

Mr. Ladner argues that no cause of action has been established, that none is conferred by the Wheat Board regulations, that the matter is purely one of contract, that the plaintiff got paid in full for what he bargained for, and that it is unjust, at this late date, to prosecute this claim, when all the money from the wheat crop of 1919 has been paid out by the Wheat Board to producers, who have surrendered their participation certificates to the Board before December 31, 1920. Mr. Ladner argues that the only recourse that can be had against the defendant is to enforce payment of the heavy penalty provided for by Regulation 4—August 14, 1919. This, of course, will be of no avail to plaintiff, as the penalty would be payable to the Crown.

A further argument for defence is that the defendant, being incorporated under the Co-operative Association Act, R.S.B.C. 1911, ch. 48, cannot be sued by plaintiff (a member of the Vernon Fruit Union), and that the only tribunal open to the plaintiff is under sec. 30, viz., by arbitration, and that accordingly this Court has no jurisdiction, that the defendant cannot submit to the jurisdiction of this Court, voluntarily or involuntarily, notwithstanding the way in which any pleadings may be drawn, quoting *Hudson Bay Ins. Co. and Walker* (1914), 16 D.L.R. 275, 19 B.C.R. 87; *Brand* v. *National Ins.* (1918), 44 D.L.R. 412.

Mr. DeBeck for plaintiff argues that the defendant has submitted to the jurisdiction of this Court by entering its dis-

pute note, and by pleading as it has pleaded, quoting 1 Hals. article on arbitration, para. 956: *Hughes* v. *Hand-in-Hand Ins. Co.* (1883), 3 C.L.T. 600. See also *Fire Insurance Policy Act, R.S.B.C. 1911, sec. 16, schedule; also *Hudson Bay Ins. Co. and Walker, supra.* Mr. DeBeck argues that the Contract of Sale is illegal, being in violation of the Wheat Board regulations, and that his client is not *in pari delicto.* He quotes Leake on Contracts, 5th ed., p. 549.

It seems to me that Mr. DeBeck's strongest position would be to urge that the breach of the statute (that is the Order in Council) consitutes the plaintiff's cause of action; but he has not so argued. The regulations of the Wheat Board were promulgated by Orders in Council framed under the War measures, October, 1914, and have undoubtedly the same force as statutory provisions. It is this phase of the case (not argued before me by counsel at all) which has given me some anxiety. The Court of Appeal have dealt with this interesting problem in a case of negligence (involving, however, a very different set of facts) arising under the Factory and Workshop Act, 1878, ch. 16, and 1891, ch. 75, through the neglect to securely fence dangerous machinery. *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402, 67 L.J. (Q.B.) 862.

It has also been held that an action will lie against a Justice of the Peace for neglect of his statutory duty (a ministerial function) to transmit to the County (District) Court the conviction made by him for the purposes of an appeal therefrom, if the appeal is dismissed because of the conviction and depositions not being before the Court. *Kowalenko* v. *Lewis and Lepine* (1921), 65 D.L.R. 273, 36 Can. Cr. Cas. 119, 14 S.L.R. 531, a decision of the Court of Appeal of Saskatchewan.

These cases turn on quite different sets of facts from those in the case before me, which is one originating at least in contract, and not in tort. This case is probably the first of its kind in this Province. I understand no such case has arisen in Western Canada. It is one certainly *primæ impressionis*, as Powys, J., said in *Ashby* v. *White* (2 Ld. Raym. 938, 92 E.R. 126), at p. 248 of the report of this case in Smith's Leading Cases, vol. 1, ed. 10, decided in the second year of Good Queen Anne's reign. True, there is no reason why the action should not be maintainable, as Holt, C.J., points out in his great judgment at p. 251 of the above case:—

"If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it."

*Editor's Note. Repealed, 1919, (B.C.) Ch. 37, sec. 12.

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I must, however, decline to wrest the general doctrine stated by the Court of Appeal in *Groves* v. *Lord Wimborne* from the set of facts to which it was held applicable, and make it apply in such a case as the one at Bar. The point is one of great interest, and it may be that our Court of Appeal may be called upon to consider this matter.

As to the position taken by Mr. DeBeck that the defendant has submitted to the jurisdiction of this Court, and cannot now take advantage of sec. 30 of Co-operative Association Act, I am of the opinion that his argument in that particular is sound. I think I would be doing violence to sound commercial principles to give effect to the plaintiff's contention. This claim of his is purely an after-thought on his part. He was perfectly satisfied with the bargain he made for the sale of his wheat. I think he should have remained satisfied. I do not think his claim should now be given effect to.

I accordingly dismiss the plaintiff's action. As the defendant failed to comply with the regulations (Order in Council) as to taking out a license, I will not allow defendant any costs.

Action is dismissed without costs.

Action dismissed.

McDOUGALL v. GARIEPY.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. June 10, 1922.

PRINCIPAL AND SURETY (§IB—10)—DISCHARGE OF SURETY—CONSENT TO FORECLOSURE—ADDITIONAL SECURITY—MATURITY OF ACTION.

Consent by a creditor of a company, holding the mortgage of another as security for advances to the company, to a foreclosure judgment under a floating charge on the company's assets, will not discharge the mortgagor as surety not prejudiced thereby. A creditor making further advances and accepting security therefor from the debtor in good faith does not thereby prejudice his rights against the surety in respect of a prior unsecured debt. Once the principal has committed a default for which the surety is responsible, a cause of action immediately arises against the surety.

[See also 63 D.L.R. 214.]

APPEAL by plaintiff from a judgment dismissing an action on a mortgage. Reversed.

S. W. Field, K.C., for appellant.

H. H. Parlee, K.C., for respondents.

STUART, J.A., concurs with CLARKE, J.A.

BECK, J.A., concurs with HYNDMAN, J.A.

HYNDMAN, J.A.:—Accepting as correct the facts as set out in the judgment of the trial Judge, which I think is the case, with

the greatest respect I find myself unable to agree with the conclusions arrived at by him.

I do not think it can be said either in fact or in law that the security of 15c. per barrel of cement was ever held by the plaintiff, although a resolution was duly passed by the company authorising such an agreement to be entered into. It must be remembered that this resolution was adopted not prior to or at the date of the agreement, but a considerable time afterwards, and of which the defendant so far as the evidence discloses, was quite unaware, and it cannot be found that it was in any way an inducement to him to execute the indemnity to the plaintiff. To put it shortly: whilst the resolution exhibited a willingness on the part of the company to give such a security it in fact never was acted upon and no such agreement was given to or accepted by the plaintiff.

Whilst it is undoubtedly the law that a creditor must hold all securities acquired either before or at the time or after the taking of an indemnity agreement for the benefit of the indemnitor or surety (*Pledge* v. *Buss* (1868), John. 663 at p. 668, 70 E.R. 585 at 587; 15 Hals. p. 561, para. 1051), nevertheless I have found no authorities which compel him, either to seek or accept additional security or which hold him responsible for failure to take steps to perfect imperfect ones.

With respect to the case before us I think, in any event, sufficient reason has been advanced why this charge in the product was never brought into effect. The finances of the company were in a chronically bad state and most difficult to manage. Without the united aid of Macdonald and the plaintiff it would appear that operations would have ceased much sooner than they did. Plaintiff testifies that Macdonald would not have stood for the advantage this resolution would have given him, which, considering the whole situation, is only what would be expected, and I think this the real reason for its failure to develop into a reality.

The plaintiff then, in fact, never had the security in question, and necessarily as a consequence cannot be held liable for failure to take advantage of it.

The other serious defence raised is that the plaintiff, to the prejudice of the defendant, agreed to the order of foreclosure made in the action of Macdonald against the company and the plaintiff.

As I regard the facts, this position cannot be successfully maintained.

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At the time of the advance of the $75,000, it must be noted that no security, beyond a promissory note, was taken from the company, and it was only at the date of the floating charge given to Macdonald & McDougall that any special security was acquired with respect to it, and the instrument creating such charge expressly postpones or places this liability subsequent to all the other advances.

Before this particular debt ($75,000) could be discharged, all the prior indebtedness specifically mentioned in said charging agreement as well as all other moneys advanced by Macdonald & McDougall thereafter, must first have been liquidated. The clause to that effect reads as follows:—

"And the said sums shall rank in point of charge in the order in which the same are vested and so that all other of the said sums with interest thereon and any sums which may be advanced hereafter by the said Alex. Macdonald either alone or with the said J. A. McDougall shall be paid in priority to the said sum of $75,000 and interest thereon owing to the said John McDougall."

The only change made, therefore, as to the standing of this liability, was that of promoting it from an entirely unsecured debt, to one having priority over unsecured creditors only.

Affairs of the company, however, went from bad to worse, steadily losing money and requiring further funds, until a crisis was reached and Macdonald entered action to secure the amounts owing him and for a foreclosure of all the assets of the company by virtue of his floating charge. No defences were entered by any of the defendants for the reason, I suppose, that no good defence existed, and in due course formal judgment was given, to which the defendant McDougall, by his solicitors, assented.

It is now complained that by consenting to this judgment McDougall acted prejudicially to the interests of the defendant Gariepy particularly because at the same time Macdonald, in consideration of such consent, agreed to relieve McDougall from a portion of the joint liability at the Bank of Montreal. I cannot see the force of the contention when it is appreciated that the amount of Macdonald's claim was over $1,000,000, and the evidence confirms the fact, in my mind, that the plant and assets were much less in value than the amount against it and it would be unreasonable to expect anyone interested such as the plaintiff to redeem it. There is no proof that on a sale the property would bring anything approaching the amount against it and that McDougall's consent to the judgment in any way operated to the prejudice of the defendant. On the contrary,

the fact that plaintiff was relieved of one-half the liability to Macdonald for $75,000 worked decidedly to his advantage. In view of the fact that the $75,000 in question was part of the indebtedness, half of which the plaintiff was relieved of must as a necessary consequence reduce the claim herein by one-half.

I agree with my brother Clarke that the action was not prematurely brought.

I would allow the appeal with costs, set aside the judgment and enter judgment for the plaintiff on the terms as set out in the judgment of Clarke, J.A.

CLARKE, J.A.:—The facts are set forth in the reasons for judgment of the trial Judge.

In my opinion, none of the matters set up by the defendant are sufficient to wholly relieve him from liability to the plaintiff.

There has been no extension of time given to the debtor for payment, and I cannot discover that any other alteration has been made in the agreement between the plaintiff and the company in respect of which the defendant became surety.

Regarding the complaint that the plaintiff failed to enforce payment of the sum of 15 cents per barrel, it is important to bear in mind the condition of the company—at and after the date of the resolution of the company of September 21, 1916, which speaks of giving collateral security to the plaintiff by way of charge upon all the manufactured product of the company present and future and agreeing to pay to the plaintiff 15 cents for each and every barrel of cement as the same is sold or otherwise disposed of.

The defendant was no party to this proposal, nor was any formal security ever given. It may be that the resolution itself should be treated as an acceptance of the plaintiff's request to the company that such security be given so as to create an enforceable agreement and charge, but, as I understand the facts, it never became possible to give effect to this arrangement, and it seems to have been ignored and forgotten. Had the expenditure of the $75,000 been sufficient to convert the plant into a rock proposition as anticipated, it is quite probable that the arrangement would have become effectual, but the expenditure of that sum was wholly inadequate for the purpose, and in order to obtain further sums necessary to convert the plant, the company was required to make other arrangements by giving security in the nature of a floating charge in September, 1917, which frustrated the proposed arrangement for the payment to the plaintiff of 15 cents per barrel. No cement was, in fact, sold or disposed of by the company after the resolution of September,

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1916, until May of 1918, and, therefore, nothing could have been realised during that period.

No authority has been cited, nor do I know of any which prevents a creditor from making further advances and accepting security therefor from the debtor in good faith without prejudicing his rights against a surety in respect of a prior unsecured debt. The amounts given priority to the plaintiff's advance of $75,000 consisted of (a) the indebtedness of the Edmonton Portland Cement Co. to Macdonald secured by encumbrance and assumed by the new company, and (b) the advances by Macdonald and the plaintiff jointly after the plaintiff's advance of $75,000 to complete the conversion of the plant, part of which was advanced before and part after the resolution and the security given in pursuance thereof of September 15, 1917.

It was necessary to give this security in order to obtain the advances, and without the advances, the plaintiff's $75,000 claim was worthless, and moreover, the said claim was thereby charged against the assets of the company, a benefit not before possessed. The evidence satisfies me that this arrangement was not prejudicial in any way to the defendant, but on the contrary at the time promised to be to his advantage, although, in the end, the claim in question herein could not be realised. The conversion of the plant was undertaken with the approval of the defendant, who was a large shareholder in the former company, which held practically all the shares in the new company, and he guaranteed a share of the plaintiff's advance for the very purpose of making the change. He does not appear to have at any time made any complaint about the transactions now in question. If he did not know the particulars, he must have known of the failure of the plaintiff's advance to complete the work and the necessity of obtaining further large advances elsewhere. The plaintiff, who is a heavy loser, appears to me to have acted in good faith and for the best interests of all concerned, and, under the circumstances, the Court should not be astute to relieve the defendant on a technicality from contributing a share of the heavy loss which has been sustained in connection with this ill-fated enterprise. I do not think the defendant has any complaint in respect of the foreclosure proceedings. Macdonald acted within his legal rights. The consent judgment was approved by a Judge of the Supreme Court and on behalf of the liquidator of the former company by the Master in Chambers at Edmonton. The plaintiff herein not only lost all the money contributed to the capital of the former company, but was finally fastened with an indebtedness of nearly $200,000, apart from

the $75,000 in question. The duty and interest of the consenting parties called upon them to make the best possible arrangement for the company, and I am satisfied they have done so.

The plaintiff agreed with the defendant to use all reasonable efforts to secure repayment of the advance of $75,000. I find no failure in this respect. It was useless to incur costs of suing the company, and if the defendant had any complaint in this respect it was open to him, at any time after the maturity of the company's note in 1918, to have called on the plaintiff to proceed, or to have proceeded himself directly against the company. His failure to do this rather indicates that he looked upon it as a hopeless prospect.

I think the plaintiff is entitled to recover from the defendant one-half of the sum of $25,000 secured by the mortgage, with interest, according to its terms, from August 1, 1917 (the first year's interest having been paid by the company). The defendant is, in my opinion, entitled to share in the benefit of the agreement by Macdonald to assume half of the plaintiff's advance of $75,000 and interest.

The defendant's agreement is to indemnify against "one-third of all loss . . . . . which the party of the first part" (McDougall) "may suffer, incur or become liable for by reason of the non-payment of the said advance of $75,000 . . . and interest as aforesaid or any part thereof."

As I understand the evidence the $75,000, for which plaintiff was solely liable to Macdonald, was treated in the same way as the $275,000 for which both were jointly liable, and speaking of both sums with the interest on them. Macdonald's offer was that plaintiff should settle with him for one-half and he (Macdonald) would assume the other half, and this was agreed upon. So that having borrowed the $75,000 loaned to the company from Macdonald and being released from one-half of it, the plaintiff only loses the other half, and it seems to me that the defendant fulfills his agreement by paying one-third of that half with interest.

I do not think the action was prematurely brought. The facts are very different from those in *McDougall* v. *Gariepy* (1922), 63 D.L.R. 214. As a general rule, once the principal has actually committed a default for which the surety is responsible, a cause of action immediately arises against the surety. De Colyar's Law of Guarantees, 3rd ed., p. 212.

Default in payment of the whole principal was made by the company in August, 1918. This action was commenced September 22, 1920. I think it can be said that on that date in the condition

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of the company the loss was ultimately sustained. Even though the company had not been sued, it was pretty certain then that recovery could not be had from the company, and the proof of the later disposal of the company's assets to Macdonald and the settlement with the plaintiff satisfies me that at the commencement of the action the loss was ultimate and certain, though evidence may have been necessary to establish the fact. The real dispute in the action was over the counterclaim for the defendant's release from liability, and it would be unfortunate if the action were defeated by so technical an objection.

I would allow the appeal with costs, set aside the judgment below, and direct that judgment be entered for the plaintiff for $12,500 and interest as above indicated, and for possession and sale or foreclosure of the mortgaged premises according to the usual practice in mortgage actions allowing 3 months to redeem and dismissing the counterclaim, both with costs, all costs to be added to the mortgage debt. If the parties cannot agree upon the amount, the same to be computed by the registrar on settling the judgment.

WALSH, J.:—The plaintiff sues upon a real estate mortgage made to him by the defendant, securing the payment of $25,000 and interest. The time for payment of the mortgage is thereby fixed for August 1, 1918, and this action was not commenced until September 25, 1920. The mortgage was made, however, under the terms of an agreement in writing, which sets out that the plaintiff had agreed to advance $75,000 to a company in which both he and the defendant were interested, upon the defendant's agreement to indemnify him against a one-third share of any loss which might ultimately be sustained by him in connection with such advance. It then provides that notwithstanding the absolute terms of the mortgage it was truly given "as security only for a one-third share of any loss that may ultimately be sustained by the party of the first part" (the plaintiff) "in connection with the said advance of $75,000." Judgment was given after the trial dismissing the action upon two grounds, one of which was that it was prematurely brought. I agree with this reason for dismissing the action.

When the action was started the amount, if any, of the plaintiff's loss in respect of his advance of $75,000, had not been ascertained. The company still owed him the full amount of it. He had security for it by way of a floating charge upon all of the company's assets, which, however, was subsequent to other large liabilities of the company. Just how much or how little, if anything, that security would avail him for the repayment of

his advance, was not then known, but it is obvious that, until it was ascertained, the amount of his ultimate loss could not be learned, and, therefore, no right to realise from the defendant in respect of his indemnity against one-third of that ultimate loss could arise. I would, therefore, dismiss the plaintiff's appeal.

The defendant by his counterclaim asks for a declaration that his mortgage and indemnity agreement have been discharged by reason of certain facts set up as a defence to the action. Although the trial Judge gave effect to this defence and held the defendant relieved from his contract of suretyship, he dismissed the counterclaim without giving any reasons therefor. It seems quite clear that, if this finding that the defendant was relieved from his suretyship is right, he was entitled to judgment on his counterclaim, and so he appeals from the dismissal of it.

The counterclaim rests upon several grounds. The company contemporaneously with the payment to it by the plaintiff of $15,000, being the first advance made by him on account of the loan of $75,000, but after the making of the mortgage and indemnity agreement, passed a resolution which provided *inter alia* for "giving collateral security to the said John A. McDougall by way of charge upon all the manufactured products of the company present and future and agreeing to pay to the said John A. McDougall the sum of 15 cents for each and every barrel (of 350 pounds) of cement as the same is sold or otherwise disposed of." This resolution was never given effect to and the plaintiff never secured and never tried to secure the charge or the payment of the 15 cents per barrel provided for by it. His reason for that is, and it is uncontradicted, that when the $75,000 was expended it was found to be entirely inadequate for the purpose for which it was advanced and that large additional sums had to be borrowed to carry the work to completion and to operate the plant after completion, which could not have been secured if this charge had been insisted upon. The stopping of the work when the plaintiff's advance was exhausted would have resulted in the complete paralysis and perhaps the entire abandonment of the company's operations. There is nothing in the evidence to indicate that this security was even in contemplation when the defendant's indemnity was given. The plaintiff in fact never had it as a security. At best he had but the promise of it, a promise which in the events which followed became incapable of fulfilment. Although there is nothing about it in the body of the resolution, the minutes of the meeting

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at which it was passed shew that the charge was to be "subject to the prior charge given to Alexander Macdonald under the terms of an agreement executed on August 3, 1916." There is nothing in evidence to shew what this charge was, although the fact does appear that Macdonald was then a creditor of the company in the sum of $250,000 and interest, and presumably his charge was related to that liability. I am satisfied that no prejudice resulted to the defendant from the plaintiff's failure to insist, even if he was able to, upon the company's promise being converted into an actual security, and that his failure to secure it was due to no fault of his. I can find no reason for relieving the defendant on this ground.

On September 17, 1917, the company gave to Alexander Macdonald and the plaintiff a floating charge upon all of its assets in security for certain large advances theretofore made by them (including the $75,000 hereinbefore referred to), a then present advance of $50,000, and such further advances as might thereafter be made. All of the advances, past, present and future, were thereby made to rank and to be payable in priority to the advance of $75,000 with which we are concerned. An action was brought in this Court by Macdonald against the company and the present plaintiff on December 19, 1919, for payment by the company of the amount then owing in respect of these advances, for a declaration that the floating charge above referred to constituted a first charge upon all of the undertaking and property of the company subject to a prior encumbrance to the said Macdonald for the enforcement of the charge by foreclosure or sale, and for payment by the present plaintiff, McDougall, of certain sums in respect of which he had made himself liable in connection with the advances to the company. The record does not shew any of the intermediate proceedings in this action, but on June 15, 1921, an order was made in it on the consent of the defendants, including the present plaintiff McDougall, which, after reciting a settlement of the matters involved in it on the terms of the order, declares that Macdonald's encumbrance and the floating charge constitute a first charge upon all the undertaking and the property of the company for $1,039,619.43, directs the payment to him by the present plaintiff McDougall of $200,000 and interest in the terms of their settlement and forecloses all interest of the defendants in the said undertaking and property and absolutely vests the same in Macdonald. The defendant Gariepy had nothing whatever to do with this settlement and in no way agreed or consented thereto. This settlement and the order

made pursuant to it are urged as a ground for the release of the defendant from his mortgage, the contention being that the plaintiff thereby improvidently deprived himself of the only security which he had for the payment of this $75,000.

The trial Judge gave effect to this contention, holding that his consent without notice to the defendant "to the wiping out of a security in which he was interested and to the foreclosure by Macdonald of a property which the evidence shews was worth more than his claim against it was an act of which the defendant had every reason to complain," and that this "was in itself sufficient to relieve the defendant from his contract of suretyship."

I am, with respect, unable to agree with this finding as to the value of the property. The plaintiff was the only witness examined at the trial upon any question, and so it is he alone who speaks on the question of value. The price that could then have been realised for such a property was, of course, largely problematical, for without analysing his evidence respecting it, and that is all that we have to go by, I can take no meaning out of it other than that, in spite of strenuous efforts to sell it, no purchaser for it could be found, as it had been a losing proposition from the start, and that the company would sell it at a price less than the amount of the charges against it if it could secure a purchaser. This evidence was given before the order of June 15, 1921, was made, the case having been re-opened before judgment to permit of the giving in evidence of this settlement. The fact that the plaintiff agreed to pay Macdonald $200,000 in satisfaction of his liability for the advances made by Macdonald to the company and which were covered by this charge is rather strong proof of the sincerity of the plaintiff's belief that the company's assets which vested in Macdonald under this order were insufficient in value to pay Macdonald's claim in full, even though, in addition, he was relieved from his share, amounting to $125,000, of a joint liability of $250,000 of Macdonald and himself to the bank, the whole of which was as a part of this settlement assumed by Macdonald.

Although the plaintiff was indiscreet in consenting to this order without the defendant's approval, the evidence quite satisfies me that he has been in no sense injured by it. The chances are that the vesting order could have been procured without his consent, as the action had been then running for a year and a half, but in the absence of evidence on the point this is mere conjecture. He was under no obligation to redeem Macdonald, and so I do not think that his consent to what was

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ultimately inevitable should relieve the defendant from his obligation.

The defendant says the plaintiff was wrong in agreeing that his security for this advance under the floating charge should be postponed to all the other advances secured by it, and that the plaintiff did not live up to his covenant in the indemnity agreement "at all times to use all reasonable efforts to secure repayment of the said advance of $75,000 with interest from the said company." The effect of the evidence is that during the years following this advance the plaintiff and Macdonald were constantly assisting with their own money and that of others procured upon their guarantee in keeping this unprofitable business going, and that it was impossible to secure repayment of this advance. I do not remember any suggestion in the argument of anything that the plaintiff could have done to get it, except to insist upon the charge and the payment of 15 cents a barrel, to which I have already referred. The only security he ever got was in the floating charge, and I do not see that he can be blamed because of the priority given by it to the other advances. Certainly that cannot of itself serve to release the defendant.

Since writing the foregoing, counsel have agreed that we should dispose of this appeal as though no question had been raised as to the action having been prematurely brought, upon certain terms as to costs arrived at between them. In view of this, I would allow the plaintiff's appeal and dismiss the defendant's cross-appeal. I think, however, that the plaintiff's recovery should be limited to $12,500 and interest instead of $25,000, as the plaintiff's ultimate loss in respect of this advance was only $37,500. Although he actually loaned $75,000 to the company, he borrowed that money from Macdonald. My understanding of the settlement that he made with Macdonald of all matters arising out of their dealings on account of the company is that Macdonald accepted from him $37,500 in satisfaction of this loan of $75,000, and so that is the loss which he made in respect of it. In substance the transaction was a loan by Macdonald to the company of $75,000, with the plaintiff's guarantee to him for repayment in full and a subsidiary guarantee from the defendant to the plaintiff of one-third of the amount of the plaintiff's loss. All that he paid Macdonald was $37,500, and he can only hold the defendant for one-third of that sum. The plaintiff held a guarantee from one Jackson for three-fifths of his ultimate loss in this same transaction, which is in the same terms as the defendant's agreement. I do not think that the

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amount received or to be received by the plaintiff under this Jackson guarantee can go in extinction or diminution of the defendant's liability. He and Jackson are practically co-sureties in different amounts for the same liability, and I think the plaintiff entitled to recover from each of them according to the tenor of his agreement without taking into account the amount contributed by the other.

Upon these findings the costs, according to the agreement of counsel, should be disposed of as follows, namely, the defendant to have his costs of defence and the plaintiff to have his costs of the counterclaim, both taxable under column 5 and to be set off against each other, and the difference, if in favour of the defendant, to be paid to him and not applied in reduction of the judgment against him, with no costs of this appeal to either party.

Appeal allowed.

Re SQUIRES BROS.

Saskatchewan King's Bench in Bankruptcy, Maclean, J.
August 19, 1922.

BANKRUPTCY (§I—4)—ASSIGNMENT BY ONE PARTNER—ABSENCE OF AUTHORITY OR RATIFICATION BY OTHER PARTNER—VALIDITY—BANKRUPTCY ACT, 1919 (CAN.), CH. 36 SEC. 85 AS AMENDED BY 1921, CH. 17 SEC. 48—CONSTRUCTION.

An assignment under sec. 85 of the Bankruptcy Act 1919 (Can.) ch. 36 as amended by 1921 ch. 17 sec. 48, by one of the members of a partnership in the absence of authority from or subsequent ratification by the other member of the firm, is not an assignment of the firm, such assignment not being within the scope of the partnership business, and cannot be treated as a personal assignment where the person making it had no intention of making such an assignment. Such an assignment, therefore, does not constitute an assignment under the Act.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPLICATION by a trustee under the Bankruptcy Act for directions.

B. M. Wakeling, for the authorised trustee.

E. B. Jonah, for William Squires.

MACLEAN, J.:—On March 23, 1922, Charles E. Squires, one of the two partners in the firm of Squires Bros., of Domremy, Sask., purported to make on behalf of his firm an assignment under the Bankruptcy Act in favour of the Canadian Credit Men Trust's Association, Ltd., as authorised trustee. The trustee proceeded to wind up the partnership business and did sell the assets. The other partner, William Squires, was, about this time, absent from Domremy for a few weeks, and was not apprised of the assignment, nor was he aware of the activities

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of the trustee until after the partnership assets had been sold. Immediately upon William Squires ascertaining what had transpired, he notified the trustee and proceeded against any further dealings with the affairs of the firm. The trustee now brings this application for directions. A notice of motion was served on all the interested parties. A great many questions are asked by the trustee, but they all depend on the validity of the assignment, and the intention of this application is to bring up the question in this summary way.

Counsel for the trustee relies upon sec. 85 of the Bankruptcy Act 1919 (Can.) ch. 36 as amended in 1921 (Can.) ch. 17, sec. 48, which reads as follows:—

"For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorised in that behalf, a firm may act by any of its members, and a lunatic may act by his committee or curator or by the guardian or curator of his property."

It is contended on behalf of the trustee that as the section quoted expressly provides that the officer or employee acting for an incorporated company must be authorised in that behalf, and as no such provision is stated in respect to a member by whom a firm acts, the lack of definite or any authority by a firm to one of its members to make an assignment will not affect the validity of that assignment. In my opinion, the section quoted merely outlines procedure in making an assignment and does not purport to, and could not, change the substantive law affecting partnerships. A member of a partnership may bind himself and his partners upon all contracts made in the course of the ordinary scope of the partnership business. An assignment such as the one in question is not within the ordinary scope of the partnership business, but practically amounts to a suspension of business and a dissolution of the partnership itself. The law on this point is very fully and forcibly stated by Draper, C.J. in *Cameron* v. *Stevenson* (1861), 12 U.C.C.P. 389. It is clear, therefore, that in the absence of authority from or subsequent ratification by William Squires the assignment cannot be considered the assignment of the firm.

The evidence before me is to the effect that William Squires did not authorise his partner, Charles E. Squires, to make the assignment. An affidavit, filed on behalf of the trustee, alleges, that what Charles E. Squires stated to the trustee at the time was that his brother William would have no objection if he, Charles E. Squires, made an assignment on behalf of the firm. It is clear from the affidavit of William E. Squires himself and

the affidavit filed on behalf of the trustee that Charles E. Squires had no authority to make the assignment and that he did not represent to the trustee that he had such authority. It is also clear, from the affidavit of William Squires, that there has been no ratification by himself of the act of his brother in making the assignment.

Counsel for the trustee argues that the words in reference to a firm in the section of the Bankruptcy Act above quoted should be strictly construed, and that by implication a member of the firm need not be specially authorised as is required of an officer or employee of an incorporated company. The strict interpretation of the words in question is that a firm may, by one of its members, make an assignment. What is really contended for by counsel is an interpretation to the effect that a member may make an assignment for his firm—something totally different to a firm acting by one of its members.

In my opinion, the assignment is invalid. In view of that, it is unnecessary to deal with any of the questions raised, excepting the second question, which, in substance, is whether the assignment may be treated as the assignment of Charles E. Squires himself and whether his assets pass to the trustee. It is true that if the assignment were a valid one, the separate assets of Charles E. Squires would pass to the assignee as well as his interest in the firm, and if Charles E. Squires had made a personal assignment his interest in the partnership would also pass to the trustee and the ultimate result might be the same in either case. But he clearly did not intend to make a personal assignment, or he would have done so, and it is not difficult to conceive numerous instances where a partner might be ready to enter into an assignment by the firm and yet not be willing to make a personal assignment.

It seems to me that an authorised assignment under the Bankruptcy Act must be the voluntary act of the assignor, and must shew expressly and not by implication his intention to assign. An authorised assignment cannot be construed out of a document which the party executing it intended for some other purpose, even though the execution of that document might, in itself, constitute an act of bankruptcy. The assignment in question does not constitute an assignment under the Act by Charles E. Squires. William Squires will have his costs against the trustee.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

TRIAL (§IF—30)—FULL ANSWER AND DEFENCE—SUMMARY CONVICTION PROCEEDINGS—REFUSAL OF MAGISTRATE TO GRANT AN ADJOURNMENT SHOWN TO BE NECESSARY FOR THE DEFENCE—GROUND FOR QUASHING CONVICTION ON CERTIORARI—DENIAL OF NATURAL JUSTICE—COURT REFERRING TO DEPOSITIONS AND PROCEEDINGS BELOW—CR. CODE SEC. 715—LIQUOR ACT 1916 (ALTA.) CH. 4 AND AMENDMENTS.

Failure to grant the accused an adjournment of the hearing before the magistrate on a showing that an adjournment is necessary to give the accused an opportunity to make his full answer and defence by procuring the attendance of a material witness from another province, will invalidate the trial and summary conviction thereon as contravening the right to make full answer and defence under Cr. Code sec. 715. There is a denial of natural justice in such cases which invalidates the trial and which affords ground for a motion to quash on *certiorari*, for which purpose the deposition proceedings before the magistrate may be examined.

[*Rex* v. *Dominion Drug Stores Ltd. and C.N.R. Co.* (1919), 44 D.L.R. 382, 30 Can. Cr. Cas. 318 and 31 Can. Cr. Cas. 86, 14 Alta. L.R. 384, applied; *R.* v. *Nat. Bell Liquors Ltd.* (1922), 65 D.L.R. 1, 37 Can. Cr. Cas. 129, [1922] 2 A.C. 128, considered.]

APPEAL from an order of Simmons, J. refusing a motion to quash a summary conviction under the Liquor Act, 1916, (Alta.) ch. 4 and amendments, made on a charge of unlawfully keeping liquor for sale. The appeal was allowed, Stuart and Clarke, JJ.A., dissenting.

J. McKinley Cameron, K.C., for defendant, appellant.

J. W. McDonald, K.C., for the Crown.

SCOTT, C.J. concurred with Hyndman, J.A.

STUART, J.A. (dissenting):—Appeal from a judgment of Simmons, J. refusing to quash on *certiorari* a conviction under The Liquor Act. One ground of appeal, not argued, but not waived by the appellant, was that there was no evidence upon which the accused could reasonably be convicted. If I understand the decision in *Rex* v. *Nat Bell Liquors Ltd.* (1922), 37 Can. Cr. Cas. 129, 65 D.L.R. 1, this ground is now untenable. It seems to be generally accepted that such is the meaning of that decision and I am in favor of following it for the present at least, although Lord Sumner states that "*certiorari* and prohibition are matters of procedure" it would seem to be a question whether this Court might not be justified even yet in assuming control at least of its own procedure.

One thing I do not understand about the judgment is why so many opinions were attributed to the Judges below which those Judges did not express.

The one ground of appeal argued before us in the present

case was that the magistrate refused an adjournment when applied for by the accused and that in so doing he deprived him of the right "to make his full answer and defence" to the charge as provided by sec. 715 (1) of the Code.

I am much at a loss to know whether we can look at the certified typewritten copy of the evidence and proceedings before the magistrate, which has been filed pursuant to the proper notice, for the purpose of examining this question. In *Rex* v. *Nat Bell Liquors Ltd.* it was decided that this copy of the depositions is not part of the record. If it is not I do not see the ground upon which we can look at it for any purpose. If I understand the decision referred to the Court may look at such material to uphold a conviction but not to quash it. Lord Sumner said, 65 D.L.R. 1 at p. 30:—"The evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, &c." I do not think the remainder of the sentence modifies the meaning of this.

Of course the question now before us was not the question before the Judicial Committee in the *Nat Bell* case and it may not be proper to attempt to apply to this case the various opinions expressed in that judgment about the exact use that may or may not be made of the depositions. But the Judicial Committee did specifically assume to inform us as to the purpose of the requirement in our procedure here that the testimony of the witnesses must be taken down and filed with the Clerk of the peace or corresponding officer. They said, 65 D.L.R. 1 at p. 28, first, that:—"Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but, if it is to be taken to good purpose the depositions must have been put into permanent form while the evidence is being given,"—a passage which I have great difficulty in understanding. And they said, secondly, that "Even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the Court and *makes it all the more possible to ensure* that no conviction will be pronounced unless evidence has been given of each essential feature of the charge." I think it is only reasonable to interpret this as meaning that "it tends to ensure &c." because how the possibility of ensuring this could

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be aided by the evidence if no Court has any power to examine it for that purpose I do not just quite understand. However that may be, these two considerations seem in the opinion of the committee to exhaust the reasons for, and the usefulness of written depositions.

Then there is the passage, 65 D.L.R. 1 at p. 22, where it is said that "there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the Court either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. . . . . That supervision (i.e. of the superior Court) goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

I am not sure just what we are to take these passages to mean. Whether the inference is that we cannot read the depositions to see whether there has or has not been "an observance of the law in the course of" the exercise of the jurisdiction I feel no certainty. My impression is that it is held that we cannot look at the depositions, though taken down stenographically and though thus including a report of what was asked and said with regard to an adjournment, for the purpose of seeing whether sec. 715 has been violated by an unfair, unjust and improper refusal of such adjournment.

Surely however we may still venture in this Court to enquire whether the inferior Court has or has not refused an accused the right to make his full answer and defence to the charge even though the magistrate has not inserted the facts relevant thereto in the formal conviction. For myself I do not feel that we should be doing right to allow anything which was said in the *Nat Bell* case (and possibly nothing there said was so intended) to prevent us from making this enquiry and that too upon any evidence or material that we may think in our judgment to be relevant and proper. I propose therefore to look at the stenographic report, at the affidavit made by the accused and at the special note signed by the magistrate relating to what really occurred. I refuse however to resort to the subterfuge that this is a matter of jurisdiction; as I did refuse in *Rex* v. *Emery* (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 117, 10 Alta. L.R. 139, with regard to the absence of evidence.

The facts appearing are that on January 11, Sergeant Nich-

olson, under search warrant, seized a quantity of liquor then in a refrigerator car of the Canadian Pacific Railway at Blairmore, that the accused came to the car in company with town Constable Carter just as the seizure was being made, that Carter asked the accused if it was his beer and that the accused replied, "Yes, seize it or do what you damn well please, it is all 2 per cent." Samples were taken for analysis at Edmonton and on January 27 an information was laid against the accused charging him with unlawfully keeping liquor for sale at Blairmore on January 11. The case came on for hearing before Gresham, a police magistrate at Blairmore, on February 9. The foregoing facts were stated in evidence before the magistrate. The accused admitted in his evidence that the car had been shipped to him from a brewery in Fernie, B.C. under the name of "Thomas Smith." He contended that he had not ordered real beer but only 2 per cent. and some soft drinks.

It was in order to adduce evidence by witnesses in the employ of the brewery at Fernie, B.C. to shew what he had really ordered that the accused asked for the adjournment. He presented the contention that it was not until the hearing of the case began that he became really aware that the charge related to the contents of the car as seized and that up to that time he was under the impression that the charge related to other material which he had removed from the car before seizure was made and which had never been seized.

What occurred in regard to the request for an adjournment is set out in the judgment of my brother Hyndman and I need not here repeat it.

My opinion is that there was ample evidence before the magistrate to justify him in making the inference that the accused knew all the time that the charge was with reference to the goods seized in the car. The accused made a statutory declaration in support of his application for an adjournment and in this he states that "*some time ago* I was served with a summons for the above named offence." In my opinion the accused here should have stated the exact day of the service, as he no doubt could have done at least approximately, in order to let it be known how long he had had to prepare for his defence because this was a very material point in respect to the request for an adjournment. Yet he deliberately left that length of time very indefinite. Of course if he expected the magistrate to believe that he never knew until the opening of the trial that he was being charged with respect to the material actually

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seized in the car it would be unnecessary to state how long a warning he had received of the approaching trial.

He stated this in his affidavit "yesterday when the case came on for trial I was taken by surprise by the effort of the prosecution to hold me responsible for the balance of the goods contained in the said car other than the 29 barrels," these being the portion removed by him before the seizure. These latter he of course felt confident had not been analysed. He felt that he knew that the prosecution would be unable to contradict him as to the nature of the contents of the 29 barrels. Therefore on his own theory he would never have needed the witnesses from Fernie.

But the whole question depends upon the belief of the magistrate as to the *bona fides* of the accused in stating in effect that he never dreamt that he was going to be held responsible for what had been actually seized. Quite apparently the magistrate did not have any confidence in this theory of a misunderstanding. On the face of it, it appears to me, as it must have appeared to the magistrate, to be a complete subterfuge. The accused knew what the officers had seized and he, in my opinion, must have known perfectly well that the charge related to that subject-matter.

In these circumstances I cannot think that any unfairness was shewn to the accused, or that there was any real violation of the provisions of sec. 715. Generally speaking the matter of an adjournment is in the discretion of the Court, and where there has been a refusal of an adjournment in the exercise of this discretion the refusal must, I think, be such as to amount to a real refusal to allow any fair opportunity to make a defence before it can be fatal to a conviction.

In my opinion the accused knew from the beginning what the charge was about and had ample time to arrange for the presence of witnesses from Fernie even if, as was no doubt the fact, he was unable to enforce their attendance by subpœna. The date stated as the date of the offence was the date of the seizure. Moreover the magistrate did offer an adjournment for two days and Fernie is not so very far away, being only a journey of an hour or two.

I am for these reasons of opinion that there was no violation of sec. 715 even if that section be interpreted as applying to the case of a refusal of adjournment which in other circumstances might require some consideration.

The appeal should be dismissed with costs.

BECK, J.A.:—I concur with the opinion of my brother Hyndman, so far as the ground of his decision goes.

I shall on some future occasion make some observations upon the decision of the Privy Council in *Rex* v. *Nat Bell Liquors* (1922), 37 Can. Cr. Cas. 129, 65 D.L.R. 1. Having examined the evidence it seems clear enough that so far as it was permitted to be given, the evidence would be sufficient to justify a conviction.

HYNDMAN, J.A.:—This is an appeal from the judgment of Simmons, J., who refused to quash a conviction made by J. W. Gresham, a police magistrate "For that the said defendant on or about the 11th day of January, A.D. 1922, at Blairmore, in the Province of Alberta, did unlawfully keep liquor for sale in contravention of the Liquor Act and amendments thereto," and whereby the defendant was adjudged to forfeit and pay the sum of $500, and costs, and in default of said sums being paid within five days, to be imprisoned and kept at hard labor in the Provincial Jail at Lethbridge for the term of three months, and confiscating to the use of the Crown the liquor seized, together with the vessels and containers.

Seventeen different grounds were set up in the notice of appeal, including one to the effect that there was no evidence before the magistrate to give him jurisdiction to make the said conviction or any conviction.

It was not until after the judgment of Simmons, J. that the decision in the Privy Council in *Rex* v. *Nat Bell Liquors* (1922), 37 Can. Cr. Cas. 129, 65 D.L.R. 1, was pronounced, so that when the appeal came on before us it was recognised that in view of the judgment just mentioned it was not competent for us to examine the evidence for the purpose of ascertaining whether or not there was any or sufficient evidence upon which a conviction should have been made. Consequently the only ground relied upon was No. 17, which reads as follows:—

"The convicting magistrate wrongfully and unjustly refused to grant an adjournment to permit the accused to secure the attendance of certain witnesses residing in Fernie, British Columbia."

This in effect means that the defendant was denied the right of full defence due to said refusal by the magistrate to grant such adjournment.

Section 715, sub-sec. 1, of the Cr. Code applicable to proceedings under the Liquor Act enacts:—

"The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence

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thereto and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf."

I agree with the judgment of Beck, J. (delivered in Chambers) and of McCarthy, J., on appeal in *Rex* v. *Dominion Drug Stores Ltd.* (1919), 44 D.L.R. 382, 30 Can. Cr. Cas. 318 and 31 Can. Cr. Cas. 86, 14 Alta. L.R. 384, that the refusal by a magistrate to the defendant of an adjournment under circumstances entitling the accused to an adjournment prevents the opportunity to make a full answer and defence to the charge and that as a consequence the magistrate loses his jurisdiction.

The authorities are so fully reviewed and set out in the judgments above mentioned, I cannot see that any useful purpose would be served by a repetition of them here as they can be so readily referred to.

At the conclusion of the argument I was inclined to the view that the defence in asking for any adjournment was merely captious and insincere. Since reading the appeal book however I am bound to say that I think my first impression was a too narrow one.

As pointed out above, the recent judgment in *Rex* v. *Nat Bell Liquors, supra,* of course prevents the Court on *certiorari* from looking at the evidence to ascertain whether or not there was any evidence upon which the accused could have been properly convicted, but I see nothing in the decision which prohibits its examination for other purposes, such as to be able to say whether or not the magistrate was acting fairly and justly in refusing an adjournment. I therefore think it advisable to state the material facts as briefly as possible.

The accused lives at Blairmore and is apparently engaged in the sale of soft drinks. A brewery at Fernie, B.C., manufactures this class of goods. Fernie is distant 45 miles by rail from Blairmore, and the two towns are connected by telephone and telegraph. The accused admits he ordered a carload of assorted soft drinks from said brewery, and on January 11, 1922, car No. 282,232 arrived at Blairmore consigned to "Thomas Smith" by "Thomas Smith," Fernie. The bill of lading was presented to the agent of the railroad by the accused who admits that the car was intended for him, but he does not give a very satisfactory explanation of the use of the name "Thomas Smith." Apparently without official permission from the agent the accused broke the seal of the car and instructed his son to enter and unload the goods. After they had hauled away a certain quantity they reported to the defendant the fact that the

remainder did not appear to be the kind of goods expected, that is, soft drinks, with the result that the defendant decided to leave it in the car and to re-ship it and either he or somebody else actually resealed the car. About this time, however, it is not clear just when, the police became suspicious, obtained a search warrant and had the car re-opened and seized what was found therein, consisting of seventy-one barrels containing bottled beer and twelve kegs of draft beer. On analysis it was found that all of this liquor was over 2½ per cent. alcoholic strength.

Certain witnesses testified that the accused admitted the goods were his, but he denies this and suggests that he merely intimated that the car was his. I think the evidence shews that there was plenty of room for a misunderstanding on this point. I gather that his defence in substance was that he was not responsible for the presence of this particular liquor and that he ordered only soft drinks and that the other came there through no fault of his. There is, of course, much that might arouse the suspicions of the magistrate with regard to this testimony. At any rate, it was to prove this fact that the defendant was desirous of procuring the attendance of witnesses from Fernie and was the reason for the requested adjournment.

It is, I think, well that I should set out what appears in the appeal book and also what the magistrate himself wrote down during the trial. The following appears in the printed appeal book:—

"....., *which closed the prosecution.*"

Mr. Harris applied for an adjournment until next Thursday for seven days for the purpose of obtaining witnesses from Fernie for the defence. The Crown strenuously opposed any adjournment whatever and the Court gave an adjournment until Saturday for the purpose of allowing the Defence to obtain witnesses from Fernie, consequently Mr. Harris asked the adjournment be held over and the case go on tomorrow, Friday, at 2 p.m.

Defence.

"Mr. Harris produced an Affidavit signed by the Defendant relating to the fact of his inability to obtain witnesses from Fernie. Adjournment refused beyond Saturday and the case will proceed."

Affidavit filed by Mr. Harris at the request of the Court, also requested by Mr. MacDonald, Crown Prosecutor.

"Mr. Harris asked that the adjournment be given until Tues-

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day, the Court did not acquiesce owing to the inability of the Crown to be present."

The following is a copy of what the magistrate entered in his own handwriting:—

"Mr. Harris asked for an adjournment to Thursday, February 16, for the purpose of obtaining witnesses for the defence from Fernie, B.C. Counsel for prosecution strenuously objects. The Court grants an adjournment until Saturday, February 11th, at 10.30 a.m., for to allow defence time to get their witnesses. Mr. Harris declines this adjournment and asks that the case come on Friday the 10th February 2 p.m. Court adjourned at 9 p.m. until 2 p.m. Friday, February 10th, 1922. Mr. Harris produced an affidavit sworn by the defendant and asked for an adjournment to Thursday, February 16, 1922. The affidavit filed on request of the Court. The Court offers adjournment for one day only. The defence refuses, so case goes on. The defence cannot guarantee the attendance of witnesses if case is adjourned."

In his affidavit the defendant states, among other things:—

"That on or about the 11th of January I had taken twenty-nine barrels of aerated waters, consisting of sodas, ginger ale, lemon sour, iron brew, and other species of soft drinks from the car on the Canadian Pacific railroad tracks at Blairmore. I had previously arranged for a carload of aerated waters, commonly called soft drinks, to be shipped to me from The Fernie Brewing Company from Fernie, B.C. This car I understood was the car which I had ordered, but on opening it I found only twenty-nine barrels of aerated waters in it. These twenty-nine barrels I took delivery of. I refused to take delivery of the balance of said car and never did take delivery of same. I caused the Canadian Pacific Railway to be notified that I refused to take delivery of same, that the balance of the car must have been shipped by mistake and requested the C.P.R. to re-ship the balance and send back to the shipper at Fernie.

When the summons herein was served upon me I considered the same was with reference to the twenty-nine barrels taken by me from the said car and I prepared my defence according to that belief. Yesterday when the case came on for trial I was taken by surprise by the efforts of the prosecution to hold me responsible for the balance of the goods contained in the said car other than the twenty-nine barrels. The evidence for the prosecution appears to be regarding the balance of the said contents of the car and not regarding the said twenty-nine

barrels accepted by me. The balance of the said car over the twenty-nine barrels was not my property. It was never accepted by me. It was never delivered to me, and I never attempted to take delivery of the same, and I did not consider when served with the summons in this matter that the summons had any reference to the balance of the contents of said car other than the twenty-nine barrels. After the evidence for the prosecution I concluded, on the advice of my solicitors, that it was necessary and material for my defence and in the interests of justice that I should obtain, if possible, the evidence of two or more witnesses resident in Fernie, namely, the manager of the Fernie Brewing Company and their shipping agent or clerk in the service of the said company, and on the conclusion of the evidence for the prosecution about eight or nine o'clock last night I caused my solicitor to ask for an adjournment of this case to enable me to produce the said witnesses, if possible. An adjournment was accordingly granted until 2 o'clock this afternoon, with the understanding that if I would have the said witnesses here on Saturday, tomorrow, the case would be further adjourned until tomorrow, that no further adjournment would be granted. I have today telephoned to the manager of the Fernie Brewing Company at Fernie and explained to him my desire to have him and the other person employed in the company responsible for the said shipment to attend here tomorrow to give evidence. I was informed by the said manager over the telephone that it was very difficult to get away on such short notice, and he did not think it was possible to come, but that he would let me know later in the day if he and his employee could come or would come. I have on two occasions since then endeavoured to get into communication with the said manager to ascertain definitely what his arrangement was but have been unable to reach him on the telephone. On both occasions the answer to my call was that he was absent from his office and that the telephone person could not catch him. The last call made by me was exactly two minutes to two o'clock p.m. this day."

The case then proceeded and was later concluded, resulting in a conviction.

It will be noticed that there is nothing in the magistrate's own notes indicating that the reason for his refusal to grant an adjournment was the inability of the Crown counsel to be present, but this does appear in the notes of the stenographer and I think is in all probability correct.

Whatever one might think about the guilt or innocence of the

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accused I am not so much concerned. It was, of course, possible that he might never be able to procure the attendance of the witnesses who resided in the Province of British Columbia, but there is no certainty that he would not have been able to do so. An important principle is at stake, and whilst we might be satisfied that no injustice was done in this particular instance, nevertheless if the principle is departed from a great injustice might happen in a case of some other innocent person.

I do think that under all circumstances he should have been afforded every reasonable opportunity to establish his alleged defence. Had these witnesses been within the jurisdiction of the Court it might well be that the following Saturday would have been quite sufficient time for him. They were however not subject to subpoena which made it much more difficult for him to produce them. Consequently I think the magistrate erred in denying the defendant a longer time to accomplish this purpose.

From the material before us I am inclined to the view that the supreme thought in the mind of the magistrate was to accommodate the Crown. That, of course, is an entirely erroneous attitude. What I think he should have kept steadily in view was justice and fairness to both sides. The Crown is, of course, entitled in all cases to the greatest respect, but to no more consideration than the accused; in fact, in theory, at least, as I have always understood it, the Crown seeks only the utmost fairness and justness and, in fact, prefers that if a magistrate should err that it be in favor of an accused person.

Now, in this case the trial opened on a Thursday and the prosecution concluded on the evening of the same day. The accused then asked for an adjournment for one week. This was strenuously opposed by the Crown and the magistrate offered Saturday. The accused declined to accept this and the trial was adjourned until Friday. On that day the affidavit already referred to was read and an adjournment requested until the following Tuesday. This was refused on the only ground apparently that the Crown prosecutor could not attend and the defence was, in effect, told to either take it or leave it.

I am quite at a loss to appreciate the reasons for such haste. No prejudice could result. The matter was of the greatest concern to the accused. The reason given by the magistrate was not one which evinced a mind intent only on doing justice, but rather to please the prosecuting counsel. That of course is the opposite of justice. I am quite sure that no Judge of the

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Supreme or District Courts would under similar circumstances refuse an adjournment.

In criminal cases I think it has been the practice at least for the Court not to be astute to convict, but it is astute to see that every possible, reasonable chance for a full defence is accorded a prisoner.

What I think should have been done here was this; when it was known that it would be inconvenient for the Crown counsel to attend the following week it should have been arranged that the trial stand for one week on the condition that on that date a further adjournment take place until a time, say, in the following week satisfactory to all parties concerned.

Failure to grant the accused this opportunity to make a full answer and defence, in my opinion, was not in accord with natural justice and invalidates the whole proceeding.

I would therefore, for the reasons above mentioned, allow the appeal and quash the conviction, but as I think the magistrate acted under a false estimate of the importance of the Crown's rights, I would give no costs against the magistrate, and would accord him the usual protection. I would make no order with regard to the forfeited goods inasmuch as the accused disclaims any ownership of them, and would allow the law to take its course in that regard.

CLARKE, J.A., (dissenting):—Where a magistrate acts in good faith I think the exercise of his discretion regarding an adjournment of the hearing before him should not be lightly interfered with, even assuming there is power to set aside a conviction on the ground of its improper exercise in *certiorari* proceedings as to which I express no opinion. The local magistrate should be the best judge of such a matter.

Upon the facts of this case I do not feel justified in saying that he did not properly deal with the application to adjourn and I would therefore dismiss the appeal with costs.

Appeal allowed and conviction quashed.

THEBERGE v. GIRARD.

Quebec King's Bench, Guerin, Bernier and Rivard, JJ. May 2, 1921.

CONTRACTS (§ID—62)—REQUEST FOR QUOTATION OF PRICES AS OFFER TO PURCHASE—REPLY GIVING INFORMATION AS OFFER TO SELL.

A telegram sent by one merchant to another simply requesting a quotation of prices, does not constitute an offer to purchase, and a telegram in reply simply furnishing the information requested does not constitute an offer of sale and an action for breach of contract founded on such telegrams will be dismissed.

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Bernier, J.

APPEAL by defendant from the judgment of the Quebec Superior Court in an action for damages for breach of an alleged contract for the sale of goods. Reversed.

Galipeault, St. Laurent, & Co., for appellant.

L. Alphonse Pouliot, for respondents.

BERNIER, J.:—The appellant is a merchant at L'Islet and occasionally deals in potatoes. He has no warehouse, but buys as occasion offers at different places in the country, and when he has a sufficient quantity loads and sells a car at the railway station at L'Islet.

The respondents are Quebec merchants engaged in buying and selling provisions.

On November 18, 1919, the respondents sent the appellant the following telegram:—"Best price for one car good white potatoes. Wire reply."

The next day the appellant sent the following reply, "$1.50 per 90 lbs. f.o.b. L'Islet."

The first of these telegrams did not constitute an offer to purchase. It was merely a simple request for a quotation of price. Nor was the second a proposal to sell. It was merely a categorical reply to a request and nothing more.

However, by November 19, the price of potatoes at Quebec had already increased. The respondents then wished to buy the appellant's goods, and about 4 o'clock in the afternoon sent the following message to the appellant:—"Message received. Accept one or two cars good white potatoes your price f.o.b. Refrigerator car. Wire confirmation."

There was no ground for accepting any offer of sale made by the appellant, whose message was not equivalent to such, but this third message amounted to an offer to purchase, at the price quoted by the appellant, one or two cars of potatoes, which respondents asked should be sent in refrigerator cars in view of the lateness of the season, to protect them from frost.

This last message asked the appellant to confirm—what? The price quoted? No, for the reply was too specific; but it was evidently confirmation of its offer to purchase one or two cars that was asked for, and the goods were to be put in a refrigerator car. This request for confirmation was tantamount to saying, "tell us if we can count on your accepting our offer to purchase one or two cars of potatoes at the price you have quoted us and putting them in a refrigerator car."

Pouliot's last message, dated November 19, was only received by the appellant the following day at about the same time

as another sent by the respondent, which reads as follows:—"Have you received our message, if so, please confirm."

The appellant at once answered:—"Received your message too late, car sold, but can load you a wooden car for Saturday or Monday next at one dollar and twenty-five cents per sixty lbs. f.o.b. L'Islet. This last offer was not accepted.

It has been proved that the appellant had sold the car of potatoes, which he had for disposal, at the price which he had quoted in his reply, to a Mr. Coristine at Montreal by contract made over the telephone. This proved his good faith.

The offer to purchase contained in the respondents' second and third telegrams was, therefore, never accepted. It could no longer be accepted, for market conditions had changed on November 19. If the respondents had telephoned the appellant on receipt of his message on the 19th, they would have had the same opportunity as Coristine, who used this more expeditious means of arranging matters.

At that time, in the autumn of 1919, prices of provisions varied from day to day and even many times in the course of a day. It was for the respondents to exercise the greatest possible diligence to carry out the transaction which they knew, on the afternoon of the 19th, must bring them a considerable profit in view of the sudden rise of the market.

A contract of sale in commercial matters is subject to the same essential conditions as a civil contract of sale. The consent of the parties is always necessary. If the appellant had first telegraphed the respondents as though to a possible purchaser, quoting his prices with a view to selling his goods, his telegram might have constituted an offer to sell; but such was not the case.

The respondents have quoted authorities to the effect that when a merchant announces by means of circulars, notices and in newspapers or elsewhere that he has goods to sell at such and such a price, such publication constitutes an offer of sale and binds the vendor.

This theory is correct in principle; but it is also admitted that there may be exceptions resulting from particular circumstances as, for example, the exhaustion of the vendor's stock of goods, and also the sudden rise in the market price of articles of commerce.

In the present case, we are confronted with no such situation. The appellant answered purely and simply a particular question asked him as to his sale price. His telegram could only be interpreted as a simple reply and nothing more.

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A communication made by the person who receives this information regarding prices, to the effect that he accepts the price and gives an order for a certain quantity of goods, merely constitutes an offer to purchase. This offer does not bind the vendor, or the person who replied by quoting his price, unless he has subsequently accepted.

The authorities cited by the appellant are *ad rem*.

I would reverse the judgment of the Court of first instance with costs.

RIVARD, J.:—The telegram of November 18 sent by the respondents to the appellant, reading as follows:—"Best price for one car good white potatoes. Wire reply," did not constitute an offer to purchase.

Did the appellant's reply, dated November 19, "$1.50 for 90 lbs., f.o.b. L'Islet," constitute a quotation of price or an offer of sale?

The terms of this latter telegram reveal nothing beyond a quotation of price furnished by the appellant. In default of proof of a well established custom, an agreement to sell cannot be read into it when no offer to purchase had yet been made. But did this telegram of November 19 constitute an offer of sale? To interpret it in this manner it would be necessary to consider the quotation of the price of the goods in which one deals as equivalent to an offer to sell. The respondents quote French authorities on this point in order to shew that dealers who publish in circulars, prospectuses, price lists, or notices, the conditions upon which they do business, are permanently in the position of making an offer to the public so long as they have not withdrawn their proposals (Beaudry-Lacantinerie, "Obligations," No. 30). It is added that this withdrawal may take place tacitly, and may result from circumstances. Beaudry-Lacantinerie quotes with approval an article of the Chilian Commercial Code, which reads as follows:—

"The act of sending advertisements to individuals always involves the implied condition that the articles offered should not have been sold when demand is made, that the price should not have varied and that they should be at the domicile of the person making the offer."

Valery (Des contrats par correspondance, No. 225 *et seq.*), after shewing that a valid offer may be made by a trader by means of advertisements, circulars and price lists, and that a contract may result from the acceptance of such offers, adds also that, in order that there may be a meeting of minds, it is necessary that the offer be still intact at the moment of ac-

ceptance and that such offer may have been modified by special circumstances of such a nature that the person seeking to purchase must be considered as not having persisted in his original desire. An unforeseen occurrence having the effect of raising the price of the goods offered would be sufficient to release the vendor from any obligation without his being obliged expressly to withdraw his offers. I do not believe that the telegram of November 19 sent by the appellant could be treated as an offer of sale. But, even if it had to be so interpreted, it would be necessary to consider the fact that prices had increased before the offer was accepted.

In any case, I am of opinion that the telegram sent by the appellant on November 19 did not contain an offer of sale. that consequently the respondents could not send the appellant an acceptance of such a nature as to complete a contract by their subsequent telegram.

The appellant's telegram dated November 19, was a simple answer to a request for information. If it further implied an intention to do business it did not constitute an offer of sale. The first regular proposal made between the parties was contained in the message whereby the respondents alleged to accept one or two cars. That was rather a proposal to purchase than an acceptance, and the proposal was not accepted.

Consequently, there is no contract and I am of opinion that the judgment of the Superior Court should be reversed with costs.

Judgment:—

Considering that the respondents' telegram dated November 18, 1918 and addressed to the appellant was a simple request for a quotation of prices for a car of potatoes and did not constitute an offer to purchase; that the appellant's telegram dated the following day did not constitute an offer of sale, but was simply a reply furnishing information requested; that respondents' subsequent telegram agreeing to purchase one or two cars of potatoes, to be loaded in a refrigerator car, at the price quoted by the appellant, constituted an offer to purchase; that this offer was never accepted by the appellant; that in view of the sudden increase in the market price on November 20, the conditions were no longer the same and that the appellant sent the respondents a reply to the effect that he could fill them a car of potatoes at a greater price than the former; that there was never any contract of sale between the parties and that the appellant therefore owes no damages to the respondents; that there is error in the judgment rendered by the Court of first instance.

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The Court maintains the present appeal, reverses the judgment of first instance, and, proceeding to render the judgment which should have been rendered, dismisses respondents' action with costs of both Courts.

Appeal allowed.

Re HAMMOND.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell and Latchford, JJ., and Ferguson, J.A. December 16, 1921.

WILLS (§IIIA—91)—CHARITABLE BEQUEST—NO NAMED CHARITIES—DISCRETION OF EXECUTORS—GENERAL CHARITABLE INTENT—VALIDITY OF BEQUEST—RIGHT OF SOLDIERS' AID COMMISSION TO ADMINISTER—SOLDIERS' AID COMMISSION ACT, 1916, 6 GEO. V. CH. 3 (ONT.)—AMENDMENT 1917, CH 27, SEC. 60—1919, CH. 25, SEC. 34—CONSTRUCTION—APPLICATION.

Where there is a general charitable intent on the part of a testator, leaving the executors to exercise their discretion as to the particular charities to be benefitted, the gift is a valid one, and will not fail for uncertainty.

A devise of certain capital and securities to be invested in war securities to be selected by the executors and trustees of the testator in their discretion and "which charities are more particularly to do with young war widows who are left widows by the war and need help" is not a devise or bequest which the Soldiers' Aid Commission, as established by the Soldiers' Aid Commission Act, 1916, 6 Geo. V., ch. 3 (Ont.), as amended by 1917, ch. 27, sec. 60, and 1919, ch. 25, sec. 34, is entitled to administer, the bequest not being void for uncertainty as to the persons entitled to receive it, or as to the object to which it may be applied.

[*In re White*, [1893] 2 Ch. 41, followed.]

APPEAL by the Soldiers' Aid Commission of Ontario from the judgment of Middleton, J., on a motion by the executors of a will for an order determining certain questions arising in the administration of the estate. Affirmed.

The judgment appealed from is as follows:—

"The late Mrs. Hammond died on the 22nd September, 1919, at Saranac Lake, New York, being domiciled and having a fixed place of abode at the city of Toronto.

By her will, made on the 23rd August, 1919, at Saranac Lake, she described herself as "of the city of London, England, now temporarily residing at" Saranac Lake. After very many substantial pecuniary and specific bequests to her relatives, and all those who she thought had a claim upon her, her will concludes with the following provisions which have given rise to this application:—

"Twenty-sixth: I give devise and bequeath unto my executors and trustees hereinafter named in trust the remainder of my money (which amounts to something like two hundred thou-

sand dollars ($200,000) consisting of the money coming from Mrs. Hammond by will at her death together with the remainder of my present moneys that is left from my present capital also the dividends and payments coming in from my present securities in the West and the Paradise Mine, to be invested in War Charities at their discretion, these charities to be selected by Mr. de Pass and Mr. Cook, and which charities are more particularly to do with young war widows who are left widows by the war and need help."

The two gentlemen named are by a separate clause appointed executors and trustees of the will. Both of them reside in London, England.

To understand the situation, it may be mentioned that Mrs. Hammond went to England with her husband during the war. After his death at the front, she remained in England, taking an active part in war-work. Her health broke down and she returned to Canada, and went to Saranac Lake in the hope of improving her physical condition, but died there. Before the war she resided with her husband in Toronto. Her husband, a man of considerable means himself, was entitled under his father's will, upon the death of his mother, to funds that had been set aside to provide for her annuity.

Before me several questions of difficulty and importance were argued. First, the next of kin of Mrs. Hammond contend that this gift is too vague and uncertain, and therefore fails, and, as it is residuary, there is an intestacy as to these funds. Second. Mr. Garvey, representing the Soldiers' Aid Commission, contends that the effect of the legislation constituting the Soldiers' Aid Commission is that the whole of this fund passes to his clients for administration. Third, assuming that neither of these contentions is well-founded, is the fund to be administered by trustees for the benefit of war charities in Canada, or have the executors the right in their discretion to use the money for the charities in England which aid young war widows needing help?

A number of minor matters relating to specific devises were argued upon the motion. These were all dealt with upon the argument, judgment being reserved only in the matters that I have mentioned.

The contention of the next of kin is easily disposed of. The gift is to charities, and the fact that the charities are not named, but left to the selection of the trustees, does not interfere with its validity. It is true that the testatrix limits the character to "war charities," but this does not take the case out of the rule. A "general charitable intent" is necessary where there is a

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failure of the particular named charity, but it is not suggested here that there are not war charities enough, nor that there are not war charities enough caring for young and needy war widows.

"A charitable bequest never fails for uncertainty:" *In re White*, [1893] 2 Ch. 41.

The claim put forward by Mr. Garvey must next be considered. His contention is that the result of the legislation is that all such gifts as that now in question go to the Soldiers' Aid Commission, notwithstanding the express wish of the testator.

The Soldiers' Aid Commission was established by the Ontario Soldiers' Aid Commission Act, 1916, 6 Geo. V. ch. 3. The object of the Commission is to grant aid to members of the Canadian Expeditionary Force or Canadian members of the Imperial Forces and to returned men, particularly in the way of training men who are unable to pursue their calling after their return. The Commission is, by sec. 10, to have such further powers and duties "with respect to soldiers returning to Ontario during or after the war" as may be conferred or imposed by order in council "with a view to securing their well-being in such manner as may be deemed advisable."

In 1920, by the Soldiers' Children's Protection Act, 1920, 10 & 11 Geo. V. ch. 29, the Commission is given wide powers with reference to the aiding and protection of the children of any person who has served in the war with His Majesty's forces or the forces of the Allies.

In 1917 (by 7 Geo. V. ch. 27, sec. 60) sec. 7*a*. is added to the original Act, and by it the Commission is given the power to receive gifts, devises, and bequests for the benefit of the classes of persons mentioned in the Soldiers' Aid Commission Act, and it is further provided that when by the will of any person a devise or bequest is made to or for the benefit of any class of persons mentioned in the original Act, or for any object within the powers of the Commission, or for any like purpose, and the devise or bequest is void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, the Commission shall receive and administer the gift.

This being the state of the law down to 1919, in that year, by 9 Geo. V. ch. 25, sec. 34, the statute was amended, and it is upon this amendment that the claim is based. As amended this section (7*a*.) reads:—

"Where by the will of any person dying before or after the passing of this Act, a devise or bequest is made to or for the benefit of any class of persons mentioned in section 4, or for any

object within the powers of the Commission, or for any like purpose, and such will does not specify the particular person, society or institution that is to receive such devise or bequest, or if such devise or bequest is or may be held to be void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, then in any such case the Commission shall be the beneficiary and shall be entitled to receive, administer and dispose of the same, in such manner as the Commission may deem expedient." This "shall apply and take effect notwithstanding that by the terms of any such will the executor or trustee thereunder is directed to distribute such devise or bequest in the discretion of such executor or trustee."

By the amendment the original salutary provision guarding against the failure of the benevolent intention of testators, by reason of uncertainty arising from the use of vague and indefinite terms, becomes a retroactive Act, doing violence to the wishes of the testator and confiscating the funds which he has set apart, taking them for the benefit of the Government of the Province, which would otherwise have to provide the funds necessary for the carrying on of the work of the Commission. This Act is probably without a parallel in the history of legislation, and calculated to discourage all attempts on the part of testators to confer benefits upon the returned soldier.

A Department of the Government carrying on even the most beneficial work does not commend itself to the charitable instincts of testators, particularly since the burden of charitable institutions upon the Government was put forward as the justification of the Succession Duties tax (R.S.O. 1897, ch. 34, preamble).

The claim now made therefore calls for the closest scrutiny.

The answer to it is, I think, plain. This will does not come within the term of the Act. The gift is to the trustees for the benefit of "war charities," particularly those having "to do with young war widows who were left widows by the war and need help." I have no doubt that all institutions that care for the returned soldier are war charities, but there are many other charities and institutions that fall within that description. The Act applies only to gifts for the benefit of returned men; and, even if the Act of 1920 is to be considered, it only adds their children to the class to be benefited. This gift is in much wider terms than the statute and covers all war charities. The direction with reference to young war widows shews that the primary wish of the testatrix was not to benefit the returned soldier, but to benefit the widow of the man who did not return or who died after returning.

There remains the question whether the charities are to be

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those in the Province only, or whether the executors may name English charities.

I can see no reason why this lady may not have intended her executors and trustees to have full discretion, nor why I should read into this will any restriction or limitation. She was, it is true, domiciled in Ontario, but she describes herself as of London, England. She had lived in England for some years, and had taken an active part in war-work there, and reposed her confidence in two English gentlemen. I can see no reason for imposing any limitation upon the unfettered discretion she has given her trustees in the choice of the war charities to be benefited.

The executors and the Official Guardian may have their costs from the estate. I can see no reason for allowing the next of kin or the Commission any costs out of this fund.

C. M. Garvey, for the appellants.

W. Lawr, for the National Trust Company, representing the executors of the will of Kathleen Saunders, deceased.

MEREDITH, C.J.C.P.:—Notwithstanding all that has been said, this case, as far as we are rightly concerned in it, is quite an uncomplicated one, and is altogether comprised within a narrow compass; and, indeed, is fully embraced in the single question: has provincial legislation changed the trustees of this will in regard to the "war charities?"

Among many things done by this Province for the benefit, directly and indirectly, of those connected with it who served their country in the recent war, it created a "Soldiers' Aid Commission," in connection with and as "a branch sub-committee" of its "military hospital committee," "to take care of and find employment for" such persons and "to assist, advise, and co-operate with" the military hospital commission, "and with all provincial or local committees or organisations, to attain the aforesaid objects, and to do all things which may be incidental and ancillary to the foregoing." This was done in 1915, and was confirmed by provincial legislation in 1916: The Soldiers' Aid Commission Act, 6 Geo. V. ch. 3 (O.)

The work of the Commissioners was to be done without remuneration: and it seems to have been so well done, and to have been so beneficial, that the powers of the Commission were from year to year extended by like legislation.

In 1917 they were given power to receive, administer, and dispose of gifts, devises, and bequests for the benefit of persons belonging to any of the classes mentioned in the earlier legislation; and to acquire cemeteries for the burial of such persons:

and this enactment further provided for the administration and disposal of devises and bequests for the benefit of such persons, or for any object with the powers of the Commission, *or for any like purpose*, by the Commission, in cases such as I shall presently more fully state: 7 Geo. V. ch. 27, sec. 60 (O.)

In 1919, their power was again extended, as I shall also presently more fully set out: 9 Geo. V. ch. 25, sec. 34 (O.)

And again, in 1920, still further power was conferred upon them: this legislation relates altogether to children of any person "who served with His Majesty's forces or the forces of any of the Allies of His Majesty in the late war," and gives very wide power to the Commission as to them. It is helpful on the question involved in this appeal in making plain the usefulness of the Commission, and the confidence of the Legislature in its honorary members, and that its usefulness was not to be employed only for the benefit of the men individually, but was to be extended to their families: The Soldiers' Children's Protection Act, 10 & 11 Geo. V. ch. 29 (O.)

Putting all this legislation together, in so far as it affects the question involved in this case directly, and using only the words of the Legislature, but using all their words, it is as follows: "60 (2). Where by the will of any person dying before or after the passing of this Act, a devise or bequest is made to or for the benefit of any class of persons mentioned in section 4, or for any object within the powers of the Commission, or for any like purpose, and such will does not specify the particular person, society or institution that is to receive such devise or bequest, or if such devise or bequest is or may be held to be void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, then in any such case the Commission shall be the beneficiary and shall be entitled to receive, administer and dispose of the same, in such manner as the Commission may deem expedient. 34 (2). Sub-section 2 of section 7*a*. aforesaid as amended by the next preceding section shall apply and take effect notwithstanding that by the terms of any such will the executor or trustee thereunder is directed to distribute such devise or bequest in the discretion of such executor or trustee."

If it be of any consequence what the thoughts of any Judge may be as to the merits or demerits of any legislation which he is judicially called upon to interpret or enforce, then I am bound to say that I can perceive nothing objectionable, not to speak of confiscatory, in this remedial, and, I feel bound to add, beneficent, legislation: its very plain main purpose is: to aid and com-

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fort those who went forth to fight for their country: to aid and connected with a man than his wife; and none, ordinarily, that, through a body of prominent gentlemen, competent as any can be, and who give their services gratuitously: services which must hitherto have been successful and very satisfactory, else the public through their representatives in the Legislature should not have continued them, and added to their powers from year to year. The provisions for saving gifts which the Courts might destroy upon what many might think "legal technicalities," should be deemed praiseworthy by even the Judges who were the destroying implements.

But, leaving unmentioned other remedial and praiseworthy features of this legislation, let me come to this very instance, and ask what can there be that is reasonably objectionable, if the administration of the "war charities" in question were taken out of the hands of the two executors of the will and placed in those of the Commission?

It can hardly be said that these two gentlemen, whether they have or have not had any kind of experience in such things, are the more competent trustees: it is quite out of the range of possibility that their experience, if any, can be comparable to that which the gentlemen of this Commission have had and are having; and so too of the knowledge which experience brings. Nor can it be good, or indeed anything but bad, that there should be many trustees dispensing many charities, in the one field, which one Commission can alone better cover. Very many trustees must be paid for that which one Commission could much better do for nothing. "Overlapping" must occur with numerous trustees. Idiosyncracies of many individuals may be given full play: whilst if trustees have any real knowledge of that which is best, or which the giver desired, they have only to communicate it to the Commission so that the fullest weight may be given to it. And it is quite erroneous to assume that the giver would object to a change of trustees; indeed, if fully informed, it is hardly likely that the less efficient and more costly should be preferred to the more efficient and less costly. The purpose of the giver is not to benefit the administrator of the gift, it is to benefit those who are the object of it.

So, too, it must not be forgotten that all Courts and Judges are under legislative command to treat these enactments as remedial legislation and to give them "such fair, large and liberal construction and interpretation as will best ensure the object of the Act, and of the provision or enactment, according to the

true intent, meaning and spirit thereof." So too we must not forget that Courts and Judges frequently change trustees in the interests of the trusts: and should hardly grumble at the highest Court doing so. Foreign and non-resident trustees are not favoured; indeed remaining out of Ontario for more than 12 months is by legislation in this Province made a ground for the removal of a trustee.

Then, returning from this disgression, which seemed to me to be needful, having regard to the wide scope of the argument here and in the Court below, to the question whether this case is within the legislation, to which I have referred, I am obliged, after some hesitation, to say that I am not convinced that it is.

I have no doubt that the words "or for any like purpose" are wide enough to bring "war charities," "more particularly to do with young war widows who are left widows by the war and need help," within these enactments. There is none more closely connected with a man than his wife; and none, ordinarily, that, in view of his death, he strives harder to benefit, and to have cared for, after his death. In these things man and wife are one, she benefits generally as much as, often more than, he, from bounties such as those administered by the Commission: how then could it be said that a continuance of the bounty to the wife after the husband's death, when it should be all the more needed for his children as well as his widow, is not "any like purpose?"

But there is nothing in any of the enactments, except the words "or any like purpose," to indicate that wife or widow could be benefited directly; and children are not brought in until the year 1920, and then by legislation expressly doing so. But that which perhaps has most weight in my mind upon this question is: that in the enactment in which the words "for any like purpose" appear—sub-sec. 2 of sec. 60—that sub-section is immediately preceded by another (1), which gives the Commission power to receive and administer gifts, but only for persons mentioned in the enactment of 1916, which does not include wives or widows or any one of the female sex: and that sub-sec. 2 is immediately followed by another sub-section (3) in which the power in regard to cemeteries is conferred on the Commission, but only expressly for the burial of persons belonging to any of the classes mentioned in the enactment of 1916: though it can hardly have been meant that neither wife nor child should be buried near husband and father; yet there is no authority to the Commission to bury them, or to acquire a cemetery for their burial.

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I am therefore in favour of dismissing this appeal; but should do so without costs. The Commission is performing an important and onerous public duty gratuitously: the will and the enactment together made it their duty to test the question whether the administration of the bounty in question should be undertaken by them: it was anything but plain that if they did not undertake it they should be guilty of a dereliction of duty. The case seems to me therefore to have been one in which they should have been allowed their costs in the Court below: but they were not, no doubt by reason of that which I consider an erroneous view of the character of the legislation in question. No question was raised as to whether the legislation in question is inapplicable to these trusts by reason of their extra-territorial character in part or otherwise: therefore it has received no consideration.

RIDDELL, J.:—I have read the statutes bearing upon the Commission and have carefully considered them in their relation to the provisions of the will in question: and I agree in all respects with the judgment appealed from. The appeal should be dismissed; but, both parties agreeing, there will be no costs.

LATCHFORD, J.:—It was the clearly expressed intention of the testatrix that the residue of her estate should be applied by the particular trustees whom she appointed for the benefit of war widows like herself, and not for the benefit of any of the classes mentioned in sec. 4 of the Soldiers' Aid Commission Act.

The amendment of 1917 does not assist the appellants, whose claim to the funds is, in my opinion, absolutely devoid of merit.

I would dismiss the appeal.

FERGUSON, J.A., concurred.

Appeal dismissed.

FAGUY v. CARRIER.

Supreme Court of Canada, Idington, Anglin, Brodeur and Mignault, JJ. May 2, 1922.

GUARDIAN AND WARD (§II—10)—TUTOR—PROMISSORY NOTE—DEBT OF ESTATE—JOINT LIABILITY—CONSIDERATION—INTEREST.

A tutrix has the right in her administrative capacity to execute a promissory note in acknowledgment of a debt of the estate for necessaries furnished to the minors or wards, and thereby charge the latter with joint liability upon their attaining majority.

The consideration supporting the debt, to the extent of the benefits derived thereby, will support the liability on the note, and cannot, therefore, extend to an amount included as interest on the debt not legally due.

LIMITATION OF ACTIONS (§IVC—165)—ACKNOWLEDGMENT OF DEBT—PROMISSORY NOTE.

A promissory note is a sufficient acknowledgment of debt interrupting prescription of the debt for which it was given.

APPEAL by plaintiff from a judgment of the Court of King's Bench of Quebec in an action on a promissory note. Reversed.

Jolicoeur, for appellant; *Gelly*, K.C., for respondent.

IDINGTON, J. (dissenting):—The legal consequences of our allowing this appeal would lead to very remarkable results in law and be most unjust. I think the appeal should be dismissed with costs.

ANGLIN, J.:—With some hesitation I accept the views of my brothers Brodeur and Mignault that the defendants are liable each for an equal part of the indebtedness of the plaintiffs.

I have no difficulty in finding that there was an interruption of prescription in 1912 for the reasons fully stated by my brother Mignault, and I also agree that there was a second interruption when the 1915 note was given.

On the question of interest, unless we impute to the tutrix an intention to do a distinctly unwarranted act in including arrears of interest in the note which she gave in 1915, it would seem to be a reasonable implication from her having done so that she then recognised liability for such arrears either because of a demand for payment having been made in 1912 (arts. 1077 and 1067 C.C. (Que.), or because of a promise then given to pay interest in consideration of the creditors' forbearance. I am, therefore, disposed to assent to the view of my brother Brodeur, shared by Martin, J., and, as I read his opinion, by the Chief Justice of Quebec, that interest at the legal rate of 5% should run from the date of the acknowledgment of 1912.

BRODEUR, J.:—This is an action on a promissory note signed July 30, 1915, by Mrs. Carrier, as tutrix to the three defendants-respondent, who were minors at that time, but had reached the age of majority when the action was taken. Omer Carrier, the father of the three defendants, died in 1897 leaving a wife and three children. It is not known whether Omer Carrier and his wife were separate or common as to property. In any event the latter had a claim of $6,000 against her husband's estate.

Joseph Edmond Roy, notary, was appointed tutor to the three minor children of Omer Carrier in 1897. These children continued to live with their mother. With the consent of their tutor an account was opened with the plaintiffs-appellant in favour of these minors in the name of "Succession Omer Car-

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rier." Appellants are dealers in novelties at Quebec and carry on business under the name of Faguy & Lépinay. It appears that the estate was financially embarrassed, its principal asset being a forest reserve which could not have been sold at that time except at a sacrifice, and that it was necessary to seek credit in order to obtain the means of subsistence for the children and their mother.

It is true that the widow Carrier might have taken judgment against her husband's heirs and had this forest reserve sold; but that would have advantaged no one, for it is quite possible that the property would not have realised enough to pay the claim of $6,000, and it was better, both for her and her children, to wait for better times.

The tutor Roy, charged with the administration of the estate, considered himself obliged as a prudent administrator to open an account with the plaintiffs and to make payments to them on account from time to time as the revenues of the estate became available. He seems to have also handled Mrs. Carrier's affairs, and he used her money in making payments to the appellants. In this account were included the articles necessary for the upkeep of the common domicile of the mother and children and the effects which Mrs. Carrier and the children needed for their personal use.

In September, 1911, the plaintiffs ceased making advances of merchandise and the account was apparently closed with a balance of $1,705.53. About 1 year afterwards, namely, August 1, 1912, Joseph Edmond Roy, who was employed at Ottawa, resigned office as tutor and was replaced by Mrs. Carrier.

A short time afterwards, the plaintiffs called upon the tutrix to pay this account of $1,705.53 due by the estate; but she asked for delay, and says in her testimony, "There was an understanding with Lépinay's office that the account should be paid when the estate should be in funds, which event could not take place because of certain law suits which the estate had pending with the Bank of Montreal."

In July, 1915, the estate being still unable to pay this account, the tutrix, Mrs. Carrier, was obliged to ask for further delay from the plaintiffs, who took from her a note which forms the basis of the present action and which she signed as tutrix to her three minor children.

This note was for a sum of $2,413.56 and covered the balance of the above mentioned account, $1,703.53, and interest at 7% amounting to $708.03. It was stipulated in the note that it should bear interest at the rate of 7%.

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The defendants Carrier when they came of age refused to pay this note with interest and were sued in May, 1920, by the appellants Faguy *et al*, who claim from them a sum of $3,030.67, the amount of the note in principal and interest.

Defendants then asked for particulars which would shew the consideration for the note and the plaintiffs produced the account shewing a balance of $1,705.54 in 1911, which, with accrued interest, made the amount of the note sued upon. The points in issue are to determine:—1. If the tutrix could sign the note; 2. If the defendants received good and valuable consideration; 3. If they can be condemned jointly and severally to pay the debt.

1. As regards the right to sign a promissory note, I refer in the first place to sec. 47 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, which states that the capacity to bind oneself as a party to a bill of exchange is co-extensive with the capacity to contract. It seems to me that a tutor has a perfect right to sign a note recognising the existence of a debt in order to obtain delay.

It is an act of good administration on the part of the tutor to give a note when his pupils' assets cannot easily be realised and it is advisable to postpone the sale of the assets to a later date. In the present case, we have an estate whose principal asset was the object of litigation before the Courts. I consider that the tutrix, Mrs. Carrier, was not exceeding her powers in signing a note which enabled her to keep her creditors waiting until better times should appear.

Article 290 C.C. (Que.) imposes upon a tutor the obligation to administer the affairs of the minors "*en bon père de famille*"; and if his administration is faulty he is responsible for any damages which may result. The tutor was obliged to have registered the legal hypothec to which the assets are subjected for the protection of the pupil (arts. 2030 and 2117).

Along with this obligation imposed upon him the tutor is allowed certain latitude in the exercise of his functions, and those who do business with him as tutor are entitled to count upon this. Section 52 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, gives implicitly to the tutor the right to have recourse to promissory notes if that would be the act of a good administrator in similar circumstances.

The evidence before us is not very complete, but it is certainly sufficient to enable us to say that the tutrix was quite justified in giving a note in acknowledgment of the debt due to the plaintiffs. It would have been otherwise if the account had been

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prescribed in 1915. She would certainly not have been entitled to revive a debt which had been extinguished. That would not have been an act of administration, but the acknowledgment of this debt, which Mrs. Carrier had made shortly after her appointment as tutrix, was valid and had the effect of interrupting prescription (C.C. art. 2227).

2. Consideration. Was the note given for good and valid consideration. This leads us to inquire if the tutor Roy acted as a good administrator in opening the account with the plaintiffs, Faguy and Lêpinay. If we had before us all the documents relating to the administration of this estate or tutorship, as the marriage contract, the inventories, the facts and circumstances respecting the assets and liabilities of the administration, and the authorizations which may have been given under art. 290a C.C. (Que.), we would perhaps be in a better position to judge if the tutor Roy acted as a good administrator in opening an account with the plaintiffs in order to provide his pupils and their creditor, their mother, with the necessaries of life, but we must not blame the plaintiffs, because all the circumstances will be easier of determination when the tutor or tutrix renders account to the appellants. If the tutor or tutrix has in fact caused damages by bad administration, the parties will have respectively the recourse provided by law. This question may be determined more easily and equitably when the tutrix renders account than it can be in an action brought by a creditor against the pupils after the latter have attained their majority.

The tutor was a man of good reputation and sound judgment. He appears to have acted in the best interests of his pupils; and the pupils, should, therefore, carry on their disputes respecting their account with him or with their tutrix and not with the plaintiffs who had good reason to believe that the tutor and tutrix were acting within the limits of their mandate.

The tutor Roy had to pay Mrs. Carrier the $6,000 which the pupils owed her; and if he considered it more expedient to pay it partially by means of this account opened with plaintiffs Faguy *et al*, it seems to me that the latter should not suffer from what might be considered an act of good administration, especially if, as Mrs. Carrier declares in her testimony, a large part of the assets were absorbed for the benefit of the minors.

The same may be said of the acknowledgment of the debt, given by the tutrix in 1912 or thereabouts, which interrupted prescription. If she could validly acknowledge by means of the note the existence of this debt and thereby interrupt pres-

cription and so bind herself to pay at a rate of interest greater than that accorded by law, could she incumber her pupils with a new obligation or a debt for which they received no consideration?

From the moment when putting in default took place through demand of payment (arts. 1067 and 1077 C.C. (Que.)) the defendants owed legal interest on their account, but their tutrix could not oblige herself to pay any more than legal interest, in default of certain circumstances which might make this obligation an act of good administration. Such circumstances do not appear in the record.

I agree in this respect with the opinion expressed by Lamothe and Martin, JJ. The note should not have been signed by the tutrix for more than $1,961.28.

3. There remains the question of solidarity.

Can the three defendants be held jointly and severally liable for the payment of this account for $1,705.53 with interest at 5% from the time when payment was demanded? I do not think so. The debt was contracted in the name of the Estate Omer Carrier and that implies a joint, not a joint and several, obligation upon the heirs.

As a general principle, the debts of a succession do not bind the heirs beyond the amount of the share of each. All the heirs contribute to the payment of the debt, each one in proportion to his share in the estate (art. 736 C.C. (Que.)). The three defendants were heirs in the same degree and must, therefore, discharge this debt in equal shares. It is quite possible that each of them may not have benefited from this account to exactly the same extent; but that may be settled by accounting proceedings between them. As far as the plaintiffs are concerned, one third of the debt may be recovered from each of the three heirs.

Joint and several liability is not presumed (art. 1105 C.C. (Que.)). It applies, it is true, to commercial matters; but in the case of sales by a merchant to a succession, it is presumed that the merchant intended his claim to be a joint obligation only, not joint and several.

For these reasons, the appeal should be maintained with costs of this Court and of the Superior Court. Costs of the Court of Appeal should be granted to the plaintiffs Carrier because they were obliged to bring their case before this Court to obtain relief from the joint and several obligation declared against them by the Superior Court. Judgment should be rendered in favour

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of the plaintiffs against the defendants jointly for the sum of $2,195 with interest from the time of bringing action, which sum would be calculated as follows:

	Balance of account	$1,705.53
1915		
30 July	Interest at 5% to the time when the note was signed	$ 255.75
		$1,961.28
1919		
25 Oct.	Interest on the note to date	$ 200.00
		$2,323.73
	Cr.	
	By cash	$ 200.00
		$2,123.73
1920		
May 27	Interest to date	$ 71.27
		$2,195.00

MIGNAULT, J. (dissenting in part):—A considerable number of legal questions are raised in this case, but I think it may be decided according to its particular circumstances, as Lamothe, J., said, without considering matters of principle.

The appellants are dealers in novelties in Quebec and the late Omer Carrier had an account with them in his lifetime. Omer Carrier died in 1897 leaving his wife, Dame Corinne Hamel and three young children. The former, who did not remarry, continued to keep house with her children after the death of her husband. J. E. Roy, notary, since deceased, was tutor to the children until replaced by Mrs. Carrier herself on August 1, 1912. The family derived an income for some time from the factory of Carrier & Laine of Levis, and the estate owned timber limits which could not be disposed of on account of a lawsuit with the Bank of Montreal. It is not clearly shewn whether or not it was Mr. Roy, the tutor, who continued the account which the late Omer Carrier had opened with the appellants, but after the death of the latter the account was continued in the name of the estate of the late Omer Carrier. Mrs. Carrier made the purchases. Roy paid from time to time, but most of the purchases were for Mrs. Carrier herself or for the household, the articles bought for the use of the children being of comparatively little importance. Mrs. Carrier does not seem to

have had any personal belongings, but she was entitled to $6,000 under her marriage contract and she thought that the notary Roy was paying the account with her money because her husband's estate still owed her this sum. The account with which we are concerned (there had been other previous accounts which must have been paid by Roy) commences November 11, 1907, and was closed September 30, 1911, with a debit of $1,705.53. No payments appear to have been made on account during these 4 years. On July 30, 1915, Mrs. Carrier, as tutrix to her three minor children, signed a demand note for $2,413.56 in favour of the appellants, covering the debt of $1,705.53 with $708.03 for interest. The note itself bore interest at 7%. On October 25, 1919, Mrs. Carrier made a payment of $200 on account, and the appellants sued the respondents, the three children of Mrs. Carrier, who had attained their majority, on May 27, 1920, claiming from them jointly and severally the amount of the note, $2,413.56, with interest at 7% besides, which interest amounted to $816.61 when the action was taken. On demand being made for particulars, they produced the account I have just mentioned. An analysis of the demand made shews that the amount of goods purchased was $1,705.53 while $1,524.64 represents the amount of interest claimed.

That is, briefly, the case we have to decide. The Superior Court granted the appellants the whole amount of their claim. The Court of Appeal reduced the condemnation to the following figures: $22.68, $76.41 and $93.82, with interest from July 30, 1915, due respectively by Camille, Eleanor and Florence Carrier for goods furnished for their respective use, of which the price was not prescribed when the note was signed. Lamothe and Martin, JJ., dissenting, would have given appellants the amount of their account with interest at 5% from the time when payment was demanded.

The first question is to determine if Mrs. Carrier had the right as tutrix to sign the note on which the action is based. That is tantamount to asking if the signing of the note was an act of administration within the power of the tutrix, and it was not such an act if it put the minors in a worse position than before. That is exactly what happened, for the note bears interest at 7% and involves a joint and several liability. I would, therefore, be of opinion that this note cannot serve as the basis of the appellants' action; but, luckily for them, they still have their claim on the account which was not novated by the note. It is, therefore, the account which we must consider.

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There remains the question of prescription, and if the appellants cannot invoke the note signed by Mrs. Carrier, they are in a bad position in this respect. If there had not been interruption of prescription within the required delay, a considerable part of the account would have been prescribed on the day when the note was signed, and the tutrix would not have had the right to renounce prescription already acquired, for she could not alienate the rights of her pupils (art. 2186 C.C. (Que.)). But Mrs. Carrier, in her testimony, admits that after her appointment as tutrix in August 1912 (prescription had not then been acquired), she promised to pay the appellants' account as soon as the affairs of the estate should be settled. This evidence was given without objection on the part of the defence, notwithstanding the right which art. 1233 gave them to object to it. This evidence must, therefore, be taken into account (*Schwersenski* v. *Vinebery* (1891), 19 Can. S.C.R. 243), with the result that there has been an acknowledgment of the debt and a promise to pay. I think it had always been understood that the estate would pay the appellants as soon as it had disposed of its timber limits.

Admitting, however, that the promise made by Mrs. Carrier in August 1912 constitutes an interruption of prescription, there still remains a period of nearly 8 years, for the action was not taken until May 1920. It is true that in October 1919 Mrs. Carrier paid the appellants $200 on account, but the heirs were of full age at that time and she could no longer bind them. If the demand note signed by her is not an evidence of debt on the part of respondents, can it not at least avail as an acknowledgement of the debt sufficient to interrupt prescription?

It is a matter of principle that a note given for an existing debt does not effect novation. The debt continues to exist and may serve as the basis of a legal action. The note is undoubtedly an acknowledgement of the debt and the fact that it cannot serve as a title of claim against one of the parties does not prevent its effect in interrupting prescription, if the acknowledgment of the debt is not itself null. For we are told that the acknowledgment resulting from a judicial act may have the effect of interrupting prescription even when the act itself is tainted with nullity for the nullity does not extend to the acknowledgment itself and is distinct from it. (Beaudry-Lacantinerie et Tissier, *verbo* Prescription, no. 529). There is an interesting decision to the same effect in our jurisprudence where the Court of Review at Montreal held that a remunerative gift was null as being made in contemplation of death and,

nevertheless, served as an interruption of prescription of an account for services which the gift was intended to pay. (*Boucher* v. *Morrison* (1901), 20 Que. S.C. 151; 11 Que. K.B. 129). I, therefore, think that the note in question interrupted prescription of the account.

That being the case, are the three respondents responsible only for the goods purchased for their personal use, as was held by the majority of the Court of Appeal?

Let us consider the situation of this family at the time of the death of Omer Carrier. There were three young children, the youngest born after its father's death, heirs of their father, who died intestate. The widow had no personal property, but only a claim against her husband's estate. The children had in the first place the income derived from the factory at Levis and then there remained to them the possibility of disposing of their father's timber limits. In order to keep the young family together with the mother and maintain a roof over their heads, it was necessary to obtain credit. The account in question was opened in the name of the estate because it was the estate which had to pay it; and the estate means the three children. In these circumstances, are the children responsible, after reaching their majority, for an account opened by their tutor for their common benefit and for that of their mother, with whom they lived and whose care was indispensable to them?

I am of opinion that the children are responsible. They owed aliment to their mother who was destitute. Their tutor recognised this obligation without waiting until it should take the form of a legal action, for he has the right to pay the debts of his pupils. Demolombe imagines a somewhat similar obligation, vol. 7, no. 692:—

"But we have also seen that it is a tutor's place to discharge the lawful debts of the minor; and if the tutor sees that the ascendant of the latter is in need, he may the better discharge this alimentary debt in the name of the minor, in as much as a judicial demand might be very burdensome for all concerned and it would even be the duty of the tutor to avoid a law suit."

In such a case it will be well to consult the family council. In the Province of Quebec a family council has not the same power of control as in France and it would be useless to consult it.

The sole alternative in such a case would be to put the children in a charitable institution and oblige the mother to earn her living. I feel no hesitation in concluding that in a case like

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the present it is the duty of children, when they have assets, to assume, each for his share, the obligations incumbent upon their mother and that, if their tutor has opened accounts with merchants for requirements of the family, the children are responsible.

But as it is a question of an account opened in the name of the estate, I would condemn the respondents to pay it, just as if it were an hereditary debt, namely, in equal shares and not jointly and severally.

I would further maintain the appeal and give the appellants judgment against each of the respondents for one third of the capital of the account, $1,705.53, with interest at 5% from July 30th, 1915.

I feel that I must explain my condemnation as regards interest. Interest may be claimed either by virtue of an agreement or by way of damages for delay in paying a sum of money. There is no proof of any agreement here. Mrs. Carrier acknowledged to owe the amount of the account and promised to pay it, but nothing appears to have been said about interest. If the note she signed cannot serve as the basis of the appellant's action, it certainly cannot prove an agreement to pay interest from the time when the account was closed or from any other time. If interest is claimed by way of damages, it only runs from the time of putting in default, (art. 1077 C.C. (Que.)). There is no direct proof of putting in default, but it may properly be inferred that Mrs. Carrier signed the note after being put in default to pay. That fixes July 30, 1915, as the proper date, and it is from that date that the majority of the Judges of the Court of Appeal have made the interest run. I am disposed, not without a certain amount of hesitation, for when I was at the Bar the Judges granted interest on a current account only from the date of service of the action, to accept July 30 as the date from which interest should be calculated.

The sum of $200 paid by Mrs. Carrier in October, 1919, which must be imputed first upon interest (art. 1159 C.C. (Que.)), must be deducted from the total amount of interest accrued. The costs of the Superior Court and of this Court, which the respondents must pay to the appellants, must be divided amongst them in the same manner as the debt. They were justified in appealing from the judgment of the Superior Court, which condemned them for more than they owed, and they, therefore, retain against the appellants the condemnation for costs awarded by the Court of King's Bench.

Appeal allowed.

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Manitoba King's Bench, Dysart, J. May 20, 1922.

INSURANCE (§IV B—170)—POLICY AS SECURITY FOR DEBT—"PLEDGE"—"BENEFICIARY FOR VALUE"—WIFE OF INSURED—CHANGE OF BENEFICIARY—"CREDITOR."

Where a life insurance policy, payable to a wife as beneficiary, was given to her by her husband as security for money she advanced him, the wife having kept the policy in a repository to which she and the husband had access in common, she will be deemed to hold such policy as a "pledge" within the meaning of sec. 7 of the Insurance Act, R.S.M. 1913, ch. 99 and as a "beneficiary for value" within sec. 15 of the Act, standing in the position of a "creditor" regardless of the description of her in the policy as "the wife of the insured." Her rights, therefor, to the proceeds of the policy to the extent of the amount of the debt, cannot be impaired by a direction of the husband to pay a portion of the insurance money to another beneficiary.

INTERPLEADER issue in an action by widow to recover life insurance money. Judgment for plaintiff.

J. E. Hansford, for plaintiff.

H. N. Baker and *J. C. Collinson*, for defendant.

DYSART, J.:—This is an interpleader issue directed by the referee to determine which of the above parties is entitled to $2,000 life insurance money now in the hands of the Great West Life Ins. Co.

The money in question is part of a $5,000 policy, which was taken out on November 7, 1916, by Robert N. W. Henderson on his own life in favour of the plaintiff, his wife, and which subsequently and without her knowledge, was reapportioned by the insured by setting aside $2,000 of the moneys for the defendant, his daughter by a former wife.

About 1915 the plaintiff and the defendant's father became engaged to marry. At that time both resided in Winnipeg, and their fortunes, though in some respects alike, were otherwise materially different. Each had been married before and each was willing to marry again. She was childless; he had one child, the defendant. She had household furniture in England available for the proposed home; he had some furniture in Winnipeg which was mortgaged and which he desired to give his daughter. She had an estate consisting of cash and convertible securities amounting to about $10,000. His estate, apart from the household furniture, consisted, so far as ascertainable, entirely of liabilities. Though unequally matched he was willing to embark with the plaintiff on the matrimonial sea, provided she procure the boat and propel it. Accordingly he proposed that she bring out from England her furniture and

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set up a home; that she use her moneys in and towards the cost of maintaining their home and themselves until he could assist; that she advance him moneys for his use in reducing or extinguishing his debts, and leave him free to apply all his own earnings to the same end. All such moneys so expended or advanced he promised to repay her at some time which was not mentioned; and in order to secure her in the meantime he offered to take out a policy of insurance upon his own life in her favour. This munificent proposal she accepted.

I find that in pursuance of this arrangement the plaintiff went to England and brought out her furniture at an expense of $1,000; that after her return she and the defendant's father were duly married and set up housekeeping, making use of her furniture; that she paid the entire household expenses for the first 18 months, and a substantial part for the ensuing 42 months; that she made numerous loans to and for her husband to be applied upon his debts or liabilities, including sums for payment of the debt incurred for the defendant's wedding trousseau and for the discharge of the mortgage on her household furniture. In all these ways I find she advanced or expended under this agreement a very large sum, the exact amount of which is not definitely ascertained, but which plaintiff says was not less than $9,000. I find also that some time after the plaintiff's marriage, her husband took out a promised policy of insurance on his life in the sum which they then agreed on at $5,000; and the initial premium thereon was paid by the plaintiff, and incidentally all subsequent premiums were paid by her husband from moneys which she from time to time loaned him for that purpose.

I find further that when the policy was issued, it was delivered by the husband to the plaintiff with the remark that it was her security and should be carefully protected; that she took possession of the policy and placed it in a drawer in which she kept her personal papers, and there she kept it under her control until her husband's death. In this drawer the husband also kept his personal papers and effects, and equally with his wife had access to the drawer.

In the meantime the defendant had also married and removed with her husband to Detroit, Michigan. With the assistance of money loaned by the plaintiff, the defendant's father visited the defendant on several occasions. Shortly after one of these visits, as it now appears, the insured made a change in the beneficiary of the said policy. This was on April 7, 1920. Prior to the change, the beneficiary of the policy was "Susannah

Henderson (wife of the Insured)." By the change of the beneficiary, the insured directed that the insurance money on his death "be payable $3,000 to Susannah Henderson, my wife, $2,000 to Mrs. Maude Stafford, my daughter, if living; otherwise to my executors, administrators or assigns." Whether or not the defendant had any knowledge of this change does not appear, but it is certain that the plaintiff knew nothing of it, and although the insured on the occasion of each payment of premium delivered the premium receipt to the plaintiff and on many of the occasions remarked that her security was good for another month, he never hinted to her anything of the change he had made. It was not until after his death in December, 1920, that she first learned of the alteration.

Some comment on this surprising proceeding is irresistible. Here we see on the one hand a husband who is deeply indebted to his wife in money and gratitude—indebted to a degree that he can never hope to repay—and on the other, a father who has bestowed upon his only daughter much that he has received from his wife and all that he has saved from his creditors. We discover this man displaying for the financial well-being of his daughter a degree of generous concern which, had he been either able or hopeful of indulging it out of his own resources, would have been highly commendable, but which, depending as it did for its realization on this insurance policy, was neither commendable nor honest. It illustrates that the conduct of some men is marked by this superb spirit of liberality only when they deal with the property of others. In the conflict between uxorial duty, and paternal sentiment, he turned from his obligation to the one to indulge his bounty to the other. "To him who hath, much shall be given, and from him who hath not, even that which he seemeth to have shall be taken away." So it has been written of old, and so, it is practiced even to this day.

How far the defendant herself is affected by a knowledge of this variation of beneficiary does not appear, but the complete absence of all testimony in support of her claim must leave us to infer that, as a mere volunteer she seeks to enforce against the beneficiary for value, a claim conceived in dishonesty and ingratitude, and brought forth in naked technicality.

The defendant's case is rested upon the provisions of the Manitoba Life Insurance Act, R.S.M. 1913, ch. 99. According to sec. 7 of this Act the husband is free at any time to vary a policy taken out on his own life for the benefit of his wife or children, and by a declaration in writing to reapportion the same, provided that such reapportionment does not "interfere

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with any pledge of the policy to any person prior to" such declaration or reapportionment. The defendant contends that this policy was not technically pledged to the plaintiff, because a pledge depends upon exclusive possession, and that as the policy was kept in a repository common to both the plaintiff and the insured, it could not be said to be in the exclusive possession of the plaintiff.

I am of the opinion, however, that the plaintiff did have the exclusive possession of the said policy while it remained in that repository. The mere fact that her husband living in harmony with her had access to the drawer, and even kept his own papers there, does not deprive her of the exclusiveness of possession. The intimate relationship between husband and wife surely allows that degree of confidence in each other which would obviate the necessity of keeping under lock and key the private effects of each. If the husband had taken this policy from this common receptacle, but without the knowledge or consent of his wife, to make adverse use of it, he would not thereby have deprived the plaintiff of her right to recover the possession of the document. In my opinion the policy was pledged to the plaintiff from the time of its delivery to her.

The plaintiff contends that in addition to being the pledgee of the policy she is also the "beneficiary for value," contemplated by sec. 15 of the said Act, as amended by 1920 (Man.), ch. 61, sec. 2. This view is strongly opposed by the defendant on the ground that the section relates only to a policy which is "expressed on its face to be for the benefit of . . . persons other than" the wife of the insured, whereas this policy was payable to "Sasannah Henderson (wife of the Insured)." But finding as I do that the policy was taken out to secure plaintiff for the loans made to the insured, a meaning should be given to these words in the beneficiary clause of the policy which will if possible give effect to the agreement. That policy was promised and was taken out to protect the plaintiff not as the *wife*, but as the *creditor* of the insured. The parenthetical description of the plaintiff as the "wife of the Insured" is merely incidental to her name, and is used only as a means of designating her with the more particularity in order to prevent possible confusion of names. The policy is really payable to the plaintiff as "Susannah Henderson," and not *as* "wife of the Insured."

There seems to be no decided cases in Manitoba upon this point, but in Ontario under the Insurance Act, whose provisions so far as they affect this case are almost identical with our own, there is a case very much in point. In *Book* v. *Book* (1901), 1

O.L.R. 86, the Ontario Court of Appeal reversed the judgment of Meredith, J., reported in (1900), 32 O.R. 206. In that case the wife of the insured was the owner of a farm and mortgaged it for her husband's purposes, both husband and wife covenanting to pay off the mortgage, the husband being in the position of principal debtor and his wife as surety only. The husband insured his life in favour of his wife for the purpose of securing her against the mortgage debt. Later he quarrelled with his wife and left her, but she continued payment of the insurance premiums till his death, although she knew that he had by his will bequeathed all the insurance money to his sons. Meredith, J., decided that the wife was not entitled to the money on the ground that the policy was payable to the wife and therefore the husband had the right to change the beneficiary at will. On appeal that decision was reversed. In his judgment, Armour, C.J.O., uses the following language at pp. 87-88:—

"The certificate of insurance in this case was granted on the 6th of February, 1885. The Act then in force to secure to wives and children the benefit of life insurance was 47 Viet. (Ont.) ch. 20, but the certificate of insurance in this case, although made payable to the plaintiff, the wife of the insured, was not made payable to her as wife under the provisions of the said Act, but was made payable to her to indemnify her against the mortgage she had given on her own land for the accomodation of her husband, the insured.

The insurance was effected for this purpose, and for this purpose the certificate was made payable to the plaintiff, and immediately upon its being obtained by the insured was handed by him to the plaintiff to be held by her as an indemnity to her against the said mortgage, and has ever since been held by her as such.

The delivery of this certificate to the plaintiff to be held by her as an indemnity against the said mortgage constituted her an equitable mortgagee of the said certificate and of the insurance money thereby made payable to secure and indemnify her against the said mortgage: *Ferris* v. *Mullins* (1854), 2 Sm. and G. 378.

From this transaction there clearly arose an implied contract on the part of the insured that he would do nothing to prejudice the security so given by him to the plaintiff: *Stirling* v. *Maitland* (1864), 5 B. & S. 840, 122 E.R. 1043, 34 L.J. (Q.B.) 1; *McIntyre* v. *Belcher* (1863), 14 C.B. (N.S.) 654, 143 E.R. 602, 32 L.J. (C.P.) 254, 11 W.R. 889.

And this Contract on the part of the insured must, in my

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opinion, prevail over the supposed right of the defendant Solon D. Book under the will of the insured, he being a mere volunteer.

Holding, as I do, that the certificate of insurance was made payable to the plaintiff, not as the wife of the insured under the provisions of the Act 47 Vict. (Ont.) ch. 20, but to indemnify her against the mortgage she had given on her own land for the accommodation of her husband, I am of the opinion that if the case is governed by the Ontario Insurance Act, R.S.O. 1897, ch. 203, at all it is governed by sec. 151 and not by sec. 160, and sec. 151 expressly forbids the diversion of the benefit of any person who is a beneficiary for value.

That this certificate of insurance might be delivered by way of equitable mortgage seems clear from the express provision of the Act that nothing therein contained should be held or construed to restrict or interfere with the right of any person to effect or assign a policy for the benefit of any one or more beneficiaries in any other mode allowed by law."

Secs. 151 and 160 of the then Ontario Act, R.S.O. 1897, ch. 203, correspond with secs. 15 and 7 respectively of our Act.

The facts and circumstances of the present case are so clearly in line with those in *Book* v. *Book*, and the language above quoted so peculiarly applicable here, that I adopt it and apply it. I hold that the plaintiff is a beneficiary for value and is not excluded from her rights as such by any provision in the Act. I hold that the extent of her interest in the policy is the amounts of money she expended and loaned to and for the insured under the agreement referred to. I hold that she is entitled to be declared pledgee or equitable mortgagee of the policy in question with all moneys payable thereunder, including of course the $2,000 in dispute, as security for the repayment to her of all moneys which as I have indicated she expended and advanced to and for her husband, or at his request, in pursuance of the said agreement.

If it is thought that the amount so expended and loaned by the plaintiff does not exceed $5,000, and that an accounting is necessary to ascertain the exact amount thereof, a reference may be had to the Master of this Court for that purpose, the costs of which reference, as well as further directions, I hereby reserve.

The plaintiff shall have costs of this interpleader application throughout to be paid by the defendant before such reference is had.

Judgment for plaintiff.

DANIELS v. SPOKE.

Alberta Supreme Court, Blain, M.C. April 13, 1922.

COSTS (§I—14)—SECURITY—ALBERTA RULE 723—DISCRETION OF JUDGE.

Under the Alberta rules an application for security for costs may be made at any time after service of the statement of claim (R. 723) and the granting of the order for security, the amount thereof and whether for past or future costs or both is in the discretion of the Judge hearing the application.

MOTION for security for costs. Granted.

G. H. Steer, for defendant.

H. R. Milner, K.C., for plaintiff.

BLAIN, M.C.:—This is an action on a mortgage the defence to which is payment. The statement of claim was issued on April 20 of last year and the endorsement thereon shewed the residence of the plaintiff to be out of the jurisdiction. The order for directions has been made, affidavits on production filed and the defendant has been partly examined for discovery. The action has been entered on the general list of cases for trial but no date yet fixed.

The defendant now moves for security for costs and counsel for the plaintiff, while admitting that his client should furnish security, contends it should be for future costs only.

Under our rules an application for security for costs may be made at any time after service of the statement of claim (R. 723), and the granting of the order for security, the amount thereof and whether for past or future costs only, or both, is in the discretion of the Judge hearing the application.

In this application I think the plaintiff should give security for past as well as for future costs. I fixed the amount of security at $300 to be paid into Court or a bond to be given for $600 when the motion was first spoken to. The point that the security should be for future costs only was raised for the first time on the settlement of the order, some days after argument of the motion. Had the defendant applied for security immediately after service of the statement of claim the plaintiff would then have had to furnish security and there is no evidence that he has been prejudiced by being allowed to carry on to this stage of the action without being asked for security. No date has yet been set for the trial of this action, as was the case in *Crossman* v. *Purvis* (1915), 23 D.L.R. 883, and it was the special circumstances in that case which led the Judge to make the order there made. I find nothing in this action to deprive the defendant of his right to security nor to preclude the propriety of ordering security for past as well as future costs.

See *Hately* v. *Merchants Despatch Transportation Co.* (1883),

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10 P.R. 253, in which a plaintiff leaving the jurisdiction permanently was ordered to give security for past as well as future costs.

Motion granted.

Re SHAW Co. Ltd.

Saskatchewan King's Bench in Bankruptcy, MacDonald, J. June 12, 1922.

BANKRUPTCY (§I—7)—AUTHORISED TRUSTEE—CONFLICT OF INTERESTS—REMOVAL.

The fact that certain large creditors of a person who has made an authorised assignment under the Bankruptcy Act 1919 (Can.) ch. 36, are directors and shareholders of a trust company, is sufficient to entitle the Court to remove such trust company as authorised trustee, and appoint another trustee in its place on the ground that there may arise a conflict between the interests and the duty of the officers of the trustee.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPLICATION by certain creditors to remove a trust company, as authorised trustee, and substitute another trustee. Application granted.

P. H. Gordon, for the creditors.

L. MacTaggart, for the trustee.

MACDONALD, J.:—This is an application on behalf of certain creditors of the above estate to remove the Executors & Administrators Trust Co., Ltd., as trustee and to substitute another trustee in its place.

The Walter W. Shaw Co., Ltd., on or about February 21, 1922, made an authorised assignment under the Bankruptcy Act, 1919 (Can.) ch. 36, to the Executors & Administrators Trust Co., Ltd., authorised trustee. Among those who claim to be creditors of the Walter W. Shaw Co. Ltd. were some ten directors and shareholders of the company who had rather large claims. Two of the directors who had claims as aforesaid are also shareholders in the Executors & Administrators Trust Co. Ltd., one of them being a director of the trust company, being one of the board of ten. The creditors who have applied herein claim that on account of the fact that these two persons are interested in the trust company and in the Walter W. Shaw Co., Ltd. the trust company should not act as trustee, as there may arise a conflict between the interests and the duty of the officers of the trustee.

After carefully perusing all the material filed herein, I have come to the conclusion that it is not desirable that the present trustee, on account of said relations, should continue to act. The

question is whether it would be difficult for the trustee to act with impartiality, not whether, in fact, it would or would not do so. *In re Lamb; Ex parte Board of Trade*, [1894] 2 Q.B. 805, 64 L.J. (Q.B.) 71 *per* Lord Esher, M.R.

There will therefore be an order removing the Executors & Administrators Trust Co., Ltd., as trustee and appointing instead the Traders Trust Co., who have consented to act in that capacity.

The creditors who applied will have their costs out of the estate.

Application granted.

WILSON v. WINNIPEG ELECTRIC R. Co.

Manitoba King's Bench, Curran, J. June 1, 1922.

STREET RAILWAYS (§III B—25)—NEGLIGENCE—PREMATURE STARTING OF CAR—FAILURE TO CLOSE DOORS—CONTRIBUTORY NEGLIGENCE—BOARDING MOVING CAR—STEPPING OFF.

Starting a street car by the conductor at a stopping point before the entrance doors are closed and before all persons attempting to board it are safely on, is negligence for which the railway company is liable; and it is no contributory negligence under such circumstances on the part of a passenger in boarding the car after it had begun moving, nor in stepping off, when finding the position precarious.

DAMAGES (§III I—190)—LOSS OF HAND.

An award of $1,500, in addition to medical expenses was allowed as damages for the partial loss of a right hand and injuries to a shoulder, the plaintiff being a woman of 75 years of age.

ACTION for damages for personal injuries. Judgment for plaintiff.

T. A. Hunt, K.C., and *F. G. Warburton*, for plaintiff.

R. D. Guy, for defendant.

CURRAN, J.:—The plaintiff is an old lady 75 years of age, and was attempting to board the street car in question accompanied by her daughter from a safety island or landing platform for passengers placed on the north side of Portage Ave. at the corner of Portage Ave. and Hargrave St. She and her daughter reached the platform and were waiting for a westbound car. One arrived, pulled up at the platform, came to a full stop, and the entrance doors were thrown open. It stopped a little west of the place on the platform where the plaintiff and her daughter were standing and they were obliged to take a number of steps westward to reach the entrance to the car.

The plaintiff could give but little explanation as to the exact cause of the accident. She claims that she had got with both

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her feet upon the bottom step of the car and had hold of the handrail when the car started and she was thrown off and hit the pavement at the end of the safety island.

The daughter, Mrs. Pugh, says:—

"The doors were opened and the car came to a full stop. A woman got on ahead of us. I had hold of my mother's arm; she was ahead of me in getting on the car. I saw her on the bottom step. She had hold of the handrail with her right hand. I was still on the platform waiting for the woman ahead of my mother to move on and make room for me to get on too. When mother was on the bottom step the car moved ahead quickly and mother was thrown full length on the pavement."

There is no doubt that the conductor signalled the motorman to go ahead before the entrance doors were closed, he himself admits it, and that the car started to move ahead whilst the plaintiff was still apparently standing on the bottom step.

The bottom step of this car folds up when the doors are closed and lets down when the doors are open, and if a person was standing upon this step while it was lowered in position for stepping upon, the doors could not be closed without throwing such person off. This was the situation when the car was started. The conductor stated that he thought all intending passengers had got on and started to close the doors and gave the motorman the signal to proceed. As he was going to close the doors the plaintiff stepped on the folding or lower step and when he saw her he at once signalled the motorman to stop the car, and when the car got to the end of the platform and while it was moving the plaintiff stepped off the car onto the platform, toppled over and fell before the car stopped. He states that there was no jerk or jar of the car to cause her to fall off.

Henri Bourgeault, a passenger who was standing in the car vestibule, says:—

"Just as the car started I heard a woman's voice say—'Wait! Wait! Mother! Mother!' very excitedly. I turned round and saw an elderly lady standing on the lower step holding on with her hands to the handrails on either side of the doorway. I went very quickly to her assistance and then she let go her left hand and stepped off, her body twisted backward and she seemed to crumple down and fell on her head and shoulder. The car was moving very slowly," creepingly, as he expressed it. On examination he said:—"She really stepped off the car backwards, I am sure of that. I think she was safe until her daughter cried out. The younger woman was running along

with the car just opposite the old lady." Edna Martman who was standing on the platform says:—

"The car started up and was barely moving when the younger woman helped the older woman in the car. She had got onto the bottom step when the younger woman called out,—'Wait a minute! Wait a minute!' and caught the elder woman by the arm and pulled her when she fell down."

Irene Lewis, a sister of the last witness, was also an eyewitness of the accident and I attach a good deal of credit to her statement of what occurred. She says:—

"The Corydon car was standing there when I came to the platform. I saw them come on the platform, they were running, the younger woman had hold of the old lady's arm. The conductor was giving the motorman the bell and started to close the doors, had his hand on the lever to close the door. The younger woman had the older one by the left arm and pushed her onto the step while the car was moving. The young woman hollered 'Wait a minute!' and still hung on to the older woman. When the car got to the end of the platform the old lady let go the car. She had been hanging on with both hands, when she let go she stepped back onto the platform from the car step and seemed to topple over sideways onto the pavement. She seemed to be dragging one foot all the time, one foot on and the other half on the step."

On cross-examination this witness further stated:—

"The old lady stepped onto the lower step with her left foot. She didn't get both feet on it. She had hold with both hands. She had one foot on the safety isle hopping along and one foot on the step. The car was moving very slow. The younger woman had hold of her right to the end. She was awfully excited. It was an awkward situation, there was reason for excitement. The car had just started to move before the old lady attempted to board it. She had started to get on the car just as it started to move. The conductor could not close the door because she was on the step. Both the women were excited."

Upon the whole I think this young woman's account of the accident is entitled to full credence. It envisages the whole occurrence from beginning to end and supplies details which neither the conductor nor Bourgeault from their position in the vestibule of the car were able to observe. It does not differ from or conflict with their accounts of the accident. I think the plaintiff is mistaken in thinking she had both feet on the car step, such an error is quite understandable under the cir-

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cumstances as I fully believe both women, plaintiff and her daughter, were excited and doubtlessly alarmed in the situation for the old lady's safety, and apparently with good reason. The daughter's cries and the moving car were sufficient in my judgment to unnerve the old lady and produce a condition of mind akin to panic, preventing the exercise of the best judgment and the doing of the right thing in a sudden and difficult situation.

Applying the principles of law as stated in *Squires* v. *Toronto R. Co.* (1920), 54 D.L.R. 575, 47 O.L.R. 613, cited by the plaintiff's counsel, I hold that the conductor was negligent in giving the signal to start the car and causing it to start before the entrance doors were closed. As long as these doors were open and the car standing at a passenger landing place there was thereby an invitation extended to any intending passenger on the platform to enter the car, and under such circumstances it is obvious it was the duty of the defendants' servant in charge of the car to afford a reasonable opportunity to such passengers to get in the car in safety. I think it was clearly the duty of the conductor before giving the signal to start the car to close the doors and thus avoid the danger of passengers attempting to get in a moving car. So long as the doors remained open the invitation to enter existed and the car should have been kept stationary. So long as the doors remained open it was the duty of the conductor to see that all persons attempting to board his car were safely on before giving the signal to start. This precaution he did not take in the case of the plaintiff. It is true he says he did not see her until she was on the step but he ought to have seen there was no one about to enter the car or in the act of entering before he gave the signal to start the car. Had he looked towards the entrance before giving the signal to start he would have seen the plaintiff, have refrained from giving the starting signal and so avoided a possible accident.

I find it very difficult to reach a satisfactory conclusion upon the evidence as to whether or not the car had actually started to move when the plaintiff attempted to enter it. I think, however, the weight of evidence shews that it was moving, though very slowly at that time. Both Martman and Lewis are quite clear that it was moving and Bourgeault's evidence is practically to the same effect. At all events the two acts, *viz.*, starting the car and the attempt to board it, were so nearly coincident that I could not hold under the circumstances that the plaintiff was guilty of contributory negligence in trying to get on the

car when she did; the doors were open, the car had at most barely begun to move; the daughter was assisting her and the attempt could not have had the appearance of being dangerous or imprudent even for a woman of the plaintiff's age and condition. In the *Squires* case, 54 D.L.R. at p. 576, the Court said:—

"It is settled law that getting off a car when it is in motion is not necessarily contributory negligence. Everything depends on the circumstances, and it is not contributory negligence where the speed of the car is such that a reasonably prudent man in the circumstances would have done what the intending passenger did, and the same rule should be applied when a person is getting on a moving car."

The proper conclusion in the circumstances of the case at Bar, in my opinion, is that the plaintiff was not guilty of contributory negligence in boarding or attempting to board the car. But the defendant contends that the plaintiff had reached a place of safety on the car step and therefore she was guilty of contributory negligence in quitting that situation and stepping off the moving car, which act was the direct and proximate cause of her injury and not the act of the conductor in causing the car to be started as he did. But had she reached a place of safety? According to the witness Lewis she had not but was always in a precarious if not dangerous situation. I cannot agree that the plaintiff had reached a place of safety and abandoned it. I find as a fact that the plaintiff did step off the car whilst it was in motion and that her doing so caused the injury she sustained. Had she attained the position on the step she says she did, I can see no reason why she should not have been able to mount to the vestibule of the car. That she did not do so tends to confirm my acceptance of the evidence of the witness Irene Lewis which clearly indicates that the plaintiff was trying to get up the steps but was unable to do so because she did not get both feet on the step and because of the movement of the car.

In the *Squires* case, *supra*, a situation arose in which the plaintiff was required to judge and act quickly and she had been put in that position through a failure of duty of the defendants' conductor in not stopping his car long enough for the plaintiff to get on it while it was standing still. The Court absolved the plaintiff from the charge of contributory negligence. The plaintiff's counsel says that that principle ought to be applied here for that the plaintiff was suddenly through the defendants' negligence placed in a position in which she

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was required to act quickly, in other words it was the defendants' act that placed her in such a position and not her own. If this is so and in the confusion of mind in which she was suddenly plunged she did the wrong thing, I think she ought to be absolved from blame on the charge of contributory negligence.

To solve this proposition I will resort to the evidence of Irene Lewis which as I said before appealed to me as being the most complete and reasonable account of the accident given by any of the witnesses. From this young woman's statement the plaintiff never did get both feet on the car step. She got only one foot on it and as the car kept on moving she having this one foot on the step and holding on with both hands partly sustaining her weight on the other foot which was on the platform kept up a sort of hopping movement along the platform to conform to the speed of the car. In this situation she let go her hand, withdrew her foot from the step and fell to the pavement. This being my conclusion of fact it seems obvious that the position in which the plaintiff found herself was due entirely to the motion of the car and her apparent inability to get both feet on the step. If she could not get any further on the car what was left to her but to try and regain the ground, which probably appeared to her the safest place. The momentum of the car would take her with it when she stepped off and it is easy to understand that instead of alighting on her feet she was thrown to the pavement with considerable violence. The nature of her injuries sufficiently establishes this.

From the best consideration of the case I have been able to give, and not without some doubt, I must hold that the plaintiff was not guilty of contributory negligence but that the accident and consequent injuries to the plaintiff were caused solely by the conductor's negligence in causing the car to be started before the entrance doors were closed and the plaintiff had a reasonable opportunity to get on the car in safety. The plaintiff is therefore entitled to recover against the defendant company. Her expenses for medical attendance, nurses, drugs, X-ray plates, etc., are proven to amount to $435.96. There is no doubt that the plaintiff's injuries considering her advanced age, were very serious. She had made a fairly good recovery but her right hand is practically useless, she cannot close her fingers, due to the wrist bones having been broken. The wrist is deformed; she cannot pick up anything with the right hand and there is no strength in it. She still suffers from a convulsive movement or nervous twitching in her shoulder and I gather

from the medical testimony that some of these injuries are permanent. If she was a younger woman it might be a case for very substantial damages. As it is the partial loss of the use of her right hand and the injuries to her shoulder are serious enough even for a woman of the plaintiff's age and expectation of life.

I assess her damages, apart from the actual disbursements, at the sum of $1,500, and allow her in addition the said sum of $435.96 to cover her disbursements, making in all the sum of $1,935.96, and enter a verdict in the plaintiff's favour for this amount, with costs of suit to include costs of discovery examinations.

Judgment for plaintiff.

CRISPIN & Co. v. EVANS, COLEMAN & EVANS, Ltd.

British Columbia Supreme Court, Morrison, J. September 9, 1922.

CONTRACTS (§IIB—150)—SALE OF SALMON—LIMITATION OF LIABILITY—EJUSDEM GENERIS—"ANY OTHER CAUSE."

A clause in a contract for the sale of salmon of a season's pack, limiting the seller's liability "in the event of packing being interfered with or stopped, or falling short through the failure of fishing, or through strikes or lock outs of fishermen or workmen or from any cause not under the control of the sellers," refers only to matters *ejusdem generis* and does not apply to an inability to make deliveries owing to an inadequacy in the supply of tins in which to pack, the run of salmon meantime ceasing.

DAMAGES (§III A—70)—COSTS—INTEREST—BREACH OF CONTRACT—SALE.

Interest and costs incurred in defending an action in consequence of a breach of contract of sale on the part of a seller, are recoverable as damages arising from the breach in an action against the seller.

ACTION for damages for breach of contract. Judgment for plaintiffs.

C. W. Craig, K.C., and *C. W. Tysoe*, for plaintiffs.

E. P. Davis, K.C., and *D. H. Hossie*, for defendants.

MORRISON, J.:—The plaintiffs are merchants in London, Eng. The defendants are merchants in Vancouver, B.C., and they, in December, 1916, entered into two contracts whereby the defendents sold to the plaintiffs certain quantities of Fraser River salmon to be packed during the season of 1917 by the B.C. Packers' Ass'n. and the St. Mungo Cannery Co. Ltd., respectively. The plaintiffs, in turn, on May 16, 1917, sold this pack to LeBeaupin, Nantes, France. There were no deliveries pursuant to these contracts and in due course LeBeaupin claimed damages against the plaintiffs and by an award made in an ar-

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bitration in the form of a special case, the umpire assessed at the sum of $12,500. This award was upheld by McCardie, J., in the King's Bench Division, England, [1920] 2 K.B. 714, 89 L.J. (K.B.) 1024, 36 Times L.R. 739 at the rate of exchange ruling upon the date of the breach of the contract, *viz.*, September 30, 1917. The plaintiffs have brought this action against the defendants for damages consequent upon the breach as between them. The point upon which this case turns and which was exactly submitted to me is as to the true construction and meaning of what has been referred to as the "packing" clause of the contracts in question. This clause reads as follows:—

"Packing: In the event of the packing being interfered with or stopped, or falling short through the failure of fishing, or through strikes or lockouts of fishermen or workmen, or from any cause not under the control of the sellers, this contract to be cancelled in respect to any non-delivery or part non-delivery, as the case may be, but sellers to use every endeavour to supply the full quantities specified. Sellers do not guarantee any special period of season for packing this grade and shape."

What apparently happened is compendiously stated in the award by the Arbitrator and later adopted by the trial Judge in *Lebeaupin* v. *Crispin & Co.*, [1920] 2 K.B. 714, 89 L.J. (K.B.) 1024 at p. 1026, 36 Times L.R. 739:—

"The St. Mungo Cannery belongs to the St. Mungo Canning Co. In the season of 1917 there was an excellent run of fish on the Fraser River. The St. Mungo Co. began to pack the salmon into the ½ lb. tins. They then proceeded to prepare the tins as usual by a cooking process, but found that the tins were defective and useless for the desired purpose. Hence they ceased to pack into ½ lb. tins and destroyed the cooking already made. Before they could get a new lot of ½ lb. tins the run of salmon had practically ceased. If they had possessed a sufficient supply of good tins they could have secured fish for 2,500 cases of ½ lb. flat pinks. The St. Mungo Co. gave evidence before the umpire to the effect that it was not possible to discover that the tins were defective until pressure was put on them in the process of cooking. Upon this point the umpire says: 'I accept this in the sense that the defects could not be found until the tins were used, and that they had no reason to suspect them until they did use them, but I find that they might have been used and so tested at an earlier date, for example, when they were packing the Toba Inlet fish. There was no evidence of the date or terms of their contract with the Am-

erican Canning Co., of the date of the delivery of the tins which proved defective' . . . Apparently the defective tins had been supplied by the American Canning Co.

The Acme Cannery belongs to the British Columbia Packers' Ass'n. Ample fish existed in the season of 1917 to enable them to pack 2,500 cases of ½ lb. flat pinks. They had a full supply of ½ lb. tins. What happened, however, was this. They had a large number of 1 lb. tins. These were getting rusty when the fish began to run. They therefore filled the 1 lb. tins first to the extent of over 3,700 cases to avoid the loss of those 1 lb. tins. Then ere they could proceed to fill the ½ lb. tins the run of fish ceased and they were unable to prepare ½ lb. tins at all. The cessation of the run was in no way abnormal. Such are the main facts as to the two contracts."

Are there any words in the above clause which prevent the application of the *ejusdem generis* rule? No useful purpose can be served by my reviewing the authorities dealing with that rule, but I shall refer only to one case, *viz.*, *Thorman* v. *Dowgate, Steamships Co. Ltd.*, [1910] 1 K.B. 410, 79 L.J. (K.B.) 287, 102 L.T. 242, where Hamilton, J., deals fully with the rule. In that case a ship was chartered to proceed to Alexandria Docks at Hull and there load a cargo of coal in 120 hours on conditions of usual colliery guarantee. The colliery guarantee excepted from the loading time, Sundays, holidays, strikes, frosts or storms, any accidents stopping the working, loading or shipping of the cargo, restrictions or suspension of labour, look-outs, delay on the part of the railway company, either in supplying wagons or loading the coal "*or any other cause beyond the charterer's control.*" I italicise the last clause. The ship arrived in the dock and gave notice of her readiness to go but owing to the presence of other vessels, which had arrived previously, and were waiting to load, delay occurred in loading. The owners claim demurrage against the charterers. It was there held that the words italicized above must be construed as referring to matters *ejusdem generis* with the enumerated exceptions; that the cause of the delay, *viz.*, presence of other ships in the dock was not a matter of *ejusdem generis* with those exceptions and that the charterer was not protected by the exceptions and was liable for demurrage. Hamilton, J., in dealing with the above clause says (see 79 L.J. (K.B.) 287 at p. 294):—

"In the form of the guarantee, too, which I understand is generally used, at any rate on the Tyne . . . the word 'whatever' is imported into a clause corresponding with the clause in question in this case. Accordingly, I think it is quite

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reasonable to suppose that the parties entering into this guarantee were fully aware, having the English language at command, that they might carry the matter considerably further if they used the word 'whatever,' . . . and if they had chosen to use the expression 'of what kind soever' it would pass the wit of man to find language more express or emphatic to indicate the utmost possible generality; but when they confine themselves to words of specific enumeration like 'any other cause beyond my control' I see nothing inserted here to derogate from the ordinary canon of construction that those words are subject to a limitation, *viz.*, that of the genus or category which the previous words have indicated."

As some aid, in arriving at what the defendants herein meant, the letters of June 27, 28 and 30, 1917, may be looked at and although the view expressed in them, as to the scope of the contract, may not be conclusive or binding upon a Court, yet at any rate it goes a long way to clear up as to what was in the mind of the defendants, assuming the writer of the letter was not disingenuous, which motive I do not for a moment ascribe to him. The letter of June 27, 1917, addressed to the St. Mungo Cannery ends up thus: "We are relying on you to make us a full delivery of pink halves as we have sold these goods (your first 2,500 cases) to a London firm who will unquestionably hold us to our contract."

In that of June 28, 1917, in reply, Anderson of the St. Mungo observes: "I don't for a moment suppose you made a hard and fast contract to deliver goods to your alleged London buyer."

To this the defendants replied on June 30, 1917, "Our contract with our London friends covering the sale of your first 2,500 cases pink half is 'hard and fast.'"

I find there was a breach of the contracts as claimed. Being bound by authority, I find that the exception clause affords no protection to the defendants. The *ejusdem generis* rule applies.

As to the first item of damages claimed, the calculation of the amount is not difficult. Taking first the St. Mungo contract—The contract price was $5.50, the market price at time of breach $9, the difference at $3.50 per case on 2,500 cases, $8,750. Acme—Contract price $5.75, market price at time of breach $9, difference is $3.25 per case on 2,500 cases, $8,125; total $16,875. Plaintiffs also claim interest on the amount paid by them to LeBeaupin as damages at the rate of 5% on £2,500, the sum so paid, as from July, 1920, to date. The rate of exchange was, at that time $4.84. This comes in all to $985. The costs paid by the plaintiffs on the arbitration proceedings, viz., £567 10s. 3d.

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are also claimed. As to what the rate of exchange then was does not appear from the evidence but it may be reasonably assumed to have been $4.84. This item, therefore, amounts to $2,746. Total, $20,606.

As to whether the interest and the costs arose as a consequence of the breach, I think the rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 23 L.J. (Ex.) 179, 2 W.R. 302 can be invoked and that these are damages which can fairly and reasonably be considered to arise naturally from the breach of the contract and such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. That rule is as follows (see head-note to *Hadley* v. *Baxendale*):—

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

Applying that test to this case, the interest and costs in question arose and were incurred in respect of the happening of a contingency which might reasonably be expected to follow from the defendants' breach of contract. It would not have been reasonable for Crispin & Co. to have submitted to judgment against them at the instance of LeBeaupin without defending that action. They are entitled to "the fair and honest costs of a fair and honest defence": *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79, 57 L.J. (Q.B.) 58, and *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413, 68 L.J. (Q.B.) 312, 47 W.R. 403.

There will be judgment accordingly for the above amount with costs. *Judgment for plaintiffs.*

POINT ANNE QUARRIES v. THE S.S. "M. F. WHALEN."

Exchequer Court of Canada, Toronto Admiralty District, Hodgins, L.J.A. February 14, 1921.

DISCOVERY AND INSPECTION (§IV—33)—EXAMINATION FOR DISCOVERY—ADMIRALTY CASES—USE OF ON TRIAL—WITNESS UNABLE TO ATTEND.

An examination for discovery may be ordered by the Judge in admiralty cases, as a matter of convenience in place of the delivery of interrogatories although no special provision is made regarding it in the admiralty rules, but under rules 102 and 109 such examination can only be read at the trial when the witness cannot attend.

[See also (1921), 63 D.L.R. 545, 63 Can. S.C.R. 109.]

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POINT ANNE QUARRIES v. THE S.S. "M. F. WHALEN."

Hodgins, L.J.A.

MOTION for an order permitting the plaintiff to read at the trial portions of the evidence of the master of the defendant ship, which was taken on his examination for discovery.

Jarvis, for plaintiff; *A. E. Knox*, for defendant.

HODGINS, L.J.A.:—Motion by plaintiff to read in evidence at the trial portions of the examination for discovery of the master of the defendant ship, one Malette, taken in this action before the local registrar of the Exchequer Court.

It appears that Mallette will be present at the trial.

The examination in question was allowed in place of interrogatories as, while there is no provision in the Canadian Admiralty Rules for such an examination, it is a convenient practice and less cumbersome than formal interrogatories, especially when the plaintiffs are in the dark as to the actual occurrences when the tow is said to have been injured. See *Isle of Cyprus* (1890), 15 P.D. 134.

But the examination so had cannot be used at the trial unless the rules are wide enough to allow that to be done.

Canadian Admiralty R. 70 provides for an affidavit of discovery relating to documents, but Rr. 68 and 69 make discovery of material facts to depend on the delivery of and the answers to interrogatories. Oral examinations are permitted under Rr. 102 to 109. These, however, are limited to cases where the witness cannot conveniently attend the trial, in which case his evidence thus taken, may be read at the trial.

No order under these last mentioned rules was made and such an order is a necessary preliminary, if what is sworn to on such an examination is to become evidence at the trial.

It was urged that R. 228, which made the practice "for the time being in force in respect to Admiralty proceedings in the High Court of Justice" applicable in all cases not provided for by the Canadian rules, would permit what is now asked. I do not think so. The rules as to evidence which govern the proceedings in English Admiralty actions are found in Roscoe's Admiralty Practice, 3rd ed. pp. 354 *et seq.* It is true they contain more detailed provisions than our rules do, but they are founded as to this particular instance, upon the discretion of the Judge in dispensing with the attendance of a witness at the trial, and so come to the same thing in the end as our own rules.

It is particularly necessary in Admiralty cases that the witnesses should appear personally before the Judge whenever possible. Here, the witness in question will be present and the motion to read part of this examination is not within the rules

nor based on necessity or inconvenience. It will, therefore, be dismissed with costs to the defendants in any event.

Judgment accordingly.

HENDERSON v. CRAIG.

Manitoba King's Bench, Mathers, C.J.K.B. May 22, 1922.

LANDLORD AND TENANT (§IIC—20)—YEARLY OR MONTHLY TENANCY—HOLDING OVER—INCREASE IN RENT—NOTICE—"ATTEMPT TO ABANDON."

Where a tenant continues in possession after the expiration of a yearly tenancy he thereafter holds as tenant from year to year and his rent cannot be increased except upon six months' notice terminating on the end of the yearly tenancy; and where a tenant thus in possession has acceded to the demands of the landlord for increases in the monthly rent he will be deemed to hold as tenant from month to month and cannot be held liable, under the terms of the lease, for thereafter quitting the premises on notice as a monthly tenant. Nor does such conduct of the tenant amount to an "attempt to abandon" as to render him liable for the rent under a forfeiture clause in the lease.

FIXTURES (§IV—20)—BEAVER-BOARD — YALE LOCK — LANDLORD AND TENANT.

Beaver-board, made into sections to permit of its removal and attached to the wall of an office by wooden plugs inserted between the bricks is a trade fixture removable by a tenant. But a Yale lock, incapable of removal without leaving a hole in the door, is not.

ACTION to recover rent and fixtures removed by tenant. Claim for rent dismissed, claim allowed for part of fixtures.

E. R. Chapman, for plaintiff.

H. Mackenzie, for defendant.

MATHERS, C.J.K.B.:—On November 26, 1912, the plaintiff leased to the defendant by an indenture in writing certain warehouse premises at the corner of Bannatyne Ave. and Adelaide St. in this city, for one year, to be computed from December 1, 1912, at a yearly rental of $360 payable $30 on the first day of each and every month. At the expiration of this lease defendant continued in possession and went on paying rent as formerly. A few days before April 19, 1919, the plaintff told him that he thought he must have $5 per month more rent, and it was then agreed that the rent should be $35 per month from May 1 ensuing, and letters were exchanged confirming the agreement. The plaintiff's letter refers to the verbal conversation:—"in which it was agreed that the rental of the premises occupied by you in my building at the above address under the lease dated 26th day of November, 1912, at $30 per month will be $35 from the 1st of May, 1919," and expresses his satisfaction

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with the arrangement. The defendant on the same day replied, saying:—"We received your letter of even date advising us that beginning on May 1st our rent will be $35 per month, which is agreeable to us."

On July 30, 1920, the plaintiff asked for another increase of $5 per month and the defendant agreed to pay $40 per month from September 1 of that year. The arrangement was confirmed by an exchange of letters in practically the same terms as on the previous occasion. The defendant went on paying rent at the new rate, $40 per month, and in September, 1921, he was once more called upon by the plaintiff, who asked for a further increase to $45 per month. The defendant told the plaintiff that he did not think he could afford to pay a further increase but that he would let him know in a few days. The defendant at once started to look for other premises and he so informed the plaintiff when he called a few days later to know what conclusion the defendant had arrived at. The defendant had not then decided whether he would pay the increased rent or quit the premises but promised to give a final answer shortly. Two or three days later the plaintiff came again and the defendant then told him that he was going to move as he could not afford to pay $45 per month and that he would be leaving about the end of November. On October 7 the defendant gave the plaintiff notice in writing:—"that we will vacate the space that we rent from you in building situate 332 Bannatyne Ave. on November 30th, 1921, the date our lease expires."

No reply was made to that notice by the plaintiff until November 17, when he wrote:—"I beg to acknowledge receipt of your letter of 7th ulto. stating that you would vacate the space occupied in my building, and I wish to inform you that this notice to quit is not sufficient and that I will expect you to continue as tenant for another year."

The defendant did move out of the premises on November 30 and the premises remained vacant until April 1 following, when a new tenant was put in.

The written lease, dated November 26, 1912, contains a clause providing that should the tenant:—"attempt to abandon the said premises, etc., the accruing rent together with the rent for twelve months next *accruing* shall immediately become due and payable and the term shall at the option of the lessor forthwith become forfeited and determined."

Relying upon that provision in the lease the plaintiff now sues the defendant for one year's rent at $40 per month.

The defendant removed certain beaver-board which he had put himself upon the walls in the part occupied as an office.

This beaver-board had been especially manufactured in sections in order that it might be removed and was attached to the wall by wooden plugs inserted between the bricks, to which the beaver-board was fastened either by nails or screws. He also removed a Yale lock from the door. I held at the trial that the beaver-board was a trade fixture which could be removed without injury to the premises, and therefore that the defendant had a right to remove it. When the Yale lock was removed a hole of considerable size was left in the door. I held that the Yale lock was not a trade fixture because it could not be removed without injury to the premises and therefore that the defendant had no right to remove it.

The larger question of the plaintiff's right to recover a year's rent depends on whether or not the defendant was bound by the terms of the lease entered into on November 26, 1912. The presumption no doubt is that if a tenant for a year who continues in possession and pays rent becomes tenant from year to year on the terms of the old lease in so far as these terms are applicable: *Right d. Flower* v. *Darby* (1876), 1 Term. Rep. 159, 99 E.R. 1029; and that neither an agreement for an increase, *Digby* v. *Atkinson* (1815), 4 Camp. 275, 16 R.R. 792; nor a reduction of rent, *In re Canada Coal Co.; Dalton's Claim* (1895), 27 O.R. 151, after the expiration of the terms is of itself sufficient to shew that the other terms of the lease are not to continue in effect. The presumption, however, only arises when there is no evidence to shew that the holding over was upon terms other than those contained in the expired lease and it is only in the absence of such evidence that a tenancy upon the old terms should be found: Woodfall, 18th ed., 252. As stated by Wightman, J., in *Thetford Corp'n* v. *Tyler* (1845), 8 Q.B. 95, at p. 101, 115 E.R. 810, 15 L.J. (Q.B.) 33:—"When a party is allowed to hold after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to shew a different understanding, he will be considered to hold on the former terms."

Until April, 1919, neither party by word or act gave any indication that the defendant's tenancy was other than might be presumed from his holding over and paying rent, that is to say, from year to year on the terms of the expired lease. But in that month the plaintiff proposes to increase the rent. He says he merely made a request for an increase and that the defendant voluntarily acceded. The defendant, however, believed that if he did not agree to pay the increased rent asked for his only

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alternative was to quit the premises. If the defendant was a tenant from year to year the plaintiff had no right to stipulate for a change in the rent except on giving 6 months' notice terminating on November 30, the end of the year. I do not accept the plaintiff's statement that he asked the defendant to pay more rent on each occasion merely as an act of grace. I think he made the request because he believed he had a right to do so and that the defendant acceded to the request under a like belief.

I entertain no doubt but that when the plaintiff in September, 1921, asked the defendant for an increase of rent from $40 to $45 per month the defendant believed that his only alternative to acceding to that request was to give up his tenancy and move from the premises. I believe that both of them understood that the plaintiff had a right to demand increased rent at any time and that the defendant had to either yield to the demand or to get out. The plaintiff knew that the defendant was searching for other premises with a view to removal under the belief that he must move or pay increased rent. He knew that the defendant was willing to remain on at the rate he was then paying but the plaintiff gave him no intimation that he was at liberty to do so. Such a course of conduct is entirely inconsistent with an agreement for a tenancy from year to year and is consistent only with a tenancy from month to month. I hold, therefore, upon the evidence that the defendant was not a tenant from year to year but from month to month and that it was properly terminated by the notice given October 7.

Even if I had come to the conclusion that the defendant was a tenant from year to year on the terms of the old lease, in my opinion there was no "attempt to abandon" the premises within the meaning of the provision relied upon by the plaintiff. The defendant did not want to leave. He was as he believed given the choice of paying a rental higher than he could afford or go elsewhere. The plaintiff knew that acting in that belief the defendant was seeking other premises. He was told in September that the defendant rather than comply with his demand would give up his tenancy about the end of November. I infer that he knew at least on October 7 that the defendant had secured other premises and yet it was not until November 17 that he notified him he must remain for another year. Such a notification would no doubt have been welcomed by the defendant had it come before he had made arrangements for a new place of business, but now it was too late. After such a course of conduct the plaintiff is in my view estopped from now

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asserting that the defendant abandoned the premises. It follows that he would have no right to recover a year's rent under the special provision in the lease. If, as he contends, the defendant, being a tenant from year to year, left without notice he would be entitled to recover such gales of rent as had become due and payable at the time this action was brought until he accepted a new tenant: *Hall* v. *Burgess* (1826), 5 B. & C. 332, 108 E.R. 124, 8 D. & R. 67, 4 L.J. (o.s.) (K.B.) 172. A new tenant was admitted on April 1, 1922, but the action was begun in December, 1921, at a time when one month's rent only was due. The most that the plaintiff could recover in this action even if the defendant was a tenant from year to year would therefore be $40. As, however, I hold the defendant to have been a monthly tenant the plaintiff recovers nothing as rent.

I have already intimated the defendant had no right to remove the Yale lock. The plaintiff is entitled to recover its value and the cost of repairing the door, amounting in all to $6.10.

There will be a verdict for the plaintiff for $6.10 and costs of suit.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. May 2, 1922.

RAILWAYS (§IID—60)—"THICKLY PEOPLED" LOCALITY—RAILWAY YARD—EXCESSIVE SPEED—INJURY TO EMPLOYEE—ASSUMPTION OF RISK.

Section 309 of the Railway Act 1919 (Can.) ch. 68, limiting the speed of trains to 10 miles an hour when passing a "thickly peopled" locality unless the track is "fenced or properly protected," does not extend to a railway yard, as such and is not intended for the protection of yard employees, whose duties require them to be within the fences and who assume the risk of their employment. A railway company cannot be held liable for the death of a repair-mechanic who jumped from between two freight cars in front of a fast express entering the yard at a speed of 25 miles an hour.

APPEAL by defendant from the judgment of the Quebec Court of King's Bench in an action for damages caused to the respondent and her children by the death of the respondent's husband while working in the yard of the defendant company. Reversed.

Lafleur, K.C., and *Beckett*, K.C., for appellant.

Curran, K.C., and *Forest*, for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, with which I fully concur, I would allow this appeal.

IDINGTON, J. (dissenting):—The respondent herein sued for

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damages caused to herself and children by the death of her husband and their father whilst working in the Turcot yard of the said railway company. The case was tried by the Court with a special jury. The trial Judge submitted to the jury a number of questions of which the three following and answers thereto are all that call for our consideration on this appeal:—

"3. Was the said accident caused by the sole fault and negligence of the said Hector Sarrazin? If you answer yes, say in what this fault and negligence consisted? No, 9 to 2.

4. Was the said accident caused by the sole fault and negligence of the defendant, its employees or servants? If you answer yes, say in what this fault and negligence consisted?—Yes—9 to 2, in the speed of the train in that place.

5. Was the accident due to the common or contributory fault of the said late Hector Sarrazin and of the defendant, its employees or servants? If you answer yes, say in what the fault and negligence of each consisted? No—unanimous."

The answer to the first is most stoutly denied by the appellant's factum herein which seeks to attribute the sole proximate cause of the accident to the act of the deceased going from where he was working to the car standing on a track on the other side of the main tracks, to get a pin needed for use in the repair work he was engaged in and on his return therewith jumping down from between said cars without waiting till the main lines were clear.

It is alleged that, had he taken due care, he would not have jumped as he did and no accident would have happened. There is something to be said for this contention. It might have had more force with fair minded men if the appellant at the trial had not pressed rather far its contention that the deceased was entirely in the wrong and without excuse in attempting to get the pin from the place he did.

The alleged printed notice on which appellant so rested what it calls absolute prohibition of such an appropriation was only in English and not liable thereby to have been brought home to the mind of deceased.

And, when read, it impliedly permits, under stress of circumstances, the very act complained of, for it directs, if done, it must be returned or rather replaced by another.

I imagine the rather unfair use of such a notice did appellant more harm than good.

The circumstance of the deceased having jumped down was perhaps no more than an error of judgment. It was, however, entirely a matter for the jury to determine whether so or not,

giving due heed to all the attendant circumstances. No one saw him jump except the engineer on the eastward bound train from Ottawa who had his own work to engage his attention. He tells that there would be 6 feet between the cars on that train and the cars on the next track from which deceased jumped.

If so, it is quite conceivable that deceased had hoped, without being negligent but merely erring in judgment, to so land in that 6 feet of space as to be entirely safe, but possibly he stumbled slightly further than he expected, and was struck on the shoulder by a part of the engine of the incoming train. He certainly did not intend to jump or, in fact, jump across the 6 feet of space between the car he stood on and the main track and thus land in front of the train, though his shoulder got so far. I cannot, therefore, see how we can say the jury reached a conclusion, that no nine reasonable men could reach, that he was negligent.

I thus eliminate the answers to questions 3 and 5 as deserving here of no further consideration. Indeed, that to question five, for evident reasons, was not seriously pressed by either side.

The answer to question 4 in assigning its answer of fault "dans la vitesse du train à cet endroit" is a most comprehensive one and may cover both the illegal conduct of running a train at more than 10 miles an hour in a thickly populated locality contrary to the provisions of sec. 309 of the Railway Act and the running of a train at too high a rate of speed consistent with the safety of others in passing through such a busy railway yard as that in question.

There is evidence tending to shew to those conversant with the locality that both grounds were conceivably supportable in favour of the respondent.

One, if well grounded, is sufficient.

It seems quite clear that appellant had been habitually offending against said sec. 309, if not at the exact point of the accident perilously close to it and hence would not likely have been running at 25 miles an hour there but for this disregard of the statutory prohibition.

Of course, it is not what was done on other occasions than the one in question, but that on the latter alone which must govern what is in question herein.

I regret to say that the evidence was not presented on either side in such a way as to render quite clear to my mind the conditions and surrounding circumstances and bearing thereon.

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Yet, I imagine a jury from the district which paid as close attention as this one did to the case before it, as evidenced by very many pointed questions they put, could find a stronger case on that ground than I can by a perusal of the evidence with such a defective plan such as presented by appellant.

On the ground that passing through such a yard two trains at the same time, and the one in question, at all events, moving at the rate of 25 miles an hour, the case is one for the jury to determine whether or not appellant was guilty of fault.

And certainly, at all events, it is not, I submit, for us to interfere and reverse the unanimous judgment of the Court of Appeal, better situated in many ways to determine the bare question of whether or not there was evidence to submit to the jury.

I observe that there was no motion at the trial to dismiss the action on that ground.

I think the appeal here should be dismissed with costs.

ANGLIN, J.:—The plaintiff's husband, Hector Sarrazin, was killed on August 1, 1920, about 6.19 p.m., in the Turcot yard of the defendant company, by a fast express train which had come from Ottawa and was travelling at about 25 miles an hour—its usual speed at that place. Sarrazin was engaged as a repair mechanic. He had been working at a car standing on a track to the north of the two main tracks passing through the yard and had crossed over to them to the south, presumably to procure a steel knuckle which he required. In returning, he passed between two freight cars standing on the track immediately to the south of the main tracks, having apparently climbed over the coupling. He was first seen by the one eye-witness of the accident—the engineer of the incoming express train—jumping from between the two freight cars towards the main tracks, about 25 feet in advance of the oncoming locomotive, the buffer beam of which struck him on the left shoulder. The space between the southerly main track and the next track to the south was about 6 feet wide.

The plaintiff charged that the defendants were negligent in not moderating the speed of the express train while passing through the Turcot yard and in placing the car which the plaintiff was required to repair on one of the principal tracks towards the centre of the yard instead of on an outside track. By amendment, made towards the close of the trial, it was also alleged that where the accident occurred was a thickly peopled portion of the City of Montreal, that the tracks were not fenced or protected according to law and that the speed of the train,

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therefore, contravened sec. 309 of the Railway Act, 1919 (Can.) ch. 68.

The action was tried by a jury who found that the death of Sarrazin was caused solely by the fault of the defendant's servants, consisting "dans la vitesse du train à cet endroit." Sarrazin was acquitted of contributory fault.

In his charge, the trial Judge barely alluded to the allegation of excessive speed apart from the requirement of sec. 309. He dwelt at some length on that section and discussed the evidence as to the number of houses in the neighbourhood and the character of the fencing of the right of way. Judgment was entered in the Superior Court on the jury's finding for $8,000 damages, and this judgment was unanimously affirmed in the Court of King's Bench on the ground that there was evidence on which the jury could reasonably find that the cause of Sarrazin's death was the speed of the train and that such speed was so excessive as to amount to fault.

Lafleur, K.C., and *Beckett*, K.C., for the appellants. Except in cases within sec. 309 there is no legal restriction on the speed of the defendant's trains and it is not competent for a jury to find excessive speed as a fault. Section 309 does not apply to a railway yard. There is no evidence that the locality of the accident was a thickly populated portion of the city or that the fencing was insufficient. The determining cause of the accident was not the speed of the train but Sarrazin's rash act in jumping or running in front of it when only 25 feet away.

Curran, K.C., and *Forest* for the respondents. Having regard to the number of men required and of locomotives used in Turcot yards, 25 miles an hour might reasonably be found to be an excessive speed, apart altogether from sec. 309. The locality was thickly populated and the fencing defective, and, therefore, sec. 309 applies and a speed over 10 miles an hour was illegal. Had the speed been less, Sarrazin might have escaped. There is evidence to warrant the jury's finding of fault.

ANGLIN, J.:—It is quite impossible to know whether the jury dealt with this case as falling within sec. 309 of the Railway Act, 1919 (Can.) ch. 68 or intended to find excessive speed amounting to fault quite apart from that provision. It will, therefore, be necessary to examine the case in both these aspects.

I doubt whether upon the evidence it can be said that the locality through which the train was passing when it struck Sarrazin was thickly peopled. But, if that fact be assumed in the

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plaintiff's favour, having regard to the conditions as to fencing shewn by the evidence, it would probably have been incumbent on the defendants to restrict the speed of their train at that place to 10 miles per hour. Granting this, however, it does not, in my opinion, entitle the plaintiff to recover, because the excess of speed over 10 miles per hour was not the cause of Sarrazin being killed, and probably, also because sec. 309 was not passed for the protection of yard employees of the railway company whose duties require them to be within the fences erected along the right of way. The evidence, in my opinion, leaves no room for doubt that the determining cause of Sarrazin's death was not the speed of the train but his own act—whether culpable or wholly innocent is on this issue quite immaterial—in projecting himself almost immediately in front of the Ottawa express. The fact, of course, likewise affords a peremptory answer to the plaintiff's case if the jury's finding should be taken to mean that the speed of the train at 25 miles per hour in Turcot yard amounted to fault although sec. 309 of the Railway Act did not apply. Moreover such a finding of fault, in my opinion, could not be maintained. There are no circumstances in evidence which indicate that there is any greater danger, or need for reduction in the speed of the trains, in the Turcot yard than exists in any other railway yard. I am not prepared to accede to the view that in the absence of proof of such special circumstances a jury may fix the standard of what is or is not a proper speed for express trains passing through such a yard. There may, no doubt, be special circumstances—such, for instance, as the known presence of some unusual concourse of people in the yard—which would render the running of a train through it at 25 miles per hour sheer recklessness. In such a case, the railway company would in vain invoke its statutory right to operate its trains. *Columbia Bitulithic Ltd.* v. *B.C. Electric R. Co.* (1917), 37 D.L.R. 64, 21 Can. Ry. Cas. 243, 55 Can. S.C.R. 1. Statutory authorisation affords a complete immunity for injury caused by the use of the powers so conferred so long as they are exercised without negligence. *C.P.R. Co.* v. *Roy*, [1902] A.C. 220. But the statute does not sanction or protect negligent or unreasonable use of the rights it confers. *East Fremantle Corp.* v. *Annois*, [1902] A.C. 213 at pp. 217-8. Here there is nothing of that kind.

On the other hand, the running of fast express trains at high speed on the main tracks passing through railway yards is such a well known feature of our railway traffic that resultant danger to persons employed in such yards may well be regarded

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as a risk of such employment assumed by them, so long as there is no negligence either in the management of such trains or in the direction or control of the persons so employed, which increases the danger.

In my opinion, not only is the finding that there was fault on the part of the defendants which caused the death of Sarrazin unwarranted but "it is absolutely clear from all the evidence in the case that no jury would be justified in finding any verdict other than one in favour of the appellant-defendant. Article 508 (3) C.C.P. (Que.)

I would, therefore, allow this appeal; and, pronouncing the judgment which, in my opinion, the Court of King's Bench ought to have rendered (Supreme Court Act, R.S.C. 1906, ch. 139, sec. 51). I would dismiss this action, with costs throughout, if the defendant company should see fit to exact them.

BRODEUR, J. (dissenting):—This case presents serious difficulties; but, after carefully considering the points in issue, I have reached the conclusion that the company's appeal should be dismissed.

The company claimed in its plea before us that it could run its trains at whatever speed it saw fit, except in the populous districts of cities or towns. I cannot acquiesce in such a proposition. I quite admit that the place where the accident occurred was not such a place as is contemplated by sec. 309 of the Railway Act 1919 (Can.) ch. 68, which provides that the speed of trains in certain places must not exceed ten miles per hour. But the general law of the land imposes upon railway companies the obligation to act with prudence and care at all times and in all places. The question of fault depends on the facts and circumstances of each case; and it would be a case of negligence, in my opinion, if a company allowed its trains to run at excessive speed in one of its yards where there was a great number of employees. The particular situation of the main lines in this Turcot yard renders it an exceedingly dangerous place; and to pretend that trains may pass through it at any speed whatever seems to be contrary to the elementary principles of ordinary prudence. Apart from any statutory provision, the speed of a train must be regulated in the interests of the safety of those who have a right to be on the right of way.

There are particular circumstances which impose the obligation of moderating the speed of trains in certain places, as for instance in a yard, or again when the engineer sees that a person is on the line or in the act of crossing it.

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This is, therefore, a question of fact which must be left to the jury. It seems to me that the verdict in this case, which has been unanimously confirmed by the lower Courts, should not be reversed.

The appeal should be dismissed with costs.

MIGNAULT, J.:—The respondent obtained judgment against the appellant for $8,000 on the verdict of a jury. $3,000 of this sum was awarded to the respondent herself and $5,000 to her five minor children. The judgment was given as a result of the death of respondent's husband, Hector Sarrazin, who was struck by a locomotive belonging to appellant, and was unanimously confirmed by the Court of Appeal. The appellant asks that this judgment be reversed and the verdict quashed.

The salient facts of the case are not disputed. On August 1, 1920, about 6 o'clock in the evening, Hector Sarrazin and a companion named Lamer were inspecting three shipments of merchandise which were destined to leave the same night, to see that the cars were in good condition and to make such minor repairs as might be necessary. This work was being done in the Turcot yard, a large yard within the limits of the city of Montreal, extending over a space of about 2 miles, with several sidings both on the north and south sides of the two main lines traversed by the appellant's trains. This yard is not crossed by any public road.

Immediately before the accident, Sarrazin and Lamer were working on the second siding north of the main line. All the tracks except the main ones, which were clear, were occupied by a great number of freight cars which were later to be sent to their various destinations. The deceased and his companion might have done their work and obtained the necessary tools and materials for that purpose on the north side of the main line, where there was no danger from passing trains, for the appellant's shops were on that side; but for some unexplained reason which can only be guessed at, Sarrazin left the place where he was working, and crossed the main lines to the south side, intending no doubt to return to his work which was not finished. A few moments later, at precisely 19 minutes past 6, when the weather was fine and clear, the fast train from Ottawa to Montreal passed at 25 to 30 miles per hour, its usual speed at that place. Weston, the engineer of the locomotive and the only witness of the accident, was at his post. He says:—

"Q.—Did you see the man Hector Sarrazin, the plaintiff's husband, when you were crossing Turcot yard? A.—Coming

into Turcot yard? Q.—Yes? A.—Yes. Q.—In what spot did you see him? A.—Well, when I saw him first he was jumping between the cars that way (indicates). Q.—What? A.—He jumped out from between the cars in front of the engine. Q.—I understand you to say that he jumped between two cars? A.—Yes, he jumped from between two cars. Q.—From the side? A. On to the track. From the side on to the main line. From the siding on the same side of the track on to the main line in front of me. I am coming in here (indicates) he jumped out from the cars on that side right immediately in front of the engine."

Weston at once applied the brakes and succeeded in stopping the train 500 ft. further on, but nothing in the world could have saved Sarrazin who was struck by the locomotive and sustained a fractured skull. He died the following day.

The jury was of the opinion that the accident happened through the sole fault of the appellant and that no fault was to be imputed to Sarrazin. To a question asking what constituted the appellant's fault, the jury answered " in the excessive speed of the train at that place." The verdict does not shew why the speed of the train was considered faulty.

It is an elementary principle that if nothing in the law or in the circumstances required a slower speed, there could be no fault in driving the train at 25 to 30 miles an hour or even more. Fault is, by definition, a failure to perform a duty. If there is no duty and one acts within his rights, there is no fault. Now, I repeat, if there was nothing in the law or the circumstances to require a slower speed, the jury could not reasonably say that the speed of the train at that place constituted a fault.

I see no circumstance in the evidence which might have required a reduction in speed at that particular place, 4½ miles from the terminus for which the train was bound. There were no large groups of workmen on the line. According to the evidence there was no one in the vicinity except Sarrazin and his companion; and Sarrazin's death was due to his own act in throwing himself in front of the locomotive. When he suddenly appeared, there was no possible means of avoiding the accident.

Nor was the speed of the train prohibited by law. Towards the end of the trial, the plaintiff obtained leave to amend her declaration by alleging that the place where the accident occurred is "a populous district situated in the city of Montreal and not protected or enclosed as required by law." This

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amendment was made for the purpose of invoking sec. 309 of the Railways Act, which provides that in such a place the speed of trains must not exceed 10 miles per hour.

But, instead of proving that the place where the accident occurred was populous, it was proved that there are streets and houses nearly a mile away in the vicinity of St. Henry station. Where Sarrazin was killed there are neither streets nor houses. It is a vast plain, bounded on the north by a steep hill with the Lachine Road running along its crest, and on the south by the Lachine Canal. The shops of the Canada Car Co. lie not very far away to the southward, separated from the appellant's lines by the Park and Island Railway and a double enclosure. Not a single witness alleges that Sarrazin was hit in a populous district. It is, therefore' evident that sec. 309 is not applicable. If, then, the law did not prohibit a speed of from 25 to 30 miles an hour, and if there is nothing in the circumstances of the case to render such speed imprudent, no jury could reasonably find the appellant at fault, by reason of the speed of the train at the place where the accident occurred (*C.P.R. Co.* v. *Roy*, [1902] A.C. 220).

Here we have a man who throws himself suddenly in front of a train, a man who has been working for more than a year in the Turcot yard and who knows that many trains pass that point; four every hour, we are told; and the jury answers that this man is free from all fault. On the other hand, the defendant, in directing the movement of its trains, exercises a right conferred upon it by law; but the jury declares that it is guilty of fault, and responsible for Sarrazin's death. Such a verdict, to quote the language of art. 501 C.C.P. (Que.), is one which the jury, viewing the whole of the evidence, could not reasonably find. In such a case, the law allows the Court to give a different judgment from that pronounced by the Judge who presided at the trial (art. 508 C.C.P. (Que.)).

The respondent, a young mother 24 years old, who already had five children, the youngest born after its father's death, is in a deplorable situation. The only insurance she received was a sum of $250 from the Association of Railway Employees and $741 from the Independent Order of Foresters; but that is no reason for granting her an indemnity at the appellant's expense, if no fault has been proved against the latter, and if Sarrazin was responsible for his own death through gross carelessness.

Doubtless, as the honourable Judges of the Court of Appeal pointed out, the jury is sovereign judge of the facts, but it is,

nonetheless, true that its decision must be reasonable. Martin, J. says that Sarrazin might perhaps have avoided the accident which caused his death if the speed of the train had been less. Supposing that that had been the opinion of the jury, the form of its answers leads us to inquire if the speed permitted by law could be declared an instance of fault, especially when the line was straight and clear and the victim of the accident jumped suddenly in front of the train. And is it an instance of fault to overlook the possibility of a man committing such an act of incredible folly? The verdict of the jury is entirely wrong and unreasonable, and if it were upheld the operation of railways in this country would be seriously embarrassed.

It is unfortunate that Sarrazin's annual salary exceeded the maximum figure allowed under the Workmen's Compensation Act. The respondent had only a common law action and she could not succeed if she failed to prove fault on the part of the appellant. I have read the evidence very carefully, but can find nothing to justify the verdict.

The appeal should be maintained and respondent's action dismissed. The appellant is entitled to its costs in all Courts, if it wishes to claim them from the respondent.

Appeal allowed.

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Manitoba King's Bench, Dysart, J. May 18, 1922.

COSTS (§I—4)—"INTERLOCUTORY COSTS"—CONTEMPT—INJUNCTION—"PARTICULAR ACTION"—SET-OFF.

Contempt proceedings, growing out of consent judgment in an injunction case, being of a criminal nature, the costs thereof cannot be regarded as "interlocutory costs" within the meaning of R. 959 (Man.). The proceedings being distinct and separate from the "particular action" in which the judgment was obtained, the costs incurred in the action cannot under R. 959 be set off to the prejudice of a solicitor's lien for costs in the proceedings.

SOLICITORS (§IIC—35)—LIEN FOR COSTS—COUNSEL FEES—TO WHAT LIEN ATTACHES.

A solicitor's lien for costs under R. 959 does not extend to counsel fees, except those actually paid; such lien attaches, not to the cause of action or to the ultimate balance after all accounts are adjusted, but to the judgment itself obtained by his efforts.

SET-OFF (§IC—15)—MUTUALITY OF CLAIMS—JOINT AND SEVERAL DEBTS.

Where the plaintiff's indebtedness to the defendant is joint and several, and the defendant's indebtedness only several a set-off is allowable only so far as the indebtedness of the plaintiff's is several.

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APPEAL from a refusal of taxing officer under R. 959 to set off costs against a judgment. Reversed.

L. L. Broad, for plaintiffs; *W. M. Crichton*, for defendant.

DYSART, J.:—The plaintiffs secured an interim injunction enjoining the defendant from collecting rents under a mortgage on their apartment block, and under cover of this injunction they collected from their tenants the sum of $315. Thereafter they consented to judgment which was duly entered for the said sum of $315 as damages and costs which were thereupon taxed. The injunction was not continued.

The order for injunction contained the usual undertaking in these words:—

"The plaintiffs by their counsel undertaking to abide by any order which the Court may make as to damages in case the Court should hereafter be of the opinion that the defendant shall have sustained any, by reason of this order which the plaintiffs ought to pay."

For alleged failure to abide by this undertaking the plaintiffs were, at the instigation of the defendant, charged with contempt of Court, but the proceedings were eventually dismissed with costs. On the taxation of these costs the taxing officer refused to set them off to the prejudice of the lien of the plaintiff's solicitors.

Rule of Court No. 958 allows set-off of costs between parties. R. 959, however, provides that:—

"No set-off of damages or costs between parties shall be allowed to the prejudice of the solicitor's lien for costs in the particular action against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same action awarded to the adverse party may be deducted."

The questions raised here are:—1. Whether the costs of contempt proceedings were incurred in this "particular action" in which the defendant secured his judgment for damages and costs; and if not, then are they interlocutory costs in the same action; 2. In either case, how far, if at all, are they affected by the solicitors lien so as to prevent set-off?

The undertaking of the plaintiffs in the injunction order was directly to the Court, to "abide by . . . any order . . . the Court may make as to damages." According to Century Dictionary to "abide by" means "to await or accept the consequences of; to rest satisfied with." In this case I think it means to accept without dispute or appeal any such order, and to fulfil or carry out any such order if made. The undertaking it will be noted extends only to damages not to costs.

Speaking of the history and meaning of this kind of undertaking, Jessel, M.R., in *Smith* v. *Day* (1882), 21 Ch. D. 421, at p. 424, 31 W.R. 187, 48 L.T. 54, says:—

"It was invented by Lord Justice Knight-Bruce when Vice-Chancellor, and was originally inserted only in *ex parte* orders for injunction. Its object was, so to say, to protect the Court as well as the defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the plaintiff but to compensate the defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression."

In this case the contemplated "order" was never made, but instead a judgment for damages was entered by consent of the parties. Does this judgment derive any virtue or peculiar dignity or special sanctity by reason of the fact that it follows upon or in a sense substitutes that undertaking? Does this judgment differ from the ordinary money judgment, the non-performance of which is not considered contempt of Court? The Judge before whom the contempt proceedings were conducted decided that failure to satisfy this consent judgment was not contempt of Court. In other words, it was not considered by him as a contemptuous breach of their undertaking. And yet, although that failure was not contempt, may not the proceedings taken in respect thereof have been undertaken as a step or a measure towards enforcing performance of that judgment? It is true that there are other and more usual methods of securing satisfaction of a money judgment, but it is argued that these contempt proceedings were taken as part of the "particular action" and were properly interlocutory proceedings therein. Against this the defendant urges that such proceedings were distinct and separate from this action.

Contempt of Court is of two kinds, ordinary and special. In 1921, Annual Practice, at p. 758 it says:—

"*Ordinary* contempt arises where there is a breach of judg-

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ment or order to do, or abstain from doing anything, or of an undertaking given in Court. 'Contempts are usually incurred by a party's neglect or refusal to do some act which is in justice due to the other party to the cause, such as the giving of answers, the payment of costs, or the like, and the imprisonment which follows is at the prayer of the other party—a prayer to which the Court cannot refuse to accede without a breach of its duty and a denial of justice.' (per Sir John Nicholl, *Barlee* v. *Barlee* (1822), 1 Add. 301 at p. 304.)"

Contempt proceedings may be instituted to punish disobedience of a Court's Order, even though in some cases the Order is for the payment of money. The punishment may and often does have the effect of enforcing obedience, that is, of purging the contempt; that, however, is only incidental to the principle invoked. "Contempt" is an offence against the dignity or authority of the Court and is punishable under the power inherent in the Court as a Court. It may find its occasion in or spring from any cause of action or proceeding, civil or criminal, but it cannot be said in any to arise therefrom as a part thereof.

"It should be borne in mind that contempt of Court is a criminal offence, punishable as a misdemeanor by fine and imprisonment, or both: 4 Blackstone, 337; 2 Hawkins P.C. bk. 2, c. 22" [per Mathew, J. in *In re Davies* (1888), 21 Q.B.D. 236, at p. 238, 37 W.R. 57.]

The conclusion therefore is that the contempt proceedings must be considered in this case as distinct and separate from the particular action in which the plaintiffs (defendants) secured judgment for damages and costs, and consequently the costs incurred in that action could not under R. 959 be set off to the prejudice of the solicitor's lien for costs incurred in this action. Such costs, however, may be set off unless to do so would prejudice the solicitor's lien. This brings us to a consideration of the solicitor's lien and how far it extends.

The solicitor's lien existed at common law but has been enlarged by statute. Speaking of this lien in a case of *In re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590, at p. 599, Kay, L.J., quotes with approval this language of Sir Thomas Plumer:—

"'There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands . . . This lien, however, does not extend to general debts, but only to what is due to him in the character of attorney.' . . . the lien extends to all those items which

are properly included in the bill of costs, or, in other or more definite words, to all such claims against his client as the Taxing Master has a right to consider, and if necessary moderate."

In the same case Stirling, J., at p. 592, says:—

"I agree that the solicitors cannot claim any lien for any sums due to them otherwise than in the character of her solicitors," and Lindley, L.J., at p. 596, says:—

"We have to consider for what a solicitor is entitled to a lien on his client's documents. He has a lien for all taxable costs, charges, and expenses incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business such as counsel's fees, which are taxable in this sense, that their allowance in full is not necessarily obtained by merely vouching them, but they may be moderated, being subject to the discretion of the Taxing Master as to the amount to be allowed; and for whatever costs, charges and expenses can be so moderated, it appears to me that the solicitor has a lien upon all his client's papers; but the lien does not include other advances which do not come within this category. I come to this conclusion, not only upon the authorities referred to, but by reason of the language of sec. 28 of the Solicitors' Act, 1860."

From this and many other authorities which might be cited it is beyond question that the solicitor's lien in England extends only to the costs, charges and expenses incurred by a solicitor in his capacity as a solicitor. There is no such lien for barristers' fees. Indeed in England a barrister's compensation is considered in the nature of an *honorarium* for which he is not even entitled to sue. In this province, however, under sec. 71 of the Law Society Act, R.S.M., 1913, ch. 111, "Every barrister shall be entitled to sue for fees due to him." In England the distinction between a barrister and solicitor is sharply defined and strictly adhered to. In this province members of the legal profession are authorised to practice and generally do in both capacities. Our solicitors have rights equivalent to the English solicitors, and it is argued that from this it should follow that, as we have extended the power of solicitors to enable them to practice as barristers, we should also by implication extend the right of a solicitor to a lien so as to cover the fees earned by him as a barrister.

This claim has been made before in our Courts but has never been sanctioned. In the case of *Coupez* v. *Lear* (1911), 16 W.L.R. 401, a solicitor sought to establish a lien on a fund

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incurred to cover the costs due to him in his capacity both as solicitor and as barrister and the objection was raised that the solicitor "was acting in his capacity as barrister and, therefore, would not be entitled to lien."

This the solicitor "disposed of . . . by limiting the application of his lien to remuneration for his work as solicitor and his outlays in that connection."

That is therefore of no assistence other than to indicate a recognition on the part of the counsel engaged in it that the solicitor's lien did not extend to counsel fees. The case of *Williams* v. *McDougall* (1909), 12 W.L.R. 381, was also referred to. This is an Alberta decision under statutes similar to our own and is relied upon by the plaintiffs as recognising a barrister's lien. Stuart, J., in delivering judgment said at p. 383, "Any claim by Mr. Bergeron as counsel should, however, be included in the taxed costs of the solicitor on the record, Collision, and I assume that he may be, and has been, amply protected in that way."

It is to be noted that the barrister's lien sought to be established was in favour of a person other than the soliictor in the case, and even then counsel fees were ordered to be included in the solicitor's bill of costs and taxed in order to secure the protection to the counsel of the solicitor's lien. As a solicitor's lien embraces counsel fees if actually paid, it seems to me that what was intended there was that the counsel fees should be considered as having been paid by the solicitor and so brought within the cover of his lien. I can find no expression which would indicate that the fees earned by a barrister who is also a solicitor may be secured by any lien for costs.

I am therefore of the opinion that the solicitor's lien does not extend to counsel fees. All counsel fees, therefore, which are included in the taxed bills of the solicitors for the plaintiffs, except those actually paid, are outside of the protection of the "solicitor's lien for costs" mentioned in R. 959.

Then it is argued that the solicitor's lien can apply only to any balance of costs, which after all deductions and adjustments are made might be found to be due to his client. But this view is clearly wrong. The solicitor's lien attaches not to the cause of action, or upon the ultimate balance due after all accounts are adjusted but rather to the judgment itself which has been obtained by his efforts. In *McGregor* v. *Campbell* (1909), 19 Man. L.R. 38, Perdue, C.J.M., says at p. 63:—

"There remains the question of solicitor's lien for the costs. The trial Judge awarded costs to the plaintiffs but none to the

defendant. At the same time, and by the same judicial act, a balance was struck between the parties, which balance was found in favour of the defendant and judgment was entered for this. There was never, therefore, any specific judgment in the plaintiff's favour to which a lien could attach. The lien is on the judgment, not on the action. The lien may be defeated by a set-off or a counterclaim, the lien only attaching on the balance; *Poley on Solicitors*, 335; *Westacott* v. *Bevan*, [1891] 1 Q.B. 774, 60 L.J. (Q.B.) 536."

While the solicitor's lien was defeated in that case because no judgment was pronounced on which it could attach the language quoted is a clear authority for the proposition that the lien attaches to the judgment itself. In this case the judgment was pronounced in favour of the plaintiffs for costs and a lien attaches thereto.

It is also contended that the solicitor's lien does not extend to interlocutory costs so as to prevent them from being deducted or set off against the adverse claim. The costs in these contempt proceedings were not, however, interlocutory costs. It is true that interlocutory costs may be incurred after judgment as well as before. In *Clarke* v. *Creighton* (1890), 14 P.R. (Ont.) 34, at p. 37, Boyd, C., referring to Ontario R. 1205, which corresponds exactly with our R. 959, stated:—

"Now upon the authorities a liberal meaning has been given to the word 'interlocutory' as used in the Judicature Act and in this particular Rule. It is not to be restricted to motions or proceedings between writ and judgment, but may extend to applications made to satisfy by equitable execution or otherwise, the judgment obtained. That is the view affirmed by *Salt* v. *Cooper* (1880), 16 Ch. D. 544, 50 L.J. (Ch.) 529, and *Smith* v. *Cowell* (1880), 6 Q.B.D. 75, 50 L.J. (Q.B.) 38, as to the Act; and as to this Rule it was said by Wightman, J., in *Melville* v. *Leesom* (1858), E.B. & E. 324, 120 E.R. 529, 27 L.J. (Q.B.) 318, that interlocutory costs are those in a proceeding in the cause though after judgment. On the same point *Thompson* v. *Parish* (1859), 141 E.R. 276, 5 C.B. (N.S.) 685, 28 L.J. (C.P.) 153, which was followed by Osler, J., in *Young* v. *Hobson*, 8 P.R. (Ont.) 253. It is a fair construction to give to this term as used in the Rule that proceedings may be considered interlocutory till satisfaction is obtained in respect of the moneys, costs, or subject matter in controversy."

In our case the costs were incurred in a contempt—that is a criminal—proceeding, which as we have seen is distinct and separate from this action. Moreover there is the additional

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difficulty that the defendant had already taxed his costs and received his certificate from the taxing officer and entered his judgment for such costs and damages. When, therefore, the plaintiffs' costs came on for taxation it was too late to deduct them from the defendant's costs previously taxed. If the Rule had permitted they might have been *set off* against these costs but they could not be *deducted*. It would be otherwise if the defendant's costs were then in a process of taxation, as the whole could have been dealt with at one time and a certificate issued after deductions made.

In this connection, however, there is one item that may and ought to be deducted. On the taxation of the contempt costs defendant taxed a bill for $86 of costs incurred in connection with the injunction and these proceedings. Such costs were admitted by counsel in their arguments to be properly taxed, and a proper subject of deduction. They were apparently interlocutory costs in the contempt proceedings and as such will be ordered to be deducted.

The final question remains—May set off be allowed here at all, even for the counsel fees? There is a certain sum of money owing jointly and severally by the plaintiffs to the defendant. There are two lesser sums owing severally to the plaintiffs by the defendant. Is there sufficient mutuality here? Set-off is allowed only when the debts are due from and to the same parties in the same right. Where two persons sue a third for a debt owing to them jointly, their debtor cannot set off a debt owing to him by one of them alone: *McDougall* v. *Cameron*; *Bickford* v. *Cameron* (1892), 21 Can. S.C.R. 379. But here the plaintiffs each seek to collect a debt due to him individually from the defendant, and the defendant seeks to cancel his indebtedness to them by setting it off in each case against the larger sum which they owe him, both jointly and severally. So far as the indebtedness of the plaintiffs to the defendant is several the set-off is allowable, and I think there is sufficient mutuality in this case to warrant set-off and I accordingly so direct to the extent of counsel fees included in the plaintiffs' costs as taxed. I do this the more readily as I think the use of the process of the Court in this case amounts almost to abuse. By securing an injunction to which they were not entitled, the plaintiffs collected the moneys to which they were not entitled and these moneys they have kept and in lieu thereof have consented to a judgment against them which they are apparently unable or unwilling to pay. At the same time the defendant

is compelled to pay their solicitors' costs of proceedings in which they were successful.

The appeal will therefore be allowed to this extent that the item of $86 interlocutory costs will be deducted from the plaintiffs' costs as taxed, and all counsel fees other than those actually paid by plaintiffs' solicitors will be set off against the judgment debt of the plaintiffs to the defendant. The defendant will have costs of this appeal.

Appeal allowed.

STONE v. S.S. "ROCHEPOINT."

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J.A. June 13, 1921.

SEAMAN (§I—4)—LIEN FOR WAGES—PREFERENCE AGAINST MORTGAGEE—MORTGAGE GUARANTEED BY MASTER AND MATE.

The liens of a master and mate of a ship for wages will not be preferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by them.

SEAMAN (§I—4)—LIENS FOR WAGES—COMPANY REGISTERED AS OWNER TO CLOAK OPERATIONS OF PARTNERS—LIEN NOT BONA FIDE—RIGHT OF COURT TO EXTRACT TRUTH FROM WHOLE EVIDENCE.

In determining the true ownership of a ship the Court will not allow itself to be misled by the presence of documents, but will resort to all the evidence to extract the truth. Where the name of a company as the registered owner of a ship was merely a cloak made use of to screen the operations of three partners, the Court held that such partners were not entitled to a lien for wages against a mortgagee of the ship, the alleged lien not being *bonâ fide*.

ACTION for arrears of wages claiming condemnation of the ship defendant.

Hume B. Robinson, for plaintiffs.

E. C. Mayers, for mortgagees.

MARTIN, L.J.A.:—This is an action for wages by the master, mate and other seamen of the "Rochepoint," a gasoline fishing vessel of about 76 tons gross, and the preferential lien that they claim is resisted by the mortgagees, the Columbia Salmon Co., which holds a mortgage on the vessel for $4,000 for moneys advanced, dated December 9, 1919, given by the registered owner, the West Coast Transportation Co., Ltd., and the payment of which is also personally guaranteed by W. J. Stone and S. S. Stone, her master and mate respectively, at that time, who signed a promissory note as collateral security for the mortgage, which they have not paid.

It was decided in *The Bangor Castle* (1896), 8 Asp. M.L.C. 156, 74 L.T. 768, that the lien of a master for wages cannot be pre-

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ferred against the claim of a mortgagee where the payment of the mortgage has been guaranteed by the master, (and see *The Edward Oliver* (1867), L.R. 1 A. & E. 379, 36 L.J. (Adm.) 13, 16 L.T. 575,) and so it was admitted that the master's claim here must give way to the mortgagee's. But, it is submitted, that the claim of the mate is in a different position because he is a seaman and the master is not in theory, (though I note he describes himself as such in his statement of claim) and hence the rule should not be extended to include seamen, who are specially protected or favoured as to exemption from attachments and the revocability of assignments of wages or salvage made "prior to the accruing thereof" by secs. 236-7 of the Canada Shipping Act, R.S.C. 1906, ch. 113. The position of the master as to his lien for wages and disbursements was considered by me in *Beck* v. *The "Kobe"* (1915), 24 D.L.R. 573, 17 Can. Ex. 215, 22 B.C.R. 169, and he is now upon the same basis in that respect as any seaman, though not a seaman in the technical use of that word, (though he is a "mariner")—*The Jonathan Goodhue* (1859), Swabey 524 at p. 527, and I am unable to see why a distinction should be drawn between two classes holding a lien of the same description simply because special protection in other respects is given to a seaman. It does not at all follow that because he may properly claim that specified statutory protection or privilege there is any principle which would otherwise entitle him to act less honestly than any other lien holder towards his creditor, and Dr. Lushington said in the *Edward Oliver* case, L.R. 1 A. & E. 379 at p. 383, that in the case of a master "it would be manifestly wrong that in defeasance of his own contract he should not only pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners leaving the bottomry bond unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed," and so I see no reason why the mate should be less honest than the master in discharging his legal obligations, I am of opinion that the claim of the mate is within the same rule as that of the master and should likewise be postponed to that of their common creditor the mortgagee.

As to the claim of Chester R. Stone as engineer; having regard to all the unusual circumstances it is obviously open to grave suspicion as a lien in conflict with the unquestioned claim of the mortgagees, who, I am satisfied, were designedly kept in ignorance of these wage claims. After an examin-

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ation, in the light of the other evidence, of the books, (if they can be dignified by that description) of the West Coast Transportation Co., I can only reach the conclusion that at time material at least the name of that company as the registered owner was being made use of as a cloak to carry on the operation of the vessel by the three Stone plaintiffs as partners behind the screen of registration. But to determine the question of the true ownership the Court will not allow itself to be misled by the presence of documents but will resort to all the evidence to extract the truth, as I did recently in *Haley* v. *88. "Comox"* (1920), 56 D.L.R. 662, 30 B.C.R. 104, 20 Can. Ex. 86. Therefore, I am of opinion that this alleged lien is not *bona fide*, and is, consequently, rejected.

With respect to the claims of the three seaman, McKee, Rhodes, and Knudsen, I am of the opinion that they are *bona fide* and the delay in asserting their lien has been satisfactorily explained and, therefore, judgment should be entered in their favour for the respective amounts due them of $301.15; $480.85 and $816.20.

Judgment accordingly.

CARTER v. McMILLAN.

Alberta Supreme Court, Harvey, C.J. May 15, 1922.

MORTGAGE (§VI J—140)—MORTGAGEE IN POSSESSION—REVENUE NOT SUFFICIENT TO PAY INTEREST—SALE OF LAND FOR TAXES—EXECUTION AGAINST MORTGAGOR FOR AMOUNT DUE—TIME FOR REDEMPTION NOT EXPIRED—NO INTENTION OF REDEEMING—RIGHTS OF PARTIES.

A mortgagee in possession, not receiving sufficient revenue from the property in any one year to meet the annual interest on his mortgage is not compelled to pay the taxes on the property out of his own moneys even to keep it from being sold for non-payment of taxes, and where such property has been sold for taxes the mortgagee may issue execution against the mortgagor for the amount due for principal, interest, and costs, the remedy against the lands having been exhausted by the tax sale proceedings—although the time for redeeming has not yet expired; it being clearly shewn that the mortgagor has no intention of redeeming the said lands.

APPEAL by defendant from the Master in Chambers granting a motion for leave to issue execution in a mortgage action. Affirmed.

L. Y. Cairns, for plaintiff.

H. R. Milner, K.C., for defendant.

The judgment appealed from is as follows.

BLAIN, M. C.:—This is an action on a mortgage on property in the city of Edmonton commenced by statement of claim on November 20, 1919. No defence was put in but a demand

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for notice was filed on behalf of the defendant. The plaintiff obtained an order *nisi* on December 16, 1919, the amount then due being $15,952.86. The defendant was represented by counsel on the application and it appeared at that time that the plaintiff was receiving the rents from the property. No step appears to have been taken in the action since the making of the order *nisi*. The plaintiff has been receiving the rents since that time but no moneys have been paid by the defendant on either principal or interest, nor has he paid the taxes or any part of them so far as appears. The property was sold for taxes in 1921 to the city of Edmonton and the amount required to redeem the property is $6,986.75 as of December 31, 1921.

The plaintiff now moves for leave to issue execution against the defendant for the amount due the plaintiff for principal, interest and costs on the grounds that the plaintiff has exhausted his remedies as against the lands and that the defendant has permitted the lands to be lost to the plaintiff through the tax-sale proceedings.

The motion was opposed by counsel for the defendant on the ground that the mortgagee was in possession of the property and that it was his duty as mortgagee in possession to pay the taxes and to keep the security from being sold for non-payment thereof. The agent of the plaintiff states in his affidavit in support of the application that the plaintiff has no intention of redeeming the lands and it would seem that to do so would have to expend moneys of his own, for the rents received have not been sufficient to meet the interest in any year, thus increasing the amount due him by the defendant, and the original loan by about $7,000.

There is a dispute as to whether or not the plaintiff is in the position of a mortgagee in possession but for the purpose of this application I am, by arrangement, to assume that he is and has been at all times material a mortgagee in possession and to determine whether or not such being the case it was his duty to pay or to have paid the taxes.

I am of opinion that he was not bound to pay the taxes and I so find. There is no authority cited, or that I have been able to find, which decides that a mortgagee in possession not receiving sufficient revenue from the property in any one year to meet the annual interest on his mortgage must pay the taxes on the property out of his own moneys even to keep it from being sold for non-payment of taxes. The mortgagee is in possession through the laches or default of the mortgagor, and though compelled to account for moneys he actually re-

ceives or which but for his default, he might have received, he is not bound to spend his own moneys in repairs (Coote on Mortgages, 8th ed., vol. 2, p. 830), nor, I take it, to expend large sums of his own money in payment of taxes. If by reason of possession, he becomes liable for the taxes it might frequently, as it certainly would in this case, result in his being compelled to lend more moneys on a security already deficient. The mortgagee by going into possession does not deprive the mortgagor of the right to pay the taxes which he has convenanted to pay. There is no prior encumbrancer in this case whose interests are to be considered or protected.

In some of the text-books on mortgages *Bompas* v. *King* (1886), 33 Ch. D. 279, 56 L.J. (Ch.) 202, 55 L.T. 190, is cited as an authority for the statement that rents received by a mortgagee in possession are applicable in the first instance to payment of current outgoings, such as rents, rates and taxes, insurance premiums and the interest on prior encumbrances, and the balance, if any, in payment of the interest on his mortgage. I do not find in that case support for this conclusion. It might be so in the case of a second mortgagee in possession as he would have to protect the prior encumbrancer but would not, in my opinion, apply to a first mortgagee in possession.

The defendant having permitted the mortgaged property to be sold for taxes, the plaintiff is, I think, entitled to leave to issue execution on the judgment under the order *nisi* and that notwithstanding the fact that the time for redeeming the property from the tax sale has not yet expired, and that the property still stands in the name of the defendant in the records of the land titles office. It is stated in the affidavit of Wilkin, agent for the plaintiff, filed in support of this application, that the plaintiff has no intention of redeeming the property, and there is no evidence that the defendant has any such intention. Indeed it would seem that it would be unwise for the defendant to do so for the sworn value of the property is $2,500 to $3,000 and the amount required to redeem approximately, $7,000. In *The Western Canada Mortgage Co.*, v. *O'Farrell* (1920), 56 D.L.R. 10, 16 Alta. L.R. 429, it was held by Simmons J., that a mortgagee who purchased the mortgaged lands at a tax sale, should be allowed to proceed upon the personal covenant and to issue execution upon the judgment recovered thereon. This decision was confirmed by the Appellate Division (1921), 65 D.L.R. 776. In *Lebel* v. *Dobbie*, (1919), 15 Alta. L.R. 126, it was held that where a

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purchaser under an agreement for sale of land, convenanted to pay the taxes but failed to do so and the lands were forfeited under the provisions of the Town Act, that the vendor was entitled to recover judgment and to issue execution for the balance of the purchase-price remaining unpaid.

The plaintiff was at the date of the order *nisi* and has been since that date receiving rents from the property and I think the defendant entitled to an accounting if he desires it, but not, under the circumstances, to a new day and further period for redemption. *Allan* v. *Vair*, (1913), 13 D.L.R. 194. The taking of the account will not I think be very complicated, and if the defendant desires an accounting, it will be referred to the clerk of the Court to take the account.

The judgment will be amended by the addition of interest, amounts properly paid by the plaintiff under the mortgage, and costs to this date, and the deduction therefrom of rents received by the plaintiff with leave to issue execution for the amount of the judgment so amended.

The appeal was dismissed by Harvey C. J., without written reasons.

RUTHENIAN FARMERS ELEVATOR Co. v. GNIAZDOSKI.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. July 10, 1922.

EVIDENCE (§VIF—540)—PAROL EVIDENCE—PROMISSORY NOTE—SUBSCRIPTION FOR SHARES—CONDITION—CONTEMPORANEOUS AGREEMENT.

Liability on a promissory note, given in payment of a subscription for shares, cannot by disproved by parol evidences of a condition or contemporaneous agreement that the liability was contingent upon the company's commencement of the erection of an elevator within a certain time, which had not been done; such evidence being inadmissible.

[*Wilton* v. *Manitoba Independent Oil Co.* (1915), 25 D.L.R. 243, 25 Man. L.R. 628, followed.]

APPEAL by plaintiff from the judgment of Bonnycastle, Co. Ct.J., dismissing the action on a promissory note. Reversed.

F. Heap, for appellant; *C. K. Guild*, for respondent.

PERDUE, C.J.M.:—The plaintiff is a company incorporated under the Companies Act., R.S.C. 1906, ch. 79, of the Dominion. The plaintiff sued the defendant, a farmer, for $100 as the amount due on 1 share of stock subscribed for and allotted to defendant. During the trial it was shown that defendant had given a promissory note in payment of the share. After some discussion it was agreed that the plaintiff should amend his pleading so as to bring an action on the promis-

sory note, the defendant to have costs of a nonsuit. The defence set up against payment of the note was that it was given and the stock subscribed for under a promise or representation that the plaintiff would build an elevator at Sifton and that construction of it would be commenced in 2 weeks. This was in the fall of 1917. The defendant alleges that the elevator was not built and he claims he is not liable on the note.

It appears to me that this case is concluded by the decision of this Court in *Wilton* v. *Manitoba Independent Oil Co.* (1915), 25 D.L.R. 243, 25 Man. L.R. 628. In that case the plaintiff gave evidence to show that at the time of giving his promissory note for shares in the defendant company it was agreed that the note should not be binding and would be returned to him in case the company failed to erect an oil tank prior to the due date of the note; that the tank had not been built. The plaintiff brought the action which was one of replevin, to recover the note. It was held by this Court that evidence was not admissible to shew an agreement contemporaneous with the making of a promissory note that the liability of the maker as it appears in the face of the note is contingent on the happening of some event. The Court followed the judgment of the Court of Appeal in *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487, 67 L.J. (Q.B.) 825, 79 L. T. 323. See also Maclaren on Bills, 4th ed. 46-47; Russell on Bills, 2nd ed., 44-48.

The appeal should be allowed with costs and judgment entered for the plaintiff for the amount of the note and interest at 7% to due date and thereafter at 5%, with costs in County Court since amendment at trial including usual counsel fee. Defendant is entitled to costs up to amendment made at trial.

CAMERON, J. A. concurred.

FULLERTON, J. A.—The action was brought to recover $100, being the amount payable in respect of one share of stock alleged to have been subscribed for by the defendant and duly allotted to the defendant. At the trial, the plaintiff failed to prove the allotment of the stock, but as a promissory note had been given for the shares which was proved by the plaintiff, it was agreed between counsel that the statement of claim should be amended by adding a claim on the note, on the understanding that the defendant should have the costs of the action up to that stage in any event. The pleadings were not formally amended but it is quite apparent from the evidence that the only point relied on by the defendant was that

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the promissory note was given upon the express condition and agreement that the plaintiff within 2 weeks from the date thereof would commence the erection of an elevator at Sifton, Manitoba, and thereafter proceed with the completion thereof and operate said elevator in the season of 1917, and that this condition had not been complied with inasmuch as the elevator was not built until 1919. The trial Judge found that the allotment of stock was not proved and also that the representations alleged had been made and gave judgment for the defendant.

Wilton v. *Manitoba Independent Oil Co.*, 25 D.L.R. 243, 25 Man. L.R. 628, was a case on all fours with this so far as the defence to the promissory note is concerned. In that case, the plaintiff gave evidence to show that, at the time of giving his promissory note for shares, it was agreed that his note should not be binding and would be returned to him in case the company failed to erect an oil tank by a time prior to the due date of the note, and that the tank had not been built. The Court held that oral evidence was not admissible to show an agreement contemporaneous with the making of a promissory note, that the liability of the maker as it appears on the face of the note is contingent on the happening of some event.

Counsel for the defendant in this case contended that the representations were false and fraudulent inasmuch as the agent of the plaintiff stated to the defendant that the material for the elevator was on the road. There is evidence that the agent did make such a statement, but there is not a line of evidence to show that the statement was untrue in fact. On this ground, therefore, the defence fails.

I would allow the appeal with costs, set aside the judgment and direct that judgment be entered for the plaintiff for the amount claimed together with costs of trial incurred after the arrangement made as to the amendment of the pleadings. The defendant will have the costs up to that time.

DENNISTOUN, J. A.:—This is an appeal from the County Court of Dauphin and the judgment of His Honour Judge Bonnycastle who dismissed the action to recover the sum of $100, the price of a share in the capital stock of the company on the ground that no by-law providing for the allotment of stock in accordance with secs. 46 and 47, the Companies Act R.S.C. 1906, ch. 79 had been proved.

An application in writing for the stock signed by the defendant was duly proved and a resolution of the directors

allotting the share was shown in the minute book, and evidence given that a notice of allotment had been sent by mail to the defendant.

Masten and Fraser, Company Law, 2nd ed. 1920, p. 231 says:

"Under the Dominion Act the proper method of procedure is to pass a general by-law providing that shares may be allotted by resolution of the directors; or to make each allotment by by-law."

The learned Judge was not prepared to presume that all things had been rightly done, and that the resolution of the directors had been preceded by a valid general by-law. He held the company to strict proof of their records and granted a non-suit when they failed to produce direct evidence that a valid contract by offer to purchase and acceptance by allotment had been made.

Upon this branch of the case, it is not necessary to pass an opinion for on another branch the rights of the parties may be determined without difficulty.

At the conclusion of the plaintiff's case when the trial Judge was about to grant a non-suit, it was agreed between counsel that the plaintiff's claim should be amended by setting up an alternative claim upon a promissory note sent to the company by the defendant with his application for stock.

The trial then proceeded, and evidence was given as to the making of the note, and the circumstances under which it was made.

There was clearly a good consideration; for the note was given for a share of stock which the company was bound to allot and issue to the defendant; but the defence is that there was a condition attached, to the effect that an elevator was to be built at Sifton, on which work was to be commenced within 2 weeks, and that materials were already on the way, whereas the elevator was not built for 2 years afterwards, and there was no real preparation made to build it at the time the representation was made.

The trial Judge has not dealt with this branch of the case, and in my humble view, the plaintiffs are entitled to succeed upon it.

This is very like the case of *Wilton* v. *Manitoba Independent Oil Co.*, 25 D.L.R. 243, 25 Man. L.R. 628, decided by this Court in 1915.

The headnote reads (See 25 Man. L.R. 628.):—

"Oral evidence is not admissible to shew an agreement con-

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temporaneous with the making of a promissory note that the liability of the maker as it appears on the face of the note is contingent on the happening of some event: *New London Credit Syndicate* v. *Neale*, [1898] 2 Q.B. 487, 67 L.J. (Q.B.) 825, 79 L.T. 323 and cases collected in Maclaren on Bills, 4th ed. pp. 46-47, and Falconbridge on Banking, 2nd ed. pp. 531-534, followed.

The plaintiff gave evidence to show that, at the time of giving his promissory note for shares in the defendant company, it was agreed that his note should not be binding and would be returned to him in case the company failed to erect an oil tank by a time prior to the due date of the note, also that the tank had not been built, and he brought this action to replevy the note.

Held, that the evidence should not have been received and the action must fail."

In my view the case at bar is not distinguishable from the *Wilton* case and there should be judgment for the plaintiff upon the note.

The amendments at the trial, made by consent, in the present case, were not incorporated in the claim or dispute note, and it was argued all defences, including that of fraud and fraudulent misrepresentations are open if they can be found in the evidence taken.

Even so, there is here no such evidence. The statements which were made as to materials are not shown to be false and the promises as to the time of building were conditional.

I would allow the appeal with costs, and direct judgment to be entered for the plaintiff for $100 with interest at 7% until the due date of the note and thereafter at 5% per annum.

In accordance with the arrangement as to costs made during the trial the defendant is entitled to the costs of the action up to the amendment referred to, the plaintiff is entitled to the costs subsequent to that amendment.

Appeal allowed.

TOWN of KAMSACK v. CANADIAN NORTHERN TOWN PROPERTIES Co. Ltd.

Saskatchewan King's Bench, Bigelow, J. July 5, 1922.

TAXES (§IE—45)—"OWNER"—INTEREST IN CROWN LANDS—INDIAN RESERVE—AGREEMENT OF SALE.

An agreement by the Crown purporting to sell to a company part of an Indian Reserve for townsite purposes, whereby half of the profits derived from the sale of the lots were to go to the Crown for the benefit of the Indians and a patent for the land

to issue when the lots are sold, the company being referred to as "purchaser" and also as "sales agent," is a sufficient agreement of sale under which the company, or an assignee of the agreement, has an interest as "owner," within the meaning of sec. 2 (16) of the Town Act R.S.S. 1920, ch. 87 taxable under the statute to the extent of the company's moiety therein.

TAXES (§III D—135)—IRREGULARITIES IN ASSESSMENT—COURT OF REVISION.

Irregularities in assessment are matters to be corrected by the Court of Revision.

LIMITATIONS (§III H—140)—SPECIALTY DEBTS—STATUTORY LIABILITY—TAXES.

Taxes being a liability created by statute, the period of limitations is that applicable to a specialty debt, not that prescribed by sec. 2 of the Limitations Act (R.S.S. 1920, ch. 47) as to action on simple debt.

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TOWN OF KAMSACK v. CAN. NORTHERN TOWN PROPERTIES CO.

Bigelow, J.

ACTION for taxes. Judgment for plaintiff.

G. H. Barr, K.C., *J. G. Banks*, and *W. B. Carss*, for plaintiff.

W. A. Doherty and *D. H. Laird*, for defendant.

BIGELOW, J.:—The main question is whether the land is liable for taxes, *i.e.*, whether the defendant has any interest in the land, or whether it belongs to the Crown.

The defendant was assessed as an owner. "Owner" is defined in the Town Act, R.S.S. 1920, ch. 87, sec. 2, sub-sec 16, as follows:—"Owner includes any person who has any right, title, estate or interest other than that of a mere occupant."

I shall refer throughout to the sections of ch. 87, R.S.S. 1920, as these sections are the same as were in force at the times in question, although not numbered the same in the previous Acts.

If the land belonged to the Crown it is quite clear that it is not assessable. Section 125, B.N.A. Act 1867; sec. 390, sub-sec. 1 of the Town Act.

And I think it is beyond dispute that no act of the town in assessing the land would make a valid and binding assessment if the land were not assessable, notwithstanding the provisions of secs. 411 and 441 of the Town Act. See *Brehaut* v. *City of North Battleford* (1920), 51 D.L.R. 609, 13 S.L.R. 202. Lamont, J.A., in 51 D.L.R. at pp. 612-613 says:—

"Section 406 (City Act, 1915 (Sask.) ch. 16), which is relied upon by the city, reads as follows: '406. The roll, as finally passed by the Court of Revision and certified by the assessor as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement

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in the notice required by sec. 393 or any omission to deliver or to transmit any notice.' A section similar to our sec. 406 came before the Supreme Court of Canada in *City of London* v. *Watt & Sons* (1893), 22 Can. S.C.R. 300. In that case Strong, C.J., at p. 302 said: 'I agree with the Court of Appeal (19 A.R. (Ont.) 675), in holding that the 65th section of the Ontario Assessment Act, R.S.O. 1887, ch. 193, does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.' And this statement as to the effect of the section was approved by the Privy Council in *Toronto R. Co* v. *Toronto Corporation*, [1904] A.C. 809 at p. 816. If therefore the defendant had no taxable interest in the property for which he was assessed, sec. 406 would not avail to render him liable for the tax, although he took no appeal against the assessment to the Court of Revision. The city cannot by assessing property to a person who has no interest therein make it obligatory on that person to appeal to the Court of Revision, on pain of being liable for the tax if he fails so to do.'' See also *City of Victoria* v. *The Bishop of Vancouver Island*, 59 D.L.R. 399, [1921] 2 A.C. 384.

On the other hand it is equally well settled that if the defendants have any interest in this land that interest is subject to taxation. *The Calgary and Edmonton Land Co.* v. *Att'y-Gen'l. of Alberta* (1911), 45 Can. S.C.R. 170; *Smith* v. *Rural Municipality of Vermilion Hills* (1914), 20 D.L.R. 114, 49 Can. S.C.R. 563; affirmed, 30 D.L.R. 83, [1916] 2 A.C. 569.

The lands in question were part of an Indian Reserve and were surrendered to the Crown, and an agreement was afterwards made between the Crown and Mackenzie Mann & Co. (whose interests afterwards passed to the defendant), proved by the following document:—

''Extract from a report of a Committee of the Honourable the Privy Council, approved by His Excellency on September 28, 1904.

On a Memorandum dated September 14, 1904, from the Superintendent General of Indian Affairs stating that Messrs. MacKenzie, Mann & Co. representing the Canadian Northern Railway Co., are purchasers from the Department of Indian Affairs of what is known as the Kamsack townsite comprising an area of 241.94 acres, in Cote's Indian Reserve in

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the Pelly Agency, Assiniboia. An advance of ten dollars per acre has been paid by the Company, and the Indians are to share equally in the proceeds of the sales of lots after the Company has recouped itself $5000.00 made up of the $2419.40 advance, and the cost of laying out the townsite, dedicating streets, etc.

The Minister further states that the Company has applied for patent for the land in the townsite; but as owing to the circumstances that the Indians are to share with the Company in the proceeds of the sales and that the sale of the townsite is necessarily incomplete, patent cannot issue therefor, it is considered that it would be well to provide for the issue of a patent to each purchaser from the Company of land in the townsite on report of the sales agent.

The Minister recommends that the above arrangement be sanctioned so that the plan of subdivision of the townsite may be placed on record in the local Land Titles Office.

The Committee submit the same for approval.

John J. M. Gee,
Clerk of the Privy Council."

The main question in this case depends on the construction to be placed on this document, the plaintiff claiming it shews a sale of the land, and the defendant claiming that the defendant is only a sales agent. I am of the opinion that the document shews a sale. It is not free from ambiguity. The word "purchaser" is used in one place, and the word "sales agent" in another. An advance of $10 an acre was paid by the company. This seems to me consistent only with the previous clause of the document that the company was a purchaser. There is the further statement in the document that the company has applied for a patent. The company would not apply for patent to land for which it was only a sales agent.

Whether there is a sufficient memorandum in writing to satisfy the Statute of Frauds, or whether specific performance could be ordered I think is not in question here. I do not think that the defendant could raise that question against the plaintiff ,and even if so the contract has been partly performed.

I hold then that the document in question shews that the Crown agreed to sell an interest in the lands in question to the defendant.

Several letters from R. R. Nichol were offered in evidence by the plaintiff, and I reserved the question of their admissibility. Nichol wrote as Assistant Tax Commissioner for the defendant.

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I now decide that these letters are admissible against the defendant. The affidavit for documents made on behalf of defendant was made by Nichol; all correspondence concerning this assessment is signed by Nichol; letters about the assessment and tax notices were sent by plaintiff to defendant and answered by Nichol; appeals against the assessment were lodged by Nichol, and Nichol attended meetings of the town council about the assessment. I think that all of these things are sufficient to shew that Nichol had authority from defendant to act for it in the matter of this assessment.

These letters shew that the holdings of Mackenzie Mann & Co. were transferred to defendant and in several notices of appeal to the Court of Revision reference is made to the assessment of property *owned* by the defendant. This would indicate to me that defendant considered itself as the owner of the land in question and not a sales agent as now contended.

A lease was also put in evidence from the defendant to George Moore dated March 20, 1918, whereby defendant leased 100 acres of the land in question for 5 years for $100 a year. This is not consistent with defendant's present claim that it was only a sales agent and had no interest in the land.

On behalf of the defendant there was offered in evidence a transfer of Lot 7, Block 7, part of the land in question, from the Superintendent of Indian Affairs to one Joseph Schneider for the purpose of shewing the system of the Crown in issuing transfers. This transfer was objected to and I reserved the question of its admissibility. I do not think this is admissible. The question whether this land belongs to the Crown or whether it is assessable must be determined by the original agreement with the Crown with the assistance of any actions or admissions by the defendant against its own interest. Even if this document were admissible I do not think it would affect the question in this action.

I do not think it is material in this action to decide what the interest of the defendant in the land in question was, whether it was a whole interest or a half interest. If the defendant had any interest in the land I do not think it can complain here that its interest was over-assessed. That was a question for the Court of Revision or a Judge of Appeal from the Court of Revision. See Lamont, J.A., in *Brehaut* v. *North Battleford*, 51 D.L.R. at p. 613:—

"But where a person has a taxable interest in the property assessed, but is assessed for an interest greater than, or different from, his real interest, or where he is entitled to have

the name of some other person joined with his own in the assessment, his proper course is to appeal to the Court of Revision, and, if he fails to avail himself of that remedy, the roll, as finally passed, will be binding on him."

See also *Canadian Northern Express Co.* v. *Town of Rosthern* (1915), 23 D.L.R. 64, 8 S.L.R. 285. Lamont, J., in giving the judgment of the Court said (23 D.L.R. at p. 67):—

"Where the town has, under the Act, the right to impose the tax, which, in fact, it did impose, and the person assessed in respect thereof does not appeal against the *quantum* of the assessment, he cannot in an action to recover the taxes which he was compelled to pay, be heard to say that he was over-assessed."

I think it is desirable, however, as a guidance for future taxation of this land to decide what the interest of the defendant is in said lands. The evidence shews that defendant was assessed as if it owned all the land. I am of the opinion that the interest of defendant is only a half interest, the other one half being held by the Crown in trust for the Indians.

The defendant complains of the following irregularities in the assessment and contends that the plaintiff cannot succeed on that account. (1) That there was no by-law appointing an assessor. An assessor was appointed every year by resolution of the council except in 1918. There is no record of an appointment for that year, but an assessor acted in all of the years in question. (2) That no Assessment Committee of the council was appointed as required by sec. 388 of the Act. I find as a fact that this is so except in the years 1919 and 1920 when an Assessment Committee was duly appointed by resolution of the council. (3) That no rate by-law was passed by the council.

Sec. 428 of the Town Act R.S.S. 1920, ch. 87, provides: "One by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient." In 1915 the rate was fixed by a resolution of the council. In 1916 and 1917 the council purported to pass a by-law but it was not certified or sealed. In 1918, 1919 and 1920 there was a regular by-law signed and sealed. (4) That the council never adopted the roll as passed by the Court of Revision. This may have some effect when the plaintiff claims the benefit of sec. 411 of the Town Act which reads:—"The roll as finally passed by the council and certified by the assessor as so passed shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll

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or any defect, error or misstatement in the notice required by sec. 399 or any omission to deliver or to transmit such notice." There is no record of adoption in 1915 or 1916 but it was adopted in 1917, 1918, 1919 and 1920 by resolution of the council.

(5) Defendant also complains about the assessment of the fractional north half of 34—39—32. Notice of assessment of this land was given in November, 1919, under sec. 413 of the Act and the land was assessed and added to the roll, appealed from by the defendant, and adopted by the council. The notice of assessment seems to me to comply with the Act and particularly sec. 413, and I cannot find any irregularity in this assessment.

I am of the opinion that all of these irregularities are covered by the curative sections of the Town Act. Section 411 *supra* and sec. 441, which reads as follows:—"The production of a copy of so much of the roll as relates to the taxes payable by any person in the town certified as a true copy by the treasurer shall be conclusive evidence of the debt." Section 411 would not cover the years when the roll was not passed by the council, but sec. 441 would. In *C. & E. Townsites Ltd.* v. *City of Wetaskiwin* (1919), 51 D.L.R. 252, at p. 261, (59 Can. S.C.R. 578) Duff J., said:—

"On this point, the meaning of the language is unmistakable and the combined effect of these sections is that if the property is assessable and if the person is a taxable person, then an assessment which contains the elements of a *de facto* 'assessment' within the meaning of sec. 134, may be appealed against and corrected by the Court of Revision, and that notwithstanding the departures from the requirements of the statute 'in or with regard to the roll' such an assessment once the roll has passed the Court of Revision and been certified in the manner provided for, shall be valid."

See also *Hislop* v. *City of Stratford* (1917), 34 D.L.R. 31, 38 O.L.R. 470, Meredith, C.J.C.P., said (34 D.L.R. at p. 37):—

"[The objections] are not the proper subject of an action in this Court, as they might be if the case were one in which there was no power in the municipality to tax; or one with which the Courts of Revision have not power to deal properly."

See also *Confederation Life Ass'n.* v. *City of Toronto* (1895), 22 A.R. (Ont.) 166, 24 O.R. 643; *Toronto* v. *G. W. Railway Co.* (1866), 25 U.C.Q.B. 570; *City of Coquitlam* v. *Langan* (1917), 33 D.L.R. 175.

Objection was also taken by the defendant to the 1915 taxes on lots 19 and 20 Block 4, and lots 17 and 18 Block 8. These lots were assessed in 1915 to Mackenzie Mann & Co. Mackenzie Mann & Co. may be liable for these taxes, but I cannot see how defendant can be. These taxes amount to $63.29 to be deducted from the amount claimed. I cannot find that any penalties are chargeable on these amounts.

The defendant also claims that the Statute of Limitations bars part of the claim. I suppose this applies only to the 1915 taxes. Section 2 of the Limitations Act R.S.S. 1920, ch. 47 provides:—

"All actions for recovery of merchants' accounts, bills, notes and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within 6 years after the cause of such action arose."

But the action being in respect of a liability created by statute the period of limitation is that applicable to an action upon a specialty. *McLean* v. *Town of Macleod* (1919), 49 D.L.R. 146, 15 Alta. L.R. 186; *In re Cornwall Minerals R. Co.*, [1897] 2 Ch. 74, 66 L.J. (Ch.) 561.

Plaintiff will have judgment for the amount claimed, $2668.55, less the 1915 taxes assessed to Mackenzie Mann & Co. $63.29, namely $2605.26, and costs of the action.

The costs of two motions in this action were reserved. The application to examine Nichol I think was reasonable, and the plaintiff will have these costs. The plaintiff's application to examine O'Connor in my opinion was not necessary. The evidence sought to be obtained from him was proved by certified copies of documents. Before plaintiff would be justified in taking out an order to examine O'Connor in Ottawa it should prove that it is unable to get the certified copies of the documents, or where the evidence is a matter of proving records that could not be proved by certified copies, the proper practice is to give notice to admit; then, if admissions are not made, plaintiff would be justified in applying for the order. The defendant will have the costs of this application to be set off against the plaintiff's costs.

Either party may remove from the file any documents filed as evidence 30 days after this judgment if there is no appeal. If there is an appeal, then after the appeal or appeals are finally determined.

Judgment for plaintiff

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THREE RIVERS SHIPYARDS Ltd., v. LA SOCIETE NAPHTES TRANSPORTS.

Quebec Court of King's Bench, Appeal Side, Greenshields, Guerin, Dorion, Flynn and Tellier, JJ. September 16, 1921.

MORTGAGE (§II—30)—OF VESSEL UNDER CONSTRUCTION—INSOLVENCY OF BUILDING CONTRACTOR—RIGHT OF MORTGAGEE TO POSSESSION OF VESSEL—RIGHT OF OTHER CREDITORS TO MATERIALS INTENDED FOR BUT NOT ALREADY USED IN CONSTRUCTION.

The holder of a hypothec on a vessel in course of construction, is entitled on the insolvency of the building contractor to possession of the vessel and, in certain cases, in the discretion of the Judge, to a lease at a proper rental, of the yard and equipment where the vessel is being built, in order that it may complete the building of the vessel, but is not entitled to material intended to be used in the construction of the vessel but not yet used, or to boilers and engines not yet actually installed, such materials until actual incorporation within the vessel being the property of the other creditors of the insolvent.

APPEAL from the judgment of the Quebec Superior Court maintaining a petition and dismissing an intervention in the following circumstances. La Société Naphtes Transports of Marseilles, France, gave the National Shipbuilding Co. a contract to build in part in March 12, 1919. The contract was accepted and executed in part in the shipyards of a company called the Three Rivers Shipyards. Having paid the first company 3,510,000 francs on account, the société obtained a hypothec on the vessel "then being built in its yards, under the name of Montricine II, and Hull No. 15", together with all materials of construction destined for the said vessel. These two last named corporations became insolvent.

On September 15, 1920, the société presented a petition asking: (1) for leave to take physical possession of the ship as well as all materials destined to enter into its construction, so as to be in a position to enforce its rights and its hypothec under the contract; (2) to be given a lease of a certain part of the yard and its equipment, for the purpose of doing the work necessary to make its possession effective, on paying a rental of $250 per week; (3) delivery of the boiler and machinery belonging to the ship after reaching an agreement with the liquidator as to the amount to be paid for the same.

This petition was contested by the liquidator and by the Molsons Bank which intervened as a creditor for $311,531.24 on notes. The following grounds were set up against the petition: (a) the bank had already obtained possession of the greater part of the materials asked for in the petition, by order of the Court; (b) the petitioner's hypothec did not give it any lien on the materials; (c) the hypothec is null under the Canada

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Shipping Act, amendment 1919 (Can.), ch. 42; (d) the Bank acquired a lien on these materials under sec. 86 of the Bank Act, 1913 (Can.) ch. 9.

The petitioner met these objections with the allegation that the bank's rights were null, because it knew when it acquired them that the company was insolvent.

Meredith, Holden & Co., for Molsons Bank.

Campbell, McMaster & Couture, for the Société Naphtes Transports.

Brown, Montgomery & McMichael, for Three Rivers Shipyards.

GREENSHIELDS, J.:—It will be at once seen that the issues of fact and law raised by the petition and by the contestation are limited to the rights of the transport company under its contract and under its mortgage to the possession, first, of the unfinished ship, secondly, to the materials fabricated and in the yards destined for the completion of the said ship; thirdly, the right of the transport company to the use of the slip or ways with the necessary machinery, at a rental of $250 a week for the purpose of completing the ship, and fourthly, and finally to the delivery and possession of the boilers and machinery in process of manufacture for the ship.

With all respect, it seems to me that at the trial and by the judgment, matters entirely foreign to the issues were considered and made the subject of proof at the trial, and were considered and disposed of by the final judgment. Whether or not the Molsons Bank obtained a valid lien or security by the letters of hypothecation alleged by it, is not a matter which should be determined in the present litigation, and at the present stage this Court, in my opinion, is not called upon to determine that question. The Molsons Bank is a creditor of the insolvent company. Whether it has a privilege, or whether it held any security, does not arise on the present issue. It has, and the liquidator has, an interest to contest the petition. If that contestation is successful, and the transport company is denied the right to the possession of the ship and materials, then the liquidator will remain in possession, and will dispose of them according to law and subject to the rights of all the parties.

For the purpose of the determination of the present appeal, the contract of March 12, 1919, and the mortgage of October 30, 1919, must be considered. The contract is one for the construction of a ship at a fixed price. The work had been commenced. There is no doubt that even if the insolvency of the contractor had not intervened the proprietor might cancel the

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contract upon indemnifying the contractor for the amount by him expended. See C.C. (Que.) sec. 1691. In the present case, the proprietor had overpaid the contractor for the work he had done. I am of opinion that that part of the transport company's petition by which it prayed for the delivery to it of the vessel in course of construction was well founded, and that the judgment giving possession to the transport company should be maintained.

The contract does not purport to vest the transport company with the ownership of the vessel, much less with the materials destined to enter into its construction, until the complete delivery of the ship. The mortgage of October 30, 1919, does not purport to mortgage anything more than the ship then in course of construction. It does not cover materials in the shipyards fabricated by others for the purpose of the completion of the ship.

The contract of March 12, 1919, was made and signed in France, and probable the *lex loci contractus* would prevail; but the materials, the possession of which is sought by the transport company, are situated in this province and are movables, and in the absence of a special provision of law, such moveables cannot be the subject matter of a hypothec or mortgage. I am of opinion that the transport company has no mortgage upon these movables, and has no right to get possession of them as against the other creditors of the insolvent company. That part of the judgment *a quo* giving possession to the transport company, in my opinion, cannot prevail. With respect to the holding of the trial Judge, that the liquidator, for the consideration of $250 a week, give the transport company the use of the ship's ways and necessary machinery, while there may be a serious question as to whether a Court could order a liquidator to enter into such a lease, there is no doubt that a Court could authorise such a lease if that be in the best interests of the interested parties.

Having regard to the particular circumstances of the present case, I am unable to conclude that the trial Judge erred in that part of this judgment. In any event, I do not think that it is such an order as calls for revision of cancellation by this Court, and I should allow it to stand.

With respect to the engines and boilers, I am of opinion the judgment went too far, and would cancel that part of the order.

Upon the whole, the appeal of the transport company will be dismissed, with costs. The appeals of the liquidator and the Molsons Bank will be maintained, with costs. The transport

company will be entitled to the costs on its petition, and the contestations will be in part dismissed, but the contestants will have to pay the costs.

GUERIN, J.:—A. La Société Naphtes Transports:—That La Société Naphtes Transports intended that this mortgage should cover the materials is probably very true, but that Three Rivers Shipyards Ltd. and the National Shipbuilding Co. were inspired with the same intention is open to grave doubt. Three Rivers Shipyards Ltd. is the only one of these three companies that signed the mortgage deed. In any case, the materials were not mortgaged, and so long as they remained undetached, they did not form part of the ship.

The ship alone could be subject to a maritime mortgage. The materials not yet incorporated in the body of the ship are moveables subject to liens, privileges and the law pertaining to the moveable property. A ship about to be built or being built may be made securety for a loan or other valuable security under sec. 41 of the Canada Shipping Act R.S.C. 1906, ch. 113, as well as for advances by a bank in aid of the building of a ship under sec. 85 of the Bank Act 1913 (Can.) ch. 9. No such authority is given regarding the materials, boilers, etc., destined for its construction, but not yet incorporated in the ship.

That a mortgage covering such materials would violate the law is an opinion supported by high authority: Canada Shipping Act R.S.C. 1906, secs. 39 *et seq*: Labori, Dict. Enc. *verbo* Droit Maritime, nos. 42, 43; *Seath & Co.* v. *Moore* (1886), 11 App. Cas. 350; *Reid* v. *Macbeth*, [1904] A.C. 223; Maclachlan's Merchant Shipping, 5th ed. p. 6. Moreover neither the Canada Shipping Act nor the Bank Act makes any provision which would authorise the mortgage of moveable not incorporated into the body of the ship.

The argument which applies to the Canada Shipping Act has been already clearly elucidated in the opinion of my colleague Greenshields, J. and further comment would be superfluous.

To conclude then, it may be said that this Court cannot read into this deed an intention which may have been in the minds of the officers of the petitioner, but which was not expressed when Three Rivers Shipyards Ltd. expressly mortgaged the ship, and nothing else.

B. Three Rivers Shipyards Ltd. (b-I). Following the text of the law, sec. 41 Canada Shipping Act, this appellant truthfully admits that a ship in course of construction could be made security for a loan or other consideration.

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The other valuable consideration mentioned by the Act, existed when this mortgage was registered at the Custom House, Sorel, on October 31, 1919. It sets forth the agreement of March 12, 1919, for the construction of the ship which is to cost 5,850,000 francs, and stipulates that this ship shall be mortgaged in favour of the petitioner as security for the completion and delivery of the said ship according to the terms of said agreement, and for such advances as have been or shall be made from time to time, in accordance with said agreement or otherwise. This then is the valuable consideration for which the ship could be made security under sec. 41.

This would seem to be a complete answer to this first objection. It should be dismissed.

(b-2). Three Rivers Shipyards Ltd. is being liquidated under the Winding-up Act, R.S.C. 1906, ch. 144. The liquidator is by law an officer of the Court and subject to its orders. The trial Judge after hearing all the parties, exercising his discretion and authority, after mature deliberation, instructed the liquidator to rent a portion of the ship-building plant to the petitioner for the latter's convenience in completing the ship. This appellant complains that such an order will indefinitely suspend the liquidation and will prejudice the creditors.

This complaint is not borne out by the evidence. Unless all signs deceive us, the petitioner is anxious to have the construction of the ship completed as soon as possible and this work will only take 6 weeks. Moreover, the petitioner is deeply interested in this liquidation, and may prove to be one of its principal creditors; the petitioner has a right to expect reasonable protection so that its rights may not suffer prejudice, if it be possible to avoid it. It would seem that the first Court exercised a wise discretion and that this second objection should be dismissed.

(b-3). The material not incorporated into the ship is not covered by the mortgage given to the petitioner, as already mentioned. This unattached material is the common pledge to secure the mass of the creditors of Three Rivers Shipyards Ltd. which is in liquidation and which admits its insolvency. The effect of the judgment would be that the petitioner would receive this material as a free gift in violation of other people's rights. It must be disposed of in the interest of the secured or ordinary creditors as the rank, nature or amount of their claims may justify, in such a manner as the Court may hereafter decide. This third objection should be maintained.

(b-4). These boilers and machinery are an asset belonging

to the insolvent estate. If any equity exists, it belongs to the creditors. The petitioner has not proved the right which the judgment conceded. The petitioner is not to be treated *sicut dominus*, it is neither the proprietor nor the mortgagee, it cannot acquire possession *invito domino*, without a valid consideration to be arranged for with the liquidator. This Court cannot sanction such a surrender of the liquidator's rights to a party holding no legal title to this movable property other apparently than that of an ordinary creditor whose claim as such is not now under inquiry. This fourth objection should be maintained.

C. The Molsons Bank. The merits of this objection have been discussed by what has been already stated. The materials fabricated for or intended for the ship are not covered by the mortgage, and the liquidator should not be ordered to deliver them to the petitioner. This objection should be maintained.

The Molsons Bank intervened in the present case alleging an indebtedness of $316,541.24, evidenced by five promissory notes signed by Three Rivers Shipyards Ltd. and the National Shipbuilding Co. jointly and severally in favour of the bank, and that to secure this indebtedness five assignments of material were made under the authority of the Bank Act by both these companies in favour of the bank. The five notes and the five assignments in favour of the bank are filed.

The petitioner in answer alleges that these assignments are invalid and illegal under the Bank Act 1913 (Can.) ch. 9, and the parties went to proof. There is no evidence to contradict the notes that shew an indebtedness of the petitioner towards the bank for $316,541.24. Whether the assignments made to secure this indebtedness are null or annullable, or whether they constitute a binding security of the estate, it matters not, so far as their case is concerned. The debt itself is proved. The Molsons Bank has proved its interest in this case, and this Court is competent to adjudicate of the conclusions taken by the three appellants, whether these assignments be void or voidable.

I am of opinion that the Court of Appeal should dismiss the petitioner's appeal, and should maintain the appeal of the liquidator of Three Rivers Shipyards Ltd. as well as the appeal of the Molsons Bank as regards the materials not incorporated into the ship, and should dismiss both these appeals as regards the general prayer for the dismissal of the whole petition.

As the battle in this Court was waged between counsel mainly

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as regards the materials not incorporated into the ship, I am of opinion that La Société Naphtes Transports, petitioner, should be condemned to pay all the costs of the three appeals.

TELLIER, J.:—The petitioner asks three things in its petition: (1) that it be put in possession of the ship in course of construction, upon which it has an hypothecary claim, and also of the materials destined for its completion; (2) that the liquidator, Scott, be instructed and authorised to permit the petitioner to use, on paying a rental of $250 per week, the yard where the ship is being built, for such time as may be required to complete it; (3) that the said liquidator be also instructed and authorised to deliver to petitioner the boilers and machinery, made or in process of construction for the said ship, on paying what they cost.

The intervenant asks in its contestation that the petitioner's hypothec be declared illegal and null and that its petition be dismissed *in toto*, or at least insofar as it refers to the materials not yet incorporated in the ship.

As for the liquidator Scott, his contestation asks that the petitioner's hypothec be declared null and the said petition dismissed.

That is all that is asked by any of the parties. There is therefore no occasion to consider the legal value of the intervenant's lien on the materials of construction possession of which is sought by the petitioner. The petitioner's hypothec is all that concerns us. Is this hypothec valid? Does it affect the said materials of construction? The Court is not called upon to decide anything more than that.

I, for my part, think that the hypothec is valid insofar as it affects the ship in process of construction, but not as regards the unused materials. The materials are movables and their hypothecation is not sanctioned by any law, so long as they have not been used in the construction of the ship. It is a general rule of our law that movables cannot be hypothecated. A specific text of law is necessary in order to create an exception to this rule; and no such rule exists which is applicable to ordinary materials not yet used.

It, therefore, follows that the petitioner cannot claim possession under its hypothec of materials which have remained in movable form. Its petition is valid, however, and must be granted insofar as it affects the ship itself.

The intervenant was entitled to intervene irrespective of the legal value of its security. The mere fact that it was a creditor gave it that right, since the case involves a considerable part of

the estate of its insolvent debtor. But it went too far when it contested the whole of the petitioner's demand. It put itself in the position of a defendant who contests the whole action when such action is well founded in part. It must pay the costs of its contestation.

The same is true of the liquidator Scott. His contestation is well founded as regards the materials only. He also must, therefore, pay the costs of his rash defence.

I have reached the conclusion that the judgment should be as follows: (1) petitioner's appeal dismissed with costs; (2) appeals of the intervenant and the liquidator Scott maintained with costs; (3) contestations of the intervenant and of the liquidator dismissed with costs as regards possession of the ship, but maintained as regards the unused materials; (4) petitioner's petition maintained with costs as regards the possession of the ship and use of the yard, but dismissed for the remainder.

Judgment:—"Considering that the mortgage obtained by the petitioner from the company known as The Three Rivers Shipyards Limited on October 30, 1919, is valid insofar as it affects the vessel then in process of construction and designated as Motricine II, Hull XV, but illegal and null as regards the materials;

That the objections raised to the validity of that mortgage, even as regards the vessel, to the effect that by the Act 1919 (Can.) ch. 42, the Société could not have such a mortgage, are not well founded, since that Act does not apply to the present mortgage;

That the same is true of the objection that the société did not conform to the provisions of sec. 69A. of the Canadian Companies Act 1917 (Can.), ch. 25, as that amendment does not apply to the present case;

That, as regards the other objections urged against the validity of this mortgage, as it affects the vessel itself, and particularly the absence of consideration, the fact that the company known as the Three Rivers Shipyards Ltd. had never contracted with the petitioner and was not a party to the contract of March, 1919, all these other objections are unfounded and must be rejected;

That the petitioner could legally ask the Court to give it possession of the part of the ship which had already been built, so that it might complete the construction at the expense of the company which had contracted with it, and which was in default to carry out its undertaking and was in liquidation;

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That in view of the special circumstances of this case the petitioner could legally ask for possession of the ways or slip on which the vessel now stands, the four cranes surrounding the same and the air compressor and pneumatic machinery connected therewith under lease at a rental of $250 per week; and that the order and authorisation to that effect in the *dispositif* of the judgment are legal, in accordance with the spirit of the law and in the interest not only of the petitioner but of the estate as well;

That the petitioner had no right to the other things asked in its petition and that the other parts of the *dispositif* of the judgment which agree with the said petition are unfounded and illegal;

That independently of the question as to whether or not the Molsons Bank was entitled to the assignments it obtained and which it invokes, it had an interest sufficient to contest, as it has done, these unfounded claims of the petitioner; and that as regards the objections raised by the said petitioner to the validity of these assignments, but without any conclusions on the part of the said petitioner to the effect that the said assignments be annulled or declared null, and the Molsons Bank itself asking only the nullity of the petitioner's mortgage, and the dismissal of its petition *in toto*, and subsidiarily, insofar as it refers to the materials, it is not necessary for this Court to express an opinion; nor is the Court called upon to pronounce on the effect of the judgment authorising that bank to take possession of certain materials, which judgment has been contested by *tierce-opposition* by the société and also by the liquidator, which proceedings are still pending;

That the liquidator also had a sufficient interest to contest that part of the petitioner's petition which was unfounded;

That the appeal of the said société is unfounded and should be dismissed with costs;

That there is ground for maintaining the appeal of the Molsons Bank and the liquidator, and for reversing the judgment of November 6, 1920, for all parts of the *dispositif* of that judgment, commencing with the words: 'doth instruct, authorise and empower the said liquidator to deliver to petitioner, all material fabricated for or intended for the said ship Hull XV. and, etc. . . . , until the end; and for maintaining the contestations of the Molsons Bank and the liquidator, for part of each contestation; reserving to the said Molsons Bank any other recourse it may have regarding the said assignments; dismisses, therefore, the appeal of the Société Naphtes Transports with

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costs; maintains with costs the appeal of the said Molsons Bank and the liquidator, and reverses the said parts of the said judgment above mentioned;

And, proceeding to render the judgment which the Superior Court should have rendered on the petitioner's conclusions mentioned in para. 3 and in the last part of para. 1 of its conclusions: dismisses those parts of the said conclusions of the petitioner referring to the materials of construction not yet used and to the boilers and engines not installed, but maintains it for the remainder, with costs; and proceeding to render the judgment which the Superior Court should have rendered on the said conclusions of the said Molsons Bank and the above named liquidator; maintains, for the foregoing reasons, the said contestations in part in each case, that is to say for that part which refers to the materials of construction not yet used, and the boilers and engines not installed, but dismisses them for the remainder, with costs in favour of the Société Naphtes Transports, petitioner, for the reason that the contestations are maintained only in part, and that the said petitioner succeeds in a part of its demand; the Court reserving to the said Molsons Bank any other recourse it may have in respect of the assignments alleged by it."

Judgment accordingly.

Re REMPEL ESTATE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. June 13, 1922.

WILLS (§II—65)—HOLOGRAPH WILL—CONDITIONAL WILL—JOURNEY.

A writing, sufficient as a holograph will under sec. 10 of the Manitoba Wills Act, R.S.M. 1913, ch. 204 stating "whereas I am going to go on a journey to Mexico, and should I die . . . my wife is entitled . . . to all my monies," confirmed by another document after his return from the journey, is not a conditional will contingent upon the death of the testator during the journey, and will be admitted to probate as a valid will even where the testator safely returned, the journey being the motive for making the will and not a condition upon which it should depend.

APPEAL from a judgment of the Surrogate Court refusing probate of a will. Reversed.

A. McLeod, K.C., for appellant.

J. W. E. Armstrong, for the official guardian.

PERDUE, C.J.M.:—This is an appeal from the Judge of the Surrogate Court of the Southern Judicial District who refused to grant probate of an alleged will made by Cornelius Rempel, deceased. The reason given for the refusal is, "that the so-

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RE REMPEL ESTATE.

Perdue, C.J.M.

called will is a proposed disposition of the estate in case of death during the journey, and alleged testator having returned alive, I refuse probate of the document as a will."

The application for probate was made by the wife of the deceased who claims that his last will and testament is contained in two documents written in the dialect of the German language in common use by the Mennonites in this Province. The translation of these documents into English is as follows:—

"Blumenort, Gretna, P.O., Man.
Jan. 26/21.

Whereas I am going to go on a journey to Mexico, and should I die, I therefore certify by these presents that my wife, Katharina Rempel is entitled to collect and draw all my outstanding monies, for which also Bank cheques are signed, as are in the Bergthaler Waisenamt, Altona, standing as deposits in the Bank of Hamilton, Gretna, standing as deposits, wheat tickets, and different outstanding monies according to book account also. She is consequently entitled to administer the whole estate and effects according to our Orphan Rules. For confirmation I sign this with the signature of my name.

[Sgd.] Corn. Rempel.
Gretna, Man., Sept. 7th, 1921.

To the Bergthaler Waisenamt, Altona.

Confirm by these presents that you pay my deposit in full to my wife Katharina Rempel. Confirm above with signature of my name and witness.

Witness, [Sgd.] F. Rempel. [Sgd.] Corn. Rempel."

These writings are sufficiently executed as holograph wills under sec. 10 of the Manitoba Wills Act, R.S.M., 1913, ch. 204.

In Theobald on Wills, 7th ed., p. 15, the question relating to conditional wills is discussed. The author says:—

"Wills are often expressed to be conditional upon the testator's death before a given period, such as return from a voyage or a military expedition, or the like, and if the condition is clearly expressed, the will does not take effect if the condition is not fulfilled."

In support of this proposition he cites *Parsons v. Lance* (1748), 1 Ves. Sen. 189, 27 E.R. 974; *In the Goods of Winn* (1861), 2 Sw. & Tr. 147, 164 E.R. 949; *Roberts* v. *Roberts* (1862), 2 Sw. & Tr. 337, 164 E.R. 1026; *In the Goods of Porter* (1869), L.R. 2 P. & D. 22, 18 W.R. 231, 21 L.T. 680, 39 L.J. (P.) 12; *In the Goods of Robinson* (1870), L.R. 2 P. & D. 171, 40 L.J. (P.) 16, 19 W.R. 135, 23 L.T. 397; *Lindsay* v. *Lindsay* (1872), L.R. 2 P. & D. 459, 27 L.T. 322, 42 L.J. (P.) 32; *In*

the Goods of Hugo (1877), 2 P.D. 73, 46 L.J. (P.) 21, 36 L.T. 518, 25 W.R. 396. The author then proceeds; "On the other hand if the will is so expressed as to shew that the contingency is the motive which induces the testator to make the will, the will is not conditional." He cites *Burton* v. *Collingwood* (1832), 4 Hag. Ecc. 176, 162 E.R. 1411; *In the Goods of Thorne* (1865), 4 Sw. & Tr. 36, 164 E.R. 1428; *In the Goods of Dobson* (1866), L.R. 1 P. & D. 88, 35 L.J. (P.) 54, 14 W.R. 408, 13 L.T. 758; *In the Goods of Mayd* (1880), 6 P.D. 17, 50 L.J. (P.) 7, 29 W.R. 214; *In the Goods of Stuart* (1888), 21 L.R. Ir. 105.

In the Goods of Spratt, [1897] P. 28, 66 L.J. (P.) 25, was a case in which Sir F. H. Jeune, President of the Court, discussed the more important decisions relating to conditional wills. The testamentary disposition in that case was contained in a letter written by the testator to his sister while he was actively engaged as an army officer in the Maori war. The important part is as follows:—

"If we remain here taking pahs for some time to come the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at Cox's, over £100 in New South Wales Bank, New Zealand. Keep this until I ask you for it."

The testator survived the war and lived for over 30 years thereafter, without having revoked the testamentary disposition contained in the above letter.

It was held that the words "in case of accident" point only to the reason why the testator desired to make a will. The President said, [1897] P., at p. 35:—

"There is no expression of any period to be found in the document within which alone it was to be operative; on the contrary, the request that the will should be kept by his sister till he asked for it appears to me to shew that the testator had not in his mind any defined period of time at the expiration of which he intended that his will should cease to be effective. Nor is there anything in the disposition of the property which indicates that it was temporary, or that it did not apply to whatever property of which the testator might at any time be possessed."

Probate was therefore granted.

Where the testamentary document commenced with the words:—

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C.A.

RE REMPEL ESTATE.

Fullerton, J.A.

"My Will. If anything should happen me while in India that all moneys, documents, property . . . or monies due to me or owing to me at the time of my death to be handed over to my wife Lucy Vines," and the testator appointed executors, it was held not to be conditional, although the testator returned from India and lived for many years thereafter: *Vines* v. *Vines*, [1910] P. 147, 79 L.J. (P.) 25.

Bigham, P., in the last-mentioned case, after referring to the *Spratt*, case, *supra*, as to the question when words in a will make the document conditional and when not, proceeded, [1910] P. at pp. 149-150.

"It is, perhaps, sufficient to say that the rule appears to be that where a will is made in terms subject to the happening of an event, that event must occur before it can become operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, the will becomes operative whether the event happen or not. To give an illustration: If a man write 'should I die tomorrow my will is' so and so, his death must occur to make the document operative; whereas if he writes 'lest I die tomorrow,' it will be operative whether he die or not on the morrow.

Looking at the will in question in this appeal, I think it is clear that the contemplated journey to Mexico is referred to as a period of danger which operates as a reason why the testator should make his will. The operation of the will is not confined to that period. The testator returned safely from his journey and on September 7, 1921, he executed the writing of that date in which he affirms the disposition in favour of his wife of the money on deposit with the Bergthaler Waisenamt. He died on the 23rd day of the same month.

I would allow the appeal and direct that the testamentary instrument of January 26, 1921, be admitted to probate. The costs of the appellant and of the official guardian should be paid out of the estate.

CAMERON, J.A.:—I would allow the appeal.

FULLERTON, J.A.:—Cornelius Rempel died on September 23, 1921, leaving a will dated January 26, 1921. The will commenced with the following words:—

"Blumenort, Gretna
P.O. Man., Jan. 26/21.

Whereas I am going to go on a journey to Mexico, and should I die, I therefore certify by these presents that my wife Katharina Rempel is entitled, &c."

The testator returned safely from his journey. Upon the will

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being presented for probate the Judge of the Surrogate Court refused probate on the ground that the will was conditional on the death of the testator while on his journey.

Jarman on Wills, at p. 40, speaking of contingent wills, says:—

"A reference to some impending danger is common to most of these cases, and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as when he says, 'Should anything happen to me on my passage to W., I leave' &c., or only the reason for making a will, as where he says, 'In case of accident, being about to travel by railway, I bequeath' &c."

The authorities shew that probate will not be refused unless it is clear from the words used that the testator only intended the will to take effect upon his death during a particular journey. *In the Goods of Mayd, supra; In the Goods of Spratt, supra.*

The authorities on conditional will are very fully reviewed in the case last cited. After a careful examination of the authorities I have arrived at the conclusion that the testator did not intend to limit the operation of his will to the event of death happening on his journey to Mexico.

I would allow the appeal and direct that the will be admitted to probate.

DENNISTOUN, J.A.:—I would allow the appeal.

Appeal allowed.

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Exchequer Court of Canada, Maclennan, L.J.A. March 6, 1922.

JUDICIAL SALE (§IIIB—30)—TITLE OF PURCHASER—WANT OF JURISDICTION—ADMIRALTY — COMPENSATION FOR IMPROVEMENTS — TRESPASSER.

The purchaser of a vessel at a judicial sale, under a decree of Court having no jurisdiction to order the sale, acquires no title thereto, and being a trespasser he cannot recover for improvements thereon, particularly where he did not conduct himself in good faith.

ACTION *in rem* to recover possession of the S.S. "Bella" which had been sold under an order of a Court of the State of New Jersey which was subsequently declared to be without jurisdiction in the matter, and a warrant of attachment and further proceedings taken thereon vacated. Judgment for plaintiff.

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Alfred C. Dobell, K.C., and *H. H. Breland* (of New York Bar), for plaintiff.

A. C. M. Thomson, for defendant.

MACLENNAN, L.J.A.:—This is an action *in rem* to recover possession of the Steamship "Bella."

The pleadings in the action are very lengthy and their material allegations are substantially as follows:—The plaintiff alleges that he purchased the SS. "Bella" on December 31, 1919, by bill of sale, warranting the ship to be free and clear from all liens, at New York from the Campanhia Metallurgica De Rio de Janeiro; that he, thereupon, took possession and removed the vessel to Ulrich's Basin at Edgewater, New Jersey; that in the course of his usual business he went to England in the latter part of May and returned in the latter part of August, 1920, when he discovered, to his surprise, that the ship had disappeared during his absence, and he, subsequently, discovered that one W. J. Thompson had taken possession of her and removed her to Quebec and plaintiff claims that he be declared the true and lawful owner and be put in possession of the ship.

The defence filed by W. J. Thompson is that he purchased the ship from a marshal of the United States of America for the district of New Jersey at a judicial sale ordered by the District Court of the United States for the District of New Jersey for the sum of $1,560 under a bill of sale from said marshal dated August 4, 1920; that in virtue of said purchase made legally and in good faith he became the owner of said vessel and has since laid out and expended on her in the Port of New York approximately $6,579 and at the port of Quebec a further sum of $4,167.09, which increased the value of the vessel by at least the amounts so expended, and defendant concludes by claiming that he should be declared the true and lawful owner of the vessel, that his possession be declared legal, that he be placed in possession of the vessel and, reserving all other recourse, he asks for the dismissal of plaintiff's action with costs and for such other and further relief as may be found just in the premises.

The plaintiff by his answer to the defence alleges that the sale by the United States marshal to defendant was null and void, because the District Court of the United States for the District of New Jersey was without jurisdiction to issue the writ of *venditioni exponas* by virtue of which the marshal purported to sell the vessel, and the said Court quashed and annulled the said writ and the sale and ordered that the bill of sale given by the marshal be returned for cancellation and that

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the said Thompson return the vessel, and, subsequently, said action was dismissed for want of jurisdiction in the said Court.

The defendant by his reply admits that the United States District Court for the District of New Jersey, which ordered the sale of the said vessel, acted without jurisdiction; that he bought the vessel at a public sale, received a title which he was advised by American counsel was good; that he made extensive repairs believing he was the true and lawful owner and that since the answer to plea was filed he offered without prejudice to allow the plaintiff to take the vessel on being refunded the purchase price and the money disbursed by him and by others on his account, which offer was refused.

The plaintiff by a reply to defendant's reply alleges among other matters that the defendant, having purported to buy the said vessel at an alleged sale by a Court which was wholly without jurisdiction to make said sale, acquired no right or title of any kind whatsoever to said vessel, the said alleged sale being void and of no effect; that any expenses repairs or improvements in connection with the said vessel after she left New York were made and done by defendant with notice of plaintiff's claim to said vessel and that defendant in so doing was a trespasser upon the plaintiff's property, and that reimbursement to defendant of sums expended by him cannot be claimed from plaintiff either as a condition to surrender of the vessel or otherwise; that the purchase price paid by defendant for said vessel was not paid to plaintiff and has never been received by him, and plaintiff further alleges that it was impossible for him to tender the cost of repairs before beginning this action as the amount thereof was unliquidated and cannot be ascertained until the same has been proved and determined by a Court of competent jurisdiction.

This vessel was built in Hull, England, in 1896, was 98.4 feet long 20.5 ft. wide, 11 ft. deep, had a gross tonnage of 146.44 tons, triple expansion engines, a speed of 9½ knots, was classed in Lloyd's Register 100A 1 steam trawler; she was originally known as the Screw Steamship "Jamaica" and, on April 20, 1912, became Brazilian property and her name was changed into "Bella." The plaintiff purchased her in New York on December 31, 1919, from a Brazilian corporation as already stated. In April, 1920, he had her placed in storage at Edgewater, New Jersey, and on May 25, 1920, left for Europe and returned August 26, 1920. During his absence and without any notification to him or to the previous owners or to any one on his behalf the Morse Dry Dock and Repair

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Co. entered an action in admiralty against the SS. "Bella" in the United States District Court for the District of New Jersey on an alleged claim for wharfage charge against said steamer, and on July 6, 1920, obtained an interlocutory order for the sale of the vessel by the marshal and an order that a writ of *venditioni exponas* issue, and upon said writ the marshal of the Court purported to sell the vessel for $1,560 to "W. J. Thompson of the City of New York, County of New York and State of New York," and said marshal issued a bill of sale to the said Thompson on the 4th August, 1920. On plaintiff's return from Europe, on August 26, 1920, he found that the ship had disappeared, and subsequently discovered that she had been sold at marshal's sale, on July 26 previous, to satisfy the claim of Morse Dry Dock & Repair Co., of which he had never had notice, to one W. J. Thompson of the City of New York, according to the records of the marshal. One of plaintiff's attorneys in New York was informed by the marshal that, on the sale of the vessel, both W. J. Thompson and one Charles H. McKinney were present and that the bill of sale, in accordance with instructions given at the time of the sale, was mailed to W. J. Thompson, in the care of McKinney, Room 406, 30 Church St., New York City, and upon inquiry at said room, which was McKinney's place of business, no W. J. Thompson could be found, and McKinney, who was Thompson's broker and paid agent in the matter, refused to give any information about his principal. The plaintiff, on September 17, 1920, upon application to a Judge of the United States District Court for the District of New Jersey obtained an order in the action therein pending of the Morse Dry Dock & Repair Co., libellant, against the SS. "Bella", that the said company and the said W. J. Thompson and the said McKinney and all other persons claiming an interest in the SS. "Bella" shew cause before one of the Judges of the said Court at a stated term thereof to be held in the Court House at Newark, New Jersey, on September 27, 1920, why an order should not be entered vacating the order of the Court made on July 6, 1920, which directed that the SS. "Bella" be sold and that a writ of *venditioni exponas* issue, and that the said persons further shew cause why said writ should not be quashed and the sale of the vessel set aside and the order of the Court confirming said sale vacated and the bill of sale of the said vessel cancelled and the purchaser directed to return the ship to the marshal, and the said McKinney and W. J. Thompson and each of them were enjoined from removing said vessel

out of the jurisdiction of said Court pending the determination of said application and that all proceedings be stayed. A copy of said order was directed to be served upon the proctors for the libellant and upon W. J. Thompson and upon McKinney and in the event that the latter could not be found so that personal service could be made upon them, leave was given to mail copies of said order addressed to the post office address given to the marshal at the time of the sale of said vessel. Service of this order was duly made upon McKinney and upon W. J. Thompson and, on September 23, Joseph P. Nolan, attorney-at-law of the City of New York, was consulted by W. J. Thompson, with reference to said order served as aforesaid and instructed to appear for said purchaser, and on the following day said Nolan filed an appearance in writing, his appearance stating that:—"I hereby appear in this proceeding specially on behalf of W. J. Thompson, purchaser of the SS. "Bella" for the sole purpose of contesting the jurisdiction of the Court," and on the same day the said Nolan filed notice of exception to the order dated September 17, 1920, and the affidavits upon which the same was granted, upon the ground:—1, that the said affidavits do not contain the necessary jurisdictional allegations binding either this appearant or any person or corporation mentioned in said papers; 2, that it appeared from the moving papers that the proceeding is an attempt to vacate a decree or order of the Court made on July 6, 1920, and that the said proceeding to vacate the same is not made within the term. Under the same date, Nolan also filed an appearance in the proceeding as proctor on behalf of McKinney. Notice of exception was also filed by Nolan on behalf of McKinney. Affidavits were filed in the United States District Court by McKinney, by the assistant superintendent of the Morse Dry Dock & Repairing Co., but none was filed by W. J. Thompson. Johnson, the plaintiff in the present action, was allowed to file a petition contesting the claim of the Morse Dry Dock and Repairing Co. and praying that the interlocutory order of July 6, 1920, and the sale of said vessel be vacated, and that he be permitted to file a claim to the vessel and that Thompson be directed to return the vessel to the marshal to be held by the latter subject to the further order of the said District Court. The District Court, having heard counsel for the present plaintiff, for the Morse Dry Dock and Repairing Co. and for McKinney and W. J. Thompson rendered judgment cancelling the bill of sale to W. J. Thompson directing him to return the vessel, and a formal order of the Court was entered on October

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18, 1920, cancelling the interlocutory decree of July 6, 1920, and setting aside and vacating the sale of the vessel to W. J. Thompson and ordering the bill of sale to be returned to the marshal for cancellation and ordering W. J. Thompson and any agent or agents of his including the said McKinney to deliver the said vessel, her tackle, engines, apparel and furniture to the present plaintiff at Ulrich's Basin, at Edgewater, or at such other place within or without the district of New Jersey as may be agreed upon by the present plaintiff and the said W. J. Thompson. This order was not obeyed by Thompson. Subsequently, the cause was heard by the District Court on the pleadings and proofs and, having been argued and submitted by counsel of the respective parties, a final decree was entered in said District Court on May 17, 1921, in which it was adjudged that the wharfage alleged to have been furnished to the vessel by the Morse Dry Dock & Repairing Co. was not of the character and kind which entitled that company to a maritime lien therefor against the vessel, and that the Court was without jurisdiction to issue the warrant of attachment or to make the interlocutory decree of July 6, 1920, or to issue the writ of *venditioni exponas* and that the marshal of the said Court was without jurisdiction to sell the vessel and the Court was without jurisdiction to confirm the sale, and it was further ordered, adjudged and decreed that the libel in the cause be dismissed with costs; the warrant of attachment, the interlocutory decree of July 6th, 1920, the writ of *venditioni exponas* and the sale of the vessel made by the marshal on 26th July, 1920, and the order confirming such sale, were each and all vacated and set aside upon the ground, in addition to that upon which the order of October 18, 1920, was based, that said Court was without jurisdiction to issue the said writ or to direct the sale of the vessel or confirm the sale thereof, and the said bill of sale given by the marshal to the present defendant for said vessel was cancelled and said defendant was ordered to forthwith return the said bill of sale given by the marshal to the present defendant for said vessel was cancelled and said defendant was ordered to forthwith return the said bill of sale to the marshal for cancellation and to forthwith return and deliver to the present plaintiff, the said vessel, her tackle, engines, apparel and furniture and that the disposition of the monies paid by said W. J. Thompson to said marshal as the purchase price of said vessel as well as any claim which the said W. J. Thompson may wish to assert, in the event that he complies with said order and delivers possession of the said

vessel to the present plaintiff as therein directed, that there should be repaid to him any monies which he may have expended for the repair, improvement, upkeep and care of the said vessel since the alleged sale thereof to him by said marshal be and the same were reserved for the further order of the Court. This final decree of the District Court has been ignored by the present defendant and no attempt has been made by him to conform thereto.

It was established by the evidence at the trial that by the law of the United States, defendant, when he appeared at what purported to be a judicial sale conducted by the marshal of the District Court of the United States for the District of New Jersey and became a bidder, and also by the appearance filed on his behalf by his attorney, Nolan, became a party to the action and was affected with notice of all subsequent proceedings relating to the purchase and title of the SS. "Bella". The Circuit Court of Appeals in the case of the *State of Tennessee* v. *Quintard* (1897), 80 Fed. 829, at p. 835 states:—"It is also settled that the purchaser, by his bid, becomes a quasi party to the suit and is affected with notice of every step subsequently taken in the case relating to the purchase and the title acquired thereby." The opinion of the Court cites in support of that proposition the following cases decided by the Supreme Court of the United States—*Davis* v. *Mercantile Trust Co.* (1894), 152 U.S. 590, at p. 594; *Kneeland* v. *American Loan & Trust Co.* (1890), 136 U.S. 89; *Stuart* v. *Gay* (1888), 127 U.S. 518; and *Blossom* v. *Milwaukee, etc., R. Co.* (1863), 1 Wall. 655. Although the appearance filed by the Attorney Nolan for defendant may have been intended as a special appearance for the purpose of alleging that the Court had no jurisdiction over the person of defendant, on the authority of *Thames & Mersey Marine Ins. Co.* v. *United States* (1915), 237 U.S. 19, and other cases, the appearance was a general appearance in the action, because exceptions and a factum or brief were filed by Nolan on behalf of his client raising questions on the merits of the application made by the present plaintiff to set aside the sale of the vessel. The merits of the present plaintiff's proceedings in the District Court to recover possession of the ship were put in issue by the purchaser. I, therefore, come to the conclusion, on the evidence, and on the authorities referred to, that defendant by his bid, and by the action of his attorney became a party to the action, and was affected with notice of all the proceedings subsequently had, including all interlocutory orders and the final decree in the

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District Court, and that he was bound thereby having been a party to the action in the District Court.

What is the effect of the sale of a ship by order of a Court which has no jurisdiction in the matter?

This question came up in the case of the Steamer "Canadian" in *Kerr* v. *Gildersleeve* (1858), 8 L.C.R. 266, in which title was claimed under a sale upon a warrant of distress issued by Justices of the Peace, and it was decided by Badgley, J., that the Justices of the Peace had no jurisdiction, power or authority to order an amount of wages to be levied by distress upon the vessel and that such order was absolutely null and void, as was also the adjudication of said vessel and that no legal right or title in or to said vessel passed by reason of said adjudication. In *Attorney General* v. *Lord Hotham* (1827), 3 Russ. 415, 38 E.R. 631, it was decided that, where a tribunal determines in a matter not within its jurisdiction, the decision is a nullity; and 9 Hals. p. 14, para. 11 says:—"Where a limited Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing." In Abbott on Merchant Shipping, 14th ed., p. 32, it is stated:—"A sale taking place under the orders of a Court, or of officials having no authority to order the same, cannot, by reason of such orders, be upheld as against the original owners." Many decisions of the Court of Admiralty in England can be cited to the same effect and among others the following:—*The Flad Oyen* (1799), 1 Ch. Rob. 135, where an English prize ship was taken to Bergen, condemned there by the French consul and sold, but was not deemed by Sir William Scott, afterwards Lord Stowell, to have been legally condemned, and the ship was restored to the former owner; *The Thomas* (1799), 1 Ch. Rob. 322 where a British ship was sold under the decree of a pretended Admiralty Court without proper authority and the proceedings were held to be null and void and the ship was restored to the former owners; *The Perseverance* (1799), 2 Ch. Rob. 239, where a prize ship purchased by a neutral under illegal condemnation was restored to the original owner; *The Nostra De Conceicas* (1804), 5 Ch. Rob. 294, which was a case where a British vessel was captured by a Dutch privateer and carried to the coast of Africa and there sold without being brought to legal condemnation; the ship was ordered to be restored to the former owner; a similar decision was rendered in *The Fanny and Elmira* (1809), Edw. 117. These cases were all decided by Sir William Scott. In *The "Segredo" or The Eliza Cornish* (1853), 1 Sp. Ecc. & Adm. 36, 164 E.R. 22, and *The Bonita* (1861),

Lush. 252, Dr. Lushington, where there was an invalid sale of ships, ordered possession to be restored to the former owner:

The principles laid down by Lord Stowell and Dr. Lushington in the High Court of Admiralty have been followed in many later cases in England, and in the Supreme Court of the United States. In the case of the Schooner "Sarah" in *Rose* v. *Himely* (1808), 4 Cranch 241, Marshall, Ch. J., said at p. 268:—"A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever." And at p. 281:—"The sentence of condemnation being considered as null and invalid, the property is unchanged." In *Elliott* v. *Piersol* (1828), 1 Peters 329, the Supreme Court of the United States in its judgment per Trimble, J., said at p. 340:—"Where a Court has jurisdiction it has a right to decide every question which occurs in the cause . . . But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers." These two cases are cited and approved by the Supreme Court in *Lessee of Hickey* v. *Stewart* (1845), 3 How. 750, and at p. 763 McKinley, J., said:—"We are of the opinion that the Court had no jurisdiction of the subject-matter and that the whole proceeding is a nullity." The cases were afterwards cited and approved in *Williamson* v. *Berry* (1850), 8 How. 495 at p. 541, and *Guaranty Trust & Safe Deposit Co.* v. *Green Cove R. Co.* (1891), 139 U.S. 137, at p. 147.

From this brief review of decided cases in Canadian, English and American Courts in Admiralty and other matters, it can be taken as settled definitely that, in order to constitute a valid judicial sale by virtue of which the purchaser can acquire title to the property sold, it is absolutely necessary that the Court ordering the sale should have the power and jurisdiction to take cognizance of the matters brought before it in the proceeding in which the sale was ordered, and that where there is an absence of jurisdiction in the Court ordering the sale, the whole proceedings are null and of no effect and purchasers of property so sold become trespassers on the property which they purport to acquire. Applying these principles to the present case, the defendant did not acquire any title to the

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SS. "Bella" under the sale from the marshal in the United States District Court, the plaintiff never lost his property or title thereto and is entitled to have the ship restored to his possession.

What claim has the defendant, under the circumstance disclosed in this case, for reimbursement of the purchase price and the sums alleged to have been expended for repairs and alterations on the ship? This question, so far as the repairs and alterations are concerned, must be considered from the point of view of the character of the possession which defendant acquired, his good faith at the time of the bid, his subsequent conduct, the nature and purpose of the expenditure and the enhanced or increased value, if any, given the ship by the sums alleged to have been expended. As has been pointed out already, the sale was made on the order of a Court without jurisdiction. It was an absolute nullity, constituted no justification for possession, no property rights passed in consequence of it and defendant is in possession without right and as a trespasser. The ship at the time of the sale was insured for £19,500 sterling. The plaintiff had refused a cash offer of $10,000 for her and defendant bought for $1,560, which the District Court Judge found to be an inadequate consideration and he cited the case of *The Sparkle* (1874), 7 Ben. 528 quoted with approval in *The Columbia*; *Thompson* v. *McIntosh* (1900), 100 Fed. 890 at p. 893. The District Court Judge found the ship worth at least $12,000 when defendant paid $1,560 for her. Defendant, apparently, concealed from the marshal his identity and had himself described in the marshal's bill of sale as W. J. Thompson, of the City of New York, County of New York and State of New York. He has not explained, when examined at the trial, why this was done. He gave the marshal his address in care of McKinney, his paid broker and agent, and McKinney, when defendant was inquired for by plaintiff's representatives, refused to give any information about the defendant.

Sir William Scott, in the case of *The Perseverance*, 2 Ch. Rob. 239, said:—"It is a general rule, undoubtedly, that whoever purchases under an illegal title, does it at his own peril; and must take the consequence (both in his purchase and in his own subsequent expenditure upon it) of his inattention to his own security." In that case, which was of a prize ship illegally sold, the Court allowed half of the money which had been expended on repairs in consideration of the benefit which the original owners were likely to receive from the ameliora-

tions. In a later case, in 1804, the case of *Nostra De Concecias, supra*, the same distinguished Judge said:—"If there shall appear to have been any actual amelioration, therefor, I shall direct the Portugese purchaser to be reimbursed. At the same time, neutral merchants must observe, that this is an allowance which the Court will not think itself bound to continue, after the invalidity of these titles has been so generally made known by the decrees of this Court, and of the Superior Court. If persons will accept ships in this manner, after such a notice, it must be at their own peril that they proceed to lay out money upon a title so notoriously invalid." In a later shipping case, *Young* v. *Brander* (1806), 8 East. 10 at p. 12, 103 E.R. 248 at p. 249, Lord Ellenborough, C.J., said:—

"It is true that the owners of a ship are liable for repairs ordered for them or for their benefit by their master; but it was never heard of that, if a stranger ordered repairs for another's ship or carriage, the owner was liable for such repairs. Suppose a pirate ran away with a ship would the owner be liable for repairs ordered by him"?

The principle to be drawn from these cases is, that a purchaser at a judicial sale is chargeable with notice as to whether or not the Court ordering the sale has jurisdiction in the matter, and when it acts without jurisdiction, any subsequent expenditure by the purchaser is at his own peril, he must take the consequences and is not entitled to compensation therefor; 16 Am. & Eng. Ency. of Law, 2nd ed. p. 94.

When defendant, on September 23, 1920, received the order of the District Court which called upon him, among others, to shew cause why the sale should not be set aside and cancelled and the ship returned to the marshal, (the ship was still in New York) he consulted his attorney, Nolan, and has testified that Nolan advised him that the title was good and that if he was ready to leave, to do so. It is quite apparent that, if his attorney, Nolan, had looked into the matter sufficiently, he could have seen that there was a serious question involved which might result, as it did, in the judgment declaring that the sale was a nullity and that defendant had no right to possession. Whether Nolan was merely mistaken in his law or not, he and defendant decided upon the immediate dispatch of the ship to Quebec. Defendant left New York at once for Quebec with the ship by way of the Hudson River, Oswego Canal, Lake Ontario and the River St. Lawrence without obtaining any clearance, although defendant knew that by the usual practice ships should clear before sailing. Defendant, who was

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the manager of the Quebec and Levis Ferry Co. was experienced in shipping matters, having been over 30 years in that business. He knew that his title was called in question and that he was being asked to return the ship to the marshal, and it is evident that he intended to get the vessel away from New York for reasons easy to surmise. The inadequacy of the price paid by the defendant, his false description of himself to the marshal, the conduct of his agent, his flight from New York with the ship without the usual clearance, when he knew his title has been attacked, are inconsistent with good faith on his part. About the middle of August, he brought 11 workmen from Quebec to overhaul the ship. Radical changes were made in her; her two masts were removed and her funnel was shortened and she was converted from an ocean going trawler into a passenger ferry boat intended for service between the City of Quebec and the Island of Orleans to be operated by the Quebec and Levis Ferry Co. for the purpose of earning a Government subsidy in favour of the company. A considerable sum of money was expended both in New York and at Quebec in making these alterations and in the sums are included railway fares from Quebec to New York, general supplies for the maintenance of the workmen, materials used in the alterations and general supplies of the ship. The defendant has testified that, outside the special service for which his company intended to use this ship, she is not of any use, and, in answer to a question in cross-examination as to the value of the ship at the time this action was commenced, defendant answered: "I would not give you $1,000 for her now after spending all that money on her, she is no good for anything." The expenditures were made to run a service to the Island, and, in defendant's opinion, the ship would not bring more than $1,000 in the open market at the time the present action was commenced. The purchase price and the money expended were all supplied by the Quebec and Levis Ferry Co. John Simpson Thom, president of Quebec and Levis Ferry Co, examined as a witness on behalf of defendant, testified that, apart from the special purpose which his company had in earning the Government subsidy, the ship had not much value, and that he did not know what she was worth when the present action was commenced, and added:— "It all depends on what a man wants her for, she might be dear at any price," and "I know she could not be sold for much today."

When defendant took possession of the ship she was an ocean going trawler, now she is a river ferry boat, and according to

evidence, not increased in value by reason of the expenditures made by defendant.

Having regard to the nullity of the sale, the evidence of defendant's bad faith in the whole transaction and the failure to show any enhanced value as the result of his expenditures, in my opinion, the defendant is not entitled to any compensation for the expenditure made by and for him, on the ship.

So far as the purchase price is concerned, the plaintiff never had it and the amount paid by defendant to the marshall, less the latter's fees, is still in the hands of the District Court and defendant should apply there for a refund. The plaintiff has no responsibility in that connection.

There will, therefore, be judgment for plaintiff, as the true and lawful owner of the SS. "Bella," and defendant will be ordered to deliver possession of the ship to plaintiff free and clear of any claims for repairs and to pay the costs of this action.

Judgment for plaintiff.

Re CHRISTIE-GRANT, Ltd.

Manitoba King's Bench in Bankruptcy, Macdonald, J. July 13, 1922.

BANKRUPTCY (§III—26)—EXPRESS COMPANY'S MONEY ORDER CONTRACT—TRUST FUNDS—IDENTIFICATION—BANKRUPTCY ACT, 1919 (CAN.) CH. 36.

A mercantile house doing a large mail order business had its accountant, appointed by an express company as agent for the sale of its signed money orders, the agent undertaking to account for each money order and to hold the proceeds in trust and separate from the other funds in his hands, the company guaranteeing the due performance of the contract. The company having made an authorised assignment under the Bankruptcy Act, 1919 (Can.) ch. 36, the Court held that money remitted to the company for the purchase of goods, which it was unable to supply, and which was remitted by express order, became the property of the express company, and was held in trust for it. The express company was entitled to the amount of its claim in preference and priority to all other claims against the debtor. The fact that the insolvent company had mixed the trust moneys with its other funds, did not affect the right of the express company, which had the right to follow the trust property.

[*Standard Imports Ltd.; Ex parte Canadian Express Co.* (1922), 68 D.L.R. 396, followed. See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL by the Canadian Express Company from a judgment of the authorised trustee disallowing its claim to be paid in priority to other creditors. Reversed.

H. J. Symington, K.C., for the creditor.

A. E. Hoskin, K.C., for the authorised trustee

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RE CHRISTIE-GRANT LTD.

Macdonald, J.

MACDONALD, J.:—This is an appeal by the above named creditor from a decision of the authorised trustee herein disallowing the claim of the said creditor to payment of its claim in full and in priority over the other creditors of the said debtor, and for an order directing the said authorised trustee to pay to the said Canadian Express Co. in full and in priority over the other creditors of the said debtor.

Christie-Grant, Ltd., was a mercantile house, its principal business being the selling and delivering of goods by mail, and the character of its business necessitated a considerable interchange of moneys between it and its customers. An arrangement was entered into between it and the Canadian Express Co., under money order trust agreement and guarantee dated February 17, 1921, filed on this appeal as ex. 1, whereby Walter Phillips, accountant of the Christie-Grant, Ltd., was appointed by the Canadian Express Co. as agent for the sale of its signed money orders, the said agent undertaking to account for each money order and the proceeds thereof and to hold in trust such proceeds and every part thereof entirely separate from the other funds in his hands and the Christie-Grant, Ltd., approved of the appointment of the said agent for the issue of money orders while in their employ and guaranteed the due performance by the said agent of the terms of the said contract.

It was in reality an arrangement with the Christie-Grant, Ltd., constituting a money order agency for their use, and Phillips as an employee named as agent, as a matter of convenience to the debtor, the Christie-Grant, Ltd.

The Dominion Express Co. supplied the Christie-Grant, Ltd. with express money orders (ex. 7) as required and the latter company signed a receipt in acknowledgement and by this receipt (ex. 6) accepted the responsibility of due issue and undertook to account therefor, and further agreed to keep the proceeds of sale of the same entirely separate and distinct from other funds in their hands.

The practice of the parties was to settle up once a week, which was done by the Christie-Grant, Ltd., giving its cheque for the amount of money orders issued for the week.

In January, 1921, the Christie-Grant, Ltd., made an authorised assignment under the Bankruptcy Act, 1919, (Can.) ch 36, and up to that date from the previous week's settlement they had issued money orders of the said express company to the value of $1,848.69, $323.50 of which amount has been paid since the assignment leaving a balance of $1,525.19

still due the said express company; and moneys largely in excess of that amount were in the hands of the said Christie-Grant, Ltd., as well as money in excess of such claims deposited in the bank to the credit of the said Christie-Grant, Ltd., at the date of the assignment and the express company claim these moneys to the extent of their claim as their moneys held in trust for them by the said Christie-Grant, Ltd.

It is contended on behalf of the authorised assignee that there were no trust funds of the express company in the hands of the Christie-Grant, Ltd., as the date of the assignment with the possible exception of a sum not exceeding $39.

The evidence establishes the fact that the cash in hand, with the exception mentioned, was received from the sale of goods over the counter and through the mails, but the evidence also establishes the fact that moneys were received, since the preceding week's settlement, from their customers and refunded through express orders to the amount of $1,848.69.

The contention that moneys so received were not for the purpose of the purchase of express orders and therefore could not be considered as trust funds, to my mind is not tenable. It is true the moneys were not remitted for that purpose. It was money remitted to Christie-Grant, Ltd., for the purchase of goods and they being unable to supply the goods, instead of remitting the cash an express order was substituted and the cash then became the property of the express company and held by the Christie-Grant, Ltd., in trust for the Canadian Express Co.

This money became mixed with the moneys of the Christie-Grant, Ltd., by deposit in their general banking account in breach of the agreement to keep it separate and apart but the fact that it was so mixed and lost its earmarks does not deprive it of its character as trust money.

A *cestui que trust* is entitled to follow trust property into whatever it may have been converted by the trustee: See Godefroi on Trusts and Trustees 4th ed. at p. 564 et seq; *In re Hallett's Estate*: *Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, 49 L.J. (Ch.) 415, 28 W.R. 732. If a trustee mixes trust property with his own the whole will be treated as trust property except insofar as he may be able to distinguish what is his own: *Lupton* v. *White* (1808), 15 Ves. 432, 33 E.R. 817. *In re Hallett's Estate*; *Knatchbull* v. *Hallett*, *supra*.

The point involved is identical with that in *Re Standard Imports*; *Ex p. Can. Express Co.* (1922), 68 D.L.R. 396, and the reasoning and conclusion in that case I adopt. The Can-

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adian Express Co. is therefor entitled to the sum of $1,525.19 in preference and priority to all other claims against the debtor and I order that they be paid that amount by the said authorised trustee. I further direct that owing to the fact that this is a new point for the first time raised in this province that costs of both sides be paid out of the estate.

Appeal allowed.

GALIBERT GLOVE WORKS v. SHARPE.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 31, 1922.

LANDLORD AND TENANT (§IID—30)—LEASE OF PROPERTY—SALE—NOTICE TO VACATE BY NEW OWNER—COMPLIANCE BY TENANT—DAMAGES.

A tenant served with notice to vacate the premises by a new owner, before the termination of the lease, who gives up possession on the strength of this notice, without waiting for judicial proceedings to be taken cannot claim damages from his lessor.

APPEAL by plaintiff from a judgment of the Quebec Court of Court King's Bench affirming the decision of the Superior Court (1921), 27 Rev. Leg. 320. in an action for damages for illegal eviction from premises held by him under lease. Affirmed.

The judgment appealed from is as follows:—

Lamothe C. J.:—Can a tenant, when threatened with eviction by a *tiers-acquireur*, take it upon himself to give up possession of the immovable leased on the strength of this mere threat and then claim damages from his lessor?

The answer to this general question must be negative. Pothier's teaching on the point has been accepted by the codifiers and sanctioned by the jurisprudence both of France and of the Province of Quebec. There must be more than a mere fear of eviction; there must be some *trouble de fait* or a legal action. "Lease of a thing belonging to another is not illegal" says Bosse, J. in *Re Baillargeon* v. *Robillard* (1907), 17 Que. K.B. 334, and that pronouncement cannot be contested under our law. The lessee cannot question his lessor's title so long as the latter maintains him in possession. The lessor may have a defence against the true owner when the latter appears upon the scene; and, in such a case, the question will be discussed as between the lessor and the newcomer. Even if the complaint of disturbance is caused by a person who purchased the property subsequently to the lease, there is nothing more than a mere fear of trouble. The law does not authorise a lessee to abandon possession because of such fear. A purchaser may withhold payment of the purchase price when he

"has just cause to fear that he will be disturbed by any action, hypothecary action or in revendication," says art. 1535 C.C. (Que.) A similar right is not given to the lessee. Even when there is fear of eviction, he must continue to pay the rent until that fear is materialized by overt acts or by a lawsuit.

Applying these principles, I would confirm the judgment rendered. The lessee, threatened with expulsion on May 1 following, may have had a right of action to force his lessor to remove that menace; he might have had recourse to the so-called *action provocatoire* and might have impleaded the new owner as *mis-en-cause;* but he had no right to decide a future possible litigation himself: he could not decide on his own authority that his lessor was unable to maintain him in possession. In fact, the new owner had bound himself to respect the lease of the company appellant, and it was owing to a clerical error that this clause had been omitted in the deed of sale. That error could have been corrected. The lessor's pretension was not unfounded, for it was supported by a writing, namely, the promise of sale. During the month of December the lessor had taken action to have the deed of sale corrected. He opposed this action against his lessee when the latter manifested his intention to leave. The former owner thereby showed that he had legal means of protecting his lessee's possession. To leave the premises becomes, in these circumstances, a voluntary act—one which gives the lessee no recourse in damages.

I shall not attempt to define *trouble de droit* itself, beyond the terms of art. 1618 C.C. (Que.) As I find that the lessee could not reasonably suppose that his lessor was unable to maintain him in possession. I must accept the *dispositif* of the judgment already rendered. Were it not for art. 2128 C.C. (Que.) which is new law, the lessee would not have had ground even to apprehend disturbance. Article 1663 C.C. (Que.) would have afforded him ample protection. After stating the general rule of art. 1663 C.C. (Que.), the legislator felt obliged, in the title concerning registration, to create an exception as regards the lease of an immovable for a period exceeding 1 year. The French Code contains no article such as our art. 2128; but the principles stated above are not changed by this new article. It is always a fear of disturbance. The lessee must wait until he is disturbed or faced with an action in expulsion before exercising his rights against his lessor. The lessor must be called upon to protect him and

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if he fails to do so, he must pay damages. That is the ordinary consequence of violation of an obligation.

Martin, J.:—Can a lessee act upon a simple notice that proceedings in eviction will be taken against him before the expiration of his lease and can he, upon such notice, vacate the leased premises and claim damages from his lessor before any legal proceedings are taken against him to deprive him of the enjoyment of the leased premises?

In the present case the new owner holding title from the lessor avers that he is not bound to respect appellant's lease and threatens to eject the latter before the expiration of his lease. This pretension of the new owners is not founded in fact though the deed of sale does not bind him to respect the lease, the omission of this clause being a clerical error, as is subsequently established. When challenged and sued to correct the deed he contests and ends by admitting respondent's pretension that by the true bargain between them he was bound to respect the lease. Had appellant remained in the premises and the new owner had sought to eject him, the action would have failed.

Was appellant justified under the circumstances in moving out and suing respondent in damages? I do not think so. Appellant always had his recourse in warranty against respondent to compel the latter to defend an action in eviction and had recourse in damages, if any, against respondent, arising from such eviction. It is suggested that because respondent had sold his property and did not offer to give security, that appellant was not bound to wait for proceedings in eviction to be taken. Even if respondent had sold the property, he had in hand the price realized for same—$65,000 in cash, over and above the mortgage, and unless the contrary is alleged and made to appear, everyone is presumed to be solvent and able to satisfy all just demands made upon him. Many people worry about what never happens. By the light of subsequent events, the Tuckett Tobacco Co. may not and probably never would have risked an action in ejectment against appellant. The latter was told by respondent, his lessor, to remain in possession and that respondent would protect him. Instead of doing so, he harkened to the voice of the Tuckett company and moved out, at some inconvenience and loss. I think in doing so he acted improvidently and without right. He might have taken action to have it judicially determined whether or not his lease would expire on May 1, 1920. He would have had an interest to maintain such an

action, but he did not do so, and I am unable to conclude that he can recover from respondent damages by voluntarily vacating the leased premises before the expiration of his lease merely because of the assertion of a right by the new purchaser Tuckett, to eject him which right did not in fact exist and was never attempted to be exercised. There was no action in ejectment and no *voies de faits* and I think there must be either judicial proceedings in eviction or some physical act of eviction in whole or in part before a lessee is entitled to vacate and claim damages.

When appellant's right to remain in the leased premises until May 1, 1921, was challenged by the new purchaser Tuckett, appellant replied that he intended to stay in possession until the expiration of his lease, and he notified the lessor respondent of this decision and the latter did all that he could reasonably be expected to do and took action against the purchasers to have the deed of sale rectified.

Later on, in March, 1920, appellant changes his position, although nothing new had occurred and no more threats of eviction had been made. He knew that his lessor was bound to give him peaceable enjoyment of the leased premises during the continuance of the lease and was bound to maintain him in possession, and his lessor in March had told him so, and that he was prepared to stand behind him and keep him in possession, and if the appellant had any doubt as to the solvency of respondent, he might have asked for some security to back respondent's obligation. Apparently he was not and could not be fearful of respondent's solvency as the latter had $65,000 cash in hand from the sale of the property.

Appellant was under no greater menace in March, 1920. than he was in July, 1919. On the latter date he resolved to stay and later in March he resolved to go. Why, we do not know.

The appellant frankly states in his factum:— "toute la question se résume, il nous semble, à savior si réellement les prétentions de l'acquéreur étaient bien fondées."

Now it is established out of the mouth of the purchaser that his presention was not well founded and he had no right to eviet appellant, having agreed to respect the latter's lease: Baudry-Lacantinerie, vol. 20, Contrat de louage, 1. 537, says: "We will see later that if the object of the lease is sold and the purchaser evicts the lessee, the latter has a recourse in damages against the lessor." and he refers to art. 1320 and following of the same volume. Of course, if appellant had

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been evicted he would have an action in damages against respondent, but can that recourse in damages be exercised as a result of a mere notification by the purchaser to the tenant to vacate before his lease expires? I am of opinion that it cannot.

As I have said, the respondent is obliged by the nature of his contract to give peaceable enjoyment on the thing to his tenant during the continuance of the lease (arts. 1612-3 C.C. (Que.)) and art. 1618 adds that if there is a disturbance in that enjoyment, the lessor is obliged to suffer a reduction in the rent proportionately to the diminution of the enjoyment and to pay damages according to the circumstances. Now, if the effect of a disturbance in peaceable enjoyment is to suffer reduction of rent and pay damages according to circumstance, it is manifest that there can be no reduction of rent until the enjoyment is interfered with, and I fail to see how there can be any damages until the enjoyment is interfered with and whether the respondent's obligation is considered by the light of 1612 or 1618, it has been fulfilled. The omission of the clause binding the purchasers to respect appellant's lease was a mistake, a mere clerical error, afterwards so admitted by all the parties, and by the light of subsequent events, respondents could have maintained appellant in possession of the leased premises, and I fail to see any merit in appellant's claim for damages against respondent.

Under the French Code there is no article corresponding to our art. 2128 C.C. (Que.) by which the lease of an immovable for a period exceeding 1 year cannot be invoked against a subsequent purchaser unless it has been registered.

Under art. 1743 C.N., a purchaser from the lessor cannot expel the lessee if the lease is in authentic form unless such right is reserved. This corresponds practically with out art. 1663 so that French authors and jurisprudence are not of much assistance: Fuzier-Herman, Repertoire, verbo bail (en général) nos 581 *et seq.* treats of "du trouble cause par le bailleur lui-même" and "trouble cause par des tiers." and at 594 says:—"On the other hand, a lessee is not disturbed in his enjoyment unless such disturbance is manifested by overt acts. So long as the disturbance is a mere intention, the lessee has no ground for complaint by way of action . . ." Trib. Seine, sous Paris, 28 févr. 1843, Ciasse d'épargne de Paris, (P. 43. 1. 533).

Reference may also be made to the doctrine of Pothier cited in Delorimier's Bibliotheque, vol. 13. p. 98. that siruple fear of trouble is not sufficient.

We were referred to Baudry-Lacantinerie, (3rd. ed. vol. 19, no. 350, p. 346), as criticising the doctrine of Pothier, on the question of warranty in sales. See same author, p. 349 and Pandectes Francaise, verbo *bail en général*, no. 857:—

I would conclude that where a lessee is not actually disturbed in his enjoyment of the thing leased by either physical eviction of judicial proceedings, that he is not entitled to vacate the leased premises and sue his lessor in damages merely because a person holding title from the lessor asserts that he is not bound to respect the lease, and this more particularly in the circumstances of the present case when the lessor asserts and notifies his tenant that the absence of such a stipulation in the deed of sale to respect the latter's lease in a clerical error, as it was, and that he undertakes to protect his tenant against eviction and maintain him in possession. Holding this view, I do not express at length my views on the appellant's account or why the increased rental was more than 100% and the increased insurance premiums nearly 400% and the loss of cancellation of orders being put at $3,000 when it was a matter of common knowledge that all buyers in all lines were, at this period, cancelling orders, some on an alleged excuse and others without any excuse.

The appellant's claim has many ear-marks of exaggeration, but as I have reached the conclusion that appellant is not entitled to recover anything, I do not find it necessary to express a view in the alternative as to how much he should recover.

The appeal should be dismissed, with costs.

Guerin, J.:—There are strong reasons to urge why this judgment should be confirmed. The plaintiff acted with great precipitation in leaving the premises, after receiving the assurance of Sharpe its lessor, that the latter would protect the plaintiff in maintaining its right under the lease. Had the Galibert Glove Works simply taken an action to oblige Sharpe to effect an alteration in his deed of sale to Creelman, whereby Galibert's right as a lessee should be respected, and had Galibert asked that Sharpe should give security that the lessee's right should be respected and that he should not be threatened by any possible disturbance in such right, there would be a good deal to say in favour of such proceedings.

But, as a matter of fact, time would have settled the whole difficulty, and on October 19, 1920, there could have been no possible danger of any intrusion of the rights of the Galibert Glove Works in the possession of its leased premises. The plaintiff certainly was never disturbed by any physical intrusion of

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the premises leased, and was never ejected from the premises that it chose voluntarily to vacate before the expiration of the lease. The Galibert Glove Works may have thought that it was more prudent on their part to look for new premises, so that their business might not be disturbed in case the new proprietors should decide to carry out their threats to eject the plaintiff; on the other hand it must be borne in mind that the defendant Sharpe was obliged to protect the plaintiff in its possession and in its peaceable enjoyment of the premises leased. It cannot be forgotten either that when Sharpe sold the premises to Creelman, he obtained $65,000; and as a man's assets form the security of his creditors, the Galibert Glove Works knew that their landlord was a person who could be made responsible for any damages which he might cause to his lessee, should Sharpe fail to fulfil his obligations as such lessor.

Such being the appreciation which I make of this case, I am of opinion that the appeal cannot be maintained and that the judgment should be confirmed with costs.

Allard and Rivard, JJ. dissented.

Rinfret, K.C., for appellant.

Geoffrion, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Mignault with which I fully concur, I would dismiss this appeal with costs.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

DUFF, J.:—I concur in dismissing the appeal with costs for the reasons given by the Chief Justice of Quebec, as well as those by Martin and Guerin, JJ.

ANGLIN, J.:—I would dismiss this appeal for the reasons stated by the Chief Justice of Quebec and Martin and Guerin, JJ. in the Court of King's Bench, to which I would merely add a reference to *Great North-Western Telegraph Co.* v. *Montreal Telegraph Co.* (1891), 20 Can. S.C.R. 170, cited by Mr. Geoffrion.

BRODEUR, J.:—This is an action in damages brought by the lessee against the lessor in the following circumstances:—Sharpe had leased a property at Montreal for 3 years from May 1, 1918, to the Galibert company. This lease was not registered. On June 24, 1919, Sharpe made a promise of sale to Creelman of the leased property and it was stipulated in this promise of sale that the prospective purchaser should be bound to respect the existing lease. On July 24, 1919, a notarial deed of sale was passed, but either by an error or otherwise, the purchaser's

obligation to respect leases was not included in this document. On the same day Creelman registered his deed of sale and gave notice in writing to the Galibert company to quit the premises on May 1, 1920. A few days later Creelman, who evidently acquired this property for the Tuckett company, signed a sale in favour of the latter of the leased property; and on July 30, 1919, the Tuckett company notified the Galibert company that they would have to leave on May 1, 1920. This notice to quit was evidently communicated to Sharpe by the lessee, for a short time afterwards, namely, November 5, 1919, Sharpe sued Creelman and the Tuckett company asking that they be condemned to acknowledge that the Galibert company was entitled to retain possession of the leased premises until May 1, 1921, and invoked in support of his claim the special agreement which had been inserted in the deed of promise of sale.

This action was contested by Creelman and the Tuckett company who urged that their contract of sale contained no obligation to respect the lease of the Galibert company, and that they were, therefore, not obliged to allow the latter to remain in possession after May 1, 1920.

The situation became very embarrassing for the Galibert company as the business which they carried on required premises of a nature difficult to procure and it could not run the risk of being obliged to move at a few days' notice in the event of Sharpe failing in his action against the purchasers.

The plaintiff, therefore, began to look for other premises which might be leased; but suitable premises could only be obtained on payment of very much greater rent and insurance rates. It then left the leased premises on May 1, in accordance with the purchaser's notice; and in June 1920 took action against its lessor Sharpe in damages, claiming from him the increase in rent and insurance premiums which it had been obliged to pay. Sharpe pleaded that, in the circumstances, there was no responsibility on his part and that the threat of eviction made against the Galibert company did not justify it in suing in damages.

Whilst action was pending in the present case, namely on October 11, 1920, Sharpe, Creelman and Tuckett settled their disputes; and the two latter acknowledged that they were obliged to respect the leases affecting the property they had purchased from Sharpe.

The Superior Court in these circumstances, dismissed the action of the Galibert company and this judgment was con-

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firmed in appeal, Allard and Rivard, JJ. dissenting. The Galibert company now brings the case before us.

To decide this appeal we must examine the respective obligations and rights of lessor and lessee.

The lessor must give the lessee complete and peaceful enjoyment of the thing leased (arts. 1612-3 C.C. (Que.)) In other words, he must warrant him against defects in the thing leased and against interference with his enjoyment thereof. Interferences (*troubles*) are of two kinds; they are either of fact or of law. *Troubles de fait* are governed by art. 1616 C.C. (Que.). *Troubles de droit*, namely interferences which consist in a claim on the part of a third party to a right of property, servitude or other right in the thing leased, are governed by art., 1617 C. C. (Que).

In the present case we have to deal with a *trouble de droit*, namely, a claim advanced by Creelman and Tuckett that the Galibert company could not occupy the leased premises after May 1, 1920. We must, therefore, examine art. 1618 which states that: "If the disturbance be in consequence of a claim concerning the right of property or other right in and upon the thing leased, the lessor is obliged to . . . . pay damages according to circumstances, provided the lessor be duly notified of the disturbance by the lessee."

In the present case the lessee gave notice of the disturbance and the lessor brought action to remove it.

I understand the difficult and dangerous situation in which the Galibert company found itself. I admit that Creelman and Tuckett, armed with the deed of sale which did not oblige them to respect existing leases, apparently had the right to expel the Galibert company on May 1, 1920. (arts. 1663 and 2128 C. C. (Que.)) and, since the latter's lease was not registered, it had no claim to be allowed to remain until May 1, 1921. I also admit that the exigencies of its business obliged it to seek new premises in order to avoid the danger of being forced to move any day and of being unable to find premises suitable for its purposes, and that it was dangerous for it to rely upon the doubtful outcome of an action.

But does all this justify it in suing its lessor in damages? It was threatened with eviction by Creelman and Tuckett. These two, contrary to their agreement with Sharpe, as we now see by the evidence, were, after all, the cause of all the trouble. Since their pretension that they had the right to dispossess the Galibert company after May 1, 1920, had been denied by their own admission, I would be tempted to believe that they them-

selves were responsible for the damages sustained (Laberi, *verbo* Bail, no. 144).

The lessor Sharpe did everything in his power to remove the cause of disturbance. He took action for this purpose. It is quite true that he had not formally stipulated in his contract of sale that the purchasers should respect the leases, but the latter were nevertheless obliged to do so; and if they violated their obligations and thereby exposed the plaintiff, the Galibert company, to damages, Sharpe should not be held responsible from the moment when he took the necessary proceedings to rectify the omission which had been made in the deed of sale.

Allard and Rivard, JJ., are of opinion that the disturbance was caused by the lessor himself and that art. 1618 should not apply to the present case. The disturbance was caused by Creelman and Tuckett. It is true that they relied upon an omission in their deed of sale to make this threat of eviction but it is none the less established that Creelman and Tuckett were the real troublemakers.

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

MIGNAULT, J.:—The appellant had leased one floor of a building belonging to the respondent and its lease had still about a year and nine months to run when, on July 24, 1919, the respondent sold the property to J. J. Creelman, K.C., who, in turn, sold it to the Tuckett Tobacco Co. Both purchasers at once gave notice to the appellant that it would have to vacate the premises on May 1, 1920. The Galibert company replied that it was entitled under its lease to remain in possession for another year; but the purchasers alleged in reply that this lease could not be set up against them since it had not been registered. The deed did not mention the fact that the sale was subject to existing leases, although the option upon which it was based contained this condition; and the respondent later took action against the purchasers to have the deed amended by inserting therein the obligation to respect the leases. He obtained judgment to that effect in the month of October 1920.

In the interval, however, the appellant appears to have omitted to notify the respondent, its lessor, of the notice it had received from the purchasers, and set about looking for other premises. It was not until March 18, 1920, that the appellant had the protest served upon the respondent declaring that the purchasers had evicted it from the building, that it had procured other premises and claiming $6,443.75 damages.

The respondent replied by another protest to the effect that the appellant was not and could not be evicted from the build-

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ing, that the sale had really been made subject to existing leases and that the respondent had taken action against the purchasers to have the deed of sale maintained by inserting therein this condition which had been omitted in error. On April 19, 1920 the appellant leased other premises from a certain Valiquette and moved into them. It then took the present action against the respondent asking for judgment for the above mentioned amount by way of damages. This action was dismissed by the Superior Court and the Court of King's Bench confirmed the judgment, Allard and Rivard, JJ., dissenting. The appellant now appeals to this Court.

The point to be decided is whether or not the appellant has a right of action against respondent in the circumstances.

It is beyond doubt that the lessor must give the lessee peaceful enjoyment of the thing leased for the period of the lease (art. 1612); but after stating this principle the Code distinguishes between *troubles de fait* against which the lessor does not warrant (art. 1616) and *troubles de droit* in respect of which he is responsible to the lessee (art. 1618). A *trouble de droit* may give rise to a claim for reduction in rent or in damages, according to the circumstances, provided, says art. 1618, that the lessor be notified of the disturbance by the lessee.

The lessee, being nothing more than a simple possessor, has not the quality to dispute the merits of an action concerning ownership or any other right in or upon the thing leased. Such action must be brought against he lessor who is owner of he thing. If the lessee take it upon himself to contest such an action when it is erroneously brought against him, he does so at his own risk and peril. Furthermore, the law gives him a much simpler means of obtaining relief, for he may be dismissed from the case upon declaring to the plaintiffs the name of the lessor (art. 1618). It is the latter, I repeat, who must be sued in such an action.

Pothier *verbo* Louage, No. 91 speaking of the lessee's action in warranty against the lessor says:—

"There is ground for this action in warranty whenever, upon condemnation of the lessor against whom the third party has been obliged to bring an action, or upon acquiescence by the lessor in the demand of such third party, the lessee has been obliged to give up his enjoyment of the premises leased, or a part of the same, or to suffer the exercise of the right of servitude claimed by the plaintiff. It is only from that date or at most from the date of summons to vacate the premises made upon the lessee by such third party in execution of the judg-

ment obtained against the lessor for the benefit of such third party or from the acquiescence of the lessor in the demand of the third party, that the action *ex conducto* lies in favour of the lessee against the lessor for the purpose of forcing the latter to give enjoyment to the former, and, in default by him to do so, to release the said lessee from his obligation under the lease, and have the lessor condemned to pay him damages and interest."

That is the true theory of our law. Fear of a *trouble de droit* is not sufficient to give rise to a recourse in damages by the lessee against the lessor and in this respect lease and sale are subject to the same rules. There must be eviction or at least, says Pothier, demand upon the lessee to vacate the premises following condemnation of the lessor to that effect.

In this case, the appellant, after receiving notice from the purchasers that they would expel it on May 1, following, should have notified the respondent and put him in default to remove the threat of eviction. The appellant instead of taking this step, which the most elementary considerations of prudence demanded, took it upon itself to decide that the respondent could not remove the threat. However, it was mistaken for the respondent, as soon as he became aware of the error in the deed of sale, brought an action against the purchasers to have the deed rectified. The appellant would never have been evicted—and it abandoned the premises of its own free will—if it had acted in accordance with the dictates of law and prudence.

I would dismiss the appeal with costs.

Appeal dismissed.

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Quebec Court of King's Bench, Lamothe, C.J., and Martin, Greenshields, Dorion and Allard, JJ. December 20, 1921.

CONTRACTS (§1D—62b)—OFFER TO PURCHASE—TIME LIMIT—NO ACCEPTANCE WITHIN TIME—OFFER VOID—NOTE FOR PART OF PRICE SENT WITH OFFER—LIABILITY OF MAKER.

Where an offer to purchase the assets of a company has a limited duration and is not accepted within that duration, it becomes null and void, and payment of a promissory note for part of the purchase price sent with the offer, and which is retained by the seller, a notice being sent to the person making the offer that in the event of the offer being accepted but the purchaser failing to fulfil his obligations the note will be held as liquidated damages, cannot be enforced by the seller, there being no contract and no consideration for the note given.

APPEAL by defendant from the judgment of the Quebec Superior Court in an action on a promissory note. Reversed.

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The facts of the case are as follows.

The action is based upon on a promissory note for $10,000, signed by the defendant A. Klein to the order of the Terrebonne Electric Power and Steel Co., for value received, endorsed by Henry Moody, M. George Moody and C. A. Kimpton. The note was transferred by the payee to J. Osborne, in his quality of receiver for the Nilson Tractor Co., only and was not transferable. The note was endorsed over to Geo. W. Scott, who sues the three endorsers jointly and severally.

The defendants did not contest, but took an action in warranty against the maker. Klein intervened and contested the principal action alleging in substance; (a) The plaintiff is not a holder in due course and he has no interest in the note, being only the prête-nom of J. Osborne; (b) No value whatever was ever given by Osborne or Scott for the note, either to the maker or to the indorsers; (c) The note was given under the following circumstances. In 1921, there were negotiations between the Terrebonne Co. and Nilson Tractor Co., for the sale of the assets of the latter. A resolution was passed by the Board of Directors of the Terrebonne Co. (by three directors in the absence of two others), offering to purchase the assets for $365,000 provided the offer is accepted within 21 days from May 17, 1919, and a copy of the resolution was handed to Osborne the receiver of the Nilson Company. Pending compliance with the necessary formalities to obtain the authorisation of the Court, the note sued upon was sent to Osborne as earnest evidence of good faith, and Osborne answered: "In event offer accepted and you failed to fulfil note to be held by me as liquidated damages."

Later, the offer of the Terrebonne Co., not having been accepted, the company withdrew from the contract. The Nilson Company kept the note as liquidated damages for breach of contract.

The plaintiff answered that the defendants, M. G. Moody, Henry Moody and Kimpton, knew of all the transactions and dealings with Osborne; that consideration was given for the note, because the company obtained an option on the plant of the Nilson Tractor Co.; the Terrebonne E. P. & S. Co. has ratified all the acts of Sinnamon, its manager; plaintiff is holder in due course; the defendant in warranty may have recourse against the Terrebonne company and the endorsers of the note sued upon, but cannot exercise it against plaintiff.

Klein instituted another action against the Terrebonne Electric Power & Steel Co., and its directors to set aside the reso-

lution of May 17, 1919 and all the contracts between the two above companies as illegal and fraudulent. Both cases were joined.

The facts will more fully appear in the following notes.

The principal action was maintained and the action in warranty and the action of Klein dismissed by the Superior Court.

Elliott & David, for appellants.

Casgrain, McDougall & Co., for respondent.

LAMOTHE, C.J.:—When the two cases are studied together, as was done by the Court of first instance, the facts appear to be complicated; but it does not seem to me to be necessary for the decision of the two appeals to review in detail the facts which have been explained already in the judgments submitted to us, nor to discuss at length all the questions raised in the factums.

The appeal from the judgment maintaining the principal action should be allowed, in my opinion for two reasons: (1) the offer of the Terrebonne Electric Co. to purchase the assets of the Nilson Tractor Co. had a limited duration. It had to be accepted within 30 days from May 17, 1919. It was not accepted within that delay; but Osborne asked for an extension of the delay until June 26, 1919, and the manager of the Terrebonne Electric, Sinnamon, consented to this extension. It was not until June 28, on demand made that day, that the Minnesota Court authorized the "receiver" Osborne to sell the whole of the company's assets. There could be no contract without that authorization. Osborne had no power to sell the assets. Why did he not obtain a further prolongation of the delay fixed? That is not explained; but it is evident that Osborne allowed the extended delay to expire without closing the agreement. That is enough, in my opinion, to defeat his action. In contracts of this nature, the delay is an essential element. The agreement fixed that delay quite clearly. The unilateral offer lapsed of itself if the term was not prolonged. Osborne's allegation that the company again accepted the agreement after the Minnesota Court had given its approval is not founded in fact. What subsequently took place does not amount either to a ratification or to an acceptance. Being an incorporated company, the Terrebonne Electric Co. could only be bound by its Board of Directors. Now a decisive act in a contrary sense is seen in a resolution of the Board dated July 16, 1919, breaking off all relations with Osborne and repudiating the promise to purchase. (2) Scott, the plaintiff in the case, is the *prête nom* of Osborne, the "receiver" appointed by the Minnesota Court. That

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is admitted. This point is equally fatal, to my way of thinking, to the plaintiff's case. An important principle of our procedure is that of art. 81. C.C.P. (Que.) that no person may plead in the name of another. This article was in existence before the old code and formed part of our law even before the code of 1865. It has never been abrogated. Our jurisprudence allows a creditor who is holder of a negotiable instrument to transfer it by endorsement to another person to obtain payment; but that is on condition that there has been a proper assignment. The *prête-nom*, as he is called, is considered, in this latter case, as a holder in due course. Such an assignment is allowed under our jurisprudence because the debtor of the negotiable instrument cannot plead want of consideration between the real plaintiff and the *prête-nom*, for that would be to derogate from the rights of another. To sum up, jurisprudence gives effect to such an assignment by endorsement if it is regular; and that theory is not in any way inconsistent with art. 81 C.C.P. (Que.). It is not the same when the assignment by endorsement is not regular. If the note is not negotiable on its very face, the holder cannot, by endorsing it, have it sued upon by a *prête-nom*, for the assignment is then irregular and the claimant has no valid title. Possession of the note in this case is not sufficient since the note itself shows that it is not negotiable. The note for $10,000 signed by A. Klein and sued upon in this case against the endorsers, the Moodys, bears on its reverse, before the signatures of Messrs. Moody, the following words: "Assign to M. Osborne, as receiver, for the Nilson Tractor Co., only and not transferable."

Such a statement is allowed by our Bills of Exchange Act and must be respected. Even the authority produced by the plaintiff Scott shows that he has no right to enforce payment of the note since the endorsers are not obliged to recognize its assignment to him.

I am repeating myself when I say that it must not be inferred that our jurisprudence has made it possible to evade article 81 C.C.P. It merely recognises the transfer by endorsement of a negotiable instrument when its negotiability is apparent and unequivocal. The holder then has a good title in the eyes of the law. . To admit the validity of a transfer by giving it full effect, on the one hand, and to "plead in the name of another", on the other, are two totally different things. The Courts have power to do the former; they cannot allow the latter. Art. 81 C.C.P. is a rule of public order. No jurisprudence can derogate from its clear provisions (a mere legal maxim in France;

a prohibitive law in this Province). In the other Provinces governed by English common law, suit by a *prête-nom* is more easily admitted. He may be declared to be the agent or the trustee of the real plaintiff. But in the Province of Quebec no agent or trustee may sue in his own name on behalf of another person, unless there is a text of law expressly authorizing him to do so. An action brought by a person styling himself the agent of another would be dismissed. on demurrer. That is because we have in this Province a special article (art. 81 C. C. P. (Que.)) which does not exist in the rest of the Dominion.

It is further to be noted that Osborne was not authorized by the Minnesota Court to sue on this note or to transfer it to Scott. That also is fatal under our law.

The present case is clearly distinguished from that of *Henderson* v. *Maher* (1918), 46 D.L.R. 143, 55 Que. S.C. 175, in which case the note was negotiable—that may be said without admitting the truth of the legal theories propounded in the said judgment.

I would reverse the judgment in the principal action for the two reasons mentioned above.

The action in warranty taken by the appellants against Klein was dismissed without costs. If the principal action is dismissed for the reasons given above, there is no ground for interfering to change the judgment rendered in the action in warranty. otherwise, I would be of opinion that the action in warranty, which was not contested by Klein, should also have been maintained, for it is evident, in view of the circumstances revealed in the record, that Klein must protect the endorsers against any action tending to force them to pay the note.

There is a second action, brought by Klein under number 710 of the records of the Superior Court, asking that the resolutions of the Terrebonne Electric Co. dated May 17, 1919 be quashed and that any promise to purchase as well as the letters exchanged between Sinnamon and the receiver Osborne be set aside. The dismissal of the principal action, makes it useless for the Court of Appeal to intervene in the second action—unless it be to adjudicate upon the costs in appeal. This action would seem to me well founded were it not for a prospectus signed by the directors of the Terrebonne Electric Co. under date of May 29, 1919. This document constitutes a proof in writing that the directors who were absent from the meeting of May 17, 1919, subsequently approved the resolution passed that day and gave their consent to it. The only utility of the second action would be to have it declared that as the offer to

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purchase had not been accepted within the delay allowed, it lapsed, or that Sinnamon was not authorized to transfer the note for $10,000 either "as receiver of good faith" or as liquidated damages. The decision reached by this Court in the principal action is sufficient. The judgment dismissing this second action may be confirmed in its *dispositif* for the reasons mentioned above, and not for those given therein.

MARTIN, J.:—The regularity and binding force of the extension of time granted of the Terrebonne company was questioned but even assuming that it was binding on the company, the latter's offer was not accepted until June 28, or 2 days after the extended period had expired. Was there a concluded agreement to purchase the assets of the Nilson Tractor Co., made within the time limit of the offer? Could the Terrebonne company have sued Osborne to enforce delivery or obtain damages at any time up to June 26? Clearly not. The Terrebonne company was not bound to buy until their offer was accepted, and it had to be accepted within the time limit therein specified, and if there was no enforceable contract up to June 26, there could be no damages recoverable for breach of what did not exist. The trial Judge referred to art. 1191 C.C. (Que.). It is suggested that the Terrebonne company was bound after June 26 because they sent an auditor Porter, but sending auditor Porter could hardly be said to be sufficient to create a new and binding contract on the part of the company obliging the latter to purchase $265,000 of property. I do not find in that act evidence of any new bargain and I am not going to give the offer more effect than was given to it by Mr. Osborne. Referring to the offer contained in May 17 resolution, he says: [Extracts from his depositions.]

From all this I would conclude that Osborne did not have any authority to sell and did not purport to have such authority or attempt to sell until the Court order of June 28 was made authorising him to do so and as that order was made after the period of the offer had lapsed, this was no binding contract which could form the basis of a claim for damages, liquidated or otherwise.

It is an elementary principle that where in the offer there is a delay stipulated for its acceptance, the right to accept is subject to this restriction that such acceptance cannot be made after the expiration of the stipulated delay. Laurent vol. 15, nos. 476, 477, *et seq.*

There is no doubt, for it is admitted in the pleadings and in the telegrams and letters, that the consideration which Osborne

gave the Terrebonne company for this note, and the only consideration he gave was that he took it as liquidated damages in case the company did not fulfil its offer to buy when he was authorized by the Court to sell. This is admitted by respondent in sec. 3 of his summary; "It (the note) was given as liquidated damages in case of a breach of the defendant's obligations which contingency occurred."

But if there was no contract and, consequently, no damages, Osborne's title to the note fails, and this is sufficient to reverse the judgment of the Superior Court.

Scott is admittedly the mere *prête-nom* of Osborne and has no greater rights that the latter would have. It is unnecessary to decide whether, in view of the assignment of the note to Osborne being made to him only and not transferable, he could endorse it to the respondent Scott. As Scott is a mere holder for collection, not claiming title, I incline to the opinion that he could.

On the question of the validity and binding force of the resolution of May 17, I am against the appellant's pretensions. The remarks of Lord Macnaghten in the Privy Council in the case of *Montreal & St. Lawrence Light & Power Co.* v. *Robert*, [1906] A.C. 196, are in point and conclusively dispose of this objection. That resolution is binding on the company. It is, moreover, unnecessary to decide whether or not Osborne could sue without first obtaining permission of Court as he would be obliged to do if he were a liquidator under our Winding-up Act, R.S.C. 1906, ch. 144, or whether he could, without such authority of Court, endorse the note in question to Scott for collection. Possibly such absence of quality might be required to be specially raised by preliminary plea. On this, I express no opinion. I do not see any ground for applying the principles of estoppel or *fins de non recevoir* laid down by the Supreme Court in the case of *Ewing* v. *Dominion Bank* (1904), 35 Can. S.C.R. 133.

I would dispose of this case on the broad ground that neither Osborne nor his *prête-nom* Scott is entitled to recover on the note sued upon, and I would maintain the present appeal and reverse the judgment of the Superior Court and dismiss the plaintiff's action with costs here and below. As the principal action fails, the action in warranty of Klein against the Terrebonne Electric suffers the same fate.

GREENSHIELDS, J.:—The action is brought in Scott's name. He alleges that he is the holder and owner of the note in due course. The question was raised on the present appeal as to

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whether Scott, the plaintiff, had any title to sue seeing the restrictive endorsation made by the payee of the note. Having arrived at a conclusion on another question, the decision of this first question is unnecessary. I have no doubt, however, that the endorsation restricted the transfer of the note, but I am not prepared to say that the holder of the note in due course could not, without transfering the note within the meaning of the Bills of Exchange Act, R.S.C. 1906, ch. 119 give possession of that note to another for the purpose only of collection, and I am not prepared to hold that such person could not, being in possession of the note, maintain an action for the recovery of the amount. Of course, it is elementary that he could not acquire any greater rights than Osborne, and that all the equities could be pleaded against him as they could against Osborne. But I do not decide the appeal upon that question. There is another and a broader question to be considered. On May 17, 1919, a resolution was adopted by the directors of the Terrebonne Electric Power & Steel Co. (the respondents). It, in terms, resolved, that the company made a firm offer for the assets of the Nilson Tractor Co., to the receiver, M. J. Osborne, of Minneapolis, Minn., U. S. A., as follows:—

"We the undersigned herewith submit to you as representative of the District Court Hennipen County, Minn., U. S. A., an offer and bid for the assets of the Nilson Tractor Co., of $265,000, payable in Canadian funds. This offer to be subject to your acceptance within twenty-one days from this date." This resolution was adopted after negotiations had been carried on between Osborne and the directors of the respondents, the Terrebonne Electric Co. At the time the resolution was adopted, Osborne was in Montreal; in fact, he was present when the resolution was adopted, although, of course, he did not take part in the meeting. A copy of the resolution was delivered to him. It is stated that the resolution was illegal and null. I am not disposed to accept that view, and again arriving at the conclusion I have, it is unnecessary to decide the question.

The delay of 21 days within which acceptance should be made was extended, and expired after extension on June 26, 1919. Up to that time, there had been no formal acceptance. As receiver of the Nilson Tractor Co., Osborne was an officer of the Court which appointed him, viz., the District Court of the County of Hennipen, in fact the offer was not made to him personally but as the representative of the Court. It would appear that he could not act without the approval or sanction of that Court. In other words, before he could accept the offer

to him submitted he was bound to obtain the authorisation of the Court.

Although Osborne received a copy of the resolution on the date it was adopted, on May 30, a letter was sent by the Terrebonne Electric Co. to Osborne enclosing the note sued upon. The letter stated:—

"Herewith 60 day note for $10,000 May 1st, 1919, and assigned to you with satisfactory endorsement, in evidence of our good faith."

A reply was sent by Osborne, which in part reads:—

"Letter and note received, solicitor advises must have 21 days from date instead of from May 17th. This is necessary to properly present matters to Court. Agreement to be acceptable must provide, in event offer accepted and you fail to fulfil, note to be held by me as liquidated damages." There was no objection made to this suggestion or demand and it can safely be said that the note from and after that date was held by Osborne as liquidated damages in case the Terrebonne Electric Co. failed to fulfil the contract for the purchase of the assets of the Nilson Company when such contract was completed by the acceptance of Osborne as receiver. It is equally clear that, up to that time, there had been no acceptance.

It was only on July 28, 1919, after the expiration of the extended delay that Osborne obtained the authority of this Court to accept the offer. It is elementary to state, that stipulated delay within which an offer must be accepted is *de rigueur*, unless waived. If the statement is correct that no acceptance was made within the stipulated delay, then no contract was formed, and no contract being formed, there could be no rupture resulting in damages, liquidated or otherwise. The note sued upon having been given as liquidated damages and no damages existing, there was no consideration for the note. Having arrived at this conclusion, neither the plaintiff or Osborne or any one else could exact the payment of the note.

I should maintain the appeal and dismiss the action. The action in warranty must fall when the principal action is unfounded, and that is my decision.

DORION, J.:—The arguments advanced in the principal contestation are the following: (1) The resolution of May 17, 1919 authorizing the transaction with Osborne is null, because it was adopted without the knowledge of Kimpton and the two Moodys; (2) The acceptance of the offer embodied in the resolution of May 17, 1919 took place after the expiration of the delay fixed by the resolution, and even after the additional un-

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authorized delay given by Sinnamon had expired; (3) The note was made payable to Osborne and was not transferable on his endorsement.

The first ground rests on a question of fact which is much disputed, namely as to whether or not the Moodys and Kimpton knew and approved of the transaction with Osborne. These three directors placed all the affairs of the company in the hands of Sinnamon and trusted him so blindly that they signed the papers he placed before them without reading them. That is how they came to sign the company's official prospectus, deposited in the office of the Secretary of State at Ottawa. That prospectus contains a description of the whole transaction which the company was in the act of carrying out with Osborne and represents it as a definitely accomplished fact, saving the consent of the Minnesota Court.

The facts are complicated by dealings which it would take too long to explain and which left the appellants in a very difficult position as regards their part in the deal; but, fortunately for them, the other grounds advanced are not so completely confused by the facts. They show clearly the importance of complying with the formalities prescribed by law in matters where negligence on the part of agents makes the fixing of responsibility an impossible task.

Granting that the meeting of May 17 was regular, and that the resolution passed at that meeting was valid, the offer it contained had to be accepted on or before June 21 or perhaps June 26, and it was not so accepted until June 28. Therefore, it was not validly accepted and Osborne cannot claim payment of the note.

It follows that Scott, who is not a holder for value, has no right of action. But if Osborne himself had a right of action on the note, the transfer which he made by endorsement to Scott is null because he held the note under an endorsement which forbade him to negotiate it. (Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 68.)

The holder of a note by endorsement is not obliged to justify his quality and his right otherwise than by the endorsement of the preceding holder. He may be the holder for the purpose of cashing the note and the maker, if sued, has nothing to say in the matter. The latter cannot plead that the preceding holder is suing through the agency of another, for the endorsement gives the present holder an incontestable right of action in his own name.

Osborne might allege in vain that he was suing in the name

of Scott. Article 81 C.C.P. (Que.), forbids him to do so, and if Scott pretends that he is suing in his own name, he has not the right to do so for the note in the hands of Osborne was not negotiable.

The principal action must, therefore, be dismissed with costs in favour of Klein, the intervenant, and the action in warranty which was not contested, must be dismissed without costs.

Klein's action against the Terrebonne Electric Co. must also be dismissed, because the plaintiff no longer has any interest therein, since the action in warranty, which gave it purpose, is dismissed.

ALLARD, J.:—In the case of *Scott*, plaintiff- respondent, v. *Moody and Moody*., plaintiffs in warranty, and Klein, defendant in warranty, No. 216, I would reverse the judgment in the principal action, with costs.

I would confirm the judgment in the action in warranty.

In case No. 217, *Klein*, plaintiff-appellant v. *Terrebonne Electric Power and Steel Co.*, I would confirm the *dispositif* of the said judgment, but without costs in appeal.

In the whole matter, I am thoroughly in agreement with the views expressed by the Honourable Chief Justice in his notes.

Judgment:—"Considering that the respondent Scott claims from the appellants the amount of a note for $10,000, payable to the order of the Terrebonne Electric Power & Steel Co.;

That this note was endorsed by the said company as follows:—'Assign to M. J. Osborne as receiver for the Nilson Tractor Co., only and not transferable'.

That the subsequent endorsement by the said M. J. Osborne in favour of the respondent Scott is null by reason of the restriction contained in the endorsement in favour of the said Osborne;

That the sale of the stock of the Nilson Tractor Co. by Osborne to the Terrebonne Electric Power & Steel Co. was not accepted within the delay fixed by the offer of purchase made by the latter company, and that that sale did not therefore take place;

That this proposed sale formed the condition and the sole consideration for the said notes, and that besides the nullity of the transfer to Scott, the transfer of this note to Osborne is also null by reason of non-fulfillment of the condition and lack of consideration;

That the said Scott was not a holder in due course of the note, but was merely the *prête-nom* of Osborne;

That there is error in the judgment of the Superior Court;

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adjudicating on the principal action, this Court maintains the appeal with costs, reverses the judgment rendered by the Court of first instance in the case of *Scott* v. *Moody*., and dismisses the said action with costs in favour of both the intervenant Klein and the defendants;

And this Court, adjudicating on the action in warranty taken by *Moody* against *Klein*:—

That as the principal action is dismissed, the action in warranty no longer has any raison d'être, confirms the judgment of the Superior Court and dismisses the said action in warranty without costs, since it was not contested;

On the action taken by Klein against the Terrebone Electric Power & Steel Co., the Court considering that this action no longer has any *raison d'être*, seeing that the principal action of Scott against the company is dismissed: dismisses Klein's appeal with costs and confirms the judgment of the Superior Court."

Judgment accordingly.

BALLS v. McGREGOR.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Prendergast, JJ.A. July 10, 1922.

BROKERS (§IIB—12)—SALE OF REAL ESTATE—COMMISSION—SUFFICIENCY OF BROKER'S SERVICES—SOLDIER SETTLEMENT ACTS, 1917 (CAN.), CH. 21, AND 1919 (CAN.), CH. 71—EFFECT ON BROKER'S RIGHT TO COMPENSATION.

The Soldier Settlement Act, 1917 (Can.), ch. 21, which was repealed by the Act 1919 (Can.), ch. 71, did not contain any restrictions on the right of a real estate agent to recover a commission on a sale of land to the Board, as contained in sec. 61 of the repealing Act, and under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 9, the repealing Act did not affect the right of a real estate agent to recover commission on a transaction entered into before the repealing Act came into force. Held also, affirming the trial Judge that the agent had earned his commission on the sale, by carrying out what he had bargained to do and fulfilling the conditions imposed by the contract.

[See Annotation on Brokers, 4 D.L.R. 531.]

APPEAL by defendant from the trial judgment (1922), 66 D.L.R. 696, 32 Man. L.R. 196 at 197, in an action by a real estate agent to recover commission on the sale of land.

Affirmed.

W. H. Trueman, K.C. for defendant.

W. B. Powell, for plaintiff.

PERDUE, C.J.M., and CAMERON, J.A. concurred with FULLERTON and DENNISTOUN, JJ.A.

FULLERTON, J.A.:—This is an appeal from the judgment of

Galt, J. (1922), 66 D.L.R. 696, in favour of the plaintiff allowing him his claim for $250 commission on the sale of the north-west quarter of sect. 29, tp. 12, rge. 12, west, and $750 commission on the sale of the south-west quarter of the same section.

As to the claim in respect of the north-west quarter, the only defence suggested is sec. 61 of the Soldier Settlement Act, 1919, (Can.) ch. 71. This act, however, did not come into force until July 7, while the sale was effected on the previous June 16. The plaintiff had earned his commission before the Act came into force and is therefore not affected by its provisions.

As to the south-west quarter, the defendant contends that the plaintiff failed to produce a purchaser ready to purchase on the terms specified by him. These terms were contained in an option agreement dated June 7, 1919, and are as follows:—

"I will sell the . . .S.W. ¼ at $3,250 on half crop payments providing the purchaser will break and crop 25 acres each year until 125 acres are under cultivation, with one-half crop payable to me wiping off the amount due under agreement for sale under which this land was purchased by me. All monies obtained over and above the above prices are to be retained by you for your commission."

On June 16, 1919, plaintiff found a purchaser ready, willing and able to purchase at the price of $4,000 payable $200 cash, $500 on or before November 1, 1919, and the balance on half crop payments, and further agreeing to the defendant's terms as to breaking. Defendant refused to carry out the sale. The only objection urged by the defendant against the right of the plaintiff to recover is that the plaintiff failed to produce a purchaser ready to buy on his terms inasmuch as the provision for the payment of the sum of $200 and $500 was something beyond the terms authorised. If there is anything in this contention the defendant has clearly waived it. The plaintiff drew up an agreement of sale embodying the above terms, had it executed by the purchaser and requested the defendant to execute it. Defendant took no objection to the terms stated in the agreement but said he wanted "to wait to see that the sale of the other quarter for all cash went through." The trial Judge states in his reasons for judgment that no question was raised on the trial as to the form of action or as to the amount recoverable, if the plaintiff was entitled to succeed at all. I think the plaintiff is entitled to recover the amount of commission claimed in respect of the south-west quarter.

The appeal will be dismissed with costs.

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BALLS v. MCGREGOR.

Dennistoun, J.A.

DENNISTOUN, J.A.:—This is an action to recover two commissions on the sale of farm property owned by the defendant.

The trial Judge, Galt, J., has given judgment, 66 D.L.R. 696, for $250 as commission on the sale of the north-west quarter section and for $750 on the sale of the south-west quarter section of the lands sold, and with respect I concur in his findings.

The defendant vendor gave to the plaintiff, who is a real estate agent, a memorandum in writing in these words:—

"In consideration of the sum of one dollar, receipt of which is hereby acknowledged I hereby give an option on the W½ of 20-12-12W1 as follows: I will sell the N.W.¼ at $3,750 cash, and the S.W.¼ at $3,250 on half crop payment provided the purchaser will break and crop 25 acres each year till 125 acres are under cultivation, with one-half of the crop payable to me or toward wiping off the amount due under the agreement for sale under which this land was purchased by me. All amounts obtained above the above prices are to be retained by you as your commission. If I desire to cancel this option I hereby agree to give you thirty days' notice in writing."

The plaintiff arranged a sale of the north-west quarter to the Soldier Settlement Bd. for $4,000 cash and the sum of $250 is by agreement payable as commission, unless the payment of such commission becomes illegal by reason of the Soldier Settlement Act, 1919 (Can.), ch. 71. As this Act was not assented to until July 7, 1919, and as the sale was arranged, and the commission earned, in June of that year, the Act does not apply, and the plaintiff is entitled to the amount awarded in respect of this branch of the case by Galt, J., 66 D.L.R. 696.

On or about July 16, the plaintiff tendered to the defendant an agreement to purchase the south-west quarter signed by one Buchanan for the sum of $4,000, with interest at 8% per annum, payable $700 on or before November 1, 1920, and as to the balance, by crop payments as provided by the option with covenants for breaking as therein specified.

The defendant told the plaintiff that he was willing to sign this agreement but he wanted to make some arrangements first, about getting a tenant off the north-west quarter. He never did sign the agreement—hence this action.

The memorandum given to the plaintiff by the defendant constituted a standing offer to sell the land on the terms stated to any unobjectionable person, able, ready, and willing to purchase. It is not an option given to the plaintiff which he is to accept himself. It was contemplated by the parties that a third

party might be induced by the plaintiff to accept the defendant's offer, and at an increased price—the excess to go to the plaintiff as remuneration for his services.

The plaintiff procured a third party, one Buchanan, to accept in writing the defendant's offer to sell, and at an increased price of $750, which the plaintiff now claims as payable to him in accordance with the terms of the offer as a reward for services rendered.

The defendant refused to carry out the sale and made it impossible for any money to be either "obtained" or "retained" in satisfaction of the plaintiff's claim.

Had the defendant carried out the sale he would not have been entitled to call for any cash until a year later, and I incline to the view that the plaintiff would not have been entitled to his remuneration until it had been received from Buchanan, but it is not necessary to decide the point for the defendant, while approving the purchaser, has, for no sufficient reason, refused to carry out the sale.

The time had expired when this action was brought within which the defendant should have received $700 cash payable on November 1, 1920, and having refused to carry out the sale, he became liable for the payment of the commission personally.

He had no objection to offer to the character of the purchaser or the ability to carry out the purchase, and has given no valid explanation of his refusal to complete the sale.

I was inclined at first to think that the plaintiff's action was one for damages for breach of contract, as in *Wrenshall & Co.* v. *McCammon* (1912), 5 S.L.R. 286, as dealt with by Lamont, J., at p. 291, but on consideration this appears to be a different case. Here there is an offer to sell and an acceptance of that offer, both in writing, duly signed by the parties to be charged. So soon as the signed agreement to purchase was tendered to the defendant and approved by him, the bargain was complete and the agent's remuneration both earned and fixed by the documents.

I cannot accept the argument that it was contemplated by the offer that the plaintiff was to make two contracts with Buchanan—one to sell him the land at $3,250 on crop payments, and the other for the payment to himself of $750 for making the sale. The defendant intended exactly what has occurred—that the plaintiff would "obtain" an increased price payable to defendant, and that increased price was to be "retained" by plaintiff when procured from the purchaser. If the defendant got it he was to pay it over to the plaintiff.

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As neither of them can get it owing to the refusal of the defendant to sell the land the plaintiff's judgment is right and this appeal should be dismissed with costs.

PRENDERGAST, J.A., concurred.

Appeal dismissed.

STANDARD TRUST Co. v. HILL.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 23, 1922.

GIFT (§III—16)—OF AUTOMOBILE—SUFFICIENCY OF DELIVERY.

A gift of chattel by words of present gift united with posession in the donee makes a perfect gift whether the possession precedes, accompanies or follows the words. The delivery may be actual, or constructive, according to the nature and character of the object of the gift, the relationship of the parties and the other circumstances and formal manual delivery is not necessary to perfect the gift in cases where real delivery is not practicable because the donee already has possession of the chattels.

[*Curtis* v. *Langrock* (1922), 63 D.L.R. 282, 17 Alta. L.R. 160; *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, referred to; *Stoneham* v. *Stoneham*, [1919] 1 Ch. 149; *Cain* v. *Moon*, [1896] 2 Q.B. 283; *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582, applied. See Annotation, 1 D.L.R. 306.]

APPEAL from the judgment of a District Court Judge upon the trial of an interpleader issue concerning the ownership of an automobile. Affirmed.

J. H. Delf, for appellant; *W. H. Sellar*, for respondent.

SCOTT, C.J., concurred with CLARKE, J.A.

STUART, J.A., concurs with BECK, J.A.

BECK, J.A.:—It is said to be law that in order to transfer a chattel by gift there must be either a deed or an actual delivery. See cases cited *Curtis* v. *Langrock* (1922), 63 D.L.R. 282, 17 Alta. L.R. 160, and especially *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, 59 L.J. (Q.B.) 377, 63 L.T. 153, 38 W.R. 588.

But the delivery need not be concurrent with the words of gift. Where the donee has the chattel in his possession and the owner made by parol a present gift of it to him, that was held to be sufficient. *Re Alderson; Alderson* v. *Peel* (1891), 64 L.T. 645, distinguishing *Shower* v. *Pilck* (1849), 4 Exch. 478, 154 E.R. 1301, as a case of the expression of an intention to make a gift in the future.

Where there is a gift of a chattel by words of present gift subsequent delivery is effective to perfect the gift: *Re Stoneham; Stoneham* v. *Stoneham*, [1919] 1 Ch. 149. A gift of chattel *per verba de presenti* united with possession in the donee makes a perfect gift, whether the possession precedes, accompanies or follows the words.

If Middleton, J., in *Kingsmill* v. *Kingsmill* (1917), 41 O.L.R. 238, in the words quoted by Clarke, J.A., *post* p. 728:—"Possession subsequent to an abortive gift is not material"—means that a delivery of possession because it is not concurrent with but subsequent to words of present gift, I cannot agree. I think he does not mean that. A gift is constituted by two things—the words giving (not merely expressing a promise or intention) and possession in the donee. It cannot be that the words and the act of delivery must be contemporaneous in the sense of occurring in the same instant. Five minutes, a day or a week intervening between the words of gift, which are not abortive if in the present tense, coupled with a subsequent delivery, make together a perfect gift: *Stoneham* v. *Stoneham*, *supra*.

What constitutes a delivery, as one of the two essential elements of a gift is another question. In this connection it is, I think, important to get rid of the idea of the special kind of possession contemplated by the Bills of Sale Ordinance, C.O. 1915, ch. 43—"an actual and continued change of possession." That ordinance does not touch the case of a gift. The words are: "Every sale, assignment and transfer of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold." The word "sold" shows that the words "assignment and transfer" mean the instruments effecting the sale. The whole purview of the Act confirms this view. The ordinance is no more applicable to an oral gift, with delivery, that to a gift by deed (without delivery).

Delivery of possession, therefore, in the case of a gift need only be such as is sufficient in law, entirely apart from any statute.

Again, although I have used the word "delivery" as the cases usually do, the question is not so much one of *delivery* as of *possession* by the donee.

In *Cain* v. *Moon*, [1896] 2 Q.B. 283, at 289, Wills, J., said:—

"Suppose a man lent a book to a friend, who expressed himself as pleased with the book, whereupon the lender, finding that he had a second copy, told his friend that he need not return the copy he had lent him; it would be very strange if in such a case there were no complete gift, the book being in the possession of the intended donee."

Surely, it would be the same if there had been no delivery by the donor but the donee had found the book; surely possession by the donee without delivery would suffice.

Delivery, still using the word for convenience, may be actual

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or constructive, according to the nature and character of the object of the gift, the relationship of the parties and the other circumstances. See 14 Am. & Eng. Ency. of Law, 2nd ed., p. 1019 *tit.* "Gifts."

Cases of husband and wife and parent and child afford instances of this proposition. It must be remembered that in England prior to 1883 a husband could not transfer the legal ownership of chattels to his wife, and that, therefore, the only manner in which he could give them to her was by means of a trustee. English decisions upon such gifts before that date are consequently valueless for our present purpose.

Irons v. *Smallpiece* (1819), 2 B. & Ald. 551, 106 E.R. 467, 21 R.R. 395, was approved and followed in *Cochrane* v. *Moore*, 25 Q.B.D. 57. Sir Frederick Pollock in his preface to 21 R.R. says, with reference to *Irons* v. *Smallpiece*:—

"The decision that a gift by word of mouth will not pass the property in chattels in the possession of the donor and capable of delivery has stood the test of criticism and was confirmed by the Court of Appeal a few years ago in *Cochrane* v. *Moore*, 25 Q.B.D. 57. The limits of this rule are partly indicated in *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582; neither the old authorities nor the Court of Appeal have said that a gift of chattels is in no case possible without a deed of actual manual delivery: *cf.* L.Q.R. X [an error for VI] 446."

In L.Q.R. vol. VIII. (1892), at p. 281, it is said:—

"Shortly after *Cochrane* v. *Moore* was reported, it was submitted in this Review (VI. 449) that the Court of Appeal did not mean to lay down that formal, manual delivery is needed to perfect a gift of chattels in cases where a real delivery is not practicable, by reason, *e.g.* of the donee already having possession or custody. The view so propounded as the result of principle and of the older authorities appears to be confirmed by *Kilpin* v. *Ratley*, which indeed may be said to go a little farther, for the custody of the goods was with the donee's husband." See also 31 Sol. Jo. under articles on the Law of Gifts *Inter Vivos* at pp. 688, 701, 713, 725, 732, 741, 753, especially at p. 725, et seq.

Kilpin v. *Ratley*, [1892] 1 Q.B. 582, held that manual delivery is not necessary; in effect, that delivery means a transfer or delivery of possession. Wills, J., says, at p. 585:—"I think that the delivery spoken of is a delivery of possession. If the possession is changed in consequence of a verbal gift—as where the possession has been held in one capacity up to the time of the gift, and from that time it is held in another capacity—in this

case as owner—I think the gift is completed.''—This evidently means that if there is no change in the physical possession but by reason of change of title—which may be effected by words of present gift—the legal possession follows the legal title. Wills, J., adds at p. 586:—''In the present case up to the time of the gift the furniture was in the possession of the husband; it was in the house where the husband lived, and where the claimant as his wife was by right living. Then her father having upon the spot pointed to the furniture and intimated that he gave it to her as it stood, it remained in the house as before. But the furniture was no longer in the possession of the husband, but of the wife.''

There can, undoubtedly, be gifts of chattels from a husband to a wife and from a parent to a child where the donee is living and continues to live as before with the donor. If the gift is distinctly made and proved, in my opinion, no change in the use of the chattel is necessary, the possession is changed in law by following the title.

In my opinion, the evidence shews a perfected gift by the husband to the wife in the present case. The parties lived near Nanton, the husband living on a rented farm; the wife working for a man named Armstrong. They were married at Calgary on May 12, 1921. On that day, the husband made his wife a gift of the automobile in question as a wedding present. He said to her: ''The only present I can make you is this car. I have some presents at home.'' The car was in the husband's garage at his home, on their return from Calgary to the husband's farm on the 14th. On this day, too, the husband signed a paper dating it back to the 12th, as follows: ''Calgary, May 12, 1921. To Ella Rose. My Studebaker automobile as a wedding present from (Sgd.) Walter Hill, Nanton, Alta.'' The wife says: ''The first time we took it (the automobile) out he said you can have a ride in your own car.''

She says she told people the car had been given to her as a present. She had some savings when she married and she also borrowed money from her brother. She paid the license fee, $22.50; and several sums for repairs amounting to $27.40, and apparently other sums. Other circumstances were proved to endeavour to shew that there was no gift but the trial Judge believed the claimant. In my opinion, the evidence was sufficient to establish a complete gift—words of present gift and such change of possession in law as the circumstances called for.

If this is correct the gift is good between the parties. It is also good as against the execution creditor unless the creditor

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brings the case within the Statute 13 Eliz.; or the Fraudulent Preferences Act 1922, ch. 48 (made retroactive to April 18, 1921). That is, shews that when the husband made the gift he was in insolvent circumstances, which is not shewn by shewing that he had no cash on hand or could instantly raise enough cash sufficient to pay all his debts in full.

It seems that the wife's title to the automobile was not attacked upon that ground at all. There is no evidence of any debt owing by the husband, even of the plaintiff creditor's debt beyond the necessary implication that they are creditors.

It was said in argument that the plaintiff's claim is for a deficiency upon a mortgage. The date of the judgment is not stated. The husband seems to have owned two quarter sections, each of which he values at $1,600. Apart from exceptional conditions, which admittedly have occured in the locality where these lands are situated, $10 an acre is a low valuation for farm land. The principal of the plaintiff's mortgage seems to have been $750.

As to the other quarter section the husband says he sold it—apparently for $1,600—and received $1,000 as a down payment; that the balance was to be made in "crop payment"; that the purchaser was a woman who left the property. The husband appears to be entitled to get his land back in his own name. The husband says he also owned—at the time of his marriage—five work horses and a drill.

There certainly is no evidence of insolvency, even if this question were open, and I think it is not.

I would therefore dismiss the appeal with costs.

HYNDMAN, J.A.:—I concur.

CLARKE, J.A. (dissenting):—This is an appeal from the District Court of Macleod upon the trial of an interpleader issue concerning the ownership of an automobile, which was seized under an execution issued by the plaintiff, the Standard Trusts Co., upon a judgment against Walter Hill, the husband of the claimant, Ella Hill. The District Court Judge found in favour of the claimant, who claimed the automobile as a gift from her husband on her wedding day. It is not suggested that marriage was a consideration for the gift and the evidence is to the contrary. The questions for determination are:—1. Was there a complete gift? (2) If so, as no bill of sale was registered, was there sufficient change of possession to satisfy the Bills of Sale Ordinance, C.O. 1915, ch. 43, and (3) was the gift void as against creditors by reason of the Statute of Elizabeth?

The evidence of the claimant, which is supported by that of

her husband, is that on May 12, 1921, they were married at Calgary and on the same day, while at Calgary, the husband made her a wedding present of the automobile which was at the time in the garage where it had been kept by the husband on a farm near the town of Nanton; there was no writing and in the absence of the car there could be no delivery. Later, on or about May 14, according to the husband, and on the same day as the marriage, according to the wife, at their home the husband gave the wife a writing in the following words:—"Calgary May 12, 1921. To Ella Rose, my Studebaker automobile as a wedding present from Walter Hill, Nanton, Alta." There was no delivery of the car on this occasion.

On May 14, 1921, the husband made application for a license for the car in his own name as owner and the license was issued in his name, but the wife says she furnished the money and that she did not authorise him to take out the licence in his name and when it came she changed the name to "Mrs." She also paid for gasoline and repairs.

If there is any evidence of delivery of the car it must be found in the following evidence of the wife:—

"Q. And when did he make delivery of the car to you? A. It was there in the garage when I came home and it was mine, he had given it to me. Q. Did he ever go up to the car and say this car is yours? A. Well it was. The first time we took it out he said, 'You can have a ride in your own car.' Q. About how long would that be after you were married? A. About a week. Q. He never made any formal delivery of the car to you? A. Only just that way."

The car was afterwards kept in the same garage as it had been kept in before the marriage, she drove it 10 or 12 times. The husband used it afterwards as he had done before. He says in his evidence "I had to use it, I had to use it, carrying on my business." There is no suggestion that he obtained any permission from his wife, and as far as I can gather from the evidence, he exercised full control over it.

My opinion is that there was not a complete gift entitling the wife to hold the car against the husband's creditors.

In the leading case of *Cochrane* v. *Moore*, 25 Q.B.D. 57, at p. 72, Fry, L.J., says:—"This review of the authorities leads us to conclude that, according to the old law, no gift or grant of a chattel was effectual to pass it whether by parol or by deed and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been granted, one in the case of deeds, and the other in that of contracts of

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sale where the intention of the parties is that the property shall pass before delivery; but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece*, 2 B. & Ald. 551, 106 E.R. 467, was decided; that that case, therefore, declared the existing law."

In *Irons* v. *Smallpiece*, *supra*, Abbott, C.J., said (106 E.R. at 468):—"I am of opinion, that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee."

The writing given to the claimant cannot have the effect of transferring the car for want of registration under the Bills of Sale Ordinance, C.O. 1915, ch. 43, and the claimant's title, therefore, must depend on delivery. What happened in Calgary on the day of the marriage gave no title for want of delivery and the same applies to the occasion when the writing was given, and I do not think that the conversation afterwards, when the husband took her for a ride and said "You can have a ride in your own car" operated as a delivery of the car, he was then exercising control over it. The words used did not create a gift at that time or profess to do so and she did not so consider it for she said it was hers already. In fact, it was not hers already for want of delivery. In *Kingsmill* v. *Kingsmill*, 41 O.L.R. 238, Middleton, J., reviews the authorities and says at p. 242: "The title cannot pass without delivery, and the possession subsequent to an abortive gift is not material." In *Re Breton's Estate*; *Breton* v. *Woollven* (1881), L.R. 17 Ch. D. 416, the evidence in support of a gift was much stronger than in the case at Bar but, in the opinion of the Court, it failed to establish it.

Valier v. *Wright and Bull Ltd.* (1917), 33 Times L.R. 366, supports the same view.

It is unnecessary in the view I have expressed to consider further the other questions raised.

I would, therefore, allow the appeal with costs, set aside the judgment below and direct judgment declaring that the claimant is not entitled to the car as against the plaintiff and that the plaintiff recover its costs of the issue incidental thereto from the claimant.

Appeal dismissed.

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McCULLOUGH v. THE S. S. "MARSHALL".

Exchequer Court of Canada, Audette, J. April 22, 1922.

APPEAL (§IIB—45)—ADMIRALTY ACT, 1891, SEC. 14 — INTERLOCUTORY JUDGMENT—ABSENCE OF PERMISSION TO APPEAL—JURISDICTION.

The judgment of a Local Judge in Admiralty confirming the taxation by the Deputy Registrar or taxing officer of the marshal's bill for services and disbursements relating to the care of a ship whilst in his custody is an interlocutory judgment from which an appeal does not lie under the provisions of sec. 14 of the Admiralty Act 1891, unless permission to so appeal has been previously obtained.

APPEAL from the decree or order of the trial Judge, as Local Judge in Admiralty of the Quebec Admiralty District, confirming the taxation, by the District Registrar. Appeal dismissed for want of jurisdiction.

H. E. Walker, for appellant.

T. M. Tansey, for the ship defendant.

W. L. R. Shanks, K.C., for The Steel Co. of Canada, purchaser of vessel.

AUDETTE, J.:—As a prelude it may be stated that appeals involving merely a question of costs should not be entertained: *Chicoutimi Pulp Co.* v. *Price* (1907), 39 Can. S.C.R. 81. And it would seem that such a principle should obtain with special force, when the appeal was originally from the finding of the taxing master to the trial Judge who had already, in the final judgment allowed costs, and who confirmed the master—the appeal being practically upon a question of *quantum*, again involving discretion from which there is generally no appeal.

However, there is in the present case a more serious objection standing in the way of the present consideration of the questions involved. The present appeal lies under the provisions of sec. 14 of the Admiralty Act, 1891, whereby it is enacted that appeals from interlocutory decree or order can be entertained by the Exchequer Court when permission to so appeal has been previously obtained.

No such permission has been obtained.

This right to appeal is entirely statutory and this Court is given jurisdiction under the provision of such statute. It has no jurisdiction to hear the appeal in the absence of such permission, as required by the statute.

The rule of construction in such cases is that all the prescribed elements of jurisdiction must be present before the appeal can be entertained. The statute in this case imposes the duty upon the appellant to obtain the leave to appeal either from the local Judge or a Judge of the Exchequer Court of

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Canada. No such leave has been obtained, and one of the requirements of the statute preliminary to the jurisdiction of this Court arising has not been satisfied. Therefore the appeal is not properly before the Court, and cannot be entertained. Brown on Jurisdiction, 2nd ed., 1901, sec. 21, p. 111.

Some stress has been laid at Bar upon the consideration that such judgment which determines the amount of the bill might be considered as a final judgment; but with that view I cannot agree.

The term judgment may be considered as a generic term in law and practice covering all decisions given by a Court of law; but there is a wide difference between a final and an interlocutory judgment.

A final judgment is one which determines the rights of the parties in an action or proceedings, while an interlocutory judgment or order is one which does not decide the cause, but merely that which only settles some intervening matters relating to the cause. Words and Phrases Judicially Defined (First Series), vol. 4, p. 3712; Second Series, vol. 2, p. 1149.

An interlocutory judgment or pronouncement determines some subordinate point or settles some special question arising in the cause and does not deal finally with the merit of the action. It can be ancillary to or executory of the final judgment and complete the adjudication of the case.

An order which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out, is interlocutory.

Having come to this conclusion, finding that this Court for want of statutory leave has no jurisdiction, and following the decisions already given in this Court upon a similar point, in *Re 251 Bars of Silver & The Sea Ins'ce Co.* v. *The Canadian Salvage Association* (1915), 15 Can. Ex. 367, and *Johnson* v. *The S.S. "Charles S. Neff"* (1917), 17 Can. Ex. 155, I hereby dismiss the present appeal with costs, without expressing any opinion one way or the other upon the questions involved in the present controversy.

Judgment accordingly.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A. June 13, 1922.

JUDGMENT (§VIIC—282) — DEFAULT JUDGMENT — WANT OF PERSONAL SERVICE — SETTING ASIDE—NEW TRIAL—"SUFFICIENT CAUSE"—SUFFICIENCY OF APPLICATION.

Where on an application to set aside a default judgment, which has been obtained without personal service as required by sec. 104 of the County Courts Act, R.S.M. 1913, ch. 44, the only material before the Court was the affidavit of the defendant's solicitor stating the defendant to have a good defence on the merits, but the Court having judicial notice of other facts in another proceeding, between the same parties, held, by a divided Court, affirming the County Court Judge, to be "sufficient cause" within the meaning of sec. 328 of the Act, warranting the granting of the application and the ordering of a new trial.

APPEAL from the order of Prudhomme, J., setting aside a judgment obtained by the plaintiff against the defendant. Affirmed by divided Court.

G. B. Montieth, for appellant.

S. Abrahamson, for respondent.

PERDUE, C.J.M.:—I concur with FULLERTON, J.A.

CAMERON, J.A.:—I concur with DENNISTOUN, J.A.

FULLERTON, J.A.:—The action was brought to recover the sum of $500 for the support and maintenance of the defendant's wife. The statement of claim was issued on December 23, but was not served personally on the defendant but left with his mother. The father of defendant on January 5, 1922, notified Simon Abrahamson, who was at the time the solicitor of the defendant, of the fact. Abrahamson, by letter of January 5, 1922, notified the County Court Clerk that no personal service of the statement of claim had been made, and the County Court Clerk replied by letter dated January 7, 1922, stating that he knew that judgment by default could not be signed.

Section 104 of the County Courts Act, R.S.M. 1913, ch. 44, required the statement of claim in this action to be served personally, subject to sec. 85, which empowers a Judge to "allow any service so already made." The action came on for trial on February 2 when the evidence of the plaintiff was taken and judgment rendered for the plaintiff for the sum of $500 and costs. Counsel for the appellant stated at the argument that the nature of the service was called to the attention of the Judge presiding and that he allowed it. On March 27 a summons was taken out by Abrahamson, acting for the defendant, requiring the plaintiff to appear on April 3, and shew cause why the judgment should not be set aside, and on the return of the summons the order complained of in this appeal was made.

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In my view the material in support of the application to set aside the judgment was insufficient.

In *Rutherford* v. *Bready* (1893), 9 Man. L.R. 29, a default judgment was signed against the defendant. Subsequently an application was made to set aside the judgment on the ground that the defendant had never been served with the writ. Defendant did not swear to merits, nor did he shew that the writ had never come to his knowledge. It was held by the full Court that the fact that defendant never was served with the writ of summons or a copy thereof, constituted an irregularity only and not a nullity, and that in order to take advantage of such irregularity defendant must shew, not only that he was not served with the process, but that the process did not come to his knowledge or into his possession.

The only affidavit filed in support of the application to set aside the judgment in the present case was that of Abrahamson, the defendant's solicitor. It shewed that the statement of claim had come to the knowledge of the father and mother of the defendant prior to January 5, 1922, and to the knowledge of his solicitor on that date.

Paragraph 10 of the affidavit reads as follows:—

"The defendant has a defence to this said action in good faith and on its merits, and is desirous of having an opportunity to defend the said case on its merits, and does not desire to delay, harass or defeat any just claims of the plaintiff."

The authorities are clear that a mere statement that the defendant has a good defence on the merits is not sufficient. Defendant must go further and shew what the character of the defence is: *Stewart* v. *McMahon* (1908), 1 S.L.R. 209; *McKay* v. *Johnston* (1913), 10 D.L.R. 806. Moreover, the affidavit of merits should be made by someone who has a knowledge of the facts and it would be a rare case indeed where the affidavit of a solicitor alone leading an application to set aside a judgment would be sufficient.

Under the above authorities it seems clear that if this were an application in the Court of King's Bench to set aside a judgment of that Court, the defendant would fail. A Judge of a County Court has, however, larger powers over judgments of the County Court than a Judge of the King's Bench has over judgments of the King's Bench.

Section 328 of the County Courts Act reads:—

"A new trial or re-hearing may be granted, or a judgment reversed or varied, in any action, suit, matter or proceeding, upon sufficient cause being shewn for that purpose."

This Court held in *Moggey* v. *Blight* (1920), 53 D.L.R. 132, 30 Man. L.R. 464, that although the Judge had a wide measure of discretion, it is a judicial discretion which must be exercised in accordance with established principles. The only statement in the affidavit filed in support which could possibly suggest a ground for setting aside the judgment is a reference in para. 7 to "a conviction of Magistrate Wallace of Niverville, Manitoba," of someone for something. We might from reading the whole affidavit infer that it was the defendant who was convicted, but of what offence we do not know. Deponent goes on to say:—"which conviction and appeal dealt with the same matter as the subject matter of the writ above referred to." When it is remembered that this action is for board and lodgings furnished the defendant's wife, it is pretty difficult from this record to make even a guess at the connection between this action and the conviction. I can find nothing whatever in any of the material filed which would justify the exercise by the County Court Judge of the powers given him by sec. 328.

At the trial both counsel discussed facts which are not shewn in the record, and it was said that the County Court Judge had full knowledge of facts which justified him in making the order. A County Court Judge must, however, be guided in his decisions by the material before him exactly in the same way as a Superior Court Judge, and in considering appeals from his decisions the Court can only look at the material upon which the judgment or order was founded as shewn by the record.

I would set aside the order appealed against and restore the judgment entered against the defendant in this action on February 2, 1922.

DENNISTOUN, J.A.:—This is an appeal by the plaintiff from an order of the Judge of the County Court of Jolys which says:—

"Upon application of the solicitor for the defendant and upon hearing counsel for the plaintiff and the defendant,—It is hereby ordered that the judgment signed herein be set aside and the defendant be permitted to file his defence within twenty days."

This order does not on its face purport to be based on anything more than the statements of counsel.

From the material filed in the County Court it appears that the summons in the action was not served on the defendant personally. It was left with his mother when the defendant was absent in Ontario.

It came to the knowledge of a solicitor who was acting for the defendant in another proceeding that the summons had been

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so served, and the solicitor wrote the County Court Clerk warning him not to sign judgment by default.

By sec. 104 of the County Courts Act, in all cases where a sum greater than $20 is claimed the service of the writ of summons and statement of claim shall be made upon the defendant personally except as provided in sec. 85 of the Act which enables the Judge by order to allow any service already made.

I can find no order allowing the service in this case and as the claim was for $500 such an order was necessary. It was stated by counsel for the appellant that such an order had been made, but it has not been produced, and there is no trace of it on the files of the Court and respondent's counsel knows nothing of such an order.

The case came on for trial in presence of counsel for the plaintiff, who offered formal evidence, and judgment was given for $500. The defendant had filed no dispute note, did not appear and was not represented.

The defendant forthwith made an application to set aside the judgment and for leave to file a dispute note and the Judge made the order quoted above.

Under these circumstances it appears but reasonable and right that there should be a new trial, but objection is taken that the defendant did not lodge sufficient material to support his application, and that the Judge should not have made the order until the defendant fully disclosed his defence, and swore that the summons which was irregularly served had never come to his knowledge.

An affidavit which was filed, but not referred to in the order, was made by the defendant's solicitor, owing, as he states, to the absence of his client in Ontario. Tested by the strict requirements of an affidavit in support of such a motion it falls short of what is necessary, but it is evident the County Court Judge did not base his order solely on that affidavit. He based it upon what was alleged by counsel coupled with what he had before him on the files of the Court, and certain facts of which he had judicial knowledge in another proceeding which was pending before him in a quasi-criminal case in which the identical parties were concerned and the subject-matter was the same, viz., the support of the plaintiff's daughter by the defendant who is her husband.

The husband had been charged with desertion and a penalty of $500 was imposed; there had been an appeal to this County Court Judge who allowed the appeal and varied the magistrate's order, and concurrently the proceedings by way of this

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civil action have been before the same Judge, the father being prosecutor in one proceeding and plaintiff in another.

Through irregularities on both sides the matter has got into a state of confusion and it is advisable that the merits should be thoroughly examined, accordingly the Judge has in the exercise of his discretion decided that the best course to pursue is to re-open the matter and allow the defendant to plead and give evidence.

The case is unique and I think the order of the Judge should be supported as the best course to pursue where the application of the strict rules of practice in the higher Courts would be oppressive and possibly work an injustice to a litigant.

Under sec. 328 a new trial or re-hearing may be granted, or a judgment reversed or varied, in any action, suit, matter or proceeding, upon sufficient cause being shewn for that purpose.

Pursuant to the order appealed from the defendant has filed his defence verified by affidavit which disclosed the merits upon which he relies, and which in strictness should have been in documentary form before the County Court Judge when the motion for a new trial was made. Counsel applied on the argument for permission to file and read this affidavit *nunc pro tunc*, and I would give leave to do so.

This being done, I hesitate to say that the Judge had not "sufficient cause" for ordering a new trial or that his discretion in so doing should be interfered with.

I would therefore dismiss the appeal, with costs to the successful party in the cause.

Appeal dismissed; the Court being equally divided.

McKEAGE v. McKEAGE.

Supreme Court of Canada, Idington, Duff, Anglin and Mignault, JJ., and Bernier, J. (ad hoc). November 21, 1921.

APPEAL (§IIA—35)—JURISDICTION OF CANADA SUPREME COURT—TITLE TO LAND—ANNUAL RENTS—RIGHTS IN FUTURE.

A judgment awarding the payment of a monthly sum in pursuance of a deed of donation of land, which by the terms of the donation may be charged upon the land, is appealable to the Supreme Court of Canada as being a "matter in controversy relating to title to lands or annual rents or where rights in the future might be bound," within the meaning of sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139.

APPEAL by the intending appellant from an order of the Registrar affirming the jurisdiction of the Court and approving security. Affirmed.

The order appealed from is as follows:—The facts from the

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pleadings and the papers filed, appear to be as follows:—A donation was made by plaintiff's father October 8, 1887, and accepted by defendant by which certain lands conveyed to the defendant were charged or hypothecated in favour of the plaintiff. The deed of donation amongst other things provided as follows:—"The said donee or his representatives . . . to pay or cause to be paid to his sister, Sarah S. McKeage the sum of $400 . . . That the said Sarah M. McKeage shall have a home with the said donee or his representatives as long as she will remain single . . . under all which charges and conditions the said donee doth hereby accept the foregoing donation consenting that the said lands shall remain affected and mortgaged for that purpose."

Subsequently difficulties arose between the plaintiff and defendants and an action was instituted by the present plaintiff in December, 1910, in which she alleged that the defendant had failed to furnish her with a home and that his obligation in that regard was of the value to her of $200 a year and asked that the lands in question be declared hypothecated in her favour for such sum of money as would produce an annual rent of $200 a year and that the defendant be condemned to pay that sum. Judgment was pronounced in this case December 18, 1911, by the Superior Court, in which was the following considerant:—

"Considering that at the argument the interpretation to be given to the word 'home' in the donation was by mutual assent of both parties submitted to the Court for an expression of opinion, it proceeded to hold that the intention of the donor was to provide the plaintiff with a home on the premises and that she be supported as a member of the family as long as she would not marry and could not be expected to be supported elsewhere."

As the donation had not been actually registered, the Court dismissed the conclusions of the action which asked for payment of $200 a year for the past year's board and for a yearly allowance in money, but declared that the plaintiff had according to the terms of the donation a right to have a home with the defendant or his representatives so long as she remained single and to have the immovable property affected by mortgage for the fulfilment of the obligation.

No appeal was taken from this judgment, but trouble did arise subsequently between the parties and the present action was brought, in which the plaintiff alleged that the defendant had failed to comply with his obligation and asked that the donation should be converted into money and the defendant

condemned to pay the plaintiff in lieu of the obligation imposed by the act of donation, $50 every month, and as a guarantee of such payment that the immovables in question should be hypothecated in favour of the plaintiff.

Various defences were set up to the demand and the case went to trial before Pouliot, J., who after reciting all the facts in his considerants gave judgment June 14, 1920, and awarded $20 a month to the plaintiff and condemned the defendant to pay that sum unless he should receive the plaintiff into his house as a member of his family and furnish her with support and maintenance until her marriage.

This judgment was confirmed by the Court of King's Bench (appeal side) (1921), 32 Que. K.B. 407, and the defendant now appeals to the Supreme Court and asks to have the jurisdiction of the Court affirmed.

The disposition of the present motion depends upon the construction to be placed upon sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139:—"Does the matter in controversy relate to title to lands or tenements, annual rents and other matters and things, where rights in future might be bound?" It was held in *Rodier* v. *Lapierre* (1892), 21 Can. S.C.R. 69, that the words "annual rents" in this section mean "ground rents" (*rentes foncières*) and not an annuity or other like charge or obligation. The expression "*rentes foncières*" is discussed very fully in Pothier vol. 55, ch. 2, art. 14, by Planiol and other French authors and in its simplest form implies an obligation by a donee to make certain payments to the donor or a third party secured by a hypothèque upon the lands donated. I do not understand the respondent to take exception to this construction nor would he seriously contend that if by the present judgment a "*rente foncière*" was granted that the present appellant would not have a right of appeal to the Supreme Court, but he argues that the judgment in this case places no charge upon the lands mentioned in the donation, or in other words that the judgment is a security of lesser value and importance than the plaintiff already had by reason of the donation and the judgment confirming it, unappealed from, given in 1911. I cannot so construe the judgment in the present case. Although there is no express declaration as there was in the judgment of 1911 that the lands in question are charged in favour of the plaintiff, yet I think the judgment has that effect and that in the words of the statute the controversy relates to "*annual rents.*" I therefore hold that the Supreme Court has jurisdiction.

Girouard, for appellant; *Walsh*, K.C., for respondent.

IDINGTON, J.:—I agree that this appeal is, according to the

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jurisprudence of this Court, within its jurisdiction and, therefore, that this appeal from the Registrar's ruling should be dismissed with costs.

DUFF, J.:—I am of the opinion that the appeal from the Registrar's judgment should be dismissed with costs.

ANGLIN, J.:—The intended respondent appeals from an Order of the Registrar affirming the jurisdiction of this Court.

Under a deed of gift from her father to her brother the plaintiff was entitled to a home with the donee (the defendant) so long as she should remain single, and also to be paid the sum of $400. In litigation between the present parties in 1911 the plaintiff was declared entitled to a home according to the terms of the donation and to have the immovable property, which was the subject of the donation, affected by a mortgage for the fulfilment of the donee's obligation to provide her with such a home. In the present action, instituted in 1919, and therefore subject to the Supreme Court Act as it stood before the amendment of 1920, the respondent sought to have the obligation to furnish her a home converted into a payment of money and the immovable donated declared subject to a charge in her favour for payment of whatever sum or sums she should be held entitled to. By the judgment of the Superior Court the appellant-defendant's obligation to provide a home for the respondent was so converted that he was condemned to pay the respondent $29 per month while she remained single, reserving to him however the right, instead of paying that sum monthly, to provide her with the home to the furnishing of which the donation to him had been made subject. No adjudication was made on the claim that the donated immovable should be declared charged with the payment of the sums so awarded. This judgment was affirmed on appeal to the Court of King's Bench, 32 Que. K.B. 407. An appeal having been taken to this Court by the defendant, the registrar on motion made on his behalf affirmed our jurisdiction. From that order the present appeal is brought.

It has been established by many decisions that in applying sec. 46 of the Supreme Court Act R.S.C. 1906, ch. 139 "the matter in controversy" means not the matter to be determined upon the appeal, or that disposed of by the judgment *a quo*, but the subject of the plaintiff's claim as disclosed by the declaration. That principle of construction is not confined to cases in which the jurisdiction of the Court depends upon the value of the matter in controversy. It extends to the other cases covered by sec. 46 as well. *Bisaillon* v. *City of Montreal*

(1916), 2 Cam. Sup. Ct. Pr. 51. In my opinion the defendant's title to the land donated to him would be affected by the plaintiff's obligation if established as a charge upon such land, as she sought.

I am further of the opinion that this case also falls within the concluding words of sec. 46, sub-sec. *b* "other matters or things where rights in future might be bound." If the amount allowed the respondent should hereafter be found insufficient and she should desire to have it increased she would find herself bound by the judgment in this case. On the other hand, the representatives of the defendant, should the plaintiff survive him, would also find their rights in the land subject to the charge of the plaintiff's claim, had the judgment accorded her the declaration of such a charge. *Les Ecclésiastiques de St. Sulpice de Montréal* v. *Cité de Montreal* (1889), 16 Can. S.C.R. 399.

I am therefore of the opinion that the order affirming jurisdiction was rightly made and that this appeal from it should be dismissed with costs.

MIGNAULT, J.:—The majority of the Court being of opinion that we have jurisdiction to hear this case I will not enter a formal dissent, although I would be inclined to consider our jurisdiction as extremely doubtful, in view of the meaning placed on the words "annual rents" by *Rodier* v. *Lapierre*, 21 Can. S.C.R. 69.

BERNIER, J.:—I am of the opinion that the appeal from the Registrar's judgment should be dismissed with costs.

Appeal dismissed.

McGUIGAN v. GREENFIELD LAND & CONSTRUCTION Co.

Quebec Court of Review, Archibald, A.C.J., Demers, and de Lorimier, JJ. December 30, 1921.

VENDOR AND PURCHASER (§IE—27)—PROMISE OF SALE—INQUIRY AS TO INCUMBRANCES—ASSURANCE THAT PROPERTY CLEAR—PROPERTY NOT CLEAR—RIGHT TO HAVE PROMISE OF SALE RESCINDED.

A purchaser of an immovable who at the time of signing the promise of sale expressly inquires if the property is free from all hypothecs and receives a formal answer in the affirmative, is entitled upon discovering that the property is incumbered by two hypothecs to have the promise of sale declared null and of no effect and to have it rescinded for all legal purposes.

APPEAL from the judgment of the Quebec Superior Court in in action for rescission of promise of sale and for a return of purchase money paid thereon. Affirmed.

The plaintiff is holder of a promise of sale from the defendant

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of a certain immovable and made a payment on account of the purchase price. The property was sold to the plaintiff as being free from all hypothecs. Plaintiff subsequently discovered that it was incumbered by two hypothecs and a sale subject to the right of redemption, so he sues in rescission of sale and asks for reimbursement of the sum paid on account.

The defendant pleads that plaintiff voluntarily signed the promise of sale with full knowledge of what he was doing and that no fraud was practised against him.

The Superior Court maintained the action on the following grounds:—

"Considering that the evidence shews that the plaintiff, before signing the said offer and the said promise of sale, expressly inquired of defendant's manager, who signed the said promise of sale for the latter, if the property was free from all hypothecs, and received a formal answer in the affirmative; in the circumstances that the plaintiff may have signed the said promise of sale believing that the printed clause reading 'The party of the first part binds itself to pay at maturity any mortgage if any affecting said property sold under this contract' did not in any way diminish the guarantee resulting from the above mentioned declaration; that the plaintiff had a great interest in assuring himself of the hypothecary condition of the property; that the said declaration was false and that the immovable sold is incumbered with the hypothecs mentioned in the declaration; that if the plaintiff could not demand the cancellation of the said promise of sale on account of the existence of these hypothecs without putting the defendant in default to have them radiated, his demand, nevertheless, constitutes a sufficient *mise-en-demeure* to do so; that it was, thenceforth, incumbent upon the defendant to have such hypothecs radiated, which it did not do; dismisses the plea, declares null and of no effect the said promise of sale and rescinds it for all legal purposes, condemns the defendant to pay to the plaintiff the said sum of $600.57 with interest, the whole with costs.'

Authority cited by the Court: *Ducharme* v. *Quintal* (1916), 49 Que. S.C. 528.

Brown, Staveley and Jenkins, for plaintiff.

R. Stanley Weir, K.C., for defendant.

Confirmed in review.

Appeal dismissed.

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REX ex rel JOHANNESSON v. RURAL MUNICIPALITY of CARTIER.

Manitoba King's Bench, Galt, J. May 22, 1922.

MANDAMUS (§IG—65)—MANITOBA PUBLIC SCHOOLS ACT, R.S.M. 1913, CH. 165—DISCRETION OF MUNICIPAL COUNCIL AS TO FORMING NEW SCHOOL DISTRICT—REFUSAL OF COUNCIL—RIGHT OF RATEPAYERS TO COMPEL.

The council of a rural municipality has a discretion under the Manitoba Public Schools Act, R.S.M. 1913, ch. 165, as to whether or not it will form a new school district under sec. 81 of the Act as amended by 1921 (Man.), ch. 49, sec. 6 (d), and where the council has exercised its discretion in refusing to form a new district a mandamus will not be ordered to force it to do so.

[See Annotation, 49 D.L.R. 478.]

APPLICATION for a mandamus requiring a rural municipality and municipal council to pass a by-law under the provisions of the Public Schools Act, R.S.M. 1913, ch. 165, and amendments thereto, to form a new school district out of portions of other school districts already in existence within the municipality. Dismissed.

H. A. Bergman, K.C., for applicant.

W. Hollands, for the municipality.

GALT, J.:—The applicant shews on affidavit that on or about October 5, 1920, a petition signed by 8 ratepayers of the said school districts, including the applicant, was presented to the council of the rural municipality of Cartier in Manitoba, praying for the formation of a new school district to be known as Elm Point school district, to be formed out of certain specified lands in the said school districts, but that no action was taken thereon by the said council until a meeting of the council on August 2, 1921, when a resolution was passed that the said petition be accepted and that a new school district be formed out of the said described lands; that on September 6, 1921, a petition was presented to the council against the formation of such school district and at a meeting of the council on this day a resolution was passed that the formation of such school district be left over and laid on the table for counter petition; and that on October 4 a further resolution was passed by the said council, "that the counter petition presented to the council against the formation of the said school district be accepted and requisition granted against the formation of the new school district at Elm Point," that on or about November 11, 1921, an appeal by these ratepayers from the last-mentioned decision of the council was heard by Prud'homme, C.C.J., and on hearing the appeal His Honour decided that when the council passed the resolution (which His

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Honour understood to be a by-law) on August 2, 1921, granting the petition to form such school district, that the council then became *functus officio*, and accordingly he dismissed the said appeal.

The applicant and other ratepayers, it is alleged, have made every reasonable effort to have the said council pass the required by-law but the said council has refused and continues to refuse to pass the same.

The applicant then shews that he and 3 other specified ratepayers are the fathers of 14 children of school age all residing at a distance of from 3½ to 5 miles from four different schools in the neighbourhood and that none of the said schools has accommodation for all of the said children.

The rights of the parties depend for the most part upon the provisions of the Public Schools Act, as amended, but before dealing with the provisions of this Act it would be well to first consider the right to a mandamus, evoked by the plaintiff. The writ of mandamus is a high prerogative writ the purpose of which is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing such right ;and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual. (See 10 Hals. p. 77, para. 160). The grant of writ of mandamus is a matter for the discretion of the Court. It is not a writ of right and it is not issued as a matter of course (See 10 Hals. para. 161). A writ of mandamus will be granted ordering that to be done which the statute requires to be done, and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body. In order, however, for a writ of mandamus to issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty the performance or non-performance of which is not a matter of discretion. *Primâ facie* the words "it shall be lawful" occurring in a statute are permissive and enabling only, and will not therefore impose a duty in respect of which mandamus will lie (See 10 Hals. para. 170). The rule that the Court will not question by mandamus the honest decision of a tribunal, even though erroneous, in matters within its jurisdiction, and in regard to which it has been entrusted with a discretion applies to all tribunals and not only to those of a judicial character. Accordingly, the writ of mandamus will not issue to command a local authority having power to approve or

disapprove of building plans, to approve plans which they have in good faith rejected. The rule applies although the withholding of approval was the result of the misconstruction of a statute (See 10 Hals. para. 192). The applicant for a writ of mandamus must shew that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In order, therefore, that a mandamus may issue to compel something to be done under a statute, it must be shewn that a statute imposes a legal duty. It is only in respect of a legal right that mandamus will lie (See 10 Hals. para. 195). The Court will, as a general rule, and in the exercise of its discretion, refuse a writ of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective (See 10 Hals. para. 201).

The obligation to perform the act must be imperative: and a mandamus will not be ordered to enforce a mere discretionary power, not amounting to an absolute duty: Seager's Magistrates' Manual, p. 85, citing *Reg.* v. *Bishop of Oxford* (1879), 4 Q.B.D. 525, 48 L.J. (Q.B.) 609.

Looking now at the Public Schools Act, R.S.M. 1913, ch. 165, I quote the following sections applicable to the matters in dispute:—

"10 (2) Notwithstanding such limitation as to area any school district may include more lands, provided the trustees make suitable arrangements for conveying to and from school all pupils who would have farther than one mile to walk in order to reach the school; and the trustees of any such district are hereby empowered to provide for the expenses in connection with such conveyance of pupils."

Sec. 57 as amended 1913-14 (Man.), ch. 86, sec. 17, provides:—

"It shall be the duty of the trustees of rural school districts,—

(*f*) to provide adequate accommodation and a legally qualified teacher or teachers according to the regulations prescribed by law, for all the actual resident children in their school district between the ages of five and eighteen years of age . . .

58. The board of school trustees may, in their discretion, provide transportation at the expense of the district for the children of the district to and from the school, and the trustees are hereby empowered to provide for the expense of such conveyance."

Further provisions with regard to conveying children to school are also contained in secs. 93 and 95.

"162. Before any steps are taken by the trustees for securing

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a new school site on which to erect a new school house, or to move an existing school house from one site to a new site, they shall call a special meeting of the resident ratepayers of the district to consider the matter, and no change of school site shall be made except in the manner hereinafter provided without the consent of two-thirds of the resident ratepayers present at such special meeting."*

The plaintiff relies mainly upon sec. 81, as amended by 1921 (Man.), ch. 49, sec. 6 (d), which reads as follows:—

"Every council of a rural municipality shall have power by by-law,—

(*d*) to form a new school district comprising portions of existing districts."

It has already appeared from the allegations of Jonas Johannesson that a petition to form a new school district was presented to the council in 1920 and that a resolution approving of it was passed in August, 1921; that shortly afterwards certain ratepayers objected by petition to the council against the formation of this new school district and the council resolved to accept the second petition and refuse to grant the former petition. Johannesson and his friends seem to have been under the impression that the first resolution was a by-law and accordingly, under the provisions of sec. 83 of the Public Schools Act, they appealed to the County Court Judge of the district but their appeal was dismissed.

Sec. 9 of the Public Schools Act provides that no school district shall be so formed unless there shall be at least 10 children of school age living within the same.

Bearing in mind that the applicants to the council in 1920 were acting on behalf of only 14 children, and legally the provisions of the Act entitled the board of school trustees to provide conveyances for children, one can readily understand the hesitation which the municipal council would feel before granting the petition for the formation of a new school district. Unquestionably it was a matter calling for the exercise of sound discretion, and when they exercised this discretion by refusing to form the new school district I think they were acting entirely within their rights and that the remedy by mandamus is not open to the plaintiff. It is argued that the defendants are refusing to grant a legal right, but it is also manifest that the parties who claim the benefit of this right have a perfectly adequate alternative remedy in having conveyances provided for the children.

Under these circumstances I must dismiss the application with costs. *Application dismissed.*

*[Editor's Note:—Section 162 repealed 1917 (Man.), ch. 71, sec. 13.]

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.

ANDERSON v. ROHDE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 10, 1922.

PARTNERSHIP (§I—3)—*Insufficiency of evidence establishing relationship—Rights of creditor—Rights of parties inter se.*]—Appeal by the defendant from the judgment of Ives, J. in an action to recover $1,355 for work done, moneys advanced, and on an account stated. Affirmed.

F. L. Burnet, for appellant.

H. H. Gilchrist, for respondent.

SCOTT, C.J. and STUART, J.A. concur with BECK, J.A.

BECK, J.A.:—The defence sets up that the plaintiff was a partner with the defendants and one Kiscadden; and that, consequently, the items of the plaintiff's claim were items, if established, to be taken into account in a general account of the partnership affairs. The trial Judge found that there was no partnership. He found this on much conflicting evidence including documents signed by the parties on each side inconsistent with their respective claims set up in the action. His finding cannot be set aside and I think I should have come to the same conclusion as he. Having so found, he held the plaintiff entitled to some items and directed a reference but suggested that the parties might agree upon the amount for which the plaintiff should have judgment, assuming there was no partnership. Judgment, approved as to the amount, was eventually entered for the plaintiff for $1,150.77 with costs.

This judgment should be affirmed and the appeal dismissed with costs.

HYNDMAN, J.A.:—I have read the evidence throughout and am bound to say I entirely agree with the conclusion reached by the trial Judge. Even taking the evidence of the defendants themselves, without considering that of the plaintiff, although perhaps it might be said that a partnership of some kind was in contemplation, I fail to find that a definite agreement was ever brought to a finality.

Some of the documents put in at the trial, if standing alone, would point to a partnership, but when all the facts and cir-

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cumstances surrounding their relationship are examined, it will be seen that these documents might very reasonably exist without necessarily involving the plaintiff and Kiscadden in an actual partnership.

I am not prepared to say, of course, that a creditor of the business might not be held to have a good claim as against the four parties but that would be on the ground of estoppel.

As between themselves, however, I do not think it possible to properly find as a fact that an actual partnership existed.

I would, therefore, dismiss the appeal with costs and affirm the judgment as entered.

CLARKE, J.A. concurs with BECK, J.A.

Appeal dismissed.

ASHWORTH v. VANCOUVER TRUST Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. January 10, 1922.

RECEIVERS (§I—2)—*Order of appointment—Further order—Validity—To obtain deeds and mortgages—To raise money.*]—Appeal by defendant from the order of Morrison, J. Reversed.

C. W. Craig, K.C., for appellant.

E. C. Mayers, for respondent.

MACDONALD, C.J.A.:—An order appointing R. K. Houlgate, receiver and manager, of certain lands on Savory Island, was made on June 21, 1921, and not appealed from, and on July 6, 1921, a further order was that the defendant deliver to the said receiver and manager, the deed of conveyance of the lands which it held in mortgage and three several mortgages held by it on the same lands. The order further authorized the receiver and manager to raise money upon the lands for the purpose of paying taxes and registering the deed and mortgages, same to take priority over the defendant's mortgages.

I am unable to understand upon what grounds or upon what principle the first order was made, but I must accept it as an existing fact. Whatever rights Houlgate is entitled to under it, and whatever powers he may be clothed with by it, he may, of course, exercise, but the second order may be set aside by this Court and as it is, in my opinion, with great respect, wrong. I would set it aside.

The appeal, therefore, ought to be allowed.

GALLIHER, J.A.:—I have examined the cases cited by Mr. Mayers, but with deference, I can find no principle laid down which, in my opinion, can be applied to the circumstances of this case, nor am I aware of any authority which would justify me

in maintaining the order appealed from. The appeal must be allowed.

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MCPHILLIPS, J.A. would dismiss the appeal.

EBERTS, J.A. would allow the appeal.

Appeal allowed.

SPENCER v. CITY OF VANCOUVER.

British Columbia Supreme Court, Clement, J. December 24, 1921.

ARBITRATION (§II—10)—*Claim for damages against municipality—Vancouver Incorporation Act, 1900, ch. 54, sec. 133 (9)—Appointment of arbitrator by Judge—Jurisdiction—Persona designata.*]—Action on an award. Dismissed.

Griffin Co., for plaintiff.

E. Jones, for defendant.

CLEMENT, J.:—On July 8, 1915, the plaintiff notified the defendant municipality that he claimed compensation for damage done to certain property of his by reason of the construction of the Hastings St. viaduct, and (by subsequent notice) that he had appointed F. C. T. Lucas as his arbitrator to act in the premises. The defendant municipality made no appointment, and the plaintiff thereupon invoked sub-sec. 9 of sec. 133 of the Vancouver Incorporation Act 1900, ch. 54, and made application to Murphy, J. to appoint an arbitrator for the city. That sub-section provides that such an appointment may, in default of appointment by the city, be made by a Judge of the Supreme Court. The application was in fact made "before the presiding Judge of this Court in Chambers," the material in support of the application being intituled "In the Supreme Court of British Columbia" and duly filed in the registry of that Court. The order itself (dated June 27, 1918) is similarly intituled, was "settled" by the Registrar, and issued as a Chamber Order of the Supreme Court. It was certainly not a consent order, and there is no warrant for saying that the defendant's counsel at any stage of the proceedings waived the objection which he now takes that the appointment was made without jurisdiction, and that, in consequence, no Board of Arbitration was ever properly constituted. The evidence would have to go so far as to shew that the statutory *in invitum* proceeding was by consent, turned into an arbitration under voluntary submission.

Were the matter *res nova* I should, I think, hold that the application was in fact made to, and the order made by one holding the office of Judge of the Supreme Court, and that the caption might well be disregarded as innocuous surplusage.

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But Mr. McCrossan strongly contended that the matter is not *res nova* and that I am bound by the decision of the Court of Appeal in *Chandler* v. *Vancouver*, (1919), 45 D.L.R. 121, 26 B.C.R. 465, to hold the objection fatal. On consideration I think he is right. Gregory, J., had held in that case that he could not hear the application to quash a by-law of the city, because Morrison, J. had granted the rule to shew cause and, being a *persona designata*, (under a section similarly worded to subsec. 9 of sec. 133) could alone hear the application on the return of the rule. He also refused to refer the matter to Mr. Justice Morrison, J. but, on the contrary, dismissed the motion. The Court of Appeal dismissed an appeal from Gregory, J.'s decision. The Chief Justice said, at p. 123, amongst other things, this: "The proceedings were wrongly taken in the Supreme Court. It was therefore, I think, the duty of Gregory, J. to dispose of the matter before him in the only way in which, in my opinion, he could have properly disposed of it, that is to say, by dismissing the motion and setting the rule aside. Had the matter been adjourned to be heard by Morrison, J., I think that Judge could only have dealt with the matter in the way I have suggested. He could not then have treated the proceedings as proceedings before him *persona designata*." In the case at Bar the matter was, in this view, never before the *persona designata*. The award must stand or fall upon the order as it exists and that order being made by a tribunal having no jurisdiction the award must fall. This defence is open, I think, under para. 7 and also under paras. 16 and 22. At all events, when the point was taken in argument, I allowed Mr. Griffin to re-open the case, and gave him every opportunity to meet it by evidence of waiver, &c.

I express no opinion upon the numerous other defences raised except to say that, in my opinion, the release relied upon does not operate to defeat plaintiff's claim, neither upon its true construction nor upon the evidence does it apply to the situation as it ultimately developed.

The action is dismissed with costs, against which the plaintiff should have a set off of costs on the issue as to the release.

Action dismissed.

WEEDON v. TURNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. June 6, 1922.

BROKERS (§IIB—10)—*Right to commissions for sale of timber limits — Listing — Option — Insufficiency of employment of*

broker.]—Appeal by plaintiff from judgment of Gregory, J. in an action for commission. Affirmed.

B.C.

C.A.

A. M. Whiteside and *C. N. Haney*, for appellant.

E. P. Davis, K.C., for respondent.

MACDONALD, C.J.A.:—I think the trial Judge came to the right conclusion on both claims.

The smaller item was a claim for $750. for services said to have been rendered by the plaintiff to the defendant. If there is evidence of a request to render the services, I think, it was not made with the intention that a legal obligation should be created, nor so understood by the plaintiff.

With regard to the larger claim for commission for the sale of the timber limits, I also think the trial Judge has come to the right conclusion.

The facts are shortly as follows:—The plaintiff having gone into the brokerage business and knowing the timber limits in question even better than defendant himself did, wrote the defendant, who lives in New York, asking for a "listing" which is a local term signifying authority to offer the property for sale by the person with whom it is listed as agent for the vendor. The defendant answered on November 26, 1919, declining to list the property but stating that if the plaintiff could find a *bonâ fide* inquirer, the plaintiff might take the matter up again with the defendant. In the letter, the defendant mentioned his price as $500,000. The plaintiff got a proposal from Anderson, Jeremiahson & Hanson, who, after an investigation of the timber limits, proceeded no further. The plaintiff then came into touch with Wilson & Brady and wired the defendant asking if he might give a 30-days' option to these parties. Defendant answered this by granting authority to give an option to Wilson & Brady, naming them, at the price of $500,000, commission to be $50,000, and stating that if any reduction in the purchase price should be made, it must come out of the commission, as the defendant would take nothing less than $450,000 net. Wilson & Brady had the property examined and "cruised", and instead of the 4,600,000 feet of timber which was supposed to be on the limits, the cruise shewed only 1,250,000. After some negotiations, in which defendant personally took part, they came to an end, but some months later, Wilson & Brady took the matter up again with the defendant without the intervention of the plaintiff, and an agreement was come to for the sale and purchase of the timber on a stumpage basis. It is upon this latter agreement that the plaintiff claims commission. In my

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opinion, it is quite clear that there was no general employment and the plaintiff cannot succeed.

There was a cross-appeal complaining of an amendment by adding plaintiff's firm as a party plaintiff. There is no merit in the cross-appeal, and it should be dismissed with costs.

MARTIN, J.A.:—I agree that this appeal should be dismissed.

MCPHILLIPS, J.A.:—I would dismiss the appeal.

EBERTS, J.A. would dismiss the appeal.

Appeal dismissed.

STANDARD TRUSTS Co. v. DAVID STEELE LTD.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. March 7, 1922.

LANDLORD AND TENANT (§IID—33)—*Leased premises—Meaning of—Bankruptcy Amendment Act, 1921 (Can.) ch. 17 sec. 11—Landlord and Tenant Act R.S.B.C. 1911 ch. 126—Writ of possession—Termination of tenancy before trustee entered into possession—Rights and liabilities.*]—Appeal by defendant from the judgment of Murphy, J. affirming (1921), 62 D.L.R. 650, in favour of the plaintiff in an action to recover possession of land and for a declaration of forfeiture of the defendant's lease thereof, and for double the yearly value until possession given. Affirmed.

E. C. Mayers, for appellant.

E. P. Davis, K.C., for respondent.

MARTIN, J.A.:—In my opinion the Judge has reached the right conclusion and, therefore, the appeal should be dismissed.

GALLIHER, J.A.:—I am in agreement with the trial Judge for the reasons given by him.

MCPHILLIPS and EBERTS, JJ.A., would dismiss the appeal.

Appeal dismissed.

MARTIN v. THE "SEA FOAM."

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J.A. December 14, 1921.

ADMIRALTY (§I—4)—*Jurisdiction—Admiralty Court Act, sec. 13—Vessel not "under arrest"—Seizure by mortgagee.*]—Action in admiralty dismissed. [See annotation 1 D.L.R. 450.]

J. A. W. O'Neill and *Hume B. Robinson*, for plaintiff.

D. N. Hossie, for defendant.

MARTIN, L.J.A.:—It is clear to me after examining the authorities cited this morning and in the light of those cited yesterday, that this Court has no jurisdiction to entertain this action, because the vessel was not "under arrest", within the meaning

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of sec. 13 of the Admiralty Court Act, 1861, ch. 10, at the time the writ was issued herein.

The case of *The Northumbria* (1869), L.R. 3 A. & E. 24, 39 L.J. (Adm.) 24, 18 W.R. 356; and *The Normandy* (1870), L.R. 3 A. & E. 152, 39 L.J. (Adm.) 48, 18 W.R. 903, which Mr. Robinson has drawn to my attention are instructive, and, if I may say so, the latter goes further than I am inclined to think it should have gone. It is an expansion of the principle laid down in *The Northumbria* to this extent, that secs. 13 and 34 "must be construed together and so construed they shew the purpose of the Legislature to have been to give jurisdiction to this court whenever it was substantially seized of a suit against the vessel" (18 W.R. 903 at 904), and Phillimore, D.C.L. of the Admiralty Court goes on to explain his decision in *The Northumbria* case by saying that (18 W.R. 903 at 904):—"There a caveat warrant having been issued, and the arrest of the vessel prevented, and bail having been given by the owners in pursuance of their undertaking, I held that, for the purposes of the present section, there was a constructive arrest," and he proceeds to say that he is prepared though not till after, I confess, much hesitation, to take the step, further, that he did take subject to a condition which he imposed. In the *Northumbria* case, L.R. 3 A. & E. at p. 27, he had observed that:—" . . . . looking to the whole scope and tenor of the Act, this Court was intended to have jurisdiction in suits of this description, when it is in possession of the bail which represents the "res" whether the "res" has been released on the giving of bail after the arrest, or whether the arrest has been prevented, as in this instance, by such a caveat as has been issued in this case."

But all that has been done in the case at Bar is that the vessel was seized by the mortgagee when it was being repaired in the plaintiff's yard and no proceedings of any kind have been instituted in this Court, and so I do not feel prepared to take still another step further and hold that the pursuance of a private remedy is at all analogous to the taking of public proceedings in this Court, and hence there is no jurisdiction to entertain this action in this Court and it must be dismissed.

Action dismissed.

JONES v. SWIFT CANADIAN Co.

Manitoba King's Bench, Curran, J. January 9, 1922.

COSTS (§II—20)—*Extra costs—Case of special importance or difficulty—Action for personal injuries—Motor Vehicle Act—*

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"Vexatious or unreasonable conduct"—Man. Rules 951, 305, 948.]—Motion by plaintiff for increased costs of action. Motion granted.

D. H. Laird, K.C., and *J. T. Whittaker*, for plaintiff.

J. B. Hugg, K.C., and *J. W. Wilton*, for defendant.

CURRAN, J.:—This is the first case to come before me where the provisions of R. 951 have been seriously discussed and authorities on the question cited, reviewed and considered. I am much pressed by counsel for the plaintiff to either remove the statutory bar entirely and permit a full taxation of the plaintiff's costs irrespective of the $300 limit imposed by the above rule, or to partially remove such limit so as to permit an increased amount to be taxed to the plaintiff but less than the full taxable costs.

It is contended by counsel for the plaintiff that this case was one of special importance or difficulty and argued as elements tending to establish this the importance of the medical testimony adduced, the special preparation for and the length of the trial, the number of counsel engaged, and necessary consideration of the Motor Vehicle Act, R.S.M. 1913, ch. 131, which he contended raised questions of special importance to the public.

I cannot agree that any of these things or all of them together render the case one of special importance or difficulty within the rule. There is nothing specially difficult in this case. It is just an ordinary action to recover damages for personal injuries due to alleged negligence on the part of the defendant company. So far as I can see, it differs not at all from any such actions which are but commonplace trials in our Courts.

The next ground argued is that the costs have been increased by "vexatious or unreasonable conduct on the part of the defendant," in first denying the ownership of the motor truck and persisting in such denial until the last witness for the plaintiff, McKnight, was put in the box. This witness was chief clerk in the auto license department of the provincial government and was called to prove ownership and licensing of the motor truck in question. It was then that defendant's counsel admitted that defendant company were the owners of the motor truck at the time of the accident. This admission was somewhat belated and if it had been made earlier, no doubt some expense might have been avoided.

The plaintiff contends that under R. 305 the fact of ownership should have been admitted in the statement of defence and also the fact that the motor truck at the date of the accident was not licensed under the provisions of the Motor Vehicle Act

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Both of these were matters within the knowledge of the defendant company; as to the former the plaintiff undoubtedly was put to unnecessary costs in proving ownership of the truck, a fact which the defendant ought to have admitted and not denied as it did. As to the latter, the statement of claim does not contain any allegation that the truck in question was not licensed, so I do not think there was any duty under R. 305 devolving on the defendant to admit this. The rule says that a defendant filing a statement of defence shall admit in his statement of defence such of the allegations in the statement of claim as he knows or can readily ascertain to be true. The plaintiff invokes R. 948 and asks that any extra costs entailed by the want of this admission should be paid by the defendant. This claim is well founded as to the question of ownership of the truck but not as to the question of the truck being licensed at the time of the accident.

The plaintiff lastly claims that the defendant's conduct was vexatious or unreasonable at the trial whereby considerable unnecessary costs were incurred in calling evidence to prove that there was a roadway across the vacant ground to the east of the cemetery between Morley and Brandon Avenues over which the truck in question could have come and so got onto Brandon Avenue along which street certain of the plaintiff's witnesses said they saw the truck going to Osborne St.

The defendant contended the truck was travelling on Osborne St. and did not come down Brandon Avenue at all.

The gist of the plaintiff's complaint on this score is simply that what the defendant's witness Law said as to the absence of a road or means of travel in winter over the stretch of waste ground was untrue; that it took him by surprise and put him to extra cost in producing witnesses to prove the contrary, which he did, causing counsel for the defendant to admit in his address to the jury that there was really nothing in the contention that this piece of ground was impassable for motor cars in winter.

The trial was prolonged by reason of this question being raised and also by the denial by the defendant of ownership of the truck. One additional witness on the roadway question was certainly rendered necessary. In my opinion, the defendant company's conduct in these respects was to some extent vexatious or unreasonable and tended to increase the costs but not to any very serious extent. I find it very difficult to say to what extent these costs have been so increased, but taking everything into consideration, I think, possibly, a day might have

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been saved at the trial and the attendance of the witnesses McKnight and Doody dispensed with.

I will allow the plaintiff on taxation of his costs in excess of the $300 limit provided by R. 951, an increased amount within the limit of costs ordinarily taxable equal to the counsel fees for plaintiff's counsel for one day properly taxable, and the costs of and incidental to the procuring of the attendance of the two witnesses McKnight and Doody. Costs of discovery also allowed.

Motion granted.

CHAMBERLIN v. MAW.

Manitoba King's Bench, Curran, J. January 9, 1922.

BROKERS (§IIB—10)—*Right to commission—Efficient cause—Evidence of employment.*]—Action to enforce payment of commission. Dismissed. [See Annotation 4 D.L.R. 531.]

P. C. Locke, for plaintiff.

E. K. Williams, for defendant.

CURRAN, J.:—The view I take of the evidence in this case is simply that the plaintiff if not acting jointly for himself and Wallar and those associated with Wallar was acting solely for Wallar and such associates in securing the lease of the premises in question. It is true he denies this, but the whole course of dealing for the lease in question, as disclosed in the evidence, confirms me in this opinion, particularly the terms of the letter (ex. 2) caused to be written by the plaintiff and signed by him and which came to the addressee who was an officer in the employ of the defendant the Standard Trust Co. It is clear to me from the language used in this letter that it purports to be an offer by the plaintiff on behalf of himself and others not disclosed to rent the premises in question. It seems strange if the plaintiff was really acting in the capacity of agent for the defendants to secure a tenant for these premises that this offer should have been made by him to his principals and not to the customer, surely a reversal of the usual course of procedure, and indicates, in my judgment, for whom the plaintiff was really acting, viz., Wallar and those associated with him in the proposed moving picture venture. I cannot discover, even in the plaintiff's own evidence, that he had any authority or instructions from any of the defendants to find a tenant for this property, and which if he succeeded in so doing would entitle him to a commission from them. McKinley was merely a salaried clerk in the employ of the defendant trust company. He had no

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authority to bind that company nor any of the other defendants to any agency contract which obligated his employer to pay any commission. I have no doubt the plaintiff, when he interviewed McKinley in the Standard Trust Co. offices did enquire about commisson, if he succeeded in finding an acceptable tenant for the land in question and that McKinley did inform him of the company's rule of paying half commission. I do not doubt that he refused this, as he says that McKinley, then went to consult Lugsdin, who was next in authority to the manager in the trust company's office (Mr. Harvey, the managing director, being then absent) and who did no doubt act in Mr. Harvey's place and for him in many of the duties that pertained to the office of a managing director but that Lugsdin agreed to payment to the plaintiff of the usual commission if a tenant was secured I am not prepared to find as a question of fact. It is true Lugsdin, who was examined on commission in the city of Toronto, where he now resides, having left the trust company's services, does not explicitly deny this assertion in as strong and unequivocal terms as it is made by McKinley. Nevertheless, I attach a good deal of importance to his statements such as they are and which certainly raise a grave doubt in my mind as to the propriety of giving full credit to McKinley's testimony on this point. In any event I doubt that Lugsdin had authority to bind or commit the defendant trust company to any such responsibility in the matter of commission and certainly he had no such authority from the other defendants, as to whom the plaintiff admits he did not discuss the question of commission with any of them, although he contends that in discussing the proposed lease with Charles Kelly that this party remarked, "he supposed he would get the usual commission." Charles Kelly was not produced as a witness being dead at the time of trial and as there is no denial of this statement of the plaintiff, I must accept it, though I do not attach any weight or importance to it as it does not appear that Charles Kelly had any authority from the owners to bind them or any of them in the matter of payment of commission. He is not a party to the action nor to the lease which was ultimately granted.

It seems strange that if the plaintiff was looking to these defendants for a commission that he did not make his position in this respect clear to J. S. Maw and Thomas Kelly, both of whom he consulted about securing this lease. It also seems strange to me that the plaintiff did not obtain some memo in writing from some responsible official of the trust company to show that he was representing it and the other defendants in

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looking for a tenant, and containing the terms upon which a leasehold interest might be acquired by third parties, and, furthermore, that he should not have had a definite understanding or agreement as to his commission in the event of success.

If the plaintiff has a claim for commission against anyone, it seems to me such claim should be made to those for whom he really was acting and not these defendants for whom I am satisfied he was not acting in any capacity that entitled him in law to payment from them of a commission. It is, in my view of the evidence, impossible to hold that the plaintiff introduced the defendants as his principals to those who ultimately became lessees of the property in question, and that he was the efficient cause of the transaction afterwards carried out as was held in *Foster* v. *British Colonial Fire Insurance Co.* (1917), 37 D.L.R. 404, 28 Man. L.R. 211. That case must be read in the light of its own evidence and not as establishing as a general principle of law that wherever a man, having found out from an owner of property the terms upon which it can be sold or leased, produces a third party who will buy or lease on those terms, thereby and without more entitles himself to payment of a commssion by such owner; there must be, I think, in addition to this, an intimation to the owner that a commission would be expected from him in the event of a sale or lease being effected upon the terms stated.

The intimation of expectancy of a commission not negatived by the owner who permits the other to go to the trouble of finding a customer in the expectation of earning a commission may well be a fact from which a promise to pay commission may be inferred. It seems to me that a mere volunteer who acts as a go-between between buyer and seller and ultimately produces a sale cannot upon that fact alone found a legal claim for commission, nor can a third party, who, acting for a possible purchaser, obtains terms of sale or lease of property from its owner and thus brings about a completed transaction upon those identical terms, legally claim a commission from the owner in the absence of some promise to pay a commission, either express or implied.

In the present case, I have no doubt but that the plaintiff was the means of bringing the contracting parties together with the resultant lease, representing the consummated transaction but I cannot find that in so doing the plaintiff was the defendant's agent, or the agent of any of them, or acting in any capacity under circumstances from which it can be fairly pre-

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sumed that the defendants, any of them, led him to expect payment of a commission for his services. On the contrary, I think the fair inference of fact to be deduced from the whole of the evidence is that the plaintiff was acting either for himself, Wallar and the latter's associates, or for Wallar and his associates alone. His letter seems to make this abundantly clear. It is a definite offer to lease made to the owners and not a proposal from such owners of terms upon which they would lease the property. Nor can the informal memo. made out by defendant Maw on the back of an envelope, be construed as a proposal or offer upon which the plaintiff might act, for this document was not handed to the plaintiff by Maw, nor was its content communicated to plaintiff by Maw, but the paper was handed to McKinley in the trust company's office after the plaintiff had interviewed Maw for the purpose of intimating to the Standard Trust Co., as Maw's co-executor, the terms upon which he, Maw, was willing to lease the property.

The plaintiff alleges as the foundation of his action in para. 3, his employment by the defendants to act for them as their agent to procure a tenant for the land in question. I find that no such employment has been proved either by express agreement or by facts and circumstances from which, in law, an implied agreement could be made out. I, therefore, dismiss the plaintiff's action with costs, to include costs of discovery examinations.

Action dismissed.

SALTER & ARNOLD v. DOMINION BANK.

Manitoba King's Bench, Dysart, J. April 10, 1922.

BANKRUPTCY (§III—15)—*Rights of trustee as to "property"—Recovery of payments—Trust funds—Preference—Appeal—Extension of time—Orders — Estoppel — Pleading motion to strike.*]—Appeal by the defendant from an order of the referee, dated April 26, 1921, refusing to strike out certain paragraphs in the plaintiff's statement of claim. Reversed. [See Annotations, 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

E. F. Haffner, for defendant.

DYSART, J.:—Against the hearing of this appeal the plaintiff has urged several reasons which being partly in the nature of preliminary objections ought to be considered at this stage. (1) It is urged that the appeal is brought too late; that the order of the referee extending time for bringing this appeal is irregular and ineffective because obtained *ex parte*: *Ham-*

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ilton v. *Tweed* (1884), 9 P.R. (Ont.) 448. But while that extension order remains intact or unappealed from it must be taken at its face value and the objection, therefore, fails. (2) Then it is objected that the defendant is estopped by the fact that the order appealed from has been acted upon. To this the defendant replies that the order was acted on, not by the defendant, but solely by the plaintiff, who amended its statement of claim thereunder. Even if this objection were otherwise valid, the leave to appeal, which was granted to the defendant after the alleged estoppel, would undoubtedly be a complete answer to this objection. (3) It is further set up that this application raises the question of *res judicata;* that the defendant is here seeking to strike out from the statement of claim paragraphs which were refused in the earlier action. Here again the leave to appeal which the referee granted to that order must be a complete answer to the objection. How can that order be said to be final when the tribunal which made it has granted leave to appeal from it? (4) Finally, the plaintiff urges that the defendant's relief, if it has any, is not by this interlocutory appeal but a demurrer. To this the defendant points out that demurrer can be argued only at the trial and that a prudent anticipation of possible defeat on the demurrer would necessitate preparation of an elaborate defence to the objectionable paragraphs, and that such defence would be wholly useless if the demurrer were upheld. To avoid the expense and trouble of a defence which in its nature must be elaborate I think the matter ought to be disposed of in the interlocutory way rather than at the trial.

Dealing with the appeal then upon its merits, it appears quite clearly that the statement of claim sets up two causes of action. The first is set forth in the first 18 paragraphs and is based briefly upon fraudulent preference. The remaining paragraphs of the statement of claim set up a cause of action based upon a breach of trust. They both complain that the defendant has received from the insolvent D. Coughlin & Co. the sum of $105,000 by instalments extending over a period of about 3 months and that these moneys should be handed over to the plaintiff as the authorized trustee in bankruptcy of D. Coughlin & Co. The question arises as to what passes to the authorized trustee in bankruptcy by an assignment.

Under sec. 10 of the Bankruptcy Act, 1919, ch. 36, "every authorised assignment shall . . . vest in the trustee all the property of the assignor at the time of the assignment, excepting

such thereof as is held by the assignor in trust for any other person . . ."

"Property," as defined by sec. 2 (dd) of the Act, "includes money, goods, things in action, land, and every description of property, whether real or personal, moveable or immoveable, legal or equitable . . . interest and profit, present or future, vested or contingent in, arising out of, or incident to property as above defined."

While this definition in attempting to define a term by the use of the term itself sins against one of the cardinal rules of definition, and leads to some confusion, inasmuch as it may be said in a condensed form to define "property" as including property and incidents of property, nevertheless, does state that "things in action" are "property" within the meaning of sec. 10. Clearly from this "things in action" as well as money pass to the trustee under the assignment. Which, if either of these things, passed to the plaintiff in this case? There is no question that the money itself has been paid to the defendant and that it has been paid by the insolvents D. Coughlin & Co. Was the payment effected so as to prevent the insolvent from securing the return of the money? There is no allegation or suggestion that the moneys were obtained by the defendant from the insolvent under duress or by means of any fraud or deceit. The payments seem to have been made voluntarily and with the intention of passing the money. What ground, therefore, would the insolvent have for asking reversal of this payment? It would seem none. This would be true whether the moneys belonged to the insolvent or to strangers. If the money was their own, clearly the insolvents had the right to deal with it and cannot now be heard to repudiate this payment. If the money belonged to strangers for whom the insolvents held it in trust, then in the allegations shown, the insolvents actively participated in an alleged breach of trust and being wrongdoers could not recover money from their joint wrongdoer. This is, of course, assuming that the plaintiff's allegations of wrongdoing are correct.

I am, therefore, of the opinion that the insolvents at the moment of making assignment were not in a position to demand from the defendant return of the said money and, therefore, that the assignment did not vest in the trustee either the said money or the right to retain it.

The plaintiffs however urge that the second branch of the case, based on breach of trust may be supported and justified by sec. 20, (1) of the Bankruptcy Act. This section states

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that the trustee may, with the permission in writing of the inspectors, do all or any of the following things:—"(c) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor."

But does this action relate to the property of the debtor? The offending paragraphs allege that the money was not the property of the insolvents but had been received by them as the proceeds of sale of consignments of cattle shipped to the insolvents by a large number of customers situate through the country and that the money belonged to those customers and was held in trust for them by the insolvents at the time of the payment. If these allegations are true, then this action, so far as it is based upon the alleged breach of trust, relates to the property of those customers and not of the insolvents.

If this money really belongs to the customers, and for the purpose of this appeal it cannot be denied, then it would seem that it falls within the exception covered by sec. 10 of the Act above mentioned, that all the property of the assignor passes "excepting such thereof as is held by the assignor in trust for any other person." As the money itself appears from the allegations to have passed from the assignors to the defendant, there remained in the insolvents, if anything, nothing more than a right to recover it. But a right to recover the money was for the benefit of the customers, the owners; and this right is alleged to have been held by the assignor in trust for those customers. Therefore, the right to recover the money was excepted from the property which vested in the trustee.

By what authority does the plaintiff assume to act for the alleged owners of this money, the customers? It shows no privity between itself and this large number of strangers to this transaction. Is it entitled to set itself up as the guardian of these customers merely because it has taken an assignment of the insolvents' estate. If it recovered the money from the defendant, would it be for the general benefit of creditors? Section 25 of the Act seems to forbid this in the following language:—"The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:— (i) property held by the debtor in trust for any other person."

Under this section, the plaintiff would be bound to turn over to the customers this money, if and when recovered. Why then should it, at the apparent expense of general creditors, concern itself with the return of money, which, when recovered, it would have to turn over unimpaired to the owners for whom

it was held in trust by the insolvents? Surely, nothing but direct authority from these customers would warrant this trustee in bringing such action, and then it is questionable whether the action should be brought by the plaintiff as trustee in bankruptcy. But, in any case, no such authority or request from the customers has been shown, and I am of opinion that the plaintiff has entirely mistaken its duties and rights in so far as this branch of the action is concerned.

Nor can it be urged that injustice will be done to these customers by allowing this appeal. If any wrong has been done to them or any of them, they have each a cause of action for the recovery of their money. Such cause of action is the personal right of each of them, and has not passed to the plaintiff. It is open to each of them to bring his individual action. Each transaction is alleged to have been separate and distinct from all others, and must depend upon its own facts and circumstances. No doubt a test case might be made of a number of cases combined, but this, however, is beside our present inquiry.

The first branch of this case, however, based as it is upon alleged fraudulent preference, assumes that the money belonged to the insolvent firm, and as such was paid to the defendant within 3 months of the assignment. These allegations set up a cause of action which is well within the plaintiff's rights, and is supported in every important particular by the provisions of the Act.

The second branch of the case, however, is, in my opinion, without foundation, as no cause of action exists on such alleged facts. The statement of claim, therefore, in so far as it sets up cause of action based upon alleged breach of trust, is embarrassing and unwarranted and ought to be stricken out: K.B. Rule 347, and cases cited in Williams' Manitoba King's Bench Act; see also Holmested's Ontario Judicature Act, 4th ed., p. 574.

This appeal will, therefore, be allowed, and the paragraphs based upon the alleged breach of trust and complained of in the notice of motion will be stricken out, with costs of this appeal to the defendant in any event.

Appeal allowed.

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SALTER & ARNOLD v. DOMINION BANK.

Manitoba King's Bench in Bankruptcy, Macdonald, J. July 19, 1922.

BANKRUPTCY (§I—6)—*Procedure—Bankruptcy Act Rule 120—Jurisdiction—Transfer of proceedings.*]—Motion on behalf of the defendants to stay proceedings in the action and a counter motion on behalf of the plaintiffs to transfer the proceedings already taken to the bankruptcy side of this Court.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

E. F. Haffner, for defendant.

MACDONALD, J.:—The statement of claim clearly indicates that the plaintiffs herein are acting as authorized trustees under the Bankruptcy Act, 1919, ch. 36, and the contention of the defendants is that the proceedings should be to a Judge in Chambers by notice of motion served in the ordinary manner as provided by Rule 120 of the Bankruptcy Act, and the subsequent proceedings carried on under that rule.

The plaintiffs, as stated, proceeded under the ordinary procedure applicable to the King's Bench actions and the defendants filed their statement of defence. Subsequently, the defendants moved to strike out certain paragraphs of the statement of claim, which application was refused by the referee in Chambers but on an appeal from the referee to a Judge in Chambers the offending paragraphs were stricken out (1922), 68 D.L.R. 757. Then the defendants moved to stay the proceedings and the plaintiffs counter-moved to have the proceedings treated as the issue between the parties and continuation of the proceedings under Rule 120. The defendants cite *Bartley's Trustee* v. *Hill* (1921), 61 D.L.R. 473, 50 O.L.R. 321.

Under sec. 63 of the Bankruptcy Act the Court of King's Bench is constituted the Court of Bankruptcy for this province, but under sec. 64, (3) all the powers and jurisdiction in bankruptcy otherwise conferred by this Act may and shall be exercised by or under the direction of one of the Judges of the Court upon which such powers and jurisdiction are so conferred.

The judgment of Middleton, J. in *Bartley's Trustee* v. *Hill*, *supra*, I accept as the proper procedure to be taken in all matters in bankruptcy. That case, differs, however, from the case under consideration. There, upon the facts there was no necessity for any such declaration as that sought in the action and it seemed to have been more a question of the incurring of unnecessary costs that appealed to the Judge who decided that case. Here, however, there is a very substantial issue to be decided and under Rule 120 the Judge may give directions for the preparation and filing of pleadings and for the trial of such

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question or issue, or may make such other order in the premises as to the Judge shall seem best.

Now, it is evident that the plaintiffs here have misconceived the proper method of proceeding. Both parties, however, have now defined the issue and I can see no reason why the pleadings as they stand should not be the issue to be tried and the proceedings continued under Rule 120 of the Bankruptcy Act. On the question of costs, no further or other costs shall be allowed for the proceedings taken except such costs as would be properly incurred had the proceedings originated under Rule 120.

If necessary an order can be made transferring the proceedings into the Bankruptcy Division and there continued as stated, and there shall be no costs to either party on either of these motions.

MANKOVSKY v. JACOB.

Manitoba King's Bench, Macdonald, J. June 7, 1922.

VENDOR AND PURCHASER (§IE—27)—*Rescission—Misrepresentations—New house—Ratification—Burden of proof.*]—Action for rescission of an agreement for purchase of a house and the return of the portion of the purchase-price paid thereon. Judgment for plaintiff.

J. A. Cherniack, for plaintiff; *E. J. Thomas*, for defendants.

MACDONALD, J.:—The plaintiff entered into an agreement with the defendant Benjamin Jacob for the purchase of a property in the city of Winnipeg upon which a dwelling-house was in course of construction and paid on account of the purchase-price the sum of $500.

He now brings this action for a rescission of the agreement and a return of the $500, alleging that he was induced to enter into the contract for the purchase of the said property through misrepresentation on the part of the defendants and their agent.

In the latter part of August, 1921, the plaintiff was desirous of purchasing a house in which to live and with, that end in view approached one Bennie Shepps, a real-estate agent, who showed him a number of houses for sale, but none being suitable Shepps stated he would bring him to a nice bungalow on Flora Avenue that was about being completed, Shepps having the property for sale, and the defendants are bound by any representations he made and he represented to the plaintiff, as did also the defendants both by word and conduct, that the house was a new house.

It had all the appearance of a new house. There was nothing

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on the outside to cause suspicion that it was not. It was stucco finish, covering any chances to detect it was not a new house as represented. It was, as is now admitted, an old cottage reconstructed and made to appear as if a new building. The defendant Aaron Jacob says that Shepps wanted to get a purchaser for it and that he told him to go ahead and get the purchaser but not to bring in a purchaser until it was finished.

Accompanying the plaintiff and Shepps when the house was first looked at were Mrs. Mankovsky, the wife of the plaintiff, and their daughter, and they examined the house inside and out. There was a pile of old lumber from an old log house and Aaron Jacob said the new house was all new material, that the house was all new. The inside had new floors, also new baseboards, new plaster and everything appeared new. No old lumber appeared. In the opening to the basement the plaintiff saw old boards in the wall leading into the cellar and he asked the defendant Aaron Jacob about this old lumber when Jacob replied that this wall held better than plaster. The plaintiff also saw an old door in the kitchen and said, "Why is this, it should be a new door," and it was agreed that a new door would be put in its place. On this first occasion they were unable to get into the basement as there was no stairway yet put down. On the assumption that the building was new the plaintiff that same day executed the agreement referred to and paid his deposit. On the following day the plaintiff and his son went again to the house and were able to enter the cellar where he discovered old joists and beside them new joists, an old beam and two old posts, one of them being decayed. He asked the defendant what this meant and Shepps who was present said Jacob would fix this for sure, put in new lumber and a new post, and it was so agreed.

The defendants contend that the plaintiff having learned on inspection that the building was not a new building that there had been such conduct on his part that he had ratified the contract and that he cannot rescind.

There is no doubt there were evidences which could be seen from the basement which created a suspicion but I do not think that the mind of the plaintiff fully grasped the situation. He may have been suspicious. His $500 had been paid, the contract had been entered into and it is quite reasonable to suppose that he might not have really understood the position he stood in. I do not think that his conduct amounted to a ratification of the agreement.

The defendant cites *Campbell* v. *Fleming* (1834), 1 Ad. & El.

40, 110 E.R. 1122, 3 Nev. & M. (K.B.) 834, which holds that there was at the first a gross fraud on the plaintiff, but after he had learned that an imposition had been practised on him he ought to have made his stand. Instead of doing so he goes on dealing with the shares and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained he had given up his right of objection by dealing with the shares after he had once discovered that he had been imposed upon.

This, however, is not a case in point . The plaintiff here has done nothing in the way of dealing with the property.

In *Schneider* v. *Heath* (1813), 3 Camp. 506, 14 R.R. 825, the sale of a ship was described as useful for general purposes. The hull is nearly as good as when launched, &c., "the vessel to be taken with all faults, &c." It was found to be worm-eaten, keel-broken, unseaworthy and by no means corresponded with the description in the particulars. Plaintiff refused to complete the purchase and demanded back his deposit. It was held there was fraud sufficient to vitiate the contract and the plaintiff was entitled to recover back his deposit.

In *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 30 W.R. 251, it was held that where one person induced another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering and might with reasonable diligence have discovered that it was untrue.

The onus lies on a person who has made false representations to show clearly that they were not acted on and this has not been shown here. Was the representation relied upon, that is the important point, and I find that in this case the representation was relied upon.

After having seen the basement and the decayed joists the plaintiff received information that the house was an old house and he then got an architect, Mr. Blanstein, to go over the building, and after he had become satisfied that the building was an old building, remodeled and recast, he took steps to repudiate the contract and demanded a return of his deposit.

Finding on the evidence that the building was represented as a new building and that as a matter of fact it was an old building reconstructed, there was a false representation and there was no ratification of the agreement upon discovery of the misrepresentation, and the plaintiff is, therefore, entitled to a rescission of the contract and to a return of his deposit.

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There shall be a judgment in his favour accordingly, together with costs.

Judgment accordingly.

Re HEFFREN.

Manitoba King's Bench, Macdonald, J. June 7, 1922.

LIMITATION OF ACTIONS (§IVC—165)—*Acknowledgment of debts—Letter—Inability to pay at present—"I will give matter my attention"—Bankruptcy claim.*]—Appeal by creditor against the disallowance of his claim by trustee in bankruptcy.

The ground of disallowance raised was that the claim was barred by the Statute of Limitations. The letter referred to in the judgment as being an acknowledgment to stay the running of the statute was worded as follows:—

"Your letter received re Bird's Hill Sand Co. account would say that it is impossible for me to pay this account at present as I have been on this farm for nearly 4 years and have not been able to pay a cent of interest or principal on the farm yet, so with about $4,000 of interest in arrears, it is quite clear there will be no chance of paying anything else this fall. And as the credit in the city have control of the house property that their material went in I think they have everything I can give them just now.

P.S.—These houses are renting for $150 per month and if your clients are not getting their just share of these moneys I will give the matter my attention at once."

J. S. Hanna, for trustee; *W. A. Johnston*, for creditor.

MACDONALD, J.:—The Great West Sand & Gravel Co. Ltd., filed a claim with the authorized trustee against the above debtor which claim the trustee disallowed and this is an appeal against the disallowance.

The only ground of defence raised by the notice of disallowance is that the claim is barred by the Statute of Limitations and is not entitled to rank as a claim against the estate.

An examination of the account filed reveals the fact that the account for goods supplied amounts to $551.32 the remainder of the account being made up of interest, that is, $319.33 interest on an account of $551.32.

There is not before me any agreement between the debtor and the creditor with respect to this which to me is an excessive amount for interest and a matter which I hope the trustee has investigated. Failing an investigation of a charge of this kind would be a neglect of duty to the damage of the creditors and also to the debtor, particularly in view of the fact that

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the debtor does not place the claim in his list of creditors. I must assume, however, that the trustee has conferred with the debtor on this point and that, apart from the defence of the statute, the account is otherwise accepted as all right. The issue before me is only as to the Statute of Limitations.

On the face of the account November 30, 1914, is the last charge for goods sold and from that date the statute would begin to run and the point that arises is, has anything happened to give the statute a fresh start?

On September 9, 1918, the account was in the hands of Mr. Markle, a solicitor, for collection on behalf of the creditor and on that date he wrote the debtor demanding payment. To this demand, the debtor replied by letter dated September 16, 1918, and the contention of the creditor is that this letter is an acknowledgment of the debt and that from this date time begins to run afresh, and unless this contention prevails the debt is clearly barred by the statute.

It is urged by counsel on behalf of the trustee that this letter is not such an acknowledgment as stays the running of the statute, that there is not such an acknowledgment from which a promise to pay can be inferred and he cites in support of this: *Derring Harvester Co.* v. *Black* (1908), 1 S.L.R. 123; *Green* v. *Humphreys* (1884), 26 Ch. D. 474, 53 L.J. (Ch.) 635; *Eyre* v. *McFarlane* (1910), 19 Man. L.R. 645; *Cooper* v. *Kendall*, [1909] 1 K.B. 405; 19 *Hals.* p. 63, sec. 105.

Any words are a sufficient acknowledgment if they either expressly or by implication amount to an unconditional acknowledgment of a debt or to a promise to pay: *Edmonds* v. *Goater* (1852), 15 Beav. 415, 51 E.R. 598.

If the words used amount to such an acknowledgment or promise they are not qualified even if accompanied by request for time: *Dodson* v. *Mackey* (1835), 8 Ad. & El. 225, note, 112 E.R. 823, note; by expressions stating or implying that the debtor is unable to pay at present he will pay in the future: *Dabbs* v. *Humphries* (1834), 10 Bing. 446, 131 E.R. 977, or by expressions of hope to pay: *Sidwell* v. *Mason* (1857), 2 H. & N. 306, 157 E.R. 127.

But when there is an unconditional acknowledgment or promise expressions of inability to pay at the present, or assurances on the part of the debtor that he will do his best to pay, may amount to a condition or qualification and prevent the implication of a promise: *Fearn* v. *Lewis* (1830), 6 Bing. 349, 130 E.R. 1314.

The letter referred to of the debtor to Mr. Markle of Sep-

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tember 16, 1918, I interpret as an unconditional acknowledgment. True, it expresses an inability to pay at present but from the authorities cited that does not make the acknowledgment conditional. Furthermore it refers to securities held by creditors from which moneys are collected and states, "if your clients are not getting their just share of these moneys I will give the matter my attention at once."

As the issue stands the appeal must be allowed.

Appeal allowed.

TOCHER v. JOHNSON.

Manitoba King's Bench, Mathers, C.J.K.B. May 22, 1922.

LANDLORD AND TENANT (§IIB—10)—*Cropping Lease—Terms—Cost of threshing—Covenant for quiet enjoyment—Mortgage—Misrepresentations as to weeds— Covenants as to cultivation and summer-fallow—Breach—Damages.*]—Action by lessee for damages for breaches of covenants in a lease of farm lands and counterclaim by lessor.

J. L. M. Thomas, for plaintiff; *F. M. Burbidge*, for defendant.

MATHERS, C.J.K.B.:—This action was originally brought by John Tocher, who died during its pendency. After his decease it was revived in the name of James Tocher, one of his sons.

The defendant, on February 4, 1921, leased to John Tocher a large farm for a period of 5 years from March 1, 1921, the defendant during the first year of the term to receive one-half of the crops grown upon the land, and during the remaining years of the term one-third of the crops. During the first year the defendant agreed to supply all the seed grain required and one-half of the twine used in cutting the crop, and to pay one-half the cost of threshing, but during the subsequent years the lessee was required to pay this expense. The lessee covenanted that he would during each year of the term either put into crop or summer-fallow in a good husbandlike and proper manner every portion of the premises which had been or should thereafter be brought under cultivation, ploughing in the fall season all lands to be cropped in the following year, provided weather conditions permitted. He further agreed in each year to break up and bring under cultivation at least 50 acres of the land in certain designated parcels which was open prairie and free from scrub until all such land in these parcels had been broken. The lease contains numerous other provisions but these are the only terms which it is necessary to refer to for the purpose of this action.

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By a concurrent agreement the lessee purchased from the defendant a quantity of live stock and implements, for which he paid in cash $1,000 and gave a chattel mortgage to secure the sum of $3,937 the balance of the purchase-price.

At the time the lease was entered into the land demised was subject to a mortgage to the North Empire Fire Ins. Co. for a large sum of money and the mortgage was then in arrear. In October, 1921, notice of exercising power of sale under this mortgage was served upon the defendant and upon the tenant. The notice was to the effect that unless payment of the mortgage money and interest was made within one calendar month from the time it was served the mortgagee would proceed without the consent and concurrence of the mortgagors or any persons claiming through them and without further notice to enter into possession of the land and proceed to take the rents, issues and profits.

This action was brought to recover from the defendant: 1. One-half the cost of the threshing which it is alleged the defendant has refused to pay; 2. Damages for false representations by the defendant that the land was free from noxious weeds; 3. Damages for breach of covenant for quiet enjoyment; and 4. Damages for negligently burning the stables upon the premises, including some of the live stock and farm implements of the plaintiff.

As already pointed out, the defendant undertook by the lease to pay one-half the cost of the threshing. The lessee threshed the crop out of the stook, in this way requiring the assistance of a number of men and teams for the purpose of hauling the sheaves from the stook to the thresher. The defendant takes the position that she is only liable for one-half the cost of threshing from the stack. She objects to paying half the cost of the necessary men and teams to haul the grain from the stook to the thresher. The lease merely speaks of half the cost of threshing without saying whether stack-threshing of stook-threshing was meant.

I find that the usual mode of threshing is from the stook and that grain in this Province is stacked only when it is impossible to get the services of a threshing machine to thresh it without stacking. The defendant must be assumed to have contracted to pay half the cost of the threshing done in accordance with the usual practice. I therefore find that the defendant is liable for one-half of the cost of hauling the sheaves from the stook to the machine. The evidence shows that 6 teams were used, employed for 6 days, and that the reasonable

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cost of the services of a man and team was $8 per day, a total of $288. There were 14 men boarded by the tenant for 7 days at a cost of 35c. per meal, total $39.90, and the board of the 6 teams for one day at $1.50, during which it rained, $9, totalling in all $336.90, one-half of which is $168.45. I find that the defendant is indebted to the plaintiff for $168.45 on this head.

I find against the plaintiff's claim for damages for false representations as to weeds. Whether or not any representation was made as to the condition of the land, I am satisfied that John Tocher was not induced to enter into the lease by any such representations but that he signed it a considerable time after he had entered into possession and was quite familiar with the condition of the land as to weeds.

The third head of claim is for breach of covenant for quiet enjoyment. Notice of exercising power of sale under the mortgage was served upon him which he contends amounted to an ejectment. In support of this claim he relies on the case of *Carpenter* v. *Parker*, (1857), 3 C.B. (N.S.) 206, 140 E.R. 718, 27 L.J. (C.P.) 78, 6 W.R. 98. In that case the land leased was subject to a mortgage which had fallen into arrears and the mortgagee served upon the tenant a notice requiring him to pay the rent to them. The tenant upon receipt of the notice gave up possession. The mortgagee was not bound by the terms of the lease and although the tenant was at liberty to pay his rent to the mortgagee he was exposed to the danger of a distress by the lessor. The Court held that the tenant was justified in declining to remain any longer in a position of such difficulty and danger and that his yielding up possession in response to the demand of the mortgagee amounted to an eviction by the latter. The distinction between that case and the one at Bar is that here the tenant has not gone out of possession but is still in occupation. He has, consequently, not been evicted, nor has he sustained any damage by the action of the mortgagee.

The fourth head of damage for negligently burning stables was, after being persisted in to the last, abandoned by the plaintiff. One night in the fall of 1921 the stables of the tenant were burned in a somewhat mysterious way. The plaintiff was not able to adduce one tittle of evidence to even cast suspicion upon the defendant and so far as the evidence goes there appears to have been no basis whatever for the claim.

That disposes of all the issues raised in the plaintiff's action.

The result is he is entitled to judgment against the defendant for $168.45.

By way of counterclaim, the defendant alleges that the tenant did not cultivate the land in a good husbandlike and proper manner in accordance with his covenant, but on the contrary farmed the land so as to cause great damage and injury to the land itself and to the defendant. She particularly claims that the fall ploughing which the tenant did in the fall of 1921 was useless because it was not deep enough. She also alleges that the summer fallow was not properly done and that the tenant broke his covenant to break at least 50 acres of the open prairie land free from scrub. Without going into the evidence in detail with respect to these claims, I find against the defendant's claim with respect to the fall ploughing, and I find in her favor with respect to the summer-fallowing and the breaking. I am satisfied the summer-fallowing was not done in a good husbandlike manner. Land to be properly summer-fallowed should be so worked that no weeds are allowed to grow up and seed. The evidence shows that this land was ploughed in June and it was then allowed to grow to weeds and was again ploughed down in September or October.

The plaintiff offered some evidence to show that there were not 50 acres of open prairie free from scrub on those portions of the demised lands where breaking was to be done, and that he broke all the land there was of that character. I find on the plaintiff's own evidence that there were at least 50 acres which should have been broken according to the terms of the lease. The quantity he actually did break only amounted to 22 acres. He therefore was in default with respect to 28 acres.

It is very difficult to estimate the damage sustained by the defendant by reason of this neglect. The defendant put his damage on the ground of the loss of his share of the crop to be grown this year but it appears to me that such damage is entirely too speculative. That crop will depend upon so many contingencies that it is impossible for me to say with any degree of certainity that the defendant will suffer any loss. The defendant was entitled to have the land properly summer-fallowed and to have 50 acres broken and the only basis of damage which I can adopt appears to be the value of the additional work necessary to have done the summer-fallowing in a proper manner and of breaking the 28 acres which the plaintiff failed to break.

Sask.

C.A.

For failure to summer-fallow in a proper manner I assess the defendant's damage at $120, and for failure to break 28 acres at $196, or a total of $316.

The principal claim made by the defendant was for a forfeiture of the term because of the plaintiff's several breaches of covenant. She is not entitled, however, to this relief because the lease contains no proviso for re-entry for breach of covenant: Woodfall, 21st ed., 377; Bell on Landlord and Tenant, 554; Foa on Landlord and Tenant, 316 and 317.

The net result is that the plaintiff is entitled to a verdict for $168.45 and the defendant is entitled upon her counterclaim to a verdict of $316.

This action was originally brought by the plaintiff in the County Court but the defendant by entering counterclaim claiming possession of the land forced a transfer of the action to the King's Bench. The plaintiff having been forced to litigate the matter in the King's Bench is, I think, entitled to costs on the King's Bench scale without right of set-off. The defendant upon her counterclaim has recovered an amount within the competence of the County Court and for that reason I think she is entitled to costs of counterclaim on the County Court scale, and there will be judgment accordingly.

Judgment accordingly.

Re F. E. WEST & Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. November 14, 1921.

BANKRUPTCY (§II—20) — *Priorities — Right of Crown to priority sales tax owing by insolvent—Right of city corporation to priority in regard to business—Rights of Workmen's Compensation Board.*]—Appeal by the municipal corporation of the City of Toronto from the order of Orde, J. (1921), 62 D.L.R. 207.

The Court made no order, as it appeared, and was admitted by all parties, that the fund would be exhausted by other payments, having priority, and so the question raised was merely academic.

DICK v. SWEET.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. June 29, 1922.

VENDOR AND PURCHASER (§IE—27)—*Fraudulent misrepresentation—Noxious weeds—Damages—Value of land—Right of vendor to payments—Costs.*]—Appeal by plaintiff from a judg-

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ment dismissing an action to recover under an agreement for the sale of land. Varied.

T. D. Brown, K.C., for appellant.

A. T. Proctor, for respondents.

The judgment of the Court was delivered by

MCKAY, J.A.:—By agreement in writing dated December 20, 1918, the appellant sold to respondent Sweet the north half of sect. 21 in Tp. 14 in R. 31, west of the principal meridian, in the Province of Saskatchewan, with certain chattels valued at $2,400, for the sum of $12,000, payable as follows:—The sum of $500 upon the execution of the said agreement; the sum of approximately $3,400 by the assignment by the respondent Sweet to the appellant of a certain agreement of sale of the N/E ¼ of section 18, Tp. 22, in R. 24, west of the 2nd meridian; the sum of approximately $1,500 by the assignment by the respondent Sweet to the appellant of a certain agreement of sale of the S/E ¼-18-22-24-W. 2nd meridian; the sum of $500 on March 1, 1919; the sum of $500 on December 1 in each and every year from 1919 to 1929, both inclusive, together with interest at the rate of 7% per annum from the date of the said agreement to be paid on the said sum or so much thereof as should from time to time remain unpaid whether before or after the same became due; and such interest to be paid yearly on the first day of December in each and every year until the whole of the monies payable thereunder were fully paid, and the first of such payments of interest to be made on December 1, 1919.

The agreement also provides that all interest on becoming overdue shall be forthwith treated as purchase money and shall bear interest at the rate aforesaid, and that on default being made in the payment of principal, interest, taxes, or premiums of insurance, or any part thereof, the whole purchase money shall become due and payable.

The respondent Sweet defaulted in his payment of the instalment of $500 and interest falling due on December 1, 1919, but subsequently paid $853 on January 2, 1920. He again defaulted in his payment of the instalment of $500 and interest falling due on December 1, 1920, and has not paid anything on the agreement since he paid the $853.

The appellant brings this action to enforce payment of the amount due under the agreement or cancellation thereof, and also for costs incurred in paying off some encumbrances which respondent Sweet should have paid on the land covered by the agreement of sale he assigned to the appellant.

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The defence is a general denial of the claim, and in the alternative damages for fraudulent misrepresentation.

The trial Judge allowed the respondent Sweet $3,200 as damages for fraudulent misrepresentation, which amount, less the costs of the appellant incurred in paying off the encumbrances above referred to, to be ascertained on reference, the trial Judge directed should be deducted from the original purchase-price as of the date of the agreement. From this judgment the appellant appeals.

The trial Judge found that the appellant was guilty of false and fraudulent misrepresentation when he represented to respondent Sweet that the only noxious weeds on the land were wild oats and stink weed, whereas the said land was infested with twitch grass, a noxious weed. There is evidence on which the trial Judge could make this finding, and this Court cannot disturb it.

With regard to the damages allowed, after reading the evidence carefully I do not think I would have allowed that amount, as the majority of the witnesses called value the land at $30 per acre at the time it was sold; but, at any rate, two witnesses besides the respondent Sweet value the land at much less than $30 per acre. Witness Sarvis values it at $15 to $20 per acre. Higgins at $10 per acre, while the appellant swears there would be a difference of $10 more per acre in the value of this land if it had no twitch grass.

In my opinion, therefore, there was evidence on which the trial Judge could assess the damages at $3,200, and this Court should not disturb the same.

I, however, am of the opinion that he was wrong in not giving the appellant some relief for the balance still due.

Apparently the trial Judge, on delivering his oral judgment at the conclusion of the trial, intended that a sufficient amount of the damages allowed was to be applied on the amount due to appellant, so as to put the agreement on good standing, and thereafter the balance of the damages was to be applied on the payments still due, in equal amounts. Under these circumstances it would be unnecessary to further deal with the balance due the appellant. But the judgment shews that the respondent Sweet's counsel was not satisfied with this disposition of the damages allowed, and asked that the damages allowed be credited as of the date of the purchase, which request the trial Judge granted, thereby reducing the original purchase price by that amount.

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The result is that the agreement is still in default, and the appellant is entitled to some relief.

The formal judgment entered is wrong, as it purports to dismiss the appellant's action with costs, and no such judgment was delivered. And further it purports to apply the damages allowed, in reduction of the original purchase-price, as of the date of agreement, December 20, 1918, and also on the instalments to fall due under said agreement.

In my opinion the judgment should be varied and added to as follows: That, after ascertaining the amount to be deducted for costs incurred by appellant in paying off the encumbrances above referred to, from the $3,200 allowed for damages, and applying the balance on the original purchase price, there will be a reference to the Local Registrar to ascertain the amount still due to appellant, and in default of payment of the same within 3 months from the date of the Local Registrar's certificate, with interest at 7% per annum, with appellant's taxed costs, the said land will be sold under the direction of the Court and the proceeds thereof, after payment of the costs of sale, will be applied in payment of appellant's claim and taxed costs, and appellant will be entitled to judgment against respondent Sweet for any deficiency.

The appellant will be entitled to costs of the action and counterclaim, except as to costs on the issue of misrepresentation as to the twitch grass, and will also be entitled to his costs on the reference.

The respondent Sweet will be entitled to the costs of the defence and counterclaim occasioned by the issue of misrepresentation as to the twitch grass. The judgment below will be varied accordingly. The appellant will be entitled to his costs.

Judgment varied.

LAND CORPORATION OF CANADA v. WILLIAM PEARSON LAND Co.

Saskatchewan King's Bench, Taylor, J. January 12, 1922.

VENDOR AND PURCHASER (§II—30)—*Sale of acreage—Separate agreements—Covenants as to payments—Interpretation of contract — Schedules — Merger — Sub-purchaser — Extension agreement—Rights and remedies of vendor—Personal judgment —Vendor's lien—Costs.*]—Action by vendor to enforce agreement of sale.

P. H. Gordon, for plaintiffs.

C. W. Hoffman, for defendants.

TAYLOR, J.:—This is a vendor's action, claiming personal

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judgment and, in default of payment, declaration of vendor's lien and an order for sale.

The default is admitted, and the only question which I am asked to determine is one arising from the interpretation of the several agreements between the parties, and to declare whether or not the defendants have, in the circumstances which have happened, still the right to compel the plaintiffs to make title to portions of the lands agreed to be sold under covenants contained in the documents.

The first agreement between the parties was made on August 15, 1906. The plaintiffs agreed to sell and the defendants agreed to purchase 40,204.77 acres, more or less, of land in this Province for $281,433.39; $1,000 down, $9051.19 upon execution of the agreement, and the balance in extended payments, with interest thereon. The purchasers were given the right to take immediate possession. The portion of the agreement specially relating to the matter now under consideration reads as follows:—

"The said purchasers to have the privilege of calling for quarter-section contracts substantially in accordance with this contract at any time during the first year upon payment of the further sum of 75 cents per acre on each contract called for, and also to have the privilege at any time during the currency of this agreement, or any agreements made pursuant hereto, upon payment being made by them of the full amount of principal and interest due at that time upon any quarter-section of land herein described, to call for and receive a deed or transfer of said tract of land so paid for. It is further agreed that upon default in payment of any moneys hereby secured the purchasers may surrender to the vendors any of the said land for which quarter-section contracts have not issued, and no action shall thereafter be brought or carried on upon the purchaser's covenants to pay therefor."

Purporting to be made according to this agreement, the parties entered into separate agreements for each of the quarter-sections described in the statement of claim (and, I take it, covering all the land in the original agreement) each contract being dated as on August 15, 1906. Each of these contracts purports to be an entire contract containing all the terms and conditions in reference to the agreement as to the particular quarter-section described therein; recites the agreement to buy and sell the particular quarter; the amount of the purchase price; where it is payable; how payable; with what interest thereon; contains the usual covenants for title and conveyance upon payment, and

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provisions as to cancellation on default. I take it that it was admitted that the purchasers completely carried out the terms of a number of these sub-purchase agreements, and had obtained title thereto prior to the action being brought.

On December 1, 1919, another agreement was made between the parties. At that time the defendants were in default in their payments. This agreement recites that by certain agreements set out in the schedule annexed the parties agreed for the sale and purchase of the lands described in the schedule. An examination shews that the schedule refers not to the first agreement but to the several contracts for different quarter-sections. The agreement goes on to recite that there still remains due and owing in respect of the said agreements to the date of figuring, $19,515.25; that the purchaser has requested an extension of time, which the vendor has agreed to on the terms contained. It is then agreed that this balance shall be paid as follows:—one-fifth in cash on execution of the document, and the balance in four equal consecutive half-yearly instalments, with interest at 8% (this is a higher rate than previously paid), and the purchaser covenanted to make the payments accordingly. Then follow two paragraphs pertinent to the present dispute:—

"And it is hereby declared and agreed that the said agreements in the said schedule mentioned, and all covenants, clauses, provisoes, powers, matters and things whatsoever contained therein, shall continue in force and applicable to the said amounts and dates and altered terms of payment herein contained.

Provided, however, that these presents shall not create any merger or alter or prejudice the rights of the vendor as regards any security collateral to the agreements mentioned in the said schedule, or as regards any surety or subsequent purchaser or any person not a party hereto liable to pay such purchase moneys or interest in the said lands, or the rights of any such surety, subsequent purchaser or other person, all of which rights are hereby reserved."

Since the execution of this last mentioned agreement the defendants applied for and obtained title to certain quarter-sections upon payment of the full balance, figured after applying the $3903.05 payment made on the agreement of December 1, 1919, rateably over the whole tract. As to one of the quarter-sections referred to in the statement of claim, the northwest quarter of sect. 3-28-25, west of the 2nd meridian, I disposed of the question at the trial. For this particular quarter the plaintiffs, on May 27, 1921, received payment of $796.78, the amount

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admitted to be sufficient, if the defendants' contention is correct, to get title. The money was accepted and held, and was afterwards applied to the contract. The correspondence distinctly shewed that it was paid for the specific purpose of obtaining title to that quarter-section, and, in my opinion, it was not open to the plaintiffs to take the money and apply it on the contract generally and then refuse to give title. The quarter-section had been re-sold and the moneys represented payments made by the sub-purchaser. This sub-purchaser was threatening specific performance, and to save any further loss of time, on the suggestion of counsel for both parties, I made an order that the title to this particular quarter-section be vested in the defendants. It would take some months to get a transfer, and it looked as if the purchaser might be in a position, owing to the protracted delay, to take action to recover the purchase price already paid, and damages, and it was to the defendants an advantageous sale, for which the defendants might for their failure to make title be responsible.

It will be noted that three of the payments in the extension agreement are now overdue. Agreements for the sale of all of the lands have been made, except as to one section. This one section, it was sworn, is alone worth $35 an acre, and the balance now against the whole contract, after crediting all payments, is only around $4,000. The sub-purchasers have not been joined as parties defendant to the action, and if I were of the opinion that the plaintiffs' contention is correct it seems to me that the action would have to be stayed, until the sub-purchasers were added as parties defendant, and given an opportunity to be heard before the matter was decided against them. However, in my opinion, it is clear that the plaintiffs' present contention is wrong and untenable. I take the position to be this: That on December 1, 1919, all of the lands described in the 16 agreements referred to in the schedule to that agreement had been under re-sale by the defendants, except one section. These sub-purchasers had, as such, rights not only against the defendants but also against the plaintiffs. The balance due on each agreement is computed in the schedule; each sub-purchaser at that date had the right, I take it, to have his purchase money applied in payment of the balance due on his particular quarter to the plaintiffs. As against a sub-purchaser, the plaintiffs had a charge against each quarter-section only for the balance due on that quarter-section. The agreement of December 1, 1919, shews clearly that the draughtsman took this into consideration in drawing the agreement, and it

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is quite clear to my mind from a perusal of the several agreements that the plaintiffs knew that the defendants bought for a re-sale in smaller portions, and knew that re-sales had been made by the defendants. It was not then open to the plaintiffs and defendants to enter into an agreement, the effect of which might be to charge against any quarter-section so resold more than was already charged against it as the balance due under the separate agreement issued for that quarter-section, and in the portion of the agreement of December 1, 1919 to which I have referred it is expressly agreed "that these presents shall not create any merger," and that "all covenants, clauses, provisoes, powers, matters and things whatsoever contained therein" (that is, in each of the separate agreements) "shall continue in force and applicable to the said amount and dates and altered terms of payment herein contained."

The result, therefore, was that the $3,903.05 then immediately paid by the defendants was to be applied, not on any one quarter but rateably on the full balance of $19,515.25 agreed as outstanding at the time of the execution of the agreement; that payment and any other payment made generally under the agreement of December 1, 1919, should be applied in reduction of the balances due under the several contracts in the proportion in which the balances as stated in the schedule as due under each contract bear to the whole $19,515.25. And, on default in the making of the payments as agreed in this extension agreement, the plaintiffs have, in addition to the remedies they previously possessed, a right of action upon the general covenant to pay in the extension agreement. Nothing in the extension agreement of December 1, 1919, however, can be taken to abridge the right of the defendants to pay any moneys on any particular quarter-section, and on payment in full of the balance due under any one of the several agreements referred to in the schedule to require title to be made thereunder. There will be a declaration accordingly.

What disposition should then be made of this action? Under the covenant contained in the extension agreement, the plaintiffs are entitled to personal judgment for the balance unpaid on these covenants when action was commenced. The agreement contains no acceleration clause. Three payments, each of $3,903.05, had accrued due on the first days of June and December, 1920, and the first of June, 1921, respectively, with interest from December 1, 1919, at the rate of 8% on the whole balance remaining outstanding, arrears of principal and interest bearing interest at the same rate.

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If counsel cannot agree on what sum then remained unpaid, there will be a reference to the local Registrar at Regina to take the necessary accounts and find the balance then outstanding, and there will be personal judgment against the defendants for any balance so found to be then unpaid.

The defendants are entitled to credit for the payments made before the issue of the writ, and purporting to have been made on specific lands and not heretofore applied as of the date of payment; but as the rights of the plaintiffs depend on the state of accounts at the time the writ was issued, they are not entitled in the accounting to credit for payments made thereafter. It does not follow, however, that it is open to the plaintiffs to issue execution for an amount greater than the balance actually due after crediting payments received since the writ was issued.

The claim of the plaintiffs to a vendor's lien against the whole of the lands for the whole balance unpaid must be dismissed. This remedy can be obtained only in separate actions on each agreement, bringing the parties interested in the particular parcel described in each agreement before the Court and giving to them an opportunity to redeem.

I gave judgment on the counterclaim as to the northwest quarter of sect. 3 at the conclusion of the trial, for the reasons then stated.

As to costs: To the extent to which the plaintiffs have succeeded there has been no dispute between the parties. I think the costs of the plaintiffs should be limited to what is allowed on a default judgment on the King's Bench medium scale. In the defences pleaded, and counterclaim, (except the claim for damages by which costs were not increased) the defendant has succeeded and is entitled to costs.

Judgment accordingly.

KIEHL v. FUSSEL.

Saskatchewan King's Bench, Maclean, J. June 22, 1922.

FRAUDULENT CONVEYANCES (§VI—35)—*Transfer of land and chattels to wife and sons—Insolvency at time of transfer—Purpose to defeat creditors—Validity as against creditors.*]—Action to set aside certain conveyances of land and chattels as fraudulent and made for the purpose of defeating creditors. Conveyances set aside.

G. H. Barr, K.C., and *W. P. Cumming,* for plaintiff.

J. F. Frame, K.C., and *A. G. Mackinnon,* for defendants.

MACLEAN, J.:—The defendant Frederick Fussel was, when this action was brought, indebted to the plaintiff in the sum of

$3,037.60. An action was commenced for the recovery of that sum. The defendant filed a defence and just before the present action was brought on for trial the defendant consented to judgment in favour of the plaintiff for the amount claimed, and I am informed executions were issued in due course. The plaintiff's claim referred to above was for part of the purchase price of land sold to the defendant Frederick Fussel. The plaintiff before bringing either this action or the other attempted to seize the grain grown on the land sold to the defendant, but before he was able to complete seizure the grain was hauled away. Immediately upon the defendants learning that the plaintiff had attempted to seize the grain, the defendants, although in the midst of harvesting, proceeded to Regina, and there gave a solicitor instructions for the preparation of the bills of sale, transfers and mortgage referred to in the statement of claim and a short time later executed those documents whereby the defendant Fred Fussel, who is the father of the other male defendants and the husband of the defendant Karolina Fussel, transferred to his wife the homestead on which they lived and to the sons certain of his lands, and to two of his sons, Martin and William, practically all his goods and chattels. It was contended on behalf of the defendant that these transfers were merely in pursuance of a family arrangement and carrying out a policy which the defendant Frederick Fussel had observed in regard to older sons; that is, as each son signified his intention of leaving the father's house and starting an establishment of his own, the father transferred a quarter section or more and transferred certain horses and machinery to him.

I have no doubt that the defendant Frederick Fussel intended to deal with his two younger sons, William and Martin, as he had dealt with the other sons, and that when either of them intimated a desire to leave his father's home and set up for himself there would have been a transfer of land and chattels from the father. There is no evidence that either Martin or William had signified his intention of setting up for himself, and there is no evidence of any former arrangement whereby the homestead was to be transferred to Karolina Fussel. It was contended that the transfer of land to Frederick F. Fussel was simply carrying out an arrangement which had been delayed through oversight when Frederick F. left some years before and started a home of his own. I find, however, that no matter what the intention of Frederick Fussel may have been in respect to providing for his sons and his wife, the whole trans-

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action was precipitated by the fact that the plaintiff had taken active proceedings towards realising his claim against Frederick Fussel and that the transfers in question, both of goods and lands, were for the purpose of preventing the plaintiff from realising his claim out of such goods or lands, and that those transfers did have the effect of delaying and hindering the defendant in the realising of his claim.

I find further that the defendant Frederick Fussel was rendered insolvent by making the transfers complained of, and I hold that not even the carrying out of his generous and laudable family arrangements can be permitted to defeat the rights of creditors. The defendant Frederick Fussel must be just as well as generous, and his being generous is subject to his being just.

The transfer of the homestead to Karolina Fussel will not be set aside, but the homestead, that is the S.E. 28-23-20, W. 2nd M. shall be made subject to the plaintiff's execution against Frederick Fussel. The two bills of sale in question, and all the transfers made by Frederick Fussel, and the mortgage by Frederick F. Fussel to Karolina shall be set aside and are hereby set aside and declared void as against the plaintiff and the other creditors of the defendant Frederick Fussel.

The plaintiff will have the costs of the action.

Judgment accordingly.

Re GAUDREAU; Ex parte DOUGLAS BROS.

Saskatchewan King's Bench in Bankruptcy, MacDonald, J. May 25, 1922.

BANKRUPTCY (§III—28)—*Unregistered lien note—Status of trustee to attack—Conditional Sales Act R.S.S. 1920 ch. 201, sec. 2 (1).*]—Application by a trustee under the Bankruptcy Act for directions as to whether or not the holders of a lien note have a lien on certain chattels of the debtor's estate. [See Annotations 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

R. Robinson, for trustee; *J. L. McDougall*, for Douglas Bros.

MACDONALD, J.:—The facts are that Douglas Bros. hold a lien note on such chattels, but the same is not registered in the proper registration district in that behalf, and the trustee claims the same is void as against him because of such non-registration.

I am of opinion that the trustee has no status to attack the lien note. Section 2 (1) of the Conditional Sales Act, ch. 201, R.S.S. 1920, reads as follows:—

"2.—(1). Whenever on a sale or bailment of goods of the

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value of $15.00 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished."

The trustee is not a purchaser or mortgagee of or from the buyer or bailee, nor does he hold a judgment, execution or attachment against the purchaser.

The trustee relied on my decision in *Re Hamer, Ex parte Royal Bank of Canada* (1922), 66 D.L.R. 800, in which I held that a trustee under the Bankruptcy Act has a right as representative of the creditors of the debtor, to attach a chattel mortgage for non-compliance with the provision of the Chattel Mortgage Act, R.S.S. 1920, ch. 200, requiring registration. But the wording of the provision in the Chattel Mortgage Act respecting the effect of the omission to register a chattel mortgage is entirely different from that of the provision in the Conditional Sales Act above quoted. In the Chattel Mortgage Act the provision is that if the mortgage is not registered it "shall be absolutely null and void as against the creditors of the mortgagor," etc. The decision is, therefore, not in point here.

I am, therefore, of opinion that as against the trustee, Douglas Bros. have a valid lien on the chattels in question.

The trustee shall pay Douglas Bros. their costs. The costs of the trustee shall be paid out of the estate.

Judgment accordingly.

Re GAUDREAU; Ex parte CARRUTHERS.

Saskatchewan King's Bench in Bankruptcy, MacDonald, J. May 25, 1922.

BANKRUPTCY (§III—28)—*Lien note—Insufficiency of description—Status of trustee to attack.*]—Application by trustee for directions as to whether a claimant has any lien on certain chattels of the debtor's estate.

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R. Robinson, for trustee; *J. L. MacDougall*, for claimant.

MACDONALD, J.:—This is an application by the trustee for directions as to whether James G. Carruthers, the claimant, has any lien on certain chattels of the debtor's estate. As a fact, the claimant has a lien note on certain horses, but the trustee claims the description is not sufficient, and that, therefore, it is void as against him.

For the reasons given by me in *Re Gaudreau, ex parte Douglas Brothers* decided this date, (1922), 68 D.L.R. 782, the trustee has no status to attack the lien note.

I am, therefore, of opinion that the lien note of the claimant is valid as against the trustee, and I may call attention to the fact that under sec. 46 (3) of the Bankruptcy Act, 1919, ch. 36, the claimant must, within 10 days of demand by the trustee, identify the chattels in question.

The trustee shall pay the costs of the claimant, and shall have his costs out of the estate.

Judgment accordingly.

Re KURYLO ESTATE.

Saskatchewan District Court, Mackenzie, J. May 29, 1922.

EXECUTORS AND ADMINISTRATORS (§IVA—80)—*Proof and allowance of claims—Trustee Act R.S.S. 1920, ch. 75—Notice of dispute—Passing of accounts—Error—Estoppel of administrator.*]—Appeal by administrator from the judgment of a Surrogate Court Judge. Affirmed.

P. H. Gordon, for administrator.

A. C. Ellison, for International Harvester Co.

MACKENZIE, J.:—This is an appeal by the administrator of the above estate from an order made by the Surrogate Court Judge of the Battleford district, at Battleford, on April 29, 1922. By that order the said Judge directed that the International Harvester Co. of Canada, and one Lorne Lelacheur, who had filed claims respectively against the above estate, should share in the distribution thereof for their said claims, *pro rata*, so far as the assets of the said estate should extend, after payment of preferred claims.

The administrator now contends that the said Judge should have found said claims barred by notice given by the administrator in that behalf under the Trustee Act, R.S.S. 1920, ch. 75, and so refused them leave to share in such distribution.

The appeal is taken now under sec. 35 of the Surrogate Courts Act, R.S.S. 1920, ch. 41, and the procedure followed has

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been that prescribed by Rule 42 of the Surrogate Court Rules, all of which appear to have been properly complied with.

The facts, as they are shewn to have developed, according to the material on file, are as follows: letters of administration of the said estate were issued by the said Surrogate Court, to John Peehodzilo, the administrator, on December 5, 1916. On September 29, 1920, an order was made by the said Surrogate Judge on the application of the said administrator, for the passing of his accounts. The material part of such order reads as follows:—

"Let the creditors, next of kin, and all persons interested in the estate, attend before the presiding Judge of the Court in Chambers, in the Law Courts building in Battleford, at 10.30 o'clock in the forenoon on Friday, the 10th day of December, 1920, or so soon thereafter as counsel can be heard for the purpose of finally passing the said accounts and fixing the compensation to be allowed to the administrator for care, time, trouble and pains expended and borne in and about the said estate and in administering the said estate; and in the meantime, let the said accounts be examined and inquired into and solicitors' costs prior to this application be taxed by the clerk of this Court at such time and place as he may appoint and so that he shall bring into Court his report thereon upon the return of this summons together with a copy of the appointment of the clerk of the Court for this examination and inquiry be served upon the persons, and in the manner following upon the following persons at their addresses as here set forth, by fully prepaid and registered letter, viz: The International Harvester Co. of Canada Ltd., North Battleford, Sask. Lorne Lelacheur, Hafford, Sask., Phemie and Simon Kurylo at Mianowice, P.O. Uhrynow, Sokal, Galicia, George H. Heuring, Highgate, Sask., and upon all other persons interested by filing a copy hereof in the office of the clerk of this honourable Court, and that such notice shall be completed at least days prior to the date so to be appointed by the clerk as aforesaid, and shall be sufficient as to all parties concerned and notice is hereby given that unless good and sufficient cause then be shewn to the contrary may be passed and allowed as filed."

On November 10, 1920, the clerk of the Surrogate Court issued an appointment pursuant to the said order, and returnable before him on December 10 following, for the purpose of examining and inquiring into the accounts of the said administrator.

On November 13, 1920, a copy of said order and appointment

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was personally served upon said International Harvester Co. of Canada, and on the said Lorne Lelacheur respectively. At the same time there was served on each of the said claimants a notice of dispute, addressed to them respectively, which reads as follows:—

"Please take notice that under sec. 46 of the Trustees Act, being ch. 46 of the Revised Statutes 1909, and amendments thereto, I hereby give you notice in writing that I intend to avail myself of the above section, and I notify you, the above named creditors, that I, the administrator of the above-named estate reject or dispute the claim filed by you against the same estate." Dated at North Battleford, Sask. this 9th day of October A.D. 1920. John Pochodzilo, administrator of the estate."

Upon the return of the above appointment on December 10, 1920, no one appeared on behalf of the administrator before the clerk of the said Surrogate Court, and such appointment was thereupon adjourned *sine die*. The representative of the International Harvester Co. was there ready to prove its claim, but whether anyone appeared for the said L. Lelacheur is not disclosed.

No further steps were taken in the matter of passing said accounts until March 3, 1922, when the administrator obtained a fresh order and appointment, almost exactly similar in form to the one set forth above, and both returnable on March 21, 1922. Copies of such order and appointment were addressed to and served upon the International Harvester Co., and the said L. Lelacheur, on March 4, 1922, pursuant to the terms of the said order.

On March 21, 1922, upon the return before him of the said appointment, the clerk of the Surrogate Court proceeded to examine into the accounts of the administrator as filed, and made his report under said date, in which he allowed the claims of the said two claimants.

On April 18, 1922, according to a fiat of that date, which appears on the file, the said Surrogate Court Judge dismissed an application to bar the said claims, without costs, and on April 27, 1922, the said Judge made the order from which this appeal is now taken as aforesaid.

My attention was drawn by the solicitor for the administrator to the fact that the notice of October 9, 1920 disputing such claimants' claims by error cited the Trustee Act as ch. 46 of the R.S.S. 1909, and amendments thereof, instead of ch. 75 of the R.S.S. 1920. Counsel for claimant, however, declined to rest his right to succeed upon such error, but took the broader

ground that by serving the claimants with the orders and appointments for passing accounts, both with, and again, subsequently, to the notice of dispute in question, the administrator was estopped from now setting up the notice of dispute as a bar to said claims. I think this contention is correct. To my mind, the action of the administrator in serving the said claimants respectively as aforesaid with the above orders and appointments is inconsistent with the conclusion that it would be necessary for said claimants to institute actions to establish their claims,, as prescribed by the Trustee Act, but is consistent rather with the conclusion that all they would have to do would be to prove their claims before the clerk in a summary way. To bar such claims effectively, the administrator should have served each of the claimants with the notice of dispute alone and not have gone on treating them as he did as if they were still subsisting creditors of the said estate. The appeal is therefore dismissed with costs.

Appeal dismissed.

Re JAMES MORRISON ESTATE.

Saskatchewan King's Bench, MacDonald, J. December 2, 1921.

WILLS (§III—70)—*Construction—Devise of farm on condition—Condition void for uncertainty—Life interest subject to forfeiture.*]—Application by executors to the Court for direction and advice regarding a will.

P. H. Gordon, for executors and for Amanda May Morrison and Eleanor V. Dinnin.

J. F. Frame, K.C., for Minnie E. Hamilton and George A. Morrison.

H. Fisher, for George Herbert Morrison, and infant; James A. Morrison not appearing.

MACDONALD, J.:—James Morrison died on or about June 28, 1920, having his fixed place of abode at Abernethy, Saskatchewan, and having made and published his last will and testament, which reads as follows:—

"This is the last will and testament of me, James Morrison of the Village of Abernethy in the Province of Saskatchewan, postmaster, made this ninth day of June in the year of our Lord one thousand nine hundred and nineteen.

I revoke all former wills and testamentary dispositions by me at any time heretofore made, and declare this to be my last will and testament.

I direct all my just debts, funeral and testamentary expenses

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to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my death.

I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: To my son James Alexander Morrison, the south-east quarter of section twenty-one, township twenty, range eleven, west of the second meridian, and the north half and south-west quarter of section twenty-two, township twenty, range eleven, west of the second meridian, on the condition that he lives on the farm and farms it himself until such time as he is in a position to retire from active work or is compelled to give up on account of ill-health or death, and in such case whichever may first happen, then the property is to descend to his son, George Herbert Morrison, absolutely.

And I direct that my executors make the necessary arrangements for my son, James Alexander Morrison, to take possession of the property as soon as practicable after my decease.

And I further direct if there is any share of the crop which is due or to become due to me at my decease, such share shall be equally divided between my daughter Mrs. Minnie Hamilton and my son George Andrew Morrison.

And I further direct that in case my son James Alexander Morrison does not comply with the conditions herein contained, that the property hereinbefore described must be sold by public auction or private contract whichever my executors deem advisable and the proceeds be divided in equal shares between my children who then may be living.

And I give, devise and bequeath unto my daughter, Amanda May Morrison all my real and personal property in the village of Abernethy of which I may die possessed, and all Government bonds which I may hold, and the balance of all monies standing to my credit after my just debts and funeral and testamentary expenses have been paid.

All the residue of my estate not hereinbefore disposed of, I give, devise and bequeath unto my daughter, Amanda May Morrison.

And I nominate and appoint John Robert Dinnin of the post office of Abernethy, farmer, and George Mitchell of the village of Abernethy, implement agent, to be executors of this my last will and testament.

In witness whereof I have hereunto set my hand the day and year first above written.

Signed, published and declared by the said James Morrison, the testator, as and for his last will and testament, in the pres-

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ence of us, who both present together at the same time, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as Witnesses.

A. V. Brooke, Abernethy, Sask.

H. H. Turner, Abernethy, municipal clerk."

The south-east quarter of sect. 21 and the north half and south-west quarter of sect. 22 referred to in the will are under lease to one Albert Ferrier, which lease is dated November 10, 1919, and expires March 15, 1925. The said lessee has farmed the said lands during 1920 and 1921 but apparently is not in a position to continue farming the land, and his financial position is stated to be such as to make his covenant of doubtful, if of any value. He is willing to surrender the lease. The executors have applied to the Court for direction and advise on the following questions, namely:—

(1) Whereas one Albert Ferrier, has the west half and the north-east of sect. 22, and the south-east of 21, all in tp. 20, r. 11, west of the second meridian, Saskatchewan, rented under lease which expires March 15, 1925, whether the executors should endeavour to get a cancellation of the said lease to carry out the terms of the said will?

(2) If so, what amount should be paid by the executors to the said Albert Ferrier for cancellation of the said lease?

(3) When the beneficiary, James Arthur Morrison should decide whether or not he will take possession of the said property?

(4) In the event of the said lease being continued, whether the rent payable thereunder shall form part of the residue or shall go to one or more specific heirs?

(5) In the event of the lease being continued, who shall be responsible for the payment of the mortgage on the said property?

(6) How many crops and for what years should Minnie Eliza Hamilton and George Andrew Morrison participate in?

(7) Should the residue of the estate, including monies in bank be paid to Amanda May Morrison after payment of the debts, or should it be retained until the lease of the hereinbefore mentioned property to Ferrier is cancelled or surrendered, or until the estate is administered?

(8) What part of the estate should be chargeable with the administation expenses, the executors' fees and the closing-out of the estate, including solicitors' fees, and should any of the legacies be rebated?

(9) In the event of James Alexander Morrison taking the

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said land, who shall judge as to his being in a position to retire from active work or the condition of his health?

In view of the fact that the said Albert Ferrier is now willing to surrender the lease without any payment therefor, questions 1 and 2 are now to be answered as though they read, whether the executors are justified in accepting the surrender of the said lease. In view of the inability of Albert Ferrier to perform his covenants under the lease and of his financial irresponsibility, it seems clear that it would be for the benefit of the estate as a whole that a surrender of the lease should be accepted. Learned counsel for the infant, George Herbert Morrison, however, contends that such surrender should not be accepted by the executors, his argument being that while the lease is subsisting James Alexander Morrison mentioned in the will cannot fulfil the condition as to living on the farm and farming it himself, and that if he died while it was [not] impossible for him to fulfil the conditions he would be excused from fulfilling them and the land would go to the said infant absolutely. He, therefore, maintains that it would prejudice the infant if a surrender of the lease were accepted. It seems to me, however, that when a person is excused from the performance of a condition because of the impossibility of such performance, it is on the ground that such person was ready and willing to perform the condition if it were possible for him to do so. If such be the true view, then the removal of the impossibility will only render possible for James Andrew Morrison putting into effect the intention which he would, necessarily, have, in order to be excused on the ground of impossibility. Moreover, in the will, the executors are directed to make the necessary arrangements for James Alexander Morrison to take possession of the property as soon as practicable after the decease of the testator. It seems to me, therefore, clear that the executors are justified in accepting the surrender of the lease.

The third question asked is, when the beneficiary James Arthur Morrison should decide whether or not he will take possession of the said property. According to the authorities it is clear that he must commence living on the farm and working the farm within a reasonable length of time after the executors are in a position to give him possession of the lands. I do not think it would be proper for me at the present stage to fix any period of time within which James Alexander Morrison should take possession. If, after the lapse of what is considered a reasonable time, it should be claimed that James Alexander Morrison has not fulfilled the said condition, the question can

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then be determined in proper proceedings in that behalf.

In view of the fact that the lessee is willing to surrender the lease, and the executors are now advised that it is quite proper for them to accept such surrender, it becomes unnecessary to answer questions 4 and 5. Should James Morrison take possession of the lands in question, he will become responsible for interest on the mortgage during the time that he is so in possession, but the principal of the mortgage should be borne by whoever may become subsequently entitled to the land.

As to the question, how many crops and for what years should Minnie Eliza Hamilton and George Andrew Morrison participate in, the same is not free from difficulty. The deceased died on or about June 28, 1920, and the rent reserved was to be paid by delivery to the lessor of a portion of the crop grown on said land in each year. As the lease commenced on November 10, 1919, it is clear that no rent was payable until the fall of 1920. There was therefore no rent due at the date of the decease of the testator. The question remains as to what is the meaning of the expression, "share of the crop to become due to me at my decease." The language is not at all clear, but on the best consideration I can give to the matter, it seems to me that what the testator intended was that the share of the crop payable to him as rent out of the crop growing on the land at the time of his death should go to the said Mrs. Hamilton and George Andrew Morrison, and I do not think they are entitled to any share of the crop grown on the land in the year 1921. They are entitled to the share coming out of the 1920 crop.

In respect to (7) and (8), I am of opinion that the residue should first be resorted to for payment of the administration expenses, including executors' remuneration and solicitors' fees. Should there not be enough to satisfy these demands, then the legacies should abate proportionately. The executors should before distributing the rest of the estate, retain sufficient funds for said expenses.

The last question asked is, in the event of James Alexander Morrison taking the said land, who shall judge as to his being in a position to retire from active work or the condition of his health?

It seems to me that the condition that James Alexander Morrison shall live on the farm and farm it himself until such time as he is in a position to retire from active work or is compelled to give up on account of ill-health is so indefinite as to be void for uncertainty. See *Re Ross* (1904), 7 O.L.R. 493; *Fillingham*

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v. *Bromley* (1823), 1 Turn. & R. 530, 37 E.R. 1204; *Clavering* v. *Ellison* (1859), 7 H.L.C. 707, 11 E.R. 282; *Re Viscount Exmouth* (1883), 23 Ch. D. 158, 52 L.J. (Ch.) 420, 31 W.R. 545; Jarman on Wills, 6th ed. p. 1465.

The result is that the said James Alexander Morrison is given in the lands in question a life-interest, subject to forfeiture if he should not fulfil the condition of living on the farm and farming it until his death. It is quite possible that a question may arise as to whether the requirements of his living on the farm and farming the land have been complied with, but such a question can only be decided when it arises, and in view of all the facts and circumstances of the case. Costs to all parties shall be paid out of the estate.

Judgment accordingly.

CLARKE BROS. Ltd., v. GOODIN.

Saskatchewan King's Bench, Brown, C.J. Sept. 6, 1922.

ASSIGNMENT (§II—20)—*Equitable assignment—Evidence — Verbal agreement—Affidavit.*]—Appeal from a judgment of a District Court Judge. Reversed.

P. H. Gordon, for appellants.

No one for respondent.

BROWN, C.J.:—With deference to the opinion of the District Court Judge, I think there is a clear distinction between the case of *Hall* v. *Prittie* (1890), 17 A.R. (Ont.) 306, to which he refers, and the case at Bar. In the case of *Hall* v. *Prittie,* Osler, J.A., at pp. 310 and 311 of the report emphasises the fact that there was no evidence in that case apart from the order itself which would indicate that any particular funds had been identified or any parol agreement had been made with reference to such a fund. In the case at Bar, para. 5 of the affidavit of Maurice N. Chase is as follows:—

"5. That on or about the 7th day of December, 1921, I ascertained that one Nels Pederson, of the village of Young, aforesaid, whose name is sometimes spelled 'Nels Peterson,' was indebted to said Charles Goodin in the sum of $300, or a little more, and on said December 7, 1921, the said Charles Goodin agreed to turn over or assign to the Monarch Lumber Co. Ltd., to apply on his indebtedness as aforesaid, the said sum of $300 then owing to said Goodin by said Nels Pederson, and in order to carry out said agreement, the said Charles Goodin gave to me as agent for the Monarch Lumber Co., a document hereto attached and marked ex. 'B' to this my affidavit."

The facts as proved by this affidavit constitute, to my mind,

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an equitable assignment; and the order was simply giving effect to the assignment which was verbially made.

In the result, the appellants succeed in their appeal; the money in Court to the extent of $300 will be paid out to the claimants, and the claimants will have their costs of the appeal and of the application to the District Court Judge against the plaintiffs.

Appeal allowed.

KAJNER v. KOVACZ.

Saskatchewan King's Bench, Maclean, J. June 28, 1922.

BOUNDARIES (§IIA—8)—*Mounds—Central mound—Witness mound—Plans and surveys—Dominion Lands Act 1908 (Can.) ch. 20—Dom. Lands Surveys Act 1908 (Can.) ch. 21—Homestead—Fence—Trespass—Removal of crops—Damages.*]—Action for trespass to land. Judgment for plaintiff.

J. E. Doerr, for plaintiff.

A. G. Mackinnon, and *Malone*, for defendant.

MACLEAN, J.:—In this case the plaintiff claims damages for trespass upon and the removal of crop in 1921 from a parcel of land which he alleges is a portion of his homestead, the S. E. ¼ of 16-16-15-W. 3rd. The defendant alleges that the parcel in question is a portion of his homestead, the S. W. ¼ of the same section and in a counterclaim asks for damages for trespass upon the said parcel and the removal of crops therefrom in 1918-19-20. To determine whether the defendant trespassed upon the land of the plaintiff or *vice versa*, it is necessary first to determine the location of the boundary line between the two quarter sections described.

A grant or patent for the S.E. ¼ was issued by the Crown (Dominion) in June 1903 to one Anton Huck, who entered as a homesteader on that quarter possibly 3 years or so earlier. Huck sold all his right and estate in the land granted to him to one Horak in 1916, and Horak in turn sold to the plaintiff in December 1917. A grant or patent for the southwest quarter was issued by the Crown (Dominion) in 1901, to one Kleckner, who entered on that land as a homesteader three or more years earlier. In 1910 Kleckner executed an agreement of sale of all his rights and estate in that quarter to the defendant. Huck and Kleckner, the original owners and occupiers of the south-east and south-west quarters respectively were unable to locate a surveyor's mound marking the southerly extremity of the boundary between the two quarters, and they, along with the occupiers of the other two quarters in

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the same section, agreed upon a conventional boundary, the southern extremity of which is practically midway between the south-east and the south-west corners of sect. 16, and which boundary practically divides the southern half of sect. 16 into two equal portions. The south-east and the south-west corners of sect. 16 are marked by surveyor's mounds and there is no dispute about the exact location of those corners. The conventional boundary decided upon by the original occupiers was marked by a roadway and was recognised by the successive occupiers of the two quarters until 1921. In 1920 the plaintiff built a fence along the middle of the roadway referred to, intending that the fence should mark the boundary between his quarter and the defendant's. This fence was erected with the knowledge of the defendant and for the time being was recognised by the defendant as the boundary line.

In February, 1917, a new plan of tp. 16 in r. 15 was prepared in the Surveyor General's Office at Ottawa, and, in due course, a copy of it was filed in the Land Titles Office of the Registration District in which the land in question was located. This plan indicates the central mound marking the southern extremity of the boundary line between the two sections in question at a point considerably east of the southern extremity of the fence and roadway which hitherto marked the conventional boundary. Presumably, from the information given on that map, the defendant came to the conclusion that his land, the south-west quarter, extended considerably west of the conventional boundary. In 1921 the defendant harvested the crop grown on that parcel of land lying east of the conventional boundary and extending east to the boundary line indicated on the map of 1917, which parcel theretofore had been considered to be a portion of the plaintiff's land.

The original survey of this section and the adjoining sections was made by J. J. Francis, a Dominion Land Surveyor in 1882. His field notes indicate that he placed a mound midway between the south-east and the south-west corners of the section. The distance between those two corners is indicated on Francis' field notes as 80.10 chains, and the central mound is indicated as a distance of 40.05 chains from either corner. A survey was made by James Warren, a Dominion Land Surveyor in 1906. His field notes shew that he did not find the mound indicated on Francis' field notes, nor any mound marking the boundary in dispute, and that he did not establish any mounds. Warren shews the distance between the south-east and the south-west corners as 83.54 chains. In 1908, there was an-

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other resurvey by one C. Bourgeault, Dominion Land Surveyor. His field notes shew a distance of 83.42 chains between the south-east and the south-west corners of the section and that he found an obliterated witness mound at a point 45.25 chains east of the south-west corner of the section.

An official plan of the township was prepared in the Surveyor General's office at Ottawa in 1909, and the compilers, from the conflicting information supplied by the field notes of the several surveyors, decided to indicate on the official plan in preparation, the mound as shewn by Francis and the chainage as shewn by Bourgeault; that is to say, the official plan of 1909 indicates a true or central mound marking the southern extremity of the boundary between the two quarter sections in question at a point 45.25 chains east of the southwest corner of the section. It will be remembered that Bourgeault, in his field notes, indicated at this point an obliterated witness mound, and not a true mound. The plan of 1917 was presumably prepared insofar as sect. 16 is concerned, from the official plan of 1909.

The questions that arise here are practically the questions that presented themselves to Wetmore, C.J., in *Rohrke* v. *Marshall* (1910), 3 S.L.R. 82, summarised by the Chief Justice in that case as follows at p. 83:—

"(a) Was a central mound placed between the two section-corner mounds indicating where the line between the two quarter-sections in question should start? (b) If there was, where was it placed? (c) If no central mound was placed or can be found, where is the dividing line between these quarter-sections located?"

The undisputed evidence of all the witnesses is to the effect that the southern boundary of sect. 16 passes through a slough, which extends at times from about 50 yards east of the central point of the southern boundary to 55 or 60 yards west of that point, and which slough, while considerably less in extent north and south, is still of substantial width. The depth of water there varies considerably with the season, but, at all times, there is such depth of water as would make it impractible to erect a surveyor's mound or other usual indications at the central point. This slough is not shewn on Francis' plan, nor is there any reference to it in his field notes. The evidence is that the slough has been there since the original occupiers on this land made homestead entries, shortly before 1900, and the reasonable inference is that the slough was there in the early eighties, when the first survey was made. It is quite clear, therefore, and I find that Francis did not erect a mound at the point

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indicated by him in his field notes, that is at the centre of the southern boundary of the section nor at a point 40.05 chains east of the south-west corner. There is a mound, however, at the point where it is so indicated in the field notes of Bourgeault, that is, 45.25 chains east from the southwest corner, or practically 3.54 chains east of the centre of the southern boundary of the section, and a very short distance east of the eastern end of the slough. The evidence is that this mound lies a considerable number of feet south of the direct line connecting the south-east and the south-west corners. The fact that it does so lie may be an explanation of Warren's failure to find any mound on that boundary. The evidence also is that the mound is constructed in the manner in which witness mounds were constructed and not in the manner in which true mounds marking actual corners were constructed. A letter from the Surveyor General's Office to the plaintiffs solicitors was put in evidence, on consent of all parties, and that letter contains the following: "When asked why he had shewn this as a witness mound, Mr. Bourgeault replied as follows: 'I reported what I thought it was, the shape and position of the M. indicated that a wit. M. had been erected.'" There was some evidence that in the late nineties there was lying on the mound a small post or piece of wood, to which there was attached a piece of tin on which there was some lettering, such as one might expect to find on a witness mound. There is no evidence as to what the lettering indicated. It was the practice of surveyors to construct at the nearest suitable point a witness mound on which was placed an inscription, giving the direction and distance to the actual location of a corner, when the corner was actually situate in a creek, lake, or slough, such as existed at the southern boundary of this section. If Mr. Francis, finding that he could not locate a true mound at the central point of the southern boundary, because of the existence of deep water, wished to construct a witness mound, he might reasonably be expected to place the witness mound at the nearest available point, which, according to the evidence, was immediately east of the east-end of the slough, in the vicinity where the mound on the ground is situate.

There is no evidence that the mound was placed there by Francis. The evidence is that it was not placed there by Warren. When found by Bourgeault in 1908 the mound was then in such a condition that he described it as an obliterated mound, and must have been there for many years. There is evidence that that mound had been erected prior to the middle nineties,

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and was constructed in the manner usual for witness mounds. If the mound is a Government mound, there is only one reasonable inference, and that is that it was placed there by Francis. If it was not placed there by Francis, there is no evidence that it is a Government mound. It is clear from the letter from the Surveyor General's Office already referred to, that the mound at chainage 45.25 was first indicated as a true mound and not a witness mound by the compilers of the official plan of 1909, who, so far as the evidence shews, had no other information on the subject excepting Francis' field notes, which indicated that he had placed a true mound on that boundary, and the compilers apparently passed over the conclusion arrived at by Bourgeault, who had re-surveyed or retraced the boundary in question, and had most ample opportunity of discovering the nature of the mound.

Considering the whole of the evidence I have come to the conclusion that the mound was intended to be a witness mound. In the absence of any evidence on the mound itself, or in the field notes of any of the surveyors, or in any plans, of the direction and distance to the actual corner, the witness mound is of no value in determining the actual boundary line. It is necessary, therefore, to proceed to determine the true boundary, without any assistance from the location of the mound upon the ground.

The case is practically on all fours with *Rohrke* v. *Marshall*, *supra*. The parties are entitled to have their rights adjusted as established by Francis' survey and the interpretation of that survey by the Dominion Lands Act 1908 (Can.) ch. 20 in force at that time, or the Dominion Lands Act in force between the time of the survey and the time that grants were issued by the Crown. That is what the predecessors in title of the respective parties obtained from the government by their patents.

Section 56 of the Dominion Lands Surveys Act, 1908 (Can.) ch. 21, makes provision for confirmation and correction of plans and provides that the new or final plan shall, after confirmation, become the official plan, and shall be used for all purposes instead of the old plan. The section, however, concludes with these words:—"Provided that nothing in this section shall affect any rights claimed or set up under the old plan prior to the date of the confirmation of the new plan, and that all transactions prior to that date shall remain in force as if the new plan did not exist." This section is made applicable to certain lands in this Province by the Saskatchewan Surveys Act, R.S.S., 1920, ch. 70, sec. 26, passed since *Rohrke* v. *Mar-*

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shall, supra, was decided and before the plan of 1917 was continued. The indication on the plans of 1909 and 1917 was made in error, and cannot effect the rights that had come into existance before that time. Having regard then, to the fact that prior rights are protected, it is of no practical difference whether I follow the sections of the Dominion Lands Surveys Act which are made applicable to this Province by the Saskatchewan Surveys Act or whether I take the Dominion Act as it existed in 1883. The provision in the Dominion Lands Act 1883 (Can.) ch. 17, applicable to this case is sec. 110, clause 9, which reads as follows:—

"When the lost corner is that of a quarter-section of land running east and west, the surveyor shall join by a straight line the opposite section corners on the meridians on each side, and give to each quarter section an equal breadth."

That provision has come down since that date through successive amendments and consolidations and is now clause (d) of sec. 66 of the Dominion Lands Surveys Act 1908 (Can.) ch. 21, and reads as follows:—

"When the lost corner is that of a quarter section on a section line running east and west in the interior of a township, the surveyor shall connect by a straight line, the opposite section corners on the meridian boundaries of the section and give to each quarter section a breadth proportional to the breadth shewn on the official plan of the township."

Section 66 is one of the sections of the Dominion Lands Surveys Act made applicable to this Province by the Saskatchewan Surveys Act R.S.S., 1920, ch. 70, sec. 26. The two quarter-sections are shewn as of equal breadth on the plan of 1883. Applying the clause just quoted in the Act of 1883 to the case in question it follows that the boundary between the two quarter sections shall commence at a point equi-distant between the south-east and the south-west corners of sect. 16, and shall continue along the line northward to the point marking the boundary between the north-east and the north-west quarters of the same section on the northern boundary of that section, and such line shall be the dividing line between the two southern quarters.

The evidence is that the fence erected by the plaintiff heretofore referred to lies practically along the line I have indicated. Therefore, the parcel of land in dispute, that is, the land lying immediately east of that fence, and extending to the boundary shewn on the plan of 1917 is a portion of the south-east quarter section, and is the land of the plaintiff. The plain-

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tiff has not trespassed on the defendant's land or removed any crop belonging to the defendant. The defendant's counterclaim is dismissed with costs.

At the trial, no evidence was given as to the actual amount of damages suffered. It was suggested that I should direct a reference to the local registrar to ascertain the amount of the damage and I do so. There will be judgment for the plaintiff for the amount of damage found on reference. The defendant is restrained from trespassing upon the disputed area and from interfering with the plaintiff's occupation or enjoyment thereof. The plaintiff will have the costs of the action and the reference.

Judgment for plaintiff.

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