Dominion Law Reports

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

ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. I-XXXIX. D.L.R., See Pages vii-xviii.

VOL. 39

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CASES REPORTED

IN THIS VOLUME.

Andrew v. Griffin	(Alta.)	202
Archibald v. The King	(Can.)	166
Audet v. City of Sherbrooke	(Que.)	306
Badger v. Torosoff	(Sask.)	606
Bank of Toronto v. Harrell	(Can.)	262
Beaubier v. Lloyd	(Alta.)	439
Belyea, Ex parte	(N.B.)	24
Bénard v. Hingston	(Can.)	137
Bifrost v. Houghton	(Man.)	650
Bijou Motor Parlors v. Keel	(Alta.)	410
Boutry v. North British & Mercantile Ins. Co	(Alta.)	414
Bradshaw v. Conlin	(Ont.)	86
Bredin v. Canadian Northern Town Properties	(Alta.)	20
British Canadian Fur Co. v. Cohen	(Que.)	320
Broderick v. McKay	(Ont.)	795
Brousseau v. The King	(Can.)	114
Buckley v. Vair	(Ont.)	796
Bulletin Co. v. Sheppard	(Can.)	339
Canada Furniture Co. v. Banning	(Man.)	313
Canada Hail Ins. Co. v. McIsaac	(Sask.)	714
Canada National Fire Ins. Co. v. Hutchings	(Imp.)	401
Canadian Bank of Commerce v. La Brasch	(Sask.)	398
Canadian Collieries v. Dixon	(Can.)	758
Canadian Explosives and Land Registry Act, Re	(B.C.)	764
Canadian Moline Plow Co. v. Trea	(Alta.)	581
Chalmers v. Machray	(Can.)	396
Clark v. Hepworth	(Can.)	395
Clegg v. Macdonald	(Man.)	130
Creed v. Jones Bros. & Co	(Sask.)	767
Cuddy v. Brodeur and the Prudential Trust Co	(Que.)	134
D., Re	(Ont.)	368
Daly v. Rev. Chenier	(Que.)	326
Dickson v. Podersky	(Alta.)	584
Dierks v. Altermatt	(Alta.)	509
Douglas v. Mutual Life Ass. Co	(Alta.)	601
Duplessis v. Edmonton Portland Cement Co	(Can.)	756
Dussault and Pageau v. The King	(Can. Ex.)	76
Etter v. City of Saskatoon	(Sask.)	1
Fafard v. City of Quebec	(Can.)	717
Farlinger, The King v.	(Can. Ex.)	107
Fawcett, Ex parte	(N.B.)	296
Ferrara v. National Surety Co	(Can.)	175
Fong Quing and Fong Toy, R. v	(N.S.)	60
Franklin v. Reardon	(Can.)	176
Freeman v. Montreal Locomotive Works	(Que.)	239

Geall v. Dominion Creosoting Co.....(Can.) 242
General Financial Corp. of Canada v. Le Jeune.....(Sask.) 33
German v. City of Ottawa.....(Can.) 669
Giroux v. The King.....(Can.) 190
Grace v. Kuebler.....(Can.) 39
Graham v. Crouchman.....(Ont.) 284
Grand Trunk R. Co. v. Mayne.....(Can.) 691
Great West Permanent Loan Co. v. Hutchings.....(Imp.) 401
Haeck v. Clermont and Chabot.....(Que.) 495
Hall, Re.....(N.S.) 551
Hamelin v. Newton.....(Man.) 706
Harmston v. Woods, Re.....(Ont.) 793
Henry Hope & Sons v. Canada Foundry Co.....(Ont.) 308
Hogue, R. v.....(Ont.) 99
Hopwood v. The King.....(Can. Ex.) 95
Hoyes v. Fraternal Order of Eagles.....(B.C.) 516
Hudson Bay Co. v. Heffernan.....(Sask.) 124
Imperial Bank of Canada v. Western Supply & Equipment Co. (Alta) 803
Imperial Elevator & Lumber Co. v. Village of Ponteix.....(Sask.) 768
James, The King v.....(N.S.) 377
Keegan v. The King.....(Can. Ex.) 27
King, The, v. Farlinger.....(Can. Ex.) 107
King, The, Giroux v.....(Can.) 190
King, The, v. James.....(N.S.) 377
King, The, v. Mason.....(Que.) 54
King, The, Murphy and Gould v.....(Can.) 370
King, The, Toronto General Trusts Co. v.....(Can.) 380
King, The, v. Tschetter.....(Sask.) 688
King, The, v. Zarkas, Antonio and Kortes.....(Sask.) 776
Kizer v. Morse.....(N.S.) 640
Kleparczuk, R. v.....(Alta.) 171
Law and McLean v. Sawyer-Massey.....(Alta.) 547
Lee v. Ætna Life Insurance Co.....(Que.) 294
Lees v. Morgan.....(Ont.) 259
Mah Kong Doon v. Mah Cap Doon.....(Alta.) 234
Marks v. Cohen.....(Que.) 320
Martin, R. v.....(Ont.) 635
Mason, The King v.....(Que.) 54
McAllister and Toronto and Suburban R. Co., Re.....(Ont.) 207
McCabe v. Jeffrey.....(Ont.) 797
McFarlane, Ex parte.....(N.B.) 187
McGibbon, Re.....(Alta.) 177
Mecker v. Nicola Valley Lumber Co.....(Can.) 497
Merchants Bank v. Thomson.....(Alta.) 664
Merritton, Village of, v. County of Lincoln.....(Ont.) 328
Mignault v. Desjardins.....(Can.) 400
Montmagny, Town of, v. Letourneau.....(Can.) 214
Montreal Tramways Co. v. Mulhern.....(Can.) 758
Mortimer v. Fesserton Timber Co.....(Ont.) 781
Murphy and Gould v. The King.....(Can.) 370
Neigel, R. v.....(Alta.) 154

Nelson v. Canadian Pacific R. Co	(Can.)	760
Nichols v. McNeil	(Can.)	763
Nova Scotia Tramways and Power Co., Re	(N.S.)	657
Oakville, Town of, v. Cranston	(Can.)	762
Ogilvie Flour Mills Co. v. Morrow Cereal Co.	(Ont.)	463
O'Hendley v. Cape Breton Electric Light Co	(N.S.)	412
Ontario-Hughes-Owens v. Ottawa Electric R. Co	(Ont.)	49
Orde v. Rutter	(B.C.)	456
Palmason v. Kjernested	(Man.)	237
Peters v. Charlot	(N.B.)	407
Pollard, R. v	(Alta.)	111
Pope v. The Royal Bank	(Can.)	757
Rabinovitch v. Cohen	(Que.)	320
Ramey v. Marcus	(N.S.)	725
Rat Portage Lumber Co. v. Harty	(Ont.)	425
Regina, City of, v. Western Trust Co	(Can.)	759
Reid v. Pinault	(Que.)	152
Rex v. Fong Quing and Fong Toy	(N.S.)	60
Rex v. Hogue	(Ont.)	99
Rex v. Kleparczuk	(Alta.)	171
Rex v. Martin	(Ont.)	635
Rex v. Neigel	(Alta.)	154
Rex v. Pollard	(Alta.)	111
Rex v. Richmond	(Alta.)	117
Rex v. Thorburn	(Ont.)	300
Rex v. Western Wine & Liquor Co	(Alta.)	397
Richardson v. Gilbertson	(Ont.)	56
Riehmond, R. v	(Alta.)	117
Ripka v. Georgetown Collieries Ltd	(Alta.)	593
Robert Bell Engine & Thresher Co. v. Farquharson	(Sask.)	625
Robinson v. Dodge	(Man.)	679
Rogers Lumber Yards v. Stuart	(Sask.)	771
Roman Catholic Arch. Corp. of St. Boniface v. Town of Transcona	(Can.)	148
Ross v. Scottish Union and National Ins. Co	(Ont.)	528
St. Lawrence Flour Mills Co. v. Stewart	(Can.)	760
Salter v. Dominion Creosoting Co	(Can.)	242
Security Trust Co. v. Stewart	(Alta.)	518, 801
Shaw v. Hossack	(Ont.)	797
Sherwood, Rur. Mun of, v. Wilson	(Can.)	761
Shewezuk v. Breeko	(Alta.)	588
Simmons v. Sheffield	(Alta.)	454
Simpson v. Local Board of Health of Belleville	(Ont.)	442
Steele v. Cape Breton Electric Co	(N.S.)	609
Stowe v. Grand Trunk Pacific R. Co	(Alta.)	127
Taggart, Re	(Ont.)	559
Tainter v. McKinnon	(Alta.)	483
Taylor v. City of Guelph	(Ont.)	416
Telegram Printing Co. v. Knott	(Can.)	762
Thompson v. Denny	(B.C.)	421
Thorburn, R. v	(Ont.)	300

Toronto General Trusts Co. v. The King.....(Can.) 380
Tropox v. Droney.....(Alta.) 133
Union Bank of Canada v. Benson.....(Sask.) 661
Vanzant v. Coates.....(Ont.) 485
Veltre v. London and Lancashire Fire Ins. Co.....(Ont.) 221
Victoria, City of, v. Mackay.....(B.C.) 450
Walker v. Walker.....(Man.) 731
Western Union Fire Ins. Co. v. Alexander, Loggin & Holmes....(B.C.) 632
Western Wine & Liquor Co., R. v.....(Alta.) 397
Westholme Lumber Co. v. Corp. of City of Victoria.....(Imp.) 805
Williams Machinery Co. v. Graham.....(B.C.) 140
Wilson v. Patterson.....(Alta.) 642
Yeo v. Farragher.....(Man.) 324
Young and Glanvilles Ltd., Re.....(Alta.) 629

TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 39 INCLUSIVE.

ADMINISTR.TOR—Compensation of administrators and executors—Allowance by Court ..... III, 168

ADMIRALTY—Liability of a ship or its owners for necessaries supplied ..... I, 450

ADMIRALTY—Torts committed on high seas—Limit of jurisdiction ..... XXXIV, 8

ADVERSE POSSESSION — Tacking — Successive trespassers ..... VIII, 1021

AGREEMENT—Hiring—Priority of chattel mortgage over ..... XXXII, 566

ALIENS—Their status during war ..... XXIII, 375

ANIMALS—At large—Wilful act of owner ..... XXXII, 397

APPEAL—Appellate jurisdiction to reduce excessive verdict ..... I, 386

APPEAL—Judicial discretion—Appeals from discretionary orders ..... III, 778

APPEAL—Pre-requisites on appeals from summary convictions ..... XXVIII, 153

APPEAL—Service of notice of—Recognizance ..... XIX, 323

ARBITRATION—Conclusiveness of award ..... XXXIX, 218

ARCHITECT—Duty to employer ..... XIV, 402

ASSIGNMENT—Equitable assignments of choses in action ..... X, 277

ASSIGNMENTS FOR CREDITORS—Rights and powers of assignee ..... XIV, 503

AUTOMOBILES—Obstruction of highway by owner ..... XXXI, 370

AUTOMOBILES AND MOTOR VEHICLES ..... XXXIX, 4

BAILMENT—Recovery by bailee against wrongdoer for loss of thing bailed ..... I, 110

BANKING—Deposits—Particular purpose—Failure of —Application of deposit ..... IX, 346

BILLS AND NOTES—Effect of renewal of original note .. II, 816

BILLS AND NOTES—Filling in blanks ..... XI, 27

BILLS AND NOTES—Presentment at place of payment XV, 41

BROKERS—Real estate brokers—Agent's authority .. XV, 595

BROKERS—Real estate agent's commission—Sufficiency of services ..... IV, 531

BUILDING CONTRACTS—Architect's duty to employer XIV, 402

BUILDING CONTRACTS—Failure of contractor to complete work ..... I, 9

BUILDINGS—Municipal regulation of building permits VII, 422

BUILDINGS—Restrictions in contract of sale as to the user of land ..... VII, 614

CARRIERS—The Crown as common ..... XXXV, 285

CAVEATS—Interest in land—Land Titles Act—Priorities under ..... XIV, 344

CAVEATS—Parties entitled to file—What interest essential—Land titles (Torrens system)..... VII, 675
CHATTEL MORTGAGE—Of after-acquired goods..... XIII, 178
CHATTEL MORTGAGE—Priority of—Over hire receipt. XXXII, 566
CHOSE IN ACTION—Definition—Primary and secondary meanings in law..... X, 277
COLLISION—On high seas—Limit of jurisdiction..... XXXIV, 8
COLLISION—Shipping..... XI, 95
COMPANIES—See Corporations and Companies.....
CONFLICT OF LAWS—Validity of common law marriage III, 247
CONSIDERATION—Failure of—Recovery in whole or in part..... VIII, 157
CONSTITUTIONAL LAW—Corporations—Jurisdiction of Dominion and Provinces to incorporate companies..... XXVI, 294
CONSTITUTIONAL LAW—Power of legislature to confer authority on Masters..... XXIV, 22
CONSTITUTIONAL LAW—Power of legislature to confer Jurisdiction on Provincial Courts to declare the nullity of void and voidable marriages..... XXX, 14
CONSTITUTIONAL LAW—Powers of provincial legislatures to confer limited civil jurisdiction on Justices of the Peace..... XXXVII, 183
CONSTITUTIONAL LAW—Property and civil rights—Non-residents in province..... IX, 346
CONSTITUTIONAL LAW—Property clauses of the B.N.A. Act—Construction of..... XXVI, 69
CONTRACTORS—Sub-contractors — Status of, under Mechanics' Lien Acts..... IX, 105
CONTRACTS—Commission of brokers—Real estate agents—Sufficiency of services..... IV, 531
CONTRACTS—Construction—"Half" of a lot—Division of irregular lot..... II, 143
CONTRACTS—Directors contracting with corporation—Manner of..... VII, 111
CONTRACTS—Extras in building contracts..... XIV, 740
CONTRACTS—Failure of consideration—Recovery of consideration by party in default..... VIII, 157
CONTRACTS—Failure of contractor to complete work on building contract..... I, 9
CONTRACTS—Illegality as affecting remedies..... XI, 195
CONTRACTS—Money had and received—Consideration—Failure of—Loan under abortive scheme.. IX, 346
CONTRACTS—Part performance—Acts of possession and the Statute of Frauds..... II, 43
CONTRACTS—Part performance excluding the Statute of Frauds..... XVII, 534
CONTRACTS—Payment of purchase money—Vendor's inability to give title..... XIV, 351
CONTRACTS—Rescission of, for fraud..... XXXII, 216

CONTRACTS—Restrictions in agreement for sale as to user of land ..... VII, 614
CONTRACTS—Right of rescission for misrepresentation—Waiver ..... XXI, 329
CONTRACTS—Sale of land—Rescission for want of title in vendor ..... III, 795
CONTRACTS—Statute of Frauds—Oral contract—Admission in pleading ..... II, 636
CONTRACTS—Statute of Frauds—Signature of a party when followed by words shewing him to be an agent ..... II, 99
CONTRACTS—Stipulation as to engineer's decision—Disqualification ..... XVI, 441
CONTRACTS—Time of essence—Equitable relief ..... II, 464
CONTRACTS—Vague and uncertain—Specific performance of ..... XXXI, 485
CONTRIBUTORY NEGLIGENCE — Navigation — Collision of vessels ..... XI, 95
CORPORATIONS AND COMPANIES—Debentures and specific performance ..... XXIV, 376
CORPORATIONS AND COMPANIES—Directors contracting with a joint-stock company ..... VII, 111
CORPORATIONS AND COMPANIES—Franchises—Federal and provincial rights to issue—B.N.A. Act ..... XVIII, 364
CORPORATIONS AND COMPANIES — Jurisdiction of Dominion and Provinces to incorporate Companies ..... XXVI, 294
CORPORATIONS AND COMPANIES—Powers and duties of auditor ..... VI, 522
CORPORATIONS AND COMPANIES—Receivers—When appointed ..... XVIII, 5
CORPORATIONS AND COMPANIES—Share subscription obtained by fraud or misrepresentation ..... XXI, 103
COURTS—Judicial discretion—Appeals from discretionary orders ..... III, 778
COURTS—Jurisdiction—Criminal information ..... VIII, 571
COURTS—Jurisdiction—Power to grant foreign commission ..... XIII, 338
COURTS—Jurisdiction—"View" in criminal case ..... X, 97
COURTS—Jurisdiction as to foreclosure under land titles registration ..... XIV, 301
COURTS—Jurisdiction as to injunction—Fusion of law and equity as related thereto ..... XIV, 460
COURTS—Publicity—Hearings in camera ..... XVI, 769
COURTS—Specific performance—Jurisdiction over contract for land out of jurisdiction ..... II, 215
COVENANTS AND CONDITIONS—Lease—Covenants for renewal ..... III, 12
COVENANTS AND CONDITIONS—Restrictions on use of leased property ..... XI, 40

CREDITOR'S ACTION—Creditor's action to reach undisclosed equity of debtor—Deed intended as mortgage..... 1, 76
CREDITOR'S ACTION—Fraudulent conveyances—Right of creditors to follow profits..... 1, 841
CRIMINAL INFORMATION—Functions and limits of prosecution by this process..... VIII, 571
CRIMINAL LAW—Appeal—Who may appeal as party aggrieved.....XXVII, 645
CRIMINAL LAW—Cr. Code. (Can.)—Granting a "view" —Effect as evidence in the case..... X, 97
CRIMINAL LAW—Criminal trial—Continuance and adjournment—Criminal Code, 1906, sec. 901....XVIII, 223
CRIMINAL LAW—Gaming—Betting house offences...XXVII, 611
CRIMINAL LAW—Habeas corpus procedure..... XIII, 722
CRIMINAL LAW—Insanity as a defence—Irresistible impulse—Knowledge of wrong..... I, 287
CRIMINAL LAW—Leave for proceedings by criminal information..... VIII, 571
CRIMINAL LAW—Orders for further detention on quashing convictions..... XXV, 649
CRIMINAL LAW—Prosecution for same offence, after conviction quashed on certiorari.....XXXVII, 126
CRIMINAL LAW—Questioning accused person in custody..... XVI, 223
CRIMINAL LAW—Sparring matches distinguished from prize fights..... XII, 786
CRIMINAL LAW—Summary proceedings for obstructing peace officers.....XXVII, 46
CRIMINAL LAW—Trial—Judge's charge—Misdirection as a "substantial wrong"—Criminal Code (Can. 1906, sec. 1019)..... I, 103
CRIMINAL LAW—Vagrancy—Living on the avails of prostitution..... XXX, 339
CRIMINAL LAW—What are criminal attempts..... XXV, 8
CRIMINAL TRIAL—When adjourned or postponed....XVIII, 223
CROWN, THE—As a common carrier.....XXXV, 285
CY-PRÈS—How doctrine applied as to inaccurate descriptions..... VIII, 96

DAMAGES—Appellate jurisdiction to reduce excessive verdict..... I, 386
DAMAGES—Architect's default on building contract—Liability..... XIV, 402
DAMAGES—Parent's claim under fatal accidents law —Lord Campbell's Act..... XV, 689
DAMAGES—Property expropriated in eminent domain proceedings—Measure of compensation..... I, 508
DEATH — Parent's claim under fatal accidents law —Lord Campbell's Act..... XV, 689
DEEDS—Construction—Meaning of "half" of a lot.. II, 143

DEEDS—Conveyance absolute in form—Creditor's action to reach undisclosed equity of debtor.... I, 76
DEFAMATION—Discovery—Examination and interrogations in defamation cases..... II, 563
DEFAMATION—Repetition of libel or slander—Liability IX, 73
DEFAMATION—Repetition of slanderous statements—Acts of plaintiff to induce repetition—Privilege and publication..... IV, 572
DEFINITIONS—Meaning of "half" of a lot—Lot of irregular shape..... II, 154
DEMURRER—Defence in lieu of—Objections in point of law..... XVI, 173
DEPORTATION—Exclusion from Canada of British subjects of Oriental origin..... XV, 191
DEPOSITIONS—Foreign commission—Taking evidence ex juris..... XIII, 338
DESERTION—From military unit..... XXXI, 17
DISCOVERY AND INSPECTION—Examination and interrogatories in defamation cases..... II, 563
DIVORCE—Annulment of marriage..... XXX, 14
DONATION—Necessity for delivery and acceptance of chattel..... I, 306
EASEMENTS—Reservation of, not implied in favour of grantor.....XXXII, 114
EJECTMENT—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title..... I, 28
ELECTRIC RAILWAYS—Reciprocal duties of motormen and drivers of vehicles crossing tracks..... 1, 783
EMINENT DOMAIN—Allowance for compulsory taking XXVII,250
EMINENT DOMAIN—Damages for expropriation—Measure of compensation..... I, 508
ENGINEERS—Stipulations in contracts as to engineer's decision..... XVI, 441
EQUITY—Agreement to mortgage after-acquired property—Beneficial interest..... XIII, 178
EQUITY—Fusion with law—Pleading..... X, 503
EQUITY—Rights and liabilities of purchaser of land subject to mortgages..... XIV, 652
ESCHEAT—Provincial rights in Dominion lands.....XXVI, 137
ESTOPPEL—By conduct—Fraud of agent or employee XXI, 13
ESTOPPEL—Plea of Ultra Vires in actions on corporate contracts.....XXXVI, 107
ESTOPPEL—Ratification of estoppel—Holding out as ostensible agent..... I, 149
EVIDENCE—Admissibility — Competency of wife against husband..... XVII, 721
EVIDENCE—Admissibility—Discretion as to commission evidence..... XIII, 338
EVIDENCE—Criminal law—Questioning accused person in custody..... XVI, 223

EVIDENCE—Deed intended as mortgage—Competency and sufficiency of parol evidence.....XXIX, 125
EVIDENCE—Demonstrative evidence—View of locus in quo in criminal trial..... X, 97
EVIDENCE—Extrinsic—When admissible against a foreign judgment..... IX, 788
EVIDENCE—Foreign common law marriage..... III, 247
EVIDENCE—Meaning of "half" of a lot—Division of irregular lot..... II, 143
EVIDENCE—Opinion evidence as to handwriting.... XIII, 565
EVIDENCE—Oral contracts—Statute of Frauds—Effect of admission in pleading..... II, 636
EVIDENCE—Sufficient to go to jury in negligence actions.....XXXIX, 615
EXECUTION—What property exempt from..... XVII, 829
EXECUTION—When superseded by assignment for creditors..... XIV, 503
EXECUTORS AND ADMINISTRATORS—Compensation—Mode of ascertainment..... III, 168
EXEMPTIONS—What property is exempt.....XVI, 6; XVII, 829
FALSE ARREST—Reasonable and probable cause—English and French law compared..... I, 56
FALSE PRETENCES—The law relating to.....XXXIV, 521
FIRE INSURANCE—Insured chattels—Change of location I, 745
FISHING RIGHTS IN TIDAL WATERS—Provincial power to grant.....XXXV, 28
FORECLOSURE—Mortgage—Re-opening mortgage foreclosures..... XVII, 89
FOREIGN COMMISSION—Taking evidence ex juris.... XIII, 338
FOREIGN JUDGMENT—Action upon..... IX, 788; XIV, 43
FORFEITURE—Contract stating time to be of essence—Equitable relief..... II, 464
FORFEITURE—Remission of, as to leases..... X, 603
FORGERY.....XXXII, 512
FORTUNE-TELLING—Pretended palmistry.....XXVIII, 278
FRAUDULENT CONVEYANCES—Right of creditors to follow profits..... I, 841
FRAUDULENT PREFERENCES—Assignments for creditors—Rights and powers of assignee..... XIV, 503
GAMING—Automatic vending machines.....XXXIII, 642
GAMING—Betting house offences.....XXVII, 611
GIFT—Necessity for delivery and acceptance of chattel I, 306
HABEAS CORPUS—Procedure..... XIII, 722
HANDWRITING—Comparison of—When and how comparison to be made..... XIII, 565
HIGHWAYS—Defects—Notice of injury—Sufficiency.. XIII, 886
HIGHWAYS—Defective bridge—Liability of municipality.....XXXIV, 589
HIGHWAYS—Duties of drivers of vehicles crossing street railway tracks..... I, 783
HIGHWAYS—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways..... IX, 490

HIGHWAYS—Unreasonable user of ..... XXXI, 370
HUSBAND AND WIFE—Foreign common law marriage —Validity ..... III, 247
HUSBAND AND WIFE—Property rights between husband and wife as to money of either in the other's custody or control ..... XIII, 824
HUSBAND AND WIFE—Wife's competency as witness against husband—Criminal non-support ..... XVII, 721
INFANTS—Disabilities and liabilities—Contributory negligence of children ..... IX, 522
INJUNCTION—When injunction lies ..... XIV, 460
INSANITY—Irresistible impulse—Knowledge of wrong —Criminal law ..... I, 287
INSURANCE—Fire insurance—Change of location of insured chattels ..... I, 745
INTERPLEADER—Summary review of law of ..... XXXII, 263
JUDGMENT—Actions on foreign judgments .... IX, 788; XIV, 43
JUDGMENT—Conclusiveness as to future action—Res judicata ..... VI, 294
JUDGMENT—Enforcement—Sequestration ..... XIV, 855
LANDLORD AND TENANT—Forfeiture of lease—Waiver X, 603
LANDLORD AND TENANT—Lease—Covenant in restriction of use of property ..... XI, 40
LANDLORD AND TENANT—Lease—Covenants for renewal ..... III, 12
LANDLORD AND TENANT—Municipal regulations and license laws as affecting the tenancy—Quebec Civil Code ..... I, 219
LAND TITLES (Torrens system)—Caveat—Parties entitled to file caveats—"Caveatable interests" VII, 675
LAND TITLES (Torrens system)—Caveats—Priorities acquired by filing ..... XIV, 344
LAND TITLES (Torrens system)—Mortgages—Foreclosing mortgage made under Torrens system—Jurisdiction ..... XIV, 301
LEASE—Covenants for renewal ..... III, 12
LIBEL AND SLANDER—Church matters ..... XXI, 71
LIBEL AND SLANDER—Examination for discovery in defamation cases ..... II, 563
LIBEL AND SLANDER—Repetition—Lack of investigation as affecting malice and privilege ..... IX, 37
LIBEL AND SLANDER—Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege ..... IV, 572
LIBEL AND SLANDER—Separate and alternative rights of action—Repetition of slander ..... I, 533
LICENSE—Municipal license to carry on a business—Powers of cancellation ..... IX, 411
LIENS—For labour—For materials—Of contractors—Of sub-contractors ..... IX, 105

LIMITATION OF ACTIONS—Trespassers on lands—Prescription..... VIII,1021
LOTTERY—Lottery offences under the Criminal Code XXV, 401
MALICIOUS PROSECUTION—Principles of reasonable and probable cause in English and French law compared..... I, 56
MALICIOUS PROSECUTION—Questions of law and fact—Preliminary questions as to probable cause..... XIV, 817
MARKETS—Private markets—Municipal control..... I, 219
MARRIAGE—Foreign common law marriage—Validity III, 247
MARRIAGE—Void and voidable—Annulment..... XXX, 14
MARRIED WOMEN—Separate estate—Property rights as to wife's money in her husband's control..... XIII, 824
MASTER AND SERVANT—Assumption of risks—Superintendence..... XI, 106
MASTER AND SERVANT—Employer's liability for breach of statutory duty—Assumption of risk..... V, 328
MASTER AND SERVANT—Justifiable dismissal—Right to wages (*a*) earned and overdue, (*b*) earned, but not payable..... VIII, 382
MASTER AND SERVANT—When master liable under penal laws for servant's acts or defaults.....XXXI, 233
MASTER AND SERVANT—Workmen's compensation law in Quebec..... VII, 5
MECHANICS' LIENS—Percentage fund to protect subcontractors..... XVI, 121
MECHANICS' LIENS—What persons have a right to file a mechanics' lien..... IX,105
MONEY—Right to recover back—Illegality of contract—Repudiation..... XI, 195
MORATORIUM—Postponement of Payment Acts, construction and application..... XXII, 865
MORTGAGE—Assumption of debt upon a transfer of the mortgaged premises..... XXV, 435
MORTGAGE—Equitable rights on sale subject to mortgage..... XIV, 652
MORTGAGE—Discharge of as re-conveyance.....XXXI, 225
MORTGAGE—Land titles (Torrens system)—Foreclosing mortgage made under Torrens system—Jurisdiction..... XIV, 301
MORTGAGE—Limitation of action for redemption of..XXXVI, 15
MORTGAGE—Necessity for stating yearly rate of interest.....XXXII, 60
MORTGAGE—Power of sale under statutory form ....XXXI, 300
MORTGAGE—Re-opening foreclosures..... XVII, 89
MORTGAGE — Without consideration — Receipt for mortgage money signed in blank.....XXXII, 26
MUNICIPAL CORPORATIONS—Authority to exempt from taxation..... XI, 66

MUNICIPAL CORPORATIONS—By-laws and ordinances regulating the use of leased property—Private markets..... I, 219
MUNICIPAL CORPORATIONS—Closing or opening streets IX, 490
MUNICIPAL CORPORATIONS—Defective highway—Notice of injury..... XIII, 886
MUNICIPAL CORPORATIONS—Drainage—Natural watercourse—Cost of work—Power of Referee..... XXI, 286
MUNICIPAL CORPORATIONS—Highways—Defective—Liability.....XXXIV, 589
MUNICIPAL CORPORATIONS—License—Power to revoke license to carry on business..... IX, 411
MUNICIPAL CORPORATIONS—Power to pass by-law regulating building permits..... VII, 422
NEGLIGENCE—Animals at large.....XXXII, 397
NEGLIGENCE—Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser.... VI, 76
NEGLIGENCE—Duty to licensees and trespassers—Obligation of owner or occupier..... I, 240
NEGLIGENCE—Evidence sufficient to go to jury in negligence action .....XXXIX, 615
NEGLIGENCE—Highway defects—Notice of claim... XIII, 886
NEGLIGENCE—Negligent driving, contributory, of children ..... IX, 522
NEGLIGENCE OR WILFUL ACT OR OMISSION—Within the meaning of the Railway Act.....XXXV, 481
NEW TRIAL—Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can.) 1906, sec. 1019..... I, 103
PARTIES—Irregular joinder of defendants—Separate and alternative rights of action for repetition of slander..... I, 533
PARTIES—Persons who may or must sue—Criminal information—Relator's status..... VIII, 571
PATENTS—Application of a well-known contrivance to an analogous use is not invention.....XXXVIII, 14
PATENTS—Construction of—Effect of publication... XXV, 663
PATENTS—Expunction or variation of registered trade mark.....XXVII, 471
PATENTS—Manufacture and importation under Patent Act.....XXXVIII, 350
PATENTS—New and useful combinations—Public use or sale before application for patent.....XXVIII, 636
PATENTS—Novelty and invention.....XXVII, 450
PATENTS—Prima facie presumption of novelty and utility .....XXVIII, 243
PATENTS—Utility and novelty—Essentials of.....XXXV, 362
PATENTS—Vacuum cleaners..... XXV, 716
PERJURY—Authority to administer extra-judicial oaths .....XXVIII, 122
PLEADING—Effect of admissions in pleading—Oral contract—Statute of Frauds..... II, 636

PLEADING—Objection that no cause of action shewn —Defence in lieu of demurrer..... XVI, 517
PLEADING—Statement of defence—Specific denials and traverses..... X, 503
PRINCIPAL AND AGENT—Holding out as ostensible agent—Ratification and estoppel..... I, 149
PRINCIPAL AND AGENT—Signature to contract followed by word shewing the signing party to be an agent—Statute of Frauds..... II, 99
PRINCIPAL AND SURETY—Subrogation—Security for guaranteed debt of insolvent..... VII, 168
PRIZE FIGHTING—Definition—Cr. Code (1906), secs. 105-108..... XII, 786
PROVINCIAL POWERS TO GRANT EXCLUSIVE FISHING RIGHTS..... XXXV, 28
PUBLIC POLICY—As effecting illegal contracts—Relief XI, 195
REAL ESTATE AGENTS—Compensation for services—Agent's commission..... IV, 531
RECEIPT—For mortgage money signed in blank..... XXXII, 26
RECEIVERS—When appointed..... XVIII, 5
REDEMPTION OF MORTGAGE—Limitation of action.. XXXVI, 15
RENEWAL—Promissory note—Effect of renewal on original note..... II, 816
RENEWAL—Lease—Covenant for renewal..... III, 12
SALE—Part performance—Statute of Frauds..... XVII, 534
SCHOOLS—Denominational privileges—Constitutional guarantees..... XXIV, 492
SEQUESTRATION—Enforcement of judgment by..... XIV, 855
SHIPPING—Collision of ships..... XI, 95
SHIPPING—Contract of towage—Duties and liabilities of tug owner..... IV, 13
SHIPPING—Liability of a ship or its owner for necessaries..... I 450
SLANDER—Repetition of—Liability for..... IX, 73
SLANDER—Repetition of slanderous statements—Acts of plaintiff inducing defendant's statement—Interview for purpose of procuring evidence of slander—Publication and privilege..... IV, 572
SOLICITORS—Acting for two clients with adverse interests..... V, 22
SPECIFIC PERFORMANCE—Grounds for refusing the remedy..... VII, 340
SPECIFIC PERFORMANCE—Jurisdiction—Contract as to lands in a foreign country..... II, 215
SPECIFIC PERFORMANCE—Oral contract—Statute of Frauds—Effect of admission in pleading..... II, 636
SPECIFIC PERFORMANCE — Sale of lands — Contract making time of essence—Equitable relief..... II, 464
SPECIFIC PERFORMANCE—Vague and uncertain contracts..... XXXI, 485
SPECIFIC PERFORMANCE—When remedy applies..... I, 354

STATUTE OF FRAUDS—Contract—Signature followed by words shewing signing party to be an agent..... II, 99
STATUTE OF FRAUDS—Oral contract—Admissions in pleading..... II, 636
STREET RAILWAYS—Reciprocal duties of motormen and drivers of vehicles crossing the tracks..... I, 783
SUBROGATION—Surety—Security for guaranteed debt of insolvent—Laches—Converted security..... VII, 168
SUMMARY CONVICTIONS—Notice of appeal—Recognizance—Appeal..... XIX, 323
TAXES—Exemption from taxation..... XI, 66
TAXES—Powers of taxation—Competency of province IX, 346
TAXES—Taxation of poles and wires..... XXIV, 669
TENDER—Requisites..... I, 666
TIME—When time of essence of contract—Equitable relief from forfeiture..... II, 464
TOWAGE—Duties and liabilities of tug owner..... IV, 13
TRADE-MARK—Distinction between Trade-mark and Trade-name, and the rights arising therefrom. XXXVII, 234
TRADE-MARK—Passing off similar design—Abandonment..... XXXI, 602
TRADE-MARK—Registrability of surname as..... XXXV, 519
TRADE-MARK—Trade-name—User by another in a non-competitive line..... II, 380
TRESPASS—Obligation of owner or occupier of land to licensees and trespassers..... I, 240
TRESPASS—Unpatented land—Effect of priority of possessory acts under colour of title..... I, 28
TRIAL—Preliminary questions—Action for malicious prosecution..... XIV, 817
TRIAL—Publicity of the Courts—Hearing in camera.. XVI, 769
TUGS—Liability of tug owner under towage contract.. IV, 13
ULTRA VIRES—In actions on corporate contracts... XXXVI, 107
UNFAIR COMPETITION—Using another's trademark or trade name—Non-competitive lines of trade.... II, 380
VENDOR AND PURCHASER—Contracts—Part performance—Statute of Frauds..... XVII, 534
VENDOR AND PURCHASER—Equitable rights on sale subject to mortgage..... XIV, 652
VENDOR AND PURCHASER—Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title..... XIV, 351
VENDOR AND PURCHASER—Sale by vendor without title—Right of purchaser to rescind..... III, 795
VENDOR AND PURCHASER—Transfer of land subject to mortgage—Implied covenants..... XXXII, 497
VENDOR AND PURCHASER—When remedy of specific performance applies..... I, 354
VIEW—Statutory and common law latitude—Jurisdiction of courts discussed..... X, 97

WAGES—Right to—Earned, but not payable, when.. VIII, 382
WAIVER—Of forfeiture of lease..... X, 603
WILFUL ACT OR OMISSION OR NEGLIGENCE—Within the meaning of the Railway Act.....XXXV, 481
WILLS—Ambiguous or inaccurate description of beneficiary..... VIII, 96
WILLS—Compensation of executors—Mode of ascertainment..... III, 168
WILLS—Substitutional legacies—Variation of original distributive scheme by codicil..... I, 472
WILLS—Words of limitation in.....XXXI, 390
WITNESSES—Competency of wife in crime committed by husband against her—Criminal non-support —Cr. Code sec. 242A..... XVII, 721
WITNESSES—Medical expert..... XXXVIII, 453
WORKMEN'S COMPENSATION—Quebec law—9 Edw. VII. (Que.) ch. 66—R.S.Q. 1909, secs. 7321-7347 VII 5

ETTER v. CITY OF SASKATOON.
(Annotated).

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

AUTOMOBILES (§ III B—200)—DEFECTIVE HIGHWAY—PRIMARY NEGLIGENCE—NON-COMPLIANCE WITH STATUTE—REGISTRATION—NUMBER PLATES. Operating a motor car in violation of the statutory requirements as to registration and number plates will bar recovery of any damages sustained by reason of defects in the highway; under such circumstances, a municipal corporation owes no duty to the driver or owner of the car except to refrain from wilful or malicious injury.

APPEAL by plaintiff from a judgment dismissing his action against defendant municipality for damage to his motor car as the result of a hidden obstruction on the highway. Affirmed.

W. H. McEwen, for appellant; *L. M. Robinson*, for respondent.

HAULTAIN, C.J., concurred with Brown, J. Haultain, C.J.

BROWN, J.:—The defendants in the fall of 1916 repaired a certain culvert on 14th St., close to the point of its intersection with another street called Saskatchewan Crescent. After filling up the excavation that was made necessary by the repairs, the defendants left a pile of earth running the whole length thereof. This pile of earth was some 20 ft. in length, running from the north side of 14th St., in an angular direction, extending half-way across 14th St., and a short distance into Saskatchewan Crescent. The obstruction varied in width from 18 to 24 inches, and was of an average height of some 14 inches. The object in leaving the earth so piled up was to provide against the settling process that would naturally follow upon the filling in of the excavation. As the cold weather set in soon after the work was done, the earth became frozen, preventing any settling process taking place, and on January 9, 1917, the obstruction remained in the proportions above described, and, in addition, it was then covered over by snow. Brown, J.

The plaintiff, on the afternoon of January 9 aforesaid, was driving his automobile along 14th St., with the intent to turn north on Saskatchewan Crescent. When nearing the obstruction mentioned, he assumed it was a snowdrift, and threw his car into intermediate gear, with the object of getting more power to

SASK.
S. C.
ETTER
v.
CITY OF SASKATOON.
Brown, J.

go through what he thought was simply an obstruction of snow. The car struck the hidden pile of earth while going at the rate of from 12 to 15 miles per hour, with the result that it was seriously damaged. The plaintiff seeks recompence for such damages, alleging negligence on the part of the defendants.

The defendants' statement of defence up to the time of trial was simply a denial of allegations made in the plaintiff's claim. At the time of the trial, the defendants amended their defence by adding a new paragraph, as follows:—

7. In the alternative, the defendant says as to the statement of claim that the plaintiff was driving on said 14th St. or its intersection with Saskatchewan Cres., unlawfully inasmuch as his said automobile was being used or operated on a public highway without having displayed thereon the number plate as prescribed by the Vehicles Act of the Province of Saskatchewan.

Counsel for the plaintiff objected that, if such amendment were allowed, it should be upon the defendants paying the costs to that date. The amendment was allowed, the question of costs being reserved.

The evidence disclosed that at the time of the accident the plate on the plaintiff's car was for 1916, and that he had not as yet applied for a renewal of his license for 1917.

The trial judge found against the plaintiff on the issue raised by the amendment, and also on the ground that the accident was caused by the plaintiff's own negligence.

In reference to the latter finding, he says:—

I am not going to make a finding as to whether the city was negligent or not; I think it unnecessary; a great deal can be said on both sides. I think the plaintiff was himself negligent, and this negligence was the proximate cause of the accident; he saw ahead of him this obstruction, thought it was snow; he may be entitled to think that; but everybody knows snow covers things, there might be stones or any other hard matter in it that would be liable to cause an accident. He had the rest of the road to drive on, and he was going along a by no means well-frequented street, and by simply swerving to the left could have got round, and the accident would never have occurred.

You cannot judge the real nature of the obstruction or of the damage by the actual result, you must take into consideration the rate of speed at which he was travelling, which seems to me in the circumstances excessive. There was the open road, and instead of taking it, he took the obstruction which he thought would be only snow. That seems to me to be his own fault; he took this chance, and unfortunately he suffered by it.

I am inclined to think that the trial judge erred in the finding on the question of negligence. It would appear to me that the

plaintiff did nothing more than what a reasonable man might be expected to do under the circumstances. He had no knowledge of a hidden danger, and had the right to assume that what appeared a snowdrift was nothing more than a snowdrift. And I am further inclined to the view that, under the circumstances, the defendants were guilty of negligence. It is, however, not necessary to give any decided opinion on these questions of negligence in the view which I take of this case.

The issue raised by the amendment constitutes an absolute bar to the plaintiff's right to recovery.

By s. 5 of c. 38 of the Statutes of Saskatchewan (1912), it is provided:—

> No motor vehicle shall be used or operated upon any public highway, which shall not have been registered under this Act, or which shall not display thereon the number plate as prescribed by this Act.

Under the circumstances, the plaintiff was distinctly prohibited by statute from operating his car at the time of the accident. He was, therefore, operating it illegally, and the defendants owed him no other duty than not to wilfully or maliciously injure. See *Contant* v. *Pigott*, 15 D.L.R. 358, also *Greig* v. *Merritt*, 11 D.L.R. 852.

It is contended, on behalf of the plaintiff, that if the defendants have succeeded only by virtue of the amendment made at the time of the trial, the plaintiff should have the costs of action up to the trial.

I can readily see that if, at the time of the amendment, the plaintiff had discontinued his action he would have had grounds for this contention, at any rate as to such costs as were incurred subsequent to the delivery of defence. The plaintiff, however, did not discontinue; on the contrary, he fought the action out on all the issues raised. It must, therefore, be assumed that he would have done the same thing even though the statutory defence had been pleaded in the first instance.

I am of the opinion, therefore, that the judgment appealed from, which dismissed the plaintiff's action with costs, should not be disturbed, and this appeal should be dismissed with costs.

LAMONT, J.:—I concur in the view that the issue raised by the amendment constitutes a bar to the plaintiff's right of recovery. I express no opinion as to the negligence alleged. Lamont, J.

Appeal dismissed.

Annotation.

ANNOTATION.

REVIEW OF CANADIAN AND ENGLISH DECISIONS ON THE LAW OF MOTOR VEHICLES.

Scope of Statutes; Constitutionality.—The word "motor car" includes a "motor bicycle": *Webster* v. *Terry*, [1914] 1 K.B. 51.

A motor car used for household purposes is within the category of "horses, carriages and household effects:" *Re Fortlage*, [1916] W.N. 214.

A motor vehicle is not an outlaw; it has as much right to be upon the highway as a farmer's waggon, when complying with the statutory requirements: *Per Garrow, J.A., in Marshall* v. *Gowans* (1911), 24 O.L.R. 522.

The statutory requirements of the Motor Vehicles Act do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

The Act is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the non-observance of the requirements of the statute: *Stewart* v. *Steele*, 6 D.L.R. 1; 5 S.L.R. 358.

A province has the power, under s. 92 of the British North America Act, to regulate the use of motor vehicles upon the highways of the province and in doing so does not trench upon the criminal law. The highways are "local works and undertakings" within the meaning of s. 92 (10), assigned exclusively to the provincial legislature, and do not come within any of the classes of subjects enumerated in s. 91 as assigned to the Parliament of Canada: *Re Rogers* (P.E.I.), 7 E.L.R. 212.

A local or municipal regulation making it an offence to use a heavy motor car on a bridge forming part of a highway of any greater weight than specified in the prescribed notice, except with the consent of the person liable to the repair of the bridge, is *intra vires*; and where such a notice has been affixed to a bridge by the person liable for its repair, any one who drives over the bridge a heavy motor car of a weight exceeding that mentioned in the notice is guilty of the offence: *Lloyd* v. *Ross*, [1913] 2 K.B. 332.

License.—One of the purposes of a license to drive a motor car issued under the Motor Car Act is the identification of the person to whom it is issued, and the production thereof, on due command, to a constable, constitutes *primâ facie* evidence that the particulars it contains refer to the person producing it, and that he is the person to whom it was issued. Secondary evidence of such particulars may be given although no notice to produce the license at the hearing has been given: *Martin* v. *White*, 79 L.J.K.B. 553, [1910] 1 K.B. 665.

The power of municipal corporations as to the granting or refusing motor vehicle licenses may be made exercisable discriminatorily; their acts cannot therefore be controlled by mandamus, particularly where another remedy is provided by statute: *Re McKay* (B.C.), [1917] 3 W.W.R. 447.

A by-law placing further restriction on the operation of automobiles for hire within the city will not be effective to control an unqualified license already held by the accused which remained unrevoked: *Rex* v. *Aitcheson*, 25 Can. Cr. Cas. 36, 9 O.W.N. 65.

Under the Quebec statute (R.S.Q. 1909, arts. 1402-5, as amended by 4 Geo. V. c. 12, s. 3), the chauffeur or operator of an automobile is required,

Annotation.

under penalty, to be able to produce his license or certificate of registration, whenever required to do so by the proper authorities; the fact that he does not have it upon his person is no defence: *Lebel* v. *Blier*, 51 Que. S.C. 246.

Registration; Identification Mark.—Under the English Motor Car Act, 1903, a right to use a general identification mark is assigned for one year, on the registration of the car; and it is no defence to a charge of using a car on a public highway without being registered that no notice was given to the accused of the expiration of the right: *Caldwell* v. *Hague*, 84 L.J.K.B. 543; 24 Cox C.C. 595.

The appellants, motor-cycle manufacturers, had had a general identification mark assigned to them, which was affixed to one of their motor-cycles. One of their employees, without their authority, took the motor-cycle to his home, and left it there for some days, while he was away on a holiday. In his absence, his brother, without the knowledge of the appellants, took out the cycle, and used it with the mark upon it:—*Held*, that as the motor-cycle was used without the knowledge or authority of the appellants, they had not violated the regulation requiring manufacturers or dealers to keep a record of the distinguishing number, placed on or annexed to the identification of plates, and of the name and address of the person driving the motor car: *Phelan & Moore* v. *Keel*, 83 L.J.K.B. 1516, [1914] 3 K.B. 165.

Lights.—The driver of a motor-cycle on a public highway, charged with failing to keep a lamp burning thereon illuminating every letter or number on the motor-cycle, is entitled to avail himself of the defence that he had taken all steps reasonably practicable to prevent the mark being obscured, or rendered not easily distinguishable: *Printz* v. *Sewell*, [1912] 2 K.B. 511.

Speed.—Where regulations provide that if a heavy motor car has all its wheels fitted with pneumatic tires, the speed at which it may be driven on the highway shall not exceed 12 miles an hour, where the registered weight of any axle does not exceed 6 tons, and 8 miles an hour, where the registered weight of any axle exceeds 6 tons, the speed limit for a car of such class, of which the registered weight of the front axle is 2 tons 2 cwts. and that of the back axle over 6 tons, is 8 and not 12 miles an hour: *Auld* v. *Pearson* (1914), S.C. (J.) 4.

Horse Power.—A statute making the license duty payable in respect of motor cars, depending upon the "horse power" of their engines, to be calculated in accordance with regulations made by the Treasury for the purpose, does not refer to true horse power as the basis of the scale of duties, but to a horse power calculated according to the Treasury regulations: *London County Council* v. *Turner*, 105 L.T. 380, 22 Cox C.C. 593.

Weight.—A regulation limiting the weight of a registered heavy motor car has reference only to the weight of the motor vehicle, and has no application to the weight of the trailer attached to it: *Pilgrim* v. *Simmonds*, 105 L.T. 241, 22 Cox C.C. 579.

A steam road roller is a locomotive for the purpose of having its weight conspicuously and legibly affixed thereon: *Waters* v. *Eddison Rolling Car Co.*, [1914] 3 K.B. 818.

Brakes.—Where it is shewn that the only means by which the wheels on the back axle could be prevented from revolving were either by reversing the engine or by applying a fly-wheel brake, if the engine were out of the

Annotation. gear the fly-wheel brake could not act nor could the engine be reversed so as to operate as a brake, it will sustain a conviction for operating a motor car without having a brake, independent of the engine: *Cannon* v. *Jefford*, [1915] 3 K.B. 477.

Condition of Highway.—Both drivers of automobiles and drivers of horses have a perfect right to use the highway, but the right of each is subject to the qualification that he must use it in conformity with any statutory requirements, and not so as to make its use dangerous to others: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358.

A highway must be in a state of repair as to be reasonably safe and fit for the requirements of the locality, as to be free from jolts and jars interfering with the physical control of cars lawfully operated thereon: *Connor* v. *Township of Brant*, 5 O.W.N. 438.

A municipal corporation is not obliged to take extraordinary precautions as to the safety of its highways for automobile traffic; it is sufficient if the streets are maintained with reasonable care for ordinary traffic: *Farad* v. *Quebec*, 35 D.L.R. 661, 26 Que. K.B. 139.

A municipal corporation operating a street railway is liable for a collision of a street car with an automobile which had become stalled owing to rails protruding at a highway crossing: *Kuusisto* v. *Port Arthur*, 31 D.L.R. 670, 37 O.L.R. 146.

In an action against a municipality for injuries sustained by the driver of a car as the result of a defective culvert across the highway, the defence failed to establish the plaintiff's non-compliance with the provisions of the Motor Vehicles Act, either as to the rate of speed or as to the duty when approaching a culvert a person operating a motor vehicle shall have it under control, and operate at a speed not exceeding 12 miles an hour, particularly where he did know the culvert was there, and could not see it: *Smiley* v. *Oakland* (Man.), 31 D.L.R. 566.

Motor omnibuses constitute "extraordinary traffic" on the highways: *Abingdon* v. *Oxford El. Tram.*, 33 T.L.R. 69.

Liability of Owner when Car Driven by Another.—At common law the owner of a motor vehicle is not answerable for the negligence of the driver thereof, except where the relation of master and servant exists, and where, at the time of the negligent act, the latter was acting within the scope of his employment; and such liability can be changed by statute only by the use of distinct and unequivocal words: *B. & R. Co.* v. *Hugh S. McLeod*, 7 D.L.R. 579, 18 D.L.R. 245; 5 A.L.R. 176, 7 A.L.R. 349.

Under the Manitoba statutes (5 Geo. V. c. 41, s. 63a) the owner of a motor car is not liable for an injury while the car is being driven by another, unless the injury was caused by the negligent or wilful act of the driver: *McIlroy* v. *Kobold* (Man.), 35 D.L.R. 587.

The provisions of the Ontario Motor Vehicles Act (6 Edw. VII. c. 46) abrogate to some extent the common law rule that the master of a vehicle is exempt from responsibility if his servant does an injury with the vehicle when, outside the duties of his employment, he is out at large on an errand or frolic of his own. Though the owner may not be responsible in a penal aspect for violation of the Act, unless he is personally present, he becomes personally responsible in damages where there has been a violation of the Act by his vehicle: *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551 (dis-

Annotation.

tinguished in *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579; 5 A.L.R. 176; 18 D.L.R. 245; 7 A.L.R. 349).

Under s. 35 of the Motor Vehicles Act (c. 6, Alta. statutes 1911-12), the owner of an automobile is liable in damages as well as the driver who is using the car with the owner's sanction or permission for injuries sustained by a third party in consequence of the driver's negligence: *B. & R. Co.* v. *McLeod*. 18 D.L.R. 245, 7 A.L.R. 349, reversing 7 D.L.R. 579, 5 A.L.R. 176; *Witsoe* v. *Arnold and Anderson*, (Alta.), 15 D.L.R. 915.

S. 19 of the Motor Vehicles Act, 1912, c. 48, R.S.O. 1914, c. 207, which provides that the owner of a motor vehicle shall be responsible for "any violation of the Act," does not relieve the plaintiff in a negligence action for personal injury against such owner from the obligation of obtaining a finding that the accident was caused by a violation of the Act for which the defendant was responsible. (Per Riddell and Leitch, JJ.) *Lowry* v. *Thompson*, 15 D.L.R. 463, 29 O.L.R. 478.

Under s. 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) c. 48, R.S.O. 1914, c. 207, the owner of an automobile is liable for any violation of the provisions of the Act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer: *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435.

The liability of the owner of an automobile, in virtue of art. 1406, R.S.Q. 1909, as amended by 3 Geo. V. (1913), c. 19, merely creates a presumption of fault on the part of the owner or the driver of the vehicle. The owner is not responsible in damages for injuries occasioned in an accident by his automobile, where the driver thereof is not his servant or agent, *e.g.*, where his nephew, a competent chauffeur, has borrowed or has taken the vehicle without his knowledge and was in charge of it at the time of the accident: *Robillard* v. *Bélanger*, 50 Que. S.C. 260.

A chauffeur who takes his master's automobile out of a garage, in contravention of his master's orders, and proceeds with it to make a call of his own before the time appointed for taking the car out for his master's use, is not to be considered as acting within the course of his employment so as to make the master liable at common law for injuries resulting to another whom he negligently runs down: *Halparin* v. *Bulling*, 20 D.L.R. 598, 50 Can. S.C.R. 471, affirming 17 D.L.R. 150, 24 Man. L.R. 235, reversing 13 D.L.R. 742.

The owner of an automobile is not liable for the negligence of his brother to whom the car was loaned for the latter's own purposes, although at the time of the accident in question the brother was engaged in driving home the owner's wife at the request of the owner's daughter, it not appearing that the owner was aware that the car was being used for that purpose, nor that the daughter had any authority from the owner to request or direct his brother to use the car for the purpose for which it was actually used: *Lane* v. *Crandell*, 10 D.L.R. 763, 5 A.L.R. 42, affirming 5 D.L.R. 580.

The father of the driver, being owner of the car and having authorized the use of it, was held liable with the son for damages, both under the statute and at common law, for the negligence of the driver: *Boyd* v. *Houston* (B.C.), 10 W.W.R. 518..

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after having used the vehicle in

Annotation.

the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct: *Bernstein* v. *Lynch*, 13 D.L.R. 134, 28 O.L.R. 435.

A chauffeur, having received permission to have his master's motor for a few minutes in order to take something to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride and, on returning with them to their father's house, injured the plaintiff. The jury held that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident. *Held*, that having regard to the terms of the statute (6 Edw. VII. (Ont.) c. 46), which cast the onus on the defendant when his motor had occasioned an accident, and make him responsible for any violation of the Act, there was enough evidence to support the findings; that under the Act the chauffeur is to be regarded as the *alter ego* of the proprietor, as the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own: *Mattei* v. *Gillies*, 16 O.L.R. 558.

E. and J. were joint owners of an automobile licensed as a jitney and, at the time of the accident, operated by E. as a "jitney." J. had a chauffeur's license, but there was no evidence of agency or partnership. *Held*, that the facts fell far short of establishing that J. had "entrusted" E. with the automobile within the meaning of the Motor Vehicles Act (B.C.), and that the onus was on the plaintiff in an action for damages sustained while riding in the automobile to shew that J. came within the provisions of sec. 33 of the Act: *Moore* v. *B.C. Electric R. Co.*, 22 B.C.R. 504, affirmed in 35 D.L.R. 771.

The Motor Vehicles Act, 2 Geo. V. c. 48, did not make the owner of a stolen automobile responsible for damages sustained when it collided with another vehicle through the negligence and furious driving of the person who had stolen it a short time previously, if the owner was himself guilty of no negligence in the manner in which he left the automobile and had taken away the spark-plug so that the thief could not have operated the car without supplying a similar spark-plug: *Cillis* v. *Oakley*, 20 D.L.R. 550, 31 O.L.R. 603.

The taking by a servant of a garage keeper, without the owner's consent, of a car stored in the garage for repairs, the servant mistaking it for a demonstration car, raises no such *animus furandi* as to render such taking an act of larceny which will relieve the owner from the liability imposed by sec. 19 of the Motor Vehicles Act, R.S.O. 1914, c. 207: *Downs* v. *Fisher*, 23 D.L.R. 726, 23 O.L.R. 504.

An employee of a repair shop, who takes out a motor vehicle left there for repairs, to test it by driving it upon a highway, and after so testing it continues to drive it for his own pleasure, has not "stolen" it from the owner within the meaning of the Ontario Motor Vehicles Act (R.S.O. 1914, c. 207, s. 19, as amended by 4 Geo. V. c. 36, s. 3); nor does it constitute a "theft" by virtue of sec. 285B of the Criminal Code, as enacted by 9 & 10 Edw. VII. c. 11, which makes it an offence to take a motor vehicle for use without the consent of the owner; also that the person so driving may be regarded as in the "employ" of the owner, who is responsible for his acts: *Hirshman* v. *Beal*, 32 D.L.R. 680, 38 O.L.R. 40, reversing 37 O.L.R. 529.

In the Quebec case of *McCabe* v. *Allan*, 39 Que. S.C. 29, it was held that where the owner of an automobile sends it for repairs to a company, and the latter after doing the work sends out the machine, in the care of one of its own chauffeurs, to test it, and an accident occurs through the fault of the chauffeur, the owner is not liable for the consequences. The fact that his own chauffeur was in the automobile at the time is immaterial. **Annotation.**

A conditional vendor, reserving title to the car until fully paid for, may be regarded as the "owner" of the car and subject to the statutory penalties. But he cannot be held for an accident at a time when the car was neither in his control nor in that of his agent: *Cote* v. *Pennock*, 51 Que. S.C. 537. In Ontario it was held that a conditional vendor is not the "owner" of the automobile within the meaning of s. 19 of the Motor Vehicles Act, 2 Geo. V. c. 48, R.S.O. 1914, c. 207, so as to incur a statutory liability for personal injuries sustained by the mismanagement of the car while under the control of the conditional vendee or of his servant, by the infringement of motor car regulations, passed under statutory authority: *Wynne* v. *Dalby*, 16 D.L.R. 710, 30 O.L.R. 67; affiirming 13 D.L.R. 569, 29 O.L.R. 62.

Statutory Onus.—By statute (see R.S.O. 1914, c. 207, s. 23) the burden of proof is shifted upon the owner or driver of the car, that the loss or damage did not arise through their negligence or improper conduct. And where there is evidence of excessive speed and want of that degree of care, which, if exercised, the accident could have been avoided, that burden is not discharged even if there had been contributory negligence: *Hall* v. *McDonald*, 12 O.W.N. 407.

But this simply shifts the onus. In the absence of such provision, when a plaintiff came into court alleging damage sustained by reason of a motor vehicle on a highway, he must prove negligence or improper conduct on the part of the owner or driver; the provision removes the necessity, and makes it sufficient for the plaintiff to prove damage sustained by reason of a motor vehicle on the highway: *Bradshaw* v. *Conlin*, 40 O.L.R. 494, 39 D.L.R. 86.

Although by the Motor Vehicles Act (Ont. 6 Edw. VII. c. 46, s. 18), when any loss or damage is sustained by any person by reason of a motor vehicle on the highway, the onus of proof that the loss or damage did not arise through the negligence of the owner or driver of the motor vehicle is on the owner or the driver, yet the person injured or his representative must establish that the damage was sustained by reason of the motor vehicle: *Marshall* v. *Gowans* (1911), 24 O.L.R. 522.

S. 33 of the Motor Vehicles Act (Alta. Stats. 1911-12, c. 6) throws upon the driver of the vehicle, in all cases of accident, the burden of proof that the injury did not arise through his negligence. Even where the plaintiff admits his own negligence in crossing a highway without looking, the driver of the vehicle must prove that he could not by the use of ordinary and reasonable care have avoided the accident which resulted: *White* v. *Hegler*, 29 D.L.R. 480, 10 A.L.R. 57.

Under the Quebec law (R.S.Q. 1909, art. 1406), a person injured as the result of the operation of an automobile establishes fault on the part of any one in charge thereof, for which the owner is responsible. The statute 3 Geo. V. c. 19, s. 3, in effect relieves the plaintiff from proving negligence: *Woo Chong Kee* v. *Fortier*, 20 D.L.R. 985, 45 Que. S.C. 365.

The onus of the defendant to disprove his negligence has been held

Annotation. not discharged in the case of a boy struck by an automobile when sitting in a toy-waggon at the side of the part of the street devoted to vehicles: *Hook* v. *Wylie*, 10 O.W.N. 15, 237 (C.A.).

Negligence—What is.—Though a motor is not an outlaw, it must also be borne in mind that the driver is not the lord of the highway, but a man in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation. He is required to signal before passing, and he should watch to see that his signal has been heard, and that way is being made for him to pass. An accident having occurred "by reason of a motor vehicle upon a highway," the statutory onus is upon the defendant to shew that the accident did not happen by his negligence or improper conduct: *Fisher* v. *Murphy*, 3 O.W.N. 150, 20 O.W.R. 201.

While the automobile is not dangerous *per se*, its freedom of motion, speed, control, power and capacity for moving without noise, give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge, and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Except but for wanton and lawful injury, the driver of an unlicensed or unregistered car is not entitled to recover for injuries sustained in a collision with another vehicle negligently driven: *Contant* v. *Pigott* (Man.), 15 D.L.R. 358.

The non-observance by the driver of an automobile of a duty imposed upon him by statute is in itself evidence of negligence: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358; *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Under certain circumstances the chauffeur is required to exercise a more than ordinary degree of care for the safety of pedestrians, and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are overcome by a sudden panic, although at other times of healthy and rational intellect: *Rose* v. *Clark*, 21 Man. L.R. 635.

It is the special duty of a person driving a motor vehicle to keep a good lookout while approaching a tramway crossing, and it is the duty of such person coming out from a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw himself headlong into the advancing traffic along the main travelled road. (*Per* Irving, J.A.): *Monrufet* v. *B.C. Electric R. Co.*, 9 D.L.R. 569, 18 B.C.R. 91.

Though there is no rule of law requiring the driver of an automobile to keep on the right side of the road, nevertheless he is negligent in being on the left side of the road without any excuse therefor, where he knows that he is very likely to collide with other drivers coming from the opposite direction: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

Under the Motor Vehicles Act (N.B.), 1911, 1 Geo. V. c. 19, s. 4, sub-sec. 1, it is the motorist's duty "reasonably to turn to the left of the centre of the highway so as to pass without interference:" *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

The statutory rule of the road in Alberta requiring drivers of vehicles when they meet to "turn to the right" does not imply that a driver of an

Annotation.

automobile should always by on the right side of the road, but simply requires the driver to turn to the right in a reasonable and seasonable time to avoid collision: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

In the absence of statutory provision and of proof of any regulation of the Lieutenant-Governor in Council under sub-sec. 3 of s. 20 of the Motor Vehicles Act (Alta.), or of any municipal by-law, the act of a defendant in driving to the left of the centre line of a street is not negligence *per se*, even though the rule of the road in this country is, as the Court is entitled to recognize without proof, to keep to the right: *Osborne* v. *Landis* (Alta.) 34 W.L.R. 118.

The driver of a motor car who attempts to pass a vehicle ahead does so at his own risk and peril, and is responsible for any collision that may occur: *Menard* v. *Lussier*, 32 D.L.R. 539, 50 Que. S.C. 416.

The driver of an automobile is not guilty of contributory negligence where, on approching another automobile coming towards him on the wrong side of the road and having reasonable ground to believe that there was not ample room for him to pass the approaching vehicle on his right side of the road, turns to his left, though it turned out to be the wrong course to adopt, because a collision resulted, where it appears that the driver's embarrassment was due solely to the action of the approaching automobile in adhering too long to the wrong side of the road without turning to the right of the road seasonably: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

A taxicab driver's act in running into an upright post plainly visible, resulting in injury to a passenger, was *primâ facie* negligent, where while running at considerable speed he turned quickly to correct a mistake in turning into a wrong street: *Hughes* v. *Exchange Taxicab and Auto Livery* (Man.), 11 D.L.R. 314.

The driver of an automobile is not relieved from liability for running into the plaintiff by reason of the fact that, in order to avoid striking children who suddenly ran into the street, he was compelled to change the course of his automobile, and in doing so struck the plaintiff who was about to board a street car, where the defendant's own negligence had placed him in a situation where the swerving of the automobile became a necessity: *Oakshott* v. *Powell*, 12 D.L.R. 148, 6 A.L.R. 178.

The driver of an automobile who does not remain at rest behind a stationary car, at a distance of not less than 10 feet, as required by a city by-law, and who injures a passenger descending from a car, is liable for the consequences of the accident. On the other hand, a passenger who descends from a car without looking around whether or not the road is clear to cross the street without danger is guilty of a serious fault. In such case the accident is due to common fault: *Evans* v. *Lalonde*, 47 Que. S.C. 374.

A pedestrian crossing a wide street, who stops in the roadway at a safe place beside the street car track for a street car to pass and then walks back in the direction from which he came without looking for approaching vehicles, is himself guilty of negligence, disentitling him to recover where, in retracing his steps, he walked in front of an automobile proceeding at a moderate rate of speed and was knocked down and injured before the motorist could avoid him: *Todesco* v. *Maas*, 23 D.L.R. 417, 8 A.L.R. 187.

Driving an automobile contrary to the rule of the road as required by a municipal traffic by-law, particularly the reckless proceeding out from behind

Annotation. a street car in a diagonal course, thereby hiding from view a street car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with the street car: *Tait* v. *B.C. Electric Ry.*, 27 D.L.R. 538, 22 B.C.R. 571, from which an appeal was quashed by the Supreme Court of Canada: 32 D.L.R. 378, 54 Can. S.C.R. 76. See also *McGarr* v. *Carreau*, 46 Que. S. C. 448.

Turning a corner in violation of the rule of the road as provided by a local municipal by-law is negligent driving: *Hodgins* v. *Lindsay*, 7 O.W.N. 133; *Kidd* v. *Lea*, 10 O.W.N. 216.

Swinging an automobile ahead of a street car going at high speed, for the purpose of avoiding a hole in the pavement, is negligence which prevents recovery for damage sustained in a collision, notwithstanding the concurrent negligence of running the street car at an excessive rate of speed. The driver could have seen the street car coming towards him had he taken the precaution to look as he should have done: *United Motor Co.* v. *Regina*, 10 S.L.R. 373.

Taking hands off steering wheel while running at high speed is gross negligence: *Borys* v. *Christowsky*, 27 D.L.R. 792, 9 S.L.R. 181.

Looking down at the machine, instead of looking up, thereby swerving to the wrong side of the road, is negligence which will preclude recovery for injuries sustained in a collision in an effort to escape from the dangerous position: *Coffey* v. *Dies*, 10 O.W.N. 255 (C.A.).

McPhillips, J.A., dissenting, in the case of *Kinnee* v. *B.C. Electric Ry.*, [1917] 1 W.W.R. 1190, held that it is active negligence to drive a motor car with a closed hood up, and only being able to look out through the isinglass.

Attempting to cross a street when in full view of an approaching street car is negligence of the driver of the automobile, regardless whether the street car was going at high speed or not: *Ontario Hughes-Owens* v. *Ottawa Electric Ry.*, 13 O.W.N. 156; *Seguin* v. *Sandwich Windsor and Amherstburg R. Co.*, 9 O.W.N. 108.

Running a street car at a high rate of speed at a place where people were leaving a theatre, thereby colliding with an automobile proceeding out from thereabouts, is negligence for which the railway company is responsible; where both are at fault the company may be condemned to pay half of the damages claimed: *Fairbanks* v. *Montreal St. Ry.* (Que.), 31 D.L.R. 728.

Placing a car in the hands of an inexperienced and unlicensed driver will render both the owner and driver jointly and severally liable for any accident: *Lebeau* v. *Colas*, 51 Que. S.C. 335.

Permitting a minor to drive a car contrary to the statutory requirements as to the age of the driver is *ipso facto* negligence: *Discepolo* v. *City of Fort William*, 11 O.W.N. 73.

Operating without license in contravention of statute constitutes an unlawful user of the highway, and precludes recovery for injuries caused by obstruction thereon: *Greig* v. *City of Merritt* (B.C.), 11 D.L.R. 852.

Non-compliance with the statutory provisions as to registration of the car, in not carrying a number plate, operates as an absolute bar to the recovery of damages sustained by it by reason of defects in the highway: *Etter* v. *Saskatoon* (Sask.), [1917] 39 D.L.R. 1.

Failure to look when approaching a street crossing, thereby resulting in a

Annotation.

collision, will not preclude recovery if the accident is caused by the ultimate negligence of the defendant, as, for instance, a failure to slow up, or to give the required signals: *Nairn* v. *Sandwich, &c. Ry.*, 11 O.W.N. 91, 394; *Jones* v. *Niagara &c. Ry.*, 10 O.W.N. 460; *Smith* v. *Regina*, 34 D.L.R. 238, 10 S.L.R. 72; *Banbury* v. *Regina* (Sask.), 35 D.L.R. 502. But see *Honess* v. *B.C. Electric Ry.*, 36 D.L.R. 301, 23 B.C.R. 90.

Injury by a motor vehicle to a person lawfully standing on a place properly reserved for the public cannot be defended on the ground of an "emergency" where the driver was negligent, and failed to keep a watchful lookout: *Elliott* v. *Fraba*, 10 O.W.N. 41 (C.A.).

An accident resulting from the disorder of a car in the course of operation, which could have been avoided by the exercise of reasonable care, by examining whether the car was in a fit condition to be safely operated before starting out with it, is properly attributable to the negligence of the driver: *Brooks* v. *Lee*, 7 O.W.N. 219.

Duty When Approaching Horses.—That automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion they are literally much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation: *Campbell* v. *Pugsley*, (N.B.), 7 D.L.R. 177.

The provisions (R.S.O. 1914, ch. 207, s. 16) as to distance and speed, when approaching horses on a highway, are of a specific and definite prohibition, and do not rest upon the knowledge or reasonable belief of the operator. Where the prohibition is clear, a *mens rea* is not necessary, even in criminal matters: *Bradshaw* v. *Conlin*, 40 O.L.R. 494, 39 D.L.R. 86.

Under the Quebec statute (6 Edw. VII. c. 13, s. 24) it is the duty of the driver of a motor vehicle to stop on signal from a person approaching and driving a carriage, although the horse does not at the time of the signal appear to be frightened: *The King* v. *Hyndman* (Que.), 17 Can. Cr. Cas. 469; *Collector of Revenue* v. *Auger*, 25 Can. Cr. Cas. 412.

The Motor Vehicles Act (N.B.) 1 Geo. V. ch. 19, s. 3, sub-sec. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car. It is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened." *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Where horses, rightfully upon the highway, become frightened and unmanageable owing to the approaching motor vehicle, the onus is upon defendant to disprove his negligence: *Ashick* v. *Hale*, 3 O.W.N. 372, 20 O.W.R. 606.

Where an auto on the highway is liable to meet a horse and buggy, and to frighten the horse because in that locality the auto may still be a strange and startling object to the horse, it is the motorist's duty to know this and increase his care and caution accordingly: *Campbell* v. *Pugsley*, (N.B.), 7 D.L.R. 177.

A driver of an automobile who continues to advance towards horses which, by their actions, indicate that they are frightened by his car, is guilty of negligence, and is liable to the owner of the horses for injuries sustained by him while trying to hold them: *Stewart* v. *Steele*, 6 D.L.R. 1, 5 S.L.R. 358.

Annotation.

If seeing that a horse encountered on the highway has become frightened, the driver merely stops the automobile, but does not turn off the motor, the noise of which causes the horse's fright to continue, he is guilty of negligence and liable jointly and severally with the owners of the car for an accident resulting therefrom. The lack of fencing or other protection along the road is no defence to an action against them: *Lubier* v. *Michaud*, 38 Que. S.C. 190.

Where an automobile on the highway is meeting a horse and buggy, and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence suggests, and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with his horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation: *Campbell* v. *Pugsley*, (N.B.), 7 D.L.R. 177.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side, where the embankment was: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

One carefully driving an automobile at slow speed on a highway is not liable, under sec. 29 of the Motor Vehicles Act, B.C. 1911, for injuries sustained by a horse, where it appeared that it became frightened and unmanageable, not at the automobile, but by a steam shovel that was in operation near the road, and ran into the automobile: *Queer* v. *Greig*, 5 D.L.R. 308.

Although the driver of a horse followed by an automobile is required "as soon as he can go to the right in order to leave a free passage on the left," nevertheless, if he does not leave the automobile sufficient space, and the chauffeur attempts to pass the carriage, he does so at his own risk and is liable in case of collision: *Ménard* v. *Lussier*, 50 Que. S.C. 416.

Allowing Vehicle to Remain on Highway.—Allowing a vehicle to remain on a street an unlawful length of time, from the time it becomes unlawful to be on the street ("between dusk and dawn" under the Motor Vehicles Act, 2 Geo. V. (Ont.) c. 48 s. 6), renders the owner liable, at common law, for his illegal act: *Bailey* v. *Findlay*, 7 O.W.N. 24, 159.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonable user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver: *Pederson* v. *Paterson*, (Man.), 31 D.L.R. 368.

The defendant's servants momentarily left stationary but unattended in a highway a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever, and to move that and two

Annotation.

other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards, so so that it ran into plaintiff's shop front and did damage for which the action was brought: *Held*, that there was in the circumstances no evidence of negligence in leaving the lorry unattended; and assuming that there was negligence, that there was no evidence that it caused the damage: *Ruoff* v. *Long*, [1916] 1 K.B. 148.

The owner of an automobile—a bright red one—was driving to a village, intending to stop a an hotel there and have dinner. On arriving at the foot of the hill, the road over which led to the hotel, he found that, owing to the condition of the road, it was impracticable to drive the car up on the hill, so he drew it up at the side of the road about 2 feet from the travelled part, locking it, as required by the Act, and taking the key with him, then went to the hotel and had dinner, remaining there some 3 hours. While the car was in this position, the plaintiff was in the act of driving down the hill, and when he was about 20 rods from the car, his horse caught sight of it, and shewed signs of fright. The plaintiff, notwithstanding, drove him on about a rod, when he again shewed fright, the plaintiff still urged him on, and when within a rod and a half of the car he shewed an inclination to leave the road, and on the plaintiff pulling him back, he wheeled around and upset the carriage, whereby the plaintiff and the horse and carriage were injured. It appeared that the car could have been driven to a yard of another hotel some 600 feet away: *Held*, there was some evidence of negligence to submit to the jury as to there being an unreasonable user of the highway, and an authorized obstruction thereof, and, therefore, a finding in favour of the plaintiff should not be disturbed: *McIntyre* v. *Coote*, 19 O.L.R. 9.

Collisions; Liability.—That loss or damage was incurred or sustained "by reason of" a motor vehicle on a highway may be found where, in order to avoid an automobile, a pedestrian was compelled to step backward and in doing so came into contact with a horse and was injured: *Maitland* v. *Mackenzie*, 13 D.L.R. 129, 28 O.L.R. 506, affirming 6 D.L.R. 366, 23 O.W.R. 80.

A horse and carriage driven on the wrong side of the street, in contravention of a municipal by-law, is negligence which will prevent recovery for damage as a result of being struck by an automobile properly operated: *Girard* v. *Wayagamack*, 51 Que. S.C. 317.

When the primary cause of an automobile collision was the defendant's violation of the rules of the road (Nova Scotia stats. 1914), by running on the wrong side of the road when approaching an intersection, and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff (who was originally on the proper side of the cross street) had swerved, in the emergency, to the wrong side of the cross street in an attempt to avoid the collision: *Bain* v. *Fuller*, 29 D.L.R. 113, 51 N.S.R. 55.

Notwithstanding the negligence of plaintiff in driving an automobile down a hill at an excessive rate of speed, recovery for injuries incurred through a collision with defendant's automobile will not be barred where the real cause of the accident was the negligence of the defendant in being on the wrong side of the road without excuse, and not turning out as soon as he should have done and not allowing the plaintiff ample room to pass him: *Thomas* v. *Ward*, 11 D.L.R. 231, 7 A.L.R. 79.

Annotation.

In a negligence action for damages resulting from the collision of two automobiles where it appears that the defendant was guilty of primary negligence, and by the exercise of reasonable care could in the circumstances eventually have avoided the result of his own primary negligence as well as that of the plaintiff (assuming the plaintiff to have also been guilty of primary negligence), the ultimate responsibility for the collision rests upon the defendant: *B. & R. Co.* v. *McLeod*, 18 D.L.R. 245, 7 A.L.R. 349, reversing 7 D.L.R. 579, 5 A.L.R. 176.

In an action for damages sustained by the plaintiff by a collision between an automobile, driven by the defendant in the streets of a city, and a bicycle ridden by the plaintiff, by reason, as the plaintiff alleged, of the negligence of the defendant: *Held*, that if the defendant could not be said, in the peculiar local condition to have been "turning" or "approaching a corner of intersecting streets," and so did not come under sec. 23 of the Motor Vehicles Act, still besides not conforming with the rules of the road, and he had violated sec. 13, by not sounding his horn when it was reasonably necessary, and sec. 22 in going at a speed that was unreasonable, improper and dangerous to life and limb; and even the speed of 7 or 8 miles an hour, which he admitted was excessive and the defendant had not rebutted the statutory presumption of negligence; but the plaintiff had made out a case which would entitle him to succeed even if the ordinary rule as to onus applied: *Wales* v. *Harper*, (Man.), 17 W.L.R. 623.

It was held (*per* Simmons and McCarthy, JJ.), that where a cyclist after becoming aware of the approach of an automobile in a direction at right angles to his own and the apparent danger of a collision, increases his speed in a rash attempt to pass ahead of the approaching automobile, his contributory negligence in this respect is the proximate cause of the ensuing collision, notwithstanding the negligence of the defendant in approaching an intersection of streets without taking proper care. Scott and Stuart, JJ., held that where a cyclist finds himself confronted with an emergency as above described and, owing to a mere mistake of judgment, swerves to the left to gain space and increases his speed in the hope of getting safely past, the automobilist is the proximate cause of the accident: *Orser* v. *Mireault* (Alta.), 7 W.W.R. 837.

Notwithstanding the grievous injuries inflicted upon the plaintiff, the rider of a motor-cycle, though partly through the negligence of the defendant driving a motor car, and notwithstanding that the defendant escaped from the collision unscathed, the plaintiff's action wholly failed, because, according to the findings of the jury, the plaintiff would not have suffered any injury from the defendant's negligence but for his own negligence: *Adams* v. *Wilson*, 10 O.W.N. 138 (C.A.).

An action for injury to an automobile by a collision with a street car on turning a corner cannot be maintained against the electric railway if there was no evidence to warrant the jury in finding that the motorman, by exercising reasonable care, could have stopped his car and have avoided the collision after he had become aware or ought to have become aware that danger was imminent: *Gooderham* v. *Toronto R. Co.*, 22 D.L.R. 898, 8 O.W.N. 3.

Where, in agony of imminent collision caused by a jitney driver's recklessness, a motorman increased speed, in the hope of avoiding an accident,

Annotation.

the railway company is not liable for injuries occasioned thereby to a passenger of the jitney: *Moore* v. *B.C. Electric Ry.*, 35 D.L.R. 771, affirming 22 B.C.R. 504.

In the derailment of a car resulting in a collision with an automobile, there is *primâ facie* negligence of the railway company: *Currie* v. *Sandwich, Windsor and Amherstburg R. Co.*, 8 O.W.N. 287; 7 O.W.N. 739, reversing 7 O.W.N. 40, 18 D.L.R. 685, 19 Can. Ry. Cas. 210.

Duty of Invitee.—An invitee, or one riding gratuitously as a guest, has a right of action against the host for an accident occurring through the latter's negligence: *Karavias* v. *Gallinocos* (1917), 144 L.T. 25, and note at p. 72. To the same effect is the recent American case of *Jacobs* v. *Jacobs* (La.), 74 So. 992, L.R.A. 1917 F, 253.

Rights and Liabilities of Seller or Manufacturer.— An automobile manufacturer and his agent are liable for an accident resulting from latent structural defects in a car sold by them, and guaranteed to be in good order when delivered; the liability is not only contractual, but also delictual: *Lajoie* v. *Robert*, 33 D.L.R. 577, 50 Que S.C. 395. See also *Nokes* v. *Kent* (Ont.), 9 D.L.R. 772, and American cases: *Macpherson* v. *Buick Motor Car Co.*, 217 N.Y. 382, L.R.A. 1916 F, 696 (annotated); *Cadillac Motor Car Co.* v. *Johnson*, 221 Fed. 801, L.R.A. 1915 E, 287 (annotated).

The seller of a gasoline engine who negligently installs it, and not the manufacturer thereof, is answerable to the purchaser for any damages resulting from its defective installation. *Tollington* v. *Jones*, 4 D.L.R. 648, 4 A.L.R. 344.

The lien of a conditional vendor covers the chattel in its altered condition, and its equipment, as a touring car when converted into a hearse: *B.C. Independent Undertakers* v. *Marine Motor Car Co.* (B.C.), 35 D.L.R. 551.

Pleading; Damages.—The Quebec statute 6 Edw. VII. c. 13 provides that no municipal by-law to regulate the speed of automobiles shall have any force or effect. An allegation in the declaration, in an action for damages against the owner of such a vehicle, that he was unlawfully driving it at a speed "far in excess of that permitted by the by-laws of the locality," is irrelevant and will be struck out on demurrer: *Peck* v. *Ogilvie*, 31 Que. S.C. 227.

The damage recoverable for injury to an automobile is not limited to repairs that are apparent, but includes also the expense of a thorough examination of the car: *Sears* v. *Gourre*, 52 Que. S.C. 186.

Garages; Liens.—The term "garages" within the meaning of a municipal by-law are "garages to be used for hire and gain," that is, public garages, automobile liveries: *Miller* v. *Tipling*, (1917), 13 O.W.N. 43; *Toronto* v. *Delaplante* (1913), 5 O.W.N. 69, 25 O.W.R. 16.

A "garage" does not include a place where automobiles are kept without extra charge while undergoing repairs. So held in construing the license provisions of the Quebec Motor Vehicles Law (R.S. Que. 1909, art. 1402b, statutes 1916, c. 21): *Collector of Revenue* v. *Verret*, 28 Can. Cr. Cas. 314, 38 D.L.R. 630.

Where petroleum spirit is kept in the tank of a motor car which is placed for the night in a garage, the garage is a "storehouse" and a "building, . . . in which petroleum spirit is kept:" *Appleyard* v. *Vaughan*, 83 L.J.K.B. 193, [1914] 1 K.B. 528.

Annotation.

The right of lien conferred by the Innkeepers Act (1 Geo. V. (Ont.) c. 49, s. 3), upon livery stable keepers, does not apply to keepers of automobile garages. As distinguished from the common law lien of an innkeeper on property of a third party in possession of the debtor, the statutory lien will not be construed as covering the property of a third person: *Automobile & Supply Co.* v. *Hands*, 13 D.L.R. 222, 28 O.L.R. 585.

The fact that an automobile was returned in a damaged condition to the care of the garage-keeper, on the order of the conditional vendee, to be left until repaired but without any change of the terms upon which the garage-keeper had theretofore taken care of it, will not change the latter's status to that of a warehouseman so as to entitle him to a lien for the fixed monthly compensation as against the conditional vendor: *Webster* v. *Black*, 17 D.L.R. 15, 24 Man. L.R. 456.

In Quebec there is a lien for automobile repairs enforceable by conservatory attachment, and it is payable as a preferred claim out of the proceeds of the sale of the vehicle: *Morin* v. *Garbi*, 50 Que. S.C. 273.

The owner of a garage is a paid depository, and as such is reponsible for damage by fire to an automobile entrusted to his care, unless he can prove that the accident did not result from any fault on his part: *Brunet* v. *Painchaud*, 48 Que. S.C. 59.

Offences and Conviction.—Under the Ontario statute (6 Edw. VII. c. 46, s. 13) the owner of a motor vehicle for whom a permit is issued is responsible not only in regard to fines and penalties imposed by the Act, but also in damages, for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council: *Mattei* v. *Gillies*, 16 O.L.R. 558. This case was distinguished in *B. & R. Co.* v. *McLeod*, 7 D.L.R. 579, 5 A.L.R. 176; 18 D.L.R. 245, 7 A.L.R. 349.

Under the provisions of the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. c. 19, s. 4, sub-sec. 4, the motorist violating its provisions incurs a fixed penalty by way of fine for the violation. This penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence: *Campbell* v. *Pugsley* (N.B.), 7 D.L.R. 177.

Under the Quebec Motor Vehicles Act (R.S.Q. 1909, art. 1416, as amended in 1914, c. 12, s. 4), a person driving an automobile must stop when signalled or called upon to do so under penalty of fine although the officer making the signal is not in official uniform or exhibiting his badge of office: *Collector of Revenue* v. *Auger* (Que.), 25 Can. Cr. Cas. 412; *The King* v. *Hyndman*, 17 Can. Cr. Cas. 469.

Driving a motor car without a light is "an offence in connection with the driving of a motor car." ***Ex. p. Symes.*** **103 L.T. 428, 22 Cox C.C. 346, 27 T.L.R. 21.**

A violation of the Defence of the Realm Regulations (1914), prohibiting the use of powerful lamps on motor cars is an offence "in connection with the driving of a motor car": *White* v. *Jackson*, 84 L.J.K.B. 1900, following ***Ex. p. Symes*, 103, L.T. 428,** and *Brown* v. *Crossley*, [1911] 1 K.B. 603.

Allowing a motor car to stand on a highway so as to cause an unnecessary obstruction thereof does not constitute an offence "in connection with the driving of a motor car": *Rex* v. *Yorkshire, Ex p. Shackelton*, **[1910] 1 K.B. 439.**

Failing to have the back plate of a motor car illuminated during the period prescribed by statute is an offence indorsable on the license: *Brown* v. *Crossley*, [1911] 1 K.B. 603.

Annotation.

Driving a motor car in a public park at a speed exceeding the limit fixed by a park regulation is such an offence: *Rex* v. *Plowden, Ex. p. Braithwaite,* [1909] 2 K.B. 269.

Unlawfully using a motor car on a public highway, on which the identification mark was not in conformity with the regulations, the letters and figures of the identification not being of the size prescribed, is an indorsable offence: *Rex* v. *Gill, Ex. p. McKin,* 100 L.T. 858, 22 Cox C.C. 118.

Driving recklessly, driving at a speed dangerous to the public, and driving in a manner dangerous to the public, are separate offences: *Rex* v. *Cavan Justices* (1914), 2 Ir. R. 150, following *R.* v. *Wells,* 68 J.P. 392.

The period of suspension of a license for a violation of the Motor Car Act dates from the time of conviction, and the giving of notice of appeal does not have the effect of deferring the operation of the order of suspension: *Kidner* v. *Daniels,* 102 L.T. 132, 22 Cox. C.C. 276.

In a prosecution for a violation of the Act the prosecution must prove that the warning or notice of the intended prosecution required by the statute was given to the accused; a conviction without such proof is bad: *Dickson* v. *Stevenson* (1912), S.C. (J.)1.

Where a defendant, knowing that his identity was to be the subject-matter of an inquiry, intentionally absented himself therefrom, the identity of his name and address and the number and place of issue of his license, and those of a person previously convicted, is evidence upon which the identity of the defendant with such person may be held to be established. The words "proof of the identity" do not mean conclusive proof, but evidence upon which a tribunal may find that the identity has been proved: *Martin* v. *White,* [1910] 1 K.B. 665.

The driver of a motor car was convicted of driving his car over a measured distance at a speed exceeding the speed limit, the only evidence being that of two constables who had been stationed at either end of the measured distance, and who deposed, the one to the time at which the car entered, the other to the time of which it passed out of the measured distance. An objection to the sufficiency of the evidence, on the ground that as each of these times was a fundamental fact in the charge it could not be established by the uncorroborated testimony of a single witness, was repelled and the conviction sustained: *Scott* v. *Jameson,* [1914] S.C. (J.) 187.

On a charge against the owner of a motor car, it is unnecessary to do more than allege generally than the driver has committed an offence under the statute. The conviction is good although it does not particularize which of the offences enumerated in the statute the driver had committed: *Ex parte Beecham* [1913] 3 K.B. 45.

Where a driver of a motor car is convicted for the offence of driving a motor car on a public highway between one hour after sunset and one hour before sunrise, without having the identification plate on the back of the car illuminated, the company owning such car may be convicted of aiding and abetting the driver of the car in the commission of the offence, inasmuch as the company must act through agents, sending out a car in an improper condition, and it is not necessary to prove a criminal intent on the part of the company: *Provincial Motor Cab Co.* v. *Dunning,* [1909] 2 K.B. 599.

A summary conviction under sec. 18 of the Ontario Motor Vehicles Act, 2 Geo. V., c. 48, providing that if an accident occurs to any vehicle in charge

Annotation. of any person owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident and give in writing to anyone sustaining loss or injury the name and address of himself and of the owner of the motor vehicle and the number of the permit, will be quashed, though the motor vehicle driven by the convicted person grazed the wheel of a passing buggy with sufficient force to loosen two spokes in its wheel, if it appeared at the trial that the person in charge of the motor vehicle did not know or have reason to know that such an injury had resulted to the buggy: *Robertson* v. *McAllister*, 5 D.L.R. 476, 19 Can. Cr. Cas. 441,

Under the Quebec Motor Vehicle Act, the owner of an automobile may be summarily convicted for an infraction of the speed limit upon a public highway, where a registered automobile is taken out without his consent by a machinist of the garage where it had been left for repairs. The doctrine of *mens rea* or guilty knowledge does not apply to that offence, in view of the clause therein (art. 1406) which provides that the "owner" shall be held responsible for any violation and for accidents or damages caused by his motor vehicle upon a highway. The onus is upon the prosecution to prove the fact of registration of the automobile on a charge against the owner for an offence committed by some else while operating his motor car: *The King* v. *Labbe* (Que.), 17 Can. Cr. Cas. 417.

I. FREEMAN.

ALTA.

S. C.

BREDIN v. CANADIAN NORTHERN TOWN PROPERTIES Ltd.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. February 15, 1918.

TAXES (§ III B—125)—INCREMENT TAX—VALUE OF LAND.

The increased value of land under the Unearned Increment Tax Act (Alta. 1913, 2nd sess. c. 10) is to be computed as of the time of registering the transfer.

Statement. APPEAL by defendant from judgment of Crawford, Dist. Ct. J. Affirmed.

H. C. Macdonald, for appellant; *H. H. Hyndman*, for respondent.

The judgment of the court was delivered by

Harvey, C.J. HARVEY, C.J.:—This is an action brought by the plaintiff, the transferee from the defendant of certain lots in the Town of Mundare, to recover from it the sum of $65 which he was required to pay for increment tax upon registration of the transfer.

The action was tried by Crawford, Dist. Ct. J., who gave judgment against the defendant who now appeals.

The amount is small, but it is admitted that if the decision stands it will impose a heavy liability on the defendant in connection with other transactions.

The lots in question were sold to the plaintiff in 1906 by the then owners Mackenzie, Mann & Co. Ltd. They were all paid for

by some time in 1914. On May 21, 1914, the owners transferred these and many other lots to the defendant and the National Trust Co. It is explained that this was a mere transmission for the purpose of giving effect to some scheme of reorganization. This transfer was registered on November 30, 1914, when the value of the lots was ascertained by an affidavit made on June 9, by the solicitor, of all of the parties to the transfer, the value of the lots in question being placed at $2,050, which it is stated is the sale price under the agreement for sale. The transfer to the plaintiff is dated June 20, 1915, though it is stated that it was some months after that it was received by the plaintiff. It was registered on February 17, 1916, when the value was ascertained by the affidavit of the plaintiff's solicitor at $3,350. The increase over the value on the registration of the last transfer was thus $1,300 on which the increment tax of $65 was charged to and paid by the plaintiff.

The Unearned Increment Tax Act (c. 10 of 1913, 2nd sess.) provides by s. 3 that:

> There shall be payable upon the registration under the Land Titles Act of any transfer of land a tax of five per cent. on the increased value of the said land over and above the value thereof according to the last preceding value for the purposes of this Act, etc.

The Act came into force on October 25, 1913, and provision is made for ascertaining the first taxable value, which I take it means the first value from which any taxable increase begins. This is $15 an acre for rural lands and for lands in a town, city or village, the assessed value for the year 1913, with a proviso for fixing a higher value under the special circumstances mentioned. S. 6 provides that the tax must be paid before the transfer is registered and s. 7 provides that, in the absence of agreement to the contrary, the tax shall be payable by the transferor, except that, in the case of the first transfer after the date of the passing of the Act, it shall be payable by the person beneficially entitled to the land at that date. It also provides that if the tax is paid by any other person it may be recovered from the person liable.

Counsel for the defendant contends that as the tax is a tax on the unearned increment it is surely payable by the person who receives the increment and one can quite believe that that was probably the intention of the legislature. Now, as I have stated, $2,050 was the price paid by the plaintiff and it is admitted the

ALTA.

S. C.

BREDIN v. CANADIAN NORTHERN TOWN PROPERTIES LTD.

Harvey, C.J.

value of $3,350 was fixed by the fact that that was the price at which the plaintiff had sold the lots. It is clear, therefore, that he, and not the defendant, receives the whole increment and is the only person who can relinquish any portion of it, and if the defendant has to pay, it pays in respect to something of which another receives the whole benefit. Counsel, therefore, contends that, as the Act does not specify the date for ascertaining the value, it should be ascertained as of the date of sale. I think, however, that the date is quite definitely fixed and that the trial judge was quite right in holding that the date of registration alone is material. That seems to be the fair inference from s. 3 above quoted. Then, one of the provisos of s. 4, authorizing the fixing of a first value in excess of $15 an acre or the assessed value, is for the case when there had been an agreement to buy the land at a price higher than $15 an acre or the assessed value, in which event that price would be the last value. The purpose of that is to determine a value with which the value upon registering the transfer can be compared for the purpose of ascertaining the difference, but, if that were the way to ascertain the value on the registration of the transfer there would be one value only and not two, and, if it may be said that that is what the proviso means, then it may be answered that that is clearly an exceptional method for a special case and has regard only to a first transfer and the rule for general application must be different.

But the matter appears free from doubt when one examines the provisions of the Land Titles Act passed by the legislature at the same time as the principal Act for the purpose of providing the machinery for enforcing it. They provide (s. 117) that the value is to be ascertained by the oaths of the transferor and transferee or such other person as the registrar will accept, and if they differ, or for any other reason the registrar is not satisfied, he may cause a valuation to be made by an inspector and accept his valuation. The form of affidavit presented requires the transferor and transferee to swear, not what the value was, but what it is. That necessarily involves that the transfer has been made as otherwise there could be no transferor or transferee. It is clear also that a valuation by an inspector must necessarily be a valuation when he makes the inspection.

I think, therefore, the contention of the defendants' counsel is clearly wrong.

It is clear from the provisions of the Act to which I have referred that it was not intended to be retroactive so as to tax any increment except such as would accrue after the passing of the Act and if the increment upon which the plaintiff has been compelled to pay a tax had accrued prior to the date of the passing of the Act neither he nor any of the other parties need have been compelled to pay any tax if due advantage had been taken of the provisions of the Act. The Act apparently assumes that a transfer represents an ordinary sale, though for many purposes it is unimportant whether it does so but for s. 7 the present case shews that it is of some consequence. If the alleged reorganization had not taken place involving a transfer of the land the plaintiff would, under s. 7, have had no right of recourse against his vendor or transferor for any tax he had to pay, but it was they, and not he, who brought about this transfer, and in doing so fixed a value which bound him when he came to register his transfer. By consent, we have had produced to us certain documents which were not before the trial judge and it appears that the registrar did have the assessed value of these lots according to the 1913 assessment and that it was $3,850 or $500 more than the value upon which the tax in question was based.

It is clear, therefore, that the plaintiff would have had no tax to pay if his predecessors in title had left the title alone until they gave him his transfer. It is clear, also, that, if the defendants had taken the trouble to have the value fixed by reference to what the Act offered as a proper basis upon which to start its taxation, instead of having its solicitor sitting in his office in Winnipeg make an affidavit fixing values on a transfer of property totalling in value $1,059,936.50 by the statement: "I know the circumstances of the transfer of the within lands and the value mentioned is the true value for which the said lands were sold prior to October 25, 1913," it need not have been compelled to pay any such tax.

It is not surprising that the registrar should have seen no objection to accepting the value on the transfer according to sales of previous years if the transferee was satisfied, since upon the latter was cast the burden of paying any tax on any further increase. Under the terms of the Act, as I have already indicated, the defendant is the person liable to pay this tax if anyone, and since

ALTA.
S. C.
Harvey, C.J.

it is by reason of its own acts and omissions that the plaintiff was required to pay it there is no equity in its favour.

I would dismiss the appeal with costs. *Appeal dismissed.*

N.B.
S. C.

Ex parte BELYEA.

New Brunswick Supreme Court, Crocket, J. January, 5, 1918.

ADULTERY (§ I—5)—AS CRIME—JURISDICTION OF MAGISTRATE.

Adultery, although a misdemeanour under an old unrepealed New Brunswick Statute (R.S.N.B. 1854 c. 145), is not a crime under the Criminal Code, and a New Brunswick magistrate has no jurisdiction under Part XVI. of the Code to try such offence.

Statement.

APPLICATION under Habeas Corpus Act for discharge of prisoner convicted of adultery. Granted.

G. T. Feeney, supports the application.

Walter Limerick, Police Magistrate of the City of Fredericton, *contra*.

Crocket, J.

CROCKET, J.:—The applicant was charged before the Police Magistrate of the City of Fredericton with having committed the offence of adultery. The magistrate, upon her appearance before him, purporting to act under the provisions of s. 778 of the Criminal Code, put her to her election as between a summary trial before him and a trial by jury at the next court of criminal jurisdiction in the County of York. The accused having consented to be tried before the magistrate summarily, the latter tried the case, convicted the accused and sentenced her to 1 year's imprisonment in the common goal of the County of York, where she is now in custody under the said sentence. She now seeks her discharge from the said imprisonment under the Habeas Corpus Act on the ground that the Police Magistrate of the City of Frederiction had no jurisdiction to try her for the offence of adultery with which she was charged before him. The magistrate relied upon s. 777 of the Criminal Code as conferring the jurisdiction which he exercised, and, as the case does not fall within the provisions of the Summary Trials Act or any other provision of the Code purporting to confer trial jurisdiction upon Police or Stipendiary Magistrates, and is one for the trial of which no authority is to be found in any existing provincial legislation: *The King* v. *Strong*, 26 D.L.R. 122, 43 N.B.R. 190, 24 Can. Cr. Cas. 430, the question for decision is: Does s. 777 of

the Criminal Code authorize the Police Magistrate of the City of Fredericton to try, with the accused's consent, a charge of adultery? The material portions of the section which bear upon the case read as follows:—

If any person is charged in the Province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district, or provisional county in such province, with having committed any offence for which he may be tried at a court of general sessions of the peace, or if . . . such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the court of general sessions of the peace.

2. This section shall apply also to district magistrates and judges of the sessions in the Province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500, according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, and to the recorder of any such city or town, if he exercises judicial functions, and to judges of the Territorial Court and police magistrates in the Yukon Territory (as amended by 8-9 Edw. VII. c. 9).

It was contended that sub-sec. 2 limited the jurisdiction to police and stipendiary magistrates of cities and towns of the required population in the Province of Quebec, but as to this I share the opinions of Gregory, J., of British Columbia in *The King* v. *Rahamat Ali*, 16 Can. Cr. Cas. 193, and of Walsh, J., of Alberta, in *Rex* v. *Spates*, 15 D.L.R. 828, 22 Can. Cr. Cas. 269, and hold that sub.sec. 2 applies to police and stipendiary magistrates of all cities and incorporated towns of the required population in every part of Canada outside of Ontario, in which province sub sec. 1 gives the jurisdiction to all police and stipendiary magistrates of all cities and incorporated towns without regard to the population. The impediment to the jurisdiction in this case arises from the fact that the offence for which the prisoner was tried by the magistrate was adultery, which, though it is an indictable offence in the province by virtue of an unrepealed section of c. 145 of R.S.N.B.1854, is not a crime that is punishable under the Criminal Code either as an offence against any of the provisions of the Code or as an offence at common law or under any statute in the Province of Ontario. It is consequently not a crime which is cognizable before a Court of General Sessions of the Peace in Ontario or for that matter, so far as I have been able to ascertain, before any court of criminal jurisdiction outside of the Province

N.B.

S. C.

EX PARTE BELYEA.

Crocket, J.

of New Brunswick, where there is no Court of General Sessions of the Peace. There are no Courts of General Sessions of the Peace in Canada except in the Province of Ontario, and no similar courts except in the cities of Montreal and Quebec, in the Province of Quebec, but notwithstanding this fact, I cannot apply s. 777 of the Criminal Code to police and stipendiary magistrates outside of the Province of Ontario, without making the jurisdiction thereby conferred dependent upon the jurisdiction of a Court of General Sessions of the Peace. In 1904, subsec. 2 read: "This section shall apply to police and stipendiary magistrates in every other part of Canada," &c. The Supreme Court of Canada in the case of *Re Vancini*, 34 Can. S.C.R. 621, held that that section gave "the magistrates in provinces and territories, other than in the Province of Ontario, the same jurisdiction to try the crime of theft (theft being the crime for which the person in that case was tried) as a Court of General Sessions in Ontario has to try the offence in that province." There was no suggestion that because another section of the Criminal Code, s. 582, confers the same jurisdiction upon County Court Judges in New Brunswick to try any indictable offence with the exception of those set forth in s. 583, as that section does upon Courts of General or Quarter Sessions of the Peace elsewhere, that the jurisdiction of the magistrate in New Brunswick was determinable, not by the jurisdiction of the Courts of General Sessions of the Peace, but by the jurisdiction of the County Court Judges of New Brunswick. The judgment above quoted clearly treated the jurisdiction of the Courts of General Sessions of the Peace in Ontario as the test. What was urged by the police magistrate as to s. 582 might have weight as a reason why parliament might have broadened the provisions of s. 777, by making the jurisdiction of magistrates to try by consent in this province determinable by the jurisdiction of the County Courts, but it is quite irrelevant, in my opinion, upon the question of the constitution of s. 777 as it stands. If it had been the intention of parliament to extend the jurisdiction of police and stipendiary magistrates to try by consent, to all cases triable before any of the courts mentioned in s. 582, whether triable as constituting offences against unrepealed provincial statutes only, or offences against the Criminal Code, it is hardly supposable that

parliament would have evidenced such an intention by putting the legislation in its existing form, and leaving the special provision as to magistrates in Ontario with its specific reference to Courts of General Sessions of the Peace stand as the controlling enactment.

N.B.
S. C.
EX PARTE BELYEA.
Crocket, J.

For these reasons, I am of the opinion that the police magistrate had no jurisdiction to try the applicant for the offence of adultery, and that the warrant of commitment under which she is now detained in cutody is null and void, and her imprisonment illegal. I shall therefore order her discharge from this imprisonment.

Judgment accordingly.

KEEGAN v. THE KING.

CAN.
Ex. C.

Exchequer Court of Canada, Audette, J. April 23, 1917.

CROWN (§ II—20)—NEGLIGENCE—PUBLIC WORK—POST OFFICE—ELEVATOR.
An injury sustained in the course of repairing an elevator-switch in a post office building, the elevator not being for the use of the public, is one happening on a "public work," and having been occasioned by the negligence of a servant of the Crown acting within the scope of his employment becomes a claim under sec. 20 of the Exchequer Court Act, for which the Crown is liable.

PETITION OF RIGHT to recover damages for personal injuries. Statement.

H. N. Chauvin and *H. E. Walker*, for suppliant; *F. J. Laverty*, K.C., for respondent.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $25,000 for injuries, loss and damage suffered by him as the result of an accident, in the General Post Office building, at Montreal, P.Q. Audette, J.

On December 21, 1914, the suppliant was engaged, with Charles Gylche, in repairing the limit-switch in the pit of the freight and passenger elevator at the post office, an elevator which is not in use by the public. Some work had been done in the morning and they resumed work in the afternoon.

Witness Donovan states in his evidence that, in the absence of superintendent Morrison, who has charge of all the buildings and public works he, himself, has charge of the elevators in the post office. At 3 o'clock in the afternoon, Tisdale, who does not speak English, was to take charge of the elevator. A few minutes before 3, after taking the power off, Donovan, in the presence of Keegan and Gylche, told Rochon, who speaks the

CAN.
EX. C.
KEEGAN
v.
THE KING.
Audette, J.

French and English languages, to tell Tisdale that he could operate the elevator, but not to take it down to the basement, where the men were working—that he was to operate above only, and both Keegan and Gylche declared themselves satisfied with this arrangement. Gylche said he did not like the idea of having the elevator operated while they were working; but on representations being made that the elevator was wanted, they all agreed to the above arrangement.

Donovan said that he then reconnected the electricity which he had shut off.

Tisdale says the accident in question occurred between 3.25 and 3.30 in the afternoon, he having taken charge of the elevator at 3 o'clock; and that between 3 o'clock and the time of the accident, he had been asked, by the men working in the pit, to come down 5 times to see how the elevator would work, and that each time, both Keegan and Gylche were out of the pit, standing on the floor of the cellar close by the elevator.

Now, immediately before the accident both men were in the pit underneath the elevator, engaged in the repairs in question, and while Keegan was in a bending position, his elbow resting on a projecting ledge of 15 to 18 inches in width at the back of the pit, leaning over this ledge or wall, holding a piece of wood into which he was running a screw to hold the limit switch, the elevator suddenly came down upon him and he was very severely injured.

Gylche, who was at the time in the pit with Keegan, says they were not expecting the elevator down, as it had been arranged it was not to be operated down to the basement. He was standing away from the wall, and the first intimation of the coming elevator was the feeling of a draft, made by the displacement of the air, as it was coming down rapidly. He then heard Keegan crying out "Oh!" before being struck. As soon as Gylche realized this predicament, he stooped down on his knees and kept his head clear of the car, and afterwards crawled out between the bottom of the car at the front, and the floor, through a space of 15 to 18 inches. The bottom of the pit is about 4 ft. lower than the floor of the basement, and the ledge in question is about 23 to 24 inches from the floor.

Keegan moaned. He was caught between the edge of the ledge and the bottom of the car—he could not move—he was

pinned down. When the car moved up, he slid to the bottom and moaned considerably.

He was afterwards moved to the hospital and placed under medical care.

Tisdale, the operator, says he took the elevator down because he heard some one call "come down." A clerk in the post office, who happened to be in the basement at the time of the accident, says that when some distance from the elevator pit, he heard the words "come down;" and *he thinks the sound appeared to him as coming* from the pit. Another clerk who was in the act of going up from the basement to the ground floor, in a small stairway open all around, with a door at the top, says he also heard the words "come down." The sound to him appeared to come from the basement. However, when he reached the ground floor, he found the elevator there, flush with the ground floor. There is, therefore, a conflict between Tisdale and this witness, because Tisdale said when he heard "come down" he was at the 3rd storey, and that he come down direct from the 3rd storey. Some one is in error.

It is proved beyond peradventure that these words "come down" were spoken by some one, but who did really pronounce them? Gylche denies absolutely that either Keegan or he did say "come down" at that moment. He said when he wanted the elevator to come for testing purposes he would ring and call; and unless both Keegan and Gylche had plotted to commit suicide they would certainly not have called the elevator when they were in this dangerous position.

While the words "come down" were actually spoken, it must be found they were not pronounced by either Keegan or Gylche, and that it is quite possible they were pronounced by some one on the ground floor, where the elevator was found to be when witness Fauteux came up from the basement, or possibly even at some other flat. Sound, indeed, controlled by walls, pits and draughts, will travel in a very capricious manner and will often prove very deceiving. The laws of reflection of a sound are the same as those of the reflection of light and heat, and curved surfaces will give rise to acoustic focuses analogous to luminous and calorific focuses which are produced before concave reflectors. As long as the waves of a sound are not interfered with in their development,

CAN.
EX. C.
KEEGAN
v.
THE KING.
Audette, J.

they will propagate in the shape of concentric spheres; but when they meet an obstacle they follow the general rule of elastic bodies, that is to say, they come back upon themselves in forming new concentric waves which seem to emanate from a second centre situate on the other side of the obstacle and this is what is called reflected waves. Therefore, it is obvious a sound is materially affected by its surrounding obstacles, and while on first impression it may appear to come from one direction, it can as a fact, have emanated from the very opposite direction.

If the elevator was at the third storey when these words "come down" were pronounced, they might have come from the first or the second storey, the sound striking the bottom of the elevator as an obstacle to the development of its waves, and may have bounced back to the cellar, and appear to many as having originated there. Such a call was, however, made, but it is under the evidence impossible to accurately locate it. But even if such a call has been made there was obviously great want of care and diligence in the manner in which Tisdale answered it, that is by rushing his elevator down to the basement notwithstanding the arrangement above mentioned respecting the service of the elevator in the basement. He knew the men were working in the pit, he knew he was not to run his elevator down to the basement—this was a departure from his usual run—and if he thought he was called to the basement he was bound under the circumstances to use such care and diligence as an ordinary prudent man would use on such an occasion. There is no excuse or justification for taking his car down in such a reckless manner, oblivious of all sense of responsibility and sane behaviour. He probably had momentarily forgotton about the men in the pit and of the understanding about the service to the basement.

The accident having occurred on a public work, the General Post Office building, at Montreal, and it being the result of the negligence of an officer or servant of the Crown acting within the scope of his duties and employment, the suppliant is entitled to recover. See the Exchequer Court Act, sec. 20.

Coming now to the question of quantum, the evidence establishes that when Keegan was brought to Notre Dame Hospital, after the accident, he was suffering from a fracture of the spine, in the last dorsal vertebrae, from a tear of the perineum and of the

rectum, that his legs were paralysed, and the suppliant adds that he was struck on the head and several of his teeth were knocked out. He was placed by Dr. Mercier in a plaster jacket and the paralysis began to improve. In March, 1915, the fracture of the spine had partly consolidated, but he was still an invalid. A few weeks after leaving Notre Dame Hospital he went to the General Hospital, at Montreal, where he was treated by Dr. Nutter, who testified that when he first saw Keegan he was still in a badly crippled condition with forward curvature, although one could see he had been still worse. He had a bad deformity of the spine, a hunch back, evidently due to the accident, and the X-Ray he had taken shewed a fracture of the last dorsal vertebrae. He will always remain in a crouched condition and be permanently disfigured. The force of the elevator had crushed the bone. He had recovered the use of his legs and was then able to go about with care in a feeble manner, but could not stand for any time. He was happier sitting than standing, but happier on his back, and could not sit more than from one to two hours at a time. The solidification of the spine was not complete, and he went to England wearing a steel and leather jacket. And he further adds that the last time he saw him, he (Keegan) had lost 75% of his capacity, and that he would never be able to handle heavy work, and while he should find something to earn his living, he could not be an electrician having in that capacity to handle weights of 15 to 20 pounds.

Arrived in England he was under Dr. Miller's treatment, who says that his ability to work is practically nil, owing to his difficulty of remaining in an upright position for more than 3 hours a day, and his powers of locomotion very limited. He further says that the tendency of recovery is bad and that he will probably require close observation and be under medical treatment all along.

Keegan was 27 years of age at the time of the accident, and was earning, he says, an average of about $22.50 a week. F. Lawson, the book-keeper at the Otis Fensom Elevator Co., says that at 30 cents an hour Keegan would average about $70 a month, and that in the 41 weeks preceding the accident Keegan earned $750.

The suppliant's life is practically wrecked, his prospects

[CAN.
EX. C.
KEEGAN
v.
THE KING.
Audette, J.

blighted, his earning power is materially decreased, and he has suffered very much pain. He cannot follow or pursue his avocation as an electrician, a walk of life fairly remunerative in our days. His earning capacity is decreased by 75%, says one medical gentleman; but, being intelligent, it is quite probable that in the near future he will be able to find some suitable employment that will keep him busy, yielding him some remuneration. He has some doctors' bills to pay and will have to meet some further expenditure in this respect.

In estimating the compensation to which the suppliant is entitled, under all the circumstances, bearing in mind all the legal elements under which he is entitled to recover, some consideration should be given to the fact that while he may not be entirely prevented from earning, his chances of employment in competition with others are very much lessened and his earning power consequently reduced to very, very little.

While, in assessing damages in a case of this kind, it is impossible to arrive at any amount with mathematical accuracy, several elements, however, must be taken into consideration and one must strive to compensate the suppliant for his loss generally, to make good to him the pecuniary benefits he might reasonably have expected had he not met with the accident. In doing so one must take into account the age of the suppliant, who at the time of the accident was 27, his state of health, his expectation of life, his employment, the income he was earning or had reason to expect to earn and his prospects, not overlooking, on the other hand, the several contingencies to which every one in his walk of life is necessarily subjected, such as being out of employment, to which, in common with other persons, he was exposed, and his being also subject to illness. All of these surrounding circumstances must be taken into account.

In the present case the suppliant was in his prime, in good health, a steady worker and good electrician, and with work and good conduct he had the right to expect fair earnings.

Under all the circumstances of this case, I am of opinion to allow the sum of $4,500 together with a further extra allowance of $200, for medical expenses, past, present and future, making in all the sum of $4,700, and with costs.

Judgment for suppliant.

SASK.

S. C.

GENERAL FINANCIAL CORPORATION OF CANADA v. LE JEUNE.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood. JJ. January 12, 1918.

PRINCIPAL AND SURETY (§ I B—12)—DISCHARGE OF SURETY—EXTENSION OF TIME.

An extension of time for payment, without actual agreement or consideration, does not release a surety.

Statement.

APPEAL from the judgment of the trial judge in an action on an agreement for sale.

J. A. Allan, K.C., for appellant; *J. M. Stevenson*, for respondent.

Haultain, C.J. Lamont, J.

HAULTAIN, C.J., and LAMONT, J., concurred with ELWOOD, J.

Brown, J.

BROWN, J.:—I entirely concur in the view expressed by the trial judge, that, under the circumstances of this case, it does not lie with the plaintiffs to say that the agreement for an extension of time is not binding on them. The consideration for this extension was an increase in the rate of interest from 8% to 15%. In both these respects there was thus a material alteration in the contract guaranteed by the defendant.

By the deed of assignment, wherein the defendant covenants to pay the debt in default of the primary debtor, he further agrees as follows:—

> And he doth further covenant and agree that the giving or extending of time for the payment of any sum or sums of money payable under the said articles of agreement, or for the performance of any condition or covenant contained therein, by the said assignee to the said purchaser or any other person shall not be a waiver or release or discharge in any way to the assignor or this covenant.

Having so agreed to an extension, the defendant cannot now object to it.

It is contended by Mr. Allan that this provision also contemplates a consideration being given for such extension; that the parties did not have in view a mere *nudum pactum*, and that it was, therefore, competent on the plaintiffs' part, without releasing the defendant, to increase the rate of interest as the consideration for the extension.

The obvious answer to this contention is, that a binding agreement for such extension could have been made which would not, necessarily, raise the rate of interest or otherwise alter any of the terms of the agreement.

SASK.

S. C.

GENERAL FINANCIAL CORPORATION OF CANADA v. LE JEUNE.

Brown, J.

I agree with the view that the parties contemplated a binding agreement for an extension being entered into; an agreement which involved a consideration passing from the primary debtors to the plaintiffs, but I cannot accept the view that it was ever contemplated that such consideration would involve a material alteration in the terms of the contract. The only alteration to that contract agreed to by the defendant was an extension of time. No other, in my opinion, was agreed to or contemplated.

A material alteration having thus been made without the consent of the defendant, he is as a surety thereby released. See *Bristol Co.* v. *Taylor*, 24 O.R. 286.

In this view of the matter, it is not necessary to consider the other defences raised, and I would dismiss the appeal with costs.

Elwood, J.

ELWOOD, J.:—By an agreement for sale dated December 12, 1912, the defendant sold to George Melville, William Govan and William T. Maddaford certain land for the price and on the terms therein mentioned; *inter alia*, providing for interest at 8% per annum. Said agreement contained, *inter alia*, the following clauses:—

The vendor further agrees to transfer any one or more lots or blocks, except blocks 4 and 11, of the within mentioned subdivision to the purchasers clear of encumbrance, except encumbrance created by or on behalf of the purchasers upon payment by the purchasers of a proportionate amount of the purchase price against said lot or blocks to be transferred, calculated on the basis of the ratio which the part to be transferred bears to the total area of the within mentioned property.

. . . .

The party of the first part further covenants, promises and agrees on request of the parties of the second part, to deliver transfers to the parties of the second part clear of all encumbrances, except encumbrance created by or on behalf of the parties of the second part, of any plots or parcels of land in blocks 4 and 11 in the within mentioned subdivision, not less than 75 ft. in width.

Provided, that before demanding such transfers the parties of the second part shall pay to the party of the first part the proportionate amount of the price mentioned levied against said property after giving the purchasers credit for the amount paid calculated on the entire area of the property to be conveyed, to the whole of the said property.

By an assignment dated October 11, 1913, in consideration of $25,500, paid by the plaintiff to the defendant, the defendant assigned to the plaintiff the said agreement of sale and all moneys due thereunder and all the defendant's right, title and interest therein, and to all the lands referred to therein. The same assignment, *inter alia*, contained the following:—

the said assignor hereby nominates constitutes and appoints the said assignee his true and lawful attorney, irrevocable, to use the name of the said assignor in securing the enforcement of all such rights, and doth hereby authorize the assignee to convey the said lands or the interest of the assignor therein named to the purchaser or such other person, including the assignee, as may become entitled to a conveyance thereof.

And the said assignor doth further, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said assignee, its successors and assigns, that in the case of default by the purchaser in payment of any sum or sums of money which shall become due or owing under the said articles of agreement, that he will forthwith on demand well and truly pay or cause to be paid to the said assignee, its successors or assigns, any sum or sums so in default.

And he doth further covenant and agree that the giving or extending of time for the payment of any sum or sums of money payable under the said articles of agreement, or for the performance of any condition or covenant contained therein, by the said assignee to the said purchaser or any other person shall not be a waiver or release or discharge in any way to the assignor of this covenant.

In the spring of the year 1914, the plaintiff had correspondence with one of the purchasers of the land with regard to the payments falling due in June of that year, and a request was made to the plaintiff to extend the time for payment of the principal, intimating that the purchasers would be prepared to pay an increased rate of interest. The plaintiff replied that it would be willing to give an extension upon payment of 15% interest. There was no letter definitely accepting this proposition, but a letter from William Govan, one of the purchasers, to the manager of the plaintiff company dated August 10, 1914, contains the following:—

Our Mr. Maddaford was in Winnipeg last month and saw you regarding our final payment on agreement No. 73.

I understand from him that you only gave us until September 15 to make this payment, notwithstanding he offered 15% for an extension for 1 year.

A letter from the plaintiff to the said Govan, dated August 12, contains the following:—

We are in receipt of your letter of the 10th inst. and in reply beg to say that we agreed with Mr. Maddaford to give him extension up to October 15, at the rate of 15% payable on the extension on that date.

So that it seems to me that those letters do shew that there was an agreement between the plaintiff and Maddaford to give an extension up to October 15, and an agreement by Maddaford to pay interest at 15% per annum. However, be that as it may, the fact remains that payments were received on several occasions by the plaintiff, and these payments were appropriated in part in

SASK.

S. C.

GENERAL FINANCIAL CORPORATION OF CANADA v. LE JEUNE.

Elwood, J.

payment of interest at 15% per annum. Notice of this appropriation was given the purchasers and no objection was apparently raised. In the statement of claim in the action the payments are so appropriated.

A number of questions were raised on the argument before us, and I shall proceed to deal with them.

It was contended on behalf of the appellant that the defendant was not a surety, but was a principal debtor. I, however, concur with what is held by the trial judge in this respect, and it seems to me that it cannot be successfully contended that the position of the defendant was other than a surety.

It appears that transfers were issued by the plaintiff from time to time with respect to certain lots on payment of certain sums of money. The first of these transfers was issued at the request of the defendant, subsequent ones were issued at the request of the purchasers under the original agreement. It was objected on behalf of the respondent that in issuing these transfers the plaintiff accepted therefor less sums than should have been paid under the agreement. Without going into the details in connection with this, and without expressing any definite opinion as to what sums should, under the agreement, have been received by the plaintiff, in exchange for the transfers which were granted, I am of the opinion that the plaintiff received less than it should have received, but that, so far as the transfers to the defendant are concerned, the defendant cannot make any objection. So far as the other transfers are concerned, I am of the opinion that the defendant is not discharged absolutely from his liability on his guarantee, but only *pro tanto*. It seems to me that, with respect to such transfers, this case comes within what is laid down in *Pearl* v. *Deacon*, 24 Beav. 186, 53 E.R. 328; *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596.

So far as the actual giving of time is concerned, I am of opinion that the assignment permitted the plaintiff to give and extend time without releasing the surety. It will be noted that the assignment provides that the "giving or extending of time for payment will not be a waiver, release or discharge." It might be argued that the use of the word "giving" would apply only to a permitting without an actual agreement, but the word "extend" goes farther that that, and would, in my opinion, embrace an actual agreement

to extend. The law seems to me to be quite clear that, where there is an extension not the result of an actual agreement, or without consideration, such an extension will not release the surety.

In *Clarke* v. *Birley*, 41 Ch.D. 422 at 434, there is the following:

As Lord Eldon says in *Samuell* v. *Howarth*, 3 Mer. 272: The rule is this: that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal, as he would have had under the original contract.

But, to produce this result, two things are necessary. There must be a binding contract to give time, capable of being enforced; and the contract must be with the principal debtor.

See also the *York City & County Banking Co.* v. *Bainbridge*, 43 L.T. 732, and *Wright* v. *Western Canada Accident Co.*, 20 D.L.R. 478.

There still, however, remains to be considered what is the effect of agreeing to pay a higher rate of interest, or, if there was not such an agreement, receiving a higher rate of interest.

As I stated above, I think the fair inference to be taken is, that there was an agreement with Maddaford to extend the time and to receive a higher rate of interest. If there was an agreement by him to pay and by the plaintiff, in consequence of that agreement, to extend the time, then, it seems to me, that the surety is discharged. There was an alteration in the terms of the original contract of sale which, at least, might be and probably would be, prejudicial to the defendant.

In *Bristol & West of England, etc., Co.* v. *Taylor*, 24 O.R. 286, Street, J., in delivering the judgment of the court at p. 294, is reported as follows:—

In *Holme* v. *Brunskill*, 3 Q.B.D. 495, at p. 505, Cotton, L.J., delivering the judgment of the majority of the court, thus stated the law: "That if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged

SASK.

S. C.

GENERAL FINANCIAL CORPORATION OF CANADA v. LE JEUNE.

Elwood, J.

or not, to be determined by the findings of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Brett, L.J., the dissenting judge, expressed his view as follows (p. 508): "The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

I have quoted this judgment of Brett, L.J., because it appears to me that, even in his view of the law, not only the alteration in the time of payment, but also the alteration in the rate of interest, must be treated as material. Under the judgment of the majority of the court there can be no doubt that both variations are material.

See also *Polak* v. *Everett*, 1 Q.B.D. 669.

The plaintiff in this case is, in fact, seeking to recover from the defendant interest for a portion of the period at 15% per annum. It is quite true that sums to that amount were received, but interest is being charged at 15% per annum and were it not so being charged the defendant would be receiving a larger credit than he is under the contract and to the extent of the difference between 8 and 15% the defendant is prejudiced. In the view I take of the case, it seems to me to be immaterial whether there was an agreement with Maddaford to pay this increased interest in consideration of the extension of time, or whether the plaintiff simply appropriated the money to the increased interest and notified the purchasers of that fact and they concurred in it. The purchasers, at least, did not protest against the appropriation, and I think under the circumstances of this case should at least be held to have concurred in it. In that event, the result is that the plaintiff, suing on its contract, is not suing on it as it originally was, but is suing claiming to be entitled to recover interest at 15% per annum for a portion of the period. Under these circumstances, as I stated above, it seems to me that the case comes well within what is laid down in *Holme* v. *Brunskill*, 3 Q.B.D. 495; *Polak* v. *Everett*, *supra*, and *Bristol, etc., Land Co.* v. *Taylor*, *supra*, and that the surety is discharged.

It seems to me, further, that there was no demand by the plaintiff made upon the defendant before action. The correspondence put in evidence does not, in my opinion, shew a demand. It was admitted, or practically admitted, on the argument before us, that a demand was necessary, and exhibits "M" and "N" do not shew that a demand had been made.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

GRACE v. KUEBLER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

VENDOR AND PURCHASER (§ II B—5)—PAYMENT OF PURCHASE MONEY—ASSIGNMENT BY VENDOR—NOTICE—CAVEAT.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land; a caveat, filed in the Land Titles Office after the assignment, is not notice, as such, to the purchaser, who is not bound to search the register before making payment.

[*Grace* v. *Kuebler*, 33 D.L.R. 1, affirmed. See annotation, 33 D.L.R. 9.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 33 D.L.R. 1, which affirmed the judgment of Harvey, C.J., at the trial, 28 D.L.R. 753, and dismissed the plaintiff's action with costs.

Armour, K.C., and *A. H. Clarke*, K.C., for appellant.

Bennett, K.C., and *Sinclair*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Stuart, J., prefaces his judgment in the Appellate Division with the observation that

> the practice which seems to have obtained to some extent in this province whereby an owner of land, who has entered into a solemn agreement to convey the land to another upon payment of a certain money, deliberately puts it out of his power to fulfil his contract by himself transferring the land to a third party is a reprehensible one.

The qualification does not seem too severe, and it may be added that it is also invalid, unless it be in the case of an innocent purchaser without notice, of which there can be no question here as the deed of assignment to the appellant sets out the sale already made to the respondents. An owner of the land, who had agreed to sell it, has parted with his ownership and has nothing left but the bare legal title.

The transfer of the title here was never effected as the transfer was not registered.

CAN.

S. C.

GRACE v. KUEBLER.

Fitzpatrick, C.J.

The appellant, in my opinion, had only an assignment of the debt, and registration does not enter into the case at all.

It seems unnecessary to say that the mere assignment of the debt could not affect the respondents, without notice. This was recognized, no doubt, in putting the respondents in as parties to the assignment of April 5, 1913, to acknowledge receipt of notice thereof, and it is strange that, if they were not asked to execute the deed, it should never even have been brought to their knowledge.

The Land Titles Office cannot be used for the purpose of giving any such notice. It would be extraordinary, if it could, that a purchaser should have to search his vendor's title every time before paying an instalment of the purchase money.

I think the appeal should be dismissed with costs, but I have considerable doubt whether the appellant is entitled to the reference offered him by the judgment on the trial.

Davies, J.

DAVIES, J.:—This was an appeal from the judgment of the Court of Appeal for Alberta (McCarthy, J., dissenting), affirming a judgment of the trial judge, Harvey, C.J., dismissing the plaintiff's, appellant's, action to recover from respondents part of the purchase money of certain lands which the respondents had purchased from one Steinbreker and which purchase money had been assigned to the plaintiff-appellant subsequently to Kuebler's purchase of the lands from Steinbreker.

The facts are stated by Beck, J., in his judgment as follows, and I agree generally with the conclusions of law he reached upon those facts (see 33 D.L.R. 3-4).

There cannot be any doubt apart from the provisions of the Land Titles Act in Alberta which may affect the matter in controversy in that province that where a mortgagee assigns his mortgage, and the mortgagor has not received notice of the assignment, he discharges his liability under the mortgage by payment to the mortgagee.

I cannot draw any distinction in this respect between a purchaser who has entered into an agreement for the purchase of land and covenanted to pay the vendor the purchase moneys in instalments and an ordinary mortgagor. Payment by such purchaser to his vendor of his purchase money without notice of any assignment from the vendor to a third person of such pur-

chase moneys is a good payment and *pro tanto* discharges the purchaser from further liability.

The Ontario decisions would seem to have settled the law in that province in the same way, notwithstanding the provisions of the Registry Act of the province.

The main contention on the part of the appellant was that the legal effect of the filing of the above mentioned caveat by him was sufficient under the Land Titles Act to protect his rights exclusively to receive the purchase moneys Kuebler had agreed to pay Steinbrekers for the land, that it constituted constructive notice to Kuebler, and that after the filing of such caveat Kuebler made any payments to any one else at his peril.

The plaintiff had full actual knowledge of the defendants' purchase and agreement to pay, and he did not beyond filing such caveat give any notice to the defendants of the transfer to him of the land and the assignment of the purchase moneys Kuebler had agreed to pay. He relied entirely upon the effect of the caveat which he registered, and in effect contended that the right of the defendant to pay Steinbreker such purchase money unless and until he had received notice of the transfer and assignment, was defeated by the statute and that the filing of the caveat was sufficient notice.

The result of this contention if maintained would be that a mortgagor or purchaser such as defendant would be obliged to search the registry every time he made a payment on his mortgage or agreement to purchase in order to protect himself.

With the result, of course, we are not concerned if the Land Titles Act in its provisions relating to the filing of caveats has the effect plaintiff contends for.

Now, I understand a caveat is something which protects the existing rights of a man filing it in and to the lands mentioned in it. It does not create any new rights.

The question then immediately arises, what were the plaintiff's rights with respect to these lands and the purchase moneys Kuebler had covenanted to pay for them at the time plaintiff filed his caveat?

They were, of course, the right to receive those moneys which had been assigned to them and to give a proper discharge to the party paying them.

CAN.

S. C.

GRACE v. KUEBLER.

Davies, J.

But they did not involve an *exclusive* right to receive them unless and until they had given the party liable to pay them notice of their rights.

These rights were, in my opinion, subject to the right of the purchaser of the land to pay to the vendor from whom he had purchased the moneys he had covenanted to pay him unless and until he, the purchaser, had notice that such moneys had been assigned to another.

That right was, in my opinion, an equitable one, which the filing of a caveat did not annul or abrogate.

The opinion of Holroyd, J., of the Supreme Court of Victoria on the point is cited by Beck, J., from the case of *Nioa* v. *Bell*, 27 Vict. L.R. 82, at 85. That judge said in speaking of the effect of the provisions of the Victoria Transfer of Land Act (which is substantially the same as the Alberta Land Titles Act) that:—

> To have destroyed it (the old equitable doctrine as to notice) the language should have been extremely clear and explicit, because it is a doctrine founded on the *plainest principles* of justice.

I conclude, therefore, concurring with both courts below, that the filing of the caveat in this case did not displace the equitable doctrine of the right of a mortgagor or purchaser, such as Kuebler was, to pay the purchase money he had covenanted to pay to the person he had covenanted to pay to, unless and until he had received notice of the assignment of such moneys to a third person, and that the mere filing of a caveat in the Registry Office was not such notice.

"It did not," as Stuart, J., says in his reasons for judgment

> protect him (the plaintiff-appellant) from the exercise by the purchaser of rights which he knew the purchaser had, rights, indeed, which were the very subject of his own contract with the vendor,

and which of course were exercised without any actual notice or knowledge of appellant-plaintiff's assignment.

I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—The appellant, as the assignee of John and Arthur Steinbreker who had sold land in Alberta to the respondents Kuebler and Karl Brunner, sought specific performance of the contract after the purchasers had paid the price to the Steinbrekers in cash and a promissory note of fifteen hundred dollars which had passed into a third party's hands for value. The cash payments were made partly at the time of the sale and

later by a reduced sum agreed upon in which considerable discount was allowed the purchasers in consideration of cash anticipating the time given by the agreement for payment thereof.

The appellant had made a loan to the Steinbrekers upon the security of the assignment to him of the said contract and other securities.

He never gave any notice of this assignment to the respondents, or either of them, and it is not pretended they had any notice of the assignment until long after they had paid in full, in the manner I have mentioned.

These facts seem rather a novel foundation upon which to rest an action for specific performance at the suit of the appellant as an assignee of the contract for sale and purchase, hoping to enforce thereby a second payment of the price by the purchasers.

I should, but for the fact evidenced herein to the contrary, have said such a claim was hardly arguable on the ordinary principles governing such suits.

And when we find that, in Alberta, there is an express statutory provision which deals with assignments of choses in action, validating them upon notice in writing to the debtor, only from the date of such notice and then only subject to the equities which would have existed but for the enactment, we are puzzled to find it argued that there are some provisions in the Land Titles Act which enable a creditor in the case of sale and purchase of land to impose upon his debtor the obligation to search the Registry Office at the time of making any payment, no matter how trivial the amount of his instalment, before he can safely pay the man he bought from.

Logically followed out the argument would require this search, on every occasion of payment, to ascertain whom to pay what he desired to pay.

I must say it seems a startling proposition. And when we turn to the instrument of assignment by virtue of which this claim is set up, and we find it expressly limited as follows:—

> To have and to hold the said lands and premises unto and to the use of the said assignee, his heirs and assigns forever, subject to the terms, covenants and conditions contained in the said Articles of Agreement,

we must ask ourselves whether it is possible that the Legislature, enacting such a statute as the Land Titles Act, can really have

CAN.
S. C.
GRACE
v.
KUEBLER.
Idington, J.

intended to have so dealt with the contractual relations of parties concerned in sales and purchases of land, as to bring about such confusion.

I do not think it ever so intended or so expressed itself.

The usual way in which purchasers protect themselves against such possible frauds as the vendors committed and are in question here is to register a caveat. But what is a caveat for? Surely it never was conceived as a something to enable the vendee to protect himself against the assertion of right on the part of the vendor. His agreement binds him and no need of it for that purpose as the appellant assignee is equally bound. It is intended solely as against others, not parties to the contract and bound by it, but who innocently might have purchased, and but for its registration have acquired a right.

Yet it has been argued herein that, because the appellant as assignee of the contract of sale, registered a caveat to protect himself against subsequent assignees of the same contract, hence he is entitled to enlarge thereby the rights conveyed to him beyond that which the instrument under which he claims gave him.

I do not think such a consequence was ever conceivable as flowing from the non-registration of a caveat.

But then it is said and proven that besides the assignment of the lands, contained in the assignment of the purchase money, there was another instrument simply transferring the land and that the caveat covers that also, and that upon the proper or improper production of that transfer for registration it would take the place of that caveat and have the effect given thereto of vesting the lands in appellant.

One answer to that is, appellant has not got so far. And as to the caveat itself it only pretends that he has an interest, and the affidavit of the agent thereto in order to effect its registration states his principal has a good and valid claim upon said land.

Investigation herein has shewn just what that claim is. It never justified a claim as the purchaser or anything but what the instrument first mentioned above conveyed.

The caveat was quite proper as a protection of what the appellant had acquired thereby.

In any way one can look at these instruments the caveat

cannot enlarge their effect and the argument resting upon s. 97 of the Act does not help appellant, unless we are to assume that by a fraudulent use of the substitution of the transfer for the caveat, when on the facts the appellant had no right to acquire registration or continue the caveat, he might gain something.

Speaking as respectfully as one can of such a proposition it seems an idle play upon words in disregard of the entire purview of the statute.

I think the principle that *Rose* v. *Watson*, 10 H.L. Cas. 672, proceeds upon is still good law, and that the appellant is but a trustee, who is bound to obey the order of the court and convey to the purchasers when required thereby. And that is not inconsistent with, but may proceed upon the exposition of the principle as dealt with in *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, even though that was the converse of this as to the requirement of specific performance. The counterclaim is, I hold, maintainable.

The appeal should be dismissed with costs.

I do not see anything calling for our judgment on the question reserved by the learned Chief Justice as to the possible right of subrogation as to mortgages, and have not examined same.

Duff, J.

DUFF, J.:—I think this appeal should be dismissed. The most important of Mr. Armour's contentions was that, while the appellant took any interest he acquired by the transfer and assignments under which he claims, subject to the rights of the respondents as purchasers from Steinbreker under the agreement of June 27, 1912, yet these last mentioned rights were subject to this—that in paying the purchase money to the Steinbrekers, as each successive payment was made, notice must be imputed to them of any dealing by Steinbreker, with his title properly appearing on the registry; and that notice consequently must be imputed to them at the time the payments in question were made of the transfer and agreements under which the appellant claims by reason of the caveat filed by the appellant.

After full consideration, I think the argument must be rejected and that the appeal fails. I think the law is settled that a vendor is acting in violation of a vendee's rights if he attempts to dispose of the property sold to any person other than the purchaser, and an injunction will lie to prevent him from carrying any such

CAN.
S. C.
GRACE
v.
KUEBLER.
Duff, J.

intention into effect: *Hadley* v. *London Bank*, 3 DeG. J. & S., 63, and such a disposition, if completed, gives the purchaser the right to rescind and to sue for damages: *Synge* v. *Synge* [1894] 1 Q.B. 466, at 471. The judgments in *Ex parte Rabbidge*, 8 Ch. D. 367, really rest on the provisions of the Bankruptcy Acts, and I think the dictum of Moulton, L.J., in *Re Taylor*, [1910] 1 K.B. 562, at 573, must not be taken too absolutely.

It is clear, however, that the vendor may assign the benefit of his contractual rights under the contract, and the assignee may enforce those rights, assuming the provisions of the law with regard to assignments to be fulfilled, and the assignee to be in a position to require the vendor to carry out his obligations under the contract. It is elementary, however, that as against the assignee claiming under an assignment of the vendor's contractual rights, the vendee is entitled to deal with the vendor until he has received notice of the assignment. See the observations of Lord Cairns in *Shaw* v. *Foster*, L.R. 5 H.L. 321, at 339. It follows that the vendee having no notice of the assignment under the vendor's contractual rights, could not be affected by a caveat, unless there is some statutory provision giving to a caveat the effect of a notice in such circumstances. I can find nothing in the statute pointing to that. S. 84 authorizes the filing of a caveat in the form mentioned

> against the registration of any person as transferee or owner of any instrument affecting such an estate or interest unless such instrument be expressed to be subject to a claim of the caveator.

There is nothing in this language pointing to the conclusion that a caveat is intended to operate as a warning against the mere payment of money; nor indeed do I think, speaking generally, that the office of the caveat is anything more than to protect rights which otherwise might be prejudicially affected by some conflicting registration.

Anglin, J

ANGLIN, J.:—In my opinion, notice to the debtors Kuebler and Brunner that their debt to the Steinbrekers had been assigned to the appellant Grace was necessary in order to complete his title to it so as to render subsequent payment by the purchasers to their original creditors made in ignorance of that assignment ineffectual to discharge their debt. S. 101 of the Land Titles Act, invoked by Armour, is, I incline to think, applicable only to

the interest of the vendee or encumbrarancee. The proviso certainly so indicates. If applicable at all to a transfer by the original vendor or owner, in my opinion it has to do with the transfer of his right, title and interest in the land only—not in the debt. Moreover, any such transfer is explicitly made "subject to the conditions and stipulations in such assignment contained," *i.e.*, in this case to the original purchasers' right to have the land conveyed to them on payment of the debt—their purchase money. The registration of a caveat by Grace did not amount to the requisite notice to them of the assignment to him of their debt to the Steinbrekers. It would, no doubt, be notice of his interest in the land to persons subsequently dealing with it—but not to persons in the position of Kuebler and Brunner so as to render their payments to the Steinbrekers ineffectual to discharge their debt or to entitle Grace to compel them to make such payments again to him. A search of title by Kuebler and Brunner when they entered into their agreement to purchase would have shewn their vendors, the Steinbrekers, to be then the registered owners of the land. In merely making their payments, they were not persons subsequently dealing with it to whom registration in the interval would be notice: *Gilleland* v. *Wadsworth*, 1 A. R. (Ont.) 82; *Williams* v. *Sorrell*, 4 Vesey 389. To their subsequent payments the equitable principle of the mortgage cases applies in which it is held:

> that as against an assignee without notice (meaning without notice to the mortgagor) the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim by way of set-off, or mutual credit, as against the mortgagee, he can equally claim against the assignee.

Turner v. *Smith*, [1901] 1 Ch. 213, at 220; *Norrish* v. *Marshall*, 5 Madd. 475, at 481. I find nothing in the Alberta Land Titles Act which excludes this equitable doctrine;

> to have destroyed it clean and explicit language would be necessary.

Nioa v. *Bell*, 27 Vict. L.R. 82. The insufficiency of registration as notice in such cases is illustrated in the case of *Pierce* v. *Canada Permanent*, 25 O.R. 671; 23 A.R. (Ont.) 516. I have not overlooked the fact that in that case the prior mortgage was registered. Here the actual and complete notice which Grace had of the rights of the original purchasers when he advanced his money and took his security puts him in a position less favourable in the eyes of a Court of Equity than he would have held had he had

CAN.
S. C.
GRACE
v.
KUEBLER.
Anglin, J.

merely the constructive notice which registration gives to persons whom it affects. *Underwood* v. *Lord Courtown*, 2 Sch. & Lef. 41, at 66. The equitable doctrine is that notice which gives real and actual knowledge affects the conscience of the person who receives it. An attempt by him to give to rights acquired with such notice an effect inconsistent with and destructive of prior rights of which he has had the notice is looked upon by equity as a fraud which it cannot countenance. I should require very explicit language indeed to lead me to the conclusion that the legislature in enacting the Land Titles Act intended to give to registration under it an effect which would render this wholesome equitable doctrine unenforceable. I am not certain that it is not expressly saved by s. 139 of the statute.

The express notice of Kuebler and Brunner's rights and of their position in regard to the Steinbrekers which Grace had when he acquired his interest clearly distinguishes this case from *McKillop* v. *Alexander*, 1 D.L.R. 586; 45 Can. S.C.R. 551, to which I refer, merely to make it clear that it has not been overlooked. Grace in fact acquired his interest in the land subject to Kuebler and Brunner's right to increase or better their pre-existing interest in it by payments on account of purchase money made to their vendors until notified that that right had ceased. The increase or betterment of Kuebler and Brunner's interest in the land by the payment which they made was therefore not adverse to or in derogation of the interest which Grace was entitled to protect by registration, whether of his assignment and transfer or of a caveat. By failing to notify his position to them he permitted their right to pay their vendors to subsist as something anterior to and higher than his right to hold the land as security for payment to him of the sums for which he had contracted in consideration of his advances to the Steinbrekers.

Until Kuebler and Brunner had notice of the assignment to Grace, they were entitled to treat the Steinbrekers as their creditors and to make payments to them, and payments so made discharged their debt *pro tanto*. Under the assignment of the agreement and the ancillary transfer of the land the appellant Grace held the latter upon trust to convey it to Kuebler and Brunner upon their purchase money being paid to the persons entitled to receive it. As to Kuebler and Brunner, until notice to them of the assignment, the Steinbrekers were so entitled as against

CAN.
S. C.
GRACE
v.
KUEBLER.
Anglin, J.

Grace, of whom and of whose rights Kuebler and Brunner knew nothing, whereas Grace had full notice of their obligations and rights under their agreement with the Steinbrekers. If the rights of the parties depended upon a balancing of their equities based upon the character of the duty of each towards the other, I should hold that the duty of the appellant to give notice of his assignment was higher and stronger than any duty of Kuebler and Brunner to search the registry before payment of each instalment of their purchase money, in order to make certain that no entry there would disclose that their vendors had parted with their interest in the land and their right to receive the purchase money under their contract. In the absence of notice to the contrary they were entitled to assume, and to act on the assumption that the right to receive their money had not been transferred. The appellant had actual and complete notice of the position of the respondents, and took the risk of their innocently making payments to their vendors. The respondents, in my opinion, had not even constructive notice of the rights of the appellant. It was undoubtedly the failure of the latter to give notice that afforded the Steinbrekers the opportunity to pose as still entitled to receive payment from Kuebler and Brunner.

I am, therefore, of the opinion, that the respondents' debt under their agreement was discharged by their payment to the Steinbrekers and that, under the trust on which he took it, the appellant is bound to convey the land to them.

I would dismiss the appeal. *Appeal dismissed.*

ONTARIO—HUGHES-OWENS Ltd. v. OTTAWA ELECTRIC R. Co.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 12, 1917.

NEGLIGENCE (§ II F—120)—ULTIMATE NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In an action for damages for injuries sustained, where contributory negligence is alleged, a new trial will be ordered if the attention of the jury has not been directed to the question whether but for the negligence of the defendant the accident might have been avoided notwithstanding the negligence of the plaintiff, and their finding is not conclusive on this point.

[*Loach* v. *B. C. Electric R. Co.*, 23 D.L.R. 4; [1916] 1 A.C. 719, followed.]

Statement.

APPEAL by the defendant company from the judgment of SUTHERLAND, J., at the trial, upon the findings of a jury, in favour

ONT.

S. C.

ONTARIO HUGHES-OWENS LIMITED v. OTTAWA ELECTRIC R. Co.

Statement.

of the plaintiff company, for the recovery of $754.23 damages and costs, in an action for injury to the plaintiff company's automobile in a collision with a street-car of the defendant company, in a highway, by reason of the negligence of the defendant company's motorman, as the plaintiff company alleged.

The questions left to the jury and their answers were as follows:—

1. Was the defendant company guilty of any negligence which caused or contributed to the accident? A. Yes. Unanimous.

2. If so, wherein did such negligence consist? A. (1) motorman negligent of his duty in not having perceived motor car sooner and then not exercising precaution to avert a possible accident. Unanimous. (2) Street-car was being driven at excessive rate of speed. Unanimous. (3) Motorman was incompetent. Unanimous.

3. Or was the plaintiff's chauffeur guilty of any negligence in operating the motor car which caused or contributed to the accident? A. No. Unanimous.

4. If so, wherein did such negligence consist? (Not answered.)

5. Could the chauffeur, by the exercise of reasonable care, have avoided the accident? A. No. Unanimous.

6. If you answer "yes" to the last question, what could he have done? (Not answered.)

7. Damages (if any)? A. $754.23. Unanimous.

Taylor McVeity, for appellant company; *A. E. Fripp*, K.C., for plaintiff company, respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—I think the chauffeur convicts himself of negligence, by his own testimony.

He arrived on the scene, operating the car, and when coming out on to Dalhousie street, which runs north and south, he found his view to the south obstructed by a building. He blew his horn and slowed up, because, as he says, "You have to go quite a distance forward before you can see up Dalhousie street." He moved ahead to go across the street, and, when he got out so that he could see up the street, he sighted the car. He was then "going so slow that" (he) "could not get up speed to go across the street to get to the other side in time." This he repeats in cross-examination.

The learned Judge in his charge to the jury put it to them as if the chauffeur was in a position of danger at the moment and had to act suddenly, and that the very best judgment could not always be expected under such circumstances. I can find no trace in his evidence of such a crisis. He thought he could run northward while the car slowed down, and cross ahead of it. He had it in full view when he made this decision, the front wheels of his car being well out and about three or four feet from the westerly track on Dalhousie street. He says he never had any idea that the street-car would hit him, and so he went "on an angle straight across the street" and "on an angle as soon as ever" (he) "saw the street-car."

Before he got across, he was struck; and, apparently to account for this, he calls the speed of the car terrific and tremendous, overlooking the fact that if it were 25 miles an hour, as he testifies, and the car only 75 feet away when sighted, it would cover that distance and the 17 yards he travelled, in about five seconds.

If his evidence as to speed is correct, he was foolhardy in the extreme in trying to cross. If it is not, and the speed was what others testify, from 7 to 12 miles an hour, then one can understand how, chauffeur-like, he came to chance getting across before the car could touch him. This latter view is more in line with his answer: "I thought I had lots of time to get away from him, and I suppose he thought I would get away from him."

It is unnecessary to decide which of the positions is the correct one. The chauffeur was, on his own shewing, perfectly safe, and the car was under control, and he chose to take a step either utterly foolish or quite unwise and unjustifiable, having regard to the approaching car, whether going at high speed or not.

The finding of the jury acquitting him of negligence cannot be supported. I think this is a case in which the powers given by sec. 27 of the Judicature Act, R.S.O. 1914, ch. 56, may be exercised; and that finding must be set aside.

There, however, remains the question whether the principle underlying the decision in *Loach* v. *British Columbia Electric R.W. Co.*, 23 D.L.R. 4, is applicable to this case. That principle, as I understand it, is, that the negligence spoken of as ultimate negligence may be established either by an act occurring after the effect of the contributory negligence has been spent

ONT.

S. C.

ONTARIO HUGHES-OWENS LIMITED v. OTTAWA ELECTRIC R. CO.

Hodgins, J.A.

and the crisis has supervened, or by a condition created negligently prior to the emergency, but still operating so as to prevent any immediate act from being effective.

Thus in the *Loach* case the defective brake created a condition continuously disabling the motorman from controlling his car in time.

In the present action, the jury have found that the appellant's negligence has two elements—omitting the third ground, incompetence—as to which there is absolutely no evidence. These were excessive speed and neglect in not perceiving the motor car sooner, and then not exercising precaution to avert a possible accident.

These findings mean that the motorman was coming along blindly and also at too high a speed, or that the speed was excessive in view of the absence of look-out, and in one aspect indicate a negligence concurrent with that of the respondent's chauffeur and operating with it so as to cause the collision. They do not precisely indicate whether, after the motorman ought to have seen the chauffeur intending to cross the tracks, he was disabled by his excessive speed from doing anything towards averting the catastrophe, or, if not, what negligent act is intended by the words "not exercising precaution."

The motorman deposed that he looked east and west when he reached York street, a wide street with a boulevard in the middle of it in the eastern section. At that time the motor would have been 40 or 50 feet in front, crossing or having crossed the western track on a course converging on the path of the street-car. The motorman may have accelerated his pace on seeing that nothing was approaching from either side, neglecting to look ahead, as in *Kerr* v. *Townsend* (1917), 12 O.W.N. 166. He may, on the other hand, have merely kept his rapid pace and been unable, even if he had seen, to check his car on the slight down grade existing at this point: *City of Calgary* v. *Harnovis* (1913), 15 D.L.R. 411; *Canadian Pacific R. Co.* v. *Hinrich* 15 D.L.R. 472. On the other hand, the contributory negligence of the chauffeur may not have been spent, in the sense of having been completely effective as negligence, until he had turned in on the track of the on-coming car. Consideration of the respective negligent acts, and apportionment of the proper consequences of each in turn, is something the jury should have had their attention

directed to, instead of it being left for an appellate Court to analyse.

Since the *Loach* case, at least, the practice, observed by the learned Judge who tried that action, of leaving the question to the jury, "If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident?" should be followed in every instance where contributory negligence is alleged, unless the facts clearly exclude any inference of ultimate negligence.

The point of time at which ultimate or second negligence may be said to arise is, when the person at fault became aware, or should have become aware, of the danger of the other person. This is so expressed in that part of the judgment of Mr. Justice Anglin in *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423, 437, 439, 440, cited by the Privy Council, though that does not necessarily carry with it approval of this specific point, the *Loach* case being one where the danger was actually seen in sufficient time.

In *Smith* v. *City of Regina* (1917), 34 D.L.R. 238, Mr. Justice Lamont states the law before the *Loach* case as settled, thus: "Where a plaintiff himself has been guilty of negligence which contributed to the accident, he cannot recover unless it is established that, notwithstanding the negligence of the plaintiff, the defendant, after he was or should have been aware of the plaintiff's danger, could have avoided the accident by the exercise of reasonable care."

It may be noted that the opinion of Mr. Justice Lamont in *Smith* v. *City of Regina* (*supra*), that excessive speed is not in itself such an act or condition of negligence as to form a disability to avoid collision of the same nature as the absence of proper brakes in the *Loach* case, is disapproved in *Critchley* v. *Canadian Northern R.W. Co.* (1917), 34 D.L.R. 245, and is rejected by the Supreme Court in *Columbia Bitulithic Limited* v. *British Columbia R.W. Co.* (1917), 37 D.L.R. 64, 55 S.C.R. 1.

The judgment in appeal should be set aside and a new trial should be directed between the parties.

The costs of this appeal should be paid by the respondent, and those of the former trial should be to the successful party in the cause. *New trial directed.*

QUE.

P. M. C.

THE KING v. MASON.

Quebec Police Magistrate's Court, Saint Cyr, P. M. February 22, 1918.

EAVESDROPPING—AS CRIMINAL OFFENCE.

Eavesdropping is not a punishable offence either under the common law of England or the criminal law of Canada.

Statement.

TRIAL on a charge of eavesdropping. Dismissed.

M. A. Phelan, K.C., for complainant.

N. K. Laflamme, K.C., for defence.

Saint Cyr, P.M.

SAINT CYR, P.M.:—In this case the complaint reads:—

I am credibly informed and do verily believe that at the city of Montreal, this sixteenth day of January nineteen hundred and eighteen, one known as Kirk, and whom I can identify, did commit the offence of eavesdropping by listening outside and under the door of a room in the Windsor Hotel leased and occupied by complainant and others, with intent to cause annoyance and damage to the persons in said room and others.

It has been admitted at the argument that the last time a case was presented before the courts on the charge of eavesdropping was in the year 1390, that is some 369 years before the cession of Canada.

Everyone admits that under our Code no such offence as eavesdropping is mentioned, but for the prosecution it is argued that under the common law of England this offence still exists and as the common law of England is in force in Canada, and therefore in the Province of Quebec, the accused should be committed for trial under the common law.

In referring to the authors we find that the definition of eavesdropping is as follows:—

Eavesdroppers are persons who listen under walls or windows or the eaves of a house to hearken after discourse and thereupon to frame slanderous and mischievous tales.

As can be seen from this, certain elements were necessary, first, listening, and, secondly, the framing of mischievous and slanderous tales.

As can easily be seen this is not the offence put forward in the complaint here, because nothing is said in the complaint about the framing of slanderous and mischievous tales.

Now, if we take the definition of common law as given in Stephens Commentaries on the Laws of England, it is this:—

The unwritten or common law is distinguishable into three kinds: 1. General customs, which are the universal rule of the whole Kingdom, and form the common law in its stricter signification.

Then Stephens gives a good definition of another kind of common law, which would be the common law as far as certain parts of England would be concerned. I must say, however, that I am of the opinion that the common law as defined in the first paragraph is the only common law that is applicable in this country, because we have nothing to do with the special customs or usages in England. The common law at large is the common law of England applicable to Canada and the Province of Quebec.

Now, if we continue the study of the common law in Stephens, we can see that the customs that have made the common law of England have certain limitations, one of which is that a custom must have been continuous, that any interruption would cause a temporary ceasing, and revival would give it a new beginning which would be within the time of legal memory and therefore the custom will be void.

It requires for the customs that would constitute the common law the same characters as is given in our Civil Code for possession for the purposes of prescription.

Now, later on, the same author mentions eavesdropping, p. 193, vol. 4, and says:—

> In concluding the treatment of common nuisances, mention may be made of two offences which, however, have long been obsolete, viz.:
>
> (1) Eavesdropping, the offence committed by those who loiter under walls or windows to hear what other people are talking about and to frame slanderous statements thereon.

Stephens considers this offence as obsolete and when something is obsolete, or some law or some offence is obsolete, I consider it no longer exists under the common law.

It is argued for the prosecution that in the United States two instances are given of conviction for eavesdropping at a date much more recent than the case in England in 1390, but it is in the United States, and as can be found in the factum filed by the prosecution it says that:—

> The common law of England as modified by statutes and including the law administered in the Equity, Admiralty and Ecclesiastical tribunals travelled with the original colonists to this country . . . and became and thenceforward constituted our American common law.

And this is quoted from Bishop's New Criminal Law, edition 1892, s. 190. But it is the American common law, and Canada has nothing to do with the American common law. If any common law is applicable here it is the common law of England as existing

QUE.
P.M.C.
THE KING v. MASON.
Saint Cyr, P.M.

there, or which may have been transformed by Canadians, not by Americans, and in the judgment of the court here, I see that the judge in these judgments insists upon the inconvenience that would be created if eavesdropping was to be allowed.

Unfortunately, even under our law there are some things that are done that bring with them great inconvenience, but as long as it is not forbidden by law, we cannot forbid them or punish them, so, under the circumstances I dismiss the case.

Case dismissed.

ONT.
S. C.

RICHARDSON v. GILBERTSON.

Ontario Supreme Court, Latchford, J. April 19, 1917.

BROKERS (§ I—2)—GRAIN EXCHANGE—MARGIN TRANSACTIONS—CR. CODE SEC. 231.

Dealing in "futures" on the grain exchange where the intent of the transaction is to meet the obligations to deliver by a set-off of a contract to purchase a like quantity of grain, and to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise, are in contravention of sec. 231 of the Criminal Code.

[*Beamish* v. *Richardson*, 23 Can. Cr. Cas. 394, 16 D.L.R. 855, 49 Can. S.C.R. 595, applied.]

Statement.

ACTION to recover $1,287, the balance alleged to be due to the plaintiffs, grain-merchants and grain-brokers, in respect of the loss upon certain quantities of May wheat bought and sold for the defendant by the plaintiffs, upon the Winnipeg Grain Exchange, in February, 1916.

The action was tried by LATCHFORD, J., without a jury, at Toronto.

B. N. Davis and *H. C. Fowler*, for the plaintiffs.

William Proudfoot, K.C., for the defendant.

Latchford, J.

LATHFORD, J.:—The plaintiffs' claim is upon a writ specially endorsed as follows:—

1916			
Feb. 21	Bought 5,000 Winnipeg May wheat at 1.25⅞	$6,293.75	
22	Bought 5,000 Winnipeg May wheat at 1.21¾	6,093.75	
29	Sold 10,000 Winnipeg May wheat at 1.06⅛		$10,612.50
	Commission ⅛c and telegrams	20.75	
	Loss		1,795.75
		$12,408.25	$12,408.25

Mar. 2	To loss 10,000 May wheat as per above a/c.	1,795.75	
Feb. 24	To draft a/c margin returned and chgd. from a/c	501.25	$2,297.00
Feb. 15	By balance of cash at defendant's credit	510.00	
	By sight draft a/c margin returned	500.00	1,010.00
	Due James Richardson & Sons Limited		$1,287.00

The transactions in February were the culmination of a series of purchases and sales of "futures" conducted by the plaintiffs for the defendant. If they were made with the authority of the defendant, and are not prohibited by sec. 231 of the Criminal Code*, there is no defence to the claim.

The plaintiffs are grain-merchants and grain-brokers, with their head office at Kingston, and branches in Toronto, Winnipeg, and other cities. Their office here is managed by Mr. David Plewes. In Winnipeg the plaintiffs are members of the Grain Exchange and also of the Winnipeg Grain and Produce Exchange Clearing Association.

*231. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,—

(*a*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or,

(*b*) makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof.

ONT.

S. C.

RICHARDSON v. GILBERTSON.

Latchford, J.

At the time his first order was given to Mr. Plewes, on the 29th December, 1916, the defendant was, as he still is, a clerk in a bank at Lucknow, in the county of Bruce, where a group of respectable villagers bought and sold "Winnipeg May wheat", through the agency of the plaintiffs' Toronto branch. Apart from one member, who was a miller, none of these gentlemen appears ever to have ordered a purchase or sale with the intention of accepting or making delivery. The defendant certainly had no such intention. It is also certain that Mr. Plewes knew that the defendant did not at any time intend to accept or make delivery of May wheat. Mr. Plewes was well aware from the 31st December, 1915, that the defendant was merely a bank-clerk, and that his orders were purely speculative.

On the 29th December, writing to Messrs. Treleaven, of Lucknow, confirming the initial purchase made at their request for the defendant, of 5,000 bushels Winnipeg May wheat, Mr. Plewes says, for the plaintiffs: "We should have ten cents margin from customers outside of our regular milling customers on transactions in futures at the present time."

All the transactions between the defendant and the plaintiffs were in "futures."

As early as the 17th January, 1916, the defendant, writing on the letter-head of his bank, inquired of the plaintiffs: "Do you have to wire every order to buy or sell to Winnipeg? How about selling short? Are options actually sold or merely a man's obligation to deliver in May sold?"

The plaintiffs replied, next day: "We have to wire every order to buy or sell to Winnipeg, and every order is executed in the trading-room at Winnipeg. A man can sell wheat short just as well as buy it long if he feels so disposed. Every time a man buys or sells grain for future delivery in Winnipeg market he enters into a contract to deliver or accept the wheat at the maturity of the contract. Of course, if a man buys 5,000 bushels wheat for May delivery to-day and sells the same quantity to-morrow his obligation is at an end so far as he is concerned."

It was buy to-day and sell to-morrow for some time, to the common advantage of the plaintiffs and Gilbertson; but when, with holdings of 10,000 bushels, the price of May wheat fell nearly twenty cents, the margin and profits of the defendant disappeared,

ONT.

S. C.

RICHARDSON v. GILBERTSON.

Latchford, J.

and he was "short" the sum now claimed from him by the plaintiffs.

The case is similar in nearly all respects to that which was before the Courts of Manitoba and the Supreme Court of Canada in *Richardson & Sons Limited* v. *Beamish* (1913), 21 Can. Cr. Cas. 487, 23 Man. R. 306, 13 D.L.R. 400, and *Beamish* v. *James Richardson & Sons Limited* (1914), 23 Can. Cr. Cas. 394, 49 Can. S.C.R. 595, 16 D.L.R. 855. At the trial the Chief Justice of the King's Bench held the transactions to be real and not fictitious and not gaming, and therefore not illegal, transactions within the meaning of sec. 231 of the Criminal Code. On appeal his judgment was confirmed, Perdue and Cameron, JJ.A., holding that the appeal should be dismissed, while Chief Justice Howell thought it should be allowed. The defendant appealed to the Supreme Court of Canada. There also a marked difference of opinion was manifested. The Chief Justice and Duff, J., considered the Richardsons entitled to recover. But a majority of the Court, Idington, Anglin, and Brodeur, JJ., held that the appeal should be allowed.

In several of the opinions reported, the manner in which transactions in "futures" are carried out on the Winnipeg Grain Exchange and adjusted by the Clearing House Association are set forth at length, and it is unnecessary to restate them here. Since the decision in the Supreme Court, and not improbably because of that decision, certain changes were made in the rules of the Clearing House Association. They seem to me merely alterations in the form and not the substance of the transactions. In this case, as was stated by Anglin, J., in the *Beamish* case (p. 619), "the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorised and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain—to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise. Such transactions are within the literal terms of sec. 231 of the Criminal Code, and, I believe, are also within the mischief against which it was directed."

ONT.

S. C.

RICHARDSON v. GILBERTSON.

Latchford, J.

The learned Judge therefore regarded such a transaction as *malum prohibitum*, and joined with Idington and Brodeur, JJ., in allowing Beamish's appeal.

By a parity of reasoning, I am of opinion that the transactions in this case are prohibited and that the action fails. It is, therefore, dismissed with costs. *Action dismissed.*

N.S.

S. C.

REX v. FONG QUING and FONG TOY.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Harris, JJ. June 2, 1917.

INTOXICATING LIQUORS (§ III H—90)—SEIZURE AND DESTRUCTION—CONVICTION FOR KEEPING—SUBSEQUENT INQUIRY FOR FORFEITURE ORDER—N.S. TEMPERANCE ACT.

On an equal division of the Supreme Court of Nova Scotia, a motion for prohibition stood dismissed by which it was sought to prevent a magistrate who had made a summary conviction for keeping liquor for sale in contravention of the Nova Scotia Temperance Act following a plea of guilty of the charge laid in general terms without identification of the liquor, from proceeding with a further hearing and inquiry upon a proceeding *in rem* under that Act to determine whether the liquor seized or what part thereof should be ordered to be destroyed.

[*Townsend* v. *Cox*, [1907] A.C. 514, 12 Can. Cr. Cas. 509, and *McNeil* v. *McGillivray*, 42 N.S.R. 133, referred to.]

Statement.

MOTION for a writ of prohibition directed to the stipendiary magistrate of the City of Halifax, George H. Fielding, Esq., to prohibit him from proceeding with an inquiry as to the ownership of a large quantity of Chinese liquor with a view to ordering its destruction. The liquor in question was taken from premises occupied by defendants who, after their trial had been partly proceeded with, pleaded guilty to the charge of keeping for sale and were convicted. The ground chiefly relied upon in opposition to proposed inquiry was that a considerable portion of the liquor seized was not the property of defendants but had been ordered from China for third parties who had paid for it and that it was not kept for sale and that the plea of guilty of keeping for sale referred to other liquor than that so ordered and paid for. Also that the liquor kept for sale must be identified before its forfeiture and destruction could be ordered and that the magistrate after the conviction was made was *functus*.

Jas. Terrell, K.C., in support of application.

R. H. Murray, K.C., and *B. W. Russell*, contra.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—In all the liquor Acts which have been in force at different times within this province or in

different parts thereof there have been two distinct offences with penalties attaching to each, namely, (1) Selling intoxicating liquor, and (2) keeping for sale intoxicating liquors (without license when there is any provision for licenses and when there is none no reference to that condition is made).

Later, I think it came in with the Canada Temperance Act, an addition was made to such provision for keeping for sale. It enabled procedure to be used by which the proceedings would be commenced by an information to obtain a warrant to search places in which liquor was believed to be kept for sale, and when such liquor was found, seizure of the same, a declaration of forfeiture, and destruction of the condemned liquor were to take place. These provisions were taken, I think, from old statutes in England used to prevent smuggling or other breaches of revenue laws and, of course, were very drastic.

Thenceforth, with such legislation, or legislation of that character in that or other Acts, there were to be two proceedings carried on before the magistrates, namely, the personal proceedings for the penalty, and, second, the proceeding *in rem* for declaration of forfeiture, and the destruction of the liquor.

This Court had to deal with this procedure under the Canada Temperance Act in *Rex* v. *Townsend*, (2) 39 N.S.R. 215, and I take the liberty of referring to it because that case went to the Judicial Committee of the Privy Council (*Townsend* v. *Cox*, [1907] A.C. 514, 12 Can. Cr. Cas. 509), and at least there is no dissent from the majority decision of that Court. I refer also to a decision of the Court in Ontario of *Reg.* v. *Walker*, 13 Ont. R. 83, in which Cameron, C.J., had taken that view.

Lately a Prohibition Act, called the Nova Scotia Temperance Act, has come into force in part of Nova Scotia, and quite lately in Halifax. That Act has provisions taken in part indirectly, *i.e.*, *via* Manitoba, from the Canada Temperance Act. But of course there are changes made, I think, to make the Act more drastic still. But there are still the two things I have mentioned, and the procedure applicable, and there are included those provisions applicable to search and destruction.

The Nova Scotia Temperance Act, 1910, c. 2, s. 46, provides as follows:

"46 (1) Any stipendiary magistrate for the city, town or county, if satisfied on the oath of an inspector, or inspector in

N.S.
S. C.
REX
v.
FONG QUING AND FONG TOY.
Graham, C.J.

chief, or other person, that there is reasonable ground for belief that any liquor is sold or kept for sale contrary to the provisions of Part I., in any place within his jurisdiction, may grant a warrant to search for such liquor.

"(2) Under such warrant it shall be lawful for any of the officers to whom it is directed, with assistants or otherwise, at any time or times within ten days from the date thereof, to enter, if need be by force, the place named in the warrant, and any part thereof, and of the premises connected or used therewith, and to examine the same and search for liquor therein.

"(3) For such purposes such officers may, if necessary, with any assistance they deem expedient, break open any door, lock or fastening of such premises or any part thereof, or of any closet, cupboard, box or other articles suspected to contain any such liquor."

Then s. 4, as amended in 1911, is as follows:

"14. Sub-section (4) of section 46 of said chapter 2 is hereby repealed, and the following sub-section substituted therefor:

"(4) If on any such search any liquor is found kept on such premises the occupant of the premises shall, until the contrary is proved, be deemed to have kept such liquor for the purpose of sale contrary to the provisions of Part I. of this Act, and may be arrested by any of the said officers having the search warrant aforesaid and their assistants."

Section 5 is as follows:

"(5) Upon arrest such person shall be brought before the magistrate who issued such search warrant, and he shall then stand charged before the said magistrate with having unlawfully kept intoxicating liquors for sale on the day of the said seizure under the said warrant at the place where the said seizure was made, contrary to the provisions of Part I. of this Act, in all respects and to the same effect as if an information had been duly laid for such offence and he had been brought before the magistrate under a warrant issued thereon."

Then section 47 (1) and (2) is as follows:

"47 (1) The magistrate shall thereupon remand to gaol such person for trial upon such charge at such time as the magistrate shall appoint, unless he shall enter into sufficient recognizance

for his appearance for trial at such appointed time, when he shall be discharged on such recognizance.

"(2) Further proceedings in such case shall be as provided in and for an ordinary prosecution under this Part for unlawfully keeping for sale intoxicating liquor."

Section 49 provides a form of information to obtain a search warrant and the search warrant itself. By reference to the forms D. and E. it will be seen that it is quite like an ordinary search warrant to bring the intoxicating liquor and the vessels before the magistrate and nothing more.

Section 50 of the Act is very wide; much wider than its associates, but among the persons the officer may bring before the magistrate when the liquor has been seized are:

"or any other person being a resident, occupant, owner or apparently in charge of said premises, house or place, or any person arrested at the time of the seizure of such liquor, or of any other person for having kept for sale such liquor contrary to the provisions of Part I. of this Act. The magistrate making such conviction may in and by the said conviction, or by a separate or subsequent order, declare the said intoxicating liquor and the vessels containing the same or any part thereof to be forfeited to His Majesty and to be destroyed: Provided always that in the case of any liquor seized as aforesaid it is proved to the satisfaction of the magistrate hearing the case that such liquor is not intoxicating, then the same shall be returned to the place from which it had been seized and removed."

I have omitted to mention that section 37 of the Act provides that in so far as no provisions are made in that Act the penalties and punishments are to be enforced by the procedure and forms of Parts 15 and 25 of the Criminal Code (of Canada) thereby made applicable.

By section 38 there is this provision:

"38. The forms given in the schedules to the Canada Temperance Act and amendments thereto or any forms to the like effect, framed in accordance with this Part, shall be sufficient in the cases thereby respectively provided for."

Turning to the facts of this case (I shall deal with Fong Quing's case) there is the information for the search warrant. A search warrant was issued in Fong Quing's case as follows:

N.S.

S. C.

REX v. FONG Q IN AND FONG TOY

Graham, C.J.

'Canada,
Province of Nova Scotia,
County of Halifax,
City of Halifax, SS.

"To all or any of the constables, police officers or other peace officers in the City of Halifax aforesaid.

"Whereas William Palmer of Halifax in the County of Halifax, Sergeant of Police, has this day made oath before me the undersigned stipendiary magistrate in and for the said City of Halifax, that he has just and reasonable cause to believe and does believe that intoxicating liquor is kept for sale in the shop and premises of Fong Quing, 35½ Sackville street in the said City of Halifax, contrary to the provisions of Parts I. and II. of the Nova Scotia Temperance Act and Acts in amendment thereto then in force in the said City of Halifax:

"These are therefore in the name of Our Sovereign Lord the King to authorize and require you and each and every one of you with necessary and proper assistance to enter into the said shop and premises of the said Fong Quing and there diligently search for intoxicating liquor, and if the same or any part thereof can be found on such search that you shall bring the intoxicating liquor so found, and also the vessels of any kind whatever containing the same before me to be disposed of and dealt with according to law.

"Given under my hand and seal at the City of Halifax, in the said County of Halifax, this 16th day of August in the year of Lord One Thousand, Nine Hundred and Sixteen.

(*Sgd.*) "Geo. H. Fielding (L.S.)"

On the 16th August, 1916, a lot of intoxicating Chinese wine of sorts was seized by William Palmer, an officer of the city. Fong Quing was arrested and was brought in; he pleaded not guilty and a great deal of evidence was taken before the magistrate extending over a long period of time with many adjournments. Then, before the evidence of one Sam Toy was given, the plea was withdrawn and a plea of guilty was substituted. That was the 16th January, 1917.

There is an unfortunate difference as to the statement which was made when the plea of guilty was substituted. I would think that the fact that a copy of a letter addressed to Palmer, the in-

formant, of January 5th, 1917, some days before, in which Fong Quing set up the contention that some of the liquor was owned by others for whom it was imported was corroborative of the view put forward by Fong Quing, viz., that when he pleaded guilty he qualified his plea as to part of the liquor, part of which only was within the law applicable to forbidden liquor and part of it was defensible on two grounds, one that it was not the property of Fong Quing or kept for sale by him, and, second, that some of it was for sale in another province. The effect of such a qualification is dealt with by Boyd, C., in *Rex* v. *Palangio*, 14 O.W.R. 620, and it would dispose of the destruction of the property.

It is conceded, however, that before the conviction was drawn up at any rate, the contention was made before the magistrate by Fong Quing's solicitor that there was only a part of the liquor which could be destroyed. The important feature of the case, however, is this. What was the charge before the magistrate to which the plea of not guilty and then guilty was pleaded? This is the conviction:

"Canada,

Province of Nova Scotia,

County of Halifax,

City of Halifax, SS.

"Conviction for a penalty and costs, and in default of payment imprisonment.

"Be it remembered that on the 16th day of January, in the year A.D. 1917, at the City of Halifax, Fong Quing is convicted before the undersigned George H. Fielding, stipendiary magistrate in and for the City of Halifax, for that he the said Fong Quing did in the said City of Halifax, on the 16th day of August, A.D. 1916, unlawfully keep for sale intoxicating liquor contrary to the provisions of Parts I. and II. of the Nova Scotia Temperance Act and Acts in amendment thereto then in force in the said City of Halifax, William R. Palmer being the prosecutor, and I adjudge the said Fong Quing for his said offence to forfeit and pay the sum of fifty dollars, to be paid and applied according to law; and also to pay to the said prosecutor the sum of eighty dollars and fifteen cents for his costs in this behalf; and if the said several

N.S.

S. C.

REX v. FONG QUING AND FONG TOY.

Graham, C.J.

sums are not paid forthwith, I adjudge the said Fong Quing to be imprisoned in the city prison of the said City of Halifax, in the said City of Halifax, and there to be kept at hard labour for the term of two months unless the said sums are sooner paid, there being no costs of conveying to prison.

"Given under my hand and seal the day and year first above mentioned at the City of Halifax aforesaid.

(*Sgd.*) "George H. Fielding (L.S.).

"Stipendiary Magistrate in and for the City of Halifax."

The charge was not of keeping for sale the liquor seized, identifying it, nor was the conviction made upon that basis.

The mistake arises out of reading too literally s. 46, sub-sec. (5).

He is to stand charged with unlawfully keeping liquors generally, any liquors for sale, the offence before the seizure clauses were introduced. But when one reaches section 50 it is "such liquor" and "said liquor," namely, the seized liquor, which is to be declared forfeited and to be destroyed. It is quite clear that at some time or another the liquor that has been seized and is to be condemned must be identified. A description of the liquor or vessels must be introduced into the record.

When brought before the magistrate and he is asked to plead guilty or not guilty, and if the latter, when he is to be remanded for trial, there are two things to be considered: one is the personal offence with the penalty attached; the other is the condemnation or declaration of forfeiture. And where there is a large stock of liquors the proceeding *in rem* transcends in importance the mere penalty. To make the plea of guilty available in respect to the forfeiture the liquors must be identified. At that time then the charge must be made.

I follow the following extract from the judgment of Mr. Justice Russell in *McNeil* v. *McGillivray*, 42 N.S.R. 133, at 147:

"The justice must determine in some way which were kept for sale and which were not, and he is just as competent to make this inquiry and determination where the search warrant issues after as where it issues before the summons, so long as it is issued before the case is tried."

I said, when the case of *The King* v. *Townsend* (No. 2), 39 N.S.R. 224, was before this court, that:

"When it comes to the making of an order for the destruction of the liquor the convicting magistrate or justices have to determine the identity of the liquor to be forfeited with that which has been seized under the warrant, and with respect to which the offence for which the party is convicted has been committed. They cannot forfeit any liquor of which it cannot be predicated that it was seized under the search warrant, and that it was kept for sale in violation of the Act."

I ought, I think, to have added "and that the defendant was convicted of having kept it for sale in violation of the Act," or rather, I should have used this expression in place of the one that was used. I suppose that it is at the trial that the justice ought to determine just what liquor it is that is subject to forfeiture as having been kept for sale contrary to the provisions of the Act, and this he can do, as I have already said, as well where the search warrant has issued previous to the information and summons.

The order for forfeiture in this case sets out with the statement that Mullins was convicted of having unlawfully kept intoxicating liquor for sale on the 6th day of December and the declaration is that "the said liquor," that is, the liquor kept for sale on the sixth, should be forfeited. (These words are not in the case as printed but counsel stated that their omission was to be regarded as a mere misprint.) The particulars of the liquor to be forfeited are then stated, and the order follows for their destruction.

It is in the form given in the statute, and I think we must take it that the magistrate was satisfied, when he made the order for destruction, that the liquor to which his order applied was that which had been the subject of the conviction, as it undoubtedly was that which had been brought before him under the search warrant. If the plaintiff had proved that it was not the same, or that there was any part of it of which it could not be predicated that Mullins had been convicted of an offence with respect to it, it is possible, subject to the question that has been raised as to the collateral attack, that his action would lie with respect to the portion to which such proof extended.

I cannot assent to a different view expressed by Mr. Justice Meagher (*McNeil* v. *McGillivray*, 43 N.S.R. 133, at the foot of page 139 to 144).

N.S.

S. C.

REX v. FONG QUING AND FONG TOY.

Graham, C.J.

Before the liquors are seized and brought in they cannot very well be identified and therefore the warrant to search is general. Now it is out of the question that a person can plead guilty or not guilty to a search warrant read out to the defendant, or an information therefor. It is too vague. If there is no information for the condemnation or declaration of forfeiture and the statutory provision is relied on then one must be improvised in order to plead to it.

Here it is not denied but was admitted at the hearing that the oral charge did not identify the liquors which had been seized and brought in. It will be seen from the conviction that this must have been the case.

But the informant contends that the language of section 50 admits of an order for a declaration of forfeiture and destruction subsequent to the conviction. And this enables him to take fresh evidence to have the liquors seized identified, and the order for destruction made in respect to them, because the evidence taken here does not identify any liquor which may be declared forfeited or condemned and destroyed. There is no express provision enabling this additional evidence to be now taken. There are not to be two trials; one for the penalty and one for the condemnation and destruction.

Provisions similar to this are to be found in other Acts.

The Canada Temperance Act; The Liquor License Act of Nova Scotia, The Ontario Liquor License Act.

Now turn to the form. Take the Canada Temperance Act forms which this Act refers to as being sufficient, for there are no applicable forms to this condition in the Criminal Code.

"*Form Y.*

"*Form of declaration of forfeiture and of order to destroy liquor seized.*

(*If in the conviction, after adjudging penalty or imprisonment, proceed thus*:)

"And I (*or* we) declare the said intoxicating liquor and vessels in which the same is kept, to wit (*two barrels*) containing *beer, three jars* containing *whiskey, two bottles* containing *gin, four kegs* containing *lager beer*, and *five bottles* containing *native wine* (*or as as the case may be*), to be forfeited to His Majesty and I (*or* we)

do hereby order and direct that the said liquor and vessels be destroyed by , the constable or peace officer who executed the search warrant under which the same was found or in whose custody the same was placed.

"Given under my hand and seal, the day and year first above mentioned, at, etc.

If by separate subsequent order.

"Canada,
Province of
District (*or* County) (*or as the case may be*)
of To wit:

"We, E. F. and G. H., two of His Majesty's justices of the peace for the of (or C.D., police magistrate of the city of), having on the day of one thousand, nine hundred and , at the of in the said , duly convicted X.Y. of having unlawfully kept intoxicating liquor for sale, contrary to the provisions of Part II. of the Canada Temperance Act, then in force in the said (*or as the case may be*), do hereby declare the said liquor and the vessels in which the same is kept, to wit—(*describe the same as above*), to be forfeited to His Majesty, and we (*or* I) do hereby order and direct that J.W.P., license inspector of the of the said , do forthwith destroy the said liquor and vessels.

"Given under our hands and seals (*or* my hand and seal) this day of , at the of , in the said

E.F. (L.S.)
J.P.
G.H. (L.S.)
J.P.

It is clear that whether there is a condemnation in one instrument or whether there are two, that the liquors to be declared forfeited and destroyed are identified; secondly, where two instruments are used that there is not additional evidence to be given for that purpose, but reference is made to the evidence already given.

The defendant here asks for a prohibition to prevent additional evidence to be taken by the magistrate on which to found an order for declaration of forfeiture and destruction, or the making up of such an order on the evidence already taken where there is not

N.S.

S. C.

REX v. FONG QUING AND FONG TOY.

Russell, J.

evidence which will justify it. I think either course cannot be properly taken and that the writ of prohibition should go with costs.

RUSSELL, J.:—The difficulties that have arisen in this case seem to be due to the fact that while the accused is by the statute deemed to have kept for sale the liquor found on his premises under the search warrant, the provision of the statute to the effect that he shall thereupon "stand charged with" an offence against the law enacts not that he shall stand charged with having kept for sale the liquor so found but simply that he shall stand charged in general terms with having kept intoxicating liquor for sale. He can be convicted of this offence without any necessary logical inference that the liquors so found are those for the keeping of which he is so convicted. I incline, therefore, to agree with the conclusions of the learned Chief Justice and Mr. Justice Harris that it was the duty of the magistrate to determine on the trial, if at all, what liquor should be ordered to be destroyed. But I do not find it necessary to express any opinion on that point because of the conclusions at which I have arrived on the contentions on other points made by counsel for the prosecution.

It was contended among other things that the magistrate had undoubted jurisdiction to hear the application for an order for forfeiture and destruction of the liquor found to have been kept for sale, and that he could not properly be restrained from hearing that application and making his proper ruling upon the question; that it was within his jurisdiction to sit and determine whether he should or should not make the order applied for. Probably it was irregular procedure on the part of the magistrate to hear further evidence in respect to the ownership of the liquor in question, but that evidence was tendered by the party who is now applying for an order to prohibit the magistrate from proceeding with the inquiry. I have considerable doubt whether under these circumstances it is proper to accede to the application, but I do not base my decision upon this ground, notwithstanding its apparent reasonableness. Possibly it is a good answer to this contention to say that the only purpose of the inquiry so entered upon was that of determining whether the liquor should be

destroyed, and that question should have been dealt with by the magistrate before making his conviction, if he was intending to deal with it at all.

There was another contention, however, on the part of the prosecution which to me seems fatal to the application before us. The magistrate had full jurisdiction to deal with the destruction of the liquor in his adjudication had he seen fit to do so and he could have done this, either in the conviction or by a subsequent order. His procedure was, therefore, only an irregular exercise of a jurisdiction with which he was clothed and not the usurpation of a jurisdiction that did not belong to him. It is to the latter class of cases that the writ of prohibition applies and not to the former.

Russell, J.

"The office of the writ of prohibition is to restrain inferior Courts from exceeding their jurisdiction, that is, not from exercising a jurisdiction which they alone can exercise—if any Court can exercise it at all—but from usurping a jurisdiction by encroaching upon that of other and superior tribunals."

These are the words of Strong, J., in *Poulin* v. *The Corporation of Quebec*, 9 Can. S.C.R. 194, and they seem to me to point with exactness to the distinction between the irregular exercise of a jurisdiction possessed by the tribunal and the usurpation of a jurisdiction by the Court which it did not possess. I think, for this reason, that the application for a writ of prohibition should be refused.

LONGLEY, J.:—I am sorry to be compelled to dissent from my learned brothers. I think the stipendiary magistrate the best entitled to form a judgment on the question and that this Court should not attempt to prohibit him from so adjudging. I think much in the evidence raises a strong presumption regarding the liquor in question, and I think also the amendment of 1911, c. 33 s. 14, makes the liquor found on the premises the liquor kept for the purpose of sale, and that the claim put forward in this case is a subterfuge.

Longley J.

HARRIS, J.:—On the 16th day of August, 1916, a warrant was issued by the stipendiary magistrate for the city of Halifax under the provisions of the Nova Scotia Temperance Act to search for

Harris, J.

N.S.

S. C.

REX v. FONG QUING AND FONG TOY.

Harris, J.

intoxicating liquor in the shop and premises of Fong Quing, 35½ Sackville street, and under which the officer on the same day seized a number of cases of intoxicating liquor found on the premises. He arrested the two defendants on the premises and after a trial Fong Quing and Fong Toy were separately convicted by the stipendiary magistrate,

"for that he the said did in the said City of Halifax, on the 16th day of August, A.D., 1916, unlawfully keep for sale intoxicating liquor contrary to the provisions of Parts I. and II. of the Nova Scotia Temperance Act and Acts in amendment thereto then in force in the said City of Halifax."

On the trial a large number of witnesses were called and examined and eventually the accused pleaded guilty and were thereupon convicted.

After the conviction of the defendants the stipendiary magistrate commenced an inquiry and proposed to examine further witnesses to decide whether the liquor which had been seized should be forfeited and destroyed under the provisions of section 50 of the Act. The defendants thereupon applied for a writ of prohibition.

Before proceeding to deal with what I think is the main question in the case, I propose to discuss one or two contentions raised by counsel which in my view are only of minor importance.

There was some controversy as to whether the accused simply pleaded guilty to keeping liquor for sale or whether counsel explained to the Court that the accused were not pleading guilty to keeping all the liquor for sale which had been seized. In the view which I take of the case it makes no difference whether the plea was guilty to the general charge or whether it was qualified by the statement of counsel as suggested.

Sec. 46 (4) as amended by section 14 of the Acts of 1911 reads:

(The section is quoted in full in the opinion of the learned Chief Justice.)

There is nothing in the case to show whether the stipendiary magistrate convicted the accused upon this statutory presumption, upon the evidence taken before him, or upon the confession or plea of guilty, or whether all three elements played a part in deciding the stipendiary to convict; and, so far as I am concerned, I must refuse to speculate upon that question. All I can say about it

is that I don't know what he based his judgment or decision upon. I only refer to the matter to point out how impossible it is in my view to base any conclusion upon the supposition—and it can be nothing more than a supposition—that he was influenced solely by the plea or confession of guilt. Even if the plea or confession had been qualified as is contended for the stipendiary clearly could still have found the defendants guilty of keeping for sale all the liquor seized, basing his conviction upon the statutory presumption, or the evidence taken before him, or upon both. Therefore, in my view, the question as to whether the plea or confession was or was not qualified is of no importance whatever.

Then it was suggested that there should have been an information other than that for the search warrant, and there was not. Under the provisions of sec. 46 (5) of the Act it is provided:

(Quoted in the opinion of the learned Chief Justice.)

The conviction is based on this section. There was no information in writing. It will be noted that under this section upon his arrest the accused shall then stand charged with having kept liquor for sale unlawfully on the day of the seizure at the place where the seizure is made in all respects and to the same effect as if an information had been duly laid for such offence.

It must be admitted that this is very drastic legislation but I do not see in the face of this language how it can possibly be successfully contended that any other information is necessary. The accused upon his arrest stands charged with the offence in all respects and to the same effect as if an information had been duly laid. That language conveys only one meaning to me and that is plain and unmistakable.

Under section 43 of the Act it is provided that in describing any offence . . . in any information . . . conviction or other proceeding it shall be sufficient to state the unlawful keeping for sale . . . of liquor simply . . . without stating the name or kind of such liquor or the price thereof . . . and it shall not be necessary to state the quantity of liquor so kept for sale . . . except in the case of offences where the quantity is essential and it shall then be sufficient to allege the sale or disposal of more or less than such quantity.

Section 50 of the Act provides that where a search warrant

N.S.

S. C.

REX v. FONG QUING AND FONG TOY

Harris, J.

has been issued and liquor has been found on the premises in question and seized and taken before the magistrate,

" upon the conviction of the . . . occupant of such house or place . . . or any person arrested at the time of the seizure of such liquor or of any other person for having kept for sale such liquor contrary to the provisions of Part I. of this Act the magistrate making such conviction may in and by the said conviction or by a separate or subsequent order declare the said intoxicating liquor . . . to be forfeited to His Majesty and to be destroyed."

The real question in this case, in my opinion, is whether the conviction made is to be regarded as a conviction for keeping for sale the liquor seized. If it can be so regarded then the magistrate under section 50 has jurisdiction to deal with the question of forfeiting and destroying the liquor; otherwise he has no jurisdiction and the prohibition should be granted.

Section 50 only confers jurisdiction to forfeit and destroy the liquor upon the conviction of the person for having kept such liquor for sale, *i.e.*, the liquor seized and brought before the magistrate. Is there such a conviction in this case? In my opinion there is not.

Under section 46 (5) the defendants stood charged with having unlawfully kept liquor for sale on the 16th day of August, at 35½ Sackville street, and the conviction when made is in the same general words. There is nothing whatever in the conviction to show that the offence for which the defendants were convicted has any reference to the liquor seized. It may have been that liquor or some other so far as the conviction shows, and the magistrate cannot proceed to forfeit and destroy until there is a conviction for having kept for sale the identical liquor seized or some part of it. It may very well be that on the trial the evidence established that none of the liquor seized was kept for sale but that the accused kept other liquor for sale; or the evidence may have shewn that only a very small portion of the liquor seized was kept for sale. We do not need to inquire whether in the former case he could be properly convicted under sec. 50. The legislature has said distinctly and clearly that it is only when the magistrate has convicted the accused for having kept "such" liquor, *i.e.*, the identical liquor seized or some part of it, that there is any jurisdiction to

declare the liquor forfeited. There is no such conviction here, nor is there anything which we can regard as the equivalent of such a conviction, and in my opinion, the jurisdiction to declare the liquor seized to be forfeited and destroyed does not exist.

There was a contention that a conviction could not be made for keeping for sale the liquor seized where the provisions of sec. 46 (5) were relied upon to take the place of an information or in other words because, under section 46 (5), the charge was a general one of keeping for sale liquor seized, therefore the conviction must be general and could not be for keeping for sale the specific liquor seized. My own view is that the conviction can be made specific where section 46 (5) is relied upon to take the place of an information. I say this because I think that is the obvious scheme and intent of the legislation.

Another question discussed on the argument was that the proposal of the magistrate to call further witnesses, after he had made his conviction, to determine whether he could order the forfeiture and destruction of the liquor, was unauthorized, assuming that there was such a conviction as is required to give jurisdiction under section 50. I cannot find anything in section 50 to warrant such an investigation. The words in section 50 referring to a separate or subsequent order I think have reference to the drawing up of the formal order. Once there has been a conviction for keeping for sale the whole or any part of the liquor seized there is nothing further to investigate. The order for the forfeiture and destruction of the whole or the part as the case may be follows as a matter of course.

The question as to whether or not the liquor belonged to the defendants has generally speaking nothing to do with the question as to whether or not it should be forfeited and destroyed; the real question is whether it was being kept for sale, and once that question is determined, that is the end of the matter. If it was being kept for sale by the defendants it would be liable to forfeiture no matter who owned it. *McNeil* v. *McGillivray*. 42 N.S.R. 147.

I think the application should be granted.

The Court being equally divided, the motion for prohibition stood dismissed.

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Ex. C.

DUSSAULT AND PAGEAU v. THE KING.

Exchequer Court of Canada, Audette, J. January 24, 1917.

CONTRACTS (§ II D—188)—BUILDING CONTRACT—CROWN—FORFEITURE.
Where a contractor enters into a contract with the Crown for the construction and completion of a public work but subsequently throws up the contract, and the Crown completes the work at a profit, the defaulting contractor is not entitled to the benefit of the saving on his contract price, but is entitled to recover his deposit.

Statement.

PETITION OF RIGHT to recover $20,390.34 on a contract for the construction of a pier at Pointe aux Trembles, P.Q.

I. N. Belleau and *A. Marchand*, for suppliant, and *F. O. Drouin*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—By an indenture bearing date June 28, 1904, the suppliant entered into a contract with the Crown for the construction and completion of a landing pier at Pointe aux Trembles, P.Q., "within 12 months of the signature" of the said contract as provided by paragraph three thereof; and by their amended petition of right they now seek to recover the sum of $20,390.34 in connection with the said contract under the circumstances hereinafter set forth.

At the end of the season of 1904, through alleged difficulty in obtaining timber, among other reasons relied upon by the suppliants, only a portion of the works had been performed, and during the winter of 1904-05 part of these works were damaged by the ice—the whole as can be ascertained by reference to plan, exhibit No. 10. This damage by the ice was, however, assigned, in the opinion of the engineer in charge, to improvidence and want of proper care or construction, but it has no bearing upon the case, and is only mentioned as one link in the chain of facts.

Under the terms of the contract the works in question had to be constructed and completed by June 28, 1905, and by paragraph 18 thereof, time was deemed to be of the essence of the contract.

A few days before the expiry of this date within which the works had to be completed, namely, on June 17, 1905, the suppliants requested the Minister to allow them to June 30, 1906, to complete and deliver the works. In answer to this request, on July 17, 1905, an extension of time was given them until November 25, 1905.

A second extension was given. On November 25, 1905, (exhibit No. 13) the suppliants again asked for a further extension

of time, within which to complete the work, to November 25, 1906. And in reply to this request, on November 27, 1905, an extension was given them to June 30, 1906. And it is well to note at this stage, that June 30, 1906, was the date mentioned by them in their first request for extension. They, therefore, did receive what they were asking on June 17, 1905, amounting to a complete year over and above the date mentioned in the contract. Upon the merits of the application reference should also be had to the views expressed by the local engineer in exhibit No. 11.

A third extension was given on March 30, 1906, to August 1, 1906, as would appear by exhibit "B." Furthermore, on June 23, 1906, Mr. Breen, the resident engineer, as will appear by exhibit No. 16, acquaints the suppliants with the communication received on the 19th from the chief engineer, which reads as follows:—

My attention is called to the fact that the contractors, Dussault and Pageau, for the building of the wharf at Pointe aux Trembles, have not yet resumed work this spring, would you kindly inform them in *writing* that *unless they proceed with the work without any further delay* the contract will be taken off their hands, and their security deposit forfeited to the Crown. Kindly attend to this matter at once, as the work must be completed before the first of August next.

On July 7, 1906, the suppliants wrote the chief engineer, acknowledging receipt of Breen's letter of June 23, 1906, and state:

En réponse, nous en sommes venus à la conclusion que si le contrat doit nous être enlevé le 1er août prochain, vaut autant cesser de suite les travaux, et nous avons donné instruction a Mr. Pageau de suspendre les travaux ce soir.

The suppliants had thrown up their contract and abandoned its completion, a very unfortunate and injudicious course for them to have taken under the circumstances, especially in view of what had in the past happened between them and the Crown when they had asked extensions, which true were not at first granted to the full extent, but which were from time to time granted for delays longer than those previously requested. However, if the suppliants, on being urged to go on with their work, and asked to complete the pier more than one full year after the time assigned by their contract, felt offended and threw up and abandoned their contract, they will have also to take and assume the full responsibility of such a course amounting to a breach of their contract.

CAN.

EX. C.

DUSSAULT AND PAGEAU v. THE KING.

Audette, J.

We have therefore to face the situation as it stands. It is perhaps unnecessary to say that while time was of the essence of the contract, and the works had to be completed within the year, by June 28, 1905, that that had been waived by giving the suppliants extensions of time within which to complete the works. And under such circumstances it would have been necessary to find whether or not that extension was reasonable, whether the contractors had reasonable time within which to complete their works. However, upon this point there is evidence in the affirmative both by the resident engineer, and by Poliquin. But this is a point which has become unnecessary to decide in view of the position taken by the suppliants in throwing up their contract. *Stewart* v. *The King*, 7 Can. Ex. 55; 32 Can. S.C.R. 483; *Walker* v. *London & N.W. Ry. Co.*, L.R. 1 C.P.D. 518; *Berlinquet* v. *The Queen*, 13 Can. S.C.R. 26. The suppliants have abandoned the work and left it unfinished and cannot be entitled to any further compensation. *Dakin* v. *Lee*, [1916] 1 K.B. 566; see also *Beck* v. *Township of York*, 5 O.W.N. 836. The contract is not at an end, and they cannot recover on a *quantum meruit*. The suppliants at the time they abandoned the contract left upon the premises materials consisting of lumber and iron to the value of $10,183.30, as set forth at p. 12 of the specifications of Poliquin's contract and referred to in clause 18 thereof.

The suppliants have been paid the total sum of $15,300 together with the sum of $4,949.89 which the Crown paid to F. R. Morneault & Co. for lumber at the request and in discharge of the suppliants' liability, for lumber bought by them. This sum of $4,949.89 forms part of the $10,183.30 above referred to, and was paid *pro tanto* for part of the lumber left by the suppliants when they abandoned the works.

Now, at the argument, the suppliants' counsel rested his case upon the following contention. He says the contract price for the whole works, as between the suppliants and the Crown was—$33,775—and the Crown has now received that wharf completed, and it is represented by that amount.

The Crown has also in its hands the suppliants' deposit amounting to—$3,600 = $37,375.

To amount brought forward	$37,375.00
The Crown confiscated our materials which are valued at	10,183.30
as shewn in the specification of Poliquin's contract.	
Then Poliquin, the second contractor, had extra work for the sum of	350.00
Making in all the sum of	$47,908.30
which he contends is in the possession of the Crown and for its benefit.	
Then he pursues, on the other branch of his argument and says the suppliants received in cash	$15,300.00
together with the further sum of	4,949.89
paid by the Crown, to their credit to Morneault & Cie, at their request	$20,249.89
And the Crown paid Poliquin to complete the works the sum of (contract price)	22,490.00
making in all	$42,739.89
and he concludes by saying the Crown received	47,908.30
and paid	42,739.89
leaving a balance in our favour of	$ 5,168.41
which the suppliant should recover.	

Recapitulating counsel's figures, they would stand as follows:

As received by the Crown.

Pier	$33,775.00
Extra work	350.00
Materials	10,183.30
Deposit	3,600.00
	$47,908.30

As paid by the Crown.

To suppliant	$15,300.00
" credit of suppliant for lumber bought by them from Morneault & Cie	4,949.89
Contract price of Poliquin for completion of work	22,490.00
	$42,739.89
Concluding by saying the Crown should pay us the sum of	5,168.41

the difference between $42,739.89 and the sum of $47,908.30.

CAN.

EX. C.

DUSSAULT AND PAGEAU v. THE KING.

Audette, J.

The obvious fallacy of this argument lies in the fact, you cannot say the Crown received the completed pier, representing $33,775, together with the $10,183.30, because the latter sum is in the pier when it is representing the sum of $33,775.

There is double appropriation (double emploi) in stating on the one hand the Crown in the result received a pier of the value of $33,775, and on the other hand to say that the Crown over and above this $33,775 pier (contract price) it also received $10,183.30 of materials which have to go into the pier before it is completed and before it has acquired the value of $33,775.

Then on the other branch of his contention with respect to what the Crown has paid, he is again in error, because the Crown did not actually pay $22,490 to Poliquin to complete the works, because under the contract, the material to the amount of $10,183.30 was used as part payment of the sum of $22,490 and in the $10,183.30 was also included the sum of $4,949.89 paid by the Crown to Morneault, at the request of the suppliants, being in part payment of the materials represented by the total sum of $10,183.30.

The true transaction would really stand as follows:

The Crown received.

Complete Pier		$33,775.00
" plus Extras		350.00
		$34,125.00

The Crown paid.

To the suppliants		$15,300.00
" Morneault & Cie at request of suppliants for lumber supplied		4,949.89
To Poliquin, the 2nd contractor, who completed pier, the contract price being	$22,490.00	
Less the sum of	10,183.30	
representing the value of the materials left on the premises by the suppliants, and of which the Crown had already paid $4,949.89		
	$12,306.70	12,306.70
(The $350 extra shown on the credit side is included in the $22,490.00)		$32,556.59

Therefore, if from the total assets or the total sum received by the Crown, viz..... $34,125.00
is deducted what the Crown actually paid..... 32,556.59

there would remain the sum of..... $ 1,568.41
showing that the Crown is to the good by that amount.
And if the amount of the deposit, viz..... 3,600.00
is added thereto, it would represent the total sum of..... $ 5,168.41

Now the question which remains to be decided is whether, under the terms of the contract, the suppliants are entitled to recover this sum of $5,168.41.

The contract entered into by the suppliants is a contract substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractors are, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and are absolutely without any resource, or remedy. *Bush* v. *Whitehaven Trustees*, Hudson on Building Contracts (4th ed.) vol. 2, p. 122.

But in this case the suppliants themselves created the breach by throwing up the contract and by failing to complete the works, and it would be contrary to justice that a party should avoid his own contract by his own wrong.

It is unnecessary to review the several clauses of this contract into which the suppliants entered with their eyes open. They must be held to them notwithstanding that they might appear oppressive, *modus et conventio vincunt legem*. The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law, Broom's Legal Maxims (8th ed.) p. 537. The suppliants cannot reject the terms of the contract and claim remuneration as upon a *quantum meruit*.

Under clause II. of the contract all the materials provided by the contractors became the property of the Crown for the purposes of the pier, and upon the completion of the works only such materials which have not been used and converted in the work, upon demand, may be delivered to the contractors. And

CAN.

EX. C.

DUSSAULT AND PAGEAU v. THE KING.

Audette, J.

this clause is by no means unusual; it is referred to in all the text books. It is a security to the building owner for the performance of the works, subject to this condition of defeasance if the builder fails to complete his works, *Hart* v. *Porthgain Harbour Co.* [1903] 1 Ch. D. 690. This is the law that must govern with respect to the materials and to this agreement and condition the contractors have bound themselves by their signature to the contract. And, indeed, *nullus commodum capere potest de injuria sua propria.*

The same principle is to be found enunciated in Emden's Building Contracts (4th ed.) p. 125, citing cases in support of the following proposition:—

> Where the contract contains a clause vesting the materials in the employer as they come on the land, it would seem that, inasmuch as such a vesting clause is in effect a security that the builder shall perform his contract, he will be precluded from recovering such materials when he has not completed. *Idem* also at pp. 121-124.

And in the case of *Quinn* v. *United States* (1878), 99 U.S. 30, where the contractors were dismissed and others employed who did the work on much lower terms than those of the contract, it it was held that the contractors were not entitled to either the profits they would have made if they had completed the contract or to the difference between the contract price and the actual cost of the work.

The case of *Hammond* v. *Miller* (1884), 2 Mackey (D.C.) 145; U.S. Dig. 1884, p. 141, cited in Hudson on Building Contracts (4th ed.) p. 617, is also authority for the principle that a defaulting contractor would not be entitled to the benefit of the saving on his contract price where the works had been completed by others at a lower figure to the employer.

I have come to the conclusion that the suppliants are not entitled to recover this sum of $1,568.41, the balance above referred to.

Coming now to the question of the deposit or security for the sum of $3,600 dealt with both under the specifications which are part of the main contract and under the subsidiary contract or agreement, with respect to the security, bearing same date as that of the original contract, it appears that the suppliants have delivered to the Crown certain securities and money, valued in the whole at $3,600, and more particularly described as two accepted cheques for the above named sum, dated Quebec, May

9 and June 10, 1904, drawn on La Banque Nationale, signed Dussault & Pageau, and made payable to the order of the Hon. the Minister of Public Works for Canada. There is no evidence shewing whether or not the cheques have been cashed, although it is to be assumed.

Par. 3 of clause 41 of the specifications which forms part of the contract, reads as follows:

Each tender must be accompanied by an accepted bank cheque made payable to the order of the Honourable the Minister of Public Works for the sum of $3,600 which will be forfeited if the party declines to enter into a contract when called upon to do so, or if he fails to complete the work contracted for. If the tender is not accepted the cheque will be returned.

Clauses 3 and 4 of the subsidiary contract, which must be read together, are as follows:—

3. That upon full performance and fulfilment by the contractors, of the said contract, and of all the covenants, agreements, provisos and conditions as aforesaid the parties hereto of the first part shall be entitled to receive back the value of said security, together with the interest, if any, which may have accrued out of the deposit whilst in the hands of the Finance Department.

4. But if at any time hereafter the said contractor should make default under the said contract, or if His Majesty, acting under the powers reserved in the said contract, shall determine that the said works, or any portion thereof remaining to be done, should be taken out of the hands of the contractors, and be completed in any other manner or way whatsoever than by the contractors, His Majesty may dispose of said security and of the interest which may have accrued thereon for the carrying out of the construction and completion of the work of the contract and for paying any salaries and wages that may be left unpaid by the said contractors.

Then s. 49 of the Exchequer Court Act enacts as follows:—

No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in such contract, shall be considered as comminatory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

Now par. 3 of clause 41 of the main contract and clauses 3 and 4 of the subsidiary contract must be considered together.

Under clause 41, and especially if read in the light of s. 49 of the Exchequer Court Act, the moment the contractors defaulted and failed to complete the work contracted for, it would seem the Crown would have the right to say to the contractors, you having defaulted, we treat your deposit of $3,600, under s. 49 of the Act, not as a forfeiture, but as *an assessment of the damages* by your default or neglect, and having done so much, no more,

CAN.

EX. C.

DUSSAULT AND PAGEAU v. THE KING.

Audette, J.

no less could be done. That is, the assessment of the damages was then made once for all, taking all prospective damages into consideration.

Then the Crown, in the present case, having failed to avail itself of clause 41, must then be taken to fall under clauses 3 and 4 of the subsidiary contract, whereby again in case of default by the contractor we fail on an actual assessment of the damages, when the Crown has a right to *dispose* of that security for the carrying out of the construction and completion of the work of the contract and for satisfying unpaid salaries and wages.

In the latter case there is no assessment of the damages as provided by the statute—it is an actual assessment which takes place. The parties are to some extent at large, and the Crown would have, I suppose, its right of action for any loss (even for more than the $3,600) suffered by it from the contractor's default, and the pendulum of justice could then be swung both ways, and do actual and untrammelled justice between the parties according to the actual facts of the case, taking into consideration the position of the parties after the full completion of the works.

In the result the Crown having suffered no loss, but being to the good by $1,568.41, is bound to return the deposit.

Would it not on the other hand seem that s. 49 of the Exchequer Court Act only applied to cases in which the Crown has suffered damages. If, indeed, effect were given to s. 49 where there be no damages, it clearly would defeat the very purpose and spirit of such section; because then, that is if we enforce the remedy provided by the section where there is no damages, but a gain, it would mean nothing else but a penalty or forfeiture in cases where there is no damages. It would clearly become a penalty as against the contractors if enforced against them in case the Crown suffered no damages.

And should not in any event this s. 49, consistent with reason, receive a fair, large and liberal construction and interpretation as could best insure the attainment of the object of the Act, and of such provision or enactment, according to its true intent, meaning and spirit? The Interpretation Act, R.S.C. 1906, ch. 1, sec. 15.

In the case of *Quinn* v. *United States* (*supra*), where the engineer in charge terminated the contract on the ground of undue delay,

the court held that the State having suffered no loss by the failure of the contractors, that the latter was entitled to recover the ten per cent. retention money payable on completion of the works.

Moreover, if claim 41 of the main contract, and clauses 3 and 4 of the subsidiary contract should be read together, the necessary meaning or inference would be that these $3,600 are to be returned to the contractors under two different circumstances. First, where under clause 3 of the subsidiary contract he has completed his work, this deposit is returned to him. And it is well to note that clause 41 of the main contract makes no provision as to the return of this money. And 2ndly, where under clause 4 of the subsidiary contract the contractors have defaulted, and the Crown has not at the time of the default and before the completion of the works availed itself of the so-called forfeiture, qualified by s. 49 of the Act, then it may dispose of this security for carrying out the construction and completion of the works and for paying any salaries or wages that may be left unpaid. But where the contractors have so defaulted and after the works have been completed by others and duly paid for, and furthermore, where no salaries or wages remain unpaid, the same having been paid and satisfied out of the original contract price without any extra expense or loss to the Crown, but even at a small benefit—the contractors, it would seem, become entitled to their deposit under the view taken in respect to s. 49 of the Exchequer Court Act, as above referred to.

Therefore, I must confess it is with some satisfaction I feel enabled to arrive at the conclusion, not without some hesitation, that the contractors are entitled to recover the amount of their deposit; because, after all, in the result the works have been performed and completed without any loss to the Crown, but with a net gain of $1,568.41, which they have a right to retain under the contract. Further, because this security of $3,600 was in any event paid only as a guarantee for the due performance and completion of the works without any loss to the Crown. The Crown having the completed pier, and having suffered no loss, but made a gain, the money should go back to the depositors or contractors.

Therefore, there will be judgment declaring that the suppliants are entitled to recover the sum of $3,600 and costs.

Judgment for suppliant.

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S. C.

BRADSHAW v. CONLIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 26, 1917.

AUTOMOBILES (§ III B—225)—DUTY WHEN APPROACHING HORSES.

Section 16 (1) of the Motor Vehicles Act, R.S.O. 1914, c. 207, that "every person having the control or charge of a motor vehicle . . . shall not approach such horse . . . at a greater speed than 7 miles an hour" is a specific and definite prohibition, and does not depend upon the knowledge or belief of the driver of the motor vehicle.

Statement.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, upon a general verdict of the jury at the trial, in favour of the defendant, in an action, in that Court, brought to recover damages for injury and loss sustained by the plaintiff by reason of his horses being frightened by the defendant's automobile, upon a public highway.

The plaintiff alleged that the defendant's car was being driven at an excessive rate of speed; that, he (the plaintiff) signalled the driver of the car to stop when the horses became frightened, but the driver did not stop; that the horses ran away, and the plaintiff was thrown from his waggon and injured. He charged negligence and failure to observe the requirements of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

The appeal was upon the ground of misdirection; the plaintiff asked for a new trial.

R. McKay, K.C., for appellant; *F. E. O'Flynn*, for respondent.

Riddell, J.

RIDDELL, J.:—This was a case tried before the Judge of the County Court of the County of Hastings and a jury, resulting in a general verdict for the defendant—an action for damages by reason of a motor vehicle on a highway.

The plaintiff moves as for a new trial on the ground of misdirection by the learned County Court Judge, and gives three grounds of complaint:—

(1) That the learned County Court Judge told the jury that the evidence shewed that the defendant was a very careful driver, and added: "That evidence, it seems to me, ought to have some weight as to the carefulness of this driver."

But the evidence itself was given without objection; there was no specific objection to this part of the charge, counsel contenting himself with raising two specific objections, and concluding, "And I object to the whole charge." And, moreover, the trial

Judge added at once, "but that won't excuse him if he drove wrong in this case."

I do not think this ground tenable.

(2) It is contended that the doctrine of contributory negligence is not applicable to a case such as this is.

It was argued at the trial that "where there is a statutory provision, and here is a statutory provision, imposing the obligation upon the motor driver to prove that it was not the result of his negligence, he can only relieve himself by proving that it is not the result of his negligence, and the statute says he is liable if he does not do it, so the doctrine of contributory negligence does not apply at all."

Substantially the same argument was advanced before us.

Section 23 of the statute, R.S.O. 1914, ch. 207, provides: "When loss or damage is sustained by any person by reason of a motor vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver."

But this simply shifts the onus, no more. In the absence of such a provision, when a plaintiff comes into Court alleging damage sustained by reason of a motor vehicle on a highway, he must prove negligence or improper conduct on the part of the owner or driver of the motor vehicle: this provision removes this necessity, and makes it sufficient for the plaintiff to prove damage sustained by reason of a motor vehicle on a highway. It does not remove any defence; whatever would be matter of substantive defence before remains to the defendant.

Or, stating the same principle from a slightly different standpoint —when a defendant is called upon to prove that the damage was not caused by the negligence or improper conduct of the owner or driver, he may do so by proving that it was caused in whole or in part by the negligence—contributory or otherwise—of the plaintiff.

The argument seems to proceed from a misreading of such cases as *Groves* v. *Wimborne*, [1898] 2 Q.B. 402; *Baddeley* v. *Granville* (1887), 19 Q.B.D. 423, etc., etc.—but the contention cannot prevail.

(3) The third ground of objection is, that the learned County

ONT.

S. C.

BRADSHAW v. CONLIN.

Riddell, J.

Court Judge told the jury that sec. 16 (1) of the Motor Vehicles Act requires the motor vehicle to be at no greater speed than 7 miles an hour, etc., only if the operator has reason to believe that he is approaching a horse—and that the restriction does not apply if he has no reason to believe that he is approaching a horse.'

I think the objection well-founded—the language of the statute (sec. 16 (1)) is to my mind clear: "Every person having the control or charge of a motor vehicle . . . outside the limits of any city or town, shall not approach such horse" (*i.e.*, a horse drawing a vehicle or upon which any person is riding) "within 100 yards, or pass the same going in an opposite direction at a greater speed than 7 miles an hour . . . " This is a specific and definite prohibition. Where the Legislature leaves anything to reasonable ground of belief, it says so, as in sec. 11 (2). Where the prohibition is clear, a *mens rea* is not necessary even in criminal matters: *Regina* v. *Prince* (1875), L.R. 2 C.C.R. 154. Moreover, a consideration of the purpose and object of the legislation will, I think, make it clear that there could have been no intention on the part of the Legislature to rest the duty of going at not more than 7 miles per hour upon the knowledge or reasonable belief of the operator of the motor vehicle.

The Act is, of course, for the protection of those in the highway against accident from motor vehicles: provision is made that the driver shall not be juvenile in years (sec. 13), must be sober (sec. 14), and careful (sec. 11 (2)). The superior limit of the speed is fixed at 20 miles per hour (sec. 11 (1)); the motor, however, is not to be run at the top-speed under all circumstances, but the speed must be limited by all the circumstances of travel, actual or reasonably anticipated (sec. 11 (2)).

Then, as I think, sec. 16 contains a special protection for horses on the highway in use for driving or riding. It is surely more reasonable to protect such horses by saying to the operator, "You must not run at a greater rate than 7 miles an hour at points on the road where you cannot see clearly 100 yards ahead," than to make the owner of the horse take all the risk of the operator running at 20 miles an hour till he sees the horse perhaps a few yards away. The motor vehicle driver can protect himself and avoid danger, the man on or driving the horse cannot.

I think that the charge in this respect of the County Court

Judge is erroneous. As the verdict was general, it is impossible to say that the error might not have affected the verdict: and there, consequently, should be a new trial. The defendant should pay the costs of this appeal and of the former trial.

ROSE, J., agreed with RIDDELL, J.

LENNOX, J.:—In the view I entertain of the proper disposal of the appeal, it is not necessary to go very carefully over the evidence adduced at the trial: and I have not done so. It is admitted that the defendant at the time of the happening of the injuries complained of was the driver of a motor vehicle on the highway where the accident occurred, within the meaning of sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207; and, whatever the actual speed at which he was driving may have been, it is common ground that the defendant approached the plaintiff's horses and vehicle upon the highway, and within 100 yards, "at a greater rate of speed than 7 miles an hour."

Section 16 of the Act, in addition to imposing upon the driver of a motor vehicle the duty, when approaching a vehicle drawn by a horse (or horses), of exercising "every reasonable precaution to prevent the frightening of such horse and to ensure the safety and protection of any person . . . driving the same," in express and definite terms provides that, upon a rural highway such as this was, he "shall not approach such horse within 100 yards . . . at a greater rate of speed than 7 miles an hour." It is admitted that, if the language of this section is absolute and unqualified, the defendant broke the law upon the occasion referred to.

The learned Judge at the trial said: "It does not seem to me at all reasonable that that section could possibly mean that a man without any knowledge of approaching a horse is bound to make his speed 7 miles an hour. It does seem to me that that section must mean that a man approaching a horse with a knowledge that he is so approaching a horse, with some reasonable ground to believe that he may be so approaching a horse, must within 100 yards of it, and while passing it, not drive at a speed greater than 7 miles an hour. I reach that conclusion partly from common sense and partly from sec. 11 (1), which reads: 'No motor vehicle shall be driven upon any highway . . . outside of a city, town or village at a greater rate of speed than 20

ONT.
S. C.
BRADSHAW v. CONLIN.
Lennox, J.

miles an hour;' and then to say he is limited to 7 miles an hour, if he has no reason to believe he is approaching a horse, does not seem to me to be quite consistent. Therefore, I take the responsibility of instructing you that that section means: If a man knows he is approaching a horse or has reasonable grounds from which he should know he is approaching a horse, he must drive at 7 miles an hour within 100 yards; but, if he has no knowledge whatever and could have no knowledge whatever, then I think I shall instruct you he is not bound by that 7 miles an hour until the point where he does know or could know that a horse was approaching; I take that responsibility."

The argument of counsel for the respondent was to the same effect. With great respect, I am of opinion that the learned Judge erred in so interpreting the statute to the jury. The language of the Legislature is explicit and positive—it does not say "knowingly" or "with reasonable ground to apprehend" or introduce any qualification, nor do I find any conflict between sec. 16 and sec. 11 or other sections of the Act. Reasonable or unreasonable, wise or unwise, if the enactment is clearly expressed, it is the law. The Legislature, like the citizen, must be taken to mean what it definitely and positively declares. It is no part of my duty or privilege to declare whether, in my opinion, it is a good law or the contrary. If it has been enacted inadvertently, it can be amended; but not in Court; and the argument that it is unreasonable is irrelevant if the meaning of the language used is unambiguous—as I think the language of sec. 16 is. And to my mind there are "pros and cons" when you attack the section as a matter of legislative discretion. Twenty miles an hour may be quite safe in the light of day and along a level, straight, and unobstructed highway, but it is another matter if motor drivers are allowed to swing over peaks and around curves and corners at the same speed. I am very far from thinking that the Legislature did not weigh the whole question carefully and view it from the opposing standpoints of convenience and safety.

It was not, I think, suggested at the trial; but I think it is clearly a case in which questions should have been submitted to the jury.

I am not satisfied that this action has been properly tried. I do not find it necessary to refer to all the matters complained of

in the Judge's charge. I think, however, that it must be said that, in view of what followed, part of which I have already set out, the learned Judge's instruction as to the meaning of sec. 23, and how to apply it, can hardly be regarded as satisfactory, although it might be sufficient where the question of the infraction of a positive provision of a statute did not arise.

Referring to the statute-law, as read by Mr. Porter, the learned Judge said: "I don't know that I need repeat it. Perhaps I might just touch it. First, that the onus of proof is on the automobile man. If a man beings an action, he has to prove his case, but here the other man, the defendant, has to prove that he didn't cause the damage, and so the burden of proof is upon Mr. Conlin to shew that he was not responsible in law for this damage; if he has satisfied you to that effect, that answers the law."

I am not quite sure that I apprehend what is meant by: "The burden of proof is upon Mr. Conlin to shew that he was not responsible *in law* for this damage; if he has satisfied you to that effect, that answers the law;" or that the provision of the statute, as expounded, would be clearer to the jury than the interpretation is to me. The question for consideration of the jury was a pretty narrow one; and, as there may be a new trial, I refrain from saying what the learned Judge should have said; but, with the fact that the defendant was driving at least 10 to 12 miles an hour admitted, "the negligence or improper conduct" of the defendant ceases to be merely a rebuttable presumption under sec. 23 (if my interpretation of sec. 16 is correct), and the only avenue of escape would appear to be, as the Judge stated in the earlier part of the sentence, for the defendant to prove "that he didn't cause the damage." I fear that the jury had not a clear conception of the issues to be tried.

The defendant would, I think, have been well advised not to have asked for costs when the action was dismissed. As it is, the plaintiff is entitled to a new trial if he desires it, and to the costs of the appeal; the costs of the former trial and the costs of the action should abide the event. There is, however, no large sum involved, and the parties or their solicitors should get together and settle their differences.

ONT.

S. C.

BRADSHAW v. CONLIN.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—The jury found that the defendant was not guilty of any negligence on the occasion when the plaintiff was injured, so nothing turns upon any question of contributory negligence; the only question is: whether the plaintiff should have a new trial because of any misdirection by the learned trial Judge as to the meaning of sec. 16 of the Motor Vehicles Act.

He told the jury, in effect, that the provisions of this section of the Act are applicable only when the person having the control or charge of a motor vehicle knows, or should know, that he is approaching a horse being driven or ridden upon the highway on which he is travelling.

I agree with him in that interpretation of the section as to knowing, but not as to should know.

The whole wording of the section indicates that the Legislature was dealing with the case of a person who knew that he was approaching such a horse, and that consequently care should be taken such as the occasion, and the statute, required. The driver is to exercise every reasonable precaution to prevent frightening the horse and to ensure the safety and protection of the person riding or driving the horse. How is that to be done by one who does not see the horse or know of its approach? Different circumstances call for different precautions. Is the person driving the vehicle to be continuously exercising all kinds of precautions for fear a horse may be approaching him without his knowledge of the fact. Is he never to drive more that 7 miles an hour, although the 11th section provides that he may go 20 miles an hour, for fear that a horse may be within 100 yards of him? One hundred yards is quite a distance. Is he to signal his desire to pass, and give the rider or driver opportunity to turn out so that he may be passed with safety, without seeing or knowing that the rider or driver is there? And, if any horse coming towards him appears to be frightened, is he to stop though unaware of such appearance? Appears to whom to be frightened? Obviously, expressly, to the person driving the motor vehicle. Is not this conclusive of the question? And, again, if the horse appears to be frightened, or if the person driving the motor vehicle is signalled to stop, he must stop to allow the horse to pass, whilst not only the vehicle, but the engine of it, must be stopped by its driver. How is all this to be

accomplished without knowledge of the signal, or of the fear, or of the approach? And, beside all this, why slacken speed when not in sight of horse or driver? What difference can it make to either of them, when they cannot know anything about it, whether the speed is 7 or 8 or 20 miles an hour? And speed can be reduced from 8 or from 20 to 7 almost instantly when in sight.

The whole section, which is in these words—

"16.—(1) Every person having the control or charge of a motor vehicle shall, when upon a highway and approaching any vehicle drawn by a horse, or a horse upon which any person is riding, operate, manage and control such motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of such horse and to ensure the safety and protection of any person riding or driving the same, and, outside the limits of any city or town, shall not approach such horse within one hundred yards, or pass the same going in the opposite direction at a greater rate of speed than seven miles an hour, and, if going in the same direction, shall signal his desire to pass and give the rider or driver an opportunity to turn out so that he may be passed with safety, and if any such horse going in the opposite direction appears to be frightened or if such person is signalled so to do he shall stop such motor vehicle, including the motor, and shall remain stationary so long as may be necessary to allow such rider or driver to pass or until directed by him to proceed; and in case any animal ridden or driven by such rider or driver appears to be frightened such person and the occupants of the motor vehicle shall render assistance to such rider or driver.

"(2) A person having the control or charge of a motor vehicel shall not sound any bell, horn or other signalling device so as to make an unreasonable noise, and an operator of any motor vehicle shall not permit any unreasonable amount of smoke to escape from the said motor vehicle, nor shall such operator at any time, by cutting out the muffler or otherwise, cause such motor vehicle to make any unnecessary noise."

—must be borne in mind; we cannot expect to reach a right conclusion if we deal with a few of its words only, divorced entirely from their context.

We are of course to give full effect to the provisions of this section of the Act, as well as to all other legislation, but we must

ONT.
S. C.
BRADSHAW v. CONLIN.
Meredith, C.J.C.P.

take care that zeal for full effect does not carry us beyond the requirements of the legislation, does not cause us to attribute to words a meaning which produces absurd effects, if the words are capable of an interpretation which produces reasonable effects—care that we do not make the double mistake of misunderstanding the words of the legislation and of then charging them with the unsatisfactory results which come only out of our own error. There is, assuredly, nothing in the words of the section in question which constrains us to hold that they are applicable to cases in which the person in control of the car has no knowledge of the approach of the horse; everything is based upon such knowledge, without which it is impossible to comply with the provisions of the section. Otherwise, the person in the control of the car, to be quite safe, would be obliged always to come to the crest of the hill where the accident happened, performing all that the section requires—not merely reduction of speed to 7 miles an hour—because over it, and out of sight, there might be a horse approaching within the distance of 100 yards, and this though perhaps not once in a thousand times there should be a horse so approaching: and a driver wholly unused to the road, and so unaware of the sharp dip on the other side of the crest of the hill, would also be an offender against the provisions of the section—and liable to its penalties—if he did not guess that there might be, and act as if, a horse was approaching, though there were none within miles of the place: so too after dark one would always be in that predicament, because there might be a horse, invisible, within the 100 yards' distance.

The section of the Act in question is quite capable of the common sense interpretation of it applied in part to it by the County Court Judge; and should not be given an interpretation which must lead to fantastic as well as unreasonable results: such as, for another instance, tying timid drivers down to 7 miles an hour always, for fear of running against the provisions of this section—and incurring its penalties—and towards an approaching horse, which, for various reasons, might not be visible 100 yards away, or less. Rapid traffic is the purpose of motor vehicles: if limited to horse-speed only, their usefulness is taken away.

What the Act means, as it seems to me, is: that the section

in question shall apply to the ordinary—999 times out of a 1000—case of drivers approaching and seeing each other. Why make it applicable to one who does not see? For no real purpose and with the results some of which I have mentioned.

If he do not see, and is not guilty of any kind of negligence in not seeing, what reason or excuse can be given for making him answerable for any consequences? Whilst, if he be guilty of some kind of negligence in not seeing, and so not taking proper precautions, what need is there to have resort to this section of the Act, for, apart from it, as well as under sec. 11, he is answerable for the consequences of his negligence?

I would dismiss the appeal.

New trial ordered; MEREDITH, C.J.C.P., *dissenting.*

HOPWOOD v. THE KING.

Exchequer Court of Canada, Audette, J. March 10, 1917.

CROWN (§ II—20)—NEGLIGENCE — PUBLIC WORK — CANAL — FLOODING—RELEASE.

An action does not lie against the Crown for an injury to land from the overflow of a government canal, "occasioned by spring floods and freshets" within the terms of a deed releasing the Crown from liability upon such contingencies; nor does it come under s. 20 of the Exchequer Court Act (R.S.C. 1906, c. 140), sub-s. (*a*) and (*b*), which deals with compensation for a compulsory taking or injurious affection of land, nor under sub-s. (*c*) thereof, as an injury on a "public work," the property being situated about 25 miles from the canal route, and the injury not being shewn to have resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

PETITION OF RIGHT to recover damages alleged to have been caused by an overflow of the Trent Canal. Statement.

J. H. Burnham, for suppliant; *G. W. Hatton*, for respondent.

AUDETTE, J.:—This case came up for trial before me at Peterborough, Ontario, and at the conclusion of the suppliant's evidence, the respondent moved for judgment of non-suit. This motion was taken under advisement. Audette, J.

The suppliant, by his amended petition of right, seeks to recover the sum of $150 for alleged damages suffered in 1912 (although in his evidence he said his claim was for 1912 and 1913) to his property, as resulting from the flooding of the same "by reason of the unlawful and improper handling of the waters known as the Trent Canal waters," at the Buckhorn Dam.

This property, which he acquired on September 10, 1900, is

CAN.
EX. C.
HOPWOOD
v.
THE KING.
Audette, J.

described in the deed of purchase as a small island in Chemong Lake. At low water it becomes a peninsula; but when the waters are high it is entirely surrounded by water, and he has therefore constructed a small foot-bridge from the mainland to the island.

As appears by an indenture of August 29, 1910, the suppliant was paid at that date the sum of $150 in full satisfaction and discharge of all claims for damages to his property in consequence of the construction, maintenance and operation of the Trent Canal, so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909, and in consideration of the same he further grants, releases, indemnifies and discharges the Crown from and against all damages of any nature and kind whatsoever, which have been heretofore caused or may hereafter be caused or done so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909.

And this indenture further recites:

That for the consideration aforesaid the said party of the first part for himself, his heirs, executors, administrators and assigns doth grant, confirm and assure to and unto His Majesty his successors and assigns forever the right to flow, flood and submerge such part of the said lands hereinbefore mentioned to such an extent as may be found necessary to flow, flood and submerge the same by the raising and increasing the height or level from time to time of the waters of the said Trent Canal System in so far as they affect the lands and premises hereinbefore mentioned to the greatest level or height to which the said waters were brought at any time during the years of 1906, 1907, 1908 and 1909, as indicated by the records kept from time to time by the proper officers of the Government of the Dominion of Canada or by maintaining or supporting at all times the waters of the said Trent Canal System in so far as they affect the said lands to the said height or level and *such further increase thereof as may be occasioned by spring floods and freshets.*

A new Buckhorn Dam was built in 1907, and completed in October, 1908, and much stress is placed on behalf of the suppliant, upon the difference of the 1907 dam and the 1908 dam. But no meritorious argument can apparently be set up from this comparison since that, from the deed of August, 1910, it appears the release thereunder is valid provided the waters are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909, that is under the state of things obtaining under both old and new dams in the years above mentioned, and all of these years are the point of comparison with 1912.

Furthermore, the height of the waters in the years 1906, 1907,

1908 and 1909, is to be ascertained "from the *records kept from time to time* by the proper officers *of the Government*," and to the height of the waters so ascertained in the years 1906, 1907, 1908 and 1909, there is still a further margin allowed the Crown by the following words of this deed of 1910, viz., "and such further increase thereof as may be occasioned by spring floods and freshets."

Now, we have uncontroverted evidence that there was a very heavy freshet in the spring of the year 1912, and that heavy rain and deep snow occasioned an extremely high precipitation. The highest point the waters reached at the dam in 1912 was on April 24, when it reckoned 9.11 on the upper gauge. Then the waters dropped down till they again rose to 7.07 on May 17, and around June 5 it reached 9.08. In 1912 the water rose up to 9.11, that is 6 inches higher than in 1909, when it went up to 9.05. But even if the case were to be decided exclusively upon the facts, as controlled by the deed of August, 1910, the action would fail, because to whatever height the water did go in 1912, over and above the years 1906, 1907, 1908 and 1909, must obviously and reasonably be taken to be due to the unusual spring floods and freshets of 1912, and that would be only 6 inches of leeway or margin allowed by the 1910 deed over the highest point reached between 1906 and 1909.

Approaching now the case under its legal aspect, it must be said that this action is in its very essence one in tort, and that, apart from special statutory authority, such an action does not lie against the Crown. The suppliant, to succeed, must bring his case within the ambit of s. 20 of the Exchequer Court Act.

If the suppliant seeks to rest his case under sub-s. (*b*) of s. 20, as was mentioned at trial, I must answer that contention by the decision of the Supreme Court of Canada in *Piggott* v. *The King*, 53 Can. S.C.R. 626, 32 D.L.R. 461, where His Lordship the Chief Justice of Canada, says: "Paragraphs (*a*) and (*b*) of s. 20 are dealing with questions of compensation not of damages.

"Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken under, or injuriously affected by, the exercise of statutory powers."

Therefore, it obviously follows that the present case does not come under sub-s. (*a*) and (*b*) of s. 20.

CAN.
EX. C.
HOPWOOD
v.
THE KING.
Audette, J.

Does the case come under sub-s. (*c*) of s. 20, repeatedly passed upon by this court and the Supreme Court of Canada?

To bring this case within the provisions of sub-s. (*c*) of s. 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; and 3rd. The injury must be the result of such negligence.

The suppliant's property is situate 20 or 25 miles south of Buckhorn Dam, a dam which is part of the Trent Canal System, which undoubtedly under s. 108 of the B.N.A. Act and the third schedule thereof is the property of Canada. The canal route, however, runs through the northwestern part of Buckhorn Lake and does not go through Chemong Lake at all. Buckhorn Lake on the east connects with Chemong Lake through a passage, and the suppliant's property is on the southeast shore of the latter lake, as the whole appears upon a general plan exhibited at trial.

Under the circumstances and under the decisions in *Macdonald* v. *The King*, 10 Can. Ex. 394; *Hamburg American Packet Co.* v. *The King*, 7 Can. Ex. 150, 33 Can. S.C.R. 252; *Paul* v. *The King*, 38 Can. S.C.R. 126; and *Olmstead* v. *The King*, 53 Can. S.C.R. 450, 30 D.L.R. 345, it is impossible to find that the suppliant's lands in question in this case, so situate 20 to 25 miles from Buckhorn Dam and entirely out of the canal route, are *on a public work*.

Were this question of *on a public work* answered in favour of the suppliant there would still be missing from the case the evidence that an officer or servant of the Crown, while acting within the scope of his duties or employment, had been guilty of such negligence that would have caused the damages complained of. There is not a tittle of evidence in this respect in the case.

In the result it must be found, following the decisions of *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King* (*supra*), *The Hamburg American Packet Co.* v. *The King* (*supra*), *Macdonald* v. *The King* (*supra*), and especially *Olmstead* v. *The King* (*supra*), that the injury complained of did not happen on a public work, and moreover that it did not result from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

Therefore, both under the facts, as controlled by the deed of August, 1910, and under the law the suppliant fails.

The motion for non-suit made at trial, by counsel on behalf of the respondent, at the conclusion of the suppliant's evidence, is granted and the suppliant is declared not entitled to any portion of the relief sought by his petition of right.

Action dismissed.

REX v. HOGUE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., and Rose, J. April 17, 1917.

1. TRIAL (§ III D—229)—READING CHARGE TO JURY AS A WHOLE—MINOR INACCURACIES.

In determining whether the instruction to the jury was a proper one or not, the appellate Court is to look at the charge as a whole; a new trial will not be granted, even in a capital case, because of minor inaccuracies in the charge if the inaccuracies cannot have misled the jury and the defence was fairly put before them.

2. DEPOSITIONS (§ IV—17)—USE AT TRIAL OF DEPOSITIONS OF ABSENT WITNESS TAKEN ON THE PRELIMINARY ENQUIRY.

The admission in evidence for the Crown of the depositions of an absent witness taken on the preliminary enquiry without the proof of absence required by Cr. Code sec. 978 will not entitle the accused to a new trial where he, through his counsel, expressly requested at the trial that such depositions should be put in.

[*R.* v. *Brooks*, 11 Can. Cr. Cas. 188, 11 O.L.R. 525, cited.]

Statement.

MOTION on behalf of the prisoner, under sec. 1015 of the Criminal Code, for leave to appeal from the conviction of the prisoner for the murder of one William Marshall Jackson, upon trial before SUTHERLAND, J., and a jury, at Sandwich, and for a direction to the trial Judge to state a case for the opinion of the Court, which he had refused to do.

The motion was made upon the following grounds:—

(1) That upon the trial the prisoner was taken by surprise, in his defence, by the failure of the Crown to produce two witnesses, Jean Watson and Arlie Thomas, whose depositions, taken upon the preliminary hearing, were admitted at the trial, and that the said Watson and Thomas ought to have been personally present in order that the weight of their evidence might properly be brought to the attention of the jury.

(2) That the learned trial Judge ought to have insisted upon adjournment of the trial until the said witnesses were produced, and that their depositions were improperly admitted, to the prejudice of the defence.

(3) That the trial, proceeding as and when it did, was preju-

ONT.
S. C.
REX
v.
HOGUE.
Statement.

dicial to the defence of the accused, in that counsel for the accused had not time to prepare the defence, and was brought in to plead to the indictment only when the case was called in Court.

(4) That the learned trial Judge failed to instruct the jury or to instruct the jury fully and comment upon the matters open to the accused by way of defence.

(5) That, when the jurors had been out for more than two hours, and then came in and asked the Judge to explain to them the meaning of sec. 259 of the Criminal Code, under which the indictment was laid, and particularly the meaning of clauses (*a*) and (*b*), the Judge's instruction then given to the jury was insufficient.

(6) That the said section of the Code is not self-explanatory or easy for laymen or jurors to understand; and that, in addition to reading and thoroughly explaining the said section, the Judge ought also to have explained the meaning of sec. 252 of the Code, dealing with culpable and non-culpable homicide, and ought to have explained and dealt with the said two sections together.

(7) That the instructions to the jury were such as to give the impression that the fact that the prisoner had been reckless in handling the revolver by which death was inflicted was sufficient to support a conviction for murder, without bringing to the minds of the jurors the fact that an intention to do injury to the deceased was necessary to constitute the offence.

The prisoner was in the custody of Jackson, an immigration officer, travelling upon a railway train, when the prisoner shot Jackson with a revolver. Jackson died almost immediately. The prisoner escaped, but was recaptured.

The defence was that the prisoner did not intend to shoot at Jackson, but only to threaten him with the revolver, with a view to escaping, and that the revolver was accidentally discharged while the prisoner was pointing it at Jackson.

At the trial, the depositions of Jean Watson and Arlie Thomas, taken at the preliminary hearing before a police magistrate, were read to the jury by counsel for the Crown; counsel for the prisoner stating that he wished that to be done—the two men not being available as witnesses at the trial. These men were in the car where the shooting took place at the time of the shooting. Other persons who were in the car were examined as witnesses at the

trial; and the prisoner testified on his own behalf and was cross-examined by counsel for the Crown.

Statement.

The charge was, in part, as follows:—

. . . .

"We are here investigating an alleged crime, which has been defined to be an act or omission forbidden by law under pain of punishment. It is forbidden by law that one man shall take unlawfully the life of another. This case is simplified in many ways. Sometimes there is the question of the identity of the person charged with the person who committed the alleged crime. Sometimes it is difficult to ascertain whether the person accused actually committed the act which caused the death of another. In this case we can commence with a number of admissions which bring us right up to the time of the shooting. The accused was the man in whose hand the revolver was when the bullet left it or was fired from it. This is undoubted on the evidence. And it is undoubted that a shot did go off and that the bullet hit the man Jackson and caused his death. These appear to be facts which are undisputed upon the evidence.

. . . .

"There are the following dispositions of this case which upon the evidence you may make: (1) If you think the evidence warrants it, you may find the accused man guilty of murder. I shall deal more fully with that later. (2) If you find there was an unlawful killing not amounting to murder, you may find him guilty of manslaughter. (3) If you cannot agree on one or other of these or cannot agree upon a third course, finding him guilty, then it is possible you may disagree. You cannot find him guilty of any crime except murder or manslaughter. You can find him guilty of the crime of murder or the lesser crime of manslaughter, but of no other.

"In consideration of a criminal accusation we have to consider what the crime is and what the ingredients are that go to make it up. There should be—there must be—a criminal intent. If, however, a man knowingly does acts which are unlawful, the presumption of law is that a criminal intent exists. The intent may be gathered from the act. And the question of intent is a question of fact for the jury. Intention has been defined as the direction of conduct towards the object chosen upon considering the motives which suggest the choice.

ONT.
S. C.
REX
v.
HOGUE.
Statement.

"Here you find a man in the custody of the law meditating and considering and determining that he is going to escape from that custody, which would be an unlawful act on his part if he attempts to do so, and deliberately considering how he is going to carry out that unlawful purpose. He says: 'I knew the man in whose custody I was had a revolver in his bag or valise. I intended to get it. I got it. I intended to use it in my preconceived unlawful plan of attempting to escape from custody—intended to use it to "bluff" him.' To 'bluff' him how? 'If he attempted to stop me in my unlawful object of escaping from his custody, he being the official in whose custody I was, I was going to "bluff" him.' I do not know to what extent that word can be defined or used in the connection or how far he intended to go by that, whether or not he intended at that time to use the weapon as it was used later on voluntarily or involuntarily. The word 'bluff' in its ordinary signification would mean much the same as to threaten—forcing some one to do what they would not otherwise do, or preventing some one doing what they otherwise would do. Applying it to this case, the prisoner in effect said: 'I intended using the revolver when I was escaping to "bluff" him form attempting to prevent my getting away.'

. . . .

"The killing of another is called 'homicide' in the law. There are two kinds of homicide, culpable homicide and homicide that may be justifiable or excusable. Homicide is defined by the Criminal Code as the killing of one human being by another, directly or indirectly, by any means whatsoever (sec. 250). Homicide is culpable, as defined also by the Code, when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform some duty (sec. 252). Keeping these definitions in mind, we have here a charge of murder—that is, unlawful killing or culpable homicide—against the accused man in the box. Murder under our law is defined by the Code in this way: 'Culpable homicide is murder,—(*a*) if the offender means to cause the death of the person killed'— that is, an intentional killing—'(*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not' (sec. 259). Applying that for the moment to this case, the

accused man tells you he had this revolver in his hand and how he got it. He tells you he meant to escape. He tells you he meant to 'bluff' the officer if he interfered with his unlawful object of escaping. He tells you of going to the water-tank for a drink, coming back and standing where he did stand and then raising the revolver and resting it upon the top of the seat-back. It was pointing, as unfortunately the subsequent results shew, directly at the deceased man. What is the story the accused tells? He says: 'I had the revolver resting on the top of the seat-back. I waved the attention of the officer to it with my other hand—called his attention to the fact that I had the revolver there. I cocked it there.' And then I think he said after two or three seconds it went off accidentally. I shall refer to some of the other evidence associated with that later on. Do you believe it was an accident? Do you believe him when he says he called the deceased man's attention to the revolver? If he called the deceased man's attention to it, what would be the natural thing for the officer to do? To sit there and watch him and smile, or to attempt at once to apprehend him. If he called the officer's attention to the revolver, as he says he did, one would expect some different action on the part of the officer than simply sitting still and smiling. At all events that is his story. If he fired the shot intending to kill or reckless whether he killed the deceased man or not, with a view to effecting his escape from custody, then I charge and direct you that would be murder—if you find that to be proved by the evidence. Or if you find that, intending to escape, he shot off the revolver meaning to cause to the deceased man any bodily injury known to him to be likely to cause death, and reckless whether death ensued or not, that would constitute murder. And so, if the evidence warrants you in coming to either one of these conclusions, it will be your duty to bring in a verdict of guilty of murder. But, as I have already indicated to you, if the evidence warrants you in finding unlawful killing not amounting to murder, then you may find the accused guilty of the lesser crime of manslaughter. Culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. Culpable homicide not amounting to murder is manslaughter. In the one case, where there is intent to kill or intent to injure in

ONT.

S. C.

REX v. HOGUE.

Statement.

some serious way with a reckless disregard whether death is caused or not, that would constitute murder. If that intent is not evident and is wanting, and there is still an unlawful killing, there may be a reduction of the crime to manslaughter. If, on the other hand, and as a third alternative, you find the discharge of the revolver was a pure accident, then perhaps you may be warranted in finding a verdict of not guilty.

"In connection with this alleged crime I should point out to you, I think, the following facts. Under our law it is an unlawful thing for a man even to point a revolver at another man, loaded or unloaded. I shall refer to the section: 'Every one who, without lawful excuse' (there can be no question that in this case the accused man had no lawful excuse to point a revolver at the man in whose custody he was), 'points at another person any fire-arm or air-gun, whether loaded or unloaded, is guilty of an offence' (sec. 122). I must also call your attention to the fact that if the accused man concluded to escape from lawful custody, and was engaged in attempting to carry that plan out when this crime was committed—if crime was committed—or when that act was done by which this man was killed, he would be committing a crime against the law. There is another section of the Code to which I shall refer: 'Every one is guilty of an indictable offence . . . . . who—(*a*) having been convicted of any offence, escapes from any lawful custody in which he may be under such conviction; or (*b*) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge' (sec. 189). The next section is the one I wish to call your attention to: 'Every one is guilty of an indictable offence . . . who, being in lawful custody other than aforesaid on any criminal charge, escapes from such custody' (sec. 190). In this particular case I tell you as a matter of law that this man was in lawful custody—in the custody of Jackson, the immigration officer, who was taking him from Winnipeg to Windsor, intending to deport him at Windsor and hand him over to the American authorities at Detroit. There is another section of the Code which perhaps bears somewhat on this case and which I shall now refer to: 'In case of treason and the other offences against the King's authority and person mentioned in Part II., piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful appre-

hension, murder, rape, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue' (sec. 260). I think that even under that section the question of intention, to which I have already referred, will have to be taken into consideration by the jury. That is the general reference to the law as applicable to the case.

"Then the accused gave evidence on his own behalf in the witness-box. He admits he got the revolver with the intention of its aiding him in his unlawful purpose of escaping. He intended to use the revolver to 'bluff' the officer in whose charge he was if he attempted to interfere with his escape. He intended to escape. He knew the revolver was loaded. He put it on the back of the seat, and it was pointing, at all events, at the officer. He didn't intend to shoot, and it went off accidentally. You have seen the revolver, and you will be able to judge whether or not it is a revolver that would go off from a slight jarring of the train. Can you believe it went off in that way? Can you believe the accused when he says he hadn't his finger on the trigger? Can you conclude anything else except that he had his finger on the trigger and it was because his finger was on the trigger the revolver went off? He said he did not have his finger on the trigger, he did not intend to shoot, did not press the trigger, and the matter was a pure accident.

"Again, I say to you: If you believe he intended to shoot and kill, it is murder. If you believe he intended to shoot the officer and hurt him seriously, even though he had no intention or expectation that he would die as the result of the shooting, it would still be murder. If he had no intention of shooting the man at all, but was pointing the revolver unlawfully at him, as he says, and it went off, it may be in that event you can see your way to find a verdict not of murder, but of manslaughter. If you think it was a pure accident, it is possible you may conclude to find him not guilty. Do not hesitate, gentlemen of the jury, to discharge your duty firmly. If the man is guilty as charged, find him so. If he is not proved to be so beyond a reasonable doubt, give him the benefit of the doubt."

The jury retired at 5 o'clock; but came back to the court-room at 7.15, when the following took place:—

ONT.
S. C.
REX
v.
HOGUE.
Statement.

"The Judge: Gentlemen of the jury, I have received from you a communication saying you would like me to explain again to you the definition of murder (*a*) and (*b*). This is exactly how it reads in the Code: 'Culpable homicide is murder, —(*a*) if the offender means to cause the death of the person killed; (*b*) if the offender means to cause to the person killed any bolily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not' (sec. 259). Is that all?

"The Foreman: Yes, my Lord.

"The Judge: In the case of a man using a weapon which might kill a man and intends to cause him bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not, that is murder under that definition."

The jury retired a second time at 7.17.

The jury returned at 7.45. The foreman handed a note to the Judge.

"The Judge: The note you hand to me reads, 'Guilty as charged according to clause (*b*).' That is, under the definition of murder as I read it to you?

"The Foreman: My Lord, that is the way we agreed.

"The Judge: It will have to be a verdict of guilty of murder, if that is what you mean. [The Judge again read clauses (*a*) and (*b*) of sec. 259 of the Code]. It is under that second clause you think the evidence warrants you in finding the prisoner guilty as charged?

"The Foreman: My Lord, that is the way we agreed. We agreed it was murder."

A verdict of guilty was recorded, and the death-sentence pronounced.

A. C. McMaster, for prisoner; *J. R. Cartwright*, K.C., for the Crown.

The judgment of the Court was delivered by

Meredith,C.J.O.

MEREDITH, C.J.O.:—We are of opinion that we ought not to direct a case to be stated by the learned trial Judge

It is not proper, even in a capital case, because it may be possible to pick out isolated sentences in the charge of a trial Judge, which may seem, when divorced from their context, to be inaccurate or incomplete, to hold that there has been, because of this, error, if, reading the charge as a whole, it is manifest that it was

ONT.

S. C.

REX v. HOGUE.

Meredith, C.J.O.

a proper one, and that the inaccuracies, real or supposed, cannot have misled the jury.

Reading the charge in this case as a whole, it was a very fair and proper one, and stated clearly the questions that were to be determined and what was necessary to be proved in order to warrant a finding that the accused was guilty of murder; the defence of the prisoner was fairly and fully put before the jury, and they were clearly told what the defence was.

Upon the other question, we are clearly of opinion that we ought not to require a case to be stated, for the reason that it is not competent for a prisoner, at whose request evidence has been admitted, especially where that evidence would have been properly received if an affidavit had been filed proving that the witnesses were absent or unable to attend, afterwards to turn round and seek to obtain a new trial upon the ground that the evidence was improperly admitted.

The granting of a new trial, even in a capital case, is a matter which lies in the discretion of the Court, and in a case such as this that discretion ought not to be exercised in favour of the prisoner. There was ample evidence to warrant the conclusion to which the jury came; and, speaking for myself, I do not see how any jury could have come to any other conclusion.

In any view, sec. 1019 of the Criminal Code is applicable and affords ground for refusing to direct that a special case be stated.

Motion refused.

CAN.

Ex. C.

THE KING v. FARLINGER.

Exchequer Court of Canada, Cassels, J. February 7, 1917.

EXPROPRIATION (§ III C—140)—COMPENSATION — CANAL — RIPARIAN RIGHTS—VIEW—WATER.

Upon an expropriation of land by the Crown for the enlargement of a canal, compensation will not be allowed for an obstruction of view to property fronting thereon, by earth left piled up in the course of construction not necessarily incidental to the expropriation, nor for the loss of the use of the canal for watering purposes, to which there are no riparian rights as such in the ordinary sense.

Statement.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

I. Hilliard, K.C., and *E. E. Fairweather*, for plaintiff; *J. A. Hutcheson*, K.C., and *R. F. Lyle*, for defendants.

CAN.

EX. C.

THE KING v. FARLINGER.

Cassels, J.

CASSELS, J.:—An information exhibited on behalf of His Majesty to have it declared that certain lands expropriated for the enlargement and straightening of the Rapide Plat Canal are vested in His Majesty, and to have the compensation payable therefor ascertained.

The expropriation plan was filed on December 7, 1911. The lands expropriated comprise 6.362 acres. The Crown offers as full compensation the sum of $1,673.60. The defendant by her defence claims the sum of $8,016.50.

The action came on for trial on September 15, 1916. Counsel were to send in written arguments. Subsequently, the defendant Isabella F. Farlinger died, and the suit has been revived by making the executors and trustees of the estate of Isabella F. Farlinger, defendants.

There are certain legal propositions which may be of importance in arriving at the amount of compensation to which the defendants are entitled.

Ex. No. 1 shews the lands in question. There is a large block of land comprised within the parcel marked in red, which embraces 5.759 acres. The small parcel immediately east, surrounded by green, marked Isabella Farlinger, is stated as containing .039 acres, and the small portion on the north of what is called the public highway is marked on the plan Isabella Farlinger, as containing 0.213 acres.

The canal in question was constructed a great many years back, and was subsequently enlarged, the contract work for such enlargement being executed by Poupore and Fraser, as contractors, referred to in the evidence.

A further enlargement of the canal is proposed, and for the purposes of such further enlargement the present expropriation plan was filed in 1911. The situation of the property is as shewn on the map. The canal is south of the highway. The defendants have a large farm situated to the north of this highway, and a residence situate a considerable distance from the north side of such highway.

The claims amounting to $8,016, are set out in the defence. Two of these claims are for damage for loss of water and water front $2,000, and damage for interfering with the view of the river, $1,000.

Stress is laid upon the damage to the defendant by reason of the obstruction of the view from the house, and also by reason of the right to watering the cattle in the old canal being taken away. In my judgment neither of these claims can be entertained.

First, with regard to the view. One reason, in my judgment, why the claim should not be entertained is that I do not think the view has been materially interfered with. One witness refers to the fact that seated outside of the house they are unable to see the hull of any vessels which pass up the canal.

Now, in point of fact, Mr. Sargeant points out that prior to the present expropriation the surface of the water in the canal was about 20 ft. below the top of the bank. When the second enlargement of the canal was proposed, the Crown obtained from Mrs. Farlinger a conveyance of a certain portion of the lands, the consideration money being $5,200. In that conveyance the following appears:—

> The above sum includes payment for all lands composed of three and three-quarter acres off the front of the west, three-fourths of lot No. 4, and the east quarter of lot No. 5, both in the first concession of the township of Matilda—all buildings damaged or taken, apple trees, well, and all other damages of whatsoever kind, and also for the removal from the three and three-quarter acres, the said sum to be in full.

The lands referred to in the deed as the west three-quarters of lot No. 4, and east one-quarter of lot No. 5, are all north of the highway in question.

After this expropriation the government piled a large amount of earth on the lands expropriated between the canal and the highway. On the centre 100 ft. the bank was as high as at present. It now continues further east and west.

If in point of fact, any injury was occasioned to the farm property by reason of the view being interfered with by any of the works proposed to be executed, it was taken into account at the time of the purchase referred to.

There was nothing to prevent the government under the earlier expropriation, when constructing the new canal, to have raised the northerly bank of the canal 40 or 50 ft. if they chose to do so, in which case the view would have been obstructed. The present bank is but little higher than the former bank, and I think the witnesses who testify to the loss of view and the injury caused thereby cannot be depended upon. Moreover, there is a further

CAN.
EX. C.
THE KING
v.
FARLINGER.
Cassels, J.

reason in my opinion which negatives any such claim as that put forward. The so-called obstruction to the view is caused, as alleged, by the government officials having dumped earth excavated in the course of the construction of the canal on the land owned by the government immediately north thereof. Now, this in no sense forms any necessary part of the construction of the canal. The earth might have been carted away or spread in a different manner so as to form no obstruction at all. It was in no sense a necessary incident to the construction of the canal that this earth should be placed, as it has been contended it has been placed. If any injury arises therefrom of an actionable kind, it is not an incident to the expropriation. It is something done subsequent to the expropriation which was in the year 1911, and how in these proceedings could a claim of this nature be put forward? If any action could lie it would have to be an action in the nature of a tort, some injury done to the defendant by reason of the wrongful act of the servants of the Crown in so depositing the earth as to cause a detriment to the defendant. I do not think such an action would lie. It would certainly not lie as against the Crown.

The next cause of complaint is for damage for the loss of watering places and water front for which the defendant claims the sum of $2,000. The defendant has no riparian rights, in the ordinary sense, which entitled her to the use of the canal for watering purposes. There is no reservation in her favour of any such right. If she exercised such a right prior to 1911, it would merely be a matter of tolerance on the part of the Crown. The Crown in forming the enlarged canal have made what is called a riprap wall which effectually prevents the cattle reaching the waters of the canal. The Crown had the right to do so, and there is no right in the defendant to prevent that kind of construction.

The damage for loss of the boat house site is also without any legal right in the defendants. Without the privilege claimed, it seems to me that $100 an acre would be ample compensation for the land taken. This would come to the sum of $636. Even if $150 were allowed it would amount to only $954.

The house which is the subject matter of contention I do not think could be placed at a value of more than $200. This would make for the land and the house about $1,154. The Crown has offered $1,673.60. Deducting the $1,154 from the $1,673.60

CAN.

Ex. C.

THE KING v. FARLINGER.

Cassels, J.

would leave $519 to cover the claims outside of the value of the land, and I think the defendant is fully compensated.

There is conflicting evidence as to the value of 12 gooseberry bushes, 6 blackberry bushes, 3 raspberry bushes, 20 apple trees, etc. Without analyzing the evidence in detail, I am of opinion, as I have stated, that the defendants are amply compensated by the amount which the Crown has tendered.

I understand there was no tender by the Crown prior to the tender by the information. This being the case, I think the proper disposition of the costs is that the defendants should receive the costs up to and inclusive of the service of the information. The costs subsequent should be paid by the defendants to the Crown. There should also be allowed on the amount of compensation interest at 5% from the time of the expropriation until the date of the service of the information.

I have waited a considerable time for the written arguments of counsel. None have been sent. Also, as to the plan of the expropriation if there is one at the date of the deed. I think it material. The Crown were certainly in occupation of land north of the canal—see the evidence of Sargeant and Frederick Robertson as to the previous dump. The Crown was certainly the owner of the north bank of the former canal and could have raised it to any height, view or no view. *Judgment accordingly.*

REX v. POLLARD.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Walsh, JJ. November 14, 1917.

1. SUMMARY CONVICTIONS (§ III—30)—ILLEGALITY OF ARREST WITHOUT WARRANT—JURISDICTION OF MAGISTRATE.

In the absence of any statutory provision in the Liquor License Act, Alta., enabling a peace officer to arrest without warrant a person whom he finds committing an offence under it, such an arrest is illegal, and the magistrate before whom the accused is brought in custody without a warrant or summons after such illegal arrest has no jurisdiction to proceed with the trial in the face of defendant's objection then taken that he was not properly before the magistrate.

[*Re Baptiste Paul* (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25, and *R.* v. *Davis*, 20 Can. Cr. Cas. 293, 7 D.L.R. 608, followed.]

2. ARREST (§ I B—9)—WITHOUT WARRANT—PROVINCIAL LIQUOR LAW.

Neither Cr. Code sec. 35, nor Cr. Code sec. 648, applies to authorize a peace officer to arrest without warrant a person whom he finds committing an offence against a provincial statute which itself provides a penalty and is therefore not within Cr. Code, sec. 164, as to wilful disobedience of provincial statutes.

[*R.* v. *McMurrer*, 18 Can. Cr. Cas. 385, approved.]

ALTA.

S. C.

REX v. POLLARD.

Walsh, J.

APPEAL by the Crown from the judgment of Hyndman, J., quashing a summary conviction.

W. F. W. Lent, for the Crown.

J. McKinley Cameron, for the defendant, respondent.

The judgment of the Court was delivered by

WALSH, J.:—The defendant was convicted by the Police Magistrate at Calgary of an offence against section 24 of the Liquor Act. This conviction was quashed by order of Hyndman, J., on the defendant's application, and from that order the Crown now appeals.

The defendant was with others riding in a motor car in Calgary on a Saturday night. A police officer stopped the car and subjected its occupants to a search of their persons. As a result a bottle of whiskey was found in the defendant's pocket. The officer thereupon arrested him without a warrant and took him to the police barracks, where he was kept until the following Monday morning. An information charging him with this offence was sworn out by this same officer on that Monday, but no warrant or summons was ever issued upon it. When the hearing of the charge began, the defendant's counsel objected that the defendant was not properly before the magistrate. Though the ground of this objection does not seem to have been then developed it was afterwards, and apparently before conviction, stated to be that the defendant had been arrested without warrant. The magistrate disregarded the objection and proceeded with the trial and convicted the defendant. It was this objection to which Hyndman, J., gave effect.

The right of a magistrate to try against his protest a man who having been illegally arrested without a warrant is brought before him for trial is now for the first time for decision before the Appellate Division. The individual opinions of several members of the Court upon this question are of record, however. Simmons, J., in *Re Baptiste Paul* (No. 1), 20 Can. Cr. Cas. 159; 7 D.L.R. 24, held that it was immaterial whether the defendant was illegally arrested or not, once he was before magistrates having authority to deal with the charge. This view he adhered to in the later case of *Rex* v. *Hurst*, 20 D.L.R. 129, though he seems to have put his decision in that case rather on the ground that the defendant had not objected to the magistrate's juris-

diction. These are the only reported judgments of any member of this Court in which that opinion is given effect to.

The other view has been taken by Stuart, J., in *Rex* v. *Wallace*, 24 Can. Cr. Cas. 370, by Beck, J., in *Re Baptiste Paul* (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25, and *Rex* v. *Miller*, 25 Can. Cr. Cas. 151, by Hyndman, J., in *Rex* v. *Young Kee*, [1917] 2 W.W.R. 442, as well as in this case, and by myself in *Rex* v. *Davis*, 20 Can. Cr. Cas. 293, 7 D.L.R. 608. The reasons for this opinion are stated with sufficient fullness in the reports of the above cases to make their repetition here unnecessary.

I am still of the opinion to which I gave effect in *Rex* v. *Davis*, *supra*, and the only question, therefore, which I consider it necessary to discuss is whether or not the arrest of the defendant without a warrant was in the circumstances of this case illegal.

There was nothing at the date of this offence, either in the Liquor Act or in any of the regulations issued under it, which authorized or justified the arrest of the defendant without a warrant. Section 35 of the Criminal Code says: "Every peace officer is justified in arresting without warrant any person whom he finds committing any offence," and section 648 provides that "a peace officer may arrest without warrant any one whom he finds committing any criminal offence." The peace officer who arrested this defendant found him committing an offence against the Provincial statute known as the Liquor Act. If that is an offence within these sections no warrant was needed to justify the arrest which therefore was not illegal and so the objection to the magistrate's jurisdiction on that ground must fail. In my opinion, however, the word "offence" in section 35 and the words "criminal offence" in section 648 do not include a violation of a Provincial statute, for which a penalty is provided by that statute. The Code deals with the Criminal Law of Canada, and treats of the various offences which come within that category, and when it speaks of an offence or a criminal offence I think that *primâ facie* it is referring to something which is within the scope of its provisions. Section 164 makes it an indictable offence to disobey, without lawful excuse, any Act of any Legislature in Canada by wilfully doing any act which it forbids unless some other penalty or other mode of punishment is expressly provided by law. That

ALTA.

S. C.

REX v. POLLARD.

Walsh, J.

section cannot, however, be relied upon by the Crown in this case, because in the Provincial statute, against which the defendant offended, a penalty is provided for his offence and it is that penalty which was imposed upon him by the conviction now under review. This is the view of that section taken by the Supreme Court of Prince Edward Island in *Rex* v. *McMurrer*, 18 Can. Cr. Cas. 385, and it appears to me to be the only possible construction to which it is open. At common law there is clearly no right to arrest for such an offence as this. See Halsbury, vol. 9, p. 296, par. 608, *et seq.*

In my opinion there was neither statutory nor common law right in the peace officer to arrest this defendant without a warrant. His arrest was, therefore, illegal and the magistrate was without jurisdiction to try him against his protest.

The Supreme Court of Saskatchewan, *en banc*, in *Plested* v. *McLeod*, 3 S.L.R. 374, discusses the question of the right to arrest without warrant, and though that case arose out of the plaintiff's arrest for breach of a city by-law, the judgments treat generally of the subject in a way that makes them of value even in such a case as this.

I would dismiss the appeal with costs.

Crown's appeal dismissed.

CAN.

S. C.

BROUSSEAU v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. November 13, 1917.

CRIMINAL LAW (§ I D—15)—COUNSELLING TO COMMIT OFFENCE.

A person who counsels or procures another to commit an offence is guilty of a specific offence under s. 69 of the Criminal Code, whether the person so counselled actually commits the offence or not.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 26 Que. K.B. 164, reversing the judgment of the Court of Sessions of the Peace, at Montreal. The accused, appellant, was discharged before the trial judge; and the respondent prayed for a reserve case before the Court of King's Bench, appeal side, which was granted. The Court of Appeal reversed the magistrate's decision and sent the prisoner back for sentence.

Laflamme, K.C., for appellant; *Walsh*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs. The appellant was charged before the

magistrate with having, he then being mayor of the council of the Town of Sault au Récollet, demanded from Beaulieu and Chagnon, two contractors with the municipality, the sum of $2,500, as a consideration for his aid in procuring them new contracts from the municipality and renewing others in process of execution.

We are asked to say whether, these facts being admitted, they disclose a criminal offence.

I have no doubt that, as found by the majority below, the charge as laid comes directly within the language of s. 69 (*d*) of the Code. In effect, that section provides that everyone is party to and guilty of an offence who counsels or procures any person to commit the offence. I am of opinion that the word "and" in the first line is to be read disjunctively. If the offence is committed then the accused is a party to it; or, if the offence is not committed, then he who counsels is guilty of a substantive offence. It was suggested, but I hope not seriously, that in demanding payment the accused cannot be said to have counselled payment. I construe "counsel" used in collocation with "procure" to mean "advise" or "recommend" and the demand made in the admitted circumstances means at least that.

In *Rex* v. *Higgins*, 2 East 5 at 17, Lord Kenyon said:—

> It is argued that a mere intent to commit evil is not indictable, without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act.

Here the accused is charged with having actually asked and demanded the money, which is by s. 69 made an offence in itself; and of that act the accused admits he was guilty. To incite to commit a felony, when no felony is committed, is generally a common law misdemeanour. *The Queen* v. *Gregory*, L.R. 1 C.C.R. 77. See also *Reg.* v. *Ransford*, 13 Cox 9.

Further it is an indictable misdemeanour at common law for any person in an official position corruptly to use the power of his position by asking for a bribe, which is exactly this case, and there can be no doubt in so far as this court is concerned that the criminal common law of England is still in force in Canada, except in so far as repealed either expressly or by implication. *Union Colliery Co.* v. *The Queen*, 31 Can. S.C.R. 81, at 87.

CAN.

S. C.

BROUSSEAU v. THE KING.

Fitzpatrick, C.J.

Complaint is made that on this construction the accused is not informed specifically of the law under which he is being proceeded against; but while the Code provides that with respect to certain offences the accused is entitled to particulars, ss. 957, 852 and 854 Criminal Code, I am not aware of any provision which requires the prosecuting officer to give notice to the accused that he is being proceeded against for the breach of some particular section of the Code or for a common law offence.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I think s. 69 of the Crinimal Code clearly makes a person who counsels or procures another to commit an offence, guilty of a specific offence, whether the person so counselled actually commits the offence he is counselled to commit or not. It is the counselling or procuring which constitutes the offence irrespective of the effect of such counselling or procuring and so in the case before us the defendant, being at the time mayor of the town, in soliciting money for his assistance in endeavouring to procure municipal contracts for certain parties, Beaulieu and Chagnon, brought himself within the provisions of this section.

I would therefore dismiss the appeal.

Idington, J.

IDINGTON, J.:—I am of the opinion that under s. 69 of the Criminal Code, every one is party to and guilty of an offence who actually commits it or counsels another to commit the offence and that when the appellant offered himself as a man to be bribed, he was suggesting and, in the ordinary meaning of the word, counselling those to whom he offered to prostitute his office for a price, and was guilty of the offence to be done.

I therefore think the Court of Appeal was right in answering the second question in the way they did, and that the appeal should be dismissed.

Duff, J.

DUFF, J.:—I agree with Idington, J.

Anglin, J.

ANGLIN J.:—The purport and intent of clause (*d*) of s. 69 of the Criminal Code, in my opinion, is to make it an offence to counsel any person to commit an offence whether the actual commission of the latter offence does or does not ensue. I entertain no doubt that the defendant in soliciting money from Beaulieu and Chagnon as a consideration for his aid in procuring municipal contracts for them counselled them to commit what would be an offence under s. 161 of the Code.

Appeal dismissed.

REX v. RICHMOND.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. June 18, 1917.

SUMMARY CONVICTIONS (§ II—20)—JURISDICTION—PLEA OF GUILTY FOLLOWED BY DENIAL OF AN ESSENTIAL INGREDIENT OF THE OFFENCE —SHOWING CAUSE WHY CONVICTION SHOULD NOT BE MADE—CR. CODE SEC. 721.

Although the Opium and Drug Act, 1-2 Geo. V., Can., ch. 17, takes away the right to *certiorari*, proceedings by way of *certiorari* may be allowed to quash a summary conviction purporting to be made on a plea of guilty of "having opium in his possession without lawful or reasonable excuse" if the accused forthwith after pleading guilty, and before a conviction was recorded, said to the magistrate that he did not know the contents of the package which he had just received at the time of his arrest. Such statement of the accused was, in effect, a statement of "sufficient cause why he should not be convicted" (Cr. Code sec. 721) and qualified his previous answer of "guilty," and thereafter the magistrate had no jurisdiction to proceed to conviction without taking evidence.

[*Colonial Bank* v. *Willan*, L.R. 5 P.C. 417, specially referred to.]

Statement.

APPEAL from an order of HYNDMAN, J., dismissing a *habeas corpus* application and a motion to quash a summary conviction.

J. McKinley Cameron, for the accused.

C. B. Reilly, for the Crown.

Harvey, C.J.

HARVEY, C.J.:—I agree in the main with the reasons of my brother Stuart, and, though I have some doubt as to the result, I am not prepared to dissent in view of the fact that the other members of the Court agree in it.

My doubt arises on a question of fact rather than one of law. Having regard to the very particularized directions of section 721 it appears to me that the entering of a conviction in such a case except upon the conditions specified is perhaps really an act beyond the Magistrate's jurisdiction and that the question of fact must, therefore, be determined to ascertain whether the Magistrate was acting within his jurisdiction.

If the accused upon being asked, not in the words of the Code, "if he has any cause to show why he should not be convicted" but in the much simpler words which are, no doubt, almost invariably asked, "if he is guilty or not guilty," had answered: "I am guilty, but I did not know the contents of the package," I am of opinion that would not be admitting "the truth of the information or complaint" and would, therefore, not give the Magistrate jurisdiction to enter a conviction, but if he said simply, "guilty" or "I am guilty" that would, I think, entitle the Magistrate to enter a conviction, and any disclaimer he might make after

ALTA.

S. C.

REX v. RICHMOND.

Harvey, C.J.

the conviction had been entered could not raise any question of jurisdiction, though, on an appeal (which, as my brother Stuart points out, was open to him), full justice could be done if any mistake had been made.

I feel satisfied from the affidavit of Mr. Cameron and from his statements of what took place which he made on the argument that the disclaimer of knowledge of the contents of the package was made with reference to the sentence rather than to the guilt, but it does not appear that any conviction had then actually been made upon the plea, and I am, therefore, not prepared to say that the accused ought not to have the benefit of it as regards the conviction itself though not quite satisfied that he should have.

Stuart, J.

STUART, J.:—This is an appeal from an order of Mr. Justice Hyndman, dismissing an application by way of *habaes corpus* and to quash a summary conviction entered against the defendant by Mr. Davidson, Police Magistrate of the City of Calgary for an offence under the Opium and Drug Act, being 1-2 Geo. V., ch. 17.

The charge was under section 3 of the Act, and in particular was that the accused had opium in his possession without lawful or reasonable excuse. The accused had received a parcel at the office of an express company at Calgary and was arrested immediately upon receiving it. When opened it was found to contain opium. When he was arraigned before the magistrate a plea of guilty was entered and he was sentenced to imprisonment for three months and to a fine of $250 and costs.

No evidence was taken by the Magistrate. The chief point in the case arises upon the questions whether the accused ever did plead guilty or whether owing to what occurred the Magistrate should not have entered a plea of not guilty and proceeded to try the accused.

The Magistrate gives in an affidavit an account of what occurred as follows: "That counsel for the accused said that his client wished to plead guilty and the accused being asked to answer the charge he pleaded guilty. The accused then addressed me and stated that he did not know the contents of the package which he received from the express office, but I told him I did not believe his statements."

A more extended account is given in affidavits made by the accused and by his counsel. In both of these affidavits it appears

that the accused told his counsel that he had no knowledge of what was in the parcel, that his counsel strongly advised him to plead not guilty, that the accused against advice of his counsel decided to plead guilty, but apparently under the impression that absence of knowledge of the contents of the parcel would be no defence and relying on his counsel to urge this lack of knowledge in mitigation of the penalty.

According to the affidavit of Mr. Cameron, defendant's counsel, it appears that he drew the Magistrate's attention to the propriety of treating the statement of the accused as a plea of not guilty, but that the Magistrate read a letter which the chief of police had handed to him and stated that he had no doubt that the accused had knowledge of what the package contained. This is not contradicted in any way in the affidavit of the Magistrate. There is a slight discrepancy between the account of what occurred as given by Mr. Cameron and that given by the Magistrate. According to the former, the accused did not personally plead guilty, but the Magistrate took Mr. Cameron's statement that the accused desired to do so as a proper plea while the Magistrate seems clearly to state that the accused himself pleaded guilty. I think there is no reason to worry about what the exact fact was because it seems to be admitted that before he was sentenced the accused did state to the Magistrate that he claimed to have had no knowledge of what the package in question contained. Even though strongly suspicious that this was a pure "bluff" by the accused I should myself never have hesitated in such circumstances in at least offering to change the plea already entered to a plea of "not guilty."

Even though a prisoner has pleaded guilty, yet if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt, it is, I think, clearly the duty of any presiding Judge or Magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of "not guilty." I think it is quite obvious from a comparison of all the affidavits that very little time elapsed in dealing with the matter. If a conviction had been entered, sentence reserved and other prisoners

ALTA.

S. C.

REX v. RICHMOND.

Stuart, J.

proceeded with before the defendant suggested his possible defence the case might very well be different.

If, therefore, there were nothing more in the case I should at once say that the appeal should be allowed and the conviction quashed.

But section 12 of the Act under which the charge was laid enacts as follows:—"No conviction, judgment or order in respect of an offence against this Act shall be removed by *certiorari* into any of His Majesty's Courts of record."

There is nothing in the special Act taking away the right of appeal, and by virtue of sections 706 and 749 of the Criminal Code the accused had a right of appeal. He does not seem to have availed himself of this opportunity, which the law affords him, of having his case fairly tried by a District Judge, nor was an explanation given for his failure to do so.

In these circumstances I see no reason why the Court should be astute to discover reasons for quashing the conviction even though the Magistrate did fail to observe that caution which should have been observed in the circumstances. Nevertheless, if there is legal ground for quashing the conviction, we are, of course, bound to do so.

The statute by direct negative language forbids the removal, of any conviction made under it unto any Court of record by *certiorari*. Perhaps it may be well to observe in the first place that, under our present practice, no writ of *certiorari* is ever issued or asked for though, of course, the writ is not abolished. Under our present Rules of Court, which in this regard may be considered as general orders, that is, orders made in general terms, Magistrates and others having convictions and accompanying records in their possession are directed to send them to the Clerk of the Supreme Court upon service of a notice in a specified form.

A technical view might be that this is not removal by *certiorari* and, therefore, not, as applied in this case, an infringement of section 12 of the Opium and Drug Act. But the only right, power or jurisdiction this Court has to cause convictions by Justices to be brought into it is the common law jurisdiction by writ of *certiorari*. The only power given the Court to make rules in regard to such a matter at all is that given by the Code to make rules in regard to *certiorari*. It was under the power so given that the present rules were passed.

Whether any penalty could be legally imposed for failure to comply with the notice might be a question. Really what the present rules have done is to extend the practice of moving to quash without the actual issue of a writ and to substitute a notice of motion for a summons by analogy to the change in our civil practice. Instead of the actual issue of a writ we have the general order contained in rule 824.

There is no doubt that such a section as section 12 of the Opium and Drug Act does forbid the operation of rule 824, because, though that rule provides another authority for sending up a conviction different in form from a writ of *certiorari*, the only jurisdiction to pass it at all was under a power given to deal with *certiorari*.

Now where a special statute expressly takes away the rights to remove a conviction by *certiorari* there are only two grounds upon which that procedure can still be resorted to by the defendant and these are (1) lack of jurisdiction in the Magistrate, and (2) fraud in obtaining the conviction. 10 Halsbury, p. 177; *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C., 417.

There is no suggestion of fraud in this case. The only question is, was there an absence of jurisdiction?

In my opinion we ought to look at this case as if the accused had pleaded not guilty and the Magistrate had thereupon made a conviction without taking any evidence. It does not seem to me that it is right to look upon the Magistrate as having exercised some discretion in the matter. Any discretion he may have exercised could only have been a formation of an opinion upon the guilt or innocence of the accused based upon things that he heard or read. Assuming that the accused did say "guilty" in answer to the question addressed to him, the Magistrate was in a few minutes made aware that the accused did not intend to admit guilty knowledge, but really intended to say that though he obviously had the opium in his possession and could not deny it, he certainly did not know what was in the package, and, therefore, had possibly a reasonable excuse within the meaning of the Act, and so a good defence.

There are no formal pleas under the summary conviction procedure. Section 721 (2) of the Code says: "If the defendant thereupon admits the truth of the information and shows no sufficient cause why he should not be convicted or why an order should not be made against him, as the case may be, the Justices

ALTA.

S. C.

REX v. RICHMOND.

Stuart, J.

present at the hearing shall convict him or make an order against him accordingly."

It is, therefore, not merely because the accused admits the truth of the information that the Justice may convict; it is also because he "shows no sufficient cause why he should not be convicted."

In my opinion, when the accused here stated to the Magistrate that he did not know what was in the package he thereby gave sufficient cause why he should not be *at that stage* convicted. This is all only saying in another and roundabout way that the accused really pleaded "not guilty."

The question then is, did the Magistrate act within his jurisdiction in entering a conviction contrary to the provisions of section 721 (2) as above quoted, that is, practically in the face of a plea of "not guilty".

My view is that the Magistrate did act beyond his jurisdiction. No doubt he had jurisdiction over the case. There can be no question about that. But the fact is that he entered a conviction when he had no legal power to do so. This is quite a different thing from misinterpreting the general law applicable to a case and entering a conviction which for that reason is invalid.

The Magistrate's authority to make a conviction is purely statutory. It is only where the conditions specified exist that he is authorized (though, of course, he is also directed) to make the conviction. If those conditions do not exist and he nevertheless makes a conviction it would seem to me to be fairly clear that he acted beyond his jurisdiction. He did something which he had no power to do.

I am prepared to admit that where the Justice goes on and hears evidence and does everything regularly and then enters a conviction which is invalid because he has made an error in the law applicable to the case, it might be hard at first to distinguish the situation from the circumstances here, and the result might be that *certiorari* might be available in nearly every case, notwithstanding the statute taking it away. But I think the distinction is upon examination of the matter obvious enough. As a Judge the Magistrate has power to decide the law in the ordinary course of hearing and adjudicating upon a case before him. But here, where a defendant, in the words of section 721 (3) "did not admit the truth of the information," and therefore where his

authority and duty was to "proceed to inquire into the charge" the Magistrate, instead of so doing, entered a conviction forthwith. Whatever other possible circumstances might give difficulty, it seems to me clear that this was pure absence of jurisdiction and that *certiorari* is not taken away.

In *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, at page 442, the Judicial Committee said (Sir James Colville):

"It is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal or upon the nature of the subject matter of the enquiry, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon facts or a fact to be adjudicated upon in the course of the enquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge or on the nature of the subject matter or on the absence of some essential preliminary must obviously in most cases depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached."

They then go on to deal with error upon a question of fact with which we have nothing to do here. Of course, the question whether the defendant did or did not admit the truth of the information is in a sense a question of fact, but it is not so in the sense in which the expression was used in the passage quoted.

By the statute, an admission of the truth of the information is made an essential preliminary to the power of the Justice to make a conviction, and it has been shown by affidavit that no such admission was in substance made.

For these reasons I think the appeal should be allowed and the conviction and warrant of commitment quashed. But I think the applicant should have no costs because he had a perfect remedy for the wrong done him by the conviction by way of appeal where he would have had the trial on the merits of which he has come here to complain that he was deprived.

BECK and WALSH, JJ., concurred.

Beck, J.
Walsh, J.

Conviction and commitment quashed.

SASK.

S. C.

HUDSON BAY Co. v. HEFFERNAN.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, Brown and McKay, JJ. July 14, 1917.

CONSTITUTIONAL LAW (§ II A—195)—KEEPING INTOXICATING LIQUOR FOR EXPORT.

The Saskatchewan Act to prevent the keeping of liquor for export to other provinces or to foreign countries is *ultra vires* as an interference with trade and commerce and not within the jurisdiction of a Provincial Legislature.

[*Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348, and *Attorney-General of Manitoba* v. *Manitoba License Holders*, [1902] A.C. 73, applied.]

Statement.

MOTION for a writ of prohibition in respect of a prosecution under the Sales of Liquor for Export Act, Sask.

J. A. Allan, K.C., and *J. F. Frame*, K.C., and *S. R. Rothwell*, for applicant.

H. E. Sampson, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—In the matter of an information against the Hudson Bay Company for violation of an Act of the Legislature entitled an Act to prevent Sales of Liquor for Export, the Police Magistrate before whom the summons was returnable decided that the Act was *intra vires* of the Legislature of Saskatchewan, whereupon the Hudson Bay Company applied to this Court for a writ of prohibition.

No objection was taken to the procedure by way of prohibition, the argument being restricted to two questions:

1st. Was the above Act *intra vires* of the Legislature of Saskatchewan? and, 2nd, does said Act hinder the said company in carrying on its trade within the meaning of the Rupert's Land Act and the Imperial Order-in-Council passed thereunder?

As to the first question: it has been decided by the Privy Council that the powers of a province to legislate with reference to the liquor question come under No. 16 of sec. 92 of the British North America Act.

"No. 16. Generally all matters of a merely local or private nature in the province."

Attorney-General of Ontario v. *Attorney-General of Canada*, [1896] A.C. 348; and *Attorney-General of Manitoba* v. *Manitoba License Holders Assn.*, [1902] A.C. 73.

In the latter case, at p. 78, Lord Macnaghten said:

"In delivering the judgment of this Board in the case of Attorney-General for Ontario v. Attorney-General for the Dominion, Lord Watson expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could not be supported under either No. 8 or No. 9 of s. 92. His Lordship observed that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16, which assigned to the exclusive jurisdiction of Provincial Legislatures 'property and civil rights in the province,' and 'generally all matters of a merely local or private nature in the province.' He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorised by the one or the other of these heads. Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic, the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province.'"

Further on in this case, which was the case that held the Manitoba Liquor Act to be within the powers of the Legislature of Manitoba, Lord Macnaghten called attention to sec. 119 of that Act, which provides that: "While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a license or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." And he said that this section must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms.

And in the *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348 at 368, Lord Watson said:

SASK.

S. C.

HUDSON BAY CO. v. HEFFERNAN.

Newlands, J.

"The manufacture of pure native wines, from grapes grown in Canada, have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a Provincial Legislature."

In the *Manitoba Liquor* case it was further pointed out that in *The Attorney-General of Ontario* v. *Attorney-General of Canada* it was held "that there might be circumstances in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province." [1902] A.C. p. 79.

The above reference of Lord Macnaghten was to questions 3 and 4 put to the Privy Council in the Ontario case, [1896] A.C. 348. These questions and answers were as follows:

"(III.) Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the province?

"Ans. In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the Provincial Legislatures would have jurisdiction to that effect, if it were shewn that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

"(IV.) Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the province?

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

Both these answers shew that in the opinion of the Privy Council the province had no power generally to prohibit the manufacture or importation of liquor into the province; that if they had any such powers it must be a merely local matter in the province, as, for instance, the prohibition of the manufacture of

liquor in certain residential sections of a city, or the importation of liquor into the Far North, where the inhabitants are principally Indians to whom it is forbidden by Dominion legislation to sell liquor under any circumstances.

Now, can the Act in question be said to be an Act of a local or private nature, or for the purpose of suppressing a local evil? The title of the Act is: "An Act to prevent Sales of Liquor for Export," and that is certainly its object, although the prohibition in the Act is only that: "No person shall expose or keep liquor in Saskatchewan for export to other provinces or to foreign countries." s. 1.

The Act does not pretend to deal with local transactions in liquor, but with the transactions between provinces and between Saskatchewan and foreign countries, thus interfering with trade and commerce, a matter which is not within the jurisdiction of a Provincial Legislature.

The Act is, therefore, in my opinion, *ultra vires* of the legislature and the writ of prohibition should be granted.

Having come to this conclusion upon the first question, it is unnecessary to consider the second one, which touches a much larger subject than the Act in question.

Prohibition ordered.

N.B.—An appeal from the above judgment to the Supreme Court of Canada was dismissed on November 14, 1917.

STOWE v. GRAND TRUNK PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Hyndman, JJ. February 14, 1918.

EVIDENCE (§ X A—680)—HEARSAY—STATEMENTS OF THIRD PERSON—NEGLIGENCE.

Evidence by a plaintiff as to statements made to him are admissible against him as proof of negligence by him, as establishing his knowledge of the existence of conditions he should have guarded against.

Statement.

APPEAL by defendant from the judgment of Scott, J., in an action for damages.

N. D. Maclean, for appellant; *C. H. Grant*, for respondent.

The judgment of the Court was delivered by

Hyndman, J.

HYNDMAN, J.:—The plaintiff, who is an unmarried man, lives in the same house with his parents and brothers, near the town

ALTA.

S. C.

STOWE v. GRAND TRUNK PACIFIC R. CO.

Hyndman, J.

of Viking, on a quarter section of land adjoining his own quarter. He was the owner of several horses which were accustomed to run, and were looked after in conjunction with the animals of his father and brothers, within the boundaries of his own and his fathers and brothers' land, there being openings between the different quarter sections.

On December 17, 1915, three mares and one gelding of the plaintiff got upon the right of way of the defendant company, and about 8 o'clock in the evening were run into by a passenger train and destroyed. The accident happened at a point about 2 miles west of Viking, not at a crossing. The property of the plaintiff and his family was well fenced, and according to the evidence it would not be possible for horses to get out through the fences, the necessary inference being that they must have escaped through the gate at the road allowance which was about a mile from the railway crossing. On the evening of the accident the plaintiff was not at home, having left for Viking about 5 o'clock in the afternoon, and personally knew nothing of the accident or as to how the horses got at large, except from what was told him by his brother.

It appears that his father and brothers living together on the section of land in question mutually assisted in looking after one another's affairs. What took place on that occasion was sought by the defendant company to be proved by a statement in writing given by Sydney Stowe, the plaintiff's brother, to the railway company on the ground that he was the agent of the plaintiff. The trial judge excluded this statement on the ground that he was not shewn to be the agent of the plaintiff. Whether or not the trial judge was right in rejecting this statement I do not think matters, in view of the testimony of the plaintiff himself in his examination on discovery and *de bene esse*.

According to the plaintiff's evidence, at about 5 o'clock in the afternoon in question, he left his home to go to Viking where he stayed for the night, and at that time his horses were in the pasture. From what his brother told him, and which he said *he believed to be true*, about 6 o'clock in the evening in question, his brother Sidney returned from town with a load of coal, driving a team of horses belonging to the plaintiff, and left the gate open "because the horses were sweating, and they would have

run away if he had'nt left the gate open." Now, if this evidence is admissible, it seems clear that the horses escaped because of the gate having been left open which, in my opinion, was an omission or act of negligence on the part of Sydney Stowe, and if he was the agent of the plaintiff, such omission or negligence would be chargeable to the plaintiff, and deprive him of the right to recover damages. If, however, Sydney was not an agent, then it seems to me the plaintiff himself must be held guilty of not exercising reasonable care, in that he failed to provide against such a contingency as this, when he was fully aware of the fact that other persons were using the gate from time to time, and it was quite reasonable to anticipate that the horses might escape if they were not properly looked after, and he should have made some kind of provision for taking care of his animals during his absence from home. (See *Becker* v. *C.P.R.*, 5 W.L.R. 569.)

The trial judge, however, held that this statement of the plaintiff, being the result of what was told him, was merely hearsay, and not admissible and it being the only account of what did happen, there was no proof of negligence on the part of the plaintiff, and that the railway company was therefore liable. In my opinion, this testimony under the circumstances should not be regarded as merely hearsay, but as an admission or declaration by the plaintiff himself, and therefore entirely proper evidence.

"The rule that the witness must only state matters within his own knowledge, what he has himself heard, seen or perceived, is expressed by the rule that hearsay is not evidence, or that a witness cannot repeat what he has heard others tell about the facts in issue." This is subject to certain exceptions, one of which is "where the words amount to an admission by the party (or his agent or privy) against whom they are used." 5 Ency. Law of Eng. 369.

"The declarations and admissions of a party to the record as to any fact material to the issue are competent evidence against him, though they are inconsistent with and tend to contradict the testimony of the other witnesses called by the adverse party." Am. Dig., 20th Cent. ed., 1134.

And it is stated in Phipson, 4th ed. p. 212, that "An admission is receivable, though its weight may be slight, which is founded on

ALTA.

S. C.

STOWE v. GRAND TRUNK PACIFIC R. CO.

Hyndman, J.

hearsay (*Re Peston*, 53 L.T. 707); or consists merely of the declarant's opinion or belief (*Dee* v. *Steel*, 3 Camp. 115). A bare statement that a party 'is informed' without the addition of his belief in the information will not amount to an admission (1 Daniels Ch. Rs., 7th ed. 492 Taylor s. 735?)."

The plaintiff is thus, in my opinion, on the horns of a dilemma, and whichever position he likes to take, he must be held guilty of not exercising proper care, and but for which the accident would not have happened.

S. 294 of the Railway Act places the onus upon the company in order to escape liability of establishing that such animals got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animals or his agent. Under the circumstances of this case, I think the railway company have satisfactorily discharged the onus cast upon them.

The appeal should, therefore, be allowed, with costs, and the action dismissed with costs. *Appeal allowed.*

MAN.

K. B.

CLEGG v. MACDONALD.

Manitoba King's Bench, Galt, J. February 14, 1918.

MANDAMUS (§ I A—1)—RIGHT TO REMEDY.

In order to entitle himself to a mandamus an applicant must first shew that he has a legal specific right to ask for the interference of the Court.

Statement.

Application by special leave for an order of mandamus.

E. J. McMurray, and *J. F. Davidson* for applicant; *John Allen*, Deputy Atty.-Gen. for the Crown, and the respondent; *H. W. Whitla*, K.C., Judge Advocate, for the military authorities, Military District No. 10.

Galt, J.

GALT, J.:—This is an application by special leave granted by Prendergast, J. to Robert Clegg, the applicant, to proceed by way of motion for an order of mandamus commanding Sir Hugh John Macdonald, in his capacity as one of His Majesty's Police Magistrates in and for the Province of Manitoba to hear the evidence and adjudicate thereon in respect of a certain charge or complaint made by one Archibald G. Cameron, of the City of Winnipeg, on the 26th day of January, 1918, charging "that he hath reason to believe and doth believe that G. J. Simpson, at the City of Winnipeg aforesaid on Tuesday, January 22, 1918,

did unlawfully commit an assault on Robert Clegg and did then and there occasion actual bodily harm to him the said Robert Clegg," which said information or complaint was duly presented on behalf of the informant before the said Sir Hugh John Macdonald at the Police Court in the City of Winnipeg on January 28, 1918, and which the said Sir Hugh John Macdonald refused to hear.

The motion was supported by affidavits of Robert Clegg, Joseph F. Davidson and S. W. McMurray. The Crown was represented by John Allen, and I gave permission to H. W. Whitla, Deputy Judge Advocate General for Military District No. 10, to be heard on behalf of the said Military District.

McMurray, on behalf of the applicant, explained the facts as detailed in the affidavits and strongly urged that a mandamus should issue to compel the police magistrate to hear the case.

It appeared that when the matter came before the police magistrate in January last the Dep. J. Advocate General attended and pointed out to the magistrate that the subject matter of the complaint was being dealt with by the military authorities by court martial, and that it would be subversive of all discipline if proceedings before the ordinary tribunals were also allowable.

I requested McMurray, who appeared as counsel for the applicant, to refer me to any authority under which a stranger to police court proceedings could be allowed to intervene and prosecute in place of the original complainant. No affidavit by Cameron was filed, and he was not represented on the argument. So far as the material before me is concerned, Cameron does not appear to object to the disposition which was made of his complaint in the police court. McMurray was unable to refer me to any authority justifying Clegg's application.

In *The Queen* v. *Lewisham Union*, [1897] 1 Q.B. 498, a metropolitan district board of works applied for a mandamus to the guardians of the poor of the district, commanding them to enforce the provisions of the Vaccination Acts generally in their district, and particularly in certain specified instances. The board of works were the sanitary authority of the district, and charged by the Public Health (London) Act, 1891, with the duty of putting in force the powers vested in them relating to public health and local government, some of which powers relate to and include the prevention of infectious diseases, including small-pox. It

MAN.

K. B.

CLEGG v. MACDONALD.

Galt, J.

was held that the board of works had no legal specific right to enforce the performance by the guardians of their duties under the Vaccination Acts, and therefore were not entitled to a mandamus.

In delivering judgment, Wright, J. says:

This is a case of great importance, but we feel able to decide it at once, and there is an appeal from our decision. Certainly, so long as I have had anything to do with applications for a mandamus I have always understood that the applicant, in order to entitle himself to a mandamus, must first of all shew that he has a legal specific right to ask for the interference of the court.

Bruce, J. says:—

I am of the same opinion. I regret to have to discharge this rule on technical grounds, but the practice is well established. This Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal specific right to enforce the performance of those duties.

In the present instance, I consider that Clegg has no legal, specific right in respect of the information laid by Cameron, against Simpson, to enforce the trial of Cameron's complaint.

The motion will be dismissed with costs. *Motion dismissed.*

The open court martial held to investigate the charges against Sergt. Simpson of ill-treating Privates R. Clegg, R. Nish and J. Matheson, have finished the case. The court found that the charges against Sergt. Simpson were absolutely groundless, and Simpson was honourably acquitted by the court.

The case has been known to the public as the Minto barrack hazing case, and owing to its peculiar circumstances has caused much comment.

The result of the court martial proceedings, however, has not yet been officially announced. In fact the report has not yet been received at the military headquarters. The procedure is for the finding to go from the court martial board to General Ruttan, officer commanding the district, and from thence to Ottawa to the adjutant-general. From the latter official it is submitted back to the district commander and from the district commander it goes to the officer commanding the depot battalion for promulgation. The promulgation constitutes the official announcement.

The facts that the charges have not been proven will mean that there will be nobody punished, but in military circles it is not taken to mean that the incident is closed. Charges of disobedience can be laid against the alleged conscientious objectors and other court martial proceedings instituted, if this is deemed advisable.

The exonerating of Simpson, however, somewhat simplifies the legal situation, according to men who have followed the case.

Had the non-commissioned officer been found guilty of an offence and punished, it is argued that no civil proceedings could have been instituted against him, as no man under British law could be punished twice for the same offence. However, the situation in this respect has led to considerable controversy.

The mandamus proceedings brought by Clegg's lawyers having been refused, the argument may be heard by the court of appeal, provided application is made within fourteen days after the decision. It was understood that this action would be taken.

TROPOX v. DRONEY.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ. February 15, 1918.

SOLICITORS (§ II C—35)—LIEN ON MONEY PAID INTO COURT—SETTLEMENT OF ACTION.

In the absence of collusion between the parties to an action, to deprive a solicitor of his costs, he is not entitled to a lien on moneys paid into Court to abide the event of the action, upon subsequent settlement by the parties themselves.

Statement.

APPEAL from an order of a Co. Ct. Judge, who declared that the solicitors for the plaintiff were entitled to a charge upon the sum of $175, paid into Court by the defendant to the extent of their costs as taxed between solicitor and client. Reversed.

G. B. O'Connor, K.C., for appellant; *G. H. Steer*, for respondent.

The judgment of the Court was delivered by

Hyndman, J.

HYNDMAN, J.:—The facts are that the plaintiff sued the defendant for $114.35 wages. The defendant failing to enter a defence, judgment by default was entered against him. Later, the judgment was set aside, and the defendant allowed to defend on the condition that he bring into Court the sum of $175, to abide the event of the trial, and such sum was paid in to the credit of the action. The defence and counterclaim were delivered and the action and counterclaim were set down for trial.

In the meantime, the parties themselves came together, and compromised the claim at $100, and the defendant paid over to the plaintiff the last mentioned sum. Subsequently the defendant made an application for payment of the money out of Court. The application was refused and the order now appealed from was made.

The only evidence of what took place is found in the affidavit of R. F. Murphy, and the extent of what he said is as follows: "That the action was all prepared for trial, and the trial was to take place on September 5, 1917, but I am informed that the same has been settled by the plaintiff and defendant personally."

There is nothing whatever on the record to shew the circumstances surrounding the settlement, or as to whether there was any collusion or attempt on the part of either of the parties to deprive the plaintiff's solicitors of their costs, and if such was the case it can only be ascertained by inference from the fact of their compromising and settling the action apart from their solicitors.

ALTA.

S. C.

TROPOX v. DRONEY.

Hyndman, J.

I do not think that sufficient evidence of collusion or that it is proper to draw such an inference.

Moxon v. *Sheppard* (1890), 24 Q.B.D. 627, was a case very similar to the present one. There a charging order was granted, but it was found that there was a collusive arrangement between the parties to deprive the solicitors of their costs.

In *Brunsdon* v. *Allard*, 2 El. & El. 19, 121 E.R. 8, Lord Campbell, C.J., said:—

> Although an attorney has a lien for his costs, and, when his client has recovered judgment in an action, may apply the fruits of the action in payment of the sum which is due to him, that does not prevent the parties to the action from coming to a compromise, the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties entered into by them in collusion to deprive the attorney of his costs.

Erle, J., said:—

> The attorney's right, however, certainly goes to this extent, that, if a conspiracy between the plaintiff and defendant to defraud the attorney of the costs is clearly made out, the court will interfere to prevent it.

Crompton, J., said:—

> Nor is the attorney's lien equivalent to the equitable assignment to him of the judgment debt. It is a right subject to that of the parties to the suit to make a *bonâ fide* compromise between themselves. Each party is for that purpose "*dominus litis*"; and the court will not interfere with any fair settlement that they may come to, although it will probably restrain them from carrying out a collusive arrangement made on purpose to defraud the attorney of either.

In the absence, then, of clear proof of collusion, I think the order should be reversed. I would, therefore, allow the appeal with costs. *Appeal allowed.*

QUE.

C. R.

CUDDY v. BRODEUR AND THE PRUDENTIAL TRUST Co.

Quebec Court of Review, Archibald A.C.J., Martineau and Lane, JJ. June 25, 1917.

DEEDS (§ II A—15)—CONSTRUCTION OF—"CEDE"—"TRANSFER."

All the language in a deed must be taken into consideration for the purpose of discovering the intention of the parties, and words are to be given their natural meaning unless inconsistent with other provisions in the deed; the words "cede" and "transfer" may be perfectly consistent with the intention of giving the property as a pledge and not a complete transfer.

Statement.

APPEAL from judgment of Lafontaine, J. Affirmed.

P. B. Mignault, K.C., for plaintiff.

Decary & Decary, for defendant.

Brossard & Pepin, for mise-en-cause De Pepin.

QUE.
C. R.
CUDDY
v.
BRODEUR AND PRUDENTIAL TRUST CO.
Archibald, A.C.J.

ARCHIBALD, A.C.J.:—This was an action *en partage* and *licitation* of an immoveable property acquired by the defendants jointly from the estate of P. B. Mignault, before Me. Perodeau, April 23, 1909. The property is found described in the declaration. Certain other individuals who had real rights upon the property were called in as mis en cause.

The defendant pleaded that, at the time when the action was brought, he had ceased to be the proprietor of the property in question, having sold and transferred the same on July 27, 1916, to a company called the Davis Co. Ltd., one of the mis-en-cause.

The whole thing depends upon the interpretation of this deed. The plaintiff claims that it amounts to a pledge or *nantissement* and did not in any way convey the right of property to the Davis Co. Ltd., which right of property remained in the defendant. The Court has so found and has maintained the action.

The Davis Co., although called in as a mis-en-cause, did not plead in the case.

The deed in question is a deed between A. N. Brodeur, the defendant in this case, and Davis and Co. Ltd. This deed commences by setting up the following facts: That both parties had declared to the notary that on July 9, 1915, by a letter addressed to the party of the second part, Davis & Co., the said Brodeur had agreed, in consideration of 6 proposed subscriptions for 20 shares each, forming altogether $12,000, that is to say, 120 preferred shares of the capital stock of the Brodeur Co. Ltd., at par, to transfer to the said Davis & Co. Ltd., 32 instalments of rent to be reckoned from September 1, then next, 1915, and amounting to $375 each, representing the share coming to the said A. N. Brodeur after deduction of the amount required to cover taxes, insurance, etc., under a lease passed before McKenna, notary, on May 21, 1913, by which the said Brodeur and Cuddy, co-owners of the premises, leased said premises to the Northeastern Lunch Co., with the understanding that the said instalments of $375 each for 32 months would be sufficient to cover the subscription of the said shares to the said capital stock of the Brodeur Co. Ltd., and that the same would be deposited as a special account to be kept for the purpose of meeting payment of the said subscribed stock.

Then it is alleged that this transaction did not go through

QUE.

C. R.

CUDDY v. BRODEUR AND PRUDENTIAL TRUST CO.

Archibald, A.C.J.

owing to the failure of the defendant to meet stipulated conditions and thereupon the said Brodeur agreed to guarantee that the said company would not be troubled in connection with its said subscription and the same would never be enforced against it and it would not be called upon to pay for the shares so subscribed. Then followed the real contract of the deed:

And now, to make good his guarantee above mentioned, the said A. N. Brodeur has hereby transferred, assigned and pledged to the said party of the second part accepting thereof in trust for the benefit of the said subscription.

(Then follows the description of the property so pledged, and in the first place is mentioned the rent above referred to); then follows, in the second place:

the one undivided half in the ownership of the property above mentioned . . (known and described as appears in the declaration; and at the end:) which property is hereby ceded, assigned and transferred and pledged to the said party of the second part in trust for the purposes mentioned in these presents, and will be returned to the said Brodeur when the said sum of $12,000 has been realized with interest and costs and all other expenses incidental with the premises, in order to guarantee the said subscriber against any claim or until such time as they will be free from all responsibility in the premises.

The defendant says this deed transferred the property; plaintiff says it did not, but was a mere *nantissement*. The defendant answers, it was not a *nantissement*, it was a complete transfer, with right of redemption. The judgment holds it was a pledge. I believe the judgment to be right.

I admit that the whole of the language connected with any deed must be taken into consideration for the purpose of discovering the intention of the parties and that it cannot be certainly stated that the parties intended a particular word to be used in its legal sense, for example, in this case the word "pledge"; but still words are to be given their natural meaning unless the other provisions in the deed are inconsistent with such natural meaning. Now, the words "cede" and "transfer" which are used in connection with "pledge," are perfectly consistent with the idea of "pledge"—that is to say, the property is handed over into the power of the pledgee. Also, it is a general rule of interpretation that, where certain specific words are associated with general words, the specific words limit the meaning of the general words. Thus, if there were general words, "cede, transfer, make-over," these would indicate an actual transference of property; but

when they are used with such a word as "pledge," their general meaning is necessarily limited to such a cession as might be consistent with "pledge." The word "pledge" could not possibly be consistent with an unlimited transfer of the property—but the making over of the property as a pledge leaves the whole consistent.

Now, is this deed, as it has been set out above, consistent with the idea of a sale with right of redemption? The essential meaning of that contract is that the sale is made absolute from the beginning, with the power to resolve it upon the performance by the debtor of a certain act within a certain time. This is of the essence of the contract of réméré. But is there anything of that kind in this case? On the contrary, there is, in the first place, a specific transference of rents, which is a clear indication that the property remained in the pledgor, because, if the property were in the pledgee, there would be no necessity for the transference of the rents and in the second place, there is a clearly defined contract that this property is not to be held in ownership. There is no time limited for the expiration of the holding of the property. It appears abundantly clear that the property never could become the indefeasible property of the creditor by the mere expiration of time. It would be always open to the debtor to pay the money and to demand the retrocession of the property. These considerations make it clear that this contract was not a contract of sale with right of redemption.

I have no hesitation in expressing the opinion that the judgment which maintained the action was right and ought to be confirmed. *Appeal dismissed.*

BÉNARD v. HINGSTON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

LANDLORD AND TENANT (§ III C—70)—REPAIRS—FLOODING—VIS MAJOR —ACT OF GOD.

To establish the defence of *vis major* or the Act of God, it is not necessary that the event should never have happened before, it is sufficient that its happening could not have been reasonably expected.

[*Hingston* v. *Bénard*, 32 D.L.R. 651, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 32 D.L.R. 651, reversing the judgment of the Superior

CAN.
S. C.
BÉNARD v. HINGSTON.

Court, District of Montreal, and dismissing the plaintiff's action with costs. Affirmed.

Arthur Brossard, K.C., and *Ed. Fabre-Surveyer, K.C.*, for appellant.

P. B. Mignault, K.C., and *L. P. Crépeau, K.C.*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C. J.:—I am to dismiss the appeal with costs. The cross-appeal was abandoned.

Davies, J.

DAVIES, J.:—I agree that this appeal should be dismissed.

I do not think that art. 1614 of the Civil Code covers the case of damages arising solely from *vis major* and the case before us is such a one.

Mr. Surveyer's contention was that the landlord's liability to the tenant under art. 1614 extends to "all defects and faults in the thing leased" that skill and science could provide against.

But that contention should only be accepted subject to the limitation that it does not extend to damages arising solely from *vis major* or the act of God.

As a matter of fact there was no defect or fault in the premises leased within the meaning of those words of the art. 1614.

The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and meaning of the words *vis major* or the act of God, that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. That is the true test under the English authorities and on principle. *Nitro Phosphate Chemical Co.* v. *London & St. Katharine Docks Co.* 9 Ch. D. 503.

The only additional precaution which it is suggested the landlord should have taken against such an unexpected flood as that which occurred in 1913, I agree with Cross, J., even if practicable, would certainly have been inefficient as against such a flood.

Idington, J.

IDINGTON, J.:—This appeal should be dismissed for the reasons assigned in the judgment appealed from and in the notes of Cross and Carroll, JJ., in support thereof.

Duff, J.

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

Anglin, J.

ANGLIN, J.:—Since the defendant (respondent) has acquiesced in the judgment allowing a diminution in the plaintiff's rental,

the only question now before us is as to the right of the latter to recover damages for injuries sustained from the flooding of the leased premises in the spring of 1913. The evidence, in my opinion, establishes that with full knowledge and appreciation of the danger of flooding, to which the situation of the property unavoidably exposed it, and of the means which the defendant had taken to prevent, as far as possible, the consequences of inundation due to the waters of the St. Lawrence overflowing its banks, the plaintiff accepted the premises as having been put in the best possible condition and as meeting all requirements on which he was entitled to insist as a tenant. He had himself obtained the report of an engineer as to what could and should be done to protect the basement of the building, as far as possible, from being flooded, yet he neither asked for nor suggested any precautionary measures greater or other than those which the defendant had taken. She had employed an architect, an engineer and a contractor, all of the highest reputation, and had faithfully carried out their recommendations.

I agree with Cross, J., that the only additional precaution suggested at the trial was probably impracticable and that, however serviceable it might have been had the rise of the river been less, it would not have availed to save the premises from being flooded in the inundation of 1913. The plaintiff's claim so far as it is based on defects in the construction of the building or in the contrivances adopted for keeping out and taking care of the water, is unfounded. Under the circumstances stated I also agree with Carroll, J., that the case does not fall within art. 1614 C.C., the lessee being presumed to have been willing to take the premises in the condition in which they were after the repairs of 1912 had been made, with the risk of further trouble from inundation, of which he was or should have been aware. The authorities cited fully warrant this conclusion. Dalloz, Receuil Periodique 1900, 1, 507; Dalloz 1849, 5, 272; Guillouard, Louage, pp. 137 & seq.; Agnel, Code et Manuel des Propriétaires, (2 ed.) 295; Planiol, 2, p. 559, No. 1688; Pothier, Louage No. 113; 25 Laurent, No. 117.

If on the other hand the flood of 1913 was so extraordinary that it would not be reasonable to hold that the plaintiff, notwithstanding his undoubted knowledge of local conditions,

CAN.

S. C.

BÉNARD v. HINGSTON.

Anglin, J.

should have anticipated it and should therefore be deemed to have assumed its attendant risks, it would seem impossible to escape the alternative conclusion that the defence of *vis major* should prevail.

Appeal dismissed.

B.C.

C. A.

WILLIAMS MACHINERY CO. v. GRAHAM.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. December 21, 1917.

ASSIGNMENT FOR CREDITORS (§ VIII A—65)—CLAIMS—AMENDMENT—PREFERRED CLAIM—ESTOPPEL.

When a creditor has made an amended claim, and valued his securities against an insolvent debtor, and such value has been acquiesced in, the creditor is estopped from subsequently setting up any preferential claim not set out in the amended claim.

Statement.

APPEAL by plaintiff from judgment of Murphy, J. Affirmed.

Russell & Wismer, for appellant; *Griffin*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss this appeal. Starting with the assumption that, but for the course pursued by the appellant, it could have succeeded in recovering the whole or part of the insurance moneys in dispute, I have arrived at the conclusion to which the trial judge came, that appellant is estopped from asserting its claim in this action.

The appellant filed a claim with the assignee without valuing its securities. These securities consisted of a lien on an engine and boiler saved from the fire, a policy of insurance unexpired at the time of the fire, by which the loss was made payable to the appellant, and its right, if any, to insurance moneys now in question. At the time the appellant filed its claim with the assignee, it was problematical how much (if any) of the insurance, bespoken by the company now in liquidation, but not fully placed, and for none of which had policies been issued, could be recovered.

Appellant's interest in the last mentioned insurance was merely an interest in the outcome of a law suit, the question being whether the insurance had in fact been bespoken and, if so, whether a parol agreement to insure was enforceable as an interim contract. There were no available assets of the insolvent to pay the costs of suit, and a plan of voluntary contribution on the basis of the amount of each creditor's claim against the estate, was resorted to to carry on the litigation. Creditors who had no preferential claim on the money sought to be recovered

contributed on the same basis as did the appellant, and no specific claim was made by appellant to a preference, until after the assignee had succeeded in the action.

But this is not all. Sometime after it had filed its claim the assignee asked the appellant to value its securities pursuant to s. 31 of the Creditors Trust Deeds Act. I attach very great importance to the correspondence which ensued, and which resulted in the appellant filing an amended claim in which it valued its securities at $3,700, being the value of the engine and boiler, and of the unexpired policy above referred to. Appellant, in that statement, ignored the contingent interest now claimed. In the correspondence above referred to, appellant's solicitors mentioned the insurance in question and said:—

> We presume, in view of the undecided condition of these matters, that you do not wish to insist upon the value being placed upon same. Would you write us in this connection.

As I read the correspondence which followed, the assignee did insist upon a value being placed on all securities which appellant claimed to possess or rely on, and when, on the insistence of the assignee, the securities were finally valued without making the claim now insisted on, the matter was closed by a letter from the assignees' solicitors, advising appellant that its valuation had been acquiesced in, and that "your claim will be reduced by the amount of the valuation, and you will be entitled to prove as an *unsecured creditor for the balance.*"

Apart from the estoppel, which I think was raised by appellant's conduct in standing by, well knowing that the assignee was carrying on a suit against the insurance company, in the belief that the fruits of the litigation would belong to the estate, or to the creditors voluntarily contributing to the cost thereof, the fair inference from the circumstances I have mentioned, evidenced by the correspondence, is that the appellant abandoned all preferential claims except those mentioned in the amended claim.

GALLIHER, J.A.:—I agree in the conclusions of the trial judge, and would dismiss the appeal. Galliher, J.A.

MCPHILLIPS, J.A. (dissenting):—The judgment of Murphy, J. as I understand it, under appeal, would have been for the appellant, had not the judge been of the opinion that there was McPhillips, J.A.

B.C.

C. A.

WILLIAMS MACHINERY CO. v. GRAHAM.

McPhillips, J.A.

estoppel in that the appellant having valued its claim was disentitled from claiming the $9,000, as being due to it out of the insurance moneys, realized *viz*: out of the $18,000 already collected and got in. It is clear that the appellant was protected by insurance placed by the Westminster Woodworking Co. to the extent of $9,000, and it is abundantly clear that the insurance, in favour of the appellant was continued, in fact that insurance was placed with loss payable to the appellant to the extent of $9,000, is not disputed by the respondent. Difficulty arose after the loss by fire in getting in the insurance moneys, and up to the present $18,000 only has been got in by the assignee, as against one company suit had to be brought (see *Westminster Woodworking Co.* v. *Stuyvesant Ins. Co.*, 25 D.L.R. 284. 22 B.C.R. 197). It will be seen upon a perusal of the report of the case last referred to that no policies in respect of any of the insurance moneys in question in fact issued, but, nevertheless it was held that there was legal liability, and this company (Stuyvesant Insurance Co.) as well as others, made payment of the amounts carried by them, there still remaining an action for $10,000, against a company in New York State. The total loss was about $37,000, and of the property destroyed there was machinery to the value of about $19,000; and the appellant had sold to the Westminster Woodworking Co. (of which company the respondent is assignee under the Creditors Trust Deeds Act (2 Geo. V., c. 13, R.S.B.C., 1911)) a considerable portion of this machinery, and there was still due to it, at the time of the fire loss, some $13,207.18, the appellant having lien notes upon the machinery sold, and out of the insurance placed by the company (I refer to the Westminster Woodworking Co. throughout as "the company") the appellant was specifically protected to the extent of $9,000, therefore in getting in the $18,000, or the correct proportion thereof, is the legal right of the appellant, and the moneys must be held to have been received for the use of the appellant; the insurance was admittedly placed and effected by the companies upon this basis. It is, however, attempted to evade this liability upon two grounds, (1) that having valued the security held within s. 31 of the Creditors Trust Deeds Act, and not having valued the insurance security beyond $3,700, no further claim can be made; (2) that, in any case, the appellant had no insurable interest, and that no claim can

by reason of this be given effect to in a court of law. Now, with respect to the first contention, in my opinion, no valuation whatever, was placed upon the security by way of insurance now in question, and it is not difficult to see why it was not done (save as to the insurance covered by existing policies). The insurance was all by verbal contract, and there was nothing tangible upon which to place a valuation, but that the appellant was not claiming to be entitled under this insurance. It is impossible to contend, and to the knowledge of the respondent, and there never was any waiver or abandonment of this position, the valuation made was plainly as to the insurance covered by existing policies, the evidence amply supports this.

It is to be observed that in par. 3, of the statutory declaration, what is said is this: "covering portion of insurance on the machinery, *which* security we value at $3,700." This is quite understandable, and is not capable of any misunderstanding, the insurance there referred to was that covered by the existing policies *i.e.* the Phoenix and Liverpool London & Globe.

In the letter of the respondent of June 1, 1915, the point was taken that the appellant had no interest in the insurance. This, in the light of the facts, cannot be characterized other than as being unconscionable and inequitable. The insurance placed, as I have already pointed out, specifically protected the appellant to the extent of $9,000, and, it is idle to contend, that this was not the position of matters, and it is in respect of this self-same insurance that, to date, $18,000 has been got in by the assignee. No valuation was made in my opinion in pursuance of s. 31 of the Creditors Trust Deeds Act, of the remaining security upon the insurance moneys yet to be got in. It is clear there was no abandonment, and the security may still be valued, and no injustice will follow. The moneys have been held not distributed (an injunction was granted by the court withholding the distribution of the moneys.) What right have the other creditors of the estate to these moneys of the appellant? None whatever, the legal duty that rests upon the respondent is to account to the appellant in respect to the moneys got in, which are the moneys of the appellant, by reason of the specific protection and appropriation accorded by the contracts of insurance entered into. Here there is an obligation by contract, binding upon the company which the assignee must

B.C.

C. A.

WILLIAMS MACHINERY CO. v. GRAHAM.

McPhillips, J.A.

carry out, and the assignee can only be held to be in possession of the moneys, subject to the appellant's claim; equity looks upon that as done which ought to be done, and is it not patent, what ought to be done, in the present case? That is account to the appellant for moneys received which must be held to be moneys received by the respondent to the use of the appellant. Otherwise stated the moneys can only be said to be held by the respondent as trustee for the appellant, and for which he must account, subject, though, to the due administration of the estate under the Creditors Trust Deed Act. Had the insurance companies who have already paid insisted upon it, it would have been necessary for the respondent, before being entitled to receive the moneys, to have produced a release from the appellant.

The trial judge referred to *Box* v. *Birds Hill Sand Co.*, 12 D.L.R. 556, a decision of the Court of Appeal of Manitoba, affirming the judgment of Mathers, C.J.K.B., 8 D.L.R. 768, 23 Man. L.R. 415.

With great respect to the judge, I am entirely unable to accept that view, and I would particularly call attention to the language of Cameron, J.A. (12 D.L.R. p. 562)

In Hals. Laws of England, vol. 5 at p. 520, it is said, speaking of a creditor under the Bankruptcy Act, that he (the creditor) may prove for his whole debt if he surrenders his security (Bankruptcy Act 1883, 46-7 Vict. c. 52, sched. 11, r. 10). If he proves for his whole debt or votes in respect of it, he thereby elects to surrender his security; but the Court may allow him to amend his proof in case of inadvertence, *Re Lister & Co.*, [1892] 2 Ch. 417; Co's Winding Up Rules r. 135. As to what is inadvertence, see *Re Safety Explosives Ltd.*, [1904] 1 Ch. 226; *Re Rowe*, [1904] 2 K.B. 489; *Re Burr*, [1892] 67 L.T. 232.

The situation in the present case is one of no possible injustice; the moneys in question have not been paid over, and the fact that the general body of creditors undertook the risk of the litigation, constitutes no injustice. The appellant contributed to these costs as well, and the estate profits by the result of the litigation; the moneys of the appellant, under the insurance security, do not exhaust the fund, in fact, if no further moneys be recovered, and the appellant should be entitled to the $9,000, there would still remain $9,000 for distribution.

Then, as to the estoppel objection, this is likewise an untenable contention. It is less arguable than the estoppel urged in *Box* v. *Birds Hill Sand Co. supra*, the contractual obligation existing that protection, to the extent of $9,000 by way of insurance, was to be given to the appellant is clear, and the language of Sir. W. Page Wood, quoted by Cameron, J.A. 12 D.L.R. 556 at 562, well demonstrates the legal position:

> The bargain by my debtor is that he will pay me and I am entitled to insist upon that. I have also a pledge in my hand which no one can take away from me without paying me in full, and it is for me to say when I will choose to realize that pledge.

In the present case the respondent has realized $18,000, and may realize $10,000 more, the valuation which the appellant would, in my opinion, be entitled to now make, would be a pure formality, and would be fixed at $9.000; and as that sum and more has been realized, the appellant is entitled to have a declaration from the Court, as claimed in the statement of claim, that it is entitled to the sum of $9,000 out of the proceeds of the insurance moneys got in by the assignee, unless upon the last ground, which is urged by the appellant Jones, and that is, that the appellant had no insurable interest to the extent of $9,000. The evidence would not appear satisfactory upon this point, but there is evidence that the appellant had lien notes upon machinery which was upon the premises at the time of the fire, and that there was a fire loss in respect thereof, and I am unable to come to the conclusion that there was no insurable interest. The company were the purchasers of the machinery from the appellant. McGillivray on Insurance Law (1912) at p. 132.

There is always the presumption of insurable interest: *Stock* v. *Inglis*, Brett, M.R. 12 Q.B.D. 564, McGillivray Insurance Law at p. 104, *Waters* v. *Monarch Fire and Life Assur. Co.* (1856), 5 El. & Bl. 870, 882, 119 E. R. 705, is an instructive case, and this case has been referred to in the following cases: *Seagrave* v. *Union Marine Ins. Co.* (1866) L.R. 1 C.P. 305; *North British Ins. Co.* v. *Moffatt* (1871) L.R. 7 C.P. 25; *Ebsworth* v. *Alliance Marine Ins. Co.* (1873) L.R. 8 C.P. 596.

In the present case the appellant's insurable interest in particular was in the machinery upon which liens were held, and the company likewise had an insurable interest therein, further the

B.C.
C. A.
WILLIAMS MACHINERY CO. v. GRAHAM.
McPhillips, J.A.

appellant may well be said to have been in like position to the plaintiff in *McPhillips* v. *London Mutual Fire Ins. Co.*, 23 A.R. (Ont.) 524. In effect the direction to the broker to provide protection to the appellant to the extent of $9,000, was an assignment or order to the companies to make payment to that extent to the appellant.

It is strongly contended that the appellant is in the position of not being entitled to recover anything in respect of the insurance moneys, as the statute stands in the way, viz: Life Insurance Policies Act (2 Geo. V., c. 115, s. 30, 14 Geo. III., c. 48), it is somewhat singular that a Life Insurance Policies Act covers fire insurance policies, but it would seem so, that is s. 30 thereof does, but s. 33, however, excludes insurance on ships, goods, or merchandise. Dealing with the Imperial Act, see McGillivray on Insurance Law at p. 110, and *Lucena* v. *Craufurd* (1802), 3 Bos. & Pul. 75, 127 E.R. 42.

In the present case, in my opinion, there can be no question that there was sufficient insurable interest in the appellant, and the company was entitled to effect the insurance which it did and provide for the loss to the extent of $9,000, being payable to the appellant. Therefore, any objection on this ground, in my opinion, falls to the ground.

With further reference to the contention that there is estoppel and which is really the point which was most pressed, and upon which the judgment under appeal is sought to be supported, coupled with the finding that there was a valuation, although the valuation has reference only to the then existent policies of insurance, and abandonment of all other insured security, I would refer to *Beattie* v. *Lord Ebury* (1872) L.R. 7 Ch. App. 777, at 800, 802, upon the point that there was representation or conduct binding upon the appellant, that the insurance security was valued, and that there was abandonment, of any other security than as valued in the statutory declaration, the valuation must speak for itself. It is futile to write letters, and put a construction upon same which it does not bear, and then contend in the absence of any denial for some time, that the position as claimed is the legal position. This is idle contention, and is not the law, further, neither the agent nor solicitor were clothed with any authority to do that which has been held to be the effect of

what was done *i.e.*, that the valuation made was in respect to all the insurance security. The respondent in assuming or acting upon the valuation as being a valuation of all the insurance security held by the appellant made a mistake in point of law, and anything that the agent or solicitor for the appellant may have done or said, cannot avail against or be effectual to prevent the appellant insisting that no such valuation to the extent claimed ever was made.

Now, at most, all that is contended for in the present case to support the estoppel, is the statutory declaration, and the letters written by the respondent or his solicitors to the solicitors for the appellant, and no dissent for sometime, that the appellant was to have after the valuation made, no position other than a position amongst the general body of creditors. Can any such contention be given effect to? I do not think so. One thing that a solicitor cannot do, is "to compromise a claim on behalf of his client, before an action has been commenced in respect thereof" *Macaulay* v. *Polley*, [1897] 2 Q.B. 122; Bowstead on Agency, 5th ed. at p. 100, and the authority of counsel is restricted to compliance with any express instructions, (see *Neale* v. *Gordon Lennox*, [1902] A.C. 465. The evidence does not support any authority from the appellant to abandon its claim, the evidence is all to the contrary, and the insurance security was claimed at meetings of the creditors after the putting in of the statutory declaration. The legal fallacy throughout on the part of the solicitors for the respondent, and given effect to is the acceptance of what was nothing but a partial valuation *i.e.* of securities *in esse*, as being a valuation of all the insurance security.

The facts of the present case establish a special contract, complete in its nature, and executed, whereby the company placed the insurance and the insurance companies undertook the risk, with the provision that to the extent of $9,000 the lien holder, the appellant, the creditor of the company, should be entitled out of the moneys payable under the policies (which had it not been for the fire would have issued) to $9,000; *Lees* v. *Whiteley*, L.R. 2 Eq. 143, *Poole* v. *Adams*, 10 L.T. 287, 33 L.J. Ch. 639; *Rayner* v. *Preston*, 18 Ch. D. 1. In *Sinnott* v. *Bowden*, [1912] 2 Ch. 414, at p. 419, Parker, J. said:—

It is, I think, clear that apart from special contract or the provisions of

B.C.
C. A.
McPhillips, J.A.

some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises.

For the reasons here stated, I am of the opinion, that the appeal should succeed. *Appeal dismissed.*

CAN.
S. C.

ROMAN CATHOLIC ARCH. CORP. OF ST. BONIFACE v. TOWN OF TRANSCONA.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

TAXES (§ III A—125)—ASSESSMENT—ACTUAL VALUE.
The Manitoba Assessment Act, R.S.M. (1913), c. 34 sec. 29, does not authorize the assessment of property at more than its actual value.

Statement.

APPEAL and cross-appeal from the decision of the senior judge of the county court of Winnipeg, reducing the assessment on appellant's property from $160,000 to $88,000.

The appellant claims that the assessment is greatly in excess of the real value, the respondent that the value should be that of normal times and that under the legislation quoted in the head-note the property could be assessed at more than its actual value provided that the whole assessment for the property was uniform and equitable.

Chrysler, K.C., for appellant; *Hull*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur with Idington, J.

Davies, J.

DAVIES, J.:—The main and substantial question arising on this appeal was as to the true construction of s. 29 of the Assessment Act of Manitoba.

That section reads:—

In cities, towns and villages all real and personal property may be assessed at less than actual value or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same. The expression "actual value" used in this section shall mean the fair market value of such property, regardless of a prospective increase or decrease, either probable, remote or near.

As I understood the argument of counsel for the respondent, it was that uniformity was the controlling principle embodied in this section and that it did not matter in applying that principle whether the assessment was above or below the actual value of the lands assessed.

I was impressed during the argument with the force of this contention but after giving the question much consideration have concluded that it cannot be upheld.

The general principle that in construing legislation imposing taxation clear language must be found supporting the taxation must be borne in mind.

Now in the section before us while express language is used permitting assessment at *less* than actual value, there is no such language permitting assessment at *more* than actual value.

It was contended that such permission should be inferred from the words

or in some uniform and equitable proportion of actual value.

These are vague and indefinite words and I do not think that from them alone a permission should be inferred to assess at more than the actual value of the land.

They are useful and probably necessary in cases where the permission to assess at less than the actual value is exercised as in such case preserving the general principle of uniformity and providing that the permission so to assess must be exercised not in a haphazard way but uniformly

so that the rate of taxation shall fall equally upon the same,

which latter words I construe to mean upon all the lands and property assessed. If the policy of assessing "lands and personal property" at *less* than their actual value is adopted by the assessors it must be applied generally "to all real and personal property" and on some fixed principle, so that uniformity may be maintained and injustice prevented.

But, however that may be worked out under the statute, it seems to me reasonably clear that no intention to assess property beyond its actual value can be assumed or inferred.

I am not insensible to the many and great difficulties which existing conditions of the absence of any actual value of the lands in many parts may give rise to in making an assessment. But if the two main principles which I suggest are followed these difficulties can be largely minimized if not entirely overcome. These principles are that the Act does not authorize assessments greater than the "actual value" of the property assessed which the section goes on to say means the fair market value of such property regardless of a prospective increase or decrease, either probable, remote or near, and that when assessed at *less* than the actual value it must be done on a uniform principle applied to all the lands and property assessed.

CAN.

S. C.

ROMAN CATHOLIC ARCH. CORP. OF ST. BONIFACE v. TOWN OF TRANSCONA.

I concur, therefore, in allowing the appeal with costs, and reducing the assessment to $40,000. There is some evidence at any rate justifying that figure as the actual value of the lands assessed and there does not appear to be any justifying a higher value.

Idington, J.

IDINGTON, J.:—I find no valid reason in the argument set up to support the claim to assess appellant's property at a sum beyond its valuation.

Whether we consider the Assessment Act or the Municipal Act or both together, and read the words "value," "actual value," "market value," respectively used therein and according to their proper force and effect within the recognized rules of interpretation and construction, there is to be found no warrant for resorting to the particularistic method of interpretation we are asked to adopt, and thereby render much of the language used and legislation it expresses, null and absurd.

I doubt if ever such methods of interpretation and construction should be tolerated, though we must admit courts of law have too frequently lent a willing ear thereto, and only for that reason do I think such an argument pardonable.

Counsel for respondent did not seem to deny that Mr. Chrysler's analysis and inferences from the evidence which placed the total value at $40,000, were fair.

The appeal should be allowed with costs and the assessment fixed at $40,000, the reduction of $48,000 being applied distributively in proportion to the relative sums fixed as to the assessment of each parcel involved, pursuant to the judgment of the district judge's decision.

Duff, J.

DUFF, J.:—The appeal should be allowed with costs, and the assessment reduced to $40,000.

Anglin, J.

ANGLIN, J.:—The sole question on this appeal is whether, under s. 29 of the Manitoba Assessment Act, (R.S.M., 1913, c. 134) an assessment of land in excess of its value is permissible in cities, towns or villages.

By s. 422 of the Municipal Act (R.S.M. 1913, c. 133; amended 1916, c. 72, s. 10) the maximum rate of taxation (exclusive of certain special rates) to be levied in cities, towns and villages is fixed at two cents on the dollar of assessed value. S. 423 of the same statute requires that the rates shall be calculated at so much

in the dollar upon the actual value of assessable property, except as otherwise provided in the Assessment Act for cities, towns and villages.

The only provision of the Assessment Act by which it is otherwise provided is s. 29, which reads as follows:—

> In cities, towns and villages all real and personal property may be assessed at less than actual value, or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same. The expression "actual value" used in this section shall mean the fair market value of such property, regardless of a prospective increase or decrease, either probable, remote or near.

The *prima facie* meaning of the word "proportion" in this collocation is clearly "portion." That is the meaning which 99 men out of 100 would give to it. The only ground for suggesting that it bears another meaning is the presence in the section of the preceding phrase, "at less than actual value," and the connecting conjunction, "or." It is argued that to avoid redundancy the word "proportion" must be given the meaning of multiple, or fraction of a multiple. But tautology in statutes is something quite too common to warrant such a straining of the ordinary meaning of the word "proportion" in order to avoid it. I think the purpose of all the words following the word "value," where it first occurs in s. 29, is to provide that in the event of the basis of the assessment of land being "less than actual value" the same fraction of value must prevail in all cases "so that the rate of taxation shall fall equally." The word "or" is not used disjunctively to separate the expression of two distinct ideas, but, as is quite ordinary, to indicate that the idea expressed in the phrase, "at less than actual value," is repeated in another form in the word "proportion," with the qualification of uniformity and equitability superadded, the purpose being indicated by the succeeding words, so that the rate of taxation shall fall equally upon the same. It may of course be conceded that the section is not a model of draughtsmanship.

The form of oath prescribed for the assessor affords a very strong indication that the legislature in fact used the word "proportion" in the sense of portion. Moreover, were it otherwise—if assessed values might be "boosted" indefinitely—the purpose of the restriction of the rate of taxation in cities, towns and villages to two cents on the assessed value would be defeated. It would

CAN.

S. C.

ROMAN CATHOLIC ARCH. CORP. OF ST. BONIFACE v. TOWN OF TRANSCONA.

Anglin, J.

indeed be purely illusory. If in fact, personalty has been assessed in Transcona "at its actual cash value," (s. 33), or on any lower basis, the "uniformity" provision of the statute is violated by the assessment of the appellant's land. The basis of assessment of realty must be the same as that of the assessment of personalty (s. 29).

It would require unmistakable language to authorize an assessment of any property at more than its value. Nothing in s. 29 of the Assessment Act warrants attributing to the legislature an intention to do anything so extraordinary, and the other statutory provisions referred to preclude such a view.

Chrysler admitted that there is evidence justifying an assessment of $40,000. Hull stated that he could not point to any evidence which would support a higher figure.

The appeal must be allowed with costs throughout and the assessment reduced to $40,000. *Appeal allowed.*

QUE.

C. R.

REID v. PINAULT.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ.
September 25, 1917.

1. CONFLICT OF LAWS (§ I C—66)—MARRIAGE—MARITAL RIGHTS.
The law of the province where a marriage takes place governs, as to the form of the marriage, but the domicile of the husband governs as to the marital rights and obligations of the parties.
[See annotation 30 D.L.R. 14, also 33 D.L.R. 146.]

2. HUSBAND AND WIFE (§ II C—65)—COMMUNITY—RIGHT OF ACTION.
By Quebec law, a wife common as to property has no right of action against her husband to recover a debt due by him to her as long as the community exists.

Statement.

APPEAL from judgment of Superior Court. Reversed.

The judgment of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff's action is based on the following writing: "I, Henri Pinault, do on February 17, 1911, agree to give the sum of $600 to Josephine Reid if she marries me on February 18; money to be paid on demand."

The parties were married on February 18, 1911, in Ottawa, defendant being described as of Hull, Que., and plaintiff as of the city of Ottawa. They lived together at Hull, and some time afterwards mutually separated. On June 8, 1915, by petition to the Superior Court, plaintiff prayed for authorization to sue her husband for payment of the aforesaid amount on the aforesaid

note, alleging that by the law of the Province of Ontario, where the marriage was celebrated, she is separated as to property. The authorization asked for was granted by the Court and the action was instituted. Defendant admitted signing the note, admitted the marriage, but denied plaintiff's right of action and alleged, in any event, payment. Plaintiff's action was maintained by the trial judge, and it was against this judgment that defendant inscribed the case in review.

Apparently the trial judge treated the document signed by defendant as a promissory note. He gave full effect to the laws of the Province of Ontario, holding that the law of that province, as proven, governed the matrimonial rights of the parties. A member of the Bar of Ontario was examined and he stated that according to the law of Ontario the writing was valid as a promissory note being given in consideration of a future marriage.

With all respect I have serious doubts as to the accuracy of the learned gentleman's statement. The Bills of Exchange Act is a Federal enactment with equal application to all the provinces. With reasonable accuracy, one can find what is a promissory note under that statute. It is at least an unconditional promise to pay. The writing in question would hardly fulfil that requirement. It would be difficult to find the elements of negotiability in the writing.

However, arriving at a conclusion which renders it unnecessary to decide the point, I express no final opinion. But the learned member of the Ontario Bar proceeds to state that parties marrying in Ontario without an ante-nuptial contract are separate as to property, and adds that during the marriage the wife may sue her husband and may by her husband be sued for debts due by her to him. Upon this statement of the law I have no criticism to offer. But that does not by any means dispose of the matter.

The husband was domiciled in the Province of Quebec. His intention was—and effect was given to his intention—to retain his Quebec domicile. He certainly never abandoned it or acquired another. The first question calling for a decision is by what law, or by the law of what province were the matrimonial rights and obligations of the parties governed? I take it that as to the form of the marriage the law of the province would govern, but as to the marital rights or obligations that the law of the domicile of the husband must govern. It follows, therefore, that the parties in

QUE.
C. R.
REID
v.
PINAULT.
Greenshields, J.

the present case, so far as their rights and obligations resulting from the marriage are concerned, are governed by the laws of the Province of Quebec. Therefore, there being no marriage contract, the parties were not separate, but were common as to property. Still, that does not dispose of the matter.

At the date of the institution of the present action, if community property still existed, it had never been dissolved by any of the causes covered by our Code enactments. And the question at once presents itself—admitting that the husband, by the paper writing referred to, contracted a legal obligation in favor of his wife to pay her $600—could she, even with the authorization of a judge, prosecute an action at law for the recovery of that debt during the existence of the community of property? In other words, does a right of action exist in her favour?

I have given the matter careful consideration and that consideration has confirmed the opinion which I expressed at Bar, namely, that no right of action whatever exists. Of the French writers, Laurent alone would seem to support a contrary opinion. I would, therefore, hold, in general terms, that a wife common as to property, has no right of action against her husband to recover a debt due by the latter to her so long as the community exists.

Upon the first question, as to what law governs, I refer to the case of *Young* v. *Deguise*, 29 L.C.J. 194; Lafleur, Conflict of Laws., and particularly the authority cited at pp. 163 *et seq.*

Upon the second point, as to the right of action, I refer to arts. 1292, 1298, 1367, C.C.; Fuzier-Herman P. annote, art. 1478, vol. 2, No. 1224.

I should, therefore, reverse the judgment and dismiss the plaintiff's action with costs, and that is the unanimous judgment of this court. *Appeal allowed.*

ALTA.
S. C.

REX v. NEIGEL.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Simmons, JJ. February 2, 1918.

WITNESSES (§ II A—32)—EVIDENCE—REFRESHING MEMORY—CONSISTENCY OF STATEMENTS.

For the purpose of rehabilitating a witness, and shewing that he is consistent with himself, evidence may be given to shew that the witness had made the same or substantially the same statement as that given in his testimony, prior to the inconsistent statement.

[*Rex* v. *Benjamin* (1913), 8 Cr. App. R. 146, *Rex* v. *Coll* (1889), 24 L.R. Ir. 522, considered. See also *Rex* v. *Anderson*, 16 D.L.R. 203 and annotation following.]

APPEAL from a refusal of Hyndman, J., to reserve certain questions of law arising on the trial and the hearing of certain questions reserved.

R. B. Davidson, and *W. Beattie*, for appellant.

W. A. Begg, for respondent.

HARVEY, C. J., concurred with Beck, J.

Harvey, C.J.

STUART, J.: The accused was tried in November last by Hyndman, J., and a jury, and was convicted on the charge of having on January 27, 1917, murdered his wife Clara Neigel by giving her poison. A witness, Joseph Fieger, called by the Crown, testified that on a certain occasion near the end of February he was at the accused's house and that the accused had then confessed that he had poisoned his wife and had promised the witness $1,500 if he would arrange to have a doctor examine the body of the deceased and declare that there was no poison to be found in it.

Stuart, J.

The witness was cross-examined at some length by counsel for the accused but in this cross-examination counsel omitted to lay the proper foundation for evidence which in the course of the defence he proceeded to adduce as to contradictory statements by the witness. He was then permitted by the Court to recall Fieger for further cross-examination and in this he asked the witness whether or not he had not told one Voorschmit that the accused had not told him that he had given poison to his wife. He denied having stated this to Voorschmit and thereupon counsel for the defence called Voorschmit and also one Weiss who was with him and they gave evidence to the general effect that on a certain occasion in April Fieger had told them that Neigel had not told him about poisoning his wife. Then after the evidence for the defence was concluded the Crown called as a witness the father of Fieger who testified that about the end of February his son had related to him the story that the accused Neigel had told him. This evidence was objected to, first by the trial judge and also, but only after the judge's objection, by counsel for the accused. The learned judge at the urgent insistence of counsel for the crown who stated that he would take the responsibility of pressing it in, allowed the evidence to be given.

The judge reserved for the opinion of this Court the question whether this evidence of the father was admissible or not.

The argument before us proceeded upon the basis of the facts

ALTA.

S. C.

REX v. NEIGEL.

Stuart, J.

which I have above set forth. The trial of the case extended over 2 weeks and the typewritten evidence covered over 1100 pages. Upon the argument, I, for my part, assumed that counsel would, on the circumstances, state to the Court all the relevant facts which the voluminous typewritten evidence revealed. It was, therefore, with much astonishment that I found a great deal of evidence material and relevant to the point reserved which counsel had never mentioned to the Court upon the argument at all.

It appears that upon the first cross-examination of Fieger by counsel for the accused the latter had, at great length, questioned the witness as to whether he had ever mentioned to anyone the story which Neigel had told him. From this it appeared that counsel for the accused had himself induced the witness to tell him that he had mentioned what he had heard from Neigel, either the first or second Sunday afterwards to 3 or 4 persons in the house of one Zahn, that "in the spring" some time he had told the story to Mr. Begg, the agent for the attorney general, and to a constable, Sergeant Fisher, who was with Begg and that Begg had taken down his statement in writing. He was also asked "Have you ever talked to any man, woman or child about this matter since you spoke to Begg and Fisher at your place last spring?" and he answered "I spoke about this case to my father and my wife but I don't remember I told some one particular." He then also was questioned by counsel for the accused about more recent conversations about the time of or during the trial and stated that Fisher had gone over with him on the then next preceding Monday the statement that Begg had taken down in the spring.

It also appears that when Fieger was recalled so as to permit counsel for the accused to lay the foundation for the evidence of a contradictory statement he stated that he had told Voorschmit and Weiss that, as far as he knew, Neigel was a good man, and it also appears that on re-examination by counsel for the crown he was asked why he had not told Voorschmit and Weiss about the story which he had heard from Neigel and he answered that it was because Fisher had told him in the spring when the written statement was given to keep quiet about it.

The question of the admissibility of such testimony as that of Fieger's father in confirmation of his son's evidence is a matter

which is discussed to some extent in the text-books. (See Phipson 4th ed. 472, Greenleaf 16th ed. p. 605, Wigmore par. 1126). But it has not been squarely raised in any Canadian case that I have been able to find and in scarcely any English cases. The absence of much recent authority on the point seems to me to indicate that the general opinion among lawyers and judges has been rather unfavorable to the admissibility of such evidence. There are, of course, many American cases, some of which point one way and some the other.

It would appear to me that an essential preliminary enquiry is as to the purpose or object of the cross-examining counsel in raising the question of previous statements at all. (See *Reg* v. *Coll*, 24 L.R. Ir. 522, judgment of Gibson, J. at p. 532). If his purpose was to suggest that the witness had recently concocted the story told in the box then I think it must be quite obvious that the party producing the witness sought thus to be impeached ought to be allowed to show that the story had not in fact been recently concocted, at any rate where evidence of a previous inconsistent statement has been adduced. And I am not sure that it ought to be otherwise at least in every case, even where the witness admits upon cross-examination having made on one previous occasion an inconsistent statement. If the previous inconsistent statement was a voluntary one on his part or made upon an occasion when he was particularly bound to tell the truth, e.g., when under oath, no doubt the matter should end there and no rehabilitation by means of proof of a previous consistent statement ought to be received. But there may be occasions when the witness might have, if not an absolutely valid reason, at least a fair excuse, for not telling exactly the same story. We have just such a case here. Voorschmit was a detective employed by the defence. He went to see Fieger and, without authority, started to question him. Of course, he might have been told to go off about his business. Instead of speaking thus bluntly, Fieger may perhaps be excused for giving him an ambiguous or even inconsistent answer in order to get rid of him. Of course there was no excuse if he, while pretending to speak frankly, had told Voorschmit a false story. If he had admitted doing so, I do not think his father's evidence would have been admissible, because the whole matter would then have been at large, and additional testimony one way

ALTA.
S. C.
REX
v.
NEIGEL.
Stuart, J.

or the other would be of no value. But he did not admit it, and I think the statement that, so far as he knew, Neigel was a good man, should be considered merely in the light of an evasion of a cross-examination to which he did not want and was not bound to submit.

Assuming, therefore, that the object of the defence was to prove recent concoction I think the evidence was admissible.

Of course, counsel for the defence never did frankly state what his object was. One can only make an inference as to this matter from the whole course of the cross-examination. In one aspect, it would appear that such was the real purpose of the defence in proceeding to ask Fieger as to how soon he had told to any one what he had heard from Neigel. But, when it came to the recalling of Fieger and to the laying of the foundation for the expected evidence of a contradictory statement, this view of the object of the defence is somewhat weakened, because the very form of the question then addressed to Fieger viz.: whether or not he had told Voorschmit that Neigel had not told him that he had poisoned his wife seems implicitly to admit that he had already circulated the story that Neigel had so told him. In other words, counsel for the accused, if directly asked what his purpose or object was might perhaps have said "Why, we admit that Fieger was telling this story around, we admit he has not *recently* concocted it, but we still affirm that it is not true and we propose to show that, on one occasion at least, he told a different story." If that was the real attitude of the defence I am bound to say that I have very grave doubts as to the strict admissibility of the father's evidence. When the suggestion is that a witness has, not recently, but from the beginning been circulating a concocted story I am very doubtful of the relevancy and, therefore, of the admissibility of independent evidence of his continued assertions of it, at any rate where these assertions have none of them been upon oath. The witness Fieger does not appear to have been called upon the preliminary hearing, which, as I gather, took place before the crown had learned of his evidence. I doubt the probative force of evidence of mere repetitions of a story in neighbourhood gossip, either with respect to the original story itself or with respect to the issue as to whether or not he ever made the alleged inconsistent statement.

But the defence, it seems to me, is here met with a dilemma. If it is denied that Fieger had told the story at any early date then it means that the charge is that of recent concoction, and, for the reasons given, I think the evidence of the father was admissible. On the other hand if it was intended to be admitted that the witness had frequently related the story from the beginning to various persons, and among these to his father, as was brought out by the cross-examining counsel himself, then, even though the evidence might not have been strictly admissible, it seems to me that it is impossible to say that any substantial wrong or miscarriage of justice occurred on account of the admission of independent testimony of such repetitions, and the wrongful admission of the evidence ought not to affect the verdict.

I would like to add directly what may be perhaps inferred from what I have said that, in such circumstances as existed at this trial, when a cross-examining counsel proceeds to lay a foundation for evidence of previous inconsistent statements, he ought to make it plain to the court exactly what attitude he is adopting towards the testimony which he proposes to impeach, and unless he is prepared to disavow any suggestion of recent concoction, then I think such a self affirming statement as was here tendered ought to be allowed. Where there is not, as there was not here, any explicit explanation of the purpose or attitude of the opposing counsel and no express disavowal of a charge of recent concoction, I think the court is, and was, entitled to assume, in the case of such an original cross-examination as took place here, that the suggestion of recent concoction was intended to be made to the jury and so was entitled and bound to admit evidence to rebut that contention. It is upon this ground that I rest my opinion that the evidence in question was admissible.

But, even if the impeaching counsel would only have said "We are quite in the dark as to whether what he has told us about having told the story at an early stage and about having repeated it around the country is true or not, we neither admit it nor deny it. He may have repeated it, or he may not, but we propose to show that on one occasion, at least, he told a different story." I think this attitude should be treated as at least a veiled suggestion of recent concoction, as a suggestion to the jury that

ALTA.

S. C.

REX v. NEIGEL.

Stuart, J.

there has been a recent concoction and that the assertion merely by the witness himself of having frequently previously repeated was merely an attempt at self confirmation.

It is unnecessary to say what would have been the result if there had been no introduction of the question of early declarations of the story into his first cross-examination by counsel for the accused and if he had without bringing out these declarations simply proceeded to prove a single prior inconsistent statement. That case may be dealt with when it arises. But this much may be said viz.: that even in such a case it would be difficult, even in the face of a disavowal of such a charge by the impeaching counsel, to get rid of, at least, a veiled suggestion of recent concoction.

The question reserved by the trial judge should, therefore, in my opinion, be answered in the affirmative. Upon the questions raised by way of appeal from the refusal of the trial judge to reserve a case, I agree with the views expressed by Beck, J.

Beck, J.

BECK, J.:—This is a case in which the prisoner was convicted of murder and which comes before us in part by way of an appeal from the refusal of Hyndman, J., to reserve certain questions of law arising on the trial and in part by way of the hearing of a question reserved. It was agreed that the case should be dealt with as if all the questions had been reserved.

Questions 1 and 2 are, in effect, whether the evidence as a whole was such as to justify a conviction. We are agreed that it is. In view of the fact that there is direct evidence of a confession by the prisoner, it is obvious that any other view would be almost impossible.

Q. 3 takes exception to the evidence of the analyst who examined the organs of the deceased for traces of poison—the charge being murder by poisoning—on the ground that the parts submitted to him, having been transmitted through several hands were not sufficiently or properly sealed and kept under observation throughout the course of being transmitted.

The sole point involved is the identity of the parts. Clearly there is no absolute need for sealing and constant personal possession and observation and clearly evidence that, though these precautions were lacking, such other precautions were taken as to leave no reasonable doubt of the identity, is sufficient.

The evidence actually given leaves no doubt in our minds of the identity of the parts, but in any case it was for the jury to decide.

Q. 4 and 5 raise questions as to the propriety of the use of certain medical text books by counsel for the crown.

We think it unnecessary to say more than that in our opinion counsel for the Crown did not go beyond what we laid down in the case of *Rex* v. *Anderson*, 16 D.L.R. 203, 7 A. L.R. 102, where we dealt exhaustively with this subject.

Q. 6 (reserved by the trial judge) is as follows:—"Was I right in admitting the evidence of Aloysius Fieger as to the conversation between himself and the witness Joseph Fieger in the re-establishment of the credit or character of the said Joseph Fieger? Was my direction to the jury sufficient to remove any prejudice which might have been created in the minds of the jury?"

Joseph Fieger was examined as a witness for the Crown in the course of the case-in-chief for the prosecution.

He told of a talk he had had with the prisoner "the second half of February" 1917—the deceased died on the 28th of the previous January in which the prisoner had told him of his having given his wife—the deceased—a drink of whiskey just before they sat down to breakfast and the symptoms following almost immediately.

Owing to the witness' mother tongue being German—he is a Russian German—and his knowledge of English being rather imperfect, his evidence, as it appears in the stenographer's notes, is not always clear. I extract the following:—

Q. Was anything else said by Neigel to you on that day concerning his wife's death? A. Yes, sir. Q. Tell his Lordship and the jury please. A. I asked him if he heard about his wife had some poison. Q. Yes? A. And said "yes," he heard it. I said, "How did it happen, Adam? Did you give her any poison or not?" . . . He said "Yes, I give her in that whiskey" and he said, "Joe, I'll give you $1,500 if you make everything clear." I said "I want nothing to do with it." Q. When he said that—he would give you $1,500 that you should make everything clear—did he make any suggestion as to how you should make it clear? A. Yes. Q. What was that? A. About seeing a doctor. Q. What did he say? Give his words. A. He said, "You go and see a doctor unbury her, take her body out of the grave and the doctor shall say she got no poison." . . . He said "I said to" (told?) "somebody else of this cause and I nearly got in trouble, and I tell you to keep quiet, don't say anything?"

ALTA.
S. C.
REX
v.
NEIGEL.
Beck, J.

The witness also related a continuation of the same conversation having reference to the prisoner's relations with Julie Giesinger (wife of Bruno Giesinger) with whom he had had illicit relations.

Naturally Joseph Fieger was cross-examined with regard to this conversation and, perhaps naturally, he made the evidence which he had given under examination in chief somewhat clearer.

On cross-examination of Fieger it was also made to appear that some time in the spring—apparently after the preliminary, which, the accused having been arrested on February 27, was concluded about March 5. Fieger had made a statement to Mr. Begg, Crown prosecutor, which Begg put in writing and which the witness signed; and the witness also stated that immediately previously to the trial he had been interviewed by Fisher who asked him about what Adam Neigel had said to him. He said: "he (Fisher) had the papers (apparently meaning the written statement which Begg had written and the witness had signed) "and I had to tell him."

This written statement was not asked for by counsel for the defence and was not produced.

Counsel for the defence called a witness Voorschmit, who said that on April 12, 1917, he had had a conversation with Joseph Fieger.

Counsel for the defence than asked Voorschmit:—"Did you have any conversation with Joe Fieger regarding Neigel the accused, or his wife and the death of his wife?"

Counsel for the Crown interposed: "If this is intended to affect Fieger, counsel did not ask about this originally; it is not competent to ask a subsequent witness to contradict a prior witness on a specific statement."

Counsel for the defence replied: "You will recall that Fieger was asked if he ever talked the matter over with any one and he said: No."

The witness having answered the foregoing question, counsel for the defence submitted that he had a right to ask what the conversation was.

The judge took time to consider and the examination of another witness as proceeded with.

Later the judge said: "With respect to the question of law arising out of the evidence of Voorschmit, I feel satisfied that

Begg (counsel for the Crown) is correct in his statement of the law. However, if the other side so desires, I will give them the opportunity of recalling Fieger, whose evidence they want to contradict; so that if Davidson (counsel for the defence) wishes to recall the witness Fieger for re-examination on that particular point, he is at liberty to."

Joseph Fieger was then recalled for further cross-examination by the defence. He was asked the question:—"Q. Did you tell S. P. Voorschmit, in the presence of Christian Weiss, on April 12, 1917, that Adam Neigel did not tell you that Adam Neigel had given his wife poison?"

He denied having said "anything like that to him.". He said that Voorschmit and Weiss came to his place about 4 or 5 o'clock in the afternoon, stayed all night and left in the morning; that they, the three, talked together for several hours. He said that Voorschmit (a detective) "asked me if I know Adam Neigel and I said, Yes. He said: Did he behave well? I said: Yes, as far as I know; but he never asked me about poisoning or anything like that."

Asked by counsel for the Crown why he did not tell Voorschmit and Weiss what the prisoner had told him, he explained that he had been visited by Sergeant Fisher in March and that Fisher had told him not to say anything about it to anybody but just to keep quiet. He said that both Voorschmit and Weiss became very drunk on the occasion referred to but that he, himself, though he drank a great deal, was not drunk.

It is to be noted that Fieger did not admit, but on the contrary denied having made the statement to Voorschmit in the presence of Weiss that Neigel did not tell him that he (Neigel) had given his wife poison or having made any similar statement. The defence therefore had a right to prove that the witness had made a statement.

Voorschmit was consequently then called back to the witness stand. I extract parts of his evidence:—

Q. Will you just tell us what conversation you had with Fieger? A. When we came in there, I told him, "Mr. Fieger, I've come from the defence of Adam Neigel; I'd like to know if we could get any information from you in regard to his case." "Well," he said, "I don't know much about it." I said, "Well, do you know Adam?" He said, "Yes, I know him very well; he is a good fellow, and I don't think that what is going on is true." I asked

ALTA.

S. C.

REX v. NEIGEL.

Beck, J.

him, "Did you ever buy any cattle from Adam Neigel?" He said, "Yes, I bought a cow, but it was after his wife was dead." I said, "Was there anything said at that time by Adam Neigel, to you in regard to Adam's wife dying?" "No," he said, "and if there was anything said I was drunk, I must have been drunk." I said, "Now listen here, was there not by you that Adam Neigel told you he had slain his wife?" "Oh, hell! no!" he said; "I know Adam well; he didn't do that." Well, the conversation was over, etc.

On cross-examination by counsel for the Crown the witness stated that he was a detective, that he had been employed by the defence, that he had made it public on April 8, that he was a detective and that he had told Fieger so on the occasion of the conversation on the 12th. Further on the witness said that he went around to practically all the families in the neighbourhood—"Adams family and Zahn's and Giesinger's and all the families and the neighbours, and some of the neighbours talked of what Joe Fieger said in Schuler that Adam Neigel had told Joe Fieger that he had given his wife poison and that is the reason I went to Fieger." Weiss was also called and gave evidence similar to that of Voorschmit.

The defence had thus given evidence which it believed would establish that the witness Fieger had on a previous occasion, made an oral statement to Voorschmit in Weiss' presence inconsistent with his testimony at the trial.

In rebuttal the Crown called Aloysius Fieger, the father of Joseph Fieger, and elicited from him a statement that Joseph Fieger had told him very shortly after the death of Mrs. Neigel that "Adam Neigel had told him that he had poisoned his wife and would give him money, $1,500, to bribe a doctor and to make the matter good." This evidence was expressly tendered by counsel for the Crown in order to remove the doubt sought to be cast upon the evidence of Joseph Fieger. Counsel for the Crown saying: "This witness is purely and simply on the point that, having made a statement to his father at the time, Joseph Fieger's present statement in Court is quite consistent with that, and his evidence should not be reflected upon or impeached by "(the attention of the jury being directed to the evidence of) Voorschmit and Weiss." Counsel for the defence objected to the questions which brought out this evidence from Aloysius Fieger but in no way disclaimed a purpose of making the suggested use of Voorschmit and Weiss' evidence.

It is this evidence of Aloysius Fieger which we have to pass upon as properly or improperly admitted.

It seems quite evident that the purpose of counsel for the accused in cross-examining Joseph Fieger with reference to the conversation between him and the prisoner was to cast doubt in the minds of the jury upon the veracity of Fieger by showing that he had made on another occasion a statement inconsistent with his then present testimony involving the suggestion to the jury that the witness' evidence in the witness box was a fabrication.

And the straight question confronts us: Was the Crown at liberty to call evidence in rebuttal to show that the witness had prior to the inconsistent statement, made the same or substantially the same statement as given in his testimony before the Court; "for the purpose of rehabilitating him as a witness." The question is discussed at some length by Wigmore in his (the 16th) edition of Greenleaf on Evidence, secs. 647 *et seq.* Wigmore also discusses it with more extended reference to authorities in his work on evidence, sec. 1126 *et seq.*

In 40 Cyc. tit. "Witnesses" pp. 2760 *et seq.* the matter is summed up as follows:—

> In some jurisdictions it is considered proper to shew that a witness assailed by proof of inconsistent statements has also made other prior statements consistent with his testimony; but the weight of authority is in support of the view that the witness cannot, in such case, be sustained by proof of prior consistent statements, *unless* the purpose of such proof is to rebut an imputation of recent fabrication or (recent) motive to falsify and not *merely* to offset the effect of the proof of inconsistency.

The question is touched upon in Roscoe's Criminal Evidence, 13th ed. p. 90, and in Taylor on Evidence, 10th ed., sec. 1474.

I am satisfied to leave to others to discuss the arguments for or against the acceptance of such evidence as here objected to and to content myself with following the recent decision of the English Court of Criminal Appeal in *R.* v. *Benjamin* (1913), 8 Cr. App. R. 146, where the Irish case of *Reg.* v. *Coll* (1889) 24 L. R., Ir. 522, is followed.

The Lord Chief Justice said as follows:—

> Mr. McDonald, counsel for the prisoner, suggested in his (opening?) address to the jury that the story of the chimney was untrue, and was an afterthought; on the ground that the witness had said nothing about the chimney in his depositions before the magistrate. The note book (which counsel for the defence contended was wrongly admitted in evidence) showed that Jones mentioned the chimney to his inspector before the proceedings

ALTA.

S. C.

REX v. NEIGEL.

Beck, J.

in the Police Court, and the note book was produced to verify that fact. Then McDonald said that the note book was a forgery. The book was not put in as evidence, but in order to shew that, unless the book was a forgery, the story of the chimney was not an afterthought. *Reg* v. *Coll*, is a case where a previous statement of a certain witness, not made in the presence of the prisoner, was put in evidence in order to rebut the charge that his story as told at the trial was an afterthought. That is exactly the case here.

I think that it is not material whether the afterthought is suggested to be recent or not.

I think, therefore, that the evidence of Aloysius Fieger was not improperly admitted.

Q. 7 takes exception to the jury being told that the Governor-General-in-Council might commute the sentence of death in the event of the prisoner being convicted.

I can see no objection to the jury being so informed, especially where the judge told them in substance, as any judge would under like circumstances naturally do, that they must give their verdict in accordance with the evidence without regard to the consequences, the responsibility for which rested elsewhere.

This information was upon a point of the general law of the land which not only were they presumed to know, but, in all probability, did know; it is difficult, indeed, to suppose that the members of the jury had not learned long before from newspapers and otherwise that the penalty for murder is death but that the Government at Ottawa quite often commutes that sentence.

In my opinion therefore the conviction should be affirmed.

Simmons, J.

SIMMONS, J., concurred with Stuart, J.

CAN.

S. C.

ARCHIBALD v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

FISHERIES (§ I B—5)—MUNICIPAL REGULATION—LICENSE—MANDAMUS.

The right of a riparian owner or occupant under c. 18 of the Nova Scotia Statutes 1912, as amended in 1916, to receive a licence from the municipal authorities for an exclusive fishing right, upon tendering the statutory license fee, is absolute, and cannot be destroyed by municipal regulation; the issue of the licence may be compelled by mandamus.

[*The King* v. *Archibald*, 35 D.L.R. 560, affirmed.]

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia 35 D.L.R. 560, ordering a writ of mandamus to issue against the appellant.

The prosecutor, Hensley, was an occupant of land in the

County of Halifax and entitled to a licence to fish in Indian River in said county. The County Council had never passed the by-law authorized by s. 7 of the Fisheries Act for the issue of licences and regulation of the fees and on his application a writ of mandamus was issued directed to the clerk of the council ordering him to issue the licence. This appeal is from the judgment ordering the issue of the writ.

Statement.

Power, *K.C.*, for appellant.

Rogers, *K.C.*, for respondent.

FITZPATRICK, C. J.:—At first sight I thought, as I suppose any one would have thought, that this action was misconceived in that the mandamus should have been asked to be directed to the municipality of the County of Halifax rather than to one of the corporation's officials, namely, the appellant, the municipal clerk.

Fitzpatrick, C.J.

Upon consideration, however, I have come to the conclusion that the judgment appealed from is right.

The reference in the Act Respecting the Rights of Fishing in the Province of Nova Scotia (Acts of 1912, c. 18), to municipal councils, is in section 6 which provides:—

> 6 (*i*) The municipal councils may by by-law provide for the issue of licences under this Act, and fix and regulate the fees to be paid by occupants for such licences in respect to fishing rights appertaining to lands within their respective municipalities, but no fee payable for any licence issued under this Act shall exceed the sum of fifty dollars.

Now this section is *primâ facie* only permissive and in order to see whether it should be read as imperative we must consider whether any further provision essential for the working of the Act is left to be provided by the municipal councils. I do not think it is; the nature and purpose of the licences not only clearly appears in the Act, but the form of a licence which "any occupant may obtain" is given in the schedule to the Act; there is provision for the dating of the licence and the period for which it shall remain in force; then it is provided that the "licence shall be issued by the municipal clerk" and there is a section imposing on him the further duty of keeping a record shewing the particulars therein set forth concerning all such licences issued, such record to be open for inspection as herein mentioned by any person without charge.

Now if the permissive section 6 were not in the Act at all

CAN.
S. C.
ARCHIBALD
v.
THE KING.
Fitzpatrick, C.J.

there is here a sufficient machinery for carrying out the intention of the legislature without the necessity of any by-laws being passed by the council to "provide for the issue of licences." No fees can be taken unless the fees to be paid are fixed and regulated by the council, but they are in no way essential to the issue of the licence; if the council does not choose to exact any fees it is so much to the advantage of the licensee; for it is not to be supposed that he is to be deprived of his right to obtain a licence because the council do not exercise the right for which permission is given to fix the fees to be paid.

The Act not having imposed any obligatory duties on the council but only given permission for the exercise of rights which must be regarded rather in the light of privileges, the duties expressly imposed on the clerk of the council, the named official, must be treated as imperative and addressed to him personally. For the fulfilment of his duties he requires no authority or instruction from the council. The duties are not judicial or discretionary but purely administrative, and that being so I think a mandamus will lie to compel him to perform them and to issue a licence in a proper case.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J. (dissenting):—I think the direction given by the statute to the clerk of the municipality is dependent upon the by-law having been passed by the council providing for the issue of the licences and fixing the fees which should be paid for them.

As stated by the Chief Justice of Nova Scotia, I think it was the clear duty of the council to have made such provision and that of the clerk to have acted upon it, and issued the licence in accordance with it. But I cannot construe the Act as authorizing the clerk to issue licences free because no by-law had been passed.

In my judgment the mandamus should have issued not to the clerk to issue the licence but to the council to discharge its clear statutory duty of providing for the issue of the licences and for the fees payable on them.

I would therefore allow the appeal on this sole ground and not on those suggested by the appellant's counsel that the municipal council was vested with the power of determining whether or

not there should be public fishing on and through an occupant's lands, or whether or not fishing licences should be granted.

I do not think any such power was conferred on the council by the statute. Their duty was simply to make regulations providing for the issue of licences and fixing the fees to be charged for them. On that being done their clerk's duty was to issue the licences in accordance with their regulations. If they refused or failed to discharge that duty they can be compelled by the court to perform it.

But their neglect or refusal does not confer upon their clerk the right or duty to issue licences without payment of any fee or at a fee he may determine, or to determine what degree of neglect on the council's part vested the right and power in him to issue the licences.

IDINGTON, J.:—I think the construction of the statute in question adopted by the court below in granting the relief prayed for as against the appellant, is well founded. Clearly sections 4 and 5 are independent of the rest of the statute and for the express purpose of enabling occupants, such as the prosecutor, of land, other than owners of timber land, to enjoy their own property free from the exercise of the rights given to strangers elsewhere in the statute. Idington, J.

S. 5 enabled such occupants to protect themselves, and s. 7 enabled the public to ascertain whose lands had become so protected, and strangers were prohibited from entering thereon for fishing purposes.

S. 6 is simply a permissive power given the municipal councils named therein to derive revenue by fixing a fee to be paid by those concerned on obtaining the licence.

I think the appeal should be dismissed with costs.

DUFF, J.:—This appeal should be dismissed with costs. Duff, J.

ANGLIN, J.:—If the statute had remained as it was in 1912 a great deal might have been urged in support of Power's contention that the legislature had left to the municipal council the right to determine whether or not the procuring of a licence should be "imposed" on the owners of several fisheries as a condition of preserving their rights. Under the Act of 1912 it was only where the council had provided by by-law for the issue of such licences that the right of fishing in inland waters Anglin, J.

CAN.

S. C.

ARCHIBALD v. THE KING.

Anglin, J.

bordering upon privately owned "uncultivated land," (not being "timber lands"), was conferred on residents of the province. Until the council saw fit to exercise the powers given to it by s. 6, the public right did not accrue and it was unnecessary for the "owner" or "occupant" to exclude it by obtaining a licence from the municipal clerk. It would seem not improbable that under such circumstances the duty of the clerk to issue such a licence would arise only if the council had passed a by-law "imposing licences."

But the amendment of 1916 entirely changed the situation. Thereafter, the public right conferred on residents of the province exists whether a by-law under s. 6 providing for the issue of licences has or has not been enacted. In order to preserve his private right and to exclude the public the owner of "uncultivated land" must now obtain a licence. The effect of the change in the statute, in my opinion, is not, as argued by Power, merely to remove a restriction upon the public right of fishing imposed by the earlier Act, but also to change the character of the duty imposed by s. 5 on the clerks of municipal councils and to take from the councils the right to determine whether uncultivated lands of private owners or occupants should or should not be subject to the provisions of the statute—leaving it in their discretion however to "fix and regulate," within the prescribed limit, and subject to the approval of the Governor-in-Council, what fees, if any, such owners or occupants should be required to pay for the licences which s. 5 requires the municipal clerks to issue. The duty of the latter to issue licences is no longer dependent upon the exercise by the councils of their powers under s. 6. Upon payment of the fees fixed by the council, if any, or, in the event of the council failing to exercise the power conferred by s. 6, without payment of any fee, the clerk is obliged to issue a licence in the prescribed statutory form. Otherwise it would be left to the discretion of municipal councils to determine whether the private fishing rights of "occupants" should be conditionally preserved or unconditionally confiscated—a result which it is scarcely conceivable that the legislature contemplated.

While I think it quite probable that it was intended to impose a duty upon municipal councils to provide for the issue of licences —leaving to their discretion the amount of the fees (if any)

to be exacted (within a prescribed limit)—I am not satisfied that that intention has been expressed. Although the word "may" is taken as equivalent to the word "shall" where "the doing of a thing for the sake of justice or the public good" is authorized, its *primâ facie* connotation is permissive or enabling. I am not satisfied that it is not so used in s. 6. Having regard to s. 23 (11) of the Interpretation Act (R.S.N.S. 1900, ch. 1), only a clear case of impelling context would justify giving it an imperative construction. The use of the word "shall" in s. 5 indicates that the word "may" was used advisedly in s. 6 and in a permissive or enabling sense. Moreover, there would appear to be grave difficulty in the way of curial enforcement of any such duty as it has been suggested is imposed upon the municipal councils by s. 6, especially in view of the provision of sub-sec. 2 which subjects any action taken by them to the approval of the Governor-in-Council.

It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee. *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214, at 241.

No such obstacle presents itself to the enforcement of the duty imposed on the clerk by s. 5.

It seems to me probable that the clerk would have a right to demand indemnity from the municipal council for any expenses properly incurred by him in carrying out the provisions of ss. 5 and 7. But if not, the fact that no provision is made for such expenses does not alter the imperative nature of the duties imposed upon him by the statute or deprive the respondent of the right to invoke the aid of the court to compel their performance.

Appeal dismissed.

REX v. KLEPARCZUK.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. February, 15, 1918.

NEW TRIAL (§ II—8)—MISDIRECTION.

A misstatement of evidence by a trial judge, however trivial, to the jury, and his refusal to correct it, is good ground for a new trial.

Statement.

CASE reserved by Scott, J., before whom accused was tried and convicted on a charge of theft.

E. B. Cogswell, for the Crown.

A. F. Ewing, K.C., and *H. H. Robertson*, for accused.

ALTA.

S. C.

REX v. KLEPARCZUK.

Harvey, C.J.

HARVEY, C. J.:—The first question reserved which requires consideration is: Was there any evidence justifying the conviction?

The accused was employed as a porter in the Post Office with somewhat general and more or less undefined duties. On the night of the alleged theft he was at work sorting and stamping letters. He was being kept under observation by one Moss who was supposed to be a fellow employee working in the office but who was in fact a detective who had been placed there by the Post Office Department by reason of suspicions of stealing.

Accused was sorting the letters brought in by the collectors and placed on the sorting table a little after midnight. There were several other clerks working about in different places. He was separating the letters which were placed face up, putting in one pile those with a 2c stamp or city letters and in another the 3c or dispatch letters. He then put the 2c letters through the stamping machine and carried them over to the proper case for city letters. Moss says he observed that accused examined with his fingers several 3c letters and that he saw him after this examination place at least three of such letters under the pile of 2c letters which he was preparing for the stamping machine. In his course to the case where the city letters were to be placed he did not go by the shortest route. He passed out of Moss's sight and Moss says that when he came back into his sight he had no letters in his hand. Moss then went to a night superintendent and disclosed to him that he was a detective and took him to accused whom he told that he was a police officer and intended searching him for the letters he had just taken and asked what he had done with them and Moss says that he replied, "What letters? I have no letters. I haven't got any letters." Accused had on overalls which had two pockets in the bib in each of which was a glove or mit. These overalls were unbuttoned and pulled down by Moss who proceeded to search through accused's waistcoat pockets whereupon accused pulled out of his trousers pocket five letters with 3 cent stamps addressed to outside points and all just through the stamping machine bearing the post mark with the time of that stamping. He was then placed under arrest.

One of the letters was opened at the trial and was found to

contain a document enclosed. Another was sworn by the writer of it to contain a dollar bill. There is no evidence of the contents of the others but they are thick and may contain enclosures.

It was shewn that it was against the rules for employees to put letters in their pockets and that accused had been reproved shortly before for putting letters in his pockets and cautioned against doing it again. I feel no doubt that upon the facts related a jury would be justified in inferring that accused had taken the letters intending to steal them. It is true that the accused gave a very plausible explanation of at least some of the circumstances and in some respects contradicted Moss and if the jury had believed him he would have been entitled to an acquittal, but the weight to be attached to his evidence was entirely for the jury's consideration and they were not bound to believe him.

I would, therefore, answer this question in the affirmative.

It thus becomes necessary to consider some of the other questions reserved, the first of which is:

Did I misdirect the jury when, in outlining the appellant's evidence and explanation, I charged as follows:—

> That he (*i.e.* the accused) then put them into his pocket and that he then took them intending to take them to the dispatch table where they properly belonged, that he put them in his pocket and on his way over he thought that he would take the truck over, that was at the point "P"?

Exception was taken by counsel for accused to this after the jury retired but the trial judge, no doubt being satisfied that he was right, declined to alter the charge.

It is admitted by counsel for the Crown that the trial judge was in error in this, and that it is not a fair presentation of the accused's evidence on this point, but he urges that if it had been put in the way accused put it it would have told more against him than as it was put and, therefore, no substantial wrong was done. I think, in any case, it would be very difficult to come to any such conclusion with certainty because one cannot tell just what effect any circumstance, however trivial, if material, may have on a juror's mind and it seems clear that on the evidence in this case there can be no such certainty. I think, therefore, that the trial judge was in error in his statement of the evidence to the jury and in his refusal to correct it and that it cannot be said that no substantial wrong has been done and consequently

ALTA.

S. C.

REX v. KLEPARCZUK.

Stuart, J.

the conviction should be set aside and a new trial ordered without regard to the other questions submitted.

HYNDMAN, J., concurred.

STUART, J.:—I agree with the view expressed by the Chief Justice but I desire to add a word in order to emphasize the distinction between evidence sufficient to show an intention to steal and evidence sufficient to show an act of stealing. Of course, a mere intention to steal is not sufficient to rest a conviction upon. There must have been some act, some dealing with the letters which, as they were originally lawfully in the accused's possession as bailee would be inconsistent with the true owner's continued constructive possession of them. I think there was sufficient, although perhaps barely sufficient evidence, if believed, to justify a jury in concluding that the accused had done an act in relation to the letters which was inconsistent with the possession of the Postmaster General. I would also like to add that inasmuch as the accused did not know the authority or position of Moss as an officer until it was suddenly and unexpectedly asserted, the significence of his denial as to possession of any letters is not so strong as might appear. There is room for argument, at least that he was merely being independent and resenting interference by one who appeared to him to be assuming an authority which he might not have.

BECK, J.:—I agree that the conviction ought to be set aside on the ground of misdirection. But I do not agree that there should be a new trial.

I think that the evidence for the Crown taken by itself would leave such a state of circumstances as to make "not guilty" at least the more reasonable verdict, but when the accused gave his explanation, I think the case was brought clearly within the rule of decision laid down in *R.* v. *Schama* (1914), 11 Cr. App. R. 45, by the Court of Criminal Appeal where the rule is stated that where theft is sought to be proved by recent possession the accused ought to be acquitted if he has given a reasonable explanation, though the jury were not convinced of the truth of the explanation. See this and other cases referred to by me at greater length in *Rex* v. *O'Neil*, 9 A.L.R. 365 at 401.

FERRARA v. NATIONAL SURETY Co. CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. December 11, 1916.

PRINCIPAL AND SURETY (§ I B—14)—*Building contract—Alteration—Non-disclosure—Discharge of surety.*]—Appeal by plaintiff from a judgment of the British Columbia Court of Appeal, 27 D.L.R. 518, 22 B.C.R. 15, dismissing (by an equally divided court), an appeal from a judgment of Murphy, J., in an action on a bond for the due execution by certain contractors of a contract they had entered into to build an apartment house.

The contractors having made default under the contract the surety stepped in to complete it, but subsequently denied all liability.

At the trial, all the issues raised in the defence were found in favour of the plaintiff, but it developed that the contractors had made use of mortar which the architect testified was not, in his opinion, suitable and was the cause of some trouble during the erection of the building.

The trial judge held that this was a change in the specifications of which, under the bond, the appellant (plaintiff) should have given the respondent notice, and that his failure to do so relieved the respondent from liability under the bond.

The present appeal was allowed, Davies and Anglin, JJ., dissenting.

Stuart Livingston, for appellant; *R. M. Macdonald*, for respondent.

The court held that in the specifications there were no precise proportions fixed for the ingredients of the mortar to be used and there was no evidence as to what was actually used beyond the general statement of the architect that there was not enough cement in it.

The appellant knew very little about building details and left everything to his architect, the vague statement of the latter that the appellant wanted everything kept on a pleasant footing amounted to very little. The contractors should not have used nor should the architect have permitted them to use any materials which might have injuriously affected the building, the building was, however, braced up and no permanent harm was done.

The reason and purpose of such a bond as this should be con-

CAN.
S. C.

sidered. It was when difficulties and complications arose as they had in this case that a bond was desirable and if too strict a construction of the duties of the obligee were adopted in such transactions there would always be some technical error or omission on his part, which would render the bond void.

On the evidence there had not been "any change or alteration by the principal or obligee made in the plans or specifications for the work," failure to give notice of which would render the bond void.

DAVIES, and ANGLIN, JJ. (dissenting), held that the proper proportion of cement was kept out of the mortar with plaintiff's knowledge and sanction and without the surety's knowledge, and inferior mortar used, and that this was a change or alteration in the specifications and unless consented to or waived by the surety would discharge it from liability.

That it was neither consented to nor waived was clear from the fact that the surety had no knowledge of the change having been made until after suit was commenced. *Appeal allowed.*

[The material clauses of the bond are set out in 27 D.L.R. 518.]

FRANKLIN v. REARDON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 26, 1917.

CONTRACTS (§ I C—29)—*Company—Transfer of shares—Specific performance.*]—Appeal from the judgment of the Supreme Court of Nova Scotia, 35 D.L.R. 380, 51 N.S.R. 161, reversing the judgment at the trial by which the action was dismissed. Affirmed.

F. H. Bell, K.C., for appellants; *Mellish*, K.C., for respondents.

By agreement between the parties, stock of a theatre company was to be transferred to the plaintiff Reardon and his nominee, who brought action to enforce it claiming a mandatory order for the transfer and for election of plaintiff and his nominee as directors, and judgment as prayed was given in his favour.

After hearing counsel the Supreme Court of Canada, with consent of both parties, varied the judgments below by striking out the order restraining defendant from excluding plaintiff and his nominee from being directors and from selling stock to any others. *Appeal dismissed.*

Re McGIBBON, AN INFANT.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. February 23, 1918.

GUARDIAN AND WARD (§ I—1)—APPOINTMENT AND REMOVAL—DOMICILE.

Where the natural and legal guardian and the person seeking to be made the judicial guardian of an infant are both domiciled and resident within the province where the application is made, the Court has jurisdiction to set aside the natural and legal guardian and appoint another guardian, although the infant is at the time residing outside the province.

[*Re Willoughby*, 30 Ch.D. 324, referred to.]

Statement.

APPEAL by plaintiff from an order of McCarthy, J., dismissing an application to change the custody of an infant. Reversed.

C. H. Grant, for appellant; *F. Ford*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J., concurred with Stuart, J.

Stuart, J.

STUART, J.:—On October 3, 1917, Berta McGibbon, the mother of the infant, obtained on an *ex parte* application an order from Hyndman, J., restraining Salton McGibbon, the father, from removing the infant from the place where he then was, until further order of the court. The order also contained a summons directing all persons concerned to attend at a certain time and place and shew cause why the custody of the infant should not be given to the mother. The father attended by his counsel upon the return of the summons and opposed the application which was heard in Chambers by McCarthy, J. It appeared from the material presented that the infant was at the time in the actual custody and care of a sister of the father who resided in Ontario. Objection was taken that the court had in such a state of affairs no jurisdiction to deal with the question of the custody of the infant and to this objection the judge gave effect and dismissed the application. His reasons were expressed as follows:—

> It is argued that there is no jurisdiction in the court to grant an order in the nature of a writ of *habeas corpus* where the child is beyond the territorial jurisdiction of the court. It is submitted that there are three classes of cases in which the court might issue a writ of *habeas corpus* or an order in the nature of such a writ where the child is actually beyond the jurisdiction of the court, namely (1) where the child is a ward of court, (2) where the child has been removed to evade process about to be issued and (3) where the removal from the jurisdiction and detention elsewhere are illegal.

Then, holding that no one of these conditions was shewn to exist, he dismissed the application and from that dismissal the mother has brought this appeal.

It appears that the child is a British subject and that the

ALTA.
S. C.
RE McGIBBON.
Stuart, J.

father and mother are both residing in Alberta. There is the further inference, which may, without question, be made from the evidence that the father, and consequently the mother, are domiciled in Alberta. The father indeed is a practising physician in the city of Edmonton. The child is about four years old and of course his domicile is that of the father. He is, therefore, legally domiciled in Alberta. It appears, also, that unfortunate disagreements and difficulties have almost, from the time of their marriage, which took place in Vienna, existed between the father and mother, that for a time they had gone to live in the State of Idaho, that the father, however, decided to return to Edmonton and resume the practice of his profession here, which he did, but that he left the mother and child in Idaho, that afterwards he persuaded his wife to return to Edmonton with the child, one of his reasons for so doing being that unless he did so, so he was advised, the courts of Alberta were powerless to help him in respect of the question of the absolute control and custody of the child; that, after an abortive attempt at a separation agreement he decided to send the boy to Ontario to his sister, to be there taken care of. The mother was apparently not consulted in regard to this and did not agree to it.

There is in the affidavits before the court, a great mass of material which is not relevant to the question of jurisdiction, but consists largely of charges and recriminations between the father and mother. I do not think we should here concern ourselves with the merits of the dispute over the custody of the child or with the truth or falsity of these mutual accusations. If the judge was right upon the question of jurisdiction, that will end the matter in this court for the present at least. If he was wrong, then it would be more convenient and proper for a single judge to deal with the merits of the case because he could have the parties before him and would have the advantage of cross-examinations if either he or counsel so desired.

What then is the position as to the question of jurisdiction?

There is no doubt, upon the authority of such cases as *Hope* v. *Hope*, 4 De G.M. & G. 328, 345, 43 E.R. 534, and *Re Willoughby*, 30 Ch. D. 324, that if the infant in question here, being a British subject, were resident in France or Spain or the United States, some British or Canadian court would have authority to deal

with the question of the appointment of a guardian. It is also clear from the decision in *Johnstone* v. *Beattie*, 10 Cl. & F. 42, 8 E.R. 657, a decision of the House of Lords, that the appointment of a guardian is merely the means adopted by the Court of Chancery for exercising its superintendence over, and its power of protection, of infants.

The question here is, who shall be the guardian of the person of the infants? In a proper case the Court of Chancery would interfere even with the natural guardianship of the father. *Johnstone* v. *Beattie*, *supra*.

The infant, however, is not in a foreign country. It is residing in a Canadian province where there is a court, no doubt with as ample jurisdiction as this court has, in regard to the custody and care of infants. As between the court of the jurisdiction where the infant is temporarily residing and that of the jurisdiction where it is domiciled and where the father and mother are domiciled and reside which court has jurisdiction? Or has each jurisdiction?

In A. & E. Encyc. of Law, 2nd ed., vol. 15, p. 33, in an article upon Guardian and Ward, the following principles are laid down:—

> The particular court, whether a Court of Chancery or a statutory court which has the right and owes the duty to appoint a general guardian, that is a guardian over both the person and the estate of the ward is the one within whose territorial jurisdiction the ward is domiciled. But as a guardian's authority as a matter of strict legal right is restricted to the country and in the United States to the State, in which he is appointed, if an infant resides in a country or State other than that of his domicile it may be necessary for his protection to have a legal guardian there. In such a case the residence of the infant within the State is sufficient to give to the courts of the State jurisdiction to appoint a guardian. In such cases, however, the courts will generally in a spirit of comity recognize the authority of the guardian appointed in the State or country of the infant's domicile.

The English authority given for these statements is the case of *Johnstone* v. *Beattie*, *supra*. While the principle laid down in the passage cited seems to me to be sound law as being in consonance with right reason and common sense the case cited only inferentially supports it. In that case a father domiciled in Scotland had died leaving a widow and infant child and had by his will appointed tutors and curators for the infant's estate and person. The widow took the child to England and resided with it there for 3 years chiefly for its health and her own and then died

ALTA.
S. C.
RE McGIBBON.
Stuart, J.

leaving the child still in England. The House of Lords decided unanimously that the Court of Chancery in England had jurisdiction to appoint a guardian of the person of the infant although Lords Brougham and Campbell were strongly of opinion that such an appointment ought not, in the particular case, to be made. But the other law lords, even in deciding that an appointment could properly be made, clearly proceeded upon the ground that from the mere fact of the infant being in England it was proper for the court to appoint a guardian as a means of exercising that protection which every infant is entitled to, and may at any moment be found to need, from the court. The Lord Chancellor said:—"It is proper that I should state that, according to the uniform course of the Court of Chancery, which I understand to be the law of that court, which has always been the law of that court, upon the institution of a suit of this description the plaintiff, the infant, became a ward of the court—became such ward by the very fact of the institution of the suit and being a ward of the court it was the duty of the court to provide for the care and protection of the infant; and as the court cannot, itself, personally superintend the infant, it appoints a guardian who is an officer of the court for the purpose of doing that on behalf of the court, and as the representative of the court, which the court cannot do itself personally."

I quote the above chiefly to shew what is meant by an infant being a ward of the court, to which some reference was made on the argument. But all the judgments when read throughout and as applied to the facts of the present case indicate very clearly that while the courts of Ontario would undoubtedly have jurisdiction to appoint a guardian of the infant in question for the purpose of exercising that protection which a helpless infant of 4 years of age may at any time need from the state, yet the existence of this jurisdiction does not exclude the general jurisdiction of the courts of the infant's domicile, that is, in the present case, the courts of Alberta.

In the case of *Re Willoughby*, 30 Ch. D. 324, the infant concerned was a British subject, but had been born in France, and her father had also been born there. The child was in France and had no property in England. Her mother was a Frenchwoman and was guardian according to French law and was residing

in France. Yet the Court of Appeal decided that the English court had jurisdiction to appoint an English guardian. The decision went upon the ground of British nationality. The difficulty in making an order where there was "neither property nor person here against whom it could be enforced" was considered and was not deemed to be an obstacle or objection. The possibility of a collision with the French courts was also carefully considered and the court simply expressed a confidence that the courts of France would do what was proper in the circumstances and would have due regard to the decision of the courts of the country of the child's nationality without even suggesting that the French courts ought necessarily to give effect to the English order. The judgments of Cotton, L.J., and Lindley, L.J., are interesting and instructive and certainly suggest that *a fortiori* the court would have acted if, as is the case here, there had been persons within the jurisdiction against whom an order could be enforced.

Now we have not here a question of distinct nationality in the courts. The child in question is a British subject, but instead of its being a question between a British court and the courts of a foreign nation, it is a question between the courts of two Canadian provinces. It seems to me, as I have said, that the principle of domicile should be applied in such a case. If, for example, the infant in question were in the State of Montana instead of in Ontario, but the other facts were the same, while it is possible that the Chancery Division in England, if applied to, might upon the principle of the *Willoughby* case make an order, I venture to think that it would at least pay very serious attention to a suggestion that the court of Alberta, a part of the King's Dominions, having jurisdiction in regard to infants equal to that of the English Court of Chancery and being the court of the infant's domicile as well as of the residence and domicile of the father and mother, the contending parties, and being in the geographical neighbourhood of Montana, would be a more suitable tribunal to deal with the matter. At the present day I think the views suggested by Lords Brougham and Campbell in *Johnstone* v. *Beattie*, *supra*, would have great weight.

Certainly, if the circumstances were reversed and the father and mother resided and were domiciled in Ontario and the father had only temporarily sent the child to Alberta to live with his

ALTA.

S. C.

RE McGIBBON.

Stuart, J.

sister, this court ought to and would recognize the general jurisdiction of the courts of Ontario to decide any controversy between the father and mother as to the proper custody of the child, while, of course, retaining our right to appoint a guardian here, if in any particular circumstances it were shewn to be necessary for the proper protection of the child while here. And as said in the *Willoughby* case, the Ontario courts may give effect to any order which may be made here, although it is not for us to say that they ought to do so. That would be entirely a question for the judges of those courts to decide.

From the words used in the judgment appealed from and above quoted, I am strongly inclined to think that the learned judge took too narrow a view of the nature of the application before him. He speaks of its being a matter of *habeas corpus* or of an order in the nature of *habeas corpus*. Now, while it is true that the Court of Chancery could, in aid of its jurisdiction, issue the writ of *habeas corpus* I think it likely that it was the mere legal jurisdiction of the common law courts that the judge had in his mind. That jurisdiction existed merely to prevent illegal detention and to vindicate legal rights. It is true that the common law courts would refuse to give effect to the legal right of custody where it was shewn that the person demanding it had forfeited it by certain sorts of misconduct. But the jurisdiction was much narrower than that of the Court of Chancery. The distinction is clearly explained by Lord Esher, M.R., in *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232 at 238, 239 and 240.

The present application was not made by the mother, on the ground that she had a legal right to the custody of the child. Her application was made to this court as possessing all the jurisdiction of the Court of Chancery in England on July 15, 1870, and under the Infants' Act 1913, which in no way restricted the former jurisdiction and was intended to obtain a declaration from the court that the father, as natural and legal guardian, should be set aside and the custody of the infant given to her. She applied to the court as the tribunal in this province exercising the King's prerogative as *parens patriæ* in superintending the question of the care and protection of infants, and her application was, in effect, an application to be appointed by the court guardian of the person of the infant. The appointment of a guardian other than the nat-

ural and legal guardian is the only way, as stated by the Lord Chancellor in the words quoted above from *Johnstone* v. *Beattie*, *supra*, in which the Court of Chancery can give its care and protection to an infant if it decides that the case is a proper one to set the natural guardian aside. It is true that there was, in keeping with present tendencies, little formality in the initiation of the proceedings and in the manner of the application to the court. But although the request was not in terms a direct one to be named as guardian that was certainly the substance of the application which was made.

Even with respect to the fact of the infant being a ward of court, which the judge thought was one ground of jurisdiction, though in this case non-existent, I think there has been some misapprehension. The significance of the expression "ward of court" is thus explained in Simpson on Infants, 3rd ed., page 206: "The term 'ward of court' properly means a person under the care of a guardian appointed by the court, but the term has been extended to infants who are brought under the authority of the court by an application to it on their behalf though no guardian is appointed by the court. As a general rule the court considers it to be for the benefit of the infant to be made a ward of court. An infant becomes a ward of court if an action is commenced in his name, whether with respect to his person or property, etc." It would seem, also, that in some cases payment of a small sum into court under the Trustee Act is used as a means of making an infant a ward of court. There is also the passage above quoted from *Johnstone* v. *Beattie*, from which it would appear that by the mere fact of the application the infant at once became a ward of court.

In any case, for the reasons given, viz,—because the child is domiciled here and the father and mother the contending parties, the one the natural guardian, the other seeking to be made the judicial guardian, are both domiciled and resident here, I think this court clearly has jurisdiction, if the case be shewn to be a proper one in which to do so, to set aside the natural and legal guardian and to appoint the mother the guardian of the infant. Certainly then the child would be a ward of this court. As to what further proceedings ought to be had or taken by the court or by the mother, if so appointed, I do not think we ought, at this stage, to make any

ALTA.
S. C.
RE McGIBBON.
Stuart, J.

express declaration. It may be that if the judge in Chambers decides to appoint the mother the guardian of the infant, she may be content with what rights or opportunities this appointment may give her in regard to securing actual custody of the child in Ontario. Or it may be that, inasmuch as the father may appear to have substantial control of the custody of the infant, she may ask the judge to order him to bring the child back to Alberta.

Here again, all we ought to decide is the question of jurisdiction. Now, once it is clear, as I think it is, that this court has jurisdiction to constitute the mother the guardian of the child it seems to me that it necessarily follows that the father being subject to the control of the court, there is jurisdiction to order him, in a proper case, to bring the child here so that the mother may be given the custody of it. I think this is clearly to be implied from the words of the English Court of Appeal in the *Willoughby* case and upon principle it must be so. The Court of Chancery acts *in personam*. I have never yet heard it suggested as a reason for not making a restraining or mandatory order that the person against whom it is directed, although within the jurisdiction, may conceivably choose to disobey and defy the court and to go to gaol in consequence rather than comply. It would, as I conceive it, be a peculiar case of impotency in the court if its authority over an infant, ordinarily domiciled here, would become nugatory merely by the passing of the child temporarily across the boundary into Saskatchewan, even without any intention of avoiding process while the person doing so and refusing to bring it back when ordered remained in Alberta. That he might conceivably prefer to go away from the province altogether is a contingency with which we have nothing to do. That might happen in every case of a mandatory order.

Surely no one would suggest, if these parties were in England and the father had sent the infant, even properly and legitimately at the time, to Scotland, that the Chancery Division there would hesitate, if it thought proper to do so, to order the father to bring the child back; nor do I think, if the parties were in Scotland and the father had sent the child to England, that the Scottish courts having the father subject to their control would defer to some supposedly superior position of the English courts and hesitate to issue a command to the father to return the child. I think the Supreme Court of this province occupies no such inferior position

as is suggested. The jurisdiction of the Lord Chancellor devolved upon the Court of Chancery and we have all the jurisdiction of that court. The English courts of first instance occupy no Imperial position any more than the Scotch courts do.

Stuart, J.

Of course all that has been said is quite aside from the merits of the case. I do not think we ought to decide these on mere affidavits without seeing and hearing the parties concerned. It is quite aside also from the question of the strong presumptive rights of the father. All proper consideration to these, as well as to the interests of the child, will of course be given by the judge before whom the application comes. It may quite well be that it may turn out to be unquestionably in the interests of the child to be left where it is for the present, even though this does involve a practical deprivation of the mother of her usual right at least to occasional access to the child to which she has given birth.

I think, therefore, the proper order is to allow the appeal with costs and to set aside the order dismissing the plaintiff's application and to remit the matter to a judge in Chambers to be dealt with by him upon the merits upon proper notice being given.

Beck, J.

BECK, J. (dissenting):—This is an application made under the Infants' Act (c. 13 of 1913, 2nd sess.) by the mother of the infant, as applicant, against the father, as respondent, for an order giving the custody of the infant to the mother, the infant at and for some time before the initiation of the proceedings being in the Province of Ontario.

It seems that the High Court of Justice in England, as the inheritor of the powers exercised by the former Court of Chancery, claims the right to appoint a guardian to the person of an infant, who is a British subject, without regard to his domicile or place of residence.

It seems to me that while so large a claim may perhaps be justified on the part of a court exercising jurisdiction under the legislative authority of a sovereign power; the authority of the courts of a colony—though a self-governing one—is necessarily much restricted; and that the jurisdiction of colonial courts is, in the case of persons, restricted to such persons as are at the moment of initiation of proceedings within the jurisdiction; though the jurisdiction may be, and to a large extent has been, extended by legislative authority, which proceeds to make it effective by

ALTA.

S. C.

RE McGIBBON.

Beck, J.

means of substituted or extraterritorial service and some method of sequestration of the defendant's property within the jurisdiction. See generally, Craies' Hardcastle's Statute Law, 2nd ed., pp. 393 *et seq.*, and 436 *et seq.*

So far as the infant himself is concerned there is, in my opinion, no ground upon which it can be said that he is subject to the jurisdiction of the court—he was not within the jurisdiction at the commencement of these proceedings; there is no statutory extension of the ordinary jurisdiction of the court (which is founded solely on actual physical presence within the territorial limits of the court's jurisdiction), which covers the infant.

In speaking of the infant, I have been speaking of him as an individual—dissociated from his parents. For it may be that a a court, by reason of having jurisdiction over one or both of the parents of an infant, with reference to some matter affecting the family, may have, as incidental to such family relationship, an indirect jurisdiction over the infant. For instance, in an action for alimony (assuming that, in an action by a wife for alimony the question of the custody of the children can properly be determined) or in an action for divorce (in such jurisdictions as possess courts which have power to grant divorce) it may be that the court dealing as it would, in these supposititious cases, with the family relationship might have jurisdiction incidentally to deal with the custody of the children of the parties, though the children should happen to be beyond the jurisdiction of the court; and in such a case the courts of the extra territorial jurisdiction might give effect to the order relating to custody.

But it seems to me that when the case is one in which the court is asked to make an order relating directly to the person of an infant actually beyond its jurisdiction, in no way having regard to the infant's property and in no way arising out of a proceeding relating the family relationship as the substantial object of the proceedings, this court has no jurisdiction, unless that jurisdiction is distinctly given it by statute; and avowedly the applicant puts her right upon the Infants' Act.

That Act deals with the infant, his person and his property, and only, incidentally, with his parents or either of them.

Assuming that the provincial legislature has power from some aspects to deal with the custody of an infant, presently out of its

ALTA.

S. C.

RE McGIBBON.

Beck, J.

jurisdiction, in some proceeding against the parent, the previous question arises, has it purported to do so? And in studying the statute for the answer, the strong presumption is that the legislature has intended to confine its operation to such persons and things, constituting the object of the legislation, as are, when the statute is invoked, within its territorial jurisdiction. Craie's Hardcastle's Statute Law, *supra*.

Looking at the Infants' Act, I do not think it was intended to deal with the custody of infants out of the jurisdiction of the court. No question arises as to the jurisdiction of a court over a person who has wrongfully taken or sent an infant out of the jurisdiction after proceedings relating to the custody of the infant have been commenced; for the father undoubtedly had an absolute right to the custody of his child, until that right was, if so be, taken away or restricted by the court.

I would, therefore, affirm the judgment of McCarthy, J., appealed from and dismiss the appeal with costs.

Hyndman, J.

HYNDMAN, J.:—I agree with the conclusion of Stuart, J., that the court has jurisdiction to entertain an application such as this, both father and mother being within the province notwithstanding the child was without the province at the time proceedings were launched.

I understand, however, that this is as far as the judgment is intended to go and in no way decides the question of the right of the court to order the father, who, at a time before any legal proceedings were begun, or when he was legally entitled to do so, took the child outside the province, to bring back or cause the child to be returned to the province. *Appeal allowed.*

Ex parte McFARLANE.

N. B.

S. C.

New Brunswick Supreme Court, Hazen, C.J., and White and Grimmer, JJ. February 22, 1918.

INTOXICATING LIQUORS (§ II B—40)—INSPECTOR—DISCRETION AS TO GRANTING LICENSES.

The Intoxicating Liquor Act, N.B., 1916, as amended by 8 Geo. V. c. 22 (9), gives the chief inspector power to investigate the merits of applications for beer licenses, and to grant or refuse them in his discretion.

Statement.

APPLICATION for a mandamus to compel the Chief Inspector under the Intoxicating Liquor Act, 1916, to grant a beer license which the inspector had formerly refused.

P. J. Hughes shews cause against a rule *nisi* for a mandamus.

J. J. F. Winslow, in support, *contra*.

N. B.

S. C.

EX PARTE MCFARLANE

Grimmer, J.

The judgment of the court was delivered by

GRIMMER, J.:—It appeared by the affidavits that the applicant, who is a resident of, and engaged in business in, the city of Fredericton, made application to the chief inspector, who for convenience will hereafter be referred to as the "inspector," for a "beer license" so called, which under the statute would permit and enable him to deal in, handle and sell by retail, so called non-intoxicating drinks.

Having received the application the inspector considered the same, inquired into the character and reputation of the applicant, the place where he proposed to sell the beer and its surroundings, and finally, having in view the purposes and intention of the statute, and appearing to have been satisfied that the granting of the license would not in any way tend to promote the same, but might have a contrary effect, he declined to issue it.

Whether this conclusion was or was not well founded, is not, I take it, for this court to inquire, or determine, the real question being whether the inspector had any discretion in the matter, or whether, under the provisions of the statute, he is absolutely bound without previous inquiry or examination to issue the license upon request.

The Intoxicating Liquor Act, 6 Geo. V. c. 20, s. 180, provided for the issuance of "beer licenses." This section, however, was repealed by 8 Geo. V. c. 22, s. 9, and a new section substituted, which provided in part as follows:—

> Upon application to the chief inspector by any person, the chief inspector may, upon payment of such fee as may be fixed by the Lieutenant-Governor-in-Council, issue a license to such person for the sale of such drinkable liquids as are non-intoxicating, etc.

It was contended by counsel in support of the rule that the word "may" in the section quoted should be construed as "must" and therefore it was imperative upon the inspector to issue the license, and in no case would he be allowed any discretion. That no matter what the character of the applicant might be, or how little worthy of credit he was, no matter where he was doing business or might wish to sell the beer, the inspector must nevertheless, upon request or application proceed at once to issue the license.

The word "may" is used in several other sections of the statute referring to the duties and powers of the inspector, as, for instance, in s. 184, where it is provided that should the inspector have what he considers sufficient reason to believe that a person holding a

beer license is selling or keeping for sale liquors without a license, or keeps a disorderly house, etc., he "may in his discretion revoke and cancel such license."

Again, in s. 186, where a license has been cancelled in certain premises, the inspector "may in his discretion refuse to grant a license to any person for the same premises."

Also in s. 187, "any inspector, peace officer, policeman or constable may from time to time, take from the drinks kept by any person holding a beer license upon the premises, sufficient to determine whether they are liquors," and in s. 188, it is provided that an "inspector, peace officer, policeman or constable 'may' at any time enter upon the premises of any person holding a beer license," etc.

By the Interpretation Act, being c. 1 of the Con. Stats., 1903, in s. 80, which defines the meaning and effect of certain words and phrases, it is expressly provided that in every case to which the section applies "shall" shall be construed as imperative, and the word "may" as permissive.

From the frequent recurrence of this word "may" in the statute, and considering the purpose and intention of the legislation, I am of the opinion the legislature did give and confer, and intended to give and confer to and upon the inspector, a discretionary power in the performance of his duty, so far as this case is concerned, trusting to the due exercise of that discretion in all cases where it appeared that the purposes of the statutes required it.

In *Nichols* v. *Baker* (1890), 44 Ch. D. 262, where it was held the power given by the Bankruptcy Act, 1883, to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy, was a discretionary power, and not a power which the judge is bound to exercise whenever the estate is shewn to be insolvent.

In *The Queen* v. *The Bishop of Chichester*, 2 El. & El. 209, 121 E.R. 80, it was held the words "it shall be lawful" were discretionary only, and in *Julius* v. *The Bishop of Oxford* (1880), 5 App. Cas. 214, it was held these words of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. Earl Cairns, L.C., in delivering judgment, quoted and approved of a judgment of Coleridge, L.J., in *Rex* v. *Tithe Commissioners* (1849), 14 Q.B. 459, 117 E.R. 179, where he said:—

N. B.

S. C.

EX PARTE McFARLANE

Grimmer, J.

The words undoubtedly are only empowering, but it has been so often decided as to become an axiom, that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice.

Considering, therefore, these authorities in the light of the statute, in my opinion, it is clear the inspector had a discretion which he could exercise, and it was not imperative upon him to issue the license, especially as there was nothing to be done which could be considered for the benefit or in advancement of public justice.

I think the legislature intended by this statute, in such cases as this, to invest the inspector with a power to cause an inquiry to be made into the merits of the application, where it appeared to him the purposes and intention of the statute required it, in the belief that such power would be duly and properly exercised, according to the merits of each particular application.

It is certainly better for the enforcement of the statute and the interests of the public, that the inspector, who is the sole referee under the same, should be entrusted with a discretion as to the propriety of issuing a "beer license," than that it should be left entirely to the needs and requirements of any and every person who might be seeking a means of benefiting himself, or perchance under cover of the license, violate the provisions of the statute, and so without regard to personal character, or a suitable place to carry on business, or other proper requirements, peremptorily demand the inspector to issue the license.

I am, therefore, of the opinion the inspector had the right to exercise his discretion, as to the propriety of issuing the license in this case, that this court has no authority to interfere with or question that discretion, and that the present rule for a mandamus should be dismissed with costs. *Rule dismissed.*

CAN.

S. C.

GIROUX v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

CRIMINAL LAW (§ II B—42)—ELECTION TO SPEEDY TRIAL—JURISDICTION.

A bill of indictment having been preferred to the grand jury under s. 873 of the Criminal Code, a true bill found, and the accused having pleaded, and a day for trial fixed, an accused may on that day elect speedy trial before the Court of Sessions of the Peace, under Part XVIII. of the Code.

Statement.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, 26 Que. K.B. 323, affirming the judgment of the Court of Sessions of the Peace, at Montreal.

CAN.

S. C.

GIROUX v. THE KING.

Statement.

The accused, appellant, was found guilty by the trial judge, but he prayed for a case to be reserved for the Court of Appeal.

The circumstances of the case and the questions submitted on the reserved case stated by the trial judge for decision by the Court of King's Bench, are stated, as follows, by Cross, J., (pp. 331-2) in his reasons for judgment in the court appealed from.

The accused Giroux appeals against a conviction of theft made against him by the judge of Sessions upon a speedy trial.

He had not been committed for trial by a justice. The prosecution commenced by a bill of indictment preferred to the grand jury by direction of a judge.

He pleaded to the indictment and a day was fixed for trial; but on the day so fixed, he elected to take a speedy trial. Effect was given to his election and he was tried as above mentioned.

The trial judge has reserved for our decision the question whether the election of speedy trial could be made or was valid, seeing that there had been no preliminary inquiry; that he had pleaded to the indictment and had been afterwards admitted to bail until this day fixed for his trial by a jury.

Laflamme, K.C., for appellant; *Walsh*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—An indictment for theft and receiving stolen goods was found by the grand jury of the District of Montreal in April, 1915, against the appellant. On that indictment he was arraigned and filed his plea of not guilty. The trial was fixed for a subsequent day, when the appellant, before the trial commenced, moved for leave to make his option to be tried by the Quarter Sessions under the provisions of Part XVIII. of the Criminal Code. The presiding judge with the consent of the Crown Prosecutor granted the motion and gave the leave asked for; and, on the same day—May 17, 1915—the appellant entered into a recognizance before a judge of the Sessions "to appear in person at the Court of the Sessions of the Peace on May 27, then instant," to answer to the charge of theft for which he had been indicted.

After much inexplicable delay the appellant was finally tried before the judge of the Sessions and found guilty of the offence with which he was charged. At his request, two questions were reserved for the consideration of the Court of Appeal.

On the application of appellant's counsel, that court also examined into the sufficiency of the evidence to support the conviction. In the result, all the questions were answered adversely to the pretensions of the appellant. Carroll, J., dis-

CAN.
S. C.
GIROUX
v.
THE KING.
Fitzpatrick, C.J.

sented from the answer of the majority to the first question, which was to this effect: Could the accused, Giroux, charged with the offence of larceny on an indictment preferred by the Crown Attorney, with the written consent of the judge presiding at the Assizes, elect, in the circumstances which I have just detailed, to be tried before the Sessions of the Peace under Part XVIII. of the Criminal Code?

In the view which I take of the case, it will be unnecessary for me to deal with the other questions and upon which there is no dissent in the lower court.

As I have already said, the indictment found against the appellant was preferred under the provisions of s. 873 of the Criminal Code. No information had been lodged with a magistrate, no preliminary investigation had been held and consequently there were no depositions and no commitment for trial, and it is in consequence argued on behalf of the appellant, that the material necessary to enable him to exercise his right to elect under the provisions of ss. 826, 827 and 828 of the Code did not exist.

It is not necessary for me to express any opinion as to whether the appellant could as of right, in the circumstances of this case, exercise his right to elect; but I have no doubt whatever that the leave given by the trial judge on the application of the appellant with the consent of the Crown Prosecutor had for its effect to validate all the subsequent proceedings before the judge of the Sessions. I do not say that the consent of the appellant conferred jurisdiction on the judge of the Sessions, but the latter had jurisdiction of the subject matter and in that respect was not dependent upon the appellant's consent. The consent is only important in this aspect of the case. It may be that by pleading to the indictment the appellant chose his forum and acquired the privilege to be tried by a jury. But by his application for leave to be tried by the judge of the Sessions he waived this privilege and selected another forum which he had a perfect right to do with the consent of the prosecuting officer.

The new forum had, as I have already said, complete jurisdiction to try the offence with which the appellant was charged and it is equally certain that he not only appeared voluntarily before the judge of the Sessions to answer the charge, but at the trial he with the assistance of counsel cross-examined the Crown witnesses

and examined witnesses on his own behalf. The only possible objection to the proceedings before the Sessions Court is that a bill of indictment had been already found against him at the Assizes for the same offence as that for which he was tried in the Court of Sessions and that indictment remains undisposed of.

But the trial on that indictment was suspended on appellant's own request, and his conviction before the judge of the Session and the sentence would be a complete bar to any further proceedings on the indictment. As Graham, J., said in *Re Walsh sub nom. County Judge's Criminal Court*, 16 D.L.R. 500, at 510; 23 Can. Cr. Cas. 7, at 19: "The case of *R.* v. *Burke*, 24 O.R. 64, shews what becomes of the indictment." In my opinion, the proper course would be to move to have it quashed.

To sum up. Both courts had jurisdiction to try the offence. Assuming that the prisoner had by his plea to the indictment selected his forum and acquired the right to be tried by a jury, it was open to him to waive that choice and he was also free to forego the privilege of a trial by a jury. Consent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter.

I venture to say that to set aside the proceedings below would in the circumstances of this case amount to a travesty of justice. I have carefully read the cases referred to in the factum, and at the argument, and when considered with reference to the particular facts with which in each case the judges were dealing, I do not find that they give us much assistance.

In the *Burke* case *supra*, the defendants had elected to be tried by the County Court Judge under the Speedy Trials Act, and indictments were subsequently found against them at the assizes for the offences for which they had so elected to be tried. The question at issue was whether they could be deprived of their right to be tried by the County Court Judge, and it was there decided that the right to elect to have a speedy trial was a statutory right of which the defendants could not be deprived if they were in a position to avail themselves of it.

In *The King* v. *Sovereen*, 4 D.L.R. 356, 20 Can. Cr. Cas. 103, the prisoner argued that a person out on bail is entitled to elect to be tried by a judge without a jury after an indictment is re-

CAN.
S. C.
GIROUX
v.
THE KING.
Fitzpatrick, C.J.

turned founded on the facts disclosed by the depositions taken at the preliminary inquiry and it was held that he is not entitled as of right upon bill found and arraignment thereon to elect to be tried without a jury. The prisoner was in that case committed for trial by a magistrate and the indictment on which he was committed was preferred as in this case by the Crown Prosecutor with the written consent of the trial judge. It is only in this last respect that the cases are analogous.

It is not necessary to say more than this, that I agree with the opinions expressed in *The King* v. *Sovereen*, *supra*, by Moss, C.J., and Magee, J. The prisoner in that case claimed to be entitled to make his election as of right and, as Magee, J., said, he had not put himself in a position to claim that right, not being in custody and not having given notice to the sheriff. The Chief Justice, with whom Garrow, J.A., and Latchford, J., concurred, said:—

> I am unable to think that it was the intention to give an accused person the *general right to elect* to be tried without a jury.

In *Re Walsh*, 16 D.L.R. 500, it was held:—

> A person sent up for trial for an indictable offence and against whom while out on bail a true bill is found is entitled on being taken into custody to elect for a trial without a jury.

In this case, the appellant, with the consent of the Crown Prosecutor and the approval of the judge, waived his right to be tried by a jury at the Assizes and then voluntarily appeared before a court having jurisdiction over the offence with which he was charged. He was then put upon his trial for the offence for which he had been indicted; he was assisted by counsel, examined and cross-examined witnesses and now seeks after he has been found guilty to escape the consequences of his own free choice. I fail to understand how ss. 826 *et seq.* have any application to the facts of this case.

I am of the opinion that this appeal must be dismissed.

Davies, J.

DAVIES, J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—The judge who presided at the March term of the King's Bench, Crown Side, for the District of Montreal, duly directed, pursuant to s. 873 of the Criminal Code, an indictment for theft and receiving stolen goods knowing them to have been stolen to be presented to the grand jury against the appellant.

Thereupon the grand jury found a true bill upon which the

appellant was arraigned and pleaded not guilty to the said indictment, on April 25, 1915, when the trial was duly fixed for May 17 following.

He had never been prosecuted before any justice of the peace in respect of the said offence or committed by any such justice of the peace to stand his trial. The preferring of the indictment to and return of a true bill by the grand jury followed by appellant's arraignment, his plea thereto and appointment of a day for trial of that issue comprised all that took place.

In short there was not the slightest semblance of any such proceedings having been had as to lay the foundation for such a proceeding as contemplated, by the speedy trial provisions of the Criminal Code, to be necessary to give jurisdiction for the exercise of any of the rights, duties or powers furnished thereby.

Yet on the day fixed for his trial, when presumably everything was ready therefor, instead of its taking place he asked to be allowed to elect to be tried by a judge under the said speedy trial provisions. Without any jurisdiction to do so on the part of the presiding judge, or vestige of authority on the part of the Crown officer, each seems to have graciously assented to this novel proposition for the disposal of an indictment, found by the grand jury in a higher court, being transferred to a lower court, on the part of one who had (as expressed by the late Würtele, J., in regard to a man before him in the like plight), conclusively and exclusively elected to be tried in due course according to law by a jury.

Doubtless this assent was inadvertently given without reference to the express terms of the Criminal Code providing for the manner of trial of any one indicted before and presented by a grand jury as having been truly so indicted.

It is stated in appellant's factum that on the same day he went before Bazin, J., and made his option for a speedy trial in the Court of Special Sessions of the Peace.

The case before us, however, only shews that on May 17, 1915, the accused appeared before Adolphe Bazin, Esquire, judge of the Sessions of the Peace for Montreal, and entered with a surety into a recognizance to appear on May 27, at the Court of General Sessions of the Peace in person to answer the indictment found against him for theft, and so continue from day to day until discharged.

CAN.

S. C.

GIROUX v. THE KING.

Idington, J.

The first speedy trial provisions were enacted in 1869, by 32 & 33 Vict. c. 35, and confined to the Provinces of Ontario and Quebec, and with many amendments later were extended to other provinces.

The purpose had in view was to enable those committed for trial to avoid being kept in suspense for many months awaiting the coming of a court with a jury, if they should choose to dispense with their right to a jury trial.

Those innocent gladly availed themselves of such an opportunity. Those guilty of some trifling offence which might be adequately punished by a shorter term than they probably would serve, if unable to find bail, were equally glad to avail themselves of the privilege. And even those who could find bail were in very many cases likewise pleased to put an end, by so electing, to the painful suspense they were enduring.

Such legislation furnished also a public gain, in saving the time of jurors, both grand and petit, at Assizes or Sessions.

In this peculiar case it is hard to find what good cause was to be served by applying the speedy trial provisions of the Act, for it was not until the 14th of the month of January following that the appellant was actually put upon his trial and pleaded again "not guilty," before the district judge, when some witnesses were examined, and the case was adjourned till January 20, when it was again adjourned till the next day, only to be adjourned again till February 1, and only after three more adjournments, ended by the judge finding him guilty.

Thereupon there was the special case reserved to determine whether the judge ever had jurisdiction to take such proceedings.

The Act itself and the many amendments to it gave rise in course of time to many cases, and reserved cases, relative to the jurisdiction of the judge in the given circumstances of each such case. Hence there were decisions of the higher courts or judges thereof in a great variety of circumstances in the Provinces of Quebec, Ontario, Manitoba, British Columbia and Nova Scotia.

These decisions would not, of course, bind us if an obvious misconception of the law had occurred in them all.

So far from there being diversity of opinion, there has been developed a uniformity of opinion relative to the main features of the statute founding jurisdiction.

In not a single instance did it occur, till this case, where an indictment of a grand jury duly found and pleaded to was, notwithstanding the express provisions by the procedure sections of the Criminal Code, attempted to be transferred to another and lower court for trial.

In effect that is what was attempted here in rather an offhand fashion.

The case of *Reg.* v. *Burke*, 24 O.R. 64, shews how when the accused had been improperly, in violation of his right to elect, indicted and induced to plead to the indictment, he could free himself from such a predicament.

Assuming the denial of legal right as was assumed in that case, the proper course was adopted of quashing the indictment. Then the accused was free to exercise his right.

No such phase is presented in this case. The indictment and plea thereto still stands ready for trial as it was two years or more ago.

Of the many cases I have referred to, presenting the true situation of accused in such circumstances, I would refer to the opinion of the late Würtele, J., in the case of *The King* v. *Wener*, 6 Can. Cr. Cas. 406, wherein, at p. 413, he spoke as follows:—

> The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary enquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a judge of a court of criminal jurisdiction, or by order of such court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it.

And I would also refer to the opinion of the late Sir Charles Moss, Chief Justice of Ontario, in the case of *The King* v. *Sovereen*, 4 D.L.R. 356, 20 Can. Cr. Cas. 103, before the Court of Appeal for Ontario, so late as 1912, after all the existing amendments had been made to the speedy trial provisions of the Criminal Code. At p. 358, he spoke as follows:—

> Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the

CAN.
S. C.
GIROUX
v.
THE KING.
Idington, J.

steps necessary to enable him to elect to be tried by a judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate a compliance with all the forms prescribed by section 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in s. 827.

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

I agree with these opinions. In either case there was some basis for the accused to have elected had he chosen to do so before plea.

In the case before us there never was the semblance of any such basis. I conclude therefore that there was no jurisdiction in the district judge to have accepted any such so called election or to try the accused under such circumstances and the appeal should be allowed accordingly.

There being no jurisdiction the second point reserved falls to the ground, and we have no right to answer the question propounded upon the evidence.

Duff, J.

DUFF, J. (dissenting):—I concur with Idington, J.

Anglin, J.

ANGLIN, J.:—Upon a bill preferred by Crown counsel with the consent of the presiding judge under s. 873 (1) of the Criminal Code, the grand jury, at a sittings of the Court of King's Bench (Crown Side), held in Montreal, presented an indictment charging the defendant with theft—an offence cognizable by the Court of the Sessions of the Peace. Upon arraignment the defendant pleaded "not guilty," and a subsequent date for his trial was thereupon fixed. He was meantime released on bail. On the date fixed he surrendered himself for trial and then demanded that he be allowed to elect to be tried under Part XVIII. of the Code by a judge of the Sessions of the Peace. Counsel for the Crown consented and an order was made granting the demand. He accordingly appeared on the same day before Bazin, J., and made his formal election for speedy trial. He was afterwards tried and convicted by Choquet, J., presiding at a special sittings of the Court of the Sessions of the Peace. He thereupon sought, and in view of the decisions in *The King* v. *Sovereen*, 4 D.L.R.

356, and some other cases, quite properly was accorded a reserved case for the decision of the Court of King's Bench upon the question (submitted in the form of two questions), whether, under the circumstances stated, his election for trial under Part XVIII. of the Code was valid and sufficient to give the judge of the Court of Sessions jurisdiction to try him. I deal with the question so reserved, to which, as I understand it, the special jurisdiction conferred on this court by s. 1024 of the Criminal Code is restricted.

Under s. 825 of the Code, every person committed for trial for an offence within the jurisdiction of the General or Quarter Sessions of the Peace may, with his consent, be tried under Part XVIII. A person in custody awaiting trial, however he may so find himself, is under s.s. 4 to "be deemed to be committed for trial within the meaning of the section." The defendant, in my opinion, was "in custody awaiting trial on the charge," when he had surrendered himself for trial on the appointed date. *Re Walsh*, 16 D.L.R. 500, 23 Can. Cr. Cas. 7 at p. 9; *The King* v. *Thompson*, 14 Can. Cr. Cas. 27, at 30. I read "the charge" as meaning the charge mentioned in sub-sec. (1), *i.e.*, a charge cognizable by the Court of Sessions. The interests of justice are protected, as far as parliament considered such protection necessary, by the provision of sub-sec. 5 that, where the offence charged is punishable with imprisonment exceeding a period of 5 years, the Attorney-General may require a trial by jury.

I see nothing in any provision of the Code, as it now stands, which precludes an election for trial under Part XVIII. by an accused under indictment, no matter how or when presented, if he comes within the comprehensive terms of s. 825. The difficulty which formerly existed owing to the supposed impossibility of complying with s. 827 in the absence of depositions taken upon a magistrate's preliminary investigation in cases where such investigation had been waived and the accused had consented to be committed for trial without it, was overcome by the insertion of the words "if any" in s. 827 by 8 & 9 Edw. VII., c. 9, s. 2. Any similar difficulty in cases of indictment, preferred under the section now numbered 873, was thus likewise removed.

It is contended that the special provision made by s. 828 for

CAN.
S. C.
GIROUX
v.
THE KING.
Anglin, J.

re-election after indictment by a person who had already elected for trial by jury imports an intention to preclude the right of election in other cases after indictment. But the *raison d'être* of this provision was not to provide for the case of an indictment having been found, but to confer or make clear the right to a second election. Its terms, however, pointedly indicate that the presentment of an indictment was not regarded by parliament as a bar to the right of election. No good reason can be suggested why, if the man who has already elected for a jury trial should be allowed to re-elect after indictment and up to the moment when his actual trial begins, the man who has never elected should be debarred from doing so by the presentment of an indictment.

As Mr. Justice (afterwards Chief Justice) Graham said in *Re Walsh*, 16 D.L.R. 500, at 508:—

> When parliament did draw the line of exercising the option as it does in s. 828, sub-sec. 2 (the re-election provision), it provided that he (the accused) may exercise "the election at any time before such trial (*i.e.*, before a jury) has commenced."

I agree with the views expressed upon this point by the judges of the Nova Scotia Appellate Court in *Re Walsh*, *supra*, and by Howell, C.J.A., in *The King* v. *Thompson*, *supra*.

But it may be said that after plea to the indictment, at all events, the right of election is irrevocably gone for two reasons: that the plea is an election of forum; and that upon arraignment the trial has already commenced. Neither reason in my opinion is sound.

Assuming that the plea should be regarded as an election of and submission to the forum of the Court of King's Bench, and a jury trial, it was the first and only election made by the accused, and by s. 828 express provision is made for a re-election by a prisoner who has elected to be tried by jury "at any time before such trial has commenced." That the arraignment is not part of the trial—that the trial only begins after plea—appears from the heading "Arraignment and Trial" (s. 940) in the Code itself and is established by many authorities collected in the judgment of Graham, E.J., in *Re Walsh*, *supra*, Parliament has therefore in explicit terms provided for an election after plea, since plea precedes the commencement of the trial. The reasoning of Graham and Ritchie, JJ., in support of the right of election after

indictment seems to me conclusive in a case such as that before us. If parliament, which, in enacting s. 828, had election after indictment brought expressly to its attention, did not mean that that right should exist where an indictment is preferred under s. 873, notwithstanding the comprehensive terms in which secs. 825 and 828 are couched, I think it certainly would have said so by an explicit exception. In the case of re-election, whatever the offence and however punishable, by the proviso to s. 828 after indictment the consent in writing of the prosecuting officer acting under s. 826 (2) is required, and in any case either the judge or the prosecuting officer may prevent effect being given to a second election sub-sec. 3). The requisite consent of the prosecuting officer was given here.

With great respect for the judges who hold the contrary view, in my opinion, the fact that the indictment under which the accused was awaiting trial had been preferred under s. 873 (1) of the Code, did not prevent his exercising the right of election either under s. 825 or s. 828, and the judge of the Court of Sessions of the Peace therefore had jurisdiction to try him.

The tendency of the courts in the earlier cases to place a narrow construction upon the "Speedy Trials" provisions of the Criminal Code has been adverted to in the *Thompson* case, *supra*; and *Walsh* case, *supra*. It should probably be attributed to the view strongly held by many, lawyers as well as laymen, that trial by jury, especially in criminal cases, should be preserved intact. But parliament, by one amendment after another, has overcome the several restrictions that judges have from time to time sought to place upon the right to elect for trial before a judge of the Court of Sessions, thus evincing its policy and determination that this mode of trial shall, as far as possible, be available within the limits and subject to the safeguards which it has prescribed, and its desire that the sections of the Code providing for it should receive a liberal rather than a narrow construction.

Upon another question, as to the sufficiency of the evidence, which the Court of King's Bench allowed the defendant to raise, there was no dissent in that court and there is therefore no right to appeal here. *Appeal dismissed.*

ALTA.

S. C.

ANDREW v. GRIFFIN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Simmons, JJ. February 14, 1918.

BAILMENT (§ III—17)—DOGS—EXHIBITION KENNEL CLUB—LIABILITY OF OFFICERS.

Officers of a kennel club who hold an exhibition are bailees of the dogs placed in their charge, and must use reasonable care and diligence in looking after them.

[See *Coltart* v. *Winnipeg Industrial Exhibition*, 4 D.L.R. 108.]

Statement. APPEAL from a judgment of Hyndman, J., in an action to recover the value of a dog. Affirmed by an equally divided court.

C. C. McCaul, K.C., for plaintiff; *B. Pratt*, for defendants.

Harvey, C.J. HARVEY, C.J.:—The plaintiff was the owner of a Boston Terrier, and he alleges that the defendants are the officers of a Kennel Club which held an exhibition at which the dog was exhibited. During the exhibition the dog was taken out for the purpose of having its ears clipped and it died during the operation. The action is to recover from the defendants the value of the dog. It was tried by my brother Hyndman, and dismissed, and the plaintiff appeals.

None of the defendants had anything to do with the operation, which was about to be performed by one Kynoch, who was a Winnipeg man here exhibiting at the dog show. The ground upon which the defendants are sought to be held liable, was one of gross negligence in allowing the dog to be taken away without the authority of the plaintiff, who says that though he had discussed with Kynoch the subject of having the dog's ears clipped, he had not decided to have it done, and had stated that if he did have it done, it would be after the show. The dog was actually taken away by Kynoch on the third and last day of the show, after the judging had all been completed, the dog in question having then been awarded three prizes.

Kynoch was not a witness, but one Mitchell states that he over-heard the conversation between the plaintiff and Kynoch, and that plaintiff then instructed Kynoch to have the dog's ears clipped before the show was over, and he also saw Kynoch take the dog away, stating that he was taking him to clip his ears, and he also witnessed the dog's death under the anesthetic.

Caswell, one of the defendants, states that he was superintendent of the show, that he did not see the dog taken, but that on

ALTA.

S. C.

ANDREW v. GRIFFIN.

Harvey, C.J.

the night before, the plaintiff told him that Kynoch was to trim the dog's ears the next day. This statment is not denied, and while the plaintiff did swear that he had not instructed Kynoch to trim the dog's ears, yet, in the face of Caswell's evidence, we must assume that Caswell was entirely justified in believing that he had.

It is urged that there was gross negligence in not having someone about who would have prevented Kynoch from taking the dog away, but if we assume that that did constitute such negligence, though I do not suggest that it did, it cannot help the plaintiff, unless that negligence was the cause of his loss.

Now, it is quite apparent that if Caswell himself had been present and seen Kynoch take the dog, he would probably have taken it for granted that he was doing it for the purpose the plaintiff had communicated to him, or if he had asked him he would have been told that such was the case, and he would, unhesitatingly, have allowed him to take the dog, and in my opinion, quite properly. If any attendant had observed it and had any doubt on the matter, it would have been his duty to report to Caswell, with the same result.

It seems clear, therefore, that the fact that neither Caswell, nor any attendant saw Kynoch take the dog had no bearing on the case since the result would have been the same had it been otherwise.

In my opinion, the facts do not establish any negligence on the part of the defendants which conduced to the plaintiff's loss, and I do not, therefore, find it necessary to consider what the effect would be if such negligence were shewn.

I think the trial judge was right, and I would dismiss the appeal with costs.

SIMMONS, J., concurred.

Simmons, J.

STUART, J.:—This case has not been in my mind by any means a clear one against the plaintiff.

Stuart, J.

The defendants, undoubtedly, were bailees of the plaintiff's dog, and, as such, were bound to return him in the condition in which they received him. From this obligation they could only relieve themselves by shewing that they had exercised reasonable care in looking after him, or, in other words, that anything that happened to him was not the proximate result of any negligence

ALTA.
S. C.
ANDREW
v.
GRIFFIN.
Stuart, J.

on their part. This burden of proof was upon them, and it has been a matter of some difficulty to me to conclude that they properly carried that burden.

I would put aside entirely the so called written contract. I do not think that, in the circumstances of the case, the conditions printed upon the back of it were binding upon the plaintiff.

The evidence given by and on behalf of the defendants has aroused some suspicion in my mind. It presents a number of peculiarities. For example, Caswell the superintendent for the defendants, and one of them, upon his examination for discovery said that he was quite sure that he had been told about noon on the first day of the show, that the dog was dead, while at the trial he stated that it was noon on the third day that he was told of it. Quilly, another of the defendants, stated on his examination for discovery that it was on the second day of the show, that he had heard of the dog's death. At the trial, Caswell said that on the night of the 11th, the second day of the show, the plaintiff told him he was going to have the dog's ears trimmed the next day by Kynoch, but he never testified that he was present at any conversation between the plaintiff and Kynoch so far as I can discover. Upon this point I think the trial judge slightly misapprehended the evidence. Then Mitchell, an exhibitor, but not a menber or official of the club, said that he was present at a conversation between plaintiff, Kynoch and Fletcher when plaintiff told Kynoch that he would like to have his dog's ears clipped, and to have it done *before* the show was over. In the use of the word "before" I strongly suspect, if not the honesty, then the accuracy of hearing or memory of this witness. Why should the exhibitor of a dog want its ears clipped *before* the show was over? I have no doubt that the plaintiff said as he swore himself "*when* the show was over." Then, strange to say, Mitchell swore positively that it was the *second* day of the show that he saw Kynoch take the dog away. He said twice that he was sure, that he was certain of it.

Now, I have no doubt that it was on the third day of the show that the dog died. And I have also no doubt at all that the plaintiff never finally authorized Kynoch and Fletcher to clip the dog's ears in his absence before the show was over. The improbability of the owner of a dog to which he was much attached

agreeing to such a thing is so great, that I think we ought to accept the plaintiff's account of the conversation in question, especially when neither Fletcher nor Kynoch, the persons with whom it was held, were called rather than that of Mitchell who only casually overheard it. In any case, Mitchell's account was ambiguous and not really inconsistent, except as to the use of the word "before," with what the plaintiff said. The plaintiff swore that he told them he wanted to be there. Caswell, I repeat, never said that he was at the conversation at all. He merely said that the plaintiff had told him that Kynoch was going to trim the dog's ears the next day.

It seems to me rather unfair to charge up against the plaintiff, uncertain suggestions about his intentions upon the matter of getting the dog's ears trimmed. Certainly the defendants did not prove, and the burden of proving it was upon them, that the plaintiff had authorized Kynoch in his absence, and before the show was over, to take the dog away and perform the operation. No witness even for the defendants went so far as that.

Then, the situation is that the defendants, as bailees, allowed persons who had no authority to do so, to take the plaintiff's dog away out of their possession and perform a surgical operation upon it.

It is very difficult for me to perceive wherein the defendants can be said to have shewn that they took reasonable care of the dog in such circumstances. They had a superintendent of the show, and he had two assistants or helpers to look after the dogs. Surely it was not demanding too much of these three men to ask them to see that no unauthorized person took a dog away from the kennels. They knew that the owner was not there. True, he was at liberty to be there, or have someone there, but they knew that he was not there and that he was trusting his dog to them, and, in the circumstances, I think they were bound to watch, at least, with reasonable care, to see that no one went off with the dog. It was not at all shewn that they did watch with reasonable care. No evidence was given as to the way in which Caswell and his two assistants did divide up their work. Where were they all when Kynoch took the dog away? No answer to this is suggested in the evidence, except that Caswell himself was away getting food. Where the assistants were or what they were doing no one testified.

ALTA.
S. C.
ANDREW
v.
GRIFFIN.
Stuart, J.

For my part, I do not think the defendants proved that they had exercised reasonable care. Then the burden of proof is still upon them to shew that it was not because of their negligence that the accident to the dog happened.

I am not satisfied with the validity of the suggestion that Caswell, even if he had been there, would have not interfered. What if one of the assistants had been there? It is not shewn that they knew anything about the conversation or arrangement in question. Apparently, Caswell was away on a proper errand. Then, apparently, it was one of the assistants who should have been there. Can we say that he would have properly omitted to interfere? I do not think so.

It is suggested that Fletcher was a judge at the show, and would not likely have been interfered with by any attendant who saw him. That could only be because he would have been considered as a person in authority and, therefore, an agent of the defendants. If he was not in authority, then he would have been stopped if the assistants had done their duty. And, even with regard to Caswell, I have much doubt whether simply because the plaintiff had told him the night before (even assuming this to be the case) that he was going to have Kynoch trim the dog's ears the next day, he would, therefore, have been justified in giving the dog into Kynoch's possession without special permission from the plaintiff. He was a bailee, and I doubt if a bailee can be excused from parting with the possession of a chattel to a third person simply because the bailor had told him he intended to let that third person do something to it. There is no suggestion of permission to the bailee in that. And I think a reasonably careful bailee would ask for definite evidence of authority or permission.

But, aside from this, I doubt the propriety of imagining a hypothetical situation. I do not think the defendants have given proof as distinguished from merely imaginary hypotheses that the accident would still have happened even if they had taken the care which in my opinion, they ought to have taken, viz., had a man watching the dogs, as apparently was their intention all the time. Even at the last moment, the plaintiff might have changed his mind, if he had been there, as he undoubtedly intended to be, and it was clearly due to the defendant's

carelessness that he was deprived entirely of that further opportunity for careful consideration of his own interests and the interests of his dog, which he undoubtedly hoped and intended to enjoy and exercise. The defendants cannot assert that he would have allowed the operation to go on without hesitation and that, therefore, the result, which unfortunately happened, would have happened all the same.

Stuart, J.

My view, therefore, is that the defendants should be considered liable.

BECK, J., concurred.

Beck, J.

Appeal dismissed, the Court being equally divided.

Re McALLISTER AND TORONTO AND SUBURBAN R. Co.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. July 4, 1917.

EXPROPRIATION (§ III C—143)—COMPENSATION—MINERALS—QUARRY OF ROCK.

The words "or other minerals" used in sec. 133 of the Ontario Railway Act (R.S.O. 1914, c. 185) do not include the ordinary rock of the district; where a quarry of such rock has a special value, such value should be included by arbitrators in fixing the amount of compensation for land expropriated.

[Imperial Acts, also *Great Western R. Co.* v. *Carpalla United China Clay Co.*, [1910] A.C. 83, *North British R. Co.* v. *Budhill Coal Co.*, [1910] A.C. 116, *Caledonian R. Co.* v. *Glenboig*, [1911] A.C. 290, *Symington* v. *Caledonian R. Co.*, [1912] A.C. 87, considered.]

Statement.

AN appeal by land-owner from an award made by a majority of a board of arbitrators appointed to determine the compensation to be paid to the appellant for lands expropriated by the railway company, under the Railway Act of Ontario, for the purposes of its railway, and for the severance of his land by the taking of part, and by reason of injury and loss to that part of the property known as "the quarry," and by cutting off access to the river Speed, and by interference with the land and means of approach at the westerly end of the property, and otherwise injuriously affecting his other lands by the exercise of the company's powers.

The award fixed the compensation at $4,573.70; and the land-owner appealed upon the ground that an additional sum of $4,860 and interest should have been allowed.

ONT.

S. C.

RE MCALLISTER AND TORONTO AND SUBURBAN R.W. CO.

Meredith, C.J.O.

M. K. Cowan, K.C., and *W. E. Buckingham*, for appellant.

R. B. Henderson and *Christopher C. Robinson*, for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the land-owner, McAllister, from the award, dated the 2nd October, 1916, made by the majority of the arbitrators appointed to determine, under the Railway Act of Ontario, the compensation to be paid to him for the land expropriated by the respondent for the purposes of its railway and for the severance of his land, by the land taken, from his other land, and by reason of injury and loss to that part of the property known as "the quarry," and by cutting off access to the river Speed, and by interference with the land and means of approach to his property at the westerly end of it, and otherwise injuriously affecting his other lands by the exercise of the powers of the respondent.

By the award which was made by a majority of the arbitrators, the compensation is fixed at $4,573.70.

As to the claim of the appellant for compensation for that part of the property known as the quarry in or under the land taken and for the damage caused to the remainder of the quarry by the respondent in the exercise of its powers, the arbitrators say in their award: "As to compensation to the owner in respect of the matters following, and if we have jurisdiction to award such compensation, which, in view of the provisions of sections 133, 134, and 135 of the Railway Act (Ontario), we do not assume to decide, then the amount of our award as above given, namely, $4,573.70 . . . should be increased by the further sum of $4,860 together with interest . . .;" and then follows a statement as to how the $4,860 is made up. What the "quarry" is will appear later on.

The land-owner appeals upon the ground that this additional sum should have been awarded to him, and the respondent answers that the "quarry" consists of minerals within the meaning of sec. 133,* and that the arbitrators had therefore no juris-

* 133.—(1) The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any land purchased by it, or taken by it under any compulsory powers given it by this Act, except only such

diction to award compensation for it, that jurisdiction being by sec. 135 vested in the Ontario Railway and Municipal Board; and that, if that contention is not well-founded, the rock, being the ordinary rock of the district, has been fully compensated for in the allowance that is made by the award.

I agree—and indeed I did not understand Mr. Cowan to argue the contrary—that, if the rock of which the quarry is composed is a mineral within the meaning of sec. 133 of the Ontario Railway Act, the respondent has not expropriated it, and I will assume that if it is a mineral the arbitrators had no jurisdiction to award compensation in respect of it.

The effect of sec. 77 of the Railway Clauses Consolidation Act, 1845 (Imperial), and of the corresponding provisions of the Railway Clauses Consolidation (Scotland) Act, 1845 (sec. 70), which, as I shall afterwards point out, is substantially the same as sec. 133 of the Ontario Act, has been considered by the House of Lords in the recent cases of *Great Western R.W. Co.* v. *Carpalla United China Clay Co. Limited*, [1910] A.C. 83; *North British R.W. Co.* v. *Budhill Coal and Sandstone Co.*, [1910] A.C. 116; *Caledonian R.W. Co.* v. *Glenboig Union Fireclay Co.*, [1911] A.C. 290; and *Symington* v. *Caledonian R.W. Co.*, [1912] A.C. 87.

As I understand the decisions in these cases, they are that, by the words "or other minerals," which occur in the expression "mines of coal, iron, stone, slate or other minerals" used in sec. 77 of the English Act and sec. 70 of the Scottish Act, exceptional substances are designated, not the ordinary rock of the district, and Lord Loreburn in his speech in the *Budhill* case (p. 127) said that he thought that to be clear. Lord Gorell in the same case said (p. 134): "The enumeration of certain specified matters tends to shew that its" (i.e., the Act's) "object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone." Lord Shaw of Dunfermline expressed his concurrence with the judgments of the Lord Chancellor and Lord Gorell, and referred with approval

parts thereof as are necessary to be dug, carried away or used in the construction of the works.

(2) All such mines and minerals, except as provided by sub-section 1, shall be deemed to be excepted from the conveyance of such land, unless they have been expressly named therein and conveyed thereby.

ONT.

S. C.

RE MCALLISTER AND TORONTO AND SUBURBAN R.W. CO.

Meredith, C.J.O.

to the language of Lords Meadowbank and Medwyn in *Hamilton's Case* (1841), 3 D. 1121, and (p. 140) quoted the following passage from the judgment of the latter: "If you were to ask any one whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not."

The second proposition established by these cases is, that, in the case of what are referred to by the Lord Chancellor in the *Budhill* case as "exceptional substances," the question whether they are or are not minerals is a question of fact, viz., what the words mean "in the vernacular of the mining world, the commercial world, and land-owners."

The reason for the decision in the *Carpalla* case that the china clay in question there was a mineral, was that it was not part of the ordinary composition of the soil in the district and its presence was rare and exceptional, and that it was of considerable value commercially.

In the *Budhill* case it was held that sandstone was not a mineral within the meaning of the section. The Lord Chancellor, at p. 126, used the following language: "In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. . . . Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision."

In the *Glenboig* case, the substance which was held on the facts to be a mineral was of "an exceptional character as to its properties and value," and the Lord Chancellor (Loreburn)

again stated what kind of substance is to be excluded under the term "minerals." He said ([1911] A.C. at p. 299): "Upon the other hand, if anything exceptional in use, character, or value was thereunder," (*i.e.*, under the railway line) "that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world, and the commercial world, and the land-owner;" and the Lord Chancellor referred to the judgment of the Lord President in the Court below as an admirable exposition of the law.

What the Lord President said is reported in [1910] Court of Sess. Cas. at pp. 961 and 962, and is as follows: "I am of opinion that the propositions deducible from these latest and most authoritative judgments may be thus stated:—

"1. Each case is a question of fact, and must be decided on its own circumstances.

"2. Whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and land-owners.

"3. Nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question, forming the ordinary subsoil of the district, were held to be a mineral and within the exception."

In the *Symington* case the question was one of pleading, and the averment was: "that certain freestone rock underneath land acquired by a railway company did not form the substratum of the soil, but on the contrary was a substance of exceptional character and recognised in the mining and commercial world and by all railway companies and by all proprietors in or through whose lands railway companies had occasion to construct lines and relative works to be a mineral within the meaning of the Act." This was held to be sufficient to warrant the allowance of a proof, though the contrary had been held by the Second Division of the Court of Session.

Lord Shaw treated the pleading as meaning that the stone in question formed an exception to the general rock of the district ([1912] A.C. at p. 93).

ONT.
S. C.
RE MCALLISTER AND TORONTO AND SUBURBAN R.W. CO.
Meredith, C.J.O.

The language of the Lord Chancellor (Loreburn) is more general, but his observation that he could not accept the proposition that in no circumstances can freestone be a mineral within the meaning of the statute must be taken, in view of what he had said in the *Budhill* case, to mean that freestone, if not the ordinary rock of the country, may be a mineral if so recognised in the mining and commercial world and by land-owners. Counsel for the appellant stated that what the appellant offered to prove was that "freestone here was a substance of exceptional quality and was not the common rock of the district" (p. 91), and he had previously said (p. 90) that the Second Division was wrong in deciding that sandstone or freestone could in no circumstances be a "mineral." I mention this to shew that it was not questioned that, if the freestone were the ordinary rock of the country, it would not be a mineral within the meaning of the Act.

The Ontario statute applicable is R.S.O. 1914, ch. 185, sec. 133, and it is substantially the same as the corresponding provisions of the English and Scottish Acts, except that in the latter the words are "mines of coal, iron, stone, slate or other minerals under," and in the Ontario Act they are "mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under," and therefore the decisions to which I have referred are applicable to the interpretation of the Ontario Act.

There was evidence adduced before the arbitrators to shew that the stone in question was a mineral, within the meaning of the Act, and evidence to shew that it was not.

The result of the evidence, and in effect the finding of the arbitrators who joined in making the award as to it, is that: "The McAllister quarry, as far as the rock composing it is concerned, is the same as others in the neighbourhood. It is a part of a geological formation which is widely spread at Guelph and in the surrounding district. The rock on both sides of the river and on the prison farm and at many other places is to all intents and purposes the same."

That is, in my opinion, a finding, as in my opinion the evidence establishes, that the rock in question is the ordinary rock of the district, and is therefore not a mineral within the meaning of the Act, unless what follows brings it within the exception mentioned in the cases to which I have referred.

The further statement of the arbitrators is: "This quarry has added value because the rock or stone was easily accessible owing to the outcropping face or ledge composing it, and any waste material could without much trouble be got rid of by dumping it on the low land; and also, because other quarries in the neighbourhood are largely worked out, this one has the correspondingly enhanced benefit of the local market in Guelph."

That finding does not, in my opinion, bring the rock in question within the exception, or warrant the conclusion that it is, within the meaning of the Act, a mineral.

A similar finding might properly be made if the substance were ordinary earth or clay for which there was a market, because it was needed for filling up low places in the neighbourhood, and no one would seriously argue that, because of that circumstance, the earth or clay should be held to be, within the meaning of the Act, a mineral.

It is clear that the arbitrators have allowed nothing for the added value which they say the appellant's land has as a quarry, but the reason for that is probably to be found in the statement of the arbitrators that they did not assume to decide the question whether that "part of the property of McAllister, called in the evidence 'the quarry,' was a mineral, and so came within secs. 133, 134, and 135 of the Railway Act (Ontario), in which case our jurisdiction to deal with it would be excluded."

The provisions of the award and of the reasons for the award are inconsistent. If the quarry was not a mineral, the arbitrators should have increased the sum awarded by $4,860; and it would seem to follow from the fact that no allowance was made in respect of it that the arbitrators treated it as being a mineral, though they say that they did not assume to decide that question.

It is clear that the arbitrators should have decided it, and the question is, what course should be taken by the Court in disposing of the appeal? All the evidence that the parties desired to adduce is before us, and we ought not, I think, to remit the case to the arbitrators to decide the question they have not decided, but the Court should, on the evidence, determine it. Indeed it is expressly provided by sec. 90 (15) that upon the hearing of the appeal the Court shall decide any question of fact upon the

ONT.

S. C.

RE MCALLISTER AND TORONTO AND SUBURBAN R.W. Co.

Meredith, C.J.O.

evidence taken before the arbitrators as in a case of original jurisdiction.

That being our duty, it should be determined that the quarry is not composed of minerals, and that the compensation awarded should be increased by $4,860, and the costs of the appeal should be paid by the respondent. *Appeal allowed.*

TOWN OF MONTMAGNY v. LETOURNEAU.

(Annotated.)

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

ARBITRATION (§ III—17)—CONCLUSIVENESS OF AWARD.

The award of arbitrators is final and without appeal under art. 5797 R.S.Q. 1909, unless it is established that they have exceeded their jurisdiction.

[*Fraser* v. *Fraserville*, 34 D.L.R. 211, [1917] A.C. 187, followed.]

Statement. APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Flynn, J., in the Superior Court for the District of Montmagny, which maintained the action of appellant and quashed the award as granting an excessive indemnity.

Belley, K.C., for appellant; *Rousseau*, K.C., for respondent.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—The appellant, by means of duly authorized expropriation proceedings, had obtained a servitude over lands of the respondent for laying and maintaining a pipe line. In due course, an arbitration took place to decide the amount of compensation payable to the respondent. In these proceedings, the appellant is resisting payment of the amount awarded.

Prior to the expropriation, the respondent laid out part of his lands, which were devoted mainly to agricultural uses, as building lots with a view, as is claimed by the appellant, of enhancing the compensation which he could claim at the arbitration.

It is unnecessary to consider in particular what he did, with what purpose or with what effect, for it must be conceded that a man has a perfect right to do what he pleases with his own property; it suffices to say that there is in the case no suggestion of anything fraudulently done in subdividing the property or in any other respect in connection with the arbitration.

The arbitration proceedings were admittedly regular. The appellants knew the basis on which the arbitrators were proceed-

ing to make their valuation and acquiesced therein by calling no evidence to shew that it was erroneous.

Art. 5797 of the R.S.Q. provides that the award of the arbitrators shall be final and without appeal.

Now, on the ground that the amount awarded is excessive and that the arbitrators proceeded on a wrong basis in estimating the compensation, the appellant is inviting the court to re-open the whole question and has put the respondent, whose property is forcibly expropriated, to all this enormous expense of legal proceedings carried from court to court in an attempt to avoid payment of part of an award of some $4,000.

It must be conceded that we cannot disturb the award merely because we deem the compensation allowed to be too great. To do so would obviously be to entertain the prohibited appeal. The appellant seeks to escape this difficulty by suggesting that the compensation was assessed on a wrong basis—*i.e.*, on the footing that the lands affected should be valued as town building lots instead of as agricultural property—and that the arbitrators thereby exceeded their jurisdiction. But whether the land had a marketable value as town building lots or had no such value and was available only for farming or market gardening purposes was certainly a question of fact upon which it was the duty of the arbitrators to pass. It is very difficult to appreciate the contention that, in doing so, they exceeded their jurisdiction. To review their determination of this issue would be to entertain the appeal which the statute excludes, and in reality to interfere with their decision as to the value of the land injuriously affected, which is of course one of the chief elements in fixing the amount of the damage for which the owner is entitled to be compensated.

I am glad to think that there is no ground on which the court is in any way justified in entertaining such a claim. The appeal should be dismissed with costs.

Davies, J.

DAVIES, J. (dissenting):—I concur with the reasons stated by Cross, J. (dissenting) in the appeal court of King's Bench, Quebec, for dismissing the appeal to that court, and would therefore allow the appeal and confirm the judgment of the Superior Court.

Idington, J.

IDINGTON, J. (dissenting):—I think, for the reasons assigned by Cross, J., in his dissenting opinion in the court of appeal,

CAN.

S. C.

TOWN OF MONTMAGNY v. LETOURNEAU.

Idington, J.

that this appeal should be allowed with costs and the judgment of the learned trial judge be restored.

The latter judge has assigned some further cogent reasons, with some at least of which I incline to agree, in support of his judgment, but I am unable without further examination, which in the view I take is unnecessary, to say whether or not I can agree in all the reasons so assigned. For example, the question of the arbitrators disregarding the benefit to be derived by respondent from the projected work in arriving at their conclusion, is one of those considerations which would require perusal of the whole evidence owing to the fact that the point was not much pressed and fully argued. Thorough examination of the evidence may support the position that the board disregarded its duty in this behalf or might lead to the conclusion that the appellant did not bring the necessary evidence before the board. However, one good ground, as it seems to me, being sufficiently apparent requiring a reversal of the judgment appealed from, it is unnecessary to labour further I think.

Duff, J.

DUFF, J.:—The proceedings of the municipality were taken under the authority of art. 5790 to 5800 R.S.Q. The principles governing the determination of compensation under these articles are concisely explained in the judgment of Lord Buckmaster, speaking for the Judicial Committee in *Fraser* v. *Fraserville*, 34 D.L.R. 211, [1917] A.C. 187, at p. 216:—

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Re Lucas and Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; and *Sidney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629. The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.
>
> Their Lordships held that as the arbitrator, instead of determining the value of the property to the seller, had arrived at the amount of compensation awarded by fixing its value to the persons buying the award could not be upheld.
>
> Their Lordships add:—

That it is plain from the language of the statute making the award of the arbitrators final and without appeal, that, apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed.

On behalf of the municipality, it is contended that the arbitrators, whose award is now the subject of consideration, proceeded upon an erroneous basis, since, in estimating compensation to be awarded to the respondent, they took, as their starting point, not the value of the property affected at the date of the expropriation including the value as of that date of its economic potentialities, but the value as of a later date. It is argued that this is proved by the evidence of the arbitrators themselves; and, if this were established, it would follow that, the arbitrators having based their award upon an appraisement of something which was not the thing they were authorized to appraise, the appellant municipality ought to succeed. The majority of the court below appear to have held that even such a departure from the principles of compensation prescribed by law would not vitiate the award. The judgment of the Judicial Committee, in the case above referred to, is so apt an illustration of the principles on which the courts have always acted in setting aside the awards of arbitrators in compensation cases that it is unnecessary to refer to the long line of authorities establishing that, since an award is a decision of one having limited authority, whether given by agreement of the parties or by statute, the award is *pro tanto* void if the limited authority has not been pursued and the arbitrator has appraised something he was not directed to appraise and void altogether if that part which is void cannot be severed from the rest; that it is immaterial whether the arbitrator in such a case has acted by mistake or by design and that the fact that his authority has not been pursued may be proved by the testimony of the arbitrator himself. *Buccleuch, Duke of*, v. *Metropolitan Board of Works*, L.R. 5 Ex. 221; L.R. 5 H.L. 418; *Falkingham* v. *Victorian Railways Commissioner*, [1900] A.C. 452.

It is sometimes difficult, very difficult indeed, to determine where an arbitrator has made a mistake of law or of fact, whether the mistake amounts to such a departure from authority as to invalidate the award.

The question before us on this appeal is whether the opinion

CAN.

S. C.

TOWN OF MONTMAGNY v. LETOURNEAU.

Duff, J.

of Cross, J., in the court below is right, that the arbitrators have shewn, by their own evidence, that they exceeded their authority. My conclusion is that excess of jurisdiction is not proved.

In *Falkingham* v. *Victorian Railways Commissioner*, *supra*, at p. 464, Lord Davey, speaking for the Judicial Committee, uses these words:—

> Where . . . there is jurisdiction to make an award and the question is one of a possible excess of jurisdiction, the rule (that the onus rests upon those who allege that an inferior tribunal has acted within its jurisdiction) has no application. In such a case the award can only be impeached by shewing that the arbitrator did in fact exceed his jurisdiction.

While the evidence of the arbitrators cannot be said to be wholly satisfactory, I think it is not inconsistent with the hypothesis that what they really had in view in estimating the compensation to be made was valued as of the date of expropriation of the economic potentialities of the land as capable of subdivision.

For these reasons I should dismiss the appeal with costs.

Anglin, J.

ANGLIN, J.:—I concur in the judgment of my Lord the Chief Justice. *Appeal dismissed.*

Annotation.

ANNOTATION.

The Ontario Municipal Act, 3-4 Geo. V. c. 43, s. 345, is as follows:—

"1. An appeal shall lie from every award (of arbitrators) in like manner as an appeal lies under the Arbitration Act, R.S.O. 1914, c. 65, where the submission provides for an appeal from the award.

2. Sub-s. 1 shall not apply where the submission is in writing, and it is not agreed by the terms of it that there may be an appeal from the award.

3. On an appeal from an award the Supreme Court may call for and receive additional evidence to be taken in such manner as the court directs, and may set aside the award or remit the matters referred or any of them, from time to time, for re-consideration and determination by the arbitrators, or may refer such matters or any of them to any other person, and may fix the time within which the further or new award shall be made, or may increase or diminish the amount awarded, or otherwise modify the award, as may be deemed just, and a Divisional Court shall have the like power and authority."

Section 17 of the Arbitration Act provides that:—

"17. (1). Where it is agreed by the terms of the submission that there may be an appeal from the award, the reference shall be conducted and an appeal shall lie to a judge of the Supreme Court in the same manner, and subject to the same restrictions, as in the case of a reference under an order of the court.

"(2) The evidence of the witnesses examined upon such reference shall be taken down in writing, and shall, at the request of either party, be transmitted by the arbitrator or umpire, as the case may be, together with the exhibits, to the Central Office at Osgoode Hall.

"(3) Where the arbitrators proceed wholly or partly on a view or any

Annotation.

knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight which should be attached thereto."

The provision as to appeals in case of references is contained in s. 67 of the Judicature Act, R.S.O. c. 56, which provides that:—

"The referee shall make his findings and embody his conclusions in the form of a report, and his report shall be subject to all the incidents of a report of a master on a reference as regards filing, confirmation, appealing therefrom, motions thereupon and otherwise, including appeals to a Divisional Court."

Consolidated Rule 503 provides that:—

"An appeal from the report or certificate of a master or referee shall be to the court upon seven clear days' notice and shall be returnable within one month from the date of service of notice of filing of the report or certificate."

The period, within which an application to set aside an award is to be made, runs from the publication to the parties of the award: *Re Burnett and Durham* (1899), 31 O.R. 262.

Where the parties agree that the reference shall include matters not within the scope of an arbitration as to compensation, and the award does not enable it to be ascertained what was awarded as compensation, unless the agreement provides for an appeal, an appeal does not lie: *Re Field-Marshall and Beamsville* (1906), 11 O.L.R. 472.

Where a municipal corporation, for the purpose of extending its waterworks, expropriated land, this section applies: *Re Herriman and Owen Sound* (1910), 1 O.W.N. 759.

It is proper that, when there is an appeal from the award, the arbitrators should state for the opinion of the court how they dealt with the claims made and the reasons on which the award is based: *James Bay Railway Co.* v. *Armstrong*, [1909] A.C. 624, 631, 26 T.L.R. 1; *Re Peterborough and Peterborough Electric Light Co.* (1915), 8 O.W.N. 564; *Re Clarkson and Campbellford Lake Erie and Western R. Co.* (1916), 35 O.L.R. 345, 26 D.L.R. 782.

In *Re Parsons and Eastnor* (1915), 34 O.L.R. 110, 23 D.L.R. 790, it was held, on a full review of the authorities, that where error in law is shewn by the reasons given by the arbitrator in a memorandum accompanying his award, the award should be set aside.

Where arbitrators have taken a view of a property and do not, as required by s. 17 (3) of the Arbitration Act, R.S.O. c. 65, state in their award whether or not they have proceeded upon anything learned upon the view, it is proper to refer back to the arbitrators, in order that they may certify in accordance with the provisions of the Act: *Re Myerscough and Lake Erie and Northern R. Co.* (1913), 4 O.W.N. 1249, 11 D.L.R. 458, 15 Can. Ry. Cas. 168; *Re Watson and Toronto*, 32 D.L.R. 637.

The effect of the Municipal Act, R.S.B.C. s. 396, is to make the award final, except where there has been misconduct on the part of the arbitrators or they have assessed the compensation on a wrong basis: *Re Laursen and S. Vancouver* (1913), 14 D.L.R. 241 (B.C.).

Rulings on points of law can be reviewed only on a case stated by the arbitrators made before the award: *Ib.*

There is no appeal from an award made under the expropriation clauses of the City Act, s. 253 (Sask.): *Yager* v. *Swift Current* (1915), 22 D.L.R. 801, (Sask.).

In *Re Sweinsson and Charleswood* (1916), 31 D.L.R. 203, where the failure to move against the award in time was due solely to the mistake of the

Annotation. solicitor and counsel of the corporation as to the time within which the motion must be launched, an extension of the time for moving was refused. See also *Sweinsson* v. *Charleswood*, 36 D.L.R. 32.

In *Swift Current* v. *Leslie* (1916), 9 S.L.R. 19, it was held that the practice and procedure to be followed in Saskatchewan for setting aside an award is the practice and procedure as it was in England on January 1, 1898, and that the jurisdiction of the court is to be exercised according to that practice and procedure. It is not proper to bring an action to set aside an award, but the proceeding should be by motion under the Arbitration Act.

These cases seem to shew that practically there is no appeal from the decision of the arbitrators upon questions as to the amount allowed as compensation (the *quantum*) unless they have adopted a wrong basis or perhaps where the amount allowed is so great or so small as to shock the conscience, especially where the arbitrators have viewed the property and acted wholly or partly upon the effect of it on their minds.

It would seem that in these cases the court has taken a narrower view of its functions than is taken by the Judicial Committee of the Privy Council, for, in dealing with the case of an appeal from an award of compensation under the Railway Act, in *Atlantic and North-West R. Co.* v. *Wood*, [1895] A.C. 257, Lord Shand said:—

"The court dealt with the award as one which it was their province to review on the facts as appearing on the evidence adduced before the arbitrators, and, in so doing, in the opinion of their Lordships, they acted rightly and in accordance with the statute. It would be a strained and unreasonable reading of the words of the statute 'as in a case of original jurisdiction' to hold that the evidence was to be taken up and considered as if it had been adduced before the court itself in the first instance, and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the legislature, and that what was intended by the statute was not that the court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law. Previously to this enactment the court had power only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience in renewed proceedings before the arbitrators, and the purpose of the legislature seems to have been to enable the court to avoid this, by giving power to make, or, rather, to reform, the award by correcting any erroneous view which the arbitrators might have taken of the evidence; that, in short, they should review the judgment of the arbitrators as they would that of a subordinate court, in a case of original jurisdiction, where review is provided for": pp. 262-3.

Re Canadian Northern R. Co. and Ketcheson (1913), 29 O.L.R. 339, 13 D.L.R. 854, 32 D.L.R. 629 (Sup. C. Can.).

Re Canadian Northern R. Co. and H. B. Billings (1913), 29 O.L.R. 608, 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 32 D.L.R. 351 (Sup. C. Can.).

Re Canadian Northern R. Co. and C. M. Billings (1914), 31 O.L.R. 329, 19 D.L.R. 841, 19 Can. Ry. Cas. 193, 31 D.L.R. 687 (Sup. C. Can.).

Annotation.

Re Lake Erie and Northern R. Co. and Brantford Golf and Country Club (1914), 32 O.L.R. 141, 32 D.L.R. 219 (Sup. C. Can.).

Re Lake Erie and Northern R. Co. and Muir (1914), 32 O.L.R. 150, 20 D.L.R. 687, 32 D.L.R. 252 (Sup. C. Can.).

The decisions of the Supreme Court of Canada in these cases have not been reported in the Canada S.C.R.

The question of how far, if at all, these cases are to be applied to appeals under this section has not been dealt with in any reported case except *Re Watson and Toronto* (*supra*), in which case Masten, J., said (p. 649), that, in his opinion, the principles laid down in these cases "apply at least as strongly, and perhaps more strongly, to an appeal under the Act respecting Municipal Arbitrations" (R.S.O. c. 199), and the Chief Justice of the Common Pleas said: "No court would be justified in giving effect to the arbitrator's judgment without exercising its own judgment on all points involved in the case. No court could be justified in failing to hear the case as carefully and fully as if it were being heard for the first time; but that in no way prevented or is inconsistent with giving due weight to any advantages the arbitrator may have had over those which the court may have in coming to a right conclusion, nor from declining to interfere with the award unless well convinced of some error in it."

For additional cases see *Re Toronto General Hospital Trustees and Sabiston*, 33 D.L.R. 78; *Ruddy* v. *Toronto Eastern R. Co.*, 33 D.L.R. 193; *Toronto Suburban R. Co.* v. *Everson*, 34 D.L.R. 421; *Can. Northern Western R. Co.* v. *Moore*, 31 D.L.R. 456; *Re White and City of Toronto*, 38 O.L.R. 337; *Debret* v. *Debret*, 10 S.L.R. 366; *Re Nash and Williams and Edmonton, Dunvegan & B.C.R. Co.*, 36 D.L.R. 601.

VELTRE v. LONDON AND LANCASHIRE FIRE INS. Co.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 12, 1917.

TENDER (§ I—2)—REGISTERED LETTER—MONEY ENCLOSED—SUFFICIENCY.

Enclosing a sum of money in a registered letter addressed to an insured is not a tender thereof within the meaning of condition 11 of the Ontario Insurance Act. (R.S.O. 1914 c. 183 sec. 194).

Statement.

APPEAL by plaintiff from the judgment of Sutherland, J., in an action on a fire insurance policy.

The judgment appealed from is as follows:—

SUTHERLAND, J.:—The plaintiff is a married woman, living with her husband, Samuel Savino, in the town of Thorold, in the county of Welland. Both are Italians, and it was testified at the trial that it is a common custom among Italians for a married woman to retain her maiden name, which in her case was "F. Veltre."

The husband was working on the canal, and while he was doing so, he and she both say, she began to carry on a grocery business, which, at the time of the fire to be hereafter referred to, was so carried on in the downstairs portion of the building occupied by them, while they lived in the upstairs portion.

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

The evidence is that, as they came to have a number of small children, it began to be necessary for him to give up his work in part and help her in the store. He is able to speak English somewhat, and imperfectly to read and write Italian. She, on the other hand, cannot speak English and cannot read or write. He says that the English-speaking people call his wife Mrs. Savino, and the Italian people Mrs. or Miss Veltre. He says he took a box (No. 984) in the post-office in the town of Thorold in his own name, and had had it for four years before the fire.

A policy of insurance was issued by the defendant company to the plaintiff in the name of "F. Veltre" on the 17th June, 1916, by which the "merchandise, consisting chiefly of stock of groceries, meats, cigars and tobacco," was insured for $1,200, and "the store furniture and fixtures, useful and ornamental, including safe, cash-register, signs, awnings, tools, implements, scales, refrigerator, cheese-cutter, shelving, electric fans, clock, table, and stove" for $300, the premium of $22.50 being paid to the defendant company by or on behalf of the plaintiff.

On the morning of the 25th December, 1916, a fire occurred, by which, as the plaintiff alleges, all of the said goods, chattels, furniture and fixtures, were totally destroyed.

In this action she makes a claim for $1,500 under this policy, which she alleges to have been in full force and effect at the time of the said fire.

The defendant company in answer pleads that the policy was subject to the statutory conditions set forth in sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183; that, on the 15th December, 1916, they terminated the insurance under the said policy by giving seven days' notice in writing of such termination, by registered letter addressed at Toronto to the plaintiff at Thorold, being her post-office address, and by tendering therewith the sum of $11.34, being the ratable proportion of the premium paid for the unexpired term calculated from the termination of the policy; and, by virtue of the conditions numbers 11 and 15 of the said statutory conditions, the policy ceased after the expiration of seven days from the giving of such notice; that the policy was not in force or effect on the 25th December, 1916, and the defendant company is not liable in respect of the loss. The defendant company also pleads that the action was commenced prior to the expiration of sixty days after proofs of loss were furnished

by the plaintiff to the defendant company, in accordance with sec. 89 of the said Insurance Act; and the defendant company pleads the provisions of the said section and of condition No. 22 of the statutory conditions, and says that the plaintiff was not, at the time the action was commenced, entitled to commence such action against the defendant company in respect of loss under the policy.

The plaintiff and her husband had left the town of Thorold for a visit in Toronto on Sunday the 24th December, at about ten o'clock in the forenoon, leaving the house and premises in charge of a caretaker of buildings of which the one occupied by them was one, and leaving him to watch the stove with which their premises was heated and attend to the feeding of their horse.

Some attempt, upon cross-examination of the plaintiff and her husband, was made to shew that the loss was not as great as testified to, but no evidence was put in to the contrary, and there is no plea upon the record definitely questioning the amount of the loss.

I think it therefore may be found as a fact, if it is necessary to make such a finding, that the plaintiff sustained a loss which would entitle her to claim $1,500 under the policy.

It was proved at the trial that on the 15th December, 1916, the defendant company, over the signature of its manager, sent a letter addressed as follows, "F. Veltre, Esq., 82-84-86 Claremont St., Thorold, Ont.," being the name of the plaintiff as mentioned in the policy, and the building in which the goods were said to be situated being described in the policy as No. 82-84, on the north side of Claremont street, in the said town. The letter is as follows:—

"I beg to hand you enclosed herewith in legal tender the sum of $11.34, being the unearned premium for balance of the current term of policy No. 10514765 of this company issued to you, dated June 17th, 1916, expiring June 17th, 1917, covering $1,200 on groceries, meats, cigars and tobacco, and $300 on store furniture and fixtures, including refrigerator, cheese-cutter, shelving, electric fans, clock, table, and stove, all while contained in the 3-storey brick building, occupied as laundry, grocery store, hall and dwelling, situate as above, which is hereby cancelled, and

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

this company will not be held liable should any loss occur after the 22nd December, 1916."

The letter contained the enclosure as stated, and was registered. It was not delivered to or received by the plaintiff or her husband up to the time that the fire occurred. The letter apparently reached Thorold, as appears by the stamp on the back of the envelope, on the 16th December.

The husband of the plaintiff told a somewhat confused story as to the registered letter, stating in one place that he asked for a registered letter for his wife at the post-office before the fire, and at another point stating that it was only after Wilson—the agent who had negotiated the insurance, delivered the policy and received the premium—told him that there was a registered letter at the post-office that he went to inquire about it, and was told at first there was no letter for her, and later on was offered a letter, but would not then take it, as it was after the fire and too late.

A man named Tony Calabrese testified that on the 26th December, about 10.30, he was present in the post-office when the plaintiff's husband, who said he was looking for a registered letter, asked for mail, and got none. Savino was also recalled, and testified that it was on the Tuesday morning that he was in the post-office with Calabrese.

For the defence, Winnifred Copeland, an employee in the post-office, testified that she knew Savino, who had a box in which his mail was put; that she did not know the name "Veltre" at all up to the time of the fire, after which Savino came in and asked for a letter; that she had remembered then a letter being produced which had come to the office on the 16th December; that it was entered in the book and put in the cupboard with the other registered letters; that the custom was to put a ticket in the box if there was a registered letter for the owner; and that this was not done with this particular letter. She says it remained there until the 6th January, 1917; that, after the fire, Savino came and asked if there was any registered letter for him; that on the same day he came back with a friend, who asked if there was any registered mail for "Veltre," to which she replied "Yes," whereupon Savino would not take it, because, as he said, it was his wife's. She says that she shewed it to him, but he

said he would leave it in the office. He came back next morning to see if it was still there, and, on her saying "Yes," he said he would not take it, as it would be of no use to him. Ultimately the letter was returned to Toronto.

She said that, in the case of a registered letter addressed to any person, if there was no box, the person was supposed to call for his letters. If he came in and inquired, the employees were supposed to tell him the letter was there. She also said that, even if there was a street number, they did not notify the people, and that no effort was made to find out who "F. Veltre" was, or to whom the letter was addressed.

She said she knew there was some blame said to be attached to some one in the office for the delay in delivering the letter—that the postmaster was blamed and the girls under him.

McKague, who had been postmaster for thirteen years, testified and said that he knew Savino had a box in his own name, that he did not know the name "F. Veltre" until after the fire, or of any one asking for mail for her before the fire. He said he had seen the letter in question, but had not known of it until about the time of the fire; that Savino came to him and asked if there was a letter for him, and said there was a letter for him which he had not received, but that he did not mention the name of "Veltre" at all, and that this conversation occurred on the street. He said his instructions were to his employees to try and reach people to whom registered letters were addressed, but that no effort, as far as he knew, was in this case made, as no one knew any one of the name of Veltre, because "they did not come to the wicket."

The amount of $11.34 enclosed in the letter consisted of Dominion bills, with the exception of 9 cents which was in postage-stamps. It is admitted that the amount tendered is larger than the unearned premium for the balance of the term of the policy properly payable to the plaintiff, but it is contended that what should have been tendered was the exact amount, and the tender of a larger amount was illegal. But "a tender by the debtor of more than is due to his creditor is a good tender of the sum really due:" Harris's Law of Tender (1908), p. 76. The principle is, *omne majus continet in se minus.*

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Included in the statutory conditions printed on the policy is the following:—

"11. The insurance may be terminated by the company by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid, for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice or notice and tender as the case may be, and the expiration of the seven days."

It is contended on the part of the plaintiff that the notice under this section and the tender accompanying it must be a personal one.

Statutory condition No. 15, however, is as follows:—

"15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post-office address notified to the company or where no address is notified and the address is not known, addressed to him at the post-office of the agency, if any, from which the application was received.

It is contended on behalf of the defendant company that this condition applies and governs. I think effect must be given to this view, and that the written notice mailed in Toronto on the 15th December, 1916, was effective.

But it is further contended that, even if such written notice were sufficient to cancel the policy, if a legal tender were also to be made, such tender must be a personal one, even though the notice could be a written one.

I am unable to think that effect can be given to this contention. It seems to me that, if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way.

It was argued for the plaintiff that no notice in writing was provided in or permitted under statutory condition 11 under which the company could give notice to terminate the contract; and that, as under statutory condition 12 provision is made for the assured giving written notice, this made it the more clear that nothing but a personal notice was intended under statutory condition 11. It seems to me, however, that, reading statutory conditions 11 and 15 together, the construction to be placed upon

them is this, that the company cannot terminate the policy unless seven days' notice is given to the assured; that, nothing being said about whether this notice shall be given to the assured personally or in writing, it may be given in either way, but, if in writing, it must be by letter delivered to the assured or by registered letter addressed to him at his last post-office address notified to the company, or, where no address is notified and the address is not known, addressed to him at the post-office of the agency, if any, from which the application was received; that the written notice contained in the letter was, therefore, in the present case, a compliance with conditions 11 and 15; and that where in 11 it speaks of "tendering therewith,"—with the notice—that must mean that the tender may accompany the registered letter, if such notice is in that form.

I was referred by counsel for the plaintiff to Laverty's Insurance Law of Canada (1911), p. 80, where is found the following statement by the learned text-writer:—

"In determining when cancellation by the insurer shall be effectual, the principal test is whether the unearned portion of the premium has been paid over to and actually received by the insured;" and certain cases are cited by him in support of his view as follows: *Caldwell* v. *Stadacona Fire and Life Insurance Co.* (1883), 11 S.C.R. 212; *Armstrong* v. *Lancashire Insurance Co.* (C.A.) (1903), 2 O.W.R. 599; *Cain* v. *Lancashire Insurance Co.* (1868), 27 U.C.R. 217, 453.

But the facts are different in those cases to the facts here. It seems to me that, once the defendant company has mailed the registered letter, tendering therewith the unearned premium, after the seven days the legal presumption is, that the notice and money have been received by the assured, and the contract is at an end.

The conclusion being that the contract had been terminated by the defendant company before the fire occurred, the plaintiff cannot succeed, and her action must be dismissed. That she did not receive the notice and money in due course of mailing was not the fault of the defendant company. She did not receive them either because she did not inquire for or send for her mail or because of the failure of the postal authorities to see that she received the letter in question.

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Hodgins, J.A.

I do not think, however, it is a case in which I should make any order as to costs. *Action dismissed.*

A. C. Kingstone, for appellant; *R. S. Robertson*, for defendant company.

HODGINS, J.A.:—Among the pleas is one setting up that the action is premature under sec. 89 of the Insurance Act, R.S.O. 1914, ch. 183, and condition 22.

This defence was insisted upon before us, but is not dealt with by the learned trial Judge, who decided that the policy had been cancelled before the fire. The respondent company, since the argument has, on terms, abandoned this defence. Attention may perhaps be directed to the case of *Strong* v. *Crown Fire Insurance Co.* (1912), 3 O.W.N. 481, 1 D.L.R. 111, in which the Court found a way to overcome such a plea, when purely technical.

There remains, therefore, only the point decided by the learned trial Judge. The respondent company pleads that it has validly cancelled the policy under statutory conditions Nos. 11 and 15. This was effected, as the company contends, by mailing to the appellant, in a registered letter, addressed to her under the name "F. Veltre, Esq.," "82-4-6 Claremont St., Thorold, Ont.," a notice cancelling the policy, and by enclosing in this letter the respondent company's cheque for $11.34, or legal tender to that amount, "being the unearned premium for balance of the current term of policy No. 10514765."

The letter containing the notice and money was never delivered to or received by the appellant until after the fire.

The sole question raised is, whether the method thus adopted was an effective compliance with the conditions which require a tender of the unearned premium to be made as well as the giving of notice.

It was held by the learned trial Judge that "if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way."

I am, with respect, unable to agree with this conclusion. While it is true that the end aimed at is cancellation, that object is not achieved by a mere notice, but requires also a tender of

the unearned premium. The giving of notice by letter does not complete the cancellation. It is only one step or element, the other being in effect the payment of the money. The reason for the return of the premium which has not been earned is two-fold. One is that it would be inequitable, on cancellation, to retain it; the other is that the assured is entitled to have in hand the money wherewith to insure elsewhere. The result of the trial judgment is to enable the respondent company to cancel the policy without the assured being aware of it, and therefore being unable to protect herself by insuring elsewhere. A tender of the money, if personal, leaves the assured in no doubt of the position and free to safeguard herself by seeking another company. It seems unjust to deprive her of all the protection against loss by fire, while leaving her in fact under the belief that she was still insured, unless required to do so by very clear words in the condition endorsed upon the policy.

Under condition 11, there are two things to be done, and done at the same time. One is a seven days' notice, not required to be in writing, and the other is a tender "therewith" of a ratable proportion of the premium paid. The essentials of a valid tender are, actual money, precise amount, and personal offering. Where, as here, the respondent company is required to calculate the amount, which is not known to the assured nor its return expected, it is reasonable that the assured should have the right to insist on all these essentials, unless they are waived. The notice is entirely the act of the insurance company, but the tender must have the assent of the assured if it is to be made otherwise than as by law required. I fail to see in the word "therewith" a wiping out of any safeguard thrown around a tender for the protection of the person who is, till that moment, entitled to enforce the contract.

The reasonable construction, as it appears to me, of the two conditions is, that, while a notice may be either a verbal or a written notice (and if written it may be given by registered letter), yet a notice of cancellation, if it is intended that the tender shall be made "therewith," must be such a one as enables a tender to be effectually given. It should not be one which eliminates all the safeguards of a legal and proper tender, for no other reason than that of saving the pocket of the insurance company. There is an element of unfairness in applying to the actual return of the money which

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Hodgins, J.A.

purchased the insurance a conventional way of giving written notices, often quite unimportant, if the result is to be that cancellation may be effective, although the insured remains totally unaware of it. I do not think the conditions pleaded should be construed in that way if there is an equally reasonable meaning to be found in them which leads to no such inequitable result.

This is sufficient to dispose of the appeal in the appellant's favour. But upon the point that, as to the notice itself, posting alone is sufficient, I think the case of *Skillings* v. *Royal Insurance Co.*, 4 O.L.R. 123, 6 O.L.R. 401, expresses the proper view to be taken where the act in question is cancellation by post-letter, and that it does not wholly turn on the improper address. The consideration pointed out by Lount, J., and by Garrow, J.A., limits, in my humble judgment, the application of the cases cited by my Lord the Chief Justice (*infra*) where what is to be accomplished by a notice is cancellation of an existing contract, and where that notice is unexpected by the other party, and till received is still subject to recall, it can be effective in terminating the obligation only if and when it reaches that other party.

Pursuant to the terms agreed upon between the parties in consideration of the abandonment of the other plea, the judgment will be set aside and judgment will be entered for the appellant for the money secured by the policy, without costs of action or appeal.

Maclaren, J.A. Ferguson, J.A.

MACLAREN and FERGUSON, JJ.A., agreed in the result.

Magee, J.A.

MAGEE, J.A.:—It seems to me that the Legislature, in giving power to an insurance company to put an end to its contract upon which an insured person was relying for protection against loss, could not have intended that, in returning the money which it had not earned and was refusing to earn, the company should be at liberty to deposit legal tender money in a letter in the post-office, and that from the moment of its deposit the money would be at the risk of the person to whom it was addressed—who would have no other information of its being sent or of the intention to send it. And yet how otherwise could the company "tender" back the money than by legal tender money? It could not send a cheque or a bank draft, for that would not be a tender. In choosing between inconvenience to the company which is cancelling its contract and the risk of actual loss to its contractee

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Meredith, C.J.O.

the interpretation should be adopted, if possible, which favours the latter, who is not in fault and is not disturbing the *status quo*. I think the language of the Legislature does not prevent this interpretation.

MEREDITH, C.J.O. (dissenting):—This is an appeal by the plaintiff from the judgment, dated the 1st August, 1917, which was directed to be entered by Sutherland, J., after the trial of the action before him sitting without a jury at St. Catharines on the previous 8th day of May.

The action is on a fire insurance policy issued by the respondent to the appellant, and two defences were set up: (1) that the policy had been cancelled before the happening of the loss; and (2) that the action was begun before the expiration of sixty days from the furnishing of the proofs of loss, and therefore prematurely.

The learned trial Judge gave effect to the first of these defences; and, by arrangement between the parties, the second has been abandoned.

The policy was on the cash plan, and the respondent, having determined to avail itself of its right under statutory condition 11 to cancel it, on the 15th day of December, 1915, sent by registered letter, properly addressed to the appellant, notice of cancellation, and enclosed in the letter the proportion of the premium which, by the provisions of that condition, the respondent was required to tender to the appellant. The letter, owing to the absence from home of the appellant, was not received by her until after the 25th December, 1915, which was the day on which the loss in respect of which the action is brought occurred.

It was contended on behalf of the appellant that what was thus done did not effect a cancellation of the policy; that the sending of the unearned premium in the letter notifying the appellant of the cancellation was not a tender of it within the meaning of condition 11; and that in any case neither the notice of cancellation nor the tender was effective until seven days had elapsed from the time of the receipt of the letter by the appellant, and *Skillings* v. *Royal Insurance Co.*, 4 O.L.R. 123, 6 O.L.R. 401, was relied upon as a conclusive authority in favour of the appellant as to the latter point.

In that case the insured had intended to give notice of their

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Meredith, C.J.O.

desire to surrender their policy by sending the notice to the agent of the company at Barrie, but by mistake their letter giving the notice was addressed to him at Parry Sound, instead of, as it should have been, at Barrie, and the notice did not reach the agent until after the loss had happened.

The company contended that what had been done had terminated the policy, but it was held that it had not.

The condition corresponding to condition 15 was then condition 23, and it provided that:—

"Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post-letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorised agent of the company."

As this condition had not been complied with, there was nothing providing for any mode of giving the notice, and the general law applied, and what was decided was, that according to it the notice was not effectively given until it was received by the company, or by some one having authority to receive it for the company.

In order to succeed in its defence in the case at bar, the respondent must prove compliance with the provisions of condition 11; and therefore (1) that the prescribed notice was given at least seven days before the loss happened; (2) that simultaneously with the giving of the notice the tender which the company was required to make was made.

It was contended by counsel for the appellant that no tender within the meaning of condition 11 was ever made; that, although condition 15 permits the notice to be sent by registered letter, it does not authorise the making of the tender in that way; and that in any case neither notice nor tender was given or made until the respondent's letter reached the hands of the appellant.

In my opinion, these contentions are not well-founded. Condition 11 requires that the giving of the notice and the making of the tender shall be concurrent acts, for that I take to be the effect of the words, "by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith . . ."

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Meredith, C.J.O.

Then, when the contract provides, as does condition 15, that "any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him . . ." it must follow that the tender may be made by sending the money in the registered letter, or that, where the insurance is on the cash plan, the insurer cannot avail himself of the means authorised by condition 15 to terminate the contract, for the tender, if it cannot be made as the respondent made it, must be a personal one, and in making it the assured must comply with all the requirements of the law as to tender.

There can, I think, be no doubt that, if a verbal or written notice, such as condition 11 provides for, were given, and at the same time the proportion of the premium which the insurer is required to return were paid to the assured, that would satisfy the requirements of the condition; and it follows, I think, if that be the case, that the payment of it by sending it with the registered letter would also satisfy those requirements.

If the notice in writing must be accompanied by the tender, as in my opinion it must be, condition 11 was complied with, if the posting of the registered letter containing the notice and the money has the same effect as the delivery of them to the insured would have had; that is, if the notice was given and the tender was, within the meaning of condition 11, made when the registered letter was posted.

The answer to this question depends upon the meaning which is to be given to the opening words of condition 15: "Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed . . ."

The general rule, no doubt, is, that, where a person communicates through the post-office, the communication is not made to the person to whom it is sent unless or until it is received by him.

There are exceptions to this rule. One of these is where the communication is notice of the dishonour of a bill or promissory note; another is where the communication is a notice to quit: *Papillon* v. *Brunton* (1860), 5 H. & N. 518, 521; and these notices, when sent by post, are effective from the time of mailing them; and a third exception is where the contract provides for that mode of communication, and in that case also where a letter

ONT.

S. C.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED.

Meredith, C.J.O.

making it, properly addressed, is posted, it is made when the letter is deposited in the post-office: *Dunlop* v. *Higgins* (1848), 1 H.L.C. 381; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex.D. 216; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; *In re Imperial Land Co. of Marseilles, Harris' Case*, L.R. 7 Ch. 587.

The case at bar falls within the third of these exceptions, inasmuch as by the contract of the parties it is provided that communications for the giving of which condition 11 provides may be sent through the post-office, and therefore the posting of the letter is the equivalent of the delivery of it to the person to whom it is sent, and what took place had, in my opinion, the effect of cancelling the policy on the expiration of seven days from the day on which the letter was deposited in the post-office. But, even if the notice is effective only from the time when in the ordinary course the letter would reach the person to whom it was sent, the notice given to the appellant was a sufficient notice.

The *Skillings* case (*supra*) is not inconsistent with this view, for in that case, as I have pointed out, the mode of sending the notice for which the policy provided had not been followed, and there was therefore nothing to take the case out of the general rule as to communication by post to which I have referred.

I admit the force of the argument that it is only the letter giving the notice that the contract provides may be given by means of the post-office, and that there is nothing provided as to the mode of making the tender, and therefore that it must be made in a way that meets all the requirements of the law, and therefore personally. The view of the learned trial Judge was in accordance with my own view as to the effect of conditions 11 and 15; but, if I were in doubt as to which of the opposing views is to be preferred, I would not be justified in joining in a judgment overruling him, for to doubt is to affirm.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs. *Appeal allowed.*

ALTA.

S. C.

MAH KONG DOON v. MAH CAP DOON.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons and Hyndman, JJ. February 23, 1918.

PARTNERSHIP (§ VI—25)—RECEIVERSHIP—DISSOLUTION—LEASE OF PREMISES.

A partnership at will is for all practical purposes dissolved when a receiver is appointed, and one partner has then a right to lease the partnership premises and hold it for his own personal benefit.

APPEAL by plaintiff from the judgment of Harvey, C.J. The the facts are fully set out in his judgment, 37 D.L.R. 50.

A. U. G. Bury, for appellant.

Woods, K.C., and *Winkler*, for respondents.

HYNDMAN, J.:—Although the statement of claim seeks a declaration that the partnership "be dissolved" and not "is dissolved," I agree with Harvey, C.J., that the partnership being one at will and a receiver having been put in charge was for all practical purposes dissolved at the time of service of the writ upon the defendant.

In my opinion, the writ should be regarded as a notice of dissolution of the partnership. No defence which defendant might file could possibly prevent a judgment decreeing dissolution, it being established that the partnership was one at will.

There remained therefore only the process of winding-up the partnership affairs, sale of the assets, payment of the debts and division of the surplus, if any.

Such being the case, there was no object in either of the partners taking a lease for the benefit of the firm for the very good reason that no such partnership would be in existence at the beginning of the new term.

The confidential relationship which theretofore existed was, in my opinion, at an end, and the only obligation which still rested upon each of the partners was to do nothing which might depreciate the value of the assets or interfere prejudicially with the winding-up of the estate.

The only interest I can conceive of which the plaintiff might have in the new lease would be its possible value to a purchaser of the business as a going concern as it would doubtless tend to increase the selling value. There is no evidence whatever to shew that the partnership or either member of it had ever contemplated securing a renewal from the landlord.

The receiver, however, did not follow the usual course of transferring the lease along with the stock-in-trade and the business as a going concern but sold the stock-in-trade separately with the intention of disposing of the lease apart from the business subsequently. In such circumstances I do not see on what ground the plaintiff can claim to be interested in the new lease, and I am of opinion that either partner became free to acquire it for himself if he could arrange to do so with the owner.

ALTA.

S. C.

MAH KONG DOON v. MAH CAP DOON.

Hyndman, J.

The rule seems to be that: "One partner cannot treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is carried on for his own individual benefit; if he does so treat, and obtains a lease in his own name, it is a trust for the partnership." *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, 34 E.R. 115.

That was a case where the defendant clandestinely obtained the renewal before the dissolution and with the object in view of afterwards dissolving the partnership and thus gaining an unfair advantage over the plaintiff partner. I cannot see that in this case such a relationship existed, for, in the words of the Chief Justice, "the then existing lease had several months to run, no renewal was necessary for the purposes for which the partnership then continued to exist, and apparently no one would have any right to obtain a new lease in the interests of the partnership."

If the premises were necessary for the proper winding-up of the partnership beyond the expiration of the old lease it might be a very different matter, but that necessity did not exist here.

Having come to the conclusion that the defendant has satisfactorily rebutted the presumption against him that the renewal should be considered as acquired for the benefit of the partnership, I would dismiss the appeal with costs.

Stuart, J.
Simmons, J.

STUART and SIMMONS, JJ., concurred with HYNDMAN, J.

Beck, J.

BECK, J.:—I agree that the appeal should be dismissed with costs; but I wish to guard myself from being supposed to assent to the general proposition that once a partnership has reached the stage of being wound up a partner owes to his co-partners no obligation which restricts his dealings with respect to the partnership assets, including what in a loose way may be termed the good-will of the business. My brother Hyndman has expressed himself in broader terms in this direction than I think are necessary for the decision in this case. Doubtless he and the other members of the Court who concur with him, do not intend that his expressions are to be taken as broadly as they seem to me to be likely to be understood. *Appeal dismissed.*

PALMASON v. KJERNESTED.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, Cameron, Haggart and Fullerton, JJ.A. February 22, 1918.

1. MORTGAGE (§ VI E—90)—WAR RELIEF ACT—APPLICABILITY.
The War Relief Act (Man.) cannot be invoked against a mortgagee proceeding with a mortgage sale commenced prior to the passage of the Act.

2. PRINCIPAL AND AGENT (§ II—8)—SALE OF LAND—PURCHASE BY AGENT.
The purchase by an agent, of land he was authorized to sell, without the knowledge of the principal can only be attacked by the principal; it is no defence to an action of ejectment.

Statement.

APPEAL by defendant from the judgment of the trial judge, 36 D.L.R. 448. Affirmed.

L. Morosnick, for appellant; *H. A. Bergman*, for respondent.

Haggart, J.A.

HAGGART, J.A.:—It seems to me the whole question we have to consider here is the effect of s. 2 of c. 88, 5 Geo. V., being an Act for the protection of volunteers serving in the forces raised by the Government of Canada in aid of His Majesty and of other persons.

This court considered the interpretation to be given to that section in the case of *Shipman* v. *Imperial Canadian Trust Co.*, reported in 29 D.L.R. 236. That case was tried before Mathers, C.J.K.B., who held that the Act made it unlawful during the continuance of the war to take foreclosure proceedings against the wife of a volunteer on active service to enforce a mortgage or encumbrance upon her property or to recover possession of property of which she is in possession, and he gave a judgment dismissing the demurrer with costs in the cause to the plaintiff in any event.

His judgment was reviewed by this Court and was reversed by a majority of the Court, 31 D.L.R. 136, which majority held that since this statute seriously interfered with contracts and the legal rights of creditors, it ought to be construed so as not to interfere with them to any greater extent than is expressly or by necessary implication provided, and the proper construction of said s. 2 of the Act when read along with the preamble to the Act is to confine its application to the prohibiting of actions or proceedings against a volunteer, or which affect any of his property, real or personal, whether in his own possession or in that of his wife or any dependent member of his family, and further that there is nothing in the section which expressly or by necessary implication protects the wife of the volunteer against actions to enforce payment

MAN.

C. A.

PALMASON v. KJERNESTED.

Haggart, J.A.

of debts of her own creation or separate proceedings to realize upon encumbrances against her separate property.

The late Richards, J., and myself dissented and agreed with the judge appealed from, that upon the proper construction of s. 2, the wife was protected during the war against all such actions and proceedings in connection with her own property and obligations as well as in respect of those of her husband.

After the delivery of this judgment, the question was considered by the Court of Appeal for British Columbia in a case of *Parsons* v. *Morris* (1917), 33 D.L.R. 593. In that case the majority of the Court of Appeal for British Columbia agreed with the finding of the minority of the Court of Appeal for Manitoba, and approved of the reasons urged by the minority of our court.

That judgment, of course, is not binding upon us, and I consider it my duty to follow the judgment of the majority of this court in the *Shipman* case until it is changed or reversed by this court or by some other court of higher authority.

Under the circumstances, I give a reluctant assent to the opinion expressed by the majority of this court and agree to dismiss the appeal.

Perdue, J.A.
Cameron, J.A.

PERDUE and CAMERON, JJ.A., concurred with FULLERTON, J.A.

Fullerton, J.A.

FULLERTON, J.A.:—This appeal involves the right to the possession of the S.W. ¼ of s. 28, t. 17, r. 4 east. Until August 22, 1916, the husband of the appellant was the owner of the land, subject to a mortgage in favour of the J.I. Case Threshing Machine Co. Mortgage sale proceedings were taken by the Case Company and the property put up for sale at public auction. The sale proved abortive and on November 30, 1914, the Case Company entered into an agreement to sell the land to the respondent. On August 7, 1916, the Case Company transferred the land to the respondent, and on August 22, 1916, a certificate of title was issued to him. Respondent took possession of the land on January 14, 1915, and lived on it until December 20, 1915. Appellant shortly afterwards went into possession of the land, and respondent brought his action to recover possession.

The appellant raises two defences: (1) That her husband enlisted for service in the war on October 24, 1914, and that she is therefore entitled to the protection of the War Relief Act. (2) That on November 27, 1914, her husband employed respond-

MAN.

C. A.

PALMASON v. KJERNESTED.

Fullerton, J.A.

ent as his agent to effect a sale of the land and that having accepted such agency plaintiff could not legally purchase the land himself.

The War Relief Act came into force on April 1, 1915. C. 88, Stats. of 1915, s. 2, provides that:

> During the continuance of the war and for one year thereafter it shall not be lawful for any person or corporation to bring any action . . . against a person who is, or has been at any time since the first day of August, 1914, a resident of Manitoba and has either enlisted and been mobilized as a volunteer . . . or against the wife . . . of any such person . . . for the recovery of possession of any . . . lands and tenements *now in his possession or in the possession of his wife.* . .

The Manitoba Interpretation Act, R.S.M. 1913, c. 105, s. 27 (1) defines the word "now" as follows:—

> The expressions "now" and "next" shall be construed respectively as having reference to the time when the Act was presented for the Royal assent.

The land was neither in the possession of the appellant or her husband when the Act came into force, but in the possession of the respondent. She cannot, therefore, invoke the benefit of its provisions.

As to the second ground of defence, I think that also fails. Any rights the husband may have to set aside the sale to plaintiff can only be asserted by himself. The sale, at most, is not void but voidable only at the option of the husband, and until disaffirmed by him stands.

I would dismiss the appeal with costs.

Appeal dismissed.

FREEMAN v. MONTREAL LOCOMOTIVE WORKS.

QUE.

S. C.

Quebec Superior Court, Duclos, J.S.C. December 3, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—ACTION FOR RENT OR CAPITAL.

A plaintiff, in an action under the Workmen's Compensation Act, as amended, may sue for either the annual rent or the capital, and even if he elects to sue for the annual rent he may, at any time, even after judgment, make option for and recover the capital representing such rent.

[See Annotation, 7 D.L.R. 5.]

DUCLOS, J.:—The question submitted is whether a plaintiff ought to first ask for rent to which he may be entitled, and, this having been determined, then make option for the capital is one that has been earnestly argued before the courts in a

Duclos, J.

QUE.

S. C.

FREEMAN v. MONTREAL LOCOMOTIVE WORKS.

Duclos, J.

number of actions under the Workmen's Compensation Act, and the jurisprudence is contradictory.

Plaintiff, who is 45 years of age, was engaged by the defendants as a helper in the manufacture of shells, at a salary of $18 per week. On April 25, 1916, while handling shells he accidentally cut one of the fingers of his right hand. It was thought to be a trivial matter at the time, but blood poisoning developed, and as a consequence plaintiff has almost completely lost the use of his right hand; the right arm is also affected. He sued his employers for $108 compensation to the date of the action, and a capital sum of $1,500.

The company defendant submitted that plaintiff could not claim the capital, but must first sue for the rent to which he might be entitled. This having been determined the said plaintiff might then make option for the capital representing such rent.

Defendants, while admitting responsibility for the accident, at the same time, maintained that it was for plaintiff to shew that the consequences of the accident were not due to any fault of his. In this regard they alleged that plaintiff's present condition was due not to the accident, but to his refusal to be operated upon.

On the plea that plaintiff could not claim the capital before seeking judgment for the rent to which he might be entitled, I must say that the jurisprudence is contradictory. In *Waters* v. *Cape*, 30 D.L.R. 718, Greenshields, J., held that as there was no conclusion in plaintiff's action for an annual rent, the action as brought could not be maintained. In *Torovik* v. *Steel Company of Canada*, 51 Que. S.C. 512, and in *Demers* v. *Graillon*, 51 Que. S.C. 42, the judgments are contradictory. In view of these conflicting decisions, I feel at liberty to follow my own opinion, and that is that the plaintiff in an action under the Workmen's Compensation Act, as amended, may sue for either the annual rent or the capital, and even if he elects to sue for the annual rent he may at any time, even after judgment is rendered, make option for and recover the capital representing such rent. The defendant's first objection, therefore, is dismissed.

The second objection must likewise be dismissed. In the case of an injury such as plaintiff suffered, blood poisoning, if not inevitable, is always probable. The medical evidence shews that septic germs are always present, perhaps on the instrument

inflicting the wound, perhaps on the person or clothes of the victim, and that infection sets in at once. It is, therefore, a natural consequence of the injury, which can be avoided by proper care. Was the plaintiff in fault in this respect? I think not. He did all that could be expected of him. He went at once to the first-aid station, provided by the defendants, and returned on one or more occasions until his condition became serious, when he consulted a physician and went to the hospital.

The other objection urged by the defendants is more serious. On September 7, 1915, plaintiff was advised to have his middle finger amputated; and the only medical evidence before the court is that if this had been done, plaintiff would have almost entirely recovered the use of his hand and arm. But plaintiff refused to have his finger amputated. Must he suffer the consequences?

I was much impressed with this medical evidence at the trial, but on further reflection it seemed to me that, after all, it was only an opinion that plaintiff might have almost entirely recovered the use of his hand and arm by amputation of the injured finger. This could not possibly be guaranteed. When it is borne in mind that plaintiff had already submitted to 4 or 5 minor operations, each one presumably performed for the purpose of bettering his condition, notwithstanding which he steadily grew worse, one can not help feeling some hesitation in accepting the medical opinion as a fact. The plaintiff's refusal, therefore, was not entirely unjustified. There will be judgment for the plaintiff for $1,686 and costs.

In the present instance the court awards the plaintiff Abraham Freeman the capital sum he asks for, and condemns his employers, the Montreal Locomotive Works, to pay him $108 compensation to the date of the action and a sum of $1,500 representing the capital of the rent to which plaintiff was entitled under the provisions of the Workmen's Compensation Act.

Judgment accordingly.

CAN.

S. C.

GEALL v. DOMINION CREOSOTING Co.
SALTER v. DOMINION CREOSOTING Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

STREET RAILWAYS (§ III B—27) — NEGLIGENCE — BRAKES ON CARS RELEASED BY CHILDREN.

A company which by its employees, without the authority of the owners of a railway, moves cars placed on a track at the top of a grade for the purpose of being unloaded further down the grade, and merely hand brakes them, without securely air braking and blocking them, assumes the risk of the cars being started down the grade by mischievous boys releasing the brakes, and is responsible for all resulting damage to life or property.

Statement.

APPEAL from the judgments of the Court of Appeal for British Columbia, reversing in each case the judgment of the trial court and dismissing the actions against the respondent.

The reasons for judgment of the trial judge in *Green* v. *B. C. Elec. R. Co.*, 25 D.L.R. 543, are applicable to the present cases, as the grounds of action are the same in the three cases.

J. W. de B. Farris, for appellants.

Bowser, Reid & Wallbridge, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.—The facts of the cases from the judgments in which these appeals are brought are fully set out in the notes of my brothers Idington and Anglin. The cars which caused the accident were left by the servants of the respondent (Dominion Creosoting Co.) in a dangerous position, insecurely fastened and without any protection. There can, I think, be no doubt on the evidence that they were actually set in motion on the down grade by mischievous school boys interfering with the insecure fastenings.

The employees of the company had reason to foresee the probability of such interference and they took no steps to guard against it. Had the case come before me, sitting as a trial judge, without a jury, I should, on these facts, have had no difficulty in finding for the plaintiffs.

The jury, however, simply found that the negligence of the defendant was the proximate cause of the accident and I entertain considerable doubt whether the omission of all reference to the action of the boys did not render it impossible to support this finding. I have come to the conclusion, however, that the negligence of the respondents' servants as involving the natural consequences that flow from it may be said to have been the

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Fitzpatrick, C.J.

proximate cause of the accident in the same way as it would have been if the cars had started moving through the mere force of gravity. It is of course obvious that the accident could not have happened at all but for the respondents' negligence.

It would certainly have been more satisfactory if the jury's attention had been pointedly directed to the exact facts and they had been invited to give a verdict accordingly. The alternative of allowing the appeal, however, is to send the case back for retrial, a most unsatisfactory proceeding in the case of a practically foregone conclusion. Since therefore I am satisfied that the appellants have a good claim on the merits and the majority of the court is prepared to find for the appellants, I am glad to be able to conclude that such finding can be reconciled with strict legal principles.

The editor of the Law Quarterly, commenting on the case of *Crane* v. *South Suburban Gas Company*, [1916] 1 K.B. 33, says:—

> People who create a dangerous nuisance on the verge of a highway come under the good and fairly old authority of *Barnes* v. *Ward*, 9 C.B. 392, and will not save themselves by trying to divert the argument into refined distinctions about negligence and intervening acts of third persons.

I would allow with costs.

Davies, J.

DAVIES, J. (dissenting).—I think the judgment of the Court of Appeal for British Columbia with respect to the defendant, the Dominion Creosoting Co., was right and that these appeals should be dismissed.

The negligence of which they were found guilty by the jury and the only negligence found against them was "in moving the cars without the B.C. Electric Company's shunter and crew in attendance with proper facilities."

I am unable to see in what respect this negligence could be said to be a proximate or effective cause of the accident. I agree with the Court of Appeal that this moving of the cars in the way they did move them "did not affect the situation at all."

The proximate and effective cause of the accident was the interference of a number of mischievous young boys about 11 years of age, two of whom worked together to unloose the brakes of the car and let them loose upon the track on which they stood.

Two of the boys worked together, one prying up the dog

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Davies, J.

of the brake with a piece of iron and the other twisting on the wheel.

They succeeded after a good deal of ingenuity and labour in loosening the brakes of the upper cars which ran down the inclined grade of the rails they were on by force of gravity and collided with the two cars lower down the grade.

Two of these cars, the upper ones, were stopped by one of two men left with the cars by the defendant company but the lower cars, which had been hit by the upper ones, ran down the grade and collided below the switch through the knife switch with a passenger car going north, in which collision the plaintiffs were injured.

There are two or three important and controlling facts which must be kept in mind in determining the liability of the Creosoting Company.

One is that when and after moving the cars on the day of the accident, in order to get from them the paving blocks necessary to enable the company to go on with the work they had contracted to do, the cars were braked and blocked in the same way in which they had been braked and blocked by the Railway Company on the day previously, and the other is that but for the mischievous intermeddling and loosening of the brakes of the two upper cars by the boys, the accident would not and could not have happened.

There was no finding of the jury that the paving company (defendant) had any reason to fear or anticipate this mischievous action of the boys, nor was there any evidence to justify any such finding had it been made. The only negligence found was that I have previously stated "in moving the cars without shunter and crew of the railway company in attendance." There was no negligence found by the jury that the cars had not been left on the tracks well and sufficiently braked and secured by the Creosoting Company.

The mischievous interference and action of the boys in unloosening the brakes of the two upper cars which the evidence shews were effectively and securely fastened was the proximate and effective cause of the accident and without which it neither would nor could have happened.

It is not the province of this court to make findings of other negligence on the defendant's part than that found by the jury. The explicit and definite negligence found excludes from our consideration any other suggested negligence not found by the jury.

If the jury had found that the company had reasonable grounds to anticipate any such mischievous interference of the boys as was proved and had neglected to take reasonable care to guard against it, or if they had found that the company defendant had not properly braked and secured the cars on the inclined grade, a totally different case would have been presented for our consideration.

On the findings of fact, however, of the negligence of the company, I am quite unable to hold them liable.

I think the principles laid down by the Court of Appeal in the case of *McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331, must govern our judgment here. These principles stand unquestioned to this day. One of them, as stated by Vaughan-Williams, L.J., at p. 337, I take to be this, that in those cases in which part of the cause of the accident was the interference of a stranger or third person the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident, and that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognize the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury.

Having regard to the facts proved and the findings of the jury, I cannot reach a conclusion that the defendants are liable in this action.

I have carefully considered the cases of *Cooke* v. *Midland Great Western R. Co.*, decided by the House of Lords, [1909] A.C. 229, and of *Crane* v. *South Suburban Gas Co.*, [1916] 1 K.B. 33, neither of which, it appears to me, question or qualify the principles upon which *McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331, above cited was decided. On the contrary, Lord Macnaghten, in the former case, with whose opinion Lord

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Idington, J.

Loreburn concurred, approved expressly of the opinions expressed by Romer and Stirling, L.JJ., in *McDowall* v. *Great Western R. Co.*, *supra*, which, as I read them, are in full accord with those of Vaughan-Williams from which I have quoted.

SALTER v. THE DOMINION CREOSOTING COMPANY.

IDINGTON J.—This action was brought against the B.C. Electric R. Co. and the respondent, the Dominion Creosoting Co. The jury found a verdict against both. The learned trial judge thereupon entered judgment against both. Upon appeal to the Court of Appeal for British Columbia, that court maintained the judgment against the B.C. Electric R. Co. but allowed the appeal as against the respondent.

The B.C. Electric Co. appealed to the Judical Committee of the Privy Council and that appeal is still pending there.

The appellant brings the appeal here against the judgment of the Court of Appeal exonerating the respondent.

The question of the liability of the respondent does not necessarily turn upon the facts implicating, or alleged to implicate, the B.C. Electric Co.

Both companies may be liable, but the facts are such that the liability of either cannot in itself necessarily in law imply the liability of the other. They were independent actors and whether jointly liable or not need not concern us herein. I desire under such circumstances as I have set forth to refrain from passing any opinion upon the liability of the company which is not before us. Yet it is necessary to state a good many facts which may bear upon the question of that company's liability in order to understand the claim made against the respondent.

The respondent was engaged in delivering creosoted blocks, for paving streets in Vancouver, brought in railway freight cars, loaded therewith, over the B.C. Electric R. Co.'s railway tracks. The latter company operated a street railway in said city and the appellant whilst a passenger in one of its passenger cars, used in such service, received serious injuries caused by a collision of one of the said freight cars with the said passenger car under circumstances I am about to relate.

The B.C. Electric R. Company had placed at different times on its track freight cars carrying said blocks for the respondent

till there were in all four such cars at one time placed at short distances apart to be unloaded by the respondent at points where its servants had directed them to be placed for that purpose. The B.C. Electric Co. had taken care, when so placing each of said cars, to have the brakes applied by the air compressor available in the operation and took care in connection with that operation to have blocks put in front of the wheels and so pinched thereby as to render it difficult, if not impossible, to move any of them by such means as were resorted to by the mischievous boys who later interfered.

The respondent's men later on, for their convenience, having desired the cars to be moved further down the grade, opened the brakes and removed these blocks and then moved the cars further down than they had originally been placed. They then again put some blocks in front only of the car furthest down the grade and applied the brakes by such simple contrivances as they found available in the absence of a shunter. It seems clear that this second attempt to fix the cars and prevent their moving was far from being as efficient as the first operations performed by the B.C. Electric Co.'s men.

It is said that the car, or perhaps two cars, last placed by the B.C. Electric Co. were left by it on a level part of the track, but all were, as finally placed by respondent, on a down grade of from 2 to 2½ per cent.

It was attempted to be proved that this second operation was done by the authority of the B.C. Electric Co. That attempt at proof failed to convince the jury, who answered a question submitted on the point, by saying that it was doubtful if any authority had been given.

It seems clear from all this that whatever responsibility existed for securing the cars from being moved by any extraneous cause was thus made to rest upon the respondent. Not only did it assume the responsibility for its men attempting to fix the cars, where they placed them, by the less efficient means they had adopted than the B.C. Electric Co. had applied; but also the entire responsibility for whatever might arise, which either company was bound to have anticipated and against which it should have protected any one liable to suffer from the consequences of want of due care.

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Idington, J.

It may well be that the means adopted by the B.C. Electric Co. were less efficient than the surrounding circumstances demanded; and that seems to be the basis of the finding against the company.

From the moment the respondent took upon itself to meddle with the cars it assumed, in such a case, the entire responsibility, whatever it was, for seeing that neither life, nor person, nor property, was jeopardized by having the cars on such an incline, movable, or in danger of being set rolling down the incline.

The cars were started rolling down that incline by some mischievous boys, from a nearby school, at noon hour, unloosening the brakes on the car furthest uphill.

According to the story of Law, an 11 year old actor in that enterprise, there were no blocks removed from the front of the car wheels.

Of course the momentum of the loaded car furthest from the point of collision (which was the one the boys meddled with) would account for much and that be aided by those started thereby lower down.

It is not necessary here to enter upon the story in all its details. Suffice it to say that the car furthest up the incline having been released was propelled by its own gravity against the lower one and all so moved on, that a collision took place between those freight cars and the passenger coach of the B.C. Electric Co. in which the appellant was, and he thereby sustained serious injuries.

It is hardly arguable and indeed was not much pressed in argument that, if the respondent can on any ground be held liable for the result of those boys' actions there was no evidence to submit to a jury.

I am unable to accept the view presented by the Chief Justice of the Court of Appeal, and acted upon by that court, in exonerating respondent from any liability.

The attempt to handle these cars without the necessary appliances to control their possible movements was rather a hazardous proceeding in itself.

Suppose the cars or any of them had got beyond the control of those so handling them and then accidentally collided with a passenger car, surely the respondent would have been held liable for the damages suffered thereby. It would have furnished no excuse

for respondent to have said that it or its servant had not any knowledge of railway business or of the precautions needed to be taken.

In assuming as the court below does that the moving of the cars without the B.C. Electric Co.'s shunter and crew in attendance with proper facilities, did not affect the situation at all, I respectfully submit there is error. Indeed it seems to me there is a grave misapprehension of the facts, for the cars were not braked and blocked in the same manner, and by the same efficient means, as I understand the evidence, they had been when placed by the B.C. Electric Co.

The jury heard the men who performed the operation and looking at the evidence may not have accepted literally all they said as true. And even if there was a perfunctory doing of that so as to lend a similarity of appearance to the results, it is not self evident that they were identical in efficiency.

To my mind there is ample evidence to warrant the jury in making the broad distinction they do.

The place where these cars were placed was on the public highway. One had been placed there on a Monday and later removed. Two of those in question were placed on Tuesday morning and two more on Tuesday evening and all left braked and blocked by the B.C. Electric Co. On Wednesday at noon, the time of the accident, they stood, as imperfectly braked by respondent, and without any blocking in front of any but the one furthest down the hill. This position of the cars and these conditions as to blocking is that outlined by the respondent's foreman. I fail to find there wear much resemblance to that which is stated to have been the condition in which they were left by the railway company.

The difficulty in the case is caused by the interference of the boys, and the question of law thus started is as to whether or not that was such an occurrence as ought to have been foreseen and provided against. Its determination depends on the facts, which I think were clearly questions for the jury.

The cars were clearly liable to all sorts of interference by boys or grown-up idlers, or by movements of other cars or by storms of wind, and their situation liable in such case to produce the disastrous result in question herein.

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Idington, J.

The question in the analogous case of *Cooke* v. *Midland Great Western R. Co.*, [1909] A.C. 229, for the consideration of the jury is put thus at p. 234 by Lord Macnaghten:—

> Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?

Lord Macnaghten proceeds to say:—

> This, I think, was substantially the question which the Lord Chief Justice presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin*, 1 Q.B. 29, and the opinion expressed by Romer and Stirling, L.JJ., in *McDowall* v. *Great Western R. Co.*, [1903] 2 K.B. 331.

The *McDowall* case, [1903] 2 K.B. 331, is that upon which the respondent most strongly relies.

The respective facts in each case, as to the care taken to provide against the contingency of interference by boys, makes a marked distinction between that case and this in hand.

There reliance was also placed upon the fact that boys had trespassed for years upon the company's premises in question but had never ventured to move a car. In this case, so far from having such assurance to rely upon, these very boys had just got done, on the day in question, amusing themselves in going a step beyond the ordinary form of boyish trespass by running a hand-car of the railway company without interference by any one. Having tried that experiment unchecked, they grew bolder and tried to follow the bad example of what they or others had done a few weeks before with another car. What is the law applicable thereto?

I have considered the *McDowall* case, [1903] 2 K.B. 331, and all the other cases counsel have referred us to, and others, including the recent case of *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, not cited. I doubt if it is possible by any ingenuity to reconcile all that has been said in these numerous cases and give even an appearance of consistency to the decisions, or find in some of them an observance of the principles of law which have many times been set forth, relative to the duty of anticipation to be observed in such like cases, and the province of a jury as absolute judges of the facts.

The law so set forth is simple and in the last analysis nothing but enlightened common sense. It would be futile to demonstrate, even if one could, by an analysis of the cases and what is implied therein, how and why such clear law has become so much mystified, merely by an appearance of learning, through the use of words and possibly more words; for the law has not been changed thereby. It may have been thus rendered confusing to those who feel they have to resort to decided cases and the numerous dicta to be found therein, rather than rely upon the long established principles of law by which the case to be decided should be governed, either as regards the liability in question or the mode of its determination, by which in our system of jurisprudence the trial of fact rests solely with the jury, and only the law with the judiciary.

The result of the test suggested by Lord Macnaghten and accepted, at least in words, by those he refers to, when it comes to be applied by a jury, and their verdict has been approved by an able judge, as happened in the *McDowall* case, [1903] 2 K.B. 331, may be set aside by three or more other men, who may be possessed of greater learning relative to law in general, but perhaps, for aught one knows, of less actual experience than either jury or judge, of the world of affairs relative to possibilities or probabilities of what was likely to have happened, for example, to a brake van and cars left in a particular situation, unless due care has been taken to avert the consequences of such possible or probable acts as produced the injury complained of in such case.

Why should this be so? The jury may not have been properly instructed in regard to the law and exactly what they have in such a case to consider and determine; or they may not have had the evidence to warrant such findings as would answer the test suggested; or from some cause or other in the way of sympathy or prejudice, failed to act within their limits of law and evidence and thus reached a conclusion that 12 reasonable men could not properly have come to. In any such case an appellate court may interfere.

There is such an infinite variety of possible situations and possible surrounding circumstances out of which may arise the question of likelihood of some injury happening through the acts of others relative to the car left on a railway track that each case must be determined by the facts presented therein.

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Idington, J.

There should not in reason, I imagine, be demanded the same care to protect, against such contingencies, a car or cars left upon a siding far from the haunts of men or children, as on a public highway in a town or city. But that there is need for such care in such latter situation surely no one of sense can now deny. Why did the B.C. Electric Co.'s men who left the cars there take such steps as they did by braking, tightly as power could, each car? Why put blocks in front of the fore wheels of each car if nobody is likely to interfere? Why do we hear of the use of toggles in such a connection? And apart from these means and need for their use being present to the minds of railway men in Vancouver as shewn by evidence and signifying, if common sense be applied, why the need of these things was felt, we have also another means suggested by the witnesses herein as not uncommon, when cars have to be kept in an exposed situation. Surely all these things imply much knowledge of needs begotten of sad experience. Are we to be assumed to be so astute as to find another meaning therein, or so stupid as not to be able to read or interpret what the man in the street can?

Any single appliance of either sort would quite suffice to keep the car from moving of its own weight or by reason of wind even on a slight down-grade.

It is the possibility of improper interference that evidently suggested a combination of all these means being used. To say that no one could be called upon to anticipate the pranks of children is not to my mind self evident. And indeed the possibility of that being a cause of cars moving when left unsecured, must depend upon the quality of the children in each country and the vigilance of the police coupled with the kind of education and bringing up the children get.

The conditions must vary in different places. I am not disposed to criticize a jury's view of what evidence may be needed in their own neighbourhood in regard to the probability of such things being done by school children as proven herein. I am not prepared to say that the jurymen who had to consider the probability of such injury happening in the way it did and the need of its being provided against, were without evidence entitling them to find that the respondent was negligent in that regard and its negligence a proximate cause of the injury complained of.

I quite agree with the Chief Justice of B.C. in appeal, when he remarked that the practice of submitting a separate question relative to the necessity of anticipating the result complained of is to be preferred because it keeps before the minds of the jurors what they might otherwise overlook.

In saying so, I by no means desire to encourage the submission of a multiplicity of questions which often tend to confuse the minds of jurors. That aspect of this particular class of cases does not often occur in accident cases where negligence is charged.

The cause and consequences are usually self evident. In this class of cases they are not always of necessity so. Want of direction by the trial judge in that behalf was not complained of at the trial or indeed pressed in argument.

I see, however, no reason to suppose that the jury did not fully appreciate the point and understand what was involved in the question submitted. After all, it comes back to the question of the respondent attempting that which ought never to have been done by its men.

It seems quite clear that the placing of these cars was a matter which had been so safeguarded by the railway company as to require a special leave to its employees to permit cars to be placed for any consignee receiving freight.

I think respondent must abide by the consequences of its meddling with them.

It is, I respectfully submit, rather an absurd excuse that is urged on its behalf that its servants had not the necessary experience. So much the more reason why they should have asked the railway company to lend its aid with the light of that experience, instead of attempting something they possibly knew nothing about. As a matter of fact, some of them seem to have had some railway experience but not enough of the sense of responsibility they ought to have had.

Can any one doubt that the mischievous boys, if of an age to appreciate what they were about, would be liable for all the damages they caused? How much better is respondent's position than theirs?

Of course if it had succeeded in establishing that what was done by it was with the leave and as directed by the railway company, this excuse would be intelligible. But failing that, I

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Idington, J.

can find no excuse for it, even in relation to the question, so much debated, of the likelihood of the boys or others intervening and their acts being provided against.

I conclude for all these several reasons that the appeal should be allowed and the judgment as against the respondent be restored with costs of this appeal and so much of the costs of the appeal in the court below as properly attributable to its share in that appeal beyond what was necessarily additional to said appeal by reason of the railway company being a party thereto.

GEALL v. THE DOMINION CREOSOTING COMPANY.

Idington, J.

IDINGTON, J.:—This appeal was argued along with the case of Salter v. same parties.

The railway company having been held liable by the Court of Appeal and the respondent exonerated by that court this appeal is taken as against the latter part of said judgment. The main facts bearing upon the liability of the respondent are the same as in the *Salter* case. I have reached the same conclusion in this as in that case and for the reasons I assign therein save as hereinafter expressed.

I observe that the verdict of the jury is not in the same language as that adopted in the *Salter* case but is more general and comprehensive. It seems to me that the finding must be read in light of the proceedings and charge of the trial judge and that when regard is had to these things there is not much difficulty in understanding what the meaning of the jury's finding is.

There was no objection taken to the trial judge's charge in relation to anything in question herein or any request by counsel to submit any more specific question bearing upon the question of the likelihood of the cars being interfered with by boys or other idlers.

That aspect of the case was no doubt well treated by counsel in addressing the jury. I do not think, in absence of any objection to the trial judge's charge relevant to that, we should presume that there was any oversight in the judge's charge in failing to do more than he did. I may repeat, however, that we should prefer specific attention in this class of cases being drawn to the question of the likelihood of boys or others improperly meddling with the cars as a matter to be foreseen and guarded against.

The case of *Jamieson* v. *Harris*, 35 Can. S.C.R. 625, is cited by respondent's counsel. Is it unfair to assume that the decision in that case should have been present to the minds of counsel at the trial? If not, then was the time to have pointed out the need of a specific question and answer.

That was a case where the unfortunate plaintiff suffered from the multiplicity of the questions submitted. Indeed, there were no less than 25 questions submitted there and, as the majority of this court held, the real point at issue had not been effectively hit by any of them.

I did not think then that the jury should have been held to have misunderstood what they were trying. Nor do I find here that they failed to comprehend what they were about.

I must, however, frankly say that the answer returned in this case does not as clearly lend itself to the meaning I have attached to that in the *Salter* case and hence the stress I have laid in the latter part of my opinion in that case does not seem to have as much force when applied to this verdict as to that in the *Salter* case.

The other reasons I have there assigned, however, seem to me sufficient to entitle me to reach the result I do herein upon the assumption that the case at the trial was fought out on all that was involved in the question of due care to be taken by the espondent.

If I had reached any other conclusion it would not be that of the court below dismissing the action as against respondent but of a new trial for which nobody seems anxious herein.

The appeal should be allowed and the trial judgment restored with costs of this appeal and in the court below, save such extra costs (if any) as entailed by the B.C. Electric Co. being a party thereto.

Duff, J.

DUFF, J. (dissenting).—The judgment of Lush, J., in *Ruoff* v. *Long & Co.*, [1916] 1 K.B. 148, contains at page 157 of the report an exposition of the principles and considerations which were held to govern the decision of the case in which he was giving judgment and which, I think, are precisely applicable for the decision of the dominating question raised by this appeal.

The question, which must be answered in the affirmative if the appellants are to succeed, is this: Could the jury properly

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Duff, J.

find that the respondents' servants ought reasonably to have anticipated the acts of the boys who loosened the brake on the first car and to have foreseen that such intervention would lead to mischief? As to the second branch of the question, I should have no trouble with that if an affirmative answer to the first branch could be justified on the evidence, but to that branch of the question I think there is no evidence to justify such an answer. There was something, it is true, to shew that apprehensions of interferences by school boys were entertained by some of the servants of the railway company and it may be, I express no opinion on the point, that an inference might properly be drawn that the experience of the employees of that company had proved more instructive than the experience of others; but there is nothing in the evidence to suggest that the extent or nature of the risk proved to have been incurred by leaving these street cars unattended when the mischievous propensities of the of the school boys frequenting the neighbourhood are revealed by the court had been brought home by any special warning or experience to the present respondents.

Anglin, J.

ANGLIN, J.:—The negligence charged against the defendants, the Dominion Creosoting Co., in both these cases is that after 4 cars of their co-defendants, the B.C. Electric Co., had been placed by that company in a situation of comparative safety on level ground at the top of the grade, the Creosoting Co. moved them to a place of much greater danger, *i.e.*, down on to the slope or grade, failed to brake them properly, failed to block three of the cars and "to pinch" the block under the fourth, and, knowing the risk to be apprehended, left the cars in this dangerous position unguarded. The finding of the jury in the *Geall* case is that the Creosoting Co. neglected "to take proper precautions when the cars were in their charge to be unloaded," and in the *Salter* case, that the Creosoting Company was negligent "in moving the cars without the B.C. Electric R. Co.'s shunter and crew in attendance with proper facilities."

In both cases the jury also found that the Creosoting Co. had failed to establish authority from the B.C. Co. to move the cars down the grade. The fact that they moved the cars from above the grade down the hillside is undisputed.

The evidence makes it reasonably clear that brakes can be

more securely set by air pressure than by hand—so much so that, whereas a boy could release brakes set by hand with comparative ease, he probably could not release brakes set by air; that it is a reasonable precaution to block as well as to brake cars on a grade; that the blocks should be "pinched" so that they cannot slip and cannot be easily dislodged; and that there is a knack in hand-braking which is acquired by training and experience. The Creosoting Co.'s employees were not trained or experienced brakemen. There is also evidence from the respondent's foreman that he knew of the proximity of the school boys and of their mischievous tendencies and had in mind the danger of their tampering with the cars and feared that "they might have got the cars going," as they had on other occasions. He was aware of the danger involved in this. Yet he left the cars in the temporarily disused highway near a school-house at the "noon hour" when he knew the boys would be out of doors and without supervision, on the grade braked only by hand by inexperienced men, and with a block under only one car, and that block not "pinched." What he anticipated might occur then happened.

Under these circumstances, notwithstanding the very meagre charge to the jury, I think we may and should read the verdict in each case as covering the negligence charged against the respondents and involving a finding that their employees either anticipated, or should have anticipated, that the school boys might release the cars. That they did in fact so anticipate was established by their foreman's undisputed testimony. Without so finding, the juries (as in pointed out by Macdonald, C.J.) could not properly have found, as they did, that the respondents' negligence was the proximate cause of the collision in which the plaintiff Salter and the deceased Geall were injured. They were explicitly told that the plaintiffs must establish "negligence (which) was the proximate cause of the accident," consisting in a failure "to take reasonable care under all the circumstances not to injure another . . . not to expose other people to unnecessary risk in connection with (their) operations."

These cases are distinguishable from *Rickards* v. *Lothian*, [1913] A.C. 263, relied on by counsel for respondent, because there the verdict was held not to involve a finding of failure to guard

CAN.

S. C.

GEALL v. DOMINION CREOSOTING CO.

Anglin, J.

against a mischievous act that should have been anticipated, which I think may fairly be held to be implied in the findings in the case before us, as it was in *Cooke* v. *Midland R. Co.*, [1909] A.C. 229.

Upon the findings so viewed the respondents are liable in both these actions, which seem to me to fall directly within the principle of the decision of the *Cooke* case, [1909] A.C. 229. There a turntable was left unlocked and therefore easily movable by children. It was situated close to a public road from which it was separated only by a defective fence through which children were in the habit of trespassing to the knowledge of the company's servants. Here the cars were left on the temporarily unused highways, insecurely braked and insufficiently blocked, on a dangerous grade and therefore capable of being easily moved by children, whose proximity and mischievous propensities were known to the company's foreman in charge. This is indeed an *a fortiori* case because the injury here was sustained not by the mischievous meddlesome trespassers themselves, as it was in the *Cooke* case, *supra*, but by innocent third persons. The language of Denman, C.J., in the case of *Lynch* v. *Nurdin*, 1 Q.B. 29, at p. 35, is in point:—

Lord Atkinson in his speech in the *Cooke* case, *supra*, at p. 237, if I may be permitted to say so with respect, admirably expresses the ground of liability in a case such as this.

The latest case illustrating liability for leaving unguarded near a highway a dangerous thing which it should have been anticipated might be so interfered with as to cause injury, though not directly in point, is *Crane* v. *South Suburban Gas Co.*, [1916] 1 K.B. 33.

The *McDowall* case, [1903] 2 K.B. 331, relied on by the respondents, is, I think, distinguishable from that at bar in several respects. In that case the cars were left on a private right-of-way safely braked. Upon the evidence the Court of Appeal concluded that there was nothing to warrant a finding that the railway company ought reasonably to have anticipated that the boys would do or might do, what they in fact did, or that the risk of their doing such acts was known to the company. The evidence of the company's foreman in the present case is not merely

that the risk was known, but that he feared that the very thing that occurred might happen.

I would, therefore, allow these appeals with costs in this court and in the Court of Appeal and would restore the judgments of the trial courts. *Appeal allowed.*

LEES v. MORGAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. July 4, 1917.

EXECUTORS AND ADMINISTRATORS (§ IV C—107) — RELEASE OF, UNDER SEAL—LIMITATIONS ACT.

A release under seal executed by a beneficiary of an interest in remainder, discharging an executor from all accounting and demands, converts the interest in remainder into an interest in possession, and in the absence of fraud the Limitations Act (R.S.O. 1914, ch. 75, sec. 47) begins to run from the date of the release.

Statement.

APPEAL by defendant from the judgment of LENNOX, J.; and cross-appeal by plaintiff in an action against a trustee for an account.

J. D. Bissett, for appellant; *H. D. Petrie*, for respondent.

The judgment of the Court was read by

Ferguson, J.A.

FERGUSON, J.A.:—This is an appeal by the defendant Morgan from a judgment pronounced by Lennox, J., dated December 6, 1916, whereby he directed that the plaintiff should recover against the defendant the sum of $936.61, and that the defendant Morgan, as executor and trustee of the estate of Andrew Thompson, deceased, should convey certain lands on a sale thereof by the plaintiff, the proceeds to be paid into Court subject to further order.

The defendant is the executor and trustee of the estate of Andrew Thompson, deceased, who, by his will, dated the 10th August, 1875, among other things, devised and bequeathed one-half of his estate to the defendant, in trust to pay the income thereof to Mary Lees during her life, and to divide the corpus among the children of Mary Lees who should attain the age of 26 years. The plaintiff is the only child of Mary Lees.

On the death of Andrew Thompson, on the 2nd May, 1882, the defendant obtained letters probate of Thompson's will and entered upon the administration of the trusts thereof.

In 1899, the defendant proposed to pass his accounts, whereupon the plaintiff and his mother agreed with the defendant to

ONT.
S. C.
LEES
v.
MORGAN.
Ferguson, J.A

take from him an affidavit verifying the proposed accounts and to take over their share of the estate and give him a release. The circumstances are set out in the affidavit then made, which reads as follows:—

"In the matter of the Thompson estate, Port Dover.

"Whereas the undersigned L. G. Morgan is the executor of the estate of the late Andrew Thompson, of the township of Norfolk, Ontario, and whereas Mary Morgan, wife of Crosbie Morgan, and Clifford Harvey Andrew Lees, only son and heir of said Mary Morgan, being legatees of a portion of said estate, and they being desirous of taking over to themselves said portion and of discharging the undersigned and his heirs, executors, and assigns, from all obligations to them in connection with said estate, and being further desirous of avoiding the expense and publicity of submitting the books and accounts of said estate to the Surrogate Court for final adjustment and discharge, have mutually agreed to accept as correct the statement of account presented to them by the undersigned on his taking affidavit to that effect.

"I, the undersigned, therefore make oath and say that to the best of my knowledge and belief the amount of the aforesaid estate legally belonging to the aforesaid Mary Morgan and Clifford Harvey Andrew Lees is $18,106.41, and that the whole of the said moneys has been handed over to them jointly in mortgages and cash, except two mortgages to the amount of $450 retained by me by mutual agreement between them and me as payment of my services in connection with the Vinegar Works; and further that the usual legal deduction of 5 per cent. made to executors has not been retained by me nor other deductions to which I was legally entitled."

On the 5th October, 1899, the plaintiff and his mother executed under seal a release, discharging the defendant from all accounting and from all demands.

Mary Lees died on or about the 19th February, 1913, and on the 4th January, 1915, the plaintiff commenced this action, alleging that the defendant had not converted all the residuary estate of Andrew Thompson, but was still in possession of certain lands in the village of Port Dover, that the defendant had failed and neglected to account to him for his share of the estate of

Andrew Thompson, and that he had executed the release of October, 1899, improvidently.

After the learned trial Judge had taken some evidence, he referred the taking of further evidence and the accounts to the Local Master at Simcoe, by whom it was found that there were some lands undisposed of, and that a mistake had been made by the defendant in arriving at the amount to be paid to the plaintiff, and, in consequence of that mistake, that the defendant is charged with the sum of $936.61.

At the time of bringing the action and up to the taking of the accounts, no person appears to have had knowledge of the mistake, and there is no doubt that the defendant did not retain the money in his possession or convert it to his own use, but many years ago (more than 6 before action) paid it over to the other beneficiaries named in the will of Andrew Thompson.

The learned Judge did not set aside the release of the 5th October, but allowed it to stand as a receipt or accounting for the amount named therein, and gave judgment for the amount that he found had been by mistake paid to the other beneficiaries. From that part of the judgment the defendant appeals, and the plaintiff cross-appeals to increase the amount from $936.61 to $1,136.61. Neither party appeals from the part of the judgment directing the sale of the unrealised real estate.

No fraud on the part of the executor in the procuring of the agreement, in the making of the affidavit, or in procuring the release, is alleged or proven. Innocent error is admitted. Under *In re Garnett* (1885), 31 Ch. D. 1, that, I think, is sufficient to set aside the release; but, where no fraud is alleged or proved, and it is not asserted or proven that the defendant has retained or converted to his own use any of the trust property, then I think he is entitled to have the benefit of his plea of the Statute of Limitations, R.S.O. 1914, ch. 75, sec. 47.

It is by the statute (sec. 47 (2) (*b*)) provided that time shall not run against a beneficiary until the interest of the beneficiary becomes an interest in possession, and it was urged on behalf of the plaintiff that his interest in the estate of Andrew Thompson did not become an interest in possession until the death of his (the plaintiff's) mother in 1913; but I am of opinion that the effect of the transaction of 1899, as indicated in the affidavit of the defendant, and of

ONT.
S. C.
LEES
v.
MORGAN.
Ferguson, J.A.

the release of the plaintiff and his mother, was such as to convert, as it were, the plaintiff's interest in remainder into an interest in possession as of the date of those documents, and that the plaintiff might, at any time after the making of the arrangement set out in these documents, have sued the defendant for the accounting that he now sues for and for the administration of the estate, and that therefore the statute commenced to run against the plaintiff on the 5th October, 1899; and that the plaintiff's right to recover the amount in question was, at the time of the commencement of this action, barred. See *How* v. *Earl Winterton*, [1896] 2 Ch. 626; *In re Davies*, [1898] 2 Ch. 142; *Thorne* v. *Heard & Marsh*, [1895] A.C. 495, at p. 504; Halsbury's Laws of England, vol. 28, p. 201.

For these reasons, I am of opinion that the defendant's appeal should be allowed, and the plaintiff's cross-appeal, to increase the amount, dismissed.

While the defendant succeeds in both appeals, the plaintiff has in the litigation had some success; and, in the circumstances, I think justice will be done by not giving costs in this Court or in the Court below. *Judgment accordingly.*

CAN.
S. C.

BANK OF TORONTO v. HARRELL.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. May 1, 1917.

1. TRIAL (§ VA—270)—GENERAL VERDICT—SPECIFIC QUESTIONS.
The law of British Columbia is that a jury may find a general verdict and ignore specific questions put to them, but if questions are put to them which they answer, a general verdict inconsistent with the answers to such questions will be set aside.
2. FRAUD AND DECEIT (§ I—1)—MISREPRESENTATION—ACTIONABILITY.
Misrepresentation, even if it amounts to what is called legal fraud, is not sufficient to found an action for deceit; actual fraud must be proven.
[*Derry* v. *Peek*, 14 App. Cas. 337, referred to.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 31 D.L.R. 440, 23 B.C.R. 202, reversing the judgment of Murphy, J., at the trial, by which the plaintiff's action was maintained with costs.

The Rex Amusement Co., of which one D. H. Wilkie (a member of the firm of Campbell & Wilkie), was a director and treasurer, was in financial difficulties. One Vanstone, manager of a local branch of the bank appellant, induced the respondent

to make in favor of the Amusement Company a note for $10,000 to be discounted by the appellant, and the respondent was to be secured by a chattel mortgage on the furniture and accessories of the company, which however were subject to unpaid vendors' liens. The firm of Campbell & Wilkie was also creditor of the Amusement Company, and the bank appellant was interested in the liquidation of their claim. The chattel mortgage security could have any value only if the claims of the lien-holders were discharged by the proceeds of the note, and the respondent alleges that he was assured by Vanstone that it would be so and that no part of such proceeds should be applied on Campbell & Wilkie's account. But $5,000 of these proceeds were so applied. Respondent, with full knowledge of such violation of the assurance given, renewed his note, though for a smaller amount, payments having been made on account, and in his evidence, respondent alleged that he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it. Statement.

On an action brought by the bank appellant, a trial was held, with a common jury. Answers were handed in by the jury to the questions put, and a general verdict was also given in favour of the respondent. The trial judge found the specific answers inconsistent with the general verdict and he gave judgment for the bank appellant for the amount of the note. The Court of Appeal reversed this judgment, finding that there was evidence to support the general verdict in favor of respondent.

Wallace Nesbitt, K.C., and *C. C. Robinson*, for appellant.

Lafleur, K.C., for respondent.

FITZPATRICK, C.J.:—I can find no ground on which the respondent can avoid liability on the renewal note which he signed. Fitzpatrick, C.J.

The trial judge in his reasons for judgment says:—

> The case went to the jury on the issue that there had been again fraud in obtaining these renewals . . . the case must now be decided on the issues as submitted to the jury.

Prior to the case of *Derry* v. *Peek*, 14 App. Cas. 337, it might perhaps have been held that misrepresentation such as in the present circumstances amounted to what was sometimes called legal fraud. By the decision of the House of Lords, however, it must be considered to have been conclusively established that

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

this is not sufficient, but that the law is that actual fraud is essential to found an action for deceit. The expression of an opinion honestly held, "the language of hope, expectation and confident belief," will not amount to a misrepresentation having legal consequences.

Fitzpatrick, C.J.

The jury have expressly negatived actual fraud and I think it must be recognized that their verdict for the defendant was given on the assumption that the misrepresentations by which, according to their finding, the respondent was induced to renew that note were sufficient for their verdict.

The trial judge held that if the jury intended by their answers to impute fraud to Vanstone at that juncture there was no evidence on which they could make such a finding. Perhaps, in view of this, the correct course would have been for the judge not to have left the question to the jury.

I am content to restore his judgment but reducing the rate of interest from 8% to 5%.

Davies, J.

DAVIES, J.:—I think this appeal must be allowed and the judgment of the trial judge in plaintiff's favour for the amount of the note sued on restored.

The action was tried before Murphy, J., and a jury. In charging them the judge said with respect to the questions he asked them to answer:—

> There are at any rate three propositions in it and they involve some law. Therefore it will be very much in the interests of the litigants if you will answer these questions. The questions are only put to enable you to understand what I have said to you, and bring before your minds exactly what is required to be dealt with in deciding the case,

and added:

> I have been requested by counsel to tell you that it is the law of British Columbia that you need not answer these questions. I have already told you that it would be very much in the interests of the parties, in my opinion, if you would answer them, but it is the law of this province that you can bring in a verdict for the plaintiff or for the defendant without answering the questions at all.

The jury answered most of the questions put to them and added a finding of a general verdict for the defendant.

The trial judge concluded that the specific answers given by the jury to the questions asked them made their general verdict for the defendant impossible and entitled the plaintiffs to judgment.

On appeal this judgment was set aside and a verdict entered for the defendant.

Macdonald, C.J., did not think the answers and the general verdict inconsistent and concluded that accepting both the defendant was entitled to judgment.

Galliher, J.A., agreed that the answers and the general verdict could be read together and was of the opinion that neither the renewal in February, 1915, of the original note given by defendant induced as it was by the promise of the branch bank manager Vanstone that the defendant would not be called upon to pay, nor the facts found by the jury as to the subsequent renewal given to the manager Ball and sued upon could be regarded as an election by defendant to confirm the original contract.

Martin, J.A., thought the answers to the questions should be disregarded and the general verdict alone considered and that there was evidence to support this general verdict.

McPhillips, J.A., held there should be a new trial on the ground that the verdict was not unanimous and the jury had not been out the full three hours which under the law of British Columbia must elapse before any verdict other than a unanimous one could be received.

I am not able to agree with the judges who held that the specific answers of the jury to the questions put to them by the trial judge are consistent or reconcilable with their general verdict or that the specific answers should be disregarded and the general verdict alone accepted.

The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered. There seems to be some conflict between the authorities as to whether the same result would follow answers given to questions of the trial judge as to their reasons for their general verdict, after it has been rendered in cases where they had not been asked previously to giving their verdict to give their reasons.

In this case, however, and apparently with consent of both

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Davies, J.

parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They, however, did answer most of them and added a general verdict for defendant.

Under these circumstances, I think the general verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put must be ignored and the verdict entered as was done by the trial judge on these specific answers for the plaintiffs.

The jury found in answer to the first four questions, and there was evidence justifying the finding, that the respondent was induced to sign the original note through the fraud of the appellant's branch manager, Vanstone.

Counsel for the appellant admitted that on these findings it was Harrell's right upon discovery of the fraud to repudiate his liability but contended that, although in February, 1915, he discovered the fraud he waived his right and signed a renewal note for the unpaid balance of the original note.

The jury found that he was induced to sign this renewal note "by promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them," and they stated the details of such promises in answer to the 5th question by saying that they accepted Harrell's evidence and "the architect's statement that Vanstone said to him (Harrell) that he (Vanstone) would take care of Harrell's loan and would see that he was looked after. That he had taken care of Harrell so far and would still do so."

The jury further found that in signing that renewal Harrell acted upon these promises and that Vanstone's promises were not intentionally fraudulent.

A very strong argument was advanced by Mr. Nesbitt that the defendant by signing this renewal note in February, definitely elected not to repudiate the transaction on the ground of the fraud already then discovered and known to him and that Vanstone's promise made at the time that if he (Harrell) did sign it he would not be held liable, did not release him from the liability he incurred by signing the renewal.

In other words, as I understand the contention, it was that

Vanstone's promises which induced the signing of the renewal note in February were mere promises as to the future only, that they were not fraudulently made and that in so far as it was attempted to construe them as an agreement that the defendant should not be liable it must fail as such a verbal agreement would be a contradiction of the terms of the renewal note and that at any rate no such issue was presented at the trial. The trial judge says in his judgment:—

> The case went to the jury on the issue that there had been again fraud in obtaining these renewals. Possibly it might have been contended that there was at the time of the renewal an agreement not to enforce the note, but this line was not taken before the jury, entailing as it would have grave difficulties under the decisions relative to introducing parol evidence to vary the tenor of a promissory note. Whatever the reason, the case must now be decided on the issues as submitted to the jury.

I admit the great force of the contention and it does seem clear on principle that no evidence of a verbal agreement made at the time of the signing of the note contradicting its terms would be admissible.

I, however, prefer to base my judgment upon the specific findings of the jury with respect to the further renewal note of August, 1915, now sued on and signed by defendant at the request of the manager of the bank in Vancouver, Mr. Ball. At this interview with Ball, Harrell went fully into the whole transaction with Ball. Harrell says in his main examination:—

> I told him then what the arrangement was I had made with Vanstone, and the way Vanstone had acted in the matter—that he hadn't carried out his agreement . . . and . . . that he had taken this money and applied it to Campbell & Wilkie's account when it should have gone to pay off these liens . . . I told him the arrangement I had . . . with Vanstone . . . that he was to carry it, and it was never to cost me a dollar, and that he would see to it. . . . I told him that I didn't owe the note. I told him all the arrangements I had with Mr. Vanstone, that I was never to pay this thing. Ball's reply was: "Yes, Mr. Vanstone has done a lot of foolish things down there. It is not the only foolish thing he has done." Ball then told him that the Amusement Company could not even pay the interest at that time, and said: "You give me a demand note and as soon as the Rex Amusement Co. get this money or Wood, Vallance & Leggatt are in a position to pay you any money, they can apply it on this note, and we won't have to wait its stipulated length of time." Thinking (says the defendant) everything was all right, I simply signed the demand note and gave it back to him.

The seventh question put to the jury and their answer is as follows:—

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

Davies, J.

Did Ball by word or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? A. No.

Now it seems to me beyond reasonable doubt under this evidence of the defendant himself and this finding of the jury that the defendant signed the note sued on with full knowledge of Vanstone's broken, unfulfilled promises, and without any promise or inducement by words or conduct on Ball's part leading him to believe he was not incurring liability upon it and without any fraud practised upon him.

By doing so under the circumstances stated and found he definitely elected not to rely upon the alleged fraud in connection with the original note, and I cannot see that he has any legitimate defence to the action. As I have already said, I think the general verdict is irreconcilable with the jury's specific findings on the question No. 7 and is also contrary to the evidence and must be ignored and judgment entered upon the specific finding of the jury for the plaintiffs.

Idington, J.

IDINGTON, J. (dissenting):—I do not think we should interfere with the conclusion of the Court of Appeal relative to any question herein arising out of the rules in British Columbia governing the time within which the jury are entitled to render a majority verdict or the right of a jury to render a general verdict.

In the broader way of looking at the case it is reduced to a question of fraud or no fraud in the representation made by appellant's agent and whether or not such fraud (if any) had been waived by the respondent, or he had not made his election in regard thereto, the general verdict is, I think, maintainable.

We were strongly pressed in argument by the proposition that the misrepresentation which can be held to support a defence of fraud must be of an existent fact.

Numerous cases of undoubted authority were cited to maintain that proposition but the question of misrepresentation of an intention as a fact was either brushed aside by the statement, equally undoubted in law, that honest intention honestly expressed which in the result proved disappointing, could not be held fraudulent or, so far as the authorities are concerned, was passed by as if there could by no such thing.

I am of opinion that the dishonest expression of an intention

having an important bearing upon that business which contracting parties are about, may be just as gross a fraud in law as a misrepresentation of any other fact.

It may be more difficult to prove such a fraud than one relative to the existence or non-existence of some physical object.

Nevertheless it may be established, as was held in the case of *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

In that case there were some minor misrepresentations of fact as well as the main one expressing to investors the intention on the part of the company to apply the money to be got by such representations as made, to certain named purposes which would indicate a possibly prosperous condition of the company's affairs when in truth the intention was to apply the money to other and more pressing needs which if truly stated would or might have indicated the reverse, and tended to prevent possible investments.

I think we can apply the law laid down there to the facts in this case. There is a very striking resemblance between the cases as to the nature of the intention.

The only difference I can see between these cases is that relative to the position of those there making the representations and that of the appellants' agent here.

It may be somewhat more difficult to understand why such an agent should misrepresent his intentions than it was to understand the directors doing so in that case.

The expression of Mr. Ball as to the agent in question, or his management of the dealing with respondent not being his only foolish act as an agent, when coupled with his relations with the firm, which profited by his success, in so inducing the respondent to become liable at all, helps to solve the mystery.

It is quite clear when one realizes the financial condition of the Rex Amusement Co. and the position of the firm of Campbell & Wilkie as the creditors of that company, and debtors to the appellant, how such an agent might be so tempted.

And if he assented there is indubitable proof in the immediate transfer by the appellant's agent of a large part of the proceeds of the respondent's note to the said firm's account that he never in truth could have had the intention, as he represented, that they were not to get any of the proceeds and that they should go to other purposes desired by the respondent.

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Idington, J.

It is equally clear how very important it was for the respondent, dependent upon security he had taken to indemnify himself, to be assured that the money being raised by his suretyship should not go to the said firm but be applied to liquidate liens or some of the liens on the company's buildings and thereby improve his position.

Leaving the firm to help itself in many conceivable ways might help to strengthen the respondent's position. The jury have by their verdict established the fact.

Can the respondents, however, be held entitled to the benefit of that in the action upon the renewal note now in question?

Or had the respondent not elected to waive and waived the fraud committed on him by his repeated renewals, though protesting all the time, and accepting reassurances of the agent that he would never have to pay a cent of the debt?

His doing so may not have been prudent, but I cannot hold that he thereby elected to waive his right to repudiate, on the ground of fraud, the original transaction which was the only foundation for liability at all.

To give effect to the contention that he had so elected would be but to help the successful promotion of the fraudulent purpose of him who had committed the fraud.

It seems idle to contend that to admit the evidence of these assurances was an infringement of the rule against varying by oral evidence the obligation contained in a written contract.

It is not at all in that sense that such oral evidence was admissible, but to rebut the possible presumption arising from signing renewals, of his election to abide by the contract, and forego his right to repudiate for fraud, the very basis of the transaction and hence that appellant could claim nothing upon such a promissory note for which there could be found no consideration if only founded on fraud.

The evidence, for example, admissible to prove fraud itself is not tendered to vary the nature of the written instrument itself.

Accommodation makers can often in particular circumstances shew by oral evidence why they should not be held liable, but such evidence is not adduced to suggest the slightest variation of the written instrument.

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

Idington, J.

The evidence so understood was admissible and entitled to weight.

I think when so applied there is no more reason to contend the fraud had been waived, or respondent had elected not to repudiate, than there was in the case of *Clough* v. *The London & North Western R. Co.*, L. R. 7 Ex. 26, or *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, at 1277 *et seq.*, and still less than in *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221.

These three cases which suggest that the respondent might well have taken the ground that as a surety he was entitled to have come into court, and on the facts that are apparent, or at least possibly easier of establishment than that he risked on the issue raised, he was not treated as a surety should be, and asked as he does in fact to have the note delivered up to be cancelled. The law sought unsuccessfully to be applied in *Hamilton* v. *Watson*, 12 Cl. & F. 109, and illustrated in cases cited therein, if followed, might have brought the result reached much easier.

The facts may all be in the pleading but are not so marshalled as we might desire to see in making such a case, or the principles of law I refer to clearly rested upon.

However, I need not pursue that, for I think in whichever way one looks at the whole of the evidence and questions tried, the general verdict is maintainable, and I have no doubt of the justice of the result, especially in view of the suggestion I have just made of the applicability of the facts found in the answers to the questions put to the jury, had we need to resort thereto.

A clearer conception on all hands of the many sided sort of case there is in evidence and possibility of it being presented from other points of view than taken, may have been desirable but in my view no new trial is needed.

The appellant cannot now be heard to complain of the trial judge's charge which was not against it on the issues as fought out and the evidence justifies a general verdict for the defendant.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J. (dissenting):—In this appeal I think there must be a new trial although the necessity is regrettable. I agree with the Court of Appeal that there was evidence which could not be withdrawn from the jury on the issue of the voidability of the promissory note sued upon because of the alleged deliberate mis-

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

Duff, J.

leading of the defendant as to the purpose for which the bank was making the advance.

But there was another issue raised by the pleadings in respect of which the course of the trial was so unsatisfactory as in my opinion to entitle the appellant bank to a new trial. The issue was this: the bank contends that admittedly after full knowledge of the fraud alleged the respondent executed a series of renewal notes that this conduct constituted an election to affirm the contract as a binding contract, notwithstanding the fraud within the rule that a person entitled to avoid a contract by fraud, who, with knowledge of fraud, does some unequivocal act whereby he manifests his intention to treat the contract as binding upon him, thereby makes his election against attacking it in such a fashion as to preclude him from doing so forever.

The view of the trial judge was that as regards this issue there was in truth no question for the jury because the facts admitted by the defendant Harrell entitled the bank to judgment upon it and that is the first point to be considered under this topic.

Such an issue obviously raises two questions. First, the question of the knowledge of the person alleged to have elected to abandon the remedy he is seeking to enforce and, secondly, the significance of the act relied upon as an unequivocal act manifesting the intention to abandon his remedy. As to the first question, I gather from the charge of the trial judge that Harrell's knowlege of the fraud was not disputed at the trial, although looking at the evidence alone I should have had little hesitation in holding that there was a question for the jury whether Harrell had brought home to him before the execution of the renewals the fact found by the jury, namely, that Vanstone was deliberately misleading him as to the intention of the bank with respect to the application of the advances—in other words, that Harrell's conduct was not only morally reprehensible, but of a kind entitling him in law to rescind the contract; and one may remark in passing that it seems a little paradoxical that knowledge of the legal right to impeach the contract should, in this court, be imputed to Harrell from the knowledge of facts which the Chief Justice of this court holds conferred no such right upon him.

I proceed, however, upon the assumption founded upon the observations of the learned trial judge and strongly supported by the frame of the question submitted without objection that Harrell's knowledge was admitted.

The answer to the second question turns upon a point of law touching the admissibility of evidence. The execution of a series of renewals by Harrell with a knowledge of fraud standing by itself comes indubitably under the category of "unequivocal act" within the meaning of the rule above referred to; that is so because *ex facie* the renewal notes executed by Harrell affirmed Harrell's responsibility and affirmed his responsibility under the original contract (the promissory note first executed) since renewals given in the circumstances in which these were given do not destroy the original obligation, they merely suspend the debt. (Byles on Bills, p. 257.) On behalf of the respondent, however, it is said that in order to determine whether or not the execution of the renewals with knowledge of fraud manifested an intention on Harrell's part to abandon his rights we must ascertain the circumstances known to Harrell and known to the bank and the communications which passed between Harrell and Vanstone, the bank's representative, acting on behalf of the bank in which and with reference to which the renewals were given; and it is argued since the attendant circumstances justify the inference that it was understood by Harrell and by the bank, that is to say, by Vanstone, acting for the bank, that the execution of the renewals was between them to be treated as a provisional measure, all questions as to Harrell's ultimate responsibility being postponed until the affairs of the Theatre Amusement Co., for which Harrell was surety, were finally sifted, it follows that the execution of the renewals cannot be properly regarded as an "unequivocal act."

There can, I think, be little doubt that in principle the argument, up to this point, is well founded. If a letter had been written expressly embodying the terms of such an understanding, nobody would argue that the execution of the renewals amounted to an election and if the existence of such an understanding were a proper inference from facts legally admissible in evidence and proved the case could not legitimately be distinguished from

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Duff, J.

the case in which the understanding was expressed in a written stipulation.

In the present case oral communications between the parties were proved, that is to say, between Harrell and Vanstone, which in themselves would support the conclusion that Harrell's execution of the renewals was not unequivocal, that is to say, that it did not convey to Vanstone the belief in a fact and was not calculated to convey to Vanstone any such belief, that Harrell was abandoning any rights he might prove to have arising out of the fraud if the bank should ultimately attempt to hold him accountable. Here emerges the point of the controversy, was evidence of these communications admissible? Broadly speaking, they consisted of assurances alleged to be given by Vanstone, and acted upon by Harrell in executing the renewals that he (it would be a question for the jury whether Vanstone might reasonably consider Harrell's assurance to be given on behalf of the bank) would protect Harrell against responsibility. The jury has in fact found that such assurances were given, and that Harrell in fact acted upon them in executing the renewals. On behalf of the appellant bank it is contended that evidence of these assurances is not admissible as being evidence contradicting the terms of the documents which constituted the contract between the parties.

I have come to the conclusion that this contention on the part of the appellant bank is not well founded. Fraud of the kind relied upon by the respondent gives a person wrongfully affected by it a right to elect whether the contract shall be avoided or not. So long as no election takes place the contract remains on foot and especially where the contract takes the form of a negotiable instrument, the wronged person may easily lose his remedy entirely in consequence of the innocent third person acquiring rights.

The admission of the evidence was not in any way in conflict with the rule which forbids the reception of parol evidence to contradict, vary or add to the contents of a written instrument which the parties have intended to be the record of a transaction. The respondent does not attempt to contradict, vary or add to the instrument but to impeach the consideration for it, the original obligation which he alleges to be voidable by reason of

the original misrepresentation, a course always held admissible and consistent with the maintenance unimpaired of the above mentioned rule. *Goldshede* v. *Swan*, 1 Ex. 154; *Morrell* v. *Cowan*, 7 Ch. D. 151.

The respondent's *primâ facie* right to impeach the consideration being attacked on the ground that he abandoned it by executing the renewals with knowledge of the alleged fraud, it was open to him to shew circumstances from which an agreement could be inferred that his act in doing so was to be treated as done in ignorance of the circumstances pointing to the fraud, of which he was in fact aware.

Such evidence being admissible, it follows, I confess I can perceive no reason for doubt upon the point, that this issue presented a question which it was the duty of the learned trial judge to leave to the jury. In view of the difference of opinion between some of my learned brethren and myself upon the point it is right to dwell a little upon it. The question was much debated in *Dublin, Wicklow and Wexford R. Co.* v. *Slattery*, 3 App. Cas. 1155, and there was much difference of opinion upon it whether a trial judge might withdraw an issue of fact from the consideration of the jury where there is conflicting evidence, but where—the onus resting upon one side—there is, to use the language of Lord Blackburn, "no reasonable evidence to rebut it." The majority of the House took the view that it is beyond the province of the trial judge where there is any evidence that is anything more than a scintilla adduced by the party on whom the onus of proof lies to withdraw the issue from the jury and the distinction between "cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by the jury," is a distinction which must be recognized. (*Paquin* v. *Beauclerk*), [1906] A.C. 148, at 161. Here the incidence of the issue was as a matter of substantive law on the appellant bank. Assuming that proof of execution of the renewals with knowledge of the facts constituting the fraud alleged would, in the absence of countervailing evidence, justify a direction to the jury to find a verdict for the appellant bank upon this issue, it is doubly clear that as against the respondent who was not supporting the burden of the issue such a direction

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

Duff, J.

could not after production of evidence of the assurances referred to properly be given.

The issue ought, therefore, to have been submitted to the jury. In concrete form for the purposes of this case the question for the jury was this: Did the respondent by his conduct in executing the renewals considered in the light of the communications which had passed between him and Vanstone and from the point of view of reasonable men accustomed to business, manifest on his part an intention to abandon his right to avoid the obligation he had *ex facie* undertaken in favour of the bank in such a way as to lead Vanstone, in other words, the bank, to believe that he had made that choice? This form of the question, I may say in passing, is based upon the judgment of Lord Blackburn in *Scarf* v. *Jardine*, 7 App. Cas. 345, at 360 and 361, a case of a somewhat different character but which Lord Blackburn held to be governed by the principles expounded in the judgment of the Court of Exchequer in *Clough* v. *London & North Western R. Co.*, L.R. 7 Ex. 26, at page 34; a judgment which Lord Blackburn mentions was written by himself although delivered by Mellor, J. In *Codling* v. *Mowlem & Co.*, [1914] 2 K.B. 61, at 66 and 67, Mr. Justice Atkins applies the judgment of the Court of Queen's Bench in *Curtis* v. *Williamson*, L.R. 10 Q.B. 57, at 59, in which it is stated that "in general the question of election can only be properly dealt with as a question of fact for the jury."

This question was neither in substance nor in form submitted to the jury as one of the specific issues on which they were asked to pass. And it cannot be contended that any decision upon it is involved in the general verdict because the learned trial judge's charge leaves it almost untouched; indeed, the one observation directly pointed to the question, namely, that the defendant was bound to elect within a reasonable time, is an observation which cannot be supported by authority, L.R 7 Ex. 26, at 35.

It is quite true that the jury finds in the answer to one of the specific questions submitted that the respondent was induced to execute the renewals upon the assurances already referred to; but the ultimate question involved in the issue of election or no election, which was a question for the jury, is not dealt with.

It follows therefore that there must be a new trial. It cannot be said that the Court of Appeal was invested with authority to

give judgment for either the plaintiff or the defendant and that one or the other of them has made out a case entitling him to such a judgment.

Any power possessed by the Court of Appeal to give judgment in this case is derived from Order 58, Rule 4, which enables the court on an appeal to "draw inferences of fact and to make such further or other order as the case may require." This rule has been the subject of a good deal of discussion and it must be taken as settled that it applies to the case of an appeal from a judgment after trial by a judge and jury, *McPhee* v. *Esquimalt and Nanaimo Railway Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43; *Dominion Atlantic* v. *Starratt* (not reported); and that it enables the court in cases in which, although there was some evidence for the jury (and the trial judge consequently would be obliged to give effect to the verdict), to give judgment either against or in absence of a finding on the whole case or on a particular issue involved in favour of the party on whom the burden of proof does not lie on the ground that no reasonable view of the evidence could justify a verdict in favour of the party on whom the *onus probandi* falls. That is settled by the decision in *McPhee's* case, *supra* (see p. 762), and the authorities therein referred to.

But has the court power under this rule to give judgment in favour of the party on whom the law casts the burden of proof?

The discussion of this question requires some reference to the senses in which the term "burden of proof" is employed. These are conveniently indicated in the treatise on evidence in Lord Halsbury's Collection, vol. 13, at pp. 433 and 434, in the following paragraphs:—

> In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him. . . .
>
> The burden of proof, in the sense of adducing evidence, on the other hand, is a burden which may shift continually throughout the trial, according as the evidence in one scale or the other preponderates. This burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Duff, J.

of proof on the pleadings, *i.e.*, who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side.

As regards the issue of election raised by the appellant bank in answer to the respondent's defence of fraud, the burden of proof was cast by the pleadings upon the former, but the burden of proof in the second of the two senses indicated in the passage just quoted, would have been shifted by proof of the execution of the renewals coupled with an admission of the respondent's knowledge of the fraud at the time of the execution of them. These facts, however, being coupled with further evidence, the evidence of the assurances alleged to have been given by Vanstone, the onus remained upon the appellant bank in the first sense to establish to the satisfaction of the tribunal of fact that the respondent had elected not to raise the defence he now relies upon. The jury has in fact accepted the respondent's testimony as to the assurances and I have already said sufficient to shew that, in my judgment, these assurances being treated as proved there was a question which the jury might not unreasonably find in favour of the respondent; and I am satisfied that on the same hypothesis a verdict in favour of the appellant bank if the jury had so found could not have been set aside as unreasonable.

Such being the circumstances of this particular case the Court of Appeal could not consistently with sound principle give judgment in favour either of the appellant bank or of the respondent.

I add for the purpose of avoiding a misconception that it is unnecessary to express an opinion as to the power of the Court of Appeal to give judgment in favour of the appellant bank on this issue (in respect of which the onus, in the first of the senses above mentioned, was cast upon it by the pleadings) if the correct view had been that there was no reasonable evidence to outweigh or bring to an equipoise the considerations which from the facts alone of the execution of the renewals and the respondent's knowledge of the fraud would require the inference to be drawn that the respondent had elected to abandon his remedy. I should by disposed in such a case to apply the reasoning of Lord Blackburn in *Dublin etc R. Co.* v. *Slattery*, 3 App. Cas. 1155, at 1200 and 1202, but as the point does not arise I express no decided opinion upon it. I may add that the rule as to the burden of

proof to which I have just referred is admirably illustrated in the judgments of Brett, LJ., in *Pickup* v. *Thames Ins. Co.*, 3 Q.B.D. 594, at 599; in *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.*, [1901] A.C. 362, at 366; and *Lindsay* v. *Klein*, [1911] A.C. 194, at 204.

ANGLIN, J.:—The Rex Amusement Co. was in financial difficulties. The defendant, on being secured by a chattel mortgage on its furniture and accessories (which, however, were subject to unpaid vendors' liens) agreed, in March, 1914, to make in its favour a promissory note for $10,000 to be discounted by the plaintiff bank. In addition to the lien-holders the firm of Campbell & Wilkie were also large creditors of the company and the bank was interested in the liquidation of their claim. The value to the defendant of his chattel mortgage security would depend upon the claims of the lien-holders being discharged or substantially reduced. He asserts that as an inducement to him to give the company his note he was given by the bank manager, Vanstone, an assurance that no part of the proceeds of it should be applied on Campbell & Wilkie's account. In violation of that assurance (if given) $5,000 of those proceeds was immediately so applied. The defendant, however, was afterwards apprised of that fact and with full knowledge of it, in February, 1915, he renewed the company's note for a smaller amount to which the bank's claim had been reduced by payments in the interval. In his evidence at the trial he alleged that he gave this renewal on the faith of a promise by Vanstone that he would protect him against liability on it. Concurrently with the giving of this renewal, however, the defendant obtained from the company's landlords an undertaking that they would collect the company's earnings, that after making necessary disbursements for expenses and on account of lien payments and taking for themselves $1,000 a month on arrears of rent, they would hand any balance of the net receipts to the defendant to be applied on his chattel mortgage, and that after their arrears of rent should have been reduced to $6,000 they would distribute the net receipts *pro ratâ* between the two accounts—their own and the defendant's. At this time the defendant appears to have acted in reliance on the payments which he expected to receive under this arrangement sufficing to meet his liability on the note. This

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Anglin, J.

expectation was not realized, and in August, 1915, the company being again on the verge of an assignment, the defendant signed the renewal note sued on for $6,448. On the occasion of this renewal he saw not Vanstone but Ball, the manager of the main office of the bank at Vancouver. His own account of this interview shews that he was fully cognizant of the payment of $5,000 which had been made to Campbell & Wilkie, as he claims in breach of the original understanding which he had with Vanstone, and that he asserted that he had been thereby relieved from liability on the note. Yet he gave a renewal note payable on demand, no doubt in the hope that money to meet it would be forthcoming under the arrangement with the landlords.

Probably because the defendant's advisers appreciated the legal obstacle in the way of attempting to establish by oral testimony anything in the nature of an agreement by Vanstone with the defendant inconsistent with the liability evidenced by his note, the only defence pleaded was that the note had been procured by fraudulent misrepresentation.

This action was tried by a jury. Under instructions that they might return a general verdict and were not obliged to answer the questions put to them (although the trial judge expressed his opinion that it was advisable that they should do so) the jury returned the following verdict:—

1. Was the making of the note induced by any representations made by Vanstone to Harrell? 7 in favour, 1 opposed.

2. If so, were such misrepresentations false to the knowledge of Vanstone and made with intent that Harrell should act on them? 6 in favour, 2 opposed.

3. If so, what were such representations? Give full particulars. That Vanstone intended to allow part of the money obtained by loan to be paid to Campbell & Wilkie after promising not to do so.

3a. Did Harrell sign the note relying on such representations? Not answered.

4. After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act upon them? 6 for, 2 opposed.

5. If so, give details of such promises made by Vanstone. By taking Harrell's evidence here and the straightforward manner it was given, and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so.

5a. Did Harrell act upon such promises? 6 in favour, 2 opposed.

6. Were Vanstone's promises fraudulent? In regard to question 5, Vanstone's promises were not intentionally fraudulent.

7. Did Ball by words or conduct or both lead Harrell to believe that Harrell would incur no liability by signing the renewal note and thereby induced Harrell to sign the note? No.

8. If "yes," did Ball, when causing Harrell to believe this, intend to hold Harrell if the bank failed to get its money from the Rex Amusement Company?

9. Did Harrell act on such belief? 8 and 9 answered by 7.

We the undersigned jury find a verdict in favour of the defendant.

For the defendant it is contended that the answers to the questions should be ignored and effect given only to the general verdict in his favour, because the questions are not completely answered and because, even if they were, the general verdict must prevail.

The only question unanswered is No. 3a. It was so left, no doubt, because the jury regarded it as covered by the answer to the first question. If the defendant was induced to give the note by Vanstone's representations, it would certainly seem to follow that he did so relying on them. Questions 8 and 9 were put contingently. They were meant to be answered only if the answer to question No. 7 should be "yes." It was "no." I am, therefore, unable to accept the view that the answers are incomplete.

I am also of the opinion that inasmuch as the jury saw fit to answer the questions put to it, thus informing the court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict the latter cannot be sustained.

They have explained what they meant by their verdict and how they arrived at it, and it is on this basis that we have to consider their verdict. We must take it as we find it.

If any judgment is to be entered upon it, it must be that which it warrants when taken as a whole. That I understand to be the effect of the decision in *Newberry* v. *Bristol Tramways and Carriage Co.*, 107 L.T. 801; 29 Times L.R. 177, and *Dimmock* v. *North Staffordshire R. Co.*, 4 F. & F. 1058, at 1065.

Brown v. *Bristol & Exeter R. Co.*, 4 L.T. 830, cited by counsel for the respondent, was a case of refusal by a trial judge to question the jury after they had returned a general verdict in order to ascertain on what ground they had found it—a refusal which

CAN.
S. C.
BANK OF TORONTO v. HARRELL.
Anglin, J.

the court held to be within the right of the learned judge and proper. See too *Arnold* v. *Jeffreys*, [1914] 1 K.B. 512, at page 514, where Bray, J., stated the distinction between cases in which questions are put before verdict and are answered by a jury and cases in which no questions are put until after a general verdict has been given.

Taking the term "representations" in the first and second questions and the word "promising" used by the jury in their answer to the third question, there is perhaps room for doubt whether they appreciated the difference between a misrepresentation of fact such as would constitute fraud and a breach of a mere promise or contractual undertaking. But I shall assume in the respondent's favour that they did and that they meant to find a misrepresentation of present intention on the part of Vanstone, which would be a misrepresentation of fact amounting to fraud.

On the jury's answer to the sixth question and the facts in regard to the renewal in February, 1915, as given by the defendant himself, I think that he then waived any defence which Vanstone's former conduct might have given him and elected to abide by his liability to the bank. He was then admittedly aware of the payment to Wilkie & Campbell. Any misleading or inducing effect of the misrepresentation which he says Vanstone made when the original note was given was thus removed. He has not attempted to allege ignorance of the common and well-known legal effect of such a fraudulent misrepresentation probably because advised of the futility of such an attempt. *Carnell* v. *Harrison*, [1916] 1 Ch. 328, at 343. Had he done so the burden of proving such ignorance at all events would have rested upon him. It could not be presumed. No new misrepresentation is suggested. He merely alleges some sort of promise or undertaking by Vanstone, clearly contractual and contradictory of the obligation evidenced by his indorsement. No such promise or contract is pleaded. Fraud is the sole defence and the jury's sixth finding is explicit that there was nothing fraudulent in what Vanstone said or did on this occasion.

The jury has again explicitly found that there was neither misrepresentation nor promise of any kind, by words or conduct, of the bank manager, in the obtaining of the renewal note of

August, 1915, which is sued upon—obviously the only finding that could be made in view of the admitted facts and the circumstances above stated under which that renewal was given. Whatever fraud or misrepresentation may have induced Harrell originally to become an indorser to the bank did not affect this last renewal. He gave it with full knowledge of all the material facts affecting the existence of his liability and in reliance not upon any representation or promises that the liability thus acknowledged would not be enforced against him, but upon the outcome of an arrangement as to which he had knowledge and means of knowledge quite as complete as had the bank manager.

His acts in renewing the note on this and the former occasion were unequivocal and amounted to communications of his election not to repudiate his liability. *Scarf* v. *Jardine*, 7 App. Cas. 345, at 360. On each occasion the bank, on the faith of what he did, changed its position by extending the time for payment by the maker of the note.

The seventh finding of the jury like the sixth is inconsistent with a general verdict for the defendant based on fraud—the only defence raised on the pleadings or at the trial. Notwithstanding that general verdict, applying the doctrine of the *Newberry* case, 107 L.T. 801, upon the verdict as a whole, judgment should, in my opinion, be entered for the plaintiffs.

But if the general verdict alone should be considered, I am convinced that it must be set aside because there is no evidence to support it. It is also perversely opposed to the direction of the learned trial judge, who expressly instructed the jury that they could return a general verdict for the defendant only if they should find in his favour all the facts covered by the questions put to them. Upon the defendant's own story it is too clear to admit of doubt or controversy that when he signed the renewal of February, 1915, he elected to waive any defence that earlier misrepresentations by Vanstone might have given him. On his own version of his interview with Ball it is obvious to me that he then abandoned any idea of repudiating liability either because of alleged misrepresentations or of alleged promises made by Vanstone—which he says Ball had characterized as "foolish things"—and accepted the position of maker of the note liable to the bank in the hope and expectation that under his arrangement of February with the Amusement Company's landlords the bank's

CAN.

S. C.

BANK OF TORONTO v. HARRELL.

Anglin, J.

claim would be satisfied out of the proceeds of the company's business—thinking, as he puts it, "that everything was all right." Any other than a verdict for the plaintiff would, in my opinion, be so palpably perverse that it could not stand for a moment.

Under these circumstances, having regard to the power conferred on the Court of Appeal by Order 58, r. 4, of the Supreme Court Rules of British Columbia, 1906, to give judgment *non obstante veredicto* for one of the parties where no reasonable view of the evidence could justify any other result, and it is satisfied that it has all the evidence before it—a power, no doubt, to be exercised sparingly and with caution (see *McPhee* v. *Esquimalt & Nanimo R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43, and *Skeate* v. *Slaters*, [1914] 2 K.B. 429, the proper course in the present case, in my opinion, is to order the entry of judgment for the plaintiff. Indeed, I strongly incline to the view that the trial judge should have directed the jury to return a verdict for the plaintiff.

I am, for these reasons, with respect, of the opinion that this appeal should be allowed with costs in this court and in the Court of Appeal and that the judgment of the learned trial judge should be restored, subject, however, to a variation reducing the rate of interest from 8% to 5%. *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299. *Appeal allowed.*

ONT.

S. C.

GRAHAM v. CROUCHMAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 12, 1917.

1. VENDOR AND PURCHASER (§ II—31)—PROMISSORY NOTE FOR UNPAID PURCHASE PRICE—OWNER OF NOTE—VENDOR'S LIEN.

Where a promissory note for the unpaid purchase price of lands sold is given, not to the vendor, but to the wife of the vendor, assuming that the note is the property of the wife, the vendor's lien passes with the note to the wife.

2. PARTIES (§ II A—65)—RULES OF PRACTICE—FUSION OF LAW AND EQUITY—EQUITY TO PREVAIL—RIGHT OF ASSIGNEE TO SUE IN OWN NAME.

The Rules of Practice and Procedure of the Supreme Court of Ontario, including r. 85, having been confirmed by statute, have the force of a legislative enactment. There is nothing in the rule which conflicts with R.S.O. 1914, c. 109, sec. 49, and both enactments may stand together; and now that fusion of law and equity has taken place, and the rules of equity, where they are in conflict with the rules of law, are to prevail, r. 85 now applies to an action in the Supreme Court of Ontario, and enables an equitable assignee to sue in his own name where the assignment is of the whole fund, leaving no beneficial interest in the assignor.

Statement.

APPEAL from a judgment of a County Court Judge in an action to recover the amount of a promissory note.

ONT.

S. C.

GRAHAM v. CROUCHMAN.

The action was tried without a jury by DROMGOLE, Co. C.J., who gave reasons for his judgment as follows:—

On the 21st April, 1910, the defendant purchased from one Fredolin Ehrhardt a residential property in Walkerville, then occupied by the vendor. It was agreed that possession would be given on the 10th May, 1910, and in default and until possession was thereafter given that the vendor would pay rent; and that, meantime, the defendant would retain $400 of the purchase-price, for which he would give his promissory note, marked "not negotiable," so that it would not be negotiated to the prejudice of the defendant's claim for the rent. The note was given, post-dated the 1st May, 1910; the remainder of the purchase-price was paid or secured; and the deed, made to Lillian Crouchman, the defendant's wife, was delivered on the 21st April, 1910. The reason why the note was made payable to Charlotte A. Ehrhardt (the vendor's wife) does not clearly appear. I infer that it was because the vendor was intending to leave Walkerville, as in fact he did, on the night of the same day—and so that, as his agent, his wife might collect the money when payable. On the 26th April, 1910, a writ of *fieri facias*, issued out of the County Court of the County of Essex, at the suit of one Flood, against the goods and lands of Fredolin Ehrhardt, for $223.50 and costs, was placed in the sheriff's hands. The deed was registered on the 29th April, 1910. The goods of Fredolin Ehrhardt were seized under a Division Court execution, at the suit of one Scott. That was superseded by the County Court execution, under which the sheriff took possession of the goods, so seized, on the 1st May, 1910. Charlotte A. Ehrhardt made claim to the goods, and interpleader proceedings were taken. On the 14th May, 1910, the plaintiff, knowing that the goods were then so under seizure, and to enable Charlotte A. Ehrhardt to have them released, advanced her $300; and, in consideration thereof, she endorsed the note in question and gave it to the plaintiff, who took it observing and knowing that it was not negotiable. On the same day, Mrs. Ehrhardt deposited the $300 and $150 additional with the sheriff as security for the goods, in lieu of a bond, and he thereupon withdrew from possession. On the 18th May, 1910, the sheriff paid the $450 to the solicitor for the execution creditor Flood, to be paid into Court

ONT.
S. C.
GRAHAM
v.
CROUCH-
MAN.

in the interpleader proceeding, pending determination of Mrs. Ehrhardt's claim. Later, the money not having been paid into Court, a settlement was made between Charlotte A. Ehrhardt and the execution creditors, by which $250 of the money was accepted in satisfaction of their claims under the executions as against the goods seized, and applied in full payment of costs and sheriff's fees and the Division Court execution, and in payment of $91.95 on account of the Flood debt; and the balance of the $450 or $200 was returned to Mrs. Ehrhardt. There was no agreement by Flood to release the execution as to the lands of Fredolin Ehrhardt. On the contrary, he instructed the sheriff to hold the writ as against lands; it has been duly renewed from time to time, and is still in force to the extent of $131.55, balance of debt, besides interest and subsequent costs and sheriff's fees. The defendant obtained possession of the purchased premises on the 23rd May, 1910. He paid rent, $30, for other premises meantime; and has received nothing for rent from Ehrhardt. On the 2nd May, 1910, the plaintiff procured Lillian Crouchman's endorsement of the note, deeming it necessary because the deed had been made to her. Flood's solicitor warned the defendant, because of the execution, not to pay the note, and the defendant in turn, when spoken to by the plaintiff on the subject, warned him not to buy the note from Mrs. Ehrhardt. The first notification to the defendant that the plaintiff was the holder of the note was Messrs. Ellis & Ellis's letter, dated the 16th December, 1914. The foregoing are the material facts.

The note was not transferable as a negotiable instrument by mere endorsement and delivery to the transferee, so as to afford him any protection, under the Bills of Exchange Act, against countervailing equities of the maker. What was done does not amount to an assignment of a chose in action within the meaning of sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109. There was, however, a valid equitable assignment to the plaintiff, subject to the same equities as the defendant would have had against Ehrhardt (whose agent the assignor was), at the date of notice of the assignment to the defendant. The assignment passed to the plaintiff the right to sue; but, the subject of the assignment being a legal chose in action, the assignor must be a party to the action. The plaintiff cannot maintain this action

as constituted. The objection is not one of form merely; it is substantial, relating, as it does, to the protection of the defendant against liability to his original creditor, and possibly third parties claiming under him.

Assuming the action to be properly constituted, the plaintiff fails upon the merits of the defendant's claim of set-off, which is the only other issue between the parties. There can be no doubt as to his right to set off the rent, $30. As to the Flood execution, the question is, whether it is an incumbrance upon the lands which the vendor is bound to discharge. I think it is. It is clear upon the facts that Ehrhardt retained a vendor's lien for the $400 unpaid purchase-money. The lien is an interest in land which is exigible under execution, and may be realised by a purchaser at sheriff's sale, as the vendor might realise it, in an action against the original purchaser to enforce it by a sale of the lands. Such an interest Ehrhardt had on the 26th April, 1910, when the execution was delivered to the sheriff. The execution thereupon attached upon such interest and became an incumbrance within the meaning of Ehrhardt's covenant against incumbrances, and a right accrued to the defendant to discharge it out of the unpaid purchase-money in his hands.

This view is supported by *Robinson* v. *Moffatt* (1916), 37 O.L.R. 52, 31 D.L.R. 490. *Russell* v. *Russell* (1881), 28 Gr. 419 (cited by the plaintiff's counsel), is distinguishable. There the whole consideration had been paid or satisfied, and the entire estate in the lands had passed to the grantee on delivery of the deed; and it was held that, therefore, there was no interest in the land remaining in the grantor upon which an execution delivered to the sheriff, after delivery but before registration of the deed, could attach.

The defendant's right to set off the amount of the execution, as well as the rent, existed at the time of the assignment of the note to the plaintiff, and of course long before notice of the assignment was given to the defendant. That being so, the defendant has a similar right of set-off as against the plaintiff.

It is too late to add the assignor at this stage. In her absence, the plaintiff cannot sue. On that ground, there will be judgment for the defendant dismissing the action; unless, within 30 days, the plaintiff give security by bond or otherwise sufficiently

ONT.

S. C.

GRAHAM v. CROUCHMAN.

indemnifying the defendant against all liability upon the note to Ehrhardt, his wife, or any other person. In that event, there will be judgment for the plaintiff for the balance of $400 remaining after deducting $30 for the rent and the amount owing now on the execution, with interest on such balance at 3 per cent. per annum from the 23rd May, 1910, compounded half-yearly. Settlement of security and amount for which judgment should be entered, if the parties cannot agree, to be made by the clerk.

As to costs: the defendant is entitled to the judgment dismissing the action. On the merits he has also succeeded in establishing his right of set-off, the only issue seriously contested. As an indulgence, I have offered the plaintiff an alternative judgment which recognises the defendant's right of set-off, for the purpose of possibly avoiding further litigation. In either case, the plaintiff must pay the defendant's costs.

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

A. J. Gordon, for respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Essex, dated the 2nd May, 1917, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him sitting without a jury on the 14th December, 1915, and the 10th January, 1916.

The action is brought to recover the amount of a promissory note for $400 made by the respondent, payable to the order of Charlotte E. Ehrhardt, dated the 1st May, 1910, and payable twelve months after date. The note is in the usual form, with the words "not negotiable" written at the end of it.

The note was given for the balance of the purchase-money of land sold by the husband of the payee to the wife of the respondent, to whom the land was conveyed by the vendor on the 21st April, 1910.

The words "not negotiable" were added in order to prevent the note from being negotiated to the prejudice of the grantee in the event of her being unable to get possession of the land. She did not get possession until between the 21st and 23rd May following, and the respondent claims to set off against the note the rent he or his wife had to pay during that period—$30—and this set-off the appellant is willing to allow.

Between the date of the conveyance and its registration, executions against the goods and lands of the grantor were placed in the hands of the Sheriff of the County of Essex. Under these executions, goods were seized, which were claimed by the wife of the grantor, and an interpleader order was made, by the terms of which the wife was required to pay into Court $450 as security for the goods in the event of her failing to establish her right to them.

In order to assist in raising this money, the wife sold the note to the appellant for $300, received the money, endorsed the note, and delivered it to the appellant. The $450 was paid to the sheriff; and eventually a compromise was effected, by which the execution creditors were to receive $250, and this sum was paid to them out of the $450, and the claim of the execution creditors to the goods was abandoned, and the remainder of the $450 was returned to Mrs. Ehrhardt.

After this payment had been made, there remained due on the executions $131.55, and this sum still remains due and unpaid.

Acting under the erroneous impression that the executions had priority over the conveyance to the respondent's wife, because they were placed in the sheriff's hands before the registration of the conveyance, the execution creditors gave notice to the respondent of their claim, and warned him not to pay the appellant the amount owing on the note.

This erroneous view was also entertained by the respondent, and it is set up as a defence to the action by para. 4 of the statement of defence.

The respondent also pleaded that the appellant is not the holder in due course of the note.

Neither in the statement of defence nor at the trial did the respondent set up the two grounds upon which the judgment in appeal is based. These grounds are:—

(1) That the effect of the transaction between the appellant and Mrs. Ehrhardt was that the appellant became the equitable assignee of her claim on the note; but that, as the assignor is not made a party to the action, the appellant could not recover in this action.

(2) That the vendor, Ehrhardt, was entitled to a vendor's lien for the unpaid purchase-money for which the note was given;

ONT.

S. C.

GRAHAM v. CROUCHMAN.

Meredith, C.J.O.

that this lien was bound by the executions; that the execution creditors are entitled to look to the land, to the extent of the lien, for payment of what remains due on their judgment; and that the respondent was entitled to set off against the note the amount required to release the land from the lien.

Although these were the conclusions of the learned Judge, the formal judgment, as settled, dismisses the action, "unless within thirty days the plaintiff give security by bond or otherwise sufficiently indemnifying the defendant against all liability upon the note in question in this action, to Fredolin Ehrhardt, his wife, or any other person;" and, in that event, "the plaintiff do recover against the defendant the balance of $400 remaining after deducting $30 for rent due to the defendant and the amount now owing on the execution against the said Fredolin Ehrhardt, with interest on such balance at 3 per cent. *per annum* from the 23rd day of May, 1910, compounded half-yearly;" and it is further adjudged that the respondent recover against the appellant, in any event, his costs to be taxed.

The effect of this judgment is, that the appellant has been required to pay the vendor's lien found to exist in favour of Fredolin Ehrhardt, to the extent of the amount remaining due on the executions, and to indemnify the respondent against claims in respect of the lien by Ehrhardt or his wife.

I am quite unable to comprehend the principle upon which, assuming that Fredolin Ehrhardt was entitled to a vendor's lien for the balance of the purchase-money, the relief granted against the appellant is warranted. The note in question was given by the respondent for the unpaid purchase-money, and was given, not to Ehrhardt, but to his wife; and, assuming that the note was the property of the wife—and there is nothing to shew that it was not—the vendor's lien passed with the note to the wife. If the note had been given at the request of Ehrhardt to a stranger, surely Ehrhardt could not have required the payee to satisfy his vendor's lien, and the wife is in no different position than the stranger would have been, unless she in fact held it for her husband, of which, as I have said, there is no evidence; or, again, if the note had been made payable to Ehrhardt, and he had transferred it to another, the right of lien would have belonged to the transferee and not to Ehrhardt, who could not have enforced it

against his transferee. It was on this principle that in *O'Donoghue* v. *Hembroff* (1872), 19 Gr. 95, where seven promissory notes had been given for the unpaid purchase-money, and one of these notes had been transferred, it was held that the transferee and the vendor must share in the proceeds realised from the property in enforcing the lien by sale of it, ratably according to the amounts of the unpaid purchase-money represented by the notes held by them respectively.

The appellant was, therefore, entitled to recover the amount of the note and interest, unless the other ground upon which the learned Judge proceeded—that the action could not be maintained in the absence of the appellant's transferor as a party plaintiff or defendant—can be supported.

Rule 85 provides that:—

"An assignee of a chose in action may sue in respect of it without making the assignor a party."

This Rule comes down from the former General Orders of the Court of Chancery, and it is somewhat singular that, as far as I have been able to discover, the effect of it has not been the subject of discussion or decision in any reported case except one: *Lee* v. *Friedman* (1909), 20 O.L.R. 49. That was the case of an equitable assignment of a chose in action, and the action was brought by the assignee suing alone. Teetzel, J., held that the plaintiff could sue alone, and this judgment was affirmed by a Divisional Court. Britton, J., stating his opinion in that Court, said (p. 53):—

"Then, if there is a good equitable assignment, the plaintiff can sue in his own name: Rule 203 (*g*)" (now Rule 85).

That was the case of a legal chose in action, and the assignment was not one answering the requirements of what is now sec. 49* of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109.

*49.—(1) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

ONT.

S. C.

GRAHAM v. CROUCHMAN.

Meredith, C.J.O

I should perhaps also except what was said by Riddell, J., in *Sovereign Bank* v. *International Portland Cement Co.* (1907), 14 O.L.R. 511, 518. He there said that it was unnecessary to decide whether the bank (an equitable assignee) could have sued the town (that is, the debtor) without adding the assignor as a party; but no reference was made to the Rule.

It is settled law that that Act does not affect equitable assignments that were, before the Act, effectual in equity to transfer a chose in action.

There is no statutory provision or Rule in England similar to Rule 85; and there, subject to the qualification I shall mention, in the case of such an assignment, the action to recover the debt assigned must be brought in the name of the assignor, or he must be made a party defendant, or perhaps a co-plaintiff.

In *McMillan* v. *Orillia Export Lumber Co.*, 6 O.L.R. 126, it was held by Street, J., that an assignee of a chose in action, claiming under an equitable assignment, could not maintain an action in his own name. The Rule which is now Rule 85 was then in force, but no reference appears to have been made to it by counsel, and it was not referred to by the learned Judge.

In *Bank of British North America* v. *Gibson* (1892), 21 O.R. 613, the plaintiff sued as equitable assignee of a chose in action and recovered, although the assignor was not a party to the action. No question appears to have been raised as to parties.

In *Hall* v. *Prittie* (1890), 17 A.R. 306, it had been held in the County Court that the plaintiff was equitable assignee, and judgment was given in his favour. The Court of Appeal reversed this judgment, holding that the instrument under which the plaintiff claimed was either an order or bill of exchange, and did not constitute an assignment of the chose in action in respect of which the action was brought. In stating his opinion, Burton, J.A., said that, if an equitable assignment had been established, he would have entertained no doubt that the judgment of the Court below in favour of the plaintiff was correct.

In this case, also, no question as to parties appears to have been raised.

What was said by Moss, J.A., in *Wood* v. *McAlpine* (1877), 1 A.R. 234, 241, seems to indicate that that learned Judge thought that a person who had become beneficially entitled to a chose in

action might sue at law in the name of the assignor or resort to a Court of Equity, and that the object of the Act respecting assignments of choses in action was to enable such a person to sue at law in his own name.

The Rules, including Rule 85, having been confirmed by statute, have the force of a legislative enactment. There is nothing in the Rule which conflicts with R.S.O. 1914, ch. 109, sec. 49, and both enactments may stand together; and, now that fusion of law and equity has taken place, and the rules of equity where they are in conflict with the rules of law are to prevail, Rule 85, though when its provisions were first enacted it was applicable only to suits in equity, now applies to an action in the Supreme Court of Ontario, and in my opinion enables an equitable assignee to sue in his own name, where, as in this case, the assignment is of the whole fund, leaving no beneficial interest in the assignor.

The qualification to the English rule to which I have referred is thus stated in Halsbury's Laws of England, vol. 4, para. 829, p. 391:—

"Where the assignor's interest in the subject-matter has ceased, his presence before the Court may be dispensed with."

The authority given for this statement is *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, 21 Times L.R. 710. The plaintiffs were equitable assignees, and neither the assignors, Kramrisch & Co., nor their trustees in bankruptcy, were parties to the action. Referring to this, Lord Macnaghten said ([1905] A.C. at p. 462):—

"Strictly speaking, Kramrisch & Co., or their trustee in bankruptcy, should have been before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter."

In the note giving this case as authority for the statement in the text, the authors add: "It would seem that an action would not now be dismissed merely because the assignor was not made a party in the first instance;" adding, "See, however, *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765, 774."

In that case, A. L. Smith, L.J., expressed the opinion that an equitable assignee cannot bring an action at law to recover the debt: p. 768. There were in that case special circumstances

ONT.

S. C.

GRAHAM v. CROUCHMAN.

Meredith, C.J.O.

which rendered it necessary that the assignor should be before the Court. It was not like the case at bar or the *Brandt's Sons* case, where the assignments were absolute and left no right or interest in the assignor.

There is the further obstacle to the objection as to parties being given effect to, that the question was not raised until the trial, if indeed it was raised then. I rather think that it was the learned Judge who discovered it when he was considering what disposition should be made of the case.

Such an objection ought to be raised promptly, and ought not to be postponed until the hearing, where no impediment exists to raising the objection at once: *Sheehan* v. *Great Eastern R. W. Co.* (1880), 16 Ch. D. 59, 63, 64.

For these reasons, I am of opinion that effect should not have been given to the objection for want of parties.

I would allow the appeal with costs, reverse the judgment, and substitute for it judgment for the appellant for the amount of the promissory note, less $30, with interest at the rate of 5 per cent. per annum from its due date, with costs.

Appeal allowed.

QUE.

C. R.

LEE v. ÆTNA LIFE INSURANCE Co.

Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. October 13, 1917.

INSURANCE (§ IV B—170)—"INFANTS"—CHILDREN—GRANDCHILDREN.

By the law of Quebec the word "Infants" used in a life insurance policy issued in 1873, whereby insurance money is assigned to the wife and children, includes also the grandchildren.

Statement.

APPEAL from judgment of Superior Court. Affirmed.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—Dame Lee and another grandchild of the late John Lee, who died in Montreal two years ago, sued Ætna Life Insurance Co. to recover $2,000 insurance due under their grandfather's policy, which was taken out in 1873. The insurance company did not contest the action, but in view of the claim of the deceased's widow, a second wife, to the money, the company paid the amount into court for adjudication. The widow, Dame Jane Archambault, was thereupon made party to the action and it was on her contestation that the action came to trial. The trial judge in the Superior Court gave judgment for the plaintiffs, and this judgment was confirmed.

Under the law relating to insurance by a husband for the benefit of his wife and children, the amount due on the policy in dispute was assigned by John Lee to his first wife and their two children, who were both married at that time. The children died, leaving each one child—the plaintiffs in the present action. Mrs. Lee also died, and sometime afterwards John Lee married Jane Archambault, by whom he had a son.

When John Lee died in 1915 the question arose whether the $2,000 insurance money should be paid to the widow or to the two grandchildren, descendants of Lee's first marriage. The widow claimed that the amount was due to her as executrix of her husband's will, under which she was to receive the income from the estate and pass the estate to the son of the second marriage. The son was a minor at the time these proceedings were instituted, and, on the advice of a family council, he renounced all rights coming to him from his father's insurance, so that he did not come into competition with the other grandchildren, the plaintiffs.

The sole question at issue is whether the word "infants," as used in the statute under which the insurance money was assigned by John Lee to his wife and children, includes the grandchildren. It is admitted that the word "infant" as used in the old French law, and as applied in the Quebec law, does include the grandchildren. But it is claimed that this statute was passed under the regime of United Canada, and that the word "infant" in Upper Canada did not mean the same as the word "infant" in this province.

Further, were this law, which was a law for the benefit and use not only of one province, but of both, it was submitted that it could not have in the one province a signification other than the smallest signification it would have in the other province—that it would be valid in Quebec only to the extent that it would be valid in Ontario. On this ground it was insisted that the word "infant" must be restrained to mean only the children, and not the grandchildren.

In 1873—that is to say, after Confederation—this law was consolidated in our laws and the same language was used and the same provisions applied, and I am of the opinion, with regard to this statute it should be interpreted in accordance with the

QUE.
C. R.
LEE v. ÆTNA LIFE INSURANCE CO.
Archibald, A.C.J.

meaning of the word "infant" as we accept it in the law of the Province of Quebec. However, it is not necessary to determine that, for there is the statute of 1878, which declares that in the statute of 1873 the word "infant" is to have the signification given to it under Art. 980 of our Civil Code.

It was then said that the statute could not have a retroactive effect. But both John Lee's children were alive at that time, and they acquired a right then. It persisted until the death of John Lee and, not having been taken away by any means which the law would allow, it became an actual and existing right to the children's children, the plaintiffs in the present action.

I am, therefore, of opinion that the judgment which had given the plaintiffs their right to recover $2,000 insurance on their grandfather's policy of 1873 was well founded and should be confirmed. And this is the unanimous opinion of the Court.

The Acting Chief Justice added that the same right extended to the child of John Lee by his second marriage, and he could have recovered one-third of the policy of insurance if he had not renounced his claim.

Ex parte FAWCETT.

N. B.
S. C.

New Brunswick Supreme Court, Hazen C.J., and White and Grimmer, JJ. February 22, 1918.

CERTIORARI (§ I A—1)—MUNICIPALITIES ACT—BY-LAWS—REGULARITY OF PROCEEDINGS.

An application by way of *certiorari* to quash a decision of a County Council will be refused when the Council has acted in accordance with the Municipalities Act, N.B., 2 Geo. V., 1912, and the by-laws of the municipality, and there has been no gross miscarriage of justice.

Statement.

APPLICATION by way of *certiorari* for a rule absolute and order *nisi* to quash a decision of the county council of the Municipality of Westmorland.

Friel, K.C., for the Mun. of Westmorland; *G. R. McCord*, shows cause; *R. Trites*, in support of the order *nisi*.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—In this case a *certiorari* was granted by White, J., January 25 last, directed to the warden and county council of the Municipality of Westmorland, for the removal into this court of certain votes, records and proceedings in connection with the election of councillors for the Parish of Sackville, held on October

9, 1917, and also the record of the proceedings before the said council and a special committee of the same in reference thereto.

At the election for county councillors in the Parish of Sackville at the date aforesaid, there were 3 candidates,—Clinton C. Campbell, William W. Fawcett, and A. Chase Fawcett, it being on the application of the last named that the present proceedings were instituted. At the close of the poll the chairman stated the total number of votes polled for each of the candidates to be as follows: C. C. Campbell, 433; W.W. Fawcett, 340; A.C. Fawcett, 339; and declared the said C. C. Campbell and W. W. Fawcett elected, and afterwards returned them as being duly elected.

Being dissatisfied with the return and believing that a number of ballots had been improperly rejected which if counted would have elected him and not W. W. Fawcett, the said A. C. Fawcett together with one Angus M. Avard, a duly qualified elector of the parish, by a document in writing appealed and protested to the warden and county council of the Municipality of Westmoreland against the election of W. W. Fawcett, alleging and claiming that he should not have been declared elected as he did not have a majority of votes over A. C. Fawcett and that the latter should have been declared elected.

This appeal or protest was dealt with at the meeting of the council in January last and referred to a committee of 3 which committee, after hearing counsel on behalf of the parties interested, submitted a report which was considered and a resolution setting aside the election of W. W. Fawcett was then moved and carried by a majority vote. This action was taken under the authority of the Municipalities Act, 2 Geo. V, 1912, and the by-laws of the municipality passed by the county council on July 25, 1916. (See under head "Contested Elections," at p. 16.)

It appears from the papers and proceedings before the court and from the argument of the case that the following ballots were rejected by the returning officers: (1) A. C. Fawcett (printed) with the letters A. C. very faintly printed thereunder in lead pencil. (2) Two separate ballots in the same envelope, one for C. C. Campbell and one for A. C. Fawcett. (3) Same as No. 2. (4) Same as Nos. 2 and 3. (5) Two ballots in same envelope—one A. C. Fawcett—the other William W. Fawcett and Clinton

N. B.

S. C.

EX PARTE FAWCETT.

Hazen, C.J.

C. Campbell. The name William W. Fawcett being struck out by lead pencil. (6) The same as No. 5. (7) Two ballots in same envelope each bearing the names of William W. Fawcett and Clinton C. Campbell. (8) Ballot bearing names William W. Fawcett and Clinton C. Campbell, Campbell's name being struck out by lead pencil and the word "dirty" written underneath. (9) Same as No. 8.

The method of voting as provided in the Municipalities Act, 1912, is practically the same as that which prevails at elections for the local legislature, and is what is known as the envelope system, the intention of which is to enable the voter to exercise his franchise secretly and with the liability of his being subjected to undue influence being reduced to a minimum. S. 29 (6) of the Act distinctly provides that no ballot shall be counted by the returning officer at the close of the poll unless the same is printed on white paper or unless the ballot is a piece of white paper having the names or surnames of the candidates written thereon in black ink or with black pencil. It will be seen from this that the ballot must be "a piece" of white paper having the names of the candidates written or printed thereon. I am therefore of opinion that if any envelope contained more than one ballot or more than one piece of paper, such ballots could not be legally counted, and the returning officer was simply doing his duty under the law in rejecting them. I am confirmed in this view by the definition of ballot in the Century Dictionary, namely:—

> A ticket or slip of paper sometimes called a voting paper, on which is printed or written an expression of the elector's choice as between candidates or propositions to be voted for.

In other words, under the language of the Municipality Act a ballot must consist of one piece of paper and one only, and the names of all the candidates whom the elector intends to vote for must be written or printed on it and on it only.

It was admitted on the argument that the ballots 8 and 9 which had the word "dirty" written on them were properly rejected, as the identity of the voter if he so desired could be determined thereby, and the secrecy of the ballot thus violated. If I am correct in my opinion, that only one piece of paper or ballot can be placed in the envelope, then ballots 2, 3, 4, 5, 6, and 7 were also properly rejected by the chairman.

This leaves ballot No. 1, and I must admit I have considerable doubt regarding its legality. It was a printed ballot bearing the name A. C. Fawcett and underneath in lead pencil written so faintly as to be scarcely discernible are the letters A. C. It is argued that these were placed on the ballot for the purpose of identification, but I think it may be strongly contended that the elector believed he had to write the name of the candidate for whom he was voting, but discovered his mistake after he had written the two initials of his Christian names. The letters might easily have escaped detection by the chairman or anyone else, and I cannot believe they were placed on the ballot for the purpose of identification or any improper purpose. After a consideration of the authorities relied on by counsel for both parties, I have, though with hesitation, come to the conclusion that ballot Number 1 should not have been rejected. Under this by-law the only power possessed by the county council was to set aside the election and order a new one to be held. There was no authority to unseat one candidate and declare the other elected, no matter what conclusion the members of the council came to with respect to the rejected ballots.

In my view of the case, however, it makes little difference whether the conclusions I have arrived at with respect to the legality of the ballots are right or wrong. The legislature has provided that the council may make regulations for trying contested elections for councillors, and that provision has been availed of by the Westmorland county council, which has made regulations and provided machinery for the purpose. The protest filed by the defeated candidate was carried on in accordance with the by-laws so made, and there has been no such gross miscarriage of justice as warrants any interference on the part of this court. There might be honest difference of opinion with regard to the legality of ballot No. 1, but the county council after taking the advice of their counsel decided it was a good ballot, thus making the vote between W. W. Fawcett and A. C. Fawcett a tie, and there are no special circumstances which call for the exercise in this case of the power which this court undoubtedly possesses, for in the exercise of its inherent jurisdiction it might set aside the order of a county council in order to prevent a gross miscarriage of justice. This principle has been acted upon by the

N. B.
S. C.
EX PARTE FAWCETT.

court in several cases of recent date. See *The King* v. *Wilson*, (1910), 39 N.B.R. 555. *The King* v. *McLatchy* (1917), 44 N.B.R. 402, and cases therein cited.

WHITE, J. (oral):—I concur, except that I express no opinion as to the sufficiency or otherwise of the so-called double ballots.

Rule discharged

ONT.
S. C.

REX v. THORBURN.

Ontario Supreme Court, Masten, J. November 15, 1917.

STATUTES (§ II A—96)—PROVINCIAL AND DOMINION BOTH LEGISLATING—CONFLICT—DOMINION ENACTMENT TO PREVAIL.

Statement.

When a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion must prevail over that of the province where the two are in conflict.

MOTION for an order quashing a conviction of Mongo R. Thorburn for an offence against sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Masten, J.

J. A. Mulligan, for defendant.

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

MASTEN, J.:—The conviction in question was made by C. E. Hewson, Esquire, Judge of the District Court of the District of Manitoulin, for that "the defendant, Mongo R. Thorburn, on or about the 26th day of April, 1917, at the township of Billings, in the district of Manitoulin, did have and give liquor at the Havelock hotel, being a place other than the private dwelling-house in which he resided, contrary to the provisions of the Ontario Temperance Act."

The facts are as follows. The defendant had a bottle of rye whisky in his room, and gave one Ramsbottam a drink from it. The room in question formed part of a building which was formerly a licensed hotel, and which I assume (though the evidence does not precisely cover the point) was not the private dwelling-house of the defendant. It is admitted that, at the time when the act in question was committed, Part II. of the Canada Temperance Act, R.S.C. 1906, ch. 152, was in force in the district of Manitoulin.

The ground upon which it is sought to quash the conviction is, "that, the Canada Temperance Act being in force in the place where and at the time when the said offence is adjudged to have been committed, the provisions of the Ontario Temperance Act

under which the said defendant was convicted were not in force therein."

The constitutional question raised by this contention is important, but the cases which have been decided by the Privy Council narrow the point which now falls to be determined.

In *Russell* v. *The Queen* (1882), 7 App. Cas. 829, the Privy Council held that it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance, applicable to all parts of the Dominion, and, when duly brought into operation in any particular district, deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada.

The cases of *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, and *Attorney-General for Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73, determine that it is not incompetent for a Provincial Legislature to pass a measure for the repression or even for the total abolition of the liquor traffic within the Province, provided the subject is dealt with as a matter of "a merely local nature" in the Province, and the Act itself is not repugnant to any Act of the Parliament of Canada.

It has also been clearly and frequently determined and is conceded in the present case that, where a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict.

See *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*, [1909] A.C. 194; see also *John Deere Plow Co. Limited* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A.C. 348, already cited, affords further assistance in narrowing the question which is here to be dealt with. The seventh question submitted to the Privy Council in that case was as follows: "Has the Ontario Legislature jurisdiction to enact sec. 18 of Ontario Act 53 Vict. ch. 56?" And sec. 18, so referred to, is as follows:—

"The council of every township, city, town and incorporated village, may pass by-laws for prohibiting the sale by retail of

ONT.
S.C.
REX
v.
THORBURN.
Masten, J.

spirituous, fermented or other manufactured liquors, in any tavern, inn or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment: Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act: Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the Province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this Province purported to repeal."

In discussing the question, Lord Watson, at pp. 369, 370, says:—

"If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass sec. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by sec. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. . . .

"Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact sec. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the Province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886."

The decision of the Privy Council in the case just referred to related to the Ontario Liquor License Act and its antecedent legislation. These differ in certain respects from the Ontario Temperance Act now in force, and the question in the present case is therefore narrowed to a consideration of whether, in the circumstances here existing, the Canada Temperance Act and

the Ontario Temperance Act afford an instance of conflicting legislation *in pari materiâ*, because, if so, the repugnancy renders ineffective the Provincial Act.

It is admitted that Part II. of the Canada Temperance Act is and was in force at the place in question. Mr. Cartwright, in support of the conviction, contends that, in respect of the subject-matter here in question, the Canada Temperance Act and the Ontario Temperance Act are not in conflict; and that, so far as they are not in conflict, effect is to be given to the Ontario Act; that, while both Acts deal with the subject-matter of intoxicating liquor, yet the provisions of the Canada Act relate solely to traffic, while the Ontario Act deals with both traffic and use; and that the provisions of the Ontario Act are supplemental and not repugnant to the Dominion Act.

Before discussing the question so raised, I pause to make two observations of a general character.

It appears to me that, in passing upon sumptuary laws of this kind, affecting the common every-day life of ordinary citizens, and making that a serious offence at law which otherwise is not an offence, the Court ought not to examine the field of legislation with a microscope to find out whether every particular corner of the field has been fully occupied by the Dominion statute; but rather should hold that, if the Dominion has legitimately entered the field, it should be deemed to have occupied it generally.

The second observation which I desire to make is one which, though not decisive, is not without significance, viz., that the Parliament of Canada and the Legislature of Ontario by their legislative enactments have each indicated a view looking in the direction just mentioned.

The Ontario Act provides:—

"140. Nothing contained in this Act shall be construed to interfere with the operation of the Canada Temperance Act or any other Act of the Parliament of Canada applicable to the Province of Ontario or any part thereof."

At the session of the Parliament of Canada just concluded, the Act 7 & 8 Geo. V. ch. 30 was passed, which, in sec. 4C., provides as follows:—

"Upon the receipt by the Secretary of State of Canada of a

ONT.
S. C.
REX
v.
THORBURN.
Masten, J.

petition, in accordance with the requirements of sections 111, 112 and 113 of the Canada Temperance Act, Revised Statutes of Canada 1906, chapter 152, praying for the revocation of any order in council passed for bringing Part II. of the Canada Temperance Act into force in any city or county, if the Governor in Council is of opinion that the laws of the Province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of the said Canada Temperance Act, the Governor in Council may, without the polling of any votes, by order, to be published in the Canada Gazette, suspend the operation of the Canada Temperance Act in such city or county, such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws continue as restrictive as aforesaid."

These enactments seem to me to make it plain that the legislators both of Ontario and of Canada have considered that the two Acts cover the same field.

That the Ontario Act does legislate within the same field as the Dominion Act appears, however, most plainly from a consideration of the scope and purpose of the two Acts.

The scope and purpose of the Dominion Act are thus explained in the *Russell* case, 7 App. Cas. at pp. 841, 842:—

"The declared object of Parliament in passing the Act is that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one Province more than in another, but as desirable everywhere throughout the Dominion. . . .

"Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one Province, and that Parliament under colour of general legislation is dealing with a provincial matter only. . . .

"The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion."

Admittedly the purpose of the Ontario Act is the promotion of temperance in Ontario.

It thus appears that the purpose of each Act is to limit the use of liquor in the territory to which it is applied. Neither Act prohibits absolutely such use. The Canada Temperance Act seeks to achieve the common purpose by prohibiting the traffic in the territory where it is brought in force.

The Ontario Act also prohibits the traffic; but, in addition, it imposes prohibitions against having and giving (except in a dwelling-house) with the design of further limiting the use of liquor. In each statute the subject-matter legislated upon is the same, viz., temperance; and the purpose is the same, viz., to limit the use of intoxicating liquor. The only difference is in the prohibitions imposed; and, as these prohibitions are not identical, the provincial prohibitions become inoperative.

But, altogether apart from this ground, it appears to me that the Ontario Temperance Act must be in force as a whole or not in force at all. It is not, to my mind, conceivable that the provisions of the Act prohibiting the traffic are ineffective and the provisions respecting "having and giving" are in force. The decision which I have quoted above makes it plain that the provisions respecting traffic do not apply where the Canada Temperance Act is in force. That being so, I am of opinion that the provisions against "having and giving" are also ineffective in the district of Manitoulin.

Mr. Cartwright relied in support of his argument on the case of *Re Rex* v. *Scott* (1916), 37 O.L.R. 453, a decision of my brother Sutherland.

I have read that decision with care, and I do not think that it governs the present case or assists in its determination. In that case the prosecution was for an infringement of the Ontario Liquor License Act, and the charge was that the defendant was drunk in a public place, contrary to the provisions of sec. 141 of that Act. The motion was to prohibit the magistrate from proceeding with the hearing of the complaint, on the ground that the Liquor License Act was superseded by the Canada Temperance Act. The learned Judge holds that in the Canada Temperance Act there is no attempt made to punish for this offence; that sec. 141, there in question, does not conflict with anything in the Dominion Act; and it is suggested in the judgment

ONT.
S. C.
REX
v.
THORBURN.
Masten, J.

that sec. 141 would properly form part of a code for the municipal regulation of streets and public places and is foreign to the main purposes both of the Liquor License Act and the Canada Temperance Act.

If I may be permitted to say so, I agree in these views, and think that sec. 141 of the Liquor License Act formed no integral part of that Act, and related to a matter which was not directly or indirectly touched by the Canada Temperance Act. The case was, therefore, in my humble opinion, well decided.

On the other hand, I think that, in the present case, the Canada Temperance Act, having for its purpose the limiting of the use of liquor and the regulating of the traffic therein, yet permits "having and giving," and so, in my opinion, impliedly authorises "having and giving," while the Ontario Act directly in terms prohibits it. The two Acts are, therefore, inconsistent, and bring the present case within the principle stated by the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. at p. 369:—

"Provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district."

The conviction will be quashed without costs, and the usual order will go protecting the Judge.

QUE.
C. R.

AUDET v. CITY OF SHERBROOKE.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ. September 28, 1917.

MUNICIPAL CORPORATIONS (§ II G—235)—UNSHORED EXCAVATION CAVING IN—ERROR IN JUDGMENT OF FOREMAN—NEGLIGENCE.

An error of judgment is not an inexcusable fault; consequently a municipality in Quebec is not liable for the death of a workman employed on a road through the caving in of an unshored excavation after the foreman has decided that shoring is not necessary.

Statement.

APPEAL from the judgment of the Superior Court for the district of St. Francis, Hutchison, J. Reversed.

On September 27, 1916, the plaintiff's husband was working for the defendant, then employed in digging trenches on the public streets in order to place therein or repair gas and water pipes. While he was working at the bottom of his trench, which had a width of about 4 or 5 feet, one of the sides suddenly caved in, and the labourer was buried by the earth and macadam up to the

shoulders. He was crushed, asphyxiated and died before his companion had time to remove him from the earth.

The plaintiff sues under the Workmen's Compensation Act, and says substantially that the said accident was due to the inexcusable fault and gross negligence of the defendant and of its foreman inasmuch as that the said defendant had not placed any support to retain the earth on each side of the trench, and thus prevent a cave-in and protect its employee.

The plaintiff's husband, at the moment of the accident, and during the twelve months preceding, was earning $2.50 per day, and his average yearly salary was $782.50. She therefore claimed from the defendant the sum of $2,000 or four times the average annual salary of the husband of the plaintiff, and, further, the sum of $25 for the medical costs and funeral expenses. And also the sum of $3,975 as additional damages by reason of the inexcusable fault of the defendant.

The defendant confessed judgment for the sum of $2,025 with costs of an action for this amount, which confession of judgment the plaintiff declared and notified the defendant that she did not accept.

The said defendant has thereupon pleaded that, in all the places of the trench in which the husband of the plaintiff worked, where there was any danger of cavein, and where it could be foreseen that the sides might cavein, there were supports, that the place where the husband of the plaintiff was working was not a dangerous place, and it could not be foreseen that either side of the said trench might cavein; and the husband of the plaintiff was accustomed to this sort of work.

The Superior Court maintained the action, and finding the defendant guilty of an inexcusable fault condemned the City of Sherbrooke to pay plaintiff $3,025, to be equally divided between the plaintiff and her minor children under 16 years of age.

Emile Roux, for plaintiff; *Leblanc*, K.C., for defendant.

The Court of Review reversed this judgment for the following reasons:

Considering that the work being carried on by the defendant, and upon which the plaintiff's husband was employed was under the supervision of a foreman;

Considering that the said foreman, after an examination of

QUE.
C. R.
AUDET v. CITY OF SHERBROOKE.

the work, and particularly of the locality at which the accident in question happened, decided that supports or bracings were not necessary;

Considering that at the most he was guilty of only an error of judgment, which under the facts proven does not amount to an inexcusable fault;

Considering there was error in the judgment *a quo*; doth cancel and annul the said judgment; and proceeding to render the judgment which should have been rendered, doth declare the confession of judgment made by the defendant good and sufficient; doth condemn the defendant to pay to the plaintiff es-qualité the sum of $2,025, with interest and costs, up to the date of the confession of judgment, doth dismiss the plaintiff's action for the surplus, with costs of contestation and costs of this court against the plaintiff, and doth order the amount of the condemnation to be divided as follows:—$1,025 to the plaintiff personally, and the balance, $1,000, to her minor children, to whom she has been named tutrix.

ONT.
S. C.

HENRY HOPE & SONS v. CANADA FOUNDRY Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Hodgins, J.A., Riddell and Lennox, JJ. September 28, 1917.

CONTRACTS (§ IV B—330)—IMPOSSIBILITY OF PERFORMANCE—STRIKE.

Delay caused by a strike over which a party to a contract has no control, should not be counted in deciding what is a reasonable time for the performance of such contract.

Statement.

APPEAL from the judgment of LATCHFORD, J.

J. A. Paterson, K.C., for the appellants.

George Wilkie, for the plaintiffs, respondents.

M. K. Cowan, K.C., for the third parties, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This case has been dealt with, by counsel for all parties, in the action and in the claim of the defendants against the third parties, each, as if it were one: (1) in which the plaintiffs were entitled to a reasonable time for the performance of their contract; (2) in which all the questions raised in the third party proceedings, as well as in the action, might be considered; and (3) in which the time lost by the plaintiffs through a "strike" of their workmen should

not be counted against them, though at the conclusion of his reply Mr. Paterson seemed desirous of changing the attitude which up to that time he had maintained on that subject.

In all these respects I am in accord with them, though, having regard to the very general manner in which the first point was put by them, I desire to say that there may well be a time fixed for the performance of a contract though no time be expressed; that, indeed, in cases of contracts for supplying goods which are known to be needed for a certain purpose, at a certain time, the contract is, under ordinary circumstances, to be performed so that such need may be met. But that was not this case; in this case the time for the construction of the building for which the metal sashes in question were needed had passed before the contract in question was made, and by no other means had a specified limitation in time been imposed upon any of the parties to contract or sub-contracts. And, as to the second point, to say that: whether these third party proceedings were regular or irregular, no objection to them having been taken by any party, but, on the contrary, all parties throughout having desired, and still desiring, that the questions raised in those proceedings should be determined in this action, and as they were so determined at the trial of the action, there is no good reason for refusing to consider them here, upon this appeal, and really would be no good excuse for turning the parties out of Court in this respect merely to come into Court again with the same questions for our consideration after much useless expense and delay.

That being so, the first question for our consideration is: whether any delay of the plaintiffs in this action in the performance of their contract was a breach of it.

It is quite clear from the evidence, that, but for the strike of the plaintiffs' workmen, their contract would have been performed within a time quite satisfactory to all persons concerned in its performance; there could have been no reasonable contention that they had exceeded a reasonable time. The sashes were very nearly completed when the strike took place, and, but for the delay so caused, could and should have come to the contractors in time to have prevented any need for delay on their part in putting them in place and proceeding with the completion of their contract.

The plaintiffs in the action were under no obligation to any one

ONT.

S. C.

HENRY HOPE & SONS LIMITED v. CANADA FOUNDRY CO.

Meredith, C.J.C.P.

to proceed with the work they were to do until the formal contract in writing, which they required, had been made; and, having regard to delays commonly occurring in the prosecution of such work as that which the plaintiffs were to do—in this case the delay caused by making sure as to the meaning of the plans, furnished by the contractor, of these sashes for instance—I cannot find that the plaintiffs had exhausted their reasonable time, for the performance of their contract, at the time when the strike took place.

And the cases, I think, require us to hold that the time during which the strike lasted is not to be counted against the plaintiffs. The law is said to be "that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably," in cases in which the law allows him a reasonable time: see *Hick* v. *Raymond & Reid*, [1893] A.C. 22, 32, 33; and *Sims & Co.* v. *Midland R.W. Co.*, [1913] 1 K.B. 103. The evidence in this case brings the plaintiffs within the law as so expressed, as well as expressed by all the Judges who considered those cases: and no one suggests that after the strike there was any delay except such as was caused by it, or that the strike was not attributable to causes beyond the plaintiffs' control. I am therefore unable to find any fault in the judgment of the trial Judge upon this branch of the case.

On the other branch of it, the finding of the trial Judge was that the plaintiffs in the third party proceedings had not within a reasonable time performed their contract, and so could not enforce it.

No time was fixed for the performance of this contract, and the considerations respecting a reasonable time apply to it the same as to the other contract; but this contract was made on the 7th July, 1914, whilst the other was not made until the 19th September, 1914, and each was for the same sashes; that difference in time is the main difference between them; if made at the same time, there is no reason why the same result should not be reached as to each, and none the less so, rather the more, because the contract of the plaintiffs in the third party proceedings contains a clause, favourable to them, respecting "strikes."

But from the 7th July until the 19th September the plaintiffs did nothing effectual towards the performance of their contract; if they had at once, or indeed at any time up to the beginning of

this September, made their contract with the plaintiffs in the action, there can be no doubt, upon the evidence, that the contract would have been fulfilled before the strike took place. I gather from some parts of the evidence, and from some things said by counsel, that the delay from July to September was caused by the plaintiffs in the third party proceedings having some hope of being able to make the sash themselves in their factory, and that it was only when that hope failed that the contract with the plaintiffs in the action was made.

But, however that may be, I am unable to say that, under all the circumstances of the case, the trial Judge erred in his finding: that the plaintiffs in the third party proceedings failed to supply the sash within a reasonable time, and so were guilty of a breach of their contract, and consequently cannot enforce it or recover damages for a breach of it against the defendants in those proceedings.

Nothing turns upon the notices given, erroneously called notices of cancellation of the contracts: in each case the contractors were entitled to a reasonable time for the fulfilment of the contract; no one could shorten the time or cancel the contract against the will of the other parties to it: the notices might be treated as breaches of the contract—if the reasonable time had not elapsed—and suit for damages for breach of it might be brought, as the plaintiffs in this action have done.

I am in favour of dismissing each appeal.

LENNOX, J., agreed with the Chief Justice. Lennox, J.

RIDDELL, J.:—The third parties had a contract for the erection of a hotel at Calgary, and, desiring certain material, made a contract with the defendants (of Toronto) for the same. The defendants made a contract for the supply to them of the material by the plaintiffs in England. By reason of the delay in supplying this material, the third parties cancelled the contract with the defendants, whereupon the defendants gave notification to the plaintiffs of cancellation of their contract—neither the defendants nor the plaintiffs accepted the cancellation. Riddell, J.

The plaintiffs sued the defendants for damages, whereupon the defendants brought in the third parties by the practice pro-

ONT.

S. C.

HENRY HOPE & SONS LIMITED v. CANADA FOUNDRY CO.

Riddell, J.

vided by the Rules. The case came on for trial before my brother Latchford, and that learned Judge found in favour of the plaintiffs against the defendants, but in favour of the third parties.

This is an appeal by the defendants against both branches of the judgment.

I can find no reason to disagree with the conclusion of my learned brother in respect of the claim of the plaintiffs and have nothing to add to what he has said in that regard—but the claim to be indemnified by the third parties has given me more trouble.

I have come to the conclusion that this is not a case in which the Rule* applies at all, and that there is no power to grant any relief to the defendants against the third parties at all in this action (unless by consent).

When the third parties cancelled their contract, the cause of action in the defendants against them was complete, and they might have brought their action at once. The damages they could claim (assuming the contract to have been broken and the cancellation wrongful) would be the difference between what the third party promised to pay and the cost to the defendants. This action could not depend upon anything the defendants should do in reference to their contract with the plaintiffs—they might insist upon that contract or attempt to abandon it, and their cause of action against the third parties could not be in the least affected.

Nothing done by the third parties was the cause of the damages sought in this action by the plaintiffs against the defendants. It is true that it may have been the part of wisdom for the defendants to try to put an end to their contract with the plaintiffs: but there was nothing whatever to prevent them standing by that contract, receiving the goods and tendering them to the third parties.

The loss of the defendants was due to their own act, and not to any act by the third parties—there is no case of indemnity and of course none of contribution. Nor can it be said to be a case of "relief over." What the defendants must pay is the difference between the amount they agreed to pay to the plaintiffs and the

* Rule 165.—(1) Where a defendant claims to be entitled to contribution or indemnity from or any other relief over against any person not a party to the action, hereinafter called a third party, he may issue a notice. . . .

cost to the plaintiffs of supplying the goods—what they must claim from the third parties has nothing to do with this, is calculated on different facts and a different principle: *Campbell* v. *Farley* (1898), 18 P.R. 97; *Wynne* v. *Tempest*, [1897] 1 Ch. 110.

The test applied by Chitty, J., in the last-named case, is not unfair: "If the plaintiff failed in the action, would the defendant's claim against the third parties be thereby defeated? It is clear that it would not." So in the present case, the plaintiffs might have failed against the defendants, without affecting the defendants' claim against the third parties.

The regular course then would be to dismiss the appeal of the defendants against the third parties, but it should be done with a reservation of their right to assert their claim against the third parties and without prejudice to such a claim.

But all parties desire their rights to be disposed of in this action: and accordingly I say that the learned trial Judge was right in his judgment on this point also.

Both appeals should be dismissed with costs.

HODGINS, J.A., agreed with RIDDELL, J.

Appeal dismissed with costs.

Hodgins, J.A.

CANADA FURNITURE CO. v. BANNING.

Manitoba King's Bench, Mathers, C.J.K.B. December 12, 1917.

COMPANIES (§ V G—283)—MEETINGS—NOTICE—WAIVER.

A general by-law of a company requiring notice to be given of any special meeting cannot be arbitrarily revoked by the directors, at a directors' meeting, signing and approving of a waiver of notice, and the proceedings at a meeting held without such notice having been given will be set aside.

A. E. Hoskin, K.C., for plaintiff.

H. J. Symington, K.C., for defendant.

ACTION under S. 48 of the Joint Stock Companies Act, for the amount unpaid on shares.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—On November 14, 1905, the Lewis Furniture Co. Limited was incorporated by letters patent under the Joint Stock Companies Act, for the purpose of taking over and carrying on the business theretofore conducted by the Lewis Furniture Co., a partnership dealing in furniture by retail.

The capital stock of the company was $50,000, divided into 500 shares of $100 each. There were 5 incorporators, 4 of whom subscribed for 30 shares each, and the fifth subscriber, W. J. Donovan, for 1 share.

MAN.

K. B.

CANADA FURNITURE CO. v. BANNING.

Mathers, C.J.K.B.

On December 29, 1906, the defendant Banning appears to have made some arrangement with W. B. Paine and D. M. Macdonald, two of the directors of the company, to take from them $3,000 fully paid-up shares in exchange for his promissory note for that amount. This arrangement does not appear to have been carried out.

On December 31, 1906, he subscribed for 30 shares, and gave his promissory note to the company for $3,000, in payment thereof. A stock certificate bearing that date for 30 shares was issued in the name of the defendant. It was not, however, delivered to him, but was retained by the company until on or about May 17, 1911, when it was delivered to the defendant under the circumstances hereinafter related. The defendant, in his examination for discovery, says the share certificate was retained pending payment by him of his promissory note. In his evidence at the trial, he said that upon consideration he had come to the conclusion that he had only left it with the company for his own convenience and safe-keeping. The certificate does not purport to be for fully paid-up shares, and that it was not so regarded by the company is evidenced by the fact that payments made by the defendant after its issue are endorsed as payments upon the certificate. Two such payments are endorsed, viz: $100 on June 29, and $400 on September 25, 1907. I find the fact to be that the share certificate was retained by the company and not delivered to the defendant, because it had not been paid for otherwise than by giving a note.

Some time between January 21, and February 5, 1907, the defendant was elected a director of the company, and he continued to act as such until the company assigned in 1915.

The defendant from time to time made payments upon his promissory note, and gave a renewal note for the balance. On May 17, 1911, there was due upon the last of such renewal notes the sum of $1,600. On that day a meeting of the directors was held. The minutes of this meeting were not recorded in the regular minute book of the company, but were preserved in the form of typewritten sheets, evidently prepared beforehand for submission to the meeting, with certain blanks to be there filled up. The business transacted at the directors' meeting, according to these minutes, was the passing of a by-law for the payment

to each of the directors as remuneration for his services to the company of an amount equal to the sum unpaid upon his shares. The sums authorised to be paid varied from $400 each to Brown and Clarke to $1,280 to the defendant and $1,490.20 to Campbell. The alleged by-law is neither signed nor sealed, and is only authenticated by a resolution to the effect that it be enacted as a by-law, and was to be submitted to a special general meeting of the shareholders of the company.

The company had on November 30, 1905, adopted general by-laws, one of which provided that "ten days' notice will be given calling any special meetings, and in case of special business the general nature of such business shall be given either by advertisement or by notice sent by post to the shareholders of the company," and another that "the accidental omission to give any notice of any meeting of the shareholders shall not invalidate any resolution passed at such meetings."

No notice whatever of an intention to hold a shareholders' meeting was given either by advertisement or by post, but those present at the directors' meeting resolved themselves into a shareholders' meeting, having first signed a very ample waiver of notice of the time, place and purpose of the meeting. The by-law passed at the directors' meeting, if it can be so designated, was then read and unanimously approved.

I find that Donovan was at that time a shareholder, and that he was not present at the meeting, nor had he any notice that such a meeting was to be held, and he did not waive his right to notice as required by the by-laws.

The omission to give Donovan notice of the meeting was not, I find, accidental. The question of whether or not notice should be given him was discussed at the directors' meeting, and it was deliberately decided that notice should not be given to him on some suggestion that he was not a shareholder. A failure to give notice under such circumstances can not be described as an "accidental omission," and is not cured by this by-law.

On May 26, 1911, following the meetings referred to, the defendant gave the company his cheque for $320 to apply upon his note for $1,600 held by the company. Pursuant to the so-called by-law the company issued to him its cheque for $1,280, which was the balance due upon his note. This cheque for

MAN.

K. B.

CANADA FURNITURE CO. v. BANNING.

Mathers, C.J.K.B.

$1,280 he at once endorsed, and handed back to the company and received credit therefor upon his note in the company's books. The company thereupon gave him his note and the certificate for 30 shares, which up to this time the company had retained in its possession.

On September 31, 1915, the Lewis Furniture Co. Limited made a general assignment for the benefit of its creditors to the plaintiff Shaw.

The plaintiff company on April 15, 1916, recovered a judgment in this court against the Lewis Furniture Co. Limited for $10,412.25, and $30.07 costs, and on April 19, 1916, issued an execution thereon directed to the Sheriff of the Eastern Judicial District, which on April 25, 1916, the sheriff returned *nulla bona*. The plaintiff company bring this action against the defendant under s. 48 of the Joint Stock Companies Act, with an alternative claim by the plaintiff Shaw as assignee of the Lewis Furniture Co. Limited for the amount alleged to be unpaid on the defendant's shares.

As against the claim of the plaintiff company, the first defence urged is that the company accepted the defendant's promissory note as payment, and issued the shares to him as fully paid up, and that thereafter his only liability was upon his note, or the debt which it represented, and proceedings under s. 48 could not be taken.

I find that the 30 shares for which the defendant subscribed were not issued to him as fully paid up, but that the real transaction was that the certificate was issued in his name, and was retained by the company until his note given therefor should be paid. It is trite law that a promissory note is but conditional payment, and that as soon as it is overdue, if unpaid, the right upon the original claim revives. The fact that the company retained the certificate indicated a clear intention not to issue the shares so as to give the defendant dominion over them until the note was paid. While the note was current the right to proceed under s. 48 may have been suspended, but I entertain no doubt that the creditors' rights revived, if they had ever been suspended, upon default in payment of the note.

The next point raised by the defence is that by what took place at the meetings held on May 17, 1911, before referred to,

and the endorsement back by the defendant of the cheque for $1,280 given to him in pursuance thereof, fully paid up the shares and that he now owes nothing upon them.

By s. 32 of the Companies Act, the directors are given power to, by by-law, fix the remuneration of all agents, servants and officers of the company, but by sub-s. 4, no by-law for the payment of any director shall be valid or acted upon until the same has been confirmed at a general meeting.

It may be doubtful whether the directors can be said to have passed a by-law fixing the remuneration to be paid to the defendant and the other directors, but assuming for the moment that the resolution recorded in the minutes does amount to a by-law, has it been confirmed at an annual or special general meeting as required? No doubt a meeting may be validly held without the required notices if all the shareholders are present, and assent thereto; but if the required notice has not been given, the corporate will cannot be expressed at a meeting at which all the shareholders are not present. 5 Hals., par. 406 *et seq*; Palmer Company Law (10th ed.), 166; Parker Company Law (1909) 177. It is in a special way necessary that notice should be given when the proposed business is to the pecuniary advantage of a director: *Tiessen* v. *Henderson*, [1899] 1 Ch. 861. In this case Donovan, the holder of one share, was not at the meeting, and I must therefore hold that the by-law of the directors fixing the defendant's remuneration, if there was such a by-law, was not confirmed by a general meeting of the company.

It was urged that the payment of remuneration to directors being a matter of internal management, and not *ultra vires* of the company, the plaintiffs have no status to question the transaction. Undoubtedly the company had power to pay remuneration to its directors, but the directors had no power to remunerate themselves without the sanction of the shareholders obtained in the manner provided by s. 32 (4) (Companies Act, R.S.M., 1913). The statute declares that such a by-law until sanctioned shall not be valid, and prohibits the directors from acting upon it. Where such sanction has not been obtained, the payment is *ultra vires* of the directors. I recently had to consider the question in *Northern Trust* v. *Butchart*, 35 D.L.R. 169, and there collected the cases bearing on the subject. It does not make any difference

MAN.

K. B.

CANADA FURNITURE CO. v. BANNING.

Mathers, C.J.K.B.

that the company might have sanctioned the payment, if as a fact it has not done so, it may be recovered back. *Young* v. *Naval & Military & Civil Service Co-operative Co.*, [1905] 1 K.B. 687.

What the directors did here was to illegally take the company's funds and pay same over to themselves, the amount paid over in such case to be returned to the company as payment upon their shares. The amount agreed to be paid to each director for his remuneration was not based upon the value of his services to the company, but was arbitrarily fixed at the exact amount owed by him on his shares. In the case of Brown and Clarke the sum voted was $400 each, because that was the sum each owed on his shares. For the same reason Campbell was voted $1,490.20, and the defendant $1,280. It was not denied that the purpose the directors had in view was not to remunerate the directors for their services, but to pay up their shares, so as to make them free from call. Had the shareholders sanctioned this proceeding, as required by the Companies Act, no doubt the court would not interfere, upon the principles enunciated in *Burland* v. *Earle*, [1902] A.C. 83, as the matter was one of internal management, and not *ultra vires*. But where that sanction was not obtained, and the matter rests entirely upon the act of the directors done under a by-law, which the statute says was invalid, and not to be acted upon, the case is different. The issue of the cheques was illegal, and in returning the amount received to the company, the defendant was but doing what he might otherwise have been compelled to do. In receiving back money illegally obtained the directors had no right to apply it in discharge of their liability upon their shares. I must hold, therefore, that the defendant's shares are unpaid to the amount of $1,280.

The defendant counterclaims for $600.18, balances of money loaned by the defendant to the company. S. 48 of the Companies Act, which gives the plaintiff company its right of action, also provides that the shareholder may plead any set-off which he could set up against the company, except a claim for unpaid dividends or salary or allowance as president or director. The claim of the defendant does not fall within the exceptions and consequently if he has such a claim it may be here set off.

In answer to the defendant's claim, the plaintiffs shew that

after the Lewis Furniture Co. had made a general assignment for the benefit of its creditors under the Assignment Act, the defendant filed a claim with the assignee for this very claim, and as required by s. 29 of the Act, in his proof of claim stated that he held as security for the claim a certain agreement dated October 8, 1907, between the Lewis Furniture Co. Limited and himself, and that he valued his security under the agreement at the full amount of his claim. The assignee did not take over the security but permitted the defendant to retain it with the result that the defendant is not entitled to rank on the estate in the hands of the assignee. In other words, he has with the concurrence of the assignee, accepted his security in satisfaction of his claim. The result is, he has no claim against the company unless he can now be permitted to amend his proof of claim and revalue his security: *Bell* v. *Ross*, 11 A.R. (Ont.) 458, at 461; *Bank of Ottawa* v. *Newton*, 16 Man. L.R. 242. The defendant says he valued his security at the full amount under the mistaken belief that lien notes to double the value, which, by the terms of his agreement of October 8, 1907, he was entitled to have set aside as security for his claim were in fact so appropriated, whereas no lien notes have been set aside for him, but all have been hypothecated to the company's bankers, and his security is consequently of no value at all.

It was contended that the defendant is bound by the valuation he put upon his security, and has no right now to revalue it. In support of this a dictum of former Phippen, J., in *Bank of Ottawa* v. *Newton*, *supra*, is relied upon. In a more recent case of *Box* v. *Birds Hill Sand Co.*, 8 D.L.R. 768, 12 D.L.R. 556, 23 Man. L.R. 415, a contrary view was expressed by both Cameron and Haggart, JJ.A. In that case a secured creditor filed a claim, but by an oversight did not in the proof mention the security. The decision was that the security was not thereby forfeited, but Cameron, J.A., said: "The omission was, after all, an oversight and there is no difficulty in rectifying at this stage of the assignment proceedings whatever misunderstandings have arisen therefrom."

The defendant has not by his pleading asked to be allowed to correct his mistake, nor has he otherwise taken any steps to correct it, but as this court has jurisdiction to relieve against accidents and mistakes, and as I am satisfied that the defendant valued his

MAN.

K. B.

CANADA FURNITURE CO. v. BANNING.

Mathers, C.J.K.B.

security, which is in fact worthless, at the full amount of his claim, under the mistaken belief that he held lien notes to cover it, I will now permit him to amend his pleading in such a way as to raise this issue, and give him judgment upon his counterclaim for the amount still due upon his loan to the company. In this way alone can complete justice be done.

The plaintiffs claim only $1,170. That is the sum which the defendant appears by the books of the company to owe, after giving credit for $110 on December 30, 1914. It appears that this $110 was for directors' fees credited without the sanction of the shareholders. The plaintiffs ask leave to amend by increasing their claim by this amount, and I permit them to do so.

There will be judgment for the plaintiffs for $1,280, and for the defendant on his counterclaim for $600.18, and interest as claimed, but, under the circumstances, no costs of the counter claim. The amount recovered upon the counterclaim will be set off and judgment entered for the plaintiff for the balance, with costs of suit. If the parties cannot agree on the amount to be recovered under the counterclaim, the calculation will be made by the registrar. *Judgment accordingly.*

QUE.

C. R.

RABINOVITCH v. COHEN.

MARKS v. COHEN.

BRITISH CANADIAN FUR TRADING Co. v. COHEN.

Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. October 29, 1917.

ALTERATION OF INSTRUMENTS (§ II B—10)—MATERIALITY—PROMISSORY NOTE—SIGNATURE.

Altering a promissory note by adding the words "Cohen Frères, per" before the signature M. Cohen is not a material alteration rendering the note void inasmuch as the liability of the maker remains unchanged.

Statement.

APPEAL from a judgment of the Superior Court in an action on a promissory note. Affirmed.

This action is on two promissory notes of $392.50 each, at the order of Friedman, and endorsed by him to plaintiff. The first, signed by "Cohen frères," the plaintiff, doing business alone under that name, is not contested. The second, dated June 4, 1914, payable on October 10, was signed "Cohen frères," per "M. Cohen."

The defendant contests this last note, on the ground that the signature and the date of the note are false, forged and unauthorized. He made a confession of judgment for $215.80 which was refused.

The Superior Court rejected the plea for the following reasons:

Considering that the defendant in this case is sued and described as doing business under the name of "Cohen Frères";

Considering that it has been established that the note sued on was signed by the defendant on or about the date it bears;

Considering that the alteration complained of by the defendant in his plea that the words "Cohen Frères, per . . ." were not written by defendant or by any person authorized by him to that effect, is well established, but considering that said alteration was not material and did not in any way affect the operations of the notes sued on and the liability of the parties thereto;

Considering, moreover, that defendant paid to the plaintiff, on account of the notes sued upon herein, the sum of $176.60, thereby admitting of the liability of the note;

Considering that the defendant's confession of judgment made in this cause for the sum of $215.80 with interest and costs of an action of that class, is insufficient;

Considering that plaintiff has established the allegations of his declaration, and that defendants have failed to prove the material averments of their plea;

Considering that plaintiff's action is well founded;

Doth reject the plea of the defendant, and doth declare his confession of judgment made in this cause insufficient, and doth condemn the defendant to pay to the plaintiff the sum of $608.30, with interest from date of the maturity of said notes and costs.

Statement.

Perron, Taschereau & Co., for plaintiff.

Pelletier, Létourneau & Co., for defendant.

ARCHIBALD, A.C.J.:—These three cases were argued together and depend precisely upon the same point.

Archibald, A.C.J.

The case of Rabinovitch was taken for the sum of $608.30, being a balance due upon two promissory notes of $392.50, one note being dated June 2, 1914, and payable on October 7, 1914, and the note dated June 4, 1914, and payable on October 10, 1914, both notes made to the order of Friedman and duly endorsed by the said Friedman to the plaintiff.

The note dated June 2, 1914, is signed "Cohen Frère." I may say that "Cohen Frère" was the name under which M. Cohen was doing business alone in the city of Montreal. The second note is signed as follows: "Cohen Frère, per M. Cohen." This is the only note which the defendant M. Cohen disputes.

QUE.

C. R.

RABINOVITCH v. COHEN.

Archibald, A.C.J.

In the case of *Marks* v. *M. Cohen*, the note in question is signed as follows: "Cohen Frère, per M. Cohen."

In the case of *British Canadian Fur & Trading Co.* v. *M. Cohen*, the note is signed as follows "Cohen Frère, per M. Cohen."

In this case, "Cohen" is inserted in red ink.

It is admitted that the bookkeeper of M. Friedman, who received these notes from M. Cohen, added in each case the words "Cohen Frère, per" after the notes had been signed by M. Cohen, and practically the only ground which the defendant raises to escape payment is that the addition of the words "Cohen Frère, per" was an alteration in the notes such as to render the notes invalid under the terms of art. 145 of the Bills of Exchange Act, which reads as follows:

> Where a bill or acceptance is materially altered without the assent of all parties liable on the bill; the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

The defendant Cohen in this case is very closely questioned as to whether the word "Cohen" on these several bills is his signature, and he answers:

> It looks like my signature, but if I signed it, it must have been before I commenced to do business under the name of Cohen Frère.

In this case the date on the bill is false, and moreover the true date would be beyond 5 years from the date of the apparent maturity of the bill. Friedman, however, to whom the bill was given, swears that the bill was signed "M. Cohen" on the date which it bears.

The Court has found that the bill was so signed on that date. There cannot, I think, be any reasonable doubt that the evidence justified the finding of the Court. Neither is there any doubt that the plaintiff became holder of these various notes before maturity and for value, and, therefore, the plaintiff is a holder in due course.

Under the article of the Act above quoted, whether the alteration is in a material part of the bill or not, the plaintiff would have a good title against the defendant, unless the alteration is to be considered apparent on the face of the bill.

In incorporated companies, it is a very common practice to

stamp the name of the company upon any bill, and have that authenticated by the signature, either of the manager or of any other person authorized to sign for the company.

If the defendant, although he swears he was never in the habit of signing in that way, but if he did sign in that way "Cohen frère, per M. Cohen," it would manifestly be a good signature. Indeed, the only essential part of the signature is "M. Cohen," because he is the only person doing business under the name of "Cohen frère," and has only become obliged by the signature. No other person had any interest in it.

It would seem then that "Cohen frère, per M. Cohen," even if the person receiving the notes knew that Cohen frère was no other than M. Cohen, and although the words "Cohen frère" are in each case written or printed in such a way as to make it manifest that they were not intended as a signature, would not be an alteration apparent on the face of the bill, because there would be no necessity that the words "Cohen Frère" should be written by the hand of M. Cohen.

Clearly, the only objection to that point of view would be that "Cohen Frère" was printed on the bill after M. Cohen signed and not before, but that would not be apparent to a third person taking the bill, so that it would seem to me that, under art. 145, the plaintiff being a holder in due course for value can avail himself of these bills against M. Cohen, inasmuch as there is no alteration apparent on the face of the bill. But this alteration is not material. It neither adds to nor subtracts anything from the effect of the bill. "Cohen Frère" is M. Cohen.

The obligation of M. Cohen is neither enlarged nor diminished by the addition of these words, and I think, in any event, the alteration is not material.

Byles on Bills, 17th ed., p. 305, cites a case with regard to the materiality of alterations, as follows:

> Where a bill was addressed to A. B. & Co'y. and the acceptance was by A. B., and the holder therefore altered the address to correspond with the acceptance, as the acceptors would be liable either way, the alteration was held not to be a material one.

That case was the case of *Farquhar* v. *Southey*, M. & M. 14.

That case was also referred to in Falconbridge on Banks and Banking, 2nd ed., p. 735. The section where he states the matter is as follows:

QUE.

C. R.

RABINOVITCH v. COHEN.

Archibald, A.C.J.

The alteration in the name of the firm to which a bill is addressed so as to correspond with the name in which it is accepted, being the true name of the firm is not material;

and immediately after that, Falconbridge added the following as immaterial:

The addition to a promissory note, in which no time of payment is expressed, of the words on demand would be immaterial, because payment on demand would be implied by law.

From the references given by Falconbridge and Byles, it would appear that any change which altered to any extent the obligations of any of the parties on the bill would be a material alteration, and any change which did not alter such obligations would be immaterial. Here there was absolutely no alteration of the obligation of the party pleading.

I think the alteration which was made clearly was an immaterial one, and one which did not nullify the bills in question in these cases.

Judgments which have condemned the defendant are therefore right and should be confirmed. *Appeals dismissed.*

MAN.

C. A.

YEO v. FARRAGHER.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. February 22, 1918.

LIENS (§ 1—3)—ANIMAL PLACED IN STABLE—LIEN FOR KEEP.

The Stable Keepers' Act, R.S.M. (1913), c. 183, does not entitle the keeper to a lien on an animal put in the stable without the knowledge and consent of the owner.

[*Buxton* v. *Baughan*, 6 Car. & P. 674, followed.]

Statement.

APPEAL by plaintiff from the judgment at the trial in an action claiming a lien under the Stable Keepers' Act, R.S.M. 1913, c. 183. Reversed.

L. D. Smith, for appellant.

H. E. Robison, K.C., for respondent.

The judgment of the court was delivered by

Cameron, J.A.

CAMERON, J.A.:—The plaintiff entrusted one McInnes with a racing mare under an agreement by which McInnes was to keep the mare and pay the expenses in connection therewith, the parties sharing in any prize money that she might win. McInnes, without any authority from Yeo, placed the mare in defendant's stable and incurred a bill of expense amounting to $304, for the feed and care of the mare from April 15, 1915, to May 22, 1917, without plaintiff's knowledge. The plaintiff brought replevin

and the defendant set up a claim for a lien under the Stable Keepers' Act (R.S.M. 1913, c. 183). The question is whether the defendant is entitled to his lien as against the plaintiff. The County Court Judge at the trial gave judgment ordering the return of the mare to the defendant and gave him his costs.

The Act in question is a variation of the common law and must not be extended beyond its plain terms.

Clearly its operation in giving a lien, having priority over other previous lawful liens and encumbrances, is confined by its terms to the stable keeper who has in his possession a horse &c. of any person who is indebted to him for stabling &c. It is impossible in this case to say that the plaintiff was indebted to the defendant as McInnes had no authority from the plaintiff to incur any such indebtedness and, in this instance, therefore, he is not in a position to claim the benefit of the Act.

The provisions of our Act were discussed by this court in *Harding* v. *Johnston*, 18 Man. L.R. 625, where it was held that a livery stable keeper has no lien on a horse for its stabling and keep as against the real owner, when the horse was stolen and placed with him by the thief.

Howell, C.J., points out that in the United States under similar Acts, the lien exists only as against the owner, and that the principle of *caveat emptor* applies.

> Our Act gives a lien to the stable keeper in priority to any other existing lien, or incumbrance, or charge and if the Legislature had intended to allow a lien to be created by a thief or *tort feasor*, as against the owner, it could have been easily so stated, p. 627.
>
> In order to create the statutory lien it is necessary that the contract be made or the horse be placed with the livery stable keeper by its owner, or by someone having authority from him so to do. Cyc. XXV. 1508.

Some of the cases referred to in the footnote, such as *Howes* v. *Newcombe*, 146 Mass. 76, arise in jurisdictions where the necessity for the owner's consent is expressly required. But in other cases the statutory provisions involved are similar to our own. In *Lowe* v. *Woods*, 34 Pac. 959, it was held that the provisions of the California Code, providing that livery stable keepers shall have a lien dependent on possession for feeding horses, gives no lien to a livery stable keeper for boarding a horse, placed in his charge by a person other than the owner, without the owner's knowledge or authority. Several cases are cited in support of this view, amongst them *Stott* v. *Scott*, 4 S.W. 494;

MAN.

C. A.

YEO v. FARRAGHER.

Cameron, J.A.

Downau v. *Green*, 19 S.W. 909; *Jacobs* v. *Knapp*, 50 N.H. 82 and *Small* v. *Robinson*, 69 Me. 425.

Buxton v. *Baughan*, 6 Car. & P. 674, cited to us on the argument, bears out this view. There, it was sought unsuccessfully to maintain a lien by agreement in circumstances somewhat similar to those in this case. Baron Alderson said: "A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me or between him and some agent authorized by me." In this respect it is difficult to see any difference in principle between a lien by agreement and a lien by statute.

I am of opinion that the defendant cannot uphold his claim for a statutory lien and that the judgment appealed from must be set aside and judgment entered in the County Court for a return of the mare to the plaintiff with costs of this appeal and of the court below. *Appeal allowed.*

QUE.

C. R.

DALY v. REV. CHENIER.

Quebec Court of Review, Fortin, Greenshields, and Lamothe, JJ.
September 25, 1917.

LIBEL AND SLANDER (§ II D—46)—ELECTION—PARISH PRIEST—CANDIDATE.

A parish priest who solicits a ratepayer not to vote for a certain person because he, as parish priest, knows things about such ratepayer which he is unable to divulge, meaning that he is not a man of integrity or good moral character, and not worthy to hold a responsible public position, is guilty of slander, and liable in damages.

Statement.

APPEAL from a judgment of the Superior Court. Affirmed.

T. P. Foran, K.C., for plaintiff.

Devlin & Ste-Marie, for defendant.

The plaintiff claims $250 from defendant for damages for slander and says that he is a farmer and has held several public offices of trust in his parish and municipality, and has always enjoyed the good esteem of the public. In May, 1912, he was appointed, by the municipal council of the township of Wakefield, as a member of a committee regarding the erection of a bridge in said township, of which committee the defendant was a member. On, or about July 24, 1913, the defendant was canvassing among the subscribers of money towards the bridge construction to have another committee appointed to replace the first one, of which committee plaintiff was not to be a member, but was to consist of defendant and others to control the work and direction

of said bridge. The plaintiff alleges that, then and there, the defendant, falsely and maliciously, made slanderous statements of and concerning plaintiff in order to injure him and obtain his dismissal from said committee, which statements were without justification and made in presence of divers persons, including one Pritchard, and that in a reply to the request of Pritchard why he Pritchard should vote against plaintiff, the defendant replied that he, in his quality and office as parish priest, knew things about the plaintiff which he was unable to divulge, meaning that he, as parish priest, had obtained in a confidential manner information regarding plaintiff which caused him to believe that plaintiff was not a man of integrity or good moral character and not worthy to hold a responsible public position, which statements have been circulated and have caused plaintiff damages real and exemplary.

The defendant's plea is, in substance, a denial of plaintiff's allegations.

The Superior Court condemned the defendant to $100 of damages for the following reasons:

Considering that the plaintiff has established the essential allegations of his declaration and that particularly in reply to a question by Pritchard aforesaid to the defendant, in the presence and hearing of one John R. Hill, the question being in substance and effect as follows to wit: "I asked him (defendant) for reasons to turn my vote against plaintiff, and he said: as a priest I know things about him which I cannot divulge;" the occasion being at a meeting called for the purpose of voting to replace the old committee aforesaid by another—he Pritchard having voted in favor of the plaintiff's retention on the committee and the defendant apparently not pleased with such vote having inquired of Pritchard why the latter had "turned him down;"

Considering that plaintiff was a parishioner in the defendant's parish and belonged to the same church, and that the insinuation above mentioned was of very injurious nature, unwarranted under the circumstances and sought to convey the impression that the plaintiff was not a man of sufficient integrity or moral character to merit the confidence and esteem of his fellow citizens, and has caused plaintiff damages which under the circumstances

QUE.

C. R.

DALY v. REV. CHENIER.

this Court assesses at $100, which he is entitled to recover from the defendant.

Doth maintain the plaintiff's action and condemn the defendant to pay and satisfy to him the sum of $100 with costs of action as instituted.

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 12, 1917.

HIGHWAYS (§ III—100)—HIGHWAY IMPROVEMENT ACT (ONT.)—POWERS OF COUNTY COUNCIL—ROADS IN VILLAGE.

A County for the purposes of the Highway Improvement Act (R.S.O. 1914 c. 40 ss. 4(1), 5(1), 12(2), and 22, in order to make a continuous good road, may assume a part of a road within a village corporation.

Statement.

APPEAL by defendant corporation from the judgment of Sutherland, J. The plaintiff corporation also appealed.

A. W. Marquis, for defendant corporation.

A. C. Kingstone, for plaintiff corporation.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 11th July, 1917, which was directed to be entered by Sutherland, J., after the trial of the action before him sitting without a jury at St. Catharines on the 18th May, 1917; and there is a cross-appeal by the plaintiff, the nature of which I shall afterwards mention.

The action is brought by the respondent, which is a village corporation, for the purpose of obtaining a declaration that by-law number 600 of the council of the appellant, which is a county corporation, bearing date the 3rd day of February, 1917, is illegal and invalid and *ultra vires* the appellant, and that the respondent and "the other local municipalities forming the defendant corporation are not bound" by it, and that the respondent is not liable to assessment or taxation under it, or to meet or pay any liability or expenditure "in pretended pursuance thereof;" for obtaining a "direction" that the by-law be set aside and quashed; "in any event a direction that the clauses" of the by-law "complained of as being ambiguous, contradictory, and *ultra vires*, be struck out," and the by-law amended accordingly; and an injunction restraining the defendant from acting or pro-

ceeding in any manner under the by-law and from assessing or taxing the respondent with any part of the cost or expenditure incurred under or by reason of the by-law.

The by-law in question was assumed to be passed under the authority of the Highway Improvement Act, R.S.O. 1914, ch. 40.

The by-law recites the Act and an amendment of it, and that the council of the appellant corporation deemed it necessary and expedient to adopt a plan for the improvement of certain highways in the County of Lincoln, being those described in the schedule to the by-law, and the by-law enacts that these roads and highways are designated and assumed as county roads to be improved and maintained under, and to be constructed, improved, and maintained in accordance with, the provisions and regulations prescribed by those Acts, and that the work of construction, improvement, and maintenance shall be commenced as soon as practicable after the coming into force of the by-law.

Section 4 of the by-law reads as follows:—

"The county council shall from time to time by by-law make such grants as may be necessary and equitable for the construction, improvement, and maintenance of highways or portions of highways in villages or towns, not separated from the county, and in townships which are extensions of or form direct connections between different portions of county roads, but the total amount of such grants to any village or town or township shall not exceed the sum of the provincial grant thereon, and the taxation paid by such urban municipalities under the by-law."

By sec. 5, provision is made that the "funds" required for the construction, improvement, and maintenance of the roads "shall be raised by an annual levy based upon the equalized assessments of the municipalities within the county, including incorporated towns and villages not separated from the county, or by the issue of debentures from time to time, or by other means authorised by the Municipal Act, the Highway Improvement Act, or other statute of the Province of Ontario in that regard, and the rate for the payment of such debentures issued for the aforesaid purposes, or any rate levied under authority of, or by reason of, the said Highway Improvement Act, shall be levied and collected upon the ratable property aforesaid, and no part

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Meredith, C.J.O.

of the cost of improvement and maintenance of the said roads and highways shall be borne by the municipalities not so included."

The by-law contains two other sections not affecting the questions raised in the action and a final section providing that the by-law shall not come into force until approved by the Lieutenant-Governor in Council in accordance with sec. 12 of the Highway Improvement Act.

Among the highways mentioned in the schedule are:—

The Queenston and Grimsby stone road from the westerly boundary of the County of Lincoln to Queenston, passing through the Villages of Grimsby and Beamsville (number 1).

Ontario street from the City of St. Catharines northerly to the Village of Port Dalhousie, and continuing through the Village of Port Dalhousie to the easterly limit of the Township of Louth (number 14).

The Niagara stone road from the Queenston and Grimsby stone road at Homer to the Town of Niagara, and continuing through the Town of Niagara to the shipping point at the wharf (number 16).

In the Township of Niagara, the Creek road from the southerly town line of the Township of Niagara through St. Davids and Virgil to the Lake Shore road, thence easterly along the Lake Shore road to the westerly limits of the Town of Niagara (number 17).

The Hartzel road from the Queenston and Grimsby stone road in the Township of Grantham southerly between lots 11 and 12 to the Village of Merritton to the southerly limits of the said village (number 18).

I should have thought it open to question whether number 18, as it appears in the by-law, includes a street in the Village of Merritton. In engrossing the by-law, words which appeared in the by-law as it was introduced and read a first time were dropped, inadvertently, I have no doubt. In it number 18 read: "The Hartzel road from the Queenston and Grimsby stone road in the Township of Grantham southerly between lots 11 and 12 to the Village of Merritton *and continuing through the Village of Merritton* to the southerly limits of the said village."

It is, however, unnecessary to consider this point, because,

as stated in the reasons for judgment, it was admitted that number 18 "includes a street within the corporate limits of the plaintiff corporation."

Various objections are made to the validity of the by-law.

It is complained that the proceedings of the council were irregular and invalid and contrary to the provisions of the standing rules of the council.

I do not recollect that this objection was taken before us; but, however that may be, it is clearly untenable. It is well settled that failure to conform with the rules of procedure of a municipal council does not invalidate a by-law passed by it.

The principal objection to the by-law is stated in paragraphs 10 and 14 of the statement of claim, and it is that the council of the appellant corporation had no jurisdiction or authority to assume as county roads numbers 1, 14, 16, and 18, parts of which are situate within the limits of incorporated villages and towns, without the consent of their councils, and that the by-law is therefore *ultra vires* and illegal; and to this objection the learned trial Judge has given effect, and has adjudged the by-law "to be illegal and invalid in so far as it assumes the street of the plaintiff corporation in question in this action as part of its plan for improvement of highways in the county."

The view of the learned trial Judge is, that, looking at the whole of the provisions of the Highway Improvement Act, and particularly those of sec. 5, the right of a county council to assume highways for the purposes of the Act is confined to highways in townships.

I am, with respect, unable to agree with that view, and I cannot find in the Act anything which warrants the cutting down of the comprehensive language of the principal enabling section (sec. 4 (1)).

That sub-section provides that:—

"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 . . ."

Wider or more comprehensive words could hardly have been used—"improvement of highways *throughout the county*;" "by assuming highways *in any municipality in the county*;" and no Court would be warranted in restricting the plain mean-

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Meredith, C.J.O.

ing of these words unless it is manifest from the other provisions of the Act that they could not have been used in their ordinary sense, and it is clearly not sufficient to point out provisions which may cause one to conjecture that something different was meant—as in this case that what was meant was not "throughout the county" but "in townships in the county," and not "any municipality in the county" but "any township in the county."

The provisions upon which the respondent relies for the restricted meaning that has been given to the words of sub-sec. 1 of sec. 4, and upon which the learned trial Judge mainly based his conclusion, do not, in my opinion, warrant the Court in giving to the words of the sub-section any other than their plain and ordinary meaning.

It was argued that the latter part of the sub-section shews that only township municipalities were intended, and is inconsistent with the intention having been that the provisions of the sub-section should extend to all municipalities. Why, it is urged, if towns and villages were to be included, is there no provision for lessening the burden upon them, as is provided in the case of townships? I should have thought it enough to answer: because the Legislature has not thought fit so to provide; but, if it were necessary to suggest a reason for not including towns and villages, it may be suggested that the Legislature may well have thought that in the case of townships, which have always a large area, parts of them might be situate so remote from the highway to be improved as not to receive a benefit equal to that of other townships differently situated, while in the case of towns and villages, which are usually compact and of comparatively small area, the inequality would not occur, or would be a negligible quantity.

Then it was argued that sec. 5 demonstrates the correctness of the respondent's contention, and that was the view of the learned trial Judge. With that I am unable to agree. Why may not the intention of the Legislature have been to give to the county council the option of assuming highways in towns and villages, with the consequent obligation to keep them in repair, or of making grants as provided by the section, without incurring that obligation?

Such a course accords with the policy of the Legislature as

to the general powers of county councils with regard to highways, as embodied in the Municipal Act.

A county council may by by-law assume as a county road any highway in a town, not being a separate town, and in a village or township which connects with a county road: sec. 446 (4) of the Municipal Act, R.S.O. 1914, ch. 192. Where it assumes a highway, the council of a county has jurisdiction over it: sec. 436 (1); and the corporation of the county is required to keep it in repair: sec. 460 (1); but, where a county council does not desire to assume a highway, with the consequent obligation to keep it in repair, it may grant "aid to the corporation of any town, village or township towards, . . . (*b*) opening, widening, maintaining or otherwise improving any highway leading from or passing through the municipality into a county road . . .:" sec. 428 (5).

Section 12 (2) of the Highway Improvement Act was also relied on in support of the respondent's contention.

That sub-section provides for the hearing of township councils upon an application by a county council for the approval of its by-laws, but says nothing as to the councils of separate towns and villages being heard.

Why this provision extended only to township councils, it may be difficult to understand, but that is no reason for cutting down the plain meaning of sec. 4 (1). It may be that the Legislature thought it unlikely that the council of a separated town or village whose highway was assumed, and which was thereby relieved of the burden of keeping it in repair, would be dissatisfied with the scheme of road improvement provided for by the by-law.

Section 22 was also relied on, but its provisions, instead of helping the argument of the respondent, seem to make against it. If township municipalities only were to be affected, why require the approval of two-thirds of the local municipalities in the county as a condition precedent to the repeal of the by-law? "Local municipality" means, according to sec. 2 (*g*) of the Municipal Act, a city, a town, a village and a township; and, by sec. 31 of the Interpretation Act, R.S.O. 1914, ch. 1, this is the meaning which the words are to receive in the Highway Improvement Act.

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Meredith, C.J.O.

It is true that the standard of repair after the repeal of the by-law is to be that of township roads, but I do not see that there is in that anything so repugnant to the wide provisions of sec. 4 (1) as to warrant the cutting down of its plain words.

Taking the provisions upon which the respondent relies separately, none of them, in my opinion, warrants the cutting down of the plain words of sec. 4 (1), nor is the cumulative effect of all of them sufficient to warrant it. The most that can be said of them is, that they lead one to conjecture that it may have been in the mind of the Legislature to limit the operation of the Act to highways in townships, but that falls far short of making a case for cutting down the broad and comprehensive words of sec. 4 (1).

If that had been the intention of the Legislature, it is strange that there is nothing in the title of the Act to indicate it; it is as broad and comprehensive as is the language of sec. 4 (1)—"An Act for the Improvement of Public Highways."

This is a case to which the language of Lord Cranworth, L.J., in *Gundry* v. *Pinniger* (1852), 1 DeG.M. & G. 502, 505, is particularly apposite. He there says:—

"The great cardinal rule is that which is pointed out by Mr. Justice Burton, viz.: to adhere as closely as possible to the literal meaning of the words. When once you depart from that canon of construction, you are launched into a sea of difficulties which it is difficult to fathom."

The cardinal rule referred to is that:—

"In interpreting all written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency and no further."*

For the reasons I have already given, I am of opinion that there is in the Act in question nothing that warrants the conclusion that reading the words of sub-sec. 1 of sec. 4 in their grammatical and ordinary sense leads to any absurdity or any inconsistency with the rest of the instrument.

* See *Warburton* v. *Loveland* (1828), 1 Hudson & Brooke (Irish) 623, 648, *per* Burton, J.

I would also refer to *Caldwell* v. *McLaren* (1884), 9 App. Cas. 392, in which it was unsuccessfully sought to cut down the words "all streams" used in the Act popularly known as "The Rivers and Streams Bill."

I should have thought it a strange omission if the Act had not extended to highways in villages and towns. If they are not included, in a county in which there are numerous small towns and villages the good roads policy embodied in the Act would often be frustrated, and there would be, in what to be a really good road should be a continuous one, gaps at every town and village on the line of it, not under the control of the county council, and which, if not kept up to the standard of the county road, would mar the whole project.

There remains to be considered the cross-appeal of the respondent, which is based upon two grounds: one, that already dealt with; and the other, that the learned trial Judge, in addition to holding the by-law to be invalid, should also have held it to be invalid in so far as it includes in the scheme the Queenston and Grimsby road.

This latter objection, as stated in the notice of appeal is, that the learned Judge "should have held that the said by-law was illegal and *ultra vires* of . . . the said defendant corporation in assuming and controlling what is known as the Queenston and Grimsby stone road, situate within the limits of the said County of Lincoln as a county highway, as the said Queenston and Grimsby stone road is governed by special statutes, and is not subject to the provisions of the Highway Improvement Act."

As I understood the argument of the respondent's counsel, it was, that this road is vested in the appellant, not as a county road within the meaning of the Municipal Act, but in it as assignee of a joint stock road company, and its obligation to keep it in repair does not depend upon the provisions of the Municipal Act, but rests upon the appellant as owner of the road, and that for that reason the road is not a county road or such a road as may be included in a scheme of highway improvement under the Act; and, further, that certain townships in the county are, under the provisions of special legislation, exempt from contributing to the maintenance of the road, but are, under the by-law, made liable to contribute to the improvement of it, and that for that reason the by-law is *ultra vires* and invalid.

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Meredith, C.J.O.

The special legislation is that referred to in *Regina* v. *Corporation of Louth* (1863), 13 U.C.C.P. 615, and *County of Lincoln* v. *City of St. Catharines* (1894), 21 A.R. 370, and was enacted by 26 Vict. ch. 13.

The preamble of the Act recites that this road has been assumed by the Corporation of the County of Lincoln as a county work, after the road had been for some years purchased and owned by a joint stock company, formed of the municipalities through which the road passes, viz., the Townships of Niagara and Grantham, the Town of St. Catharines, and the Townships of Louth, Clinton, and Grimsby, the company engaging to pay all liabilities and expenses connected with the construction and maintenance of the road, "there being a large amount of indebtedness thereupon," and that it would be very unjust that any portion of this indebtedness and maintenance should be imposed upon the Town of Niagara and the Townships of Gainsborough and Caistor; and that the Corporation of the County of Lincoln had petitioned for an Act to relieve the last mentioned town and townships therefrom, and that it was expedient to grant the prayer of the petition.

The enacting clause is as follows:—

"For 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 work, the said Corporation shall assess or tax the Townships of Niagara, Grantham, Louth, Clinton and Grimsby, and the Town of St. Catharines only, and shall not for any such purpose impose any such assessment or tax upon either the Town of Niagara or the Townships of Gainsborough and Caistor in the said County, nor shall any such liability or expenditure be in any way chargeable upon or borne by the said Town and Townships last mentioned."

The question in the *Louth* case was as to the jurisdiction of the County Council of Lincoln to impose upon the Township of Louth the obligation of keeping in repair that part of the road which lay within its limits, which that council had assumed to do under the authority of sec. 342 (8) of the Municipal Act then in force, C.S.U.C. ch. 54.

That sub-section provided that a county council might pass by-laws "for requiring that the whole or any part of any county

road shall be opened, improved and maintained by any local municipality within the county."

What was decided was, that the road was held by the county, not as a road belonging to the county, within the meaning of the statute, but as one acquired by the county as the assignee of the road company, in whose right the county still held it; that by the Road Companies Act a municipal corporation so acquiring a road was bound to keep it in repair; and that there was no power in the council to divest itself of the character in which it took the road so as to make it a county road within the meaning of the Municipal Act and to throw the duty of repairing it on the Township of Louth.

I do not understand that it was decided that the road was not a county road, but that it was not such a county road as sec. 342 (8) dealt with.

Neither the *Louth* case nor the *St. Catharines* case decided anything as to the meaning or effect of the exemption which the special Act created, and the only reason for referring to it in the latter case was because the plaintiffs relied upon it to support a claim that the City of St. Catharines, which had ceased to form part of the county for municipal purposes, was liable to contribute to the cost of the maintenance and repair of the road.

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.

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

ONT.

S. C.

VILLAGE OF MERRITTON v. COUNTY OF LINCOLN.

Meredith, C.J.O.

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 equalized 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.

If I had been of a different opinion, I should have been nevertheless of opinion that this branch of the respondent's case failed, because the respondent has no *locus standi* to bring or maintain an action to set aside the by-law on the ground I am now considering.

According to the provisions of sec. 285 of the Municipal Act, it is only where the by-law *injuriously* affects another municipality or a ratepayer in it that the corporation of that other municipality, or that ratepayer, may apply under the Act to quash the by-law.

If the by-law improperly imposes a rate on the municipalities exempted by the special Act, it does not injuriously affect the respondent, but is in ease of it.

The policy of the Act, as indicated by sec. 285, ought, I think, to be applied to an action by which it is sought to obtain a judgment quashing a by-law, for it would be anomalous indeed if a municipal corporation, which has no *locus standi* to apply under the statute to quash a by-law, could obtain that relief by bringing an action instead of proceeding under sec. 283 by motion; or, at all events, in the exercise of our discretion, we ought, in view of that policy, to refuse to quash the by-law.

For the reasons I have given, I am of opinion that the respondent's action failed and should have been dismissed, and I would therefore allow the appeal with costs, reverse the judgment of the learned trial Judge, and substitute for it judgment dismissing the respondent's action with costs, and dismiss the cross-appeal with costs. *Appeal allowed.*

BULLETIN Co. v. SHEPPARD.

CAN.
S.C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 22, 1917.

LIBEL AND SLANDER (§ II E—80)—CHARGING CORRUPTION—FAIR COMMENT.
No action for libel will lie against a newspaper which makes fair and reasonable comments upon prevalent evil conditions provided they do not exceed the bounds of legitimate criticism, and do not impute personal knowledge and corrupt intention.
[27 D.L.R. 562, reversed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, 27 D.L.R. 562, which reversed the judgment of Ives, J., at the trial, by which the plaintiff's action was dismissed with costs.

Henderson, K.C., for appellant; *Edwards*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—The appellant devoted much pains, both in the newspaper articles out of which the present libel suit arises and at the trial, to proving his assertion that there was in the Edmonton city council a party, to which the respondent belonged, known as the "administration party," the members of which held together on all matters of substance, and, composing the majority of the council, had the control of the affairs of the city. There is no point to the statement, unless the power of the alleged party was directed to improper and corrupt ends. The rule of the majority is necessarily incident to any elected council, and such majority has commonly stability through the party sustem as may be seen in Parliament, the chief council in the land. It was not necessary, as the appellant claims, "that the result of this system was to bring about a condition in Edmonton practically the same as the Tammany system in New York."

The appellant, in his defence, alleged that his attacks were directed against the system and not against the respondent as an individual. This is perhaps rather inconsistent with the argument advanced in the article of November 28, "that good government depends on men rather than on form," but there can, I think, be no doubt that the innuendo in the article of December 2 is supported, "that the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt

CAN.
S.C.
BULLETIN CO. v. SHEPPARD.
Fitzpatrick, C.J.

and unlawful practices usually associated with the name of Tammany."

As the judge delivering the judgment under appeal says:—"There can in this matter be no way open for an interpretation which would not impute personal knowledge and participation;" it is personal corruption.

The appellant is really driven to the claim insistently made before this court that there is a difference between charges against the respondent in his public and in his private capacity. There is none; and I think this cannot be too emphatically stated. The morality which a man is bound to observe in his public life is the same as in his private life. There are not two persons in a man, neither are there two codes of morality but only one. Whilst a man has the same responsibility for his actions whether in his public or private capacity, he is also entitled to a corresponding protection when unjustly charged with immoral acts either in his public or private capacity.

I give the effect of the appellant's argument so far as I can gather it, but as it is to be found in his factum, it is certainly confused and apparently far from clear to the writer of it. In it we read:—

> The second point taken by the appellant is that the learned judges in appeal failed to appreciate the difference between criticism of the public action of a public man and an imputation upon the same person in his private capacity.

Criticism of a man is not synonymous with an imputation upon him. The passage proceeds:—

> The quotation from the judgment of Stuart, J., shews that the judges in appeal had clearly in mind the proposition of law that there must be an imputation upon the private or personal character of the respondent in order that he might be entitled to judgment.

There is no such previous quotation, and I can find nothing in the judgment to which counsel can be referring. Further, I do not know the proposition of law asserted. The counsel appears throughout to confound the words "private" and "personal capacity" and "character." What is meant by a man's private character I do not know, but every imputation upon his character is a personal imputation whether in his public or private capacity. Again, it is said:—

> The judges have surely gone too far in finding that the reasonably neces sary result of the language was a charge of personal corruption. Had they

kept in mind the distinction which is always made between conduct in a public capacity and conduct in a private capacity it would have been clear to them that the article not only did not make any charge against the respondent in his personal capacity but made it plain that the criticism was directed against the system and not against the individual.

There is no such distinction made or capable of being made and the confusion of language is worse than ever. What capacity can the respondent have which is not a personal capacity? Apparently the argument is that a charge against the respondent in his personal capacity is a charge against the individual, but a charge against a public man is not a charge against an individual but a system. It is idle to attempt to follow such arguments any further.

Beck, J., did not, as alleged, dissent from the judgment of the other judges of appeal; on the contrary, he agreed with it and went further. I do not find it necessary to say more than that I concur n the disposition of the case made by the Appellate Division and would dismiss this appeal with costs.

Davies, J.

DAVIES, J.:—This action was one brought by the plaintiff against the defendant printing company for several alleged libels published respecting him in their newspaper the Bulletin in the City of Edmonton.

The plaintiff was an alderman of that city at the time the articles were published and the libels related to his actions and conduct as such alderman and as one supporting what was known as "the administration" in the city council of Edmonton. They were written on the eve of a city election for a number of aldermen. The plaintiff was not one of these, as he had been elected for a 2 year term, only one of which had expired.

The articles complained of were written in a very vigorous and forceful style and did not mince matters in charging that the civic "administration party," that is the mayor with a majority of the aldermen who usually voted with him to support and carry out the policy he advocated, had brought the affairs of the city, socially as well as financially, into a very disgraceful condition which could and should be remedied by the election of a new mayor and a body of aldermen who would support a new and better policy and method of civic government.

There were five distinct libels charged against the defendant as having been published in its newspaper. In order to under-

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Davies, J.

stand these articles properly and to appreciate their true meaning and object and how they would be understood by an ordinary citizen of Edmonton, it is absolutely necessary to read the record we have before us, which includes not only the articles in full as published and the evidence given at the trial, but also many exhibits and amongst them an important report made by Scott, J., who had been appointed to examine and report upon the existence of crime and vice within the city and whether its growth and extent had been such as to indicate a failure on the part of the civic authorities to enforce the law.

The judge, acting as such commissioner, found it difficult if not impossible, to obtain the evidence of many witnesses who were in a position to know the facts on which he was asked to report, as they had been spirited away and could not be had.

But while he reported that:—

There is no direct evidence of the receipt by any alderman, commissioner or other officer, servant or agent of the city, of any money for the protection of vice, he went on to say:

If the evidence of the prostitutes who left the city on the eve of the investigation could have been procured, more light might have been thrown upon the question. Some of those who were examined before me are shown to have stated that they were under protection by the police by reason of their having paid for it; but, upon their examination, they denied that they had paid any money for that purpose.

He winds up his report as follows:—

Having regard to the inconclusiveness of the evidence already given in some respects and to the number of witnesses whose absence has made it impossible to examine them, it is suggested that the present report be treated as an interim one, and the authority conferred by the council for the inquiry be extended, so that, if it hereafter becomes possible to obtain any further information, a tribunal for that purpose will be available. The general condition revealed is of the most serious possible character and it seems important from the point of view of the citizens generally, that the fullest possible light should be thrown upon the subject and the persons responsible definitely ascertained.

The conditions the commissioner was able to report upon being, as he said, of the "most serious character" and "requiring the fullest possible light to be thrown upon the subject," it became not only the right but the duty of the press of the city thoroughly to discuss the deplorable situation revealed and to make such fair and reasonable comments upon it and upon the civic administration responsible for it as the revealed facts called for.

Such right and duty however would not, of course, justify unfair or unreasonable comment reflecting upon the characters and reputations of those more or less responsible for those facts. The defence set up by the defendant is that, in the discharge of its right and duty as a newspaper, it did not trespass or go beyond what was fair and reasonable comment upon matters of public interest.

Whether such defence has been made out is the question before us now, and, in determining it, we are practically acting as jurymen and must decide, not on any possible interpretation which might be suggested of the language complained of, but upon such an interpretation as is reasonably plain and fair and as would be understood by the people of Edmonton.

It is, in my opinion, most unfortunate that the issues had not been submitted to a jury—a tribunal recognized as peculiarly well qualified to pass on such a question as we have before us. But we have to deal with the case as it stands with a conflict of judicial opinion.

The trial judge held that each and all of the alleged libels were fair and reasonable comments upon matters of public interest and on such a finding of fact he dismissed the action.

The Appeal Court was divided.

Three of the judges agreed with the trial judge with respect to all of the alleged libels but one, that they were merely fair comment in matters of public interest; but with respect to that one, two of them concurred in the opinion delivered by Stuart, J., that, it contained beyond doubt an insinuation that the plaintiff was one of a number of aldermen who were acting corruptly and dishonestly in their dealing with the paving contracts and that applying the meaning of the word "Tammany" to be that given by the defendant in its article of December 1 it clearly supported the innuendo alleged in par. 5 of the claim that the plaintiff conspired with other members of the council to introduce and carry on in the City of Edmonton corrupt and unlawful practices.

Beck, J., held that all of the articles charged as libellous were in fact so and was in favour of setting aside the verdict of the trial judge and entering judgment for the plaintiff and if he was not satisfied with nominal damages "there should be an assessment of damages."

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Davies, J.

The extract from the article of December 2, which the Appeal Court has held to be libellous, is as follows:—

> The members of the council (clearly referring to the plaintiff among others) who were so careful not to let a printing contract of $10,000 or $12,000 get by their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts running into the hundreds of thousands was for the protection of the city's interest and not because of a split as to a possible rake-off . . . We have had one year of Tammany. We can't stand another.

I have given the judgment of the majority of the Court of Appeal a great deal of consideration and do not find myself able to concur in the conclusion they reached as to the libellous character of this article.

In construing that article and forming a conclusion as to what is really meant, one must place oneself in the position of a resident of Edmonton to whom it was specially addressed on the then eve of an election for mayor and aldermen for the then coming year. One must ask oneself in view of the then existing proved conditions in civic matters, of Scott, J's., report, of the evidence given at the trial and of all other surrounding circumstances, whether, as the trial judge found, the article did not go beyond what, in the extraordinary and unfortunate civic circumstances, was fair and legitimate criticism or had crossed the line as the Appeal Court found and become libellous. But in forming one's conclusion, one must not confine one's mind to the *ipsissima verba* of the extract from the article in question found to be libellous but upon the language of the article as a whole and in the light of all the surrounding conditions and circumstances.

I do not think that the language of the article when so viewed necessarily "imputed personal knowledge and participation" on the plaintiff's part in civic corruption and dishonesty or of a corrupt conspiracy of which the plaintiff was a party with regard to the affairs of the City of Edmonton.

I fully agree with the statement of Stuart, J., that when personal corruption is charged, there is no distinction between the plaintiff as an alderman and as a private citizen.

Where I cannot agree is in finding any charge of personal corruption at all.

The writer was referring to and considering the actions of

"the majority of the administration" to which, it is true, the plaintiff was allied and with whom he as a rule voted. The judge himself says in his judgment:—

> After an examination of the reports of the proceedings of the council, I am of the opinion that it could with some appearance of reason by a fair and honest though vigorous critic be argued that there was such an administration party and that the plaintiff at least supported it.

I fully agree. I also concur generally in the reasons given by the judge for the conclusions reached by him and concurred in by the majority of the court with respect to all the other alleged libels that they did not exceed the bounds of legitimate criticism when read in the light of all the circumstances and should not be construed as "imputing personal and corrupt intentions" on the plaintiff's part.

Adopting and accepting as I do those reasons, however, I cannot concur in the conclusion reached by him respecting the article of December 2. There is no charge that the plaintiff knowingly and consciously was a party to a corrupt conspiracy to defraud the city or that he personally was guilty of fraud or corruption. It was the "administration" of which the plaintiff was a member that was being attacked, not the plaintiff personally. He, it was argued, must be held responsible with the others comprising it for its acts and its policy. But to say that a member of a party must be held responsible for the acts of the administration he supports and to call that administration "Tammany" falls short in my judgment under such facts as are here disclosed of charging personal corruption and dishonesty.

I frankly admit that it is difficult sometimes to draw the line between libel and fair and reasonable comment upon matters of public interest.

In the instance before us, I feel compelled to hold, largely for the reasons advanced by the judge who delivered the majority judgment of the Court of Appeal when deciding against the libellous character of all the other charges, that the article in question of December 2 did not, under all the circumstances, exceed the bounds of fair and legitimate criticism upon a matter of great public interest, and did not impute to the plaintiff personal fraud or corruption in connection with the affairs of the city of which he was an alderman, or that he "had conspired with other

CAN.
S.C.
BULLETIN CO. v. SHEPPARD.
Davies, J.

members of the council to introduce and carry on in the City of Edmonton corrupt and unlawful practices."

I think undue weight has been given to the use of the word "Tammany" in the libel complained of. Years ago in the United States the word was in very bad odour especially in New York under the "Boss" governments so called of Tweed and some of his successors. But a construction seems to have been placed upon the meaning of the word in the libel complained of which it does not necessarily bear. It is argued that Tammany government means the practical and systematic application to civic government of the old party cry "to the victors belong the spoils" not only with regard to appointments to office but with respect to the letting and awarding of civic contracts. That may be so; the policy may be a very vicious one and may be carried out in ways the most objectionable and corrupt. But it does not necessarily follow that it must be corrupt and it certainly cannot be said that it involves personal charges against each and all of those who supported the administration so called "Tammany." In fact, the defendant, when first charged with libel by the plaintiff, most emphatically disclaimed any intention of imputing personal corruption to the plaintiff or conspiracy on his part to abet, or procure, or maintain corruption. If any such construction was put upon the language complained of, the defendant unequivocally repudiated it and expressed himself as willing and ready to make the most complete apology.

The substance of the charge was that the plaintiff as a public man and an alderman supported by his votes and maintained in power an administration that the paper held was corrupt—not that he did so for any personal benefit or knowingly and consciously abetted and assisted and supported corruption in civic government.

The plaintiff, it must be remembered, was not before the electors for re-election. He had another year to serve as alderman. The articles were written to defeat the mayor, "the Boss" of the administration, and those members of it seeking re-election. Looking at the conditions and circumstances and atmosphere surrounding the publication of the article complained of, the relation of the plaintiff to the attack made, and the purpose and object of the writer, so far as I acting as a juryman can

determine them, I conclude that the court below has placed a meaning upon the article which it does not reasonably bear and that under all the circumstances it does not exceed the bounds of fair comment and criticism, though it may be fairly argued that it reaches to those bounds.

Davies, J.

I would have been very much surprised if any independent witness, a citizen or resident of Edmonton, could have been found who would state that he understood the article to bear the meaning the judges determined it did.

I need hardly say that no such witness was found.

The law on this important subject of fair comment as concisely stated in 18 Hals., p. 711, is, I think, correct and is supported by authorities which will not be challenged. It reads:—

> The defendant may nevertheless succeed on his plea of fair comment if he shews that the imputation of which the plaintiff complains, although defamatory, and although not proved to have been true, yet was an imputation in the matter of public interest, made fairly and *bonâ fide* as the honest expression of the opinion which the defendant held upon the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair minded man might upon those facts *bonâ fide* hold that opinion.

The conclusions inferred as matters of opinion have not to be proved as facts and on the issue of fair comment the mental attitude of the commentator is immaterial.

I am of the opinion that the appeal should be allowed with costs here and in the Court of Appeal and that the judgment of the trial judge should be restored.

Idington, J.

IDINGTON, J.:—The respondent was an alderman of the City of Edmonton when the appellant as the publisher of a newspaper called "The Bulletin," in evident anticipation of the annual city election, attacked, in five different articles, the conduct of the mayor and city council in relation to their management of the city's municipal government.

The respondent complained of these articles in an action tried in Edmonton before Ives, J., without a jury and he dismissed the action.

Upon an appeal to the Court of Appeal for Alberta, that judgment was reversed and judgment entered for $450 damages and costs.

The opinion judgment of the majority of the court held that each one of the first three of said articles, taken by itself, was not

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Idington, J.

libellous under the circumstances, but that the fourth, published on December 2, was so.

The part of the article which Stuart, J., writing the majority judgment, quotes and relies upon is as follows:—

(Quoted in judgment of Davies, J.)

The formal judgment of the court is expressed in general terms and makes no distinction between the several counts (if I may be permitted to use the old fashioned term) in the statement of claim. But in the argument of counsel before us, it seemed to be conceded that the judgment appealed from must rest upon this paragraph alone.

The innuendo thereto in the statement of claim is as follows:—

meaning thereby that the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of "Tammany."

No witness was called to support this innuendo and we are left to conjecture.

I am unable from reading that article, indeed all the articles in their entirety, to attach any such meaning as Stuart, J., places thereon.

I think we must look at all the facts and read all the articles and understand, so far as we can, the situation with which the writer of the article is dealing, before we can even, approximately, reach a correct interpretation of this paragraph.

The article was largely based on the action, or want of action, on the part of the mayor and those in the council usually supporting him. The respondent would have us believe he was a man of independent action in everything and not tainted with the common frailty of uniting with others to push forward any agreed-on policy.

He seems to have been a respectable man who was nominated on a municipal ticket along with the mayor, and that ticket seems to have carried at the election in December, 1913, for the part of the council of 1914 to be then elected.

His knowledge of his colleagues was, according to his own story, so slight that I infer he knew little of Edmonton's chosen people.

Indeed he seems to have been such a stranger that I doubt

if he could ever have been elected but by reason of his being placed on their ticket or some one else's ticket.

And at the organization of the council for the coming year, he was kindly taken by the hand on the part of those on whose ticket he was elected, and selected as one of the chosen three to strike the standing committees for the year.

That labour, he tells us, was not very arduous, for when he retired to a room with the other two, who were certainly then friends of the mayor, he found the lists all ready. All he had to do was to assent, and he instantly assented accordingly.

How could a stranger given a place on two committees, when some had to be satisfied with only one place, refuse to thus assent? Or had he been consulted beforehand?

Certainly, if we analyse the composition of the committees thus struck, and bear in mind so much of the council's doings as presented to us, someone close to the mayor had been consulted, unless we attribute the result of these labours to some miraculous inspiration.

As any one of experience knows, the formation of these committees was perhaps the most important step of the year, either to promote the general good or the strengthening the hands of the mayor, or someone else, bent on dominating the council. Hence the due preparation of the lists of men constituting the needed committees. There is much in the result arrived at which shews the mayor had a policy of his own and saw to it he could control things generally as he desired.

The respondent, later, on February 3, although on two committees already, was chosen as a member of the Health and Safety Committee, when a Mr. Calder, of whose position as one of the opposition to the administration party there seems to have been no doubt, had resigned from that committee.

In light of the foregoing, and what I am about to advert to, I think ordinary people, only conversant with ordinary actions of public men and their associates, would be quite justified in assuming and saying that the respondent was looked upon, by the other supporters of the administration, as a general supporter thereof. And as such men often know a man better than he knows himself, they might be quite justified in setting him down as such.

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Idington, J.

The organization for business seemed according to practice and policy to require commissioners to be appointed of whom each was in charge of the department allotted to him. This year, there were four such salaried officers of whom one was supposed to be under the Safety and Health Committee which had to deal with the police department. Perhaps it would be more correct to say the committee was under the commissioner. The commissioner assigned to the charge of the police was one that respondent had voted to place there.

The chief of police, an excellent officer, it is admitted, at the dictation of the mayor, was driven out of the service, and step by step the condition of things became so disgraceful that there was an outburst of public indignation early in February.

The respondent admits having heard on the 1st of January and perhaps before, that prostitution was on the increase in the city. Scott, J., reports that the general increase of crime, which is the usual accompaniment of such a condition, is not traceable till about early February and so continued until the investigation.

The most pitiable thing in this case is the respondent's story of all he ever did to put a stop to this carnival of vice that Scott, J's., report set forth as existent.

He voted for an investigation and brought a trifling incident or two to the notice of the commissioner besides asking him to restore a respectable policeman who had been dismissed.

If he had no more force of character than to rest satisfied with that course of conduct and serve on that committee in silence, as he seems to have done for four months, whilst the criminal part of the population were having a fine time, under the policy of the administration of the city, I assume he is, by reason of his thus lending his respectability for others to hide behind, not entitled to complain of being treated as one of the mayor's supporters.

It likely never would have been necessary to hold any expensive judicial inquiry such as began in the following June after four months of agitation, had the respondent, and such as he, done their whole duty.

To remain almost dumb in such a position as he was given at the hands of the mayor and his friends was in my opinion an unworthy toleration of evil policies that was deserving of criticism and censure.

If not an active pandering to the desires of the seamy side of social life, it is a policy likely to reap its reward from that side, in kindly remembrance at election times.

If that is not in accord with just what "Tammany" sometimes stands for in popular estimation and expression, I misunderstand the term.

Neither Tammany nor any other organization ever sinks so low as to be in action wholly wicked or composed entirely of wicked men. The most deplorable thing about what Tammany and its like are betimes supposed to stand for, is the facility with which respectable men lend their support to those dragging down what was originally respectable. Alone they would be powerless. The aid of respectable men willing to give their countenance to those of evil mind is the menace of what may ultimately destroy free institutions.

It need not necessarily be a slavish and unfaltering support but yet enough to lend aid and encouragement to that combination of men who are pursuing an evil or dangerous policy which entitles the press to classify them as of that party or faction and subject to more or less severe criticism as the occasion calls for.

There are several incidents in the later development of the municipal management by the mayor and those supporting him, in which the respondent voted with them, which formed the subject of some of these attacks complained of.

These incidents furnish concrete illustrations, either of the party alliance of respondent with the administration party (or faction as he on examination for discovery designated the parties in the council) or an identical conception of duty in given crucial tests of the principles which guided him as an alderman in the discharge of his duty. In either alternative he does not seem to me to have any right to complain of his classification by the writer of the articles, if his votes on these occasions reflect his views of public duty.

The mayor conceived the idea that the slow method of voting the moneys which lent itself to obstructing the aims and desires of the administration should be swept away and power sought to constitute a two million dollar fund for the council to draw upon, and for this proposal the respondent voted. It was adopted in

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Idington, J.

haste and without due consideration submitted to the electors who refused their assent.

They were entitled to have the fullest consideration thereof by the council before being called upon to vote. They were entitled to assume that the council had only after such consideration decided to recommend the adoption of such a scheme before putting the city to the expense of such an election. Moreover, they were entitled to look to these chosen men for guidance.

I am unable to justify the method of the submission or to understand how such risks as involved in the adoption of the scheme, liable to be operated by the men who had brought disgrace upon the city through the mismanagement of police affairs, could properly be supported by any one possessing the experience of that mismanagement, yet respondent tells us he was independent in so acting.

There is another concrete illustration of how the administration acted and in doing so got the support of the respondent in a way of which the objectionable feature is easily understood. I refer to the letting of a contract for printing the telephone directory.

Three tenders were the same on one basis affording greater service than a fourth for a less figure. It seems the superintendent selected that, of the three first named, given by the Esdale Press which had given satisfactory service. It is charged that the difference between that tender and the one favoured meant a loss to the city of $1,700, or, in another way of putting it, possibly $2,000 to $2,500. I cannot find these figures verified. But that there was a loss does not seem to be seriously denied.

The civic commissioners were approached by the printing company writing a letter and pointing out some things which possibly entitled it to some consideration from the point of view which had been taken earlier in the year.

And it then ended the letter thus:—

> It is the aim of the printers of the city to see the work equally distributed so that the condition of affairs that obtained during 1913, in which year the *Bulletin* Job or Esdale Press obtained seven-eighths of the city's printing does not occur again.
>
> We favour the distribution of the city's printing on the pay roll basis and are anxious to include the Esdale Press in a just distribution, but we feel that the letting to one firm of a contract that is likely to reach the $12,000 mark is putting the whole matter back where it was in 1913. Being tax-

payers and employers of labor, we feel that your Commission Board will see the justice of this course.

The council ultimately adopted this scheme in substance and the respondent supported it. It seems to me a most vicious principle of action on the part of the majority, including the respondent.

If proper to apply any such rule to printers why not extend it to contractors of every kind giving the city a supply of labour and material? And the same mode of reasoning would shut out all outside contractors. The printing or other contractors would no doubt thus get better prices and all classes so involved would if the scheme of division were fairly conducted have reason to rejoice. But what of the rest of the ratepayers who would not fall within the contracting classes yet had to help foot the bills in their taxes?

This, as I understand it, is alleged to be a leading feature of what is sometimes offensively referred to as the "Tammany System."

The reward the respectable alderman gets is electoral support and the baser elements occasionally get a something more commonly called a "rake-off."

The adoption of such a method is doubly offensive in the case of the printers publishing newspapers. He who saps the independence of the press is the worst corrupter of the people in any community.

The amount involved in this case was small, but well tended and cared for the plant would grow.

Yet it is to the article complained of herein which trenchantly criticised this conduct of the majority, including respondent, responsible for the adoption of such methods, in dealing with the printing for the city, that the judgment below refers in order to find the meaning of the language used.

In the paragraphs I have quoted above as that upon which the judgment rests there is blended an allusion to this very transaction and to a something else I am about to deal with and explain how I understand it and the allusion respecting it.

So far as the paragraph alludes to the printing business I hold the appellant has amply maintained its plea of justification.

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Idington, J.

The "split on the paving contracts running into the hundreds of thousands," etc., cannot be understood without bearing in mind what is sworn to have taken place.

It was proven and not denied in argument that there were such paving contracts before the council in April, and that in relation thereto there seemed to have been some split, or division of opinion let us put it, between some members of the council usually referred to as the administration or its supporters or as a faction.

The result of that difference of opinion led the mayor to publish in a local newspaper an interview giving, as I infer from the evidence, his justification of some proposal to withdraw the proposed paving contracts. In that interview he had referred to "a gang of wolves" and as a result thereof no doubt there was much speculation as to who composed the "gang of wolves."

It is proven that, following that publication, Alderman Driscoll, up to then a steady supporter of the mayor, demanded, in council, an explanation from the mayor of whom he referred to, that the mayor refused and Driscoll left and said he would not attend till an explanation was forthcoming and ceased to attend council meetings for some weeks thereafter.

He did come back again though no explanation was offered so far as the public knew.

What was the meaning of all this? There certainly had been a grave difference of opinion and rupture of some kind between those concerned and it was a matter well deserving of criticism. Indeed, an investigation of some kind would have been in order but respondent did not move for it.

The city's charter provides for several methods of investigation including a committee of the council and when respondent failed to move, he cannot have treated the matter so seriously as the Court of Appeal has done.

All the paragraph, upon which the judgment rests, says and means in that regard is that the electors were entitled to think in view of the printing contract business, and the mode of dealing with it, that there was a something in the split not merely for the protection of the city's interests, but because of a split as to a possible rake-off. By whom that was expected is not stated. It certainly could not be by all, else there could have been no

split. It certainly indicated something that those concerned had no desire to have cleared up. It did not involve the mayor for it is he that made the accusation.

Yet I most respectfully submit that he could maintain an action upon this paragraph by the same reasoning as the judgment puts forward to maintain that of the respondent.

All said therein relative to the "gang of wolves" cannot found any action. Indeed, no one seems at the trial to have supposed so. The respondent's answer as to it does not indicate he had any grievance as to it. But as to the printing business he assumed a different attitude and says there was nothing wrong in it he ever knew of. I differ from him for the reasons already stated.

I therefore cannot find anything in the paragraph but criticism of facts, well and amply proven and deserving what was said and needed to be said in the interest of the public.

There are many other illustrations of the curious views held by some of those concerned of their public duty in transacting the city's business needless to dwell upon.

Moreover, it is to be observed that the appellant in the very article complained of set forth many of these cases as well as those I have mentioned and gave the division list upon them, wherefrom the reader could see wherein the respondent occasionally opposed his colleagues, and whether or not he was in serious or important matters generally of the party supporting the administration.

Even if there had been something more than appears in the case as a whole when a trial judge has had before him the man and the situation during a long trial, as the trial judge here had, and he dismissed such an action, his finding should not, I respectfully submit, be lightly set aside.

If it had been the verdict of a jury, it must have stood unimpeachable.

In a case of this kind where the defendant had given in the strongest terms an explanation that should remove all suspicion of personal dishonesty and pointed out that anything said was relative to his public acts and these acts are plain and palpable so that any one reading can tell whether or not the criticism is fair and it is found by a judge fair, it should rest there.

The appeal should be allowed with costs here and below and the judgment of the trial judge be restored.

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Duff, J.

DUFF, J.:—This appeal should be allowed and the action dismissed with costs. The primary tribunal in this instance was a judge without a jury; but that does not, in my judgment, in the circumstances of this case, greatly affect the principle upon which the verdict should be dealt with. It is impossible fairly to construe the publications of which the respondent complains without reference to the circumstances existing in Edmonton and to the atmosphere in which the articles were published and read. Having regard to the facts which were notorious and in the light of which the public would read the articles the trial judge might, I think, reasonably hold the expressions which the Court of Appeal held to be actionable to be a not unreasonable comment upon the conduct of the group of municipal politicians controlling in part, at least, through the plaintiff's assistance, the municipal administrative machinery which was notoriously exerting its authority and influence in ways tending to destroy respect for the law and to propagate public immorality.

The conduct of this group, when considered as a whole as exhibited in the evidence, gave too much ground to suspect some of its members of designs in relation to the municipal finances; strong language with regard to the group as a group was both natural and justifiable; and I am by no means satisfied that the trial judge was wrong in holding that the plaintiff was not charged with anything more disgraceful than giving his support generally to this ring—and by means of that support enabling it on critical occasions to retain control—a charge proved in fact to have been true.

Anglin, J.

ANGLIN, J. (dissenting):—The holder of an elective public office seeks damages from the proprietor of a newspaper for the publication of a series of articles which he alleges contained libellous statements in regard to his discharge of the duties of his office. The defences set up are "no libel" and "fair comment."

In dealing with such a case, two dangers confront the courts, which are veritably a Scylla and a Charybdis. On the one hand the right of fair comment on the conduct of public business must not be so restricted that one of the chief instruments for protection against corruption and maladministration in public affairs will be rendered impotent. The publicist who attacks corruption and incompetence in the conduct of public business and has the

courage, when justified by facts, to say to a guilty public representative "Thou art the man," should have the assurance that he can rely upon the courts to protect him against the blackmail of the unmeritorious action for libel. On the other hand, a newspaper writer cannot be allowed, under the cloak of fair comment, to make, with impunity, against a public man in regard to the transaction of public affairs, charges which are not merely untrue, but for which there is in fact no foundation on which they could reasonably be based and the libellous character of which, if made against the same man in regard to the administration of a private trust committed to him, no one would dream of questioning. By permitting such libels on public men to pass without condemnation the courts would not only discourage the citizen who esteems his good reputation at its true value and is properly sensitive to attacks upon it from undertaking public office, but would go far towards stamping with approval the wholly vicious idea that the conduct of public business is not subject to the same code of morals as that which governs the performance of fiduciary duties in private life.

What else is meant by the contention, thinly veiled, if at all, that, while such conduct is "reprehensible," so long as the writer abstains from suggesting the motive of personal pecuniary profit or advantage, it is not libellous to charge an alderman with having been a party to the manipulation of contracts involving the expenditure of civic funds "with a view to securing the interests of 'the boss' and his friends rather than those of the city"—"with a view to private profit rather than civic gain," and in such a manner that "the taxes are made to pay for the votes which keep the controlling majority in their places as aldermen?" What other significance has an "apology" in which, after setting forth the following paragraph from the notice served complaining of the alleged libel:—

> The statements complained of are false and malicious and are libels upon Sheppard in that they falsely charge him with being guilty of the crime and offence of aiding, abetting and protecting crime and criminals, encouraging and protecting vice, and as an alderman, conspiring with others to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of "Tammany," and in that they falsely charge him with fraudulent, dishonest and dishonourable conduct and motives as an alderman of the City of Edmonton, and by the production of the findings of Judge Scott and otherwise attempt to prove the truth of the statements against him,

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Anglin, J.

the writer, while disclaiming an intention to reflect on the personal character or motives of Rice Sheppard, and withdrawing and expressing regret for the publication of any statement which could be reasonably so construed, asserts, as to *Alderman* Sheppard, the right "to take an entirely different stand," adding:—

> It is not necessary to reiterate the statement of the "Bulletin's" position regarding the results of Tammany's administration or its membership.

I agree with Stuart, J., that

> It is fallacious to say that any man leaves behind his personal character when he enters public life by accepting an office of honour, or that he can be safely though untruthfully accused of dishonesty and corruption merely because it can be pleaded that he was being referred to in his capacity as a public man. A man's moral character is the same whether in private or public life and is in either case equally entitled to the protection of the law from libellous attacks.

A homily on false standards of morality in public life is not the purpose of these observations. They are intended merely to indicate the point of view from which, in my opinion, the consideration of the case at bar should be approached.

I agree with the judges of the Appellate Division that their function in dealing with an action for libel tried by a judge without a jury is the same as in any other case where that has been the mode of trial. Our statutory duty is to give the judgment which they should have given.

The inquiry with which we are immediately concerned is whether the judgment of the Appellate Division holding that the "Bulletin" Company had libelled the plaintiff Sheppard is right or wrong. Did that company's newspaper charge the plaintiff with having been guilty of the gross breach of the public trust committed to him as an alderman which conscious participation in the handling of municipal affairs and the awarding of civic contracts for the purposes above indicated would involve? Upon the facts in evidence is such a charge defensible as "fair comment?"

I put aside the alleged libels on the plaintiff in connection with matters dealt with by the report made by Scott, J., who had held a judicial investigation into the manner in which the "social evil" had been dealt with by the city council and the police of Edmonton. In this particular, affirming the judgment of the trial judge, the majority of the judges of the Appellate Court

held that what the defendant company had published, though no doubt perilously near the line in view of the attitude of the plaintiff upon that question, did not exceed the bounds of fair comment because in their opinion

> fairly and fully read in the light of all circumstances (it) could not be taken as imputing (to the plaintiff) a personal and corrupt intention to encourage vice and crime.

Beck, J., thought otherwise. I am not prepared to hold that the conclusion of the majority on this branch of the case was so clearly wrong that we should reverse it.

A civic election took place in Edmonton on December 14, 1914. At the same time the question whether a new charter introducing municipal government by a commission should be sought from the legislature was submitted to the electors. The plaintiff had been elected in December, 1913, as alderman for a term of 2 years and was therefore not a candidate for election in December, 1914. The defendant affirmed in its statement of defence, and (speaking generally) I think it proved, that during the year 1914 the affairs of the city had been controlled by a "party" in the city council which usually supported Mayor McNamara and comprised a majority of the members, including the plaintiff, and that this "party" was known as the McNamara administration.

The publication of the series of articles in which the alleged libels appeared began on November 21, 1914. I make extracts from them, necessarily somewhat copious, confined however to the portions relevant to the crucial question whether they charge the plaintiff with having committed the gross breaches of public trust in regard to civic expenditure outlined above. The passages set forth in the statement of claim and alleged to contain this charge are italicized. In his plea the defendant has claimed—and it is his right—that the series of articles should be read and considered as a whole. I have so dealt with them.

An article, published on November 21, contains these passages:

> The "Bulletin" has received from W. H. Todd, secretary of the "Charter Committee," what the committee is pleased to call "an open challenge" to W. T. Henry, Hon. Frank Oliver, James Douglas, M.P., George S. Armstrong (postmaster), A. F. Ewing, M.P.P., Dr. H. R. Smith (deputy mayor), and W. J. Magrath, to debate the question: "Shall Edmonton adopt Elective Commission Government as provided in the new charter upon which the electors will vote on December 14th?" Evidently the charter committee

CAN.
S.C.
BULLETIN CO. v. SHEPPARD.
Anglin, J.

is looking for a line of advertising that will achieve the main purpose they have in view—namely, to take public attention away from the matter that is of immediate and pressing concern by directing it towards a subject that is at the moment rather of academic than of practical interest.

* * *

The men who bedevilled the city's affairs during the current year are the men who are shouting for a new franchise and a new form of government. If there had been another or any other form of city government that they had control of, would the results have been different? Would the election of Messrs. McNamara, Clarke, East, May, Driscoll, Kinney and Sheppard, or any five of them as commissioners, with absolute and arbitrary power to do just what they pleased, have made them do any less harm than they did when they had control by being a majority of the council?

Would they have been less likely to use the taxpayers' money to build up a Tammany organization on strictly New York lines?

Having been served on behalf of the plaintiff and others with notices of their intention to bring actions for libel on account of these statements in the article of November 21, and others not now relevant, the defendant, on November 28, published another article from which I extract the following passages:—

TAMMANY SHOWS ITS TEETH.

Aldermen Sheppard, Driscoll and Kinney give notice of libel suits against the "Bulletin," while Alderman Clarke threatens the "Unwritten Law" against Rev. Stewart—a new way of establishing confidence in the good faith and fair play of the Tammany candidates.

There is just one specific statement in the extract complained of:—

"The men who bedevilled the city's affairs during the current year are the men who are shouting for a new franchise and a new form of government."

If the three martyrs take exception to this statement, the public will be delighted to hear from them or their colleagues now offering for election in what particular it is not correct and the "Bulletin" will be pleased to retract, apologize and pay costs to date if it can be shewn not to be true in substance and in fact, or not to have been made purely in the public interest. Messrs. Sheppard, Driscoll and Kinney will surely not deny that the city's affairs have been "bedevilled" during the current year. *Neither can they successfully deny that they formed part of the council majority that controlled civic affairs during that part of the year when the "bedevilling" was done.*

The members constituting that majority are mentioned for the sole purpose of fixing in the public mind the fact that there was a definite majority as it could not be definitely fixed in any other way—and not with any intent of reflecting upon their personal characters, action, or motives or the personal characters, actions, or motives of any one of them. In no way can the extract be fairly construed as such a reflection except in so far as the personal character of a public servant may be affected by his public actions, or the result of actions or failure to act for which he as a public servant is responsible.

If it is not the duty as well as the privilege of the press to criticize the results of the administration of public affairs by the elected representatives of the people, and to fix responsibility for acts of administration and their results upon the men from time to time elected or seeking election, we have

passed from a condition of democratic government to that of irresponsible tyranny, which is none the less tyranny because it has the sanction of law—if it has that sanction.

An article of December 1 opened as follows:—

HOW TAMMANY BUYS CONTROL OF THE PEOPLE WITH THE PEOPLE'S MONEY.

Tammany tactics are the methods by which the taxes of the city are made to pay for the votes which keep the members of the controlling majority in their places as aldermen. That is, money is paid out for work or material, either directly as wages or for purchases, or by the awarding of contracts to such persons and in such manner as may be expected to ensure their support and the use of their influence at the polls for the aldermen who do the bidding of the "boss" at the council board.

In the first place, the business of the city is dealt with as being the business of the "boss," not of the citizens, and in the second place it is directed with a view to securing the interests of the boss and his friends rather than those of the city. When the city's business is handled with a view to private profit rather than civic gain it is inevitable that it is not well done, or not done at all, while the city's money is spent and the city's credit destroyed.

The article proceeds to deal with steps taken in the council which resulted in the awarding to the Edmonton Printing and Publishing Co. of a large printing contract for work which had previously been done by The "Bulletin" Job, or Esdale Press, Aldermen Clarke, Kinney, Sheppard and Driscoll having supported the change. The article proceeds:—

The foregoing recital of the facts shews that the contract for telephone directory was:—

Not let to the firm which could give the most efficient service.

Not let to the firm that tendered at the lowest price.

That the Tammany majority in the council took out of the hands of the commissioners the letting of this and other contracts because they were determined they should go to the firms that could and would be of most advantage to them in the coming elections without regard to the interests of the city.

The Esdale Press was absolutely boycotted from city work from May 1st until November 1st for no other known reason than that the "Bulletin" company held a part of the stock in the Esdale Press and the "Bulletin" did not support the administration. No doubt the "Bulletin" could have traded its support of the interests of the city and of common decency for fat printing contracts for the Esdale Press, but neither the "Bulletin" nor the Esdale Press are in that line of business.

In this connection it is in order to point out that the evident reason why the Tammany majority was so insistent that the telephone directory contract should go to the Edmonton Printing and Publishing Co. was because there is produced in the office of that company the only surviving representative of journalistic thuggery in the city since the decease of the "Official Gazette" and the "Daily Capital." No doubt the grass has been short in recent weeks, and unless the city till could be tapped it would have to follow its late confreres, and Tammany would have been without an instrument

CAN.

S.C.

BULLETIN CO. v. SHEPPARD.

Anglin, J.

of ruffianism with which it might hope to frighten off criticism and opposition at the polls, during the present contest.

Tammany always works for Tammany, and the joke is that the taxpayer "pays the freight."

An article of December 2 contained the following:—

WHO IS TAMMANY?

Why did it split—And, Why Again Unite?

We have government by majority in Edmonton civic affairs. A majority of the electors voting elect the council. A majority of the council hires or fires the commissioners, appoints the committees, votes the estimates, passes by-laws, and generally governs the city. The mayor is the administrative head of the city government and the members of the council usually acting with him form the majority that enables him to carry out his policy and constitute the "administration." If the administration is conducted on Tammany principles and for Tammany purposes—that is, to secure private ends instead of the public good—the members of the council who usually form part of the administration majority are properly responsible to the people for what is done and for the results of its being done. It is not necessary, nor would it be advisable, that the supporters of the administration should always vote together. So long as enough of them vote together to maintain Tammany control of the city's affairs, it diverts public attention from the true conditions if from time to time one or another votes the other way—assumedly for reasons of principle.

The aldermen who always voted against the mayor's proposals are of course not members of the "administration" or Tammany, and are not responsible for the mayor's policy or its results.

The "Bulletin" is now being threatened with three actions for libel because it intimated that Mayor McNamara and Aldermen Clarke, East, Driscoll, Sheppard, Kinney and May were, as members of the administrative majority, responsible for the condition of city morals and finances. As to whether there was or was not such a majority and whether these men or any of them were members of it, it is necessary to go to the records.

The writer then gives what purports to be an analysis of votes in council during the year to demonstrate the existence of an administration party of which the plaintiff was a member. The analysis includes this paragraph:—

On April 29 the administration apparently split on the question of paving. The mayor's proposal to drop the entire paving programme was opposed in discussion by Driscoll and Sheppard. Later Driscoll ceased attending the sittings of the council, pending explanations by Mayor McNamara as to who were members of the "gang of wolves" to whom he had alluded in a published interview. Still later Driscoll again attended council meetings without any public explanation, such as he had demanded.

Continuing, the writer says:—

It will be noted that although Messrs. Sheppard, Driscoll and Kinney from time to time voted against the administration, of all the instances mentioned above only in the case of the motion to withdraw the three money by-laws did the vote of any one of the three prevent the will of the administration from being carried out. On that occasion, the mayor—the then boss—was absent which no doubt

accounted for the error. Or it may have been to shew the acting mayor that although acting mayor he was not actually "boss."

Nothing more seems to be necessary to shew that there was an administrative majority at the council board until the time came for awarding the paving contracts. The paving contracts ran into a great deal of money, and amongst a large number of paving contractors there is always a possibility that one or more may be approachable. The members of the council who were so careful not to let a printing contract of ten or twelve thousand dollars get by their friends will have to do a lot of explanation to satisfy the men who had to stint their families in order to get their taxes paid by last Monday afternoon that their split on the paving contracts, running into the hundreds of thousands, was for the protection of the city's interests and not because of a split as to a possible rake-off. Mayor McNamara's reference to his efforts to protect the city against a "gang of wolves" in connection with the paving contract still stands without public explanation to the man who publicly held himself to be affronted by it. We have Mayor McNamara's word that there was a "gang of wolves." His statement has not yet been challenged. He and his colleagues are the men who ought to know—and evidently they do know. We have had one year of Tammany. We can't stand another.

On December 5 appeared an article intituled.

AN APOLOGY, TWO LETTERS AND CIVIC COMMENT.
Apology to Mr. Rice Sheppard.

This apology has been already noticed. The article concludes with this paragraph:—

It is not necessary to reiterate the statement of the "Bulletin's" position regarding the results of Tammany administration or its membership. Alderman Sheppard and his advisors are necessarily aware that the present general financial stringency affects the newspapers, as well as other lines of business. They know that one daily paper in Edmonton has recently suspended and that those which remain have to struggle to keep their heads above water. At such a time it has no doubt been figured out by Tammany that the "Bulletin" could be made to "lie down" during the civic elections, if plenty of libel suits were threatened or brought. The "Bulletin" has been in business for some years in Edmonton. During those years it has maintained a measure of reputation for dealing with public affairs from the standpoint of the public interest, frequently at considerable risk and cost. A libel suit is a serious matter under present conditions. But the most valuable part of the capital of a newspaper is its reputation. The "Bulletin" is placed in the position that it stands to lose either capital or reputation, if Alderman Sheppard can use the courts of the country to that end. Under all the circumstances it will have to take a chance on losing the capital, rather than the reputation. How far the citizens will, on the 14th, condone a system of terrorism ranging from threats of the "unwritten law" to libel suits, as a means of preventing criticism and deterring opposition to Tammany and its candidates, remains to be seen.

At the trial the president of the defendant company in his evidence gave a definition of the word "Tammany" similar to that above quoted from the article of December 1. That word as used

CAN.
S.C.
BULLETIN CO. v. SHEPPARD.
Anglin, J.

in the articles complained of probably required neither innuendo nor definition to make plain and obvious its defamatory signification. If a glossary were necessary the defendant supplied it in the article of December 1. After having read and reread the articles complained of, I entertain no doubt that they charge the defendant pointedly and directly with having been a member of a "Tammany" party in the city council, which had had control of civic affairs for the current year—that they thereby charge him with having, as a member of that party, pursued

methods by which the taxes of the city (were) made to pay for the votes which (would) keep the members of the controlling majority (the Tammany party) in their places as aldermen,

with having "dealt with" the business of the city "as being the business of the 'boss'" (the mayor; see article Dec. 2), "not of the citizens," with having aided in directing the conduct of civic business "with a view to securing the interests of the boss and his friends rather than those of the city," and with having been a participant in handling "the city's business . . . with a view to private (whose?) profit rather than civic gain."

After having, on December 1, explicitly stated that the Tammany majority in the council (including the plaintiff) had manipulated a large printing contract and other contracts, to the prejudice financially and otherwise of the city,

because they were determined they should go to the firms that could and would be of most advantage to them in the coming elections without regard to the interests of the city,

and having added an insinuation of direct corruption by saying,

no doubt the "Bulletin" could have traded its support of the interests of the city and of common decency for fat printing contracts for the Esdale Press, but neither the "Bulletin" nor the Esdale Press are in that line of business,

in its article of December 2, it pointed out that the plaintiff and Alderman Driscoll had opposed a proposal of the mayor in regard to paving contracts and then proceeded to suggest that the "split on the paving contracts, running into the hundreds of thousands, was not for the protection of the city's interest but because of a split as to a possible rake-off."

The indirect form adopted by the writer takes nothing from the force of the charge thus made. It rather serves to emphasize it. This same article had stated that "the administration *apparently* split on the question of paving," this observation having been preceded by another—

It is not necessary—nor would it be advisable—that the supporters of the administration should always vote together. So long as enough of them vote together to maintain Tammany control of the city's affairs, it diverts public attention from the true conditions if from time to time one or another votes the other way—assumedly for reasons of principle.

The innuendo at the close of par. 5 of the statement of claim,

That the plaintiff conspired with other members of the council of the City of Edmonton to conduct the business of the city so as to secure private ends instead of the public good and to introduce and carry out in the City of Edmonton corrupt and unlawful practices usually associated with the name of Tammany

is fully warranted by the terms of the articles complained of. Indeed they are not susceptible of any other interpretation, and the innuendo was probably quite superfluous. Evidence to prove it was certainly not required. I agree with Stuart, J., that—

There can in this matter be no way open for an interpretation which would not impute personal knowledge and participation. And when personal corruption is charged there is no difference between the plaintiff as an alderman and as a private citizen.

If what the defendant published of the plaintiff was not defamatory and libellous, "written words which expose the plaintiff to hatred, contempt, ridicule and obloquy" has ceased to be an accurate definition of libel or is inapplicable where the plaintiff happens to be a public man.

But it is claimed for the defendant that the matter complained of is merely "fair comment," consisting not of bare allegations of fact but either of mere expressions of opinion honestly held or of statements fairly made of inferences or deductions reasonably drawn from facts.

The statements complained of in my opinion cannot properly be regarded as mere expressions of opinion or as inferences drawn by the writer. They amount to allegations of disgraceful and corrupt conduct by the plaintiff and of grave and wilful breaches of the trust committed to him as an alderman in consciously and deliberately participating in the misuse of public moneys. *Davis* v. *Shepstone*, 11 App. Cas. 187, at 190.

No attempt was made to prove facts from which the truth of any of the charges might possibly be a reasonable inference. No evidence was given that civic money had been expended corruptly or dishonestly for private gain; no testimony that a

CAN.
S.C.
BULLETIN CO. v. SHEPPARD.
Anglin, J.

single contract had been given for improper motives or otherwise than in what might fairly be regarded as the best interests of the city. There was not a shred of proof of a rake-off or of a conspiracy to blind public opinion by "apparent" splits. Nothing in the nature of "a Tammany organization on strictly New York lines" was shewn to have existed.

Moreover, statements of fact and comment are so intermingled in the matter complained of that it would be difficult for any reader to discern what purports to be the one and what the other. *Hunt* v. *Star Newspaper Co.*, [1908] 2 K.B. 309, at 319 and 320.

But if the statements in question could be regarded as merely expressions of opinion or of inferences and therefore comment, they appear to lack the necessary quality of good faith and to go far beyond a fair expression of a reasonable inference from any facts, which the evidence establishes, to have been truly stated. They indicate an absence of that "honest sense of justice" and of that "reasonable degree of judgment and moderation" on the part of the critic which are essential to sustain a plea of fair comment. *Wason* v. *Walter*, L.R. 4 Q.B. 73, at 96.

In this connection our attention is drawn to the fact that the so-called administration party had diverted from the "Bulletin Job or Esdale Press" some large and, no doubt, profitable printing contracts. But even a person who has a spite against another or who feels that he has been grievously wronged by such other may bring a dispassionate judgment to bear upon a discussion of his work as a public representative. *Thomas* v. *Bradbury Co.*, [1906] 2 K.B. 627, at 642; 18 Hals., p. 707 n. (*m*). No doubt that is scarcely probable; and, where the imputation of evil motives and the suggestion of deliberate breach of public trust is made so persistently as it was in the articles now under review and rests upon so little of proven fact, the suspicion that the writer was actuated by malice is necessarily grave. I prefer, however, to rest my rejection of the defence of fair comment in this case on the ground that the statements complained of cannot be regarded as mere expressions of opinion and that no facts have been established from which an inference could reasonably be drawn that the plaintiff's actions as an alderman had been influenced by the wicked motives and dishonourable purpose imputed to him. *Dakhyl* v. *Labouchère*, [1908] 2 K.B. 325, at 329.

No doubt a personal attack which imputes base and sinister motives is not necessarily and as a matter of law outside the limits of fair comment, *ibid.* But

> One man has no right to impute to another whose conduct may be fairly open to ridicule or disapprobation base, sordid and wicked motives unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements but that his belief was not without foundation . . . It is not because a public writer fancies the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest . . . *Campbell* v. *Spottiswoode*, 3 B. & S. 769, at pp. 776, 777.
>
> It is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think that, because he has a *bonâ fide* belief that he is publishing what is true, that is any answer to an action for libel: *ibid*, p. 778; *Merivale* v. *Carson*, 20 Q.B.D. 275, at 280.

He may not make statements which "convey imputations of evil sort" not warranted by the facts truly stated. *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K.B. 292, at 294; *Walker* v. *Hodgson*, [1909] 1 K.B. 239, at 251 and 252. That which the defendant seeks to justify as comment was, in my opinion, neither fair nor such as might reasonably be made under the circumstances. There are no facts in evidence which would warrant any man in attributing to the plaintiff that he had participated in the expenditure of civic funds "with a view to private profit rather than civic gain"—that he had knowingly aided in directing the conduct of civic business "with a view to securing the interests of the 'boss' and his friends rather than those of the city"—that he had voted as he did in the matter of the paving contracts "because of a split as to a possible rake-off." To bring such imputations within a plea of fair comment a defendant must establish a foundation of facts upon which they can be reasonably based. That the appellant has failed to do.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs of this court and of the Supreme Court of Alberta *en banc*, and that the judgment of the trial judge should be restored. I concur with Sir Louis Davies. *Appeal allowed.*

Brodeur, J.

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Re D.

Ontario Supreme Court, Middleton, J. October 9, 1917.

INCOMPETENT PERSONS (§ VI—30)—EXPENDITURES—CHARITABLE PURPOSES.

The Court has, under s. 12 of the Lunacy Act, (R.S.O. 1914, c. 68,) no power to sanction the disbursement of large amounts for the benefit of charitable and philanthropic schemes.

Statement.

APPLICATION, upon the settlement of the order appointing guardians of the estate of an incompetent, for authority to continue charitable and philanthropic subscriptions similar to those made by him when competent.

M. L. Gordon, for petitioner.

Middleton, J.

MIDDLETON, J.—The Court has, under sec. 12 of the Act, wide powers for the management and administration of the estate of a person declared incompetent "for the maintenance or benefit of the lunatic or of his family;" and, no doubt, these words ought to be and have been in practice construed most liberally; but, where what is sought is the disbursement of large amounts for the benefit of schemes and projects undoubtedly worthy, but which cannot by any stretch of the imagination be regarded as falling within these words, I fail to find any jurisdiction under the statute for judicial sanction.

English cases have been cited, but with respect to them there are two comments: first, in England the jurisdiction in lunacy is not limited as our jurisdiction is by the statute, but is founded upon the ancient jurisdiction of the Lord Chancellor; and, secondly, no case cited goes anything like as far as what is here sought.

In Halsbury's Laws of England, vol. 19, p. 438, it is said that allowances may be made to relations for whom the lunatic is not bound to provide, the Court being guided by what the lunatic would probably have done if sane. Such allowances, particularly when originated by the lunatic, are, when paid to persons as to whom he stood *in loco parentis*, authorised almost as a matter of course when the estate is ample, but may be originated by the Court even where this relationship does not exist, when claims for special consideration can be put forward.

In *In re Darling* (1888), 39 Ch. D. 208, the Court puts the matter upon a sound basis. Legal and moral claims of relations are recognised—the Court considering what the lunatic would probably have done as to such claims himself—"But it is not our business to deal benevolently or charitably with the property of

the lunatic, and in my opinion it would be wrong for us to do so:" *per* Cotton, L.J., at p. 211.

Allowances to old servants and retainers have been placed upon the same footing as payments to members of the family: *In re Earl of Carysfort* (1840), Cr. & Ph. 76.

In *In re Evans* (1882), 21 Ch. D. 297, the reluctance of the Court to make payments to relatives for whom the lunatic was under no legal obligation to provide was emphasised. It was stated that the practice was to be narrowed rather than extended.

The only case of a subscription to a charitable purpose cited was *In re Strickland* (1871), L.R. 6 Ch. 226. The heiress of the lunatic and his sole next of kin was his committee, and sought leave to subscribe £250 towards building a church and £250 towards schools to be built upon property sold by the committee as a site for the church and schools, at an advantageous price. She owned about 70 houses in the immediate neighbourhood. The Master had refused the order, as he thought he had no power, and a petition was presented to the Lords Justices, who "made the order," no reason being given. Counsel cited *Oxenden* v. *Lord Compton* (1793), 2 Ves. Jr. 69; *Ex p. Whitbread* (1816), 2 Mer. 99.

The former case relates to the effect of conversion by a committee upon the rights of the real and personal representatives of a deceased lunatic. In the course of the judgment it is stated that the committee may and should do in the management of the estate all that a prudent owner would do.

Ex p. Whitbread was the case of an allowance to relatives, and the statement is made (2 Mer. at p. 103): "The Court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done."

This, in view of the other cases, cannot be read as sanctioning all that might be brought within the words used, but must be confined to the matter there under discussion.

If shewn that a lunatic speculated upon the stock-market, could the Court for that reason sanction speculation by his committee?

Application refused.

CAN.

S.C.

MURPHY AND GOULD v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. March 22, 1917.

MINES AND MINERALS (§ I—1)—GOLD COMMISSIONER—MINING RECORDER—POWERS.

The Governor-in-Council having appointed only one Gold Commissioner for the Yukon Territory, such Gold Commissioner has all the powers and authority of a mining recorder throughout the whole territory under the Yukon Placer Mining Act, R.S.C. 1906, c. 64, ss. 3, 4, 5, and 6, as amended by 7 & 8 Edw. VII. c. 77, s. 25, without any direction to that effect by the Commissioner of the Yukon Territory.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, 27 D.L.R. 405, 16 Can. Ex. 81, maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that a water grant was issued in error and improvidently and should be declared null and void. Reversed.

Congdon, K.C., for appellants; *Hogg*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The claim of the Crown in this suit is to set aside a water grant in the Yukon Territory made to the appellant on Oct. 8, 1909.

The Yukon Placer Mining Act, R.S.C. 1906, c. 64, as amended by 7 & 8 Edw. VII., c. 77, provides:—

S. 3.—The Governor in Council may appoint gold commissioners and acting and assistant gold commissioners, for the purpose of carrying out the provisions of this Act; but mining recorders and mining inspectors and deputies thereto shall be appointed by the commissioner subject to the approval of the Governor in Council.

S. 4.—The Commissioner may, by proclamation published in the Yukon Official Gazette, divide the territories into districts to be known as mining districts, and may, as occasion requires, change the boundaries of such districts.

S. 5.—The Gold Commissioner shall have jurisdiction within such mining districts as the Commissioner directs, and within such districts shall possess also all the powers and authority of a mining recorder or mining inspector.

S. 6.—A mining recorder shall be appointed in each mining district, and within such district shall possess also all the powers and authority of a mining inspector.

Ss. 54 to 58 provide for the adjudication on any application for a water grant by a mining recorder who is then empowered to make the grant.

It is admitted that all necessary proceedings were regularly taken under the Act except that the adjudication on the application was held before the Gold Commissioner and it is claimed that this was contrary to the statute inasmuch as he had not been directed by the Commissioner to act as a mining recorder for the district.

The Act does not provide for any such direction. S. 5 provides that the Gold Commissioner shall have jurisdiction within such districts as the Commissioner directs "and within such districts shall possess also all the powers and authority of a mining recorder."

There was, I think, no necessity for any direction at all because at the date of the grant only one Gold Commissioner had been appointed by the Governor in Council. The statute contemplates the appointment of more than one gold commissioner as appears from other than the sections above quoted, for instance s. 79, which provides that affidavits "may be made before any Gold Commissioner anywhere within the Territory."

When there are several gold commissioners appointed, the Commissioner is to direct in which districts each shal have jurisdiction and of course it was never intended that there should be a gold commissioner for each district as there is a mining recorder. In the districts directed by the Commissioner each gold commissioner exercises jurisdiction and by s. 5 has within those districts the powers of a mining recorder. Where there is only one gold commissioner appointed there can be no division of jurisdiction and the only possible direction of the Commissioner would be that he should have jurisdiction in all the districts; if this were necessary it would amount to saying that the gold commissioner appointed by the Governor in Council could have no jurisdiction without being further appointed by the Commissioner. The Judge of the Exchequer Court does indeed attempt a distinction between certain duties of the Gold Commissioner under the statute and those of a mining recorder. He says:—"An analysis of the statute shews that the Gold Commissioner had certain duties to perform as Gold Commissioner but was not clothed with the powers of a mining recorder until appointed by the Commissioner." Passing by the fact that the statute says nothing about any appointment of the Gold Commissioner by the Commissioner such an interpretation of s. 5 must apply to all the duties of the Gold Commissioner who would have no jurisdiction either as to the special duties imposed on him by the Act or as to the powers of a mining recorder.

The judge says in his reasons for judgment: "Turning to the statutes, for convenience, I have been furnished with a copy

CAN.

S.C.

MURPHY AND GOULD v. THE KING.

Fitzpatrick, C.J.

of the Yukon Placer Mining Act, as consolidated with the amending Acts. In case he has not referred to the statutes themselves it may not be amiss to point out that under the original statute the Governor-General in Council appointed all the officials, mining recorders as well as gold commissioners. It was only by the amending Act, 7 & 8 Edw. VII., c. 77, that the change was introduced "but mining recorders and mining inspectors and deputies thereto shall be appointed by the Commissioner." This, the only power of appointment given to the Commissioner, may have given rise to the error as to appointment of gold commissioners by the Commissioner; it does not touch them at all.

I think the Act is perfectly clear though it would have been better if in s. 5, in place of the words "The Gold Commissioner," the words "The Gold Commissioners" or "A Gold Commissioner" had been used. The Act, however, repeatedly refers to *the* Gold Commissioner, and if one may make a surmise, this is to be accounted for by the fact that there was, and for years previous to the passing of the Act had been, only one official known as the Gold Commissioner in the Yukon Territory.

The objection to the grant entirely fails and the appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—I concur with the reasons of my brother Anglin for allowing the appeal.

Idington, J.

IDINGTON, J.:—I think this appeal should be allowed and the information be dismissed with costs here and below.

Duff, J.

DUFF, J.:—The controversy on this appeal relates to the construction of certain provisions of the Yukon Act, R.S.C. 1906, ch. 64. (The sections are quoted in the judgment of Fitzpatrick, C.J.)

The question can be dealt with without any further reference to the particular facts of the case in which it arises and it is this. Is an express direction by the commissioner a condition which must be complied with before a Gold Commissioner appointed by the Governor in Council under the authority of s. 3 is invested with jurisdiction as gold commissioner or as mining recorder to perform the duties and to exercise the powers committed to a gold commissioner or a mining recorder under the statutes relating to the Yukon and to mining therein?

It is contended on behalf of the Attorney-General that this question must be answered in the affirmative even where only a

single gold commissioner for the whole territory has been appointed under s. 3; and it was quite candidly admitted by Mr. Hogg that the practical effect of accepting this interpretation of s. 5 must be that from some date in 1906, down to some date in 1912, a period of 6 years, no officer was invested with the powers of a gold commissioner in the Yukon although a gold commissioner had been appointed by the Governor in Council and was all that time acting as if he possessed authority, and in the full belief of everybody that his acts were lawful and valid. The section is no doubt a crabbed one, but I think when the law in existence at the time the statute was passed by virtue of the orders in council then in effect touching the powers and authority of the Gold Commissioner is considered, a way is opened out of the difficulty though it is impossible to say the difficulty wholly disappears. Under that law a gold commissioner was *ex officio* mining recorder. That provision of the law is not explicitly repealed by the Act of 1906, and I think s. 5 manifests an intention to recognize the gold commissioner's *ex officio* capacity as mining recorder.

I agree with Mr. Congdon's contention that the application of s. 5 must be restricted to those cases in which more than one gold commissioner is appointed. Further that that, I express no opinion upon the true construction of s. 5; it may be hoped that before any further question can arise with regard to that parliament will by a declaratory Act make the meaning of it clear.

The appeal should be allowed and the information dismissed with costs.

Anglin, J.

ANGLIN, J.:—The Crown in this proceeding seeks a declaration that a grant of the right to use and divert water issued to the defendants on Oct. 8, 1909, is null and void and an order for its cancellation. This relief is asked on the grounds that "the grant was made and issued through improvidence, inadvertence and error" and without any adjudication on the application therefor by the Mining Recorder who signed it. Secs. 54-57 of the Yukon Placer Mining Act (R.S.C., 1906, c. 64), as amended by 7 & 8 Edw. VII., c. 77, s. 25, provide for adjudication by a Mining Recorder upon any application for a grant of the right to use or divert water and for the issue of such grants with the approval of the Commissioner of Yukon Territory.

CAN.

S.C.

MURPHY AND GOULD v. THE KING.

Anglin, J.

In the case at bar the adjudication upon the defendants' application was made by the Gold Commissioner, Mr. F. X. Gosselin, and by his direction Mr. G. P. Mackenzie, a mining recorder signed the grant to them and it issued with the approval of the Commissioner of the Yukon Territory, who appears to have had full knowledge of the facts.

The substantial question presented is whether the Gold Commissioner had the powers and authority of a mining recorder requisite to enable him validly to adjudicate upon the defendants' application under s. 57 of the statute. If he had I attach no importance to the fact that the grant was signed not by the Gold Commissioner himself, as it might have been, but by another mining recorder acting by his direction. No improvidence, inadvertence or error in the making of the grant other than an alleged absence of jurisdiction as mining recorder in the Gold Commissioner has been suggested.

Prior to 1906 the Gold Commissioner for the Yukon Territory was appointed under the provisions of an order in council of July 7, 1898. By this order in council the Gold Commissioner was constituted *ex officio* Mining Recorder at the headquarters of the Government of the Territory, *i.e.*, at Dawson City, and he was empowered to appoint such additional Mining Recorders as might be necessary and to divide the Territory into such mining divisions as he deemed advisable. Under this order in council the Gold Commissioner acted as a Mining Recorder for the Dawson district and adjudicated upon all conflicting or contested applications for grants of water privileges. That this was the practice which obtained is fully established by the evidence.

In 1906 the Yukon Placer Mining Act was passed, and it appears in the R.S.C., 1906, which came into force on Jan. 31, 1907, as c. 64, ss. 3, 4, 5 and 6 of that Act are as follows: (The sections are fully set out in the judgment of Fitzpatrick, C.J.)

On May 28, 1907, Gosselin, theretofore Assistant Gold Commissioner at Dawson, was appointed by the Governor in Council Gold Commissioner for the Yukon Territory and he held that office for about 5 years. During that time there was no other Gold Commissioner nor any Assistant Gold Commissioner appointed. The Yukon Territory had been divided into mining districts by the Commissioner of the Yukon Territory prior to

1906. No re-division or alteration of existing divisions appears to have been made under s. 4 of the Yukon Placer Mining Act.

Mr. Gosselin states that prior to April 1, 1912, he never had "any specific appointment or directions from the Commissioner of the Yukon Territory as to what districts within the Yukon Territory he should exercise his jurisdiction over as Gold Commissioner and the Mining Recorder," that he acted as mining recorder because of his construction of the Yukon Placer Mining Act . . . and the construction of the order in council of July 7, 1898, defining the powers of the Gold Commissioner . . . (and) according to the practice of the office from the earliest times.

I am quite satisfied that under s. 5 of the Yukon Placer Mining Act the authority and powers of the Gold Commissioner as Mining Recorder were territorially co-extensive with his jurisdiction as Gold Commissioner.

Having regard to the circumstances and to the provisions of ss. 3 and 4, I should, if necessary, require to consider very carefully whether, although it speaks of "*the* Gold Commissioner," the provision of s. 5 prescribing a direction by the Commissioner of the Yukon Territory was meant to apply unless the Governor in Council, under the power conferred by s. 3, should appoint more than one Gold Commissioner, as it was probably expected that he would when the statute was enacted. Until that had been done there could be no purpose in having the Commissioner of the Yukon Territory direct within what mining districts the sole Gold Commissioner should act. It was certainly not intended by Parliament that any part of the Yukon Territory should not be subject to the jurisdiction of a Gold Commissioner, nor can I think that it was intended that while the Governor in Council had appointed only one Gold Commissioner for the Territory the Commissioner of the Yukon Territory should have the power to restrict his jurisdiction to particular mining districts. If the construction of s. 5 for which counsel representing the Attorney-General contends should prevail and no direction under that section was given by the Commissioner of the Yukon Territory to Gosselin, from the date of his appointment in May, 1907, until April 12, 1912, though appointed sole Gold Commissioner for the Yukon Territory as a whole, he had no jurisdiction therein

CAN.

S.C.

MURPHY AND GOULD v. THE KING.

Anglin, J.

and all his acts not only as Mining Recorder, but as Gold Commissioner were invalid. Before accepting a construction of s. 5 which would entail consequences so disastrous, I would have to be convinced that it is not open to any other.

But this case may be disposed of without determining that the provisions for designation by the Commissioner of particular districts as those within which a Gold Commissioner shall exercise his office was inapplicable. Since it was clearly intended that every mining district in the Yukon Territory should be subject to the jurisdiction of a Gold Commissioner, the Commissioner of the Yukon Territory had no discretion under s. 5, if applicable, but was obliged to direct that the sole Gold Commissioner appointed should exercise jurisdiction throughout the whole Territory. Such a direction would be the veriest formality. No form of direction having been prescribed, it should be inferred from the facts that Gosselin acted as Gold Commissioner for 5 years under the direct supervision of the Commissioner of the Territory and that his acts as Gold Commissioner and Mining Recorder were continually under the consideration of the Commissioner, who expressly approved in writing of grants made upon some 64 applications for water privileges, of which this was one, adjudicated upon during that period by him; that he had been, however informally it matters not, directed by the Commissioner of the Yukon Territory to act as Gold Commissioner throughout the Territory, as his predecessors in office had done. It is true that Gosselin himself appears to have thought that no direction from the Commissioner of the Territory was necessary—that under the statute and the order in council of 1898 his commission from the Governor in Council made his official status complete. The Commissioner of the Territory, however, was not examined as a witness, and we do not know that he entertained the same view, and in the absence of evidence to that effect it should not be assumed that he did. On the contrary, we should rather presume that if his duty required that he should give a direction under s. 5—as it clearly would if that section were applicable—that that duty was discharged, though it may have been in some manner so informal that it escaped Gosselin's notice, as it well may have since no change was made in the practice which had theretofore prevailed. It is consistent with Mr. Gosselin's evidence that something may have transpired

which would satisfy s. 5 as a general direction, but which he would not regard as a "specific appointment or direction from the Commissioner." If the Crown desired to exclude the inference of performance of his duty by the Commissioner of the Yukon Territory, I think the burden was upon it to adduce that officer's evidence to negative it. The case is one to which the maxim *omnia praesumuntur rite esse acta* applies with peculiar force. Either because the direction prescribed by s. 5 of the Yukon Placer Mining Act was not necessary under the circumstances, or because, if it was requisite, there is a cogent presumption that it was given, which has not been rebutted, I would uphold the grant made to the defendants.

I would, therefore, with respect, allow this appeal with costs and dismiss the information also with costs.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs of this court and of the court below. Brodeur, J.

Appeal allowed.

THE KING v. JAMES.

N. S.
S. C.

Nova Scotia Supreme Court, Russell, Longley, Harris and Chisholm, JJ. December 31, 1917.

STATUTES (§ II A—96)—OPIUM AND DRUG ACT—VALIDITY OF CONVICTIONS UNDER.

The Opium and Drug Act (1 2 Geo. V. 1911, Can., c. 17, s. 3) contemplates that a penalty shall be imposed on each person offending, not that each offence shall be punished; a conviction against two or more persons jointly and a joint order to pay a fine are therefore invalid, and will be quashed.

The facts of the case are as follows: Statement.

The prisoners were arrested without warrant on December 5, 1917, while endeavouring to effect a sale of opium. Subsequently, an information was laid against them, charging them jointly with the offence for which they were arrested, and they were jointly convicted and jointly ordered to pay the penalty of $400. Application was made to Harris, J., at Chambers for the discharge of the prisoners on the grounds: (1) That the commitment recited a conviction for a joint offence which in its nature was several, citing *Reg* v. *Sutton*, 42 U.C.Q.B. 220, and *Gaul* v. *Township of Ellice*, 6 Can. Cr. Cas. 15; (2) That whether the conviction be single or joint the penalty awarded must be against each offender, citing *Morgan* v. *Brown*, 4 Ad. & El. 515, 111 E.R. 881; *Ex parte Howard*, 25 N.B.R. 191; Paley on Convictions, 290; *Re Rice*,

N. S.

S. C.

THE KING v. JAMES.

Statement.

20 N.S.R. 294; (3) That the applicants being illegally arrested, and having objected to the magistrate's jurisdiction, a conviction made after objection was invalid. *R.* v. *Pollard*, 29 Can. Cr. Cas. 35.

The judge referred the matter to the full court where the same objections were taken.

W. J. O'Hearn, K.C., for the prisoners.

T. S. Rogers, K.C., for the prosecutor.

The judgment of the court was delivered by

Harris, J.

HARRIS, J.:—By s. 3 of the Opium and Drug Act (c. 17, Acts 1911, Can.) it is provided that:—

> Every person who, without lawful or reasonable excuse . . . offers for sale . . . any drug for other than scientific or medicinal purposes, shall be guilty of a criminal offence and shall be liable, upon summary conviction, to a fine not exceeding $500, etc.

By s. 2 of the Act the word "drug" means and includes among other articles opium.

The two defendants were arrested without a warrant on December 5, 1917, by a police officer for the City of Sydney, and on December 6, 1917, an information was sworn before the stipendiary magistrate charging the two defendants with having, on December 5, unlawfully offered for sale, a quantity of drugs, to wit, opium, for other than scientific or medicinal purposes.

The two accused were brought before the stipendiary magistrate on December 13, and refused to plead and the magistrate thereupon proceeded to hear the evidence against them, and convicted them jointly of the offence charged and adjudged:—

> The said James James and Archie Boxill for their said offence to forfeit and pay the sum of $400 to be paid and applied according to law, and also to pay to the said J. B. McCormack (the informant) the sum of $3 for his costs in this behalf, and if the said several sums are not paid forthwith I adjudge the said James and Boxill to be imprisoned in the common goal of the county of Cape Breton . . . and there to be kept for the term of 3 months unless the said sums and the costs and charges of the commitment and of the conveying of the said James and Boxill to the said common goal are sooner paid.

Counsel appeared for the accused before the stipendiary magistrate and protested against the hearing on the ground that the accused were arrested without any warrant or any charge being laid against them.

We are told by counsel that a warrant was issued on the information laid on December 6, under which defendants were

thereafter detained. The defendants remained in custody from the time of their arrest on December 5, and on their conviction were placed in the common goal for the county of Cape Breton where they are still confined. They applied for their discharge on *habeas corpus* to me at Chambers, and I referred the matter to the Full Court.

The grounds urged are: (1). That there could not be a joint conviction of the two defendants, or in any event there should have been separate penalties against each defendant, and (2) That the arrest of the defendants on December 5, without warrant, was illegal, and the stipendiary magistrate had no jurisdiction to convict notwithstanding the information of December 6, and the subsequent arrest thereunder.

It should perhaps be noted that by s. 12 of the Act:

> No conviction, judgment or order in respect of an offence against this Act shall be removed by *certiorari* into any of His Majesty's Courts of Record.

It appears that after the conviction one of the defendants tendered $203 to the informant and demanded his release, but the informant refused to act unless the whole $403 was paid.

An affidavit has been produced shewing that both defendants participated in an offering of the same opium to a third party and, although it is not so stated, I assume that this evidence was given before the stipendiary magistrate, and that the conviction is based thereon.

I have reached the conclusion that the conviction cannot be upheld, and that the prisoners ought to be discharged.

In Paley on Convictions (8th ed.), p. 287, the law is thus stated:—

> Though several offenders may be (as it seems) included in one conviction for offences jointly committed, it depends upon the wording of the particular statutes applicable to each case, and the quality of the offence, whether each person be liable to a distinct penalty, or all collectively to but one.

After referring to some cases where the offences under the wording of the statutes in question were held to be single and to warrant a joint conviction, Paley proceeds, pp. 288-9:

> But, if either the penalty be imposed by the Act upon each person convicted, even where the offence would in its own nature be single—or, if the quality of the offence be such, that the guilt of one person may be distinct from that of the others,—in either of these cases the penalties are several.

Rex v. *Clark*, 2 Cowper 610, 98 E.R. 1267; *Reg.* v. *Dean*, 12

N. S.

S. C.

THE KING v. JAMES.

Harris, J.

M. & W. 39, at 44, 152 E.R. 1102; *Reg.* v. *Littlechild*, L.R. 6 Q.B. 293, see also *Reg.* v. *Sutton*, 42 U.C. Q.B. 220; *Ex parte Howard*, 25 N.B.R. 191; *Gaul* v. *Township of Ellice*, 6 Can. Cr. Cas. 15; *Re Rice*, 20 N.S.R. 294, (per Townshend, J., at p. 299); *Morgan* v. *Brown*, 4 Ad. & El. 515, 111 E.R. 881; Paley on Convictions, 290.

I think the statute in question imposes a penalty upon each person offending and that the quality of the offence is such that the guilt of one defendant may be distinct from that of the other—that the penalties are several, and that the conviction imposing one penalty on the two defendants cannot be upheld.

Applying the test of Alderson, B., in 13 M. & W. 39, I do not see how it can be said that the statute is intended merely to punish each offence, but on the other hand it clearly means, I think, that every person offending shall be punished.

I am unable to appreciate the argument of Rogers, K.C., in which he sought to distinguish this case from *Morgan* v. *Brown*, *supra*; *Reg.* v. *Sutton*, *supra*, and other cases cited, and it is, I think, clear that a separate penalty should have been imposed upon each defendant.

For this reason the application should be granted, but on the condition that no civil action is to be brought.

It is unnecessary to consider the other question argued.

Application granted conditionally.

CAN.

S. C.

TORONTO GENERAL TRUSTS Co. v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

TAXES (§ V C—190)—SUCCESSION DUTIES—MORTGAGES—SITUS.

Mortgages under the Alberta Land Titles Act to a person resident out of Alberta on land situated therein are property situate within the province, and upon the death of the mortgagee are subject to duty under the Succession Duties Act (Alberta); the duplicate retained by the registrar, under the Land Titles Act (Alberta), is the real security, not the duplicate retained by the mortgagee.

[*Payne* v. *The King*, [1902] A.C. 552, followed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, affirming the judgment at the trial, 32 D.L.R. 524, 11 A.L.R. 138, in favour of the respondent.

The facts of the case are as follows: One Griggs, a resident of

Ottawa, held a mortgage on land in Alberta and when he died the Provinces of Ontario and Alberta each claimed the right to succession duties on the value of this mortgage. An action was brought by the Alberta Government against the appellant as administrator *cum testamento annexo* of Grigg for the amount of such duties and a special case was submitted to the Supreme Court of the province. It was heard before Hyndman, J., who held that the duties could be collected and his judgment was affirmed by the Appellate Division.

Statement.

Hogg, K.C., and *Ford, K.C.*, for appellant.

Lafleur, K.C., for respondent.

FITZPATRICK, C. J.:—This case does not, I think, present any difficulty and if I entertained any doubt about the correctness of the judgment appealed from the question is concluded by the authority of the Privy Council, notably in the decision in *Payne* v. *The King*, [1902] A.C. 552. The facts of that case are practically identical with those in the present appeal. The testator resided in Victoria and had a mortgage of lands in New South Wales. The instrument of mortgage was in the form authorized by the Real Property Act of New South Wales (26 Vict. No. 9) and was not under seal; it was in Victoria at the date of the testator's death. The debtor as well as the testator resided in Victoria. It was held that "the debt though a specialty debt in New South Wales was a simple contract debt in Victoria and recoverable under a Victorian probate."

Fitzpatrick, C.J.

That was all that was necessary to decide in the case but in their Lordships' judgment it was added, "it may well be that in order to discharge the mortgage probate duty would also have to be paid in New South Wales."

For material purposes I think the Real Property Act of New South Wales and the Land Titles Act of the Province of Alberta are alike. For this and the reasons given by the trial judge I think it impossible to contend that the mortgage was not a specialty debt in the Province of Alberta and I do not know that it would matter if it were considered to be also a specialty debt in the Province of Ontario.

The property was an asset of the testator in the Province of Alberta and it was not disputed that if it were such it was property within the interpretation in s. 3 of the Succession Duties Act and subject to the duties thereby imposed.

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Fitzpatrick, C.J.

It is well established that the name under which duties are imposed is immaterial if the intention of the legislature is clear. It is only in cases of ambiguity that comparison can be made with probate, succession or other duties for the purposes of endeavouring to ascertain what may be supposed to have been the intention of the legislature in using words which have acquired a particular meaning in other well known statutes. *Rex* v. *Lovitt*, [1912] A.C. 212.

The appeal will be dismissed.

Davies, J.

DAVIES, J.:—I entertain no doubt that the mortgage in question in this case of lands situate in the Province of Alberta and the debt secured thereby were taxable by the Province of Alberta and came within the provisions of the Succession Duties Act of that province, unless it can be held that at the time of the death of the mortgagee who was domiciled and resident in the Province of Ontario and in whose possession at such time a duplicate copy of such mortgage was found, the rule in *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, operated to make this specialty debt "conspicuous" in that province.

After giving the facts of the case and the arguments at bar much consideration, I have reached the conclusion that the judgment of Hyndman, J., the trial judge, confirmed by the Appeal Court of Alberta, was correct and that the artificial judicial rule as to the situs of the debt laid down in *Hope's* case, *supra*, does not apply in this case, because of the provisions of the Land Titles Act.

The reasons for his judgment given by the trial judge commend themselves to me. I agree with him that the real security for the payment of the debt in question is the mortgage registered and held in the Land Titles Office, just as the certificate of title entered and kept in the register is the essential evidence of title, and that "the mortgage upon which the deceased would have had to rely for the enforcement of his security would be the instrument registered with and retained by the registrar."

I think s. 23 of the Lands Titles Act clearly operates to overcome the artificial rule laid down in *Hope's* case, *supra*, as to the situs of the mortgage and as to where it was "conspicuous" at the mortgagee's death. It reads as follows:—

> Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of regis-

tration and not according to the date of execution; and the registrar, upon registration thereof, *shall retain the same in his office*, and so soon as registered every instrument shall become operative according to the tenour and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

So soon as registered, every instrument shall become operative according to its intent. The registrar is required to "retain the registered instrument in his office." The fact that a mortgagee may have his mortgage executed under seal and in duplicate and may retain and keep in his possession such duplicate copy, cannot in my judgment avail to defeat this statutory requirement that the registered mortgage be retained by the registrar in his office.

The mortgage specialty debt, therefore, in my judgment, would be conspicuous in the province where the mortgage security is required to be registered and kept, and the duplicate copy which the mortgagee may, for convenience or other reasons, take with him abroad to his residence, cannot have the effect contended for of making the debt "conspicuous" at such residence in another province.

The legislature having full power and authority in the subject matter has so legislated as to make the mortgage when registered and retained in the registrar's office the statutory and official mortgage and the situs of the specialty debt should be held to be the place where the statute has declared the registered mortgage shall be retained.

I would, therefore, dismiss the appeal and answer the question submitted in the special case in the affirmative.

Idington, J.

IDINGTON, J.:—Since this appeal was argued counsel in response to an inquiry from the bench during the argument have submitted the following admission:—

> The parties admit that at the date of the execution of the mortgages referred to in the stated case, the mortgagors were resident in the Province of Alberta, and that the place of payment of the debt, was in each case in the Province of Alberta.

This I take it is to be read as part of the admissions of fact upon which the case is asked to be decided.

The statute in question is the Succession Duties Act of Alberta, assented to October 22, 1914, of which s. 7 provides as follows:—

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Idington, J.

7. Save as otherwise provided, all property of any person, situate within the province, and passing on his death, shall be subject to succession duties, at the rate or rates set forth in the following table, the percentage payable on the share of any person or beneficiary being fixed by the following or by some one or more of the following considerations as the case may be:—

(*a*) Net value of the property of deceased;

(*b*) Place of residence of person or beneficiary;

(*c*) Value of property taken, wherever situate;

(*d*) Degree of kinship or absence of kinship to the deceased.

The determination of the question submitted must turn upon the words "all property of any person, situate within the province, and passing on his death" in their plain ordinary meaning having due regard to the general purview of the statute in which the section is found and the specific provisions therein illuminating what is intended to be expressed by the words "passing on his death," but subject always to the limitations of the taxing power of the province as expressed in the British North America Act, s. 92, item 2.

The property attempted to be taxed is a number of mortgages which can only derive their efficacy from and by virtue of the statutes of Alberta having exclusive legislative jurisdiction over property and civil rights in the province.

The Land Titles Act of that province declares, by s. 60 thereof, how a mortgage may be constituted, and by s. 61 thereof, what it is to be, and cannot be, and by other sections how it may be registered.

No seal is required any more than under our English law to a will. Yet some one, doubtless through ignorance, has been known to affix a seal to such a will; and it is admitted seals were needlessly used in the execution of the mortgages in question herein.

Does that sort of error constitute a will a specialty? Or does the affixing of a seal to an Alberta mortgage constitute it any greater security on the land than the Land Titles Act declares it to be?

And if the mortgagee desires to enforce it as against the land he can only go to the courts of Alberta and rely upon the laws of Alberta to realize the security out of the land.

Personal remedies he may have elsewhere for the debt but even that is admitted to be payable in each of the cases herein involved in Alberta, and *primâ facie* only recoverable there.

How can such a debt and such a security be held to be situate elsewhere than in Alberta? We are told because, probably by accident, someone affixed a seal and constituted the debt a specialty, and therefore because in certain circumstances in English law a presumption exists that the property in that specialty is situate where the mortgagee was domiciled, hence that is the meaning which we must attribute to this Alberta statute.

Is it conceivable that such a highly technical meaning was present to the mind of the Alberta Legislature?

Suppose the mortgage had contained no covenant but the mortgagee had, after its registration, taken a bond under seal for payment of the same debt which it secured and kept it with him till his death, would the mortgage, thus freed from such questions as rest upon the covenant being therein, be situate in Alberta or Ontario? How fine can the distinctions be drawn and yet supply the reasoning by which the mortgage can cease to be property situate in Alberta? Some one might tell us that the debt merged in the sealed bond and hence must be situate where the bond is found. However all that may be, surely that is not the kind of process of reasoning by which we will be best able to determine what the Legislature of Alberta had in view.

Is it not plain and palpable that the legislature, if we regard the general purview of the Succession Duties Act and its manifold provisions, had determined to reach out with all its taxing power to tax the security and the debt due by one of its own citizens as property situate in and taxable by it in the event of death necessitating that such property should pass to someone else and could only pass by virtue of Alberta laws to someone else?

Such is my reading of the statute; and of the power to enact it I have no manner of doubt. And if I had a doubt of the meaning of the language used the obvious consideration that the power was intended to be fully exercised would weigh much with me in arriving at the meaning of the words "situate within the province."

I can conceive of the case where the security had become nil and the debtor had become resident elsewhere than in Alberta at the time of his death, yet perfectly solvent and the debt recoverable from him, in such case that the doctrines resting upon the nature of a specialty debt might well be looked to for guidance in relation

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Idington, J.

to the right of taxation by some other province than Alberta. Then in such case it might be hard to argue that the property at the death was situate in Alberta unless, as admitted herein, the debt was payable there.

It was pressed upon us in argument that Ontario was making a claim to duties in relation to these same mortgages. I pass no opinion upon the question of whether or not it can maintain such a claim, or upon the much wider questions either of the economic wisdom or justice of either claim.

Yet it may not be impertinent to suggest that, where a man's money has been invested and enjoyed the protection of the laws of that place, an enforced contribution, called taxation, to the maintenance thereof, cannot be held to fall beyond the limits of direct taxation.

The trouble is, however, that direct taxation may, as well as any other form of taxation, carry in it an element of injustice. With that we have (paradoxical as it may sound) nothing to do.

So long as the struggle over these succession duties is fought out upon the lines of highly technical reasoning, perfectly sound where relevant, instead of measuring the meaning of legislation by the plain ordinary sense of the language used and then clearly operative within the taxing power of the legislature, will the day be postponed for an adjustment of the respective rights and duties of the provincial legislatures.

The problems involved are by no means easy of solution on a just basis. And double taxation may in law be inevitable, so it seems to me, if legislatures fail to observe justice. Perhaps wise men investing in the west will avoid needless seals and watch the Statute of Limitations.

I think the appeal must be dismissed and I am glad to see the parties concerned have by agreement relieved us of deciding the question of cost.

Duff, J.

DUFF, J.:—It will be convenient, first, to consider whether the securities in question were at the death of the testator taxable subjects in Alberta, that is to say, subjects within the power of Alberta to levy taxation upon. They are mortgages constituted under the Alberta Land Titles Act as mortgages; that is to say, as affecting the lands mortgaged they are operative by virtue of the provisions of the statute in consequence of registration pursuant to

s. 60 of that Act. By s. 62 the usual remedies for the enforcement of the rights of a mortgagee are given to the holder of the mortgage. By s. 62 a power to enter in default of payment of interest or principal, power of sale upon notice and authority to the Registrar of Titles to grant an order for foreclosure on certain conditions are all given. By the provisions of the Act the security may be released by an entry on the certificate of title made by the registrar under the prescribed conditions and may be assigned by a registered transfer in the prescribed form, and the Act provides that upon registration of such a transfer not only the transferee's interest in the land and all his rights, powers and privileges pertaining to the land, but also the right to recover the mortgage debt shall pass to and become vested in the transferee. The case of the absence of the mortgagee from the province is dealt with by a provision which enables the mortgagor by leave of the judge to pay the amount of the mortgage debt into a bank and to procure the release of the mortgage by the registration of a memorandum prescribed by the statute.

I have no difficulty in the conclusion that these registered instruments create interests in land which are assets in Alberta. The point, indeed, is concluded by a decision of the Judicial Committee of the Privy Council in *Walsh* v. *The Queen*, [1894] A.C. 144. I quote from the judgment of the Board, delivered by Lord Watson, at p. 148:—

> Though resting partly upon personal obligation the debts are all charged upon real and personal estate which the appellant himself alleges to be in "Queensland." Although the debt is not yet due and payable, so that the creditor has no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only. The market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt in as securities. It is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a *jus ad rem*, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor. Is such an interest in property admittedly situated in Queensland an asset in Queensland within the meaning of the Act? That is the sole question arising for decision in this appeal, and its merits lie within a very narrow compass.
>
> The appellant's counsel did not dispute that the debtor's interest in the subjects which he assigned in security was an asset in Queensland; and

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Duff, J.

they went so far as to admit that the creditor's interest would also be so, if he enforced his security by entering into possession. Independently of any concession in argument, neither of these propositions appears to be attended with doubt. Laying aside, as plainly untenable, the theory that, until he has attained possession, the creditor's right consists in the bare personal obligation of his debtor, it would be difficult to find any good reason for holding that it includes no interest in the subjects of the security which is capable of valuation. The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon an estate within the colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the colony. Such an interest is certainly property of the company, and property in the colony, because it affects the estate which is admittedly situated there.

See also *Henty* v. *The Queen*, [1896] A.C. 567, at 574.

The appellant company relies upon s. 61 of the Act, which is as follows:—

A mortgage or incumbrance under this Act shall have effect and security but shall not operate as a transfer of the land thereby charged.

The corresponding section of the Manitoba statute was considered in *Yockney* v. *Thompson*, 16 D.L.R. 854, 50 Can. S.C.R. 1, in which it was unanimously held by this court that this last mentioned section which goes further than s. 61 had not the effect now contended for. The enactment in the Manitoba Act provides (s. 100) that the mortgage shall not operate as a transfer of the land thereby charged "or of any estate or interest therein." It was nevertheless held that an agreement to execute a mortgage was sufficient to constitute a foundation for a caveat under s. 130 of that statute, on the ground that the beneficiary of the agreement (the vendee) desiring to file a caveat to protect his rights under the agreement was a person claiming an "estate or interest in land" within the meaning of s. 130. My view of these sections is expressed in my judgment in that case, in these words:—

The effect of s. 100 was fully considered in *Smith* v. *The National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618. It was there pointed out that, as regards land registered under the new system, title is consummated by registration and that the effect of s. 100 is that the holder of a "mortgage or incumbrance" registered under the Act has not vested in him, in whole or in part, the registered title. The execution and registration of the mortgage, in a word, does not immediately effect any dismemberment of the mortgagor's registered title. In that sense the mortgagee has no estate or interest in the land.

I entirely agree, however, with the learned trial judge that it is something very much like a contradiction in terms to say that a mortgagee, having the powers of sale and foreclosure vested in him by the statute, together with other rights as to the possession of the land which the statute gives him,

has not, in the broader sense of the words, an interest in the mortgaged land. I do not think s. 136 can properly be limited to those cases in which the claim is a claim to be registered as possessor in whole or in part of the registered title. In other words, I do not think it can be properly limited to those cases in which an "interest is claimed" in the restricted sense in which "interest" is used in s. 100.

That there was an interest, and a taxable interest in the sense above mentioned, in these lands at the time of the death of the testator seems therefore clear.

As Lord Watson pointed out, however, in *Walsh* v. *The Queen*, [1894] A.C. 144, the question whether or not the mortgage debt could properly be the subject of taxation in Alberta is not necessarily the same question. But the answer, I think, to that question must be in the affirmative.

The instrument, as we gather from the stated case, was in the statutory form with some additional covenants, and, further, was executed in duplicate under the seal of the mortgagor in every instance, a formality not contemplated by the form. One duplicate was in possession of the testator at the time of his death, in Ontario, where he was domiciled, and the other remained in the proper registry office in Alberta. I do not find it necessary to consider the point raised as to whether the statute requires that the mortgage or the duplicate of the mortgage should be left in the registry where it is registered. The fact is, that in each case this was done, and that in doing this the parties acted in accordance with the usual practice.

The mortgage debt was in the sense of international law an immovable. That, I think, results from the decision of the Court of Appeal and especially from the judgment of the Master of the Rolls in *Re Hoyles*, [1911] 1 Ch. 179. I quote from pp. 183 and 184:—

> I think a mortgage debt secured by land is to be regarded, not as a movable but as an immovable. The authority of text-writers is strongly in favour of this view. Story, s. 447, expressly includes "charges on lands, as mortgages," as in the sense of the law immovables and governed by the *lex rei sitæ;* and Dicey states that "immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests" (Dicey, 2nd ed., p. 76; see also p. 496). Thus a Scotch heritable bond has always been treated by our law as immovable although there is a personal obligation to pay; *Jerningham* v. *Herbert*, 4. Russ. 388; *Re Fitzgerald*, [1904] 1 Ch. 573, at 588. But apart from authority, I should have arrived at the same conclusion from considering the nature and extent of the rights of a mortgagee of freehold land. If he sues on the covenant to pay he must

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Duff, J.

reconvey the land on payment. If he has parted with the land, otherwise than in exercise of a power of sale, he would be restrained from suing on the covenant: *Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, 27 Beav. 349, 28 Beav. 341; *Kinnaird* v. *Trollope*, 39 Ch. D. 636. The result is that a mortgagee cannot assign the mortgage debt effectually without also transferring the security upon the land.

Every word of this is applicable to the securities now under consideration. It follows from the fact that they are immovables that the law governing their assignment, their discharge and their devolution is the law of Alberta.

Moreover, they can only be effectively assigned, that is to say, assigned in such a way as to protect the rights of the assignee, by something done in Alberta. They can only be effectively discharged, that is to say, discharged in such a way as to protect the interests of the mortgagor by something done in Alberta. They can only be effectively enforced in Alberta, because of the debtor being resident in Alberta and the common rule requiring the debtor to seek out his creditor and pay him being abrogated by the provision that I have mentioned; in other words, the debt being in substance a debt being payable in Alberta, the mortgagee could not even effectively sue upon the debt in Ontario. The circumstance that one duplicate of the instrument executed by the mortgagor was in the mortgagee's possession in Ontario strictly can have no bearing because if it be said that for that reason the debt had its situs in Ontario, precisely the same reasoning leads to the conclusion that the debt had also its situs in Alberta. Whether you take these instruments as constituting together one instrument, or as constituting separate instruments, the result is the same for the purposes of this appeal. If they are one instrument, then the instrument was just as much in Alberta as in Ontario; if two separate instruments, it is equally obvious that neither can be considered, exclusively of the other, to determine the locality of the debt.

But does the statute in question effectively cover these securities? On that point I can entertain no doubt whatever. The word "property" is so broad as to admit of no escape from it. What I have said already will sufficiently indicate the reason why, in my opinion, *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, has no application. And it may be added that probate in Ontario would neither be necessary nor sufficient to enable the

executors to enforce their mortgage debt. Westlake, pp. 115 and 116; *Whyte* v. *Rose*, 3 Q.B. 493, while probate in Alberta would be both necessary and sufficient, *ibid.*

But there is a consideration which I should like to emphasize in addition to what I have already said and it is this: As Lord Macnaghten said, speaking for the Judicial Committee in *Payne* v. *The King*, [1902] A.C. 552, if an attempt were made by the appellant company to enforce these mortgages in Ontario and if, by some accident (the present debtors, for example, being in Ontario), it succeeded in obtaining judgment, the company would not be permitted to enforce the judgments against the debtors in person without first providing for the discharge of the mortgages. That could only be done effectively by registration on the books of the registry office in Alberta, and I can conceive no manner of reason for doubting the power of the Province of Alberta to require as a condition of the registration of such discharges the payment of duties such as those imposed by the Act in question. The same remark applies to a transfer. In other words, in normal circumstances, the executors cannot effectively realize on these securities either by enforcing the covenants for payment or by a sale of them without resort to the registration machinery provided by the Land Titles Act.

In view of these considerations, it would seem an extraordinary conclusion that for the purposes of taxation these debts are deemed by construction of law to have locality in Ontario and not to have locality in Alberta.

ANGLIN, J. (dissenting):—It is the common case of both parties to this litigation that the property on which the Province of Alberta seeks to levy succession duties is a debt secured by mortgage on lands in that province—that this debt, which the mortgagor has covenanted under seal to pay, is a specialty debt—and that its artificial situs for purposes of taxation is where the specialty was "conspicuous" at the date of the mortgagor's death. That there may be no room for doubt as to the position taken by the respondent on these points, I quote from his factum the propositions numbered 2 and 3.

Anglin, J.

2. The locality of a simple contract debt is at the domicile of the debtor and that a specialty debt where the specialty is found at the time of the creditor's death.

3. The mortgage in the present case being a deed under seal constitutes a specialty debt.

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Anglin, J.

The parties differ only in their views as to what was the situs of the specialty—as to where it was "conspicuous"—the appellant administrator asserting that it was at the City of Ottawa, Ontario, where the mortgagee resided and where an original of the mortgage (which had been executed in duplicate) was found amongst his effects; the respondent claiming that it was at the registry office in Alberta where the other original of the mortgage had been deposited for registration in conformity with the requirements of the Alberta Land Titles Act.

No doubt what passed or devolved on the death of the mortgagee was the debt owing to him. Incidentally, but only as an accessory (*Lawson* v. *Commissioners of Inland Revenue*, [1896] 2 Ir. Rep. 418, 434-6), the security and the contingent right to enforce it also passed. But no estate in the Alberta land devolved because under the Land Titles Act of that province (s. 61) a mortgage or incumbrance does not "operate as a transfer of the land thereby charged." The case in this aspect is more favourable to the appellant than it would have been had the subject of devolution been a debt secured by a common law mortgage, the devolution of which would have carried with it an interest in land in Alberta.

The debt existed as a specialty debt enforceable by virtue of the mortgagor's covenant apart from, and independently of, registration of the instrument evidencing it. When the Land Titles Act by s. 25 (so much made of by the respondent) provides that instruments shall have priority according to the time of registration and that so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge as the case may be, the land or the estate or interest therein mentioned in the instrument, it is obviously only the operation and effect upon the land, or the estate or interest therein, to be transferred or charged that is dealt with. The operation and effect of an instrument as creating or evidencing a debt or other obligation independent of the security for its payment or fulfilment is not in contemplation and is in nowise affected. The mortgagee might enforce the mortgagor's covenant although the mortgage were never registered; and, if it should be registered, proof of that fact would be wholly irrelevant in an action on the covenant

in which the plaintiff's claim would be established by production of the duplicate original in his possession.

The duly appointed personal representative of the mortgagee in the jurisdiction where the debt has its legal locality is the person entitled to collect it and to enforce payment of it from the debtor and, upon his default, by resorting to the securities taken to provide against that event. That, for purposes of identification or to obtain a status in the local courts in order to enforce the security, he might require to obtain ancillary probate or administration from the State or province in which the security was situate does not affect the situs of the debt itself or his right to collect it. *Payne* v. *The King*, [1902] A.C. 552, 560.

If for an entire single debt security were taken by a mortgage (containing a covenant for its payment) upon two parcels of real estate, one in Quebec and the other in Alberta, the mortgagee residing in Ontario and there holding an original of the instrument containing the covenant, could it be successfully or even plausibly contended that the situs of the specialty debt was other than Ontario? Would it be in Quebec, or would it be in Alberta? Anything that could be said for a situs in Alberta would obviously have equal force as an argument in favour of the situs being in Quebec. There is only one debt and it can have but one legal locality, and that, according to English law, must be where the specialty is "conspicuous." Highly artificial as this rule of law undoubtedly is, it is too long and too firmly established to permit of question. If the bond or covenant for payment were contained in one document and the mortgage security in another, as was formerly customary, the fact that a duplicate of the latter was deposited for the purpose of registration where the land charged was situate could not affect the situs of the debt evidenced by the bond or covenant for payment, which would depend solely upon where that document was found. The fact that the two instruments, the bond or covenant and the mortgage, are now for reasons of convenience or economy usually embodied in a single document does not alter their distinct legal characteristics. The duplicate original of the debtors' covenant in the Alberta registry office at the time of the mortgagee's death was there only because the parties had incorporated it in the mortgage instead of executing a separate bond. The instrument held by

CAN.

S. C.

TORONTO GENERAL TRUSTS CO. v. THE KING.

Anglin, J.

the creditor as evidence of the debt due him and upon which he would undoubtedly have proceeded in any action brought to enforce the debtor's personal obligation was the document held by him in Ottawa. There is nothing in the record to shew that the personal obligation of the debtor is not perfectly good or that the debt will not be paid at maturity on demand; and the presumption is that it will. It may never be necessary to resort to the accessory security. Its actual value to the estate may be little or nothing.

It does not appear from the reports of *Hope's* case, [1891] A.C. 476; 12 N.S.W.L.R. 220, whether a duplicate original mortgage had been similarly deposited in the registry office in New South Wales. I rather think that must have been the case. Hogg on Australian Torrens Titles, pp. 104 (s. 36), 88, col. 1, line 3, 761. Although not so stated in the report, I have little doubt that there was also a duplicate original mortgage deposited in the Michigan registry office in the case of *Treasurer of Ontario* v. *Pattin*, 22 O.L.R. 184. Such a fact would not have escaped the attention of the learned counsel and judges concerned in those two cases. In each the situs of the specialty debt was held to be at the residence of the mortgagee amongst whose effects the instrument evidencing it was found.

The decision in *Estate of Sir William Clark*, 28 Vict. L.R. 447, is instructive and closely in point.

Ivey v. *Commissioners of Taxation*, 3 N.S.W. St. R. 184, much relied on by the respondent, is distinguishable in that the question there at issue was not the situs of property, but the source of an income. In so far as the court may have held that the effect of registration was to give to the specialty debt a situs at the place of registration of the mortgage, regardless of the place where the instrument creating the specialty should afterwards be found, it would seem to have ignored or disregarded the decision in *Hope's* case, *supra*. No doubt for the purpose of making title to the land the duplicate original on deposit in the registry office, or rather the copy thereof made in the register itself, may be deemed the sole original and the copy in the mortgagee's possession "really a duplicate of that which forms the effective instrument." *Ivey's* case, *supra*. But that is not the case where the question is one not of title to the land charged

as security but of the existence and nature of the debt secured. See *Re McLachlin*, 14 W.N. (N.S.W.), 45.

The question before us is not as to the constitutional power of the Province of Alberta to provide for the taxation of securities held by decedents, wherever domiciled, upon real property in that province, or to impose fees, based on the amounts of the debts secured, for the granting of letters probate or of administration sought to enable foreign executors or administrators to realize by enforcing securities on Alberta real estate. Within the restrictions imposed by s. 92 (2) of the B.N.A. Act, I should not question the power of the province to impose such taxation. The duty demanded in the case at bar, however, is not based on the value of the security in Alberta either intrinsic or to the estate. It is based upon the whole mortgage debt regardless of the value of the security, and would be the same if the value of the personal obligation of the debtor were unquestionable or if the mortgagee had also held other security of indubitable value on property situate elsewhere. The claim made is that by virtue of the provisions of the Alberta Land Titles Act, and registration pursuant thereto the situs of the mortgage debt itself is in Alberta and that that debt is therefore subject to duty under s. 7 of the Alberta Succession Duties Act as "property . . . . situate with the province."

For the reasons above stated I am, with respect, of the opinion, that it was not so situate. I would therefore allow this appeal and answer the question proposed by the special case in the negative. *Appeal dismissed.*

CLARK v. HEPWORTH.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

PRINCIPAL AND AGENT (§ III—30)—*Sale of land—Fraud—Liability of agent—Concealment—Rescission.*]—Appeal from the judgment of the Supreme Court of Alberta, 34 D.L.R. 177, Affirmed.

Ford, K.C., for appellant; *Hogg*, K.C., for respondent Mitchener; *Lafleur*, K.C., and *Payne*, for respondent Hepworth.

The plaintiff seeks rescission of a contract for the purchase

CAN.
S. C.

of a farm in the Province of Alberta and claims damages because of alleged misrepresentations by the vendor's agents as to its value and relative situation and because, while professing to act in a confidential relation to the plaintiff, they either actively misrepresented, or at least wilfully and with fraudulent intent concealed their relations with the vendor.

The trial judge found in the plaintiff's favour on the ground of concealment of the agency, granted rescission of the sale and ordered repayment, by the vendor and the firm of real estate agents, of the moneys paid on account of the purchase price. This judgment was reversed by the Appellate Division of the Supreme Court of Alberta and an appeal to the Supreme Court of Canada by the plaintiff was dismissed, Idington, J., dissenting.

Appeal dismissed.

CHALMERS v. MACHRAY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

[See annotation 4 D.L.R. 531.]

BROKERS (§ II—B1—10)—*Sale of real estate—Partial payment of price—Receipt by agent—Variation of terms.*]—Appeal from the judgment of the Manitoba Court of Appeal, 26 D.L.R. 529, 26 Man. L.R. 105. Affirmed.

G. A. Elliott, K.C., for appellant.

E. K. Williams, for respondents.

One Campbell employed the plaintiff to sell his hotel for $50,000 retaining for himself any excess over that amount. He sold for $52,500 and $22,000 was paid to defendants, solicitors for Campbell, who used it to pay rent due and incumbrances on the property. Plaintiff obtained judgment against Campbell for the $2,500 due him under the agreement but not being able to collect it he brought action against the defendants alleging that they had notice of his claim before paying out the money. The Court of Appeal held that plaintiff could not maintain this action.

After hearing counsel for both parties the Supreme Court reserved judgment and on a later day dismissed the appeal with costs.

Appeal dismissed.

FAFARD v. THE CITY OF QUEBEC.

CAN. S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 9, 1917.

MUNICIPAL CORPORATIONS (§ II G—222)—*Highways—Maintenance of—Protection wall—Automobile traffic—Negligence—Liability for damages.*]—Appeal from the judgment of the Quebec King's Bench, 35 D.L.R. 661, 26 Que. K.B. 139. Affirmed.

Bernier, K.C., and *Dion*, for appellant; *Taschereau*, K.C., and *Morin*, for respondent.

The appellant was being driven down a very steep hill in the city of Quebec, in a hired automobile. As it was raining, the pavement was slippery. The hill has always been considered as a very dangerous one: half way down there is a stiff turn to the right and the highway is along the edge of a precipice of over twenty feet high. The respondent had erected a prop wall up to the road surface and had put on that wall a wooden fence. The chauffeur, noticing that the wheels of his car were slipping, put on the brakes, but with no result, the automobile ascended the curb stone and the sidewalk, broke through the fence and fell down the incline. The appellant, seriously wounded, claimed from the respondent damages to the amount of $2,500 on the grounds that the accident had been caused by the bad condition of the hill and the want of proper protection for the public.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs. Idington and Anglin, JJ., dissenting. *Appeal dismissed.*

REX v. WESTERN WINE & LIQUOR Co.

ALTA. S. C.

Alberta Supreme Court, Harvey, C.J. December 10, 1917.

INTOXICATING LIQUORS (§ III A—55)—*Possession of liquor for purpose of exportation—Enabling statute—Ultra vires.*]—Motion to quash conviction for violation of Liquor Act.

J. McKinley Cameron, for Western Wine & Liquor Co.; *A. L. Smith*, for Wootten; *H. H. Parlee*, K.C., for the Crown.

HARVEY, C.J.:—The defendants were convicted of having liquor in their possession contrary to the provisions of s. 24 of the Liquor Act.

ALTA.

S. C.

The evidence shews that they had it in their warehouses and it is not denied and is indeed sworn by the Crown witnesses that it was there, not for sale or consumption in the province, but for the purpose of *bonâ fide* export out of the province.

The having of liquor for such purpose was expressly authorized by the statute as passed in 1916 (s. 27), but by amendment of last session the provision authorizing it was repealed. The magistrate apparently had pressed upon him the argument of *ultra vires* for, in his reasons for his decision, he deals only with this argument.

At present, I am by no means satisfied that the view expressed by him is not the correct one, but it is argued before me that the act of the defendants is not prohibited by the statute. As I have stated, the express authority for this act is gone, but I am of the opinion that implied authority is given and it is only the keeping of liquor that is not authorized by the statute which is prohibited. S. 72 states that the purpose of the statute is only to prohibit transactions between parties in the province and to restrict the consumption of liquor in the province and not to affect transactions between persons in the province and those outside and that the provisions of the statute are to be so construed. It is clear that the act of the defendants does not fall within what the statute is intended to prohibit but is something done for a purpose which the statute is not intended to prohibit. The rule of construction laid down by this section makes it necessary to qualify the absolute prohibition so asnot to apply to this case.

(See *Att'y-Gen'l of Man.* v. *Man. License Holders*, [1902] A.C. 73, 80.)

The convictions will therefore be quashed.

Convictions quashed.

SASK.

S. C.

CANADIAN BANK OF COMMERCE v. La BRASCH.

Saskatchewan Supreme Court, Newlands, McKay and Elwood, JJ. November 24, 1917.

PARTIES (§ I A—40)—*Interest of assignor as party—Lien note—Endorsement—Equitable assignment.*]—Appeal by defendant in an action on a lien note.

G. A. Cruise, for appellant; *C. M. Johnston*, for respondent.

NEWLANDS, J.:—This was an action on a lien note. The

SASK.

S. C.

trial judge found that the note was assigned to plaintiffs by endorsement, and that there was no proper assignment in writing until after action brought. He held that the endorsement was a good equitable assignment of a chose in action. There is no question but that the judge was right in this finding. The defendant admitted on the trial that plaintiffs demanded payment of the same before action, so he had notice of the assignment.

The original assignor parted with all his interest in the lien note to the plaintiffs' assignor by equitable assignment. The intermediate assignor, who assigned to plaintiffs, appeared at the trial and stated that he assigned the same to the plaintiffs for value and claimed no interest in the proceeds of the same, and a proper legal assignment was made to plaintiffs before the trial. This brings the case under the decision of the House of Lords in *Wm. Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454. At p. 462 Lord Macnaghten says:—

> Strictly speaking Kramrisch & Co., or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordship's bar the Dunlops disclaimed any wish to have him present, and in both courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts.

The House of Lords in this case allowed the appeal, and confirmed the trial judge's judgment in favour of plaintiffs without adding the assignor as a party.

As the trial judge has found against the defendant on the facts of the case, I think that the above decision is authority for confirming his judgment in favour of plaintiffs, without adding the original or intermediate assignor as parties.

The appeal should be dismissed with costs.

McKAY, J., concurred.

ELWOOD, J.:—The only object in adding the assignor is to have all the parties who may be interested before the court. In the case at bar an assignment was produced at the trial and therefore there was no object in adding the assignor as a party.

The appeal should be dismissed with costs.

Appeal dismissed.

CAN.

S. C.

MIGNAULT v. DESJARDINS.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. October 9, 1917.

PRINCIPAL AND AGENT (§ II C—20)—*Real estate agent—Option—Fraud.*]—Appeal from a decision of the Court of Review at Montreal, 23 Rev. Leg. 85, affirming the judgment of the trial court and maintaining the plaintiff's action with costs.

On September 11, 1912, the appellants wrote one Rollit a letter in which they agreed to buy the property situate in Montreal and known as the Molson property, at the price of $425,000, payable $75,000 at the passing of the deed, $50,000 in 1 year, and the balance in 5 years. Thereupon, Rollit secured a sub-option on that property from the Colonial Real Estate Company, which had an option to purchase from the owners, the Grey Nuns, the price to be paid being $395,000. Rollit took such option "on behalf of his client," but it has been found by both courts below, as a fact, that in doing so, he was not acting as the agent of the appellants. Subsequently, the appellant Morin became aware of the fact that the respondent was Rollit's undisclosed principal but said nothing at the time. The condit ons of the option held by Rollit were altered, with respect to the terms of payment, to suit the appellants; and to bind the option, Rollit paid the Colonial Real Estate Co. $5,000, which sum he had received from the appellants. The appellants were notified in due course that Rollit and his principal were prepared to sell the property and make good the title in accordance with the terms of appellants' letter, but the appellants refused to carry out the bargain. The result was that the appellants bought the property direct from the Grey Nuns for the price at which the latter agreed to sell to Rollit; and the respondent lost the benefit of his option, *i.e.*, $29,824, for the recovery of which he took action against the appellants.

The judgment of the trial judge, Panneton, J., maintaining the action of the respondent, was affirmed by the Court of Review; and, on appeal to the Supreme Court of Canada, the judgment was also affirmed by a majority of the court.

Appeal dismissed.

Louis Boyer, K.C., for appellants; *Lafleur*, K.C. and *G. Barclay*, for respondent.

CANADA NATIONAL FIRE INSURANCE Co. v. HUTCHINGS. GREAT WEST PERMANENT LOAN Co. v. HUTCHINGS.

IMP.

P. C.

Judicial Committee of the Privy Council, Lord Parker of Waddington, Lord Sumner and Sir Walter Phillimore, Bart. January 31, 1918.

COMPANIES (§ V E—185)—TRANSFER OF SHARES—VETO—ULTRA VIRES.

A company constituted under a special Act incorporating Part II. of the Companies Act (c. 79 R.S.C. 1906) has no power to make a by-law restricting or empowering its directors to veto the transfer of its shares; a by-law providing that transfers shall be subject to the approval of the directors means that they are to be satisfied as to matters within their power upon which they have to exercise a judgment.

[See annotation 36 D.L.R. 107.]

Statement.

APPEAL from Manitoba Court of Appeal, 33 D.L.R. 752. Affirmed.

The judgment of the Board was delivered by

Sir Walter Phillimore.

SIR WALTER PHILLIMORE:—The first-mentioned action is brought by transferor and transferee of a parcel of fully paid-up shares in the company against the Insurance Company; the second action is also a joint action by two transferors and the transferee of two parcels of fully paid-up shares in the company against the Loan Company.

It is the same transferee in both cases, and the same point; that is, whether the directors of either company have an absolute power of refusing to approve and register transfers of fully paid-up shares regular in form and regularly presented to them.

It appears that in the first instance application was made upon motion for prerogative writs of mandamus; but that upon some question arising as to the propriety of this form of remedy, the applications for these writs were by consent converted into actions, statements of claim being delivered setting forth the facts, and claiming as relief a mandamus or an order in the nature of a mandamus commanding either defendant company to register the transferee as the owner of the shares in question.

Some formal evidence was given; but, again by consent, the actions were heard upon motion for judgment without further pleadings, it being agreed that the matter was one entirely of law.

Both companies were constituted by special Acts incorporating Part II. of the Companies Act, 1906 (c. 79 of the Dominion Statutes).

Except as incorporating the General Act, the special Acts are of no importance in this case.

IMP.

P. C.

CANADA NATIONAL FIRE INS CO. v. HUTCHINGS.

Sir Walter Phillimore.

The material clauses of the general Act are as follows:—

BY-LAWS.

132. The directors may from time to time make by-laws, not contrary to law or to the special Act or to this part, for—

(*a.*) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock;

(*b.*) The declaration and payment of dividends;

(*c.*) The number of the directors, their term of service, the amount of their stock qualification, and their remuneration, if any;

(*d.*) The appointment, functions, duties, and removal of all agents, officers, and servants of the company, the security to be given by them to the company, and their remuneration;

(*e.*) The time and place for the holding of the annual meeting of the company, the calling of meetings (regular and special) of the Board of Directors and of the company, the quorum at meetings of the directors and of the company, the requirements as to proxies, and the procedure in all things at such meetings;

(*f.*) The imposition and recovery of all penalties and forfeitures admitting of regulation by by-laws; and

(*g.*) The conduct in all other particulars of the affairs of the company.

133. The directors may from time to time repeal, amend, or re-enact any such by-law, provided that every such by-law, repeal, amendment, or re-enactment, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat shall from the time of such default cease to have force or effect.

CAPITAL STOCK AND CALLS THEREON.

138. The stock of the company shall be personal estate, and shall be transferable in such manner only and subject to such conditions and restrictions as are prescribed by this part or by the special Act, or the by-laws of the company.

143. No share shall be transferable until all previous calls thereon have been fully paid, or until it is declared forfeited for non-payment of a call or calls thereon.

BOOKS OF THE COMPANY.

144. The company shall cause a book or books to be kept by the secretary, or by some other officer specially charged with that duty, wherein shall be kept recorded—

(*e.*) All transfers of stock in their order as presented to the company for entry, with the date and other particulars of each transfer, and the date of the entry thereof.

145. The directors may allow, or refuse to allow, the entry in any such book of any transfer of stock whereof the whole amount has not been paid.

146. No transfer of stock, unless made by sale under execution, or under the decree, order, or judgment of a court of competent jurisdiction, shall be valid for any purpose whatsoever, until entry thereof has been duly made in such book or books . . .

At the time of the presentation of the transfers for registra-

tion, the by-law of the Insurance Company relating to the transfer of shares was in the following terms:

ARTICLE VII.

(*a.*) Shares in the capital stock of the company shall be transferable only on the books of the company by the owner in person, or by attorney, on surrender of the certificates of stock properly endorsed.

(*b*) Transfers and allotment of shares shall not be valid unless approved by the Board of Directors.

And the by-law of the Loan Company was in the following terms:

ARTICLE III.

This stock shall be issued subject to the following conditions.—

(*a.*) That the holder of this stock will be paid the semi-annual dividends that may be declared from time to time by the Board of Directors.

(*b.*) Said dividends shall be payable on the 1st day of January and July of each year.

(*c.*) That said stock shall be non-withdrawable, but may be sold, and such transfers must be recorded in the books of the company.

Assignment of stock shall not be valid unless approved and endorsed by the Board of Directors and accompanied by a transfer fee of $1. The assignment shall be accompanied by the stock certificate.

These by-laws had been confirmed by the shareholders in their respective companies, and were in force when the transfers were presented for registration.

After the receipt of the transfers, a meeting of the directors of each of the companies was held, and the by-laws were then amended by the addition in each case of the following words:—

For greater certainty, but not so as to restrict anything herein contained, or and in addition thereto, the directors may refuse to register any transfer of stock heretofore or hereafter made upon which the company has a lien; and the directors, without assigning any reason, may refuse to register any transfer of stock heretofore or hereafter made, whether fully paid-up stock or not, to a person of whom they do not approve.

These amendments, however, were never brought before or confirmed by the shareholders of either of the companies; and counsel for the appellants admitted that he could not place reliance upon them.

Upon the actions coming on for hearing the judge of first instance (Galt, J., 33 D.L.R. 750), decided in favour of the plaintiffs, and ordered the defendant companies to register the transfers, make the necessary entries, and issue the proper certificates. And upon appeal the Court of Appeal (Howell, C.J.A., and Perdue and Cameron, JJ.A.) confirmed these decisions (33 D.L.R. 752).

The question now raised upon appeal from the Court of Appeal

IMP.

P. C.

CANADA NATIONAL FIRE INS CO. v. HUTCHINGS.

Sir Walter Phillimore.

is one of some importance, in the solution of which their Lordships have been greatly assisted by counsel.

There are two branches of it: (1) Did the by-law in the case of either company warrant the directors in their refusal? (2) If so, was the by-law valid?

At the time that the cases were before the courts in Manitoba the amendments to the by-laws had not come up before the shareholders for confirmation, and the courts below appear to have proceeded upon the footing that they were provisionally in force.

If this were so still, there would only be one matter for enquiry, were the by-laws valid?

But now that the amendments have not been confirmed, and after the admission of counsel for the appellants, both matters have to be considered.

Upon the whole it will be best to give first consideration to the point upon which the courts below decided, the validity of a by-law supposing it to warrant the directors in absolutely refusing to register a transfer of fully paid-up shares, regular in form and regularly presented.

In the argument for the appellants stress was laid upon the line of English decisions upon cases of this nature arising under the Joint-Stock Companies Acts.

There is, however, for the present purpose no analogy between companies in the United Kingdom which are formed by contract, whether it be under deed of settlement or under memorandum and articles of association to which the registrar of joint-stock companies necessarily assents if the documents are regular in form, and Canadian companies which are formed under the Canadian Companies Act, either by letters patent or by special Act.

A nearer resemblance would be found in the Companies Clauses Act, 1845.

But it is wiser to look at the Canadian legislation as complete in itself and unaffected by British jurisprudence.

The Canadian companies, at any rate those created under Part II. of the general Act by special Act, are pure creatures of statute, and their powers and duties are to be found in the two Acts.

There being nothing material in the special Act, their Lord-

ships look to the general Act, and especially to ss. 132 and 138.

The latter section provides that stock shall be personal estate and transferable.

No doubt the stock is transferable "in such manner only, and subject to such restrictions and conditions as are prescribed by this part" (of the Act) "or by the special Act or by the by-laws of the company" (s. 138).

This provision, however, is not to be construed as empowering the company to make restrictive by-laws.

The power to make by-laws is in s. 132, and it is confined in this matter to by-laws regulating " . . . the transfer of stock."

Regulation does not mean restriction, still less subjection, to an arbitrary veto.

The words in s. 138 should be construed "*reddendo singula singulis*," and so construed means subject to such restrictions as are imposed by the general or the special Act and in such manner as prescribed by the by-laws.

The word "condition" is perhaps ambiguous. If the condition is to effect substantive limitation, it would go with "restriction"; if formal, with "manner."

That a power of regulation does not extend to restriction was well stated by MacMahon, J., in *Re Imperial Starch Co.* (10 O.L.R. 22, at 25), in language which was adopted in a later case, and which their Lordships would repeat:

> The statute gives the company power to pass by-laws "regulating the transfer" of stock; that is; how and in what manner and with what formalities it is to be transferred. But the Imperial Starch Co. has passed a by-law virtually empowering the directors to prohibit the transfer of stock; that is, unless the directors approve of the transfer it cannot be made in the books of the company. This, in effect, would prevent a holder of fully paid-up shares in the company from selling and realising on his stock because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate.

And they are of opinion that the Court of Appeal for Ontario came to the right conclusion in *Re Good and Jacob Y. Shantz, Son, and Co.*, 23 O.L.R. 544.

The reasoning of the judges who were in the majority in that case is substantially the same as that of MacMahon, J., in *Re Imperial Starch Co.*, and it is in that case that his words are adopted by Garrow, J.A.

IMP.

P. C.

CANADA NATIONAL FIRE INS CO. v. HUTCHINGS.

Sir Walter Phillimore.

It is to be observed that Jacob Y. Shantz, Son, and Co. was a company formed under letters patent by virtue of Part I. of the Companies Act, and not by special Act in accordance with Part II. But so far as there is any difference, the argument against assuming that a company formed under the Companies Act has any other powers than those expressly given to it is stronger in the case of a company incorporated by special Act than in the case of a company incorporated by letters patent.

The conclusion is that a by-law purporting to impose such a restriction upon transfer as would be imposed if the directors had a power of veto would be *ultra vires;* and further that it would interfere with that transferability of stock which is an ordinary incident to personal property, and which is provided for in the general Act.

This is the conclusion at which correctly, in their Lordships opinion, the courts of Manitoba have arrived.

If, therefore, the by-laws of these two companies purport to give such a power of veto they cannot stand.

This is the matter of general interest, to which alone the courts below addressed themselves, and which has accordingly been dealt with by their Lordships in the first instance.

But now that it is admitted that the amendments are not to be regarded, it may be that the by-laws upon a true construction do not purport to impose any such restriction.

There is a slight difference in the language as between the two companies, but it is not material.

Both require transfers to be approved, and to be recorded in the books of the company.

This leaves to the directors certain matters upon which they have to exercise a judgment.

They are by s. 143 to refuse to register if a call is unpaid. They have under s. 145 a discretion in the case of stock not fully paid up.

They are entitled to take precautions against forged transfers. If the shareholder on the books is dead or has become bankrupt, they have to see that the title has duly devolved upon the transferor before they register his transfer.

The usual form of assignment in these companies is by transfer endorsed on the certificate. The directors may require a transfer

in this form, or satisfactory explanation and indemnity in case of a departure from it.

They could refuse to register a transfer to an alien enemy. They may, and in the case of one of the two companies they do, require a reasonable fee.

On the whole, the directors have the powers and duties conferred by ss. 143 and 145, and they have to see to matters of title and conveyance.

A by-law requiring their approval is properly construed as meaning that they are to be satisfied in respect of matters which are within their province.

So construed, as it should be, *ut res magis valeat quam pereat*, it is a valid by-law; but one which gives no warrant for the imposition of a veto.

On both grounds, therefore, because the action of the two companies in refusing to register these transfers was not supported by their by-laws, and because if it were so supported the by-laws would be invalid, this appeal fails.

It was pressed upon their Lordships that there are classes of companies in which it is highly important that directors should have such a power of veto; and this consideration had weight with the two judges who formed the minority in *Good's* case. It may well be so.

There are decided cases in the English courts which shew that such a power may be lawfully reserved on the occasion of the constitution of the company; and a sufficient number of such cases to shew that the power has been found convenient in use.

But if it is to be introduced under the Canadian legislature, it must be in the letters patent or in the Special Act.

Their Lordships will therefore humbly recommend to His Majesty that these consolidated appeals should be dismissed with costs. *Appeals dismissed.*

PETERS v. CHARLOT.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. February 14, 1918.

ARREST (§ II B—21)—WRIT OF CAPIAS—MONEY CLAIM—ARREST OF DEBTORS ACT—INVALIDITY OF AFFIDAVIT.

A defendant arrested under a writ of *capias* for a money claim who makes a deposit in lieu of bail and obtains his release under the Arrest of Debtors Act (Can. Stats. N.B. 1903, c. 130, s. 5) is entitled to a return of the deposit upon an order setting aside the arrest because of the invalidity of the affidavit to hold to bail.

[*MacAuley* v. *Jacobson* (1906), 37 N.B.R. 537, distinguished.]

N. B.

S. C.

PETERS v. CHARLOT.

Statement.

The facts of the case are as follows:—

The defendant was arrested under a writ of *capias*, endorsed for a money claim. He made a deposit in lieu of bail and obtained his release. He subsequently made application for an order setting aside the arrest, and for the return of the deposit, on the ground that the affidavit to hold to bail did not disclose any ground of action. Chandler, J., found that the affidavit was a nullity, as contended, and made an order setting aside the arrest, but refused to order the sheriff to repay the money deposited. This appeal was taken from that order, it being sought to have an order made for the repayment of money deposited.

A. T. LeBlanc, for appellant, no one *contra*.

The judgment of the court was delivered by

White, J.

WHITE, J.:—This is an appeal by the defendant from an order made by Chandler, J., granting the defendant's application to set aside the arrest, but refusing his application that an order be made directing the sheriff to return certain moneys which had been deposited with the sheriff under the provisions of c. 130, s. 5, Con. Stats. 1903.

The judge, in declining to make the order for the return of the money, delivered a written judgment, from which I quote. He said:—

> I am unable to find in this section (s. 5 referred to above) anything which would authorize me to deal with this sum of money until the termination of the action, and under the authority of *MacAuley* v. *Jacobson* (1906), 37 N.B.R. 537, it seems to me that this money, which was paid voluntarily by the defendant, must remain in the hands of the sheriff until the termination of the action.

Inasmuch as the facts are that the defendant was arrested on November 28, 1917, under a writ of *capias* issued as the first process in the cause, indorsed for a debt certain, and the defendant made the deposit with the sheriff admittedly under the provisions of s. 5, c. 130 of the Con. Stats. 1903, it seems to us that the judge erred in refusing the order to return the money, as asked for by the defendant. The statute provides that where a person is arrested under a writ of *capias* such as was issued here, the defendant, if he wishes to be released from custody, may either give bail to the sheriff or make a deposit as was made in this case. Had he given bail to the sheriff it is not open to question, I think, under the practice of the court and under the authorities, that if the

arrest were set aside on the ground that the affidavit disclosed no distinct cause of action, as was the case here, the order would have been made for the delivering up of the bail bond to be cancelled. When the statute affords, as it does, an alternative method to the giving of the bail bond, and the defendant adopts such alternative and pays the money into court, we think the same reasons which would require the bail bond to be delivered up require that an order should be made for the return of the money. The case is very distinguishable from that of *MacAuley* v. *Jacobson*, referred to by the judge, because, there, no question whatever was involved based upon the invalidity of the affidavit to hold to bail or the insufficiency of the writ. The sole question there was whether, when a defendant had been arrested and had obtained his release from custody by the payment of money to the sheriff, pursuant to the provisions of s. 5, referred to, he could subsequently obtain an order for the return of the money so paid upon rendering himself into custody, or giving bail. The court held that could not be done, in view of the requirement of the Act, that the money thus paid should be held to abide the result of the suit. But the court in that case was dealing with a valid arrest made under, and in compliance with, the statute, whereas here the arrest was invalid and has been set aside. The statute not only provides that when money is deposited it shall be retained by the sheriff as stated, but likewise provides that when bail is given the bond shall be assigned to the plaintiff upon request, and that the plaintiff may in case of breach sue upon it. But it is clear that in both cases the provisions of the statute are based upon, or made applicable to, the case of a valid arrest; and if the arrest itself is bad, and is set aside, these provisions which are founded upon it, we think, fall with it.

Perhaps I ought to refer to an English case which is mentioned in Archbold's Practice: *Green* v. *Glassbrook*, 1 Bing. N.C. 516, 131 E.R. 1216, where it was held that money paid into court in lieu of bail, but under protest against the sufficiency of the affidavit to hold to bail, will not be paid out of court to the defendant on the ground of the insufficiency of the affidavit. That case was decided upon the statute of 7 and 8 Geo. IV. c. 71, s. 2, which expressly provides that money may be paid into court upon the arrest of a defendant, instead of putting in special bail, and the

N. B.

S. C.

PETERS v. CHARLOT.

White, J.

court there held that inasmuch as unquestionably, the putting in of special bail would have waived any defect in the affidavit, the adopting by the defendant of a remedy given in lieu of special bail also had the effect of a waiver. That statute was very different from our own, and we think, therefore, cannot affect this case.

We think the order of the judge is wrong, insofar as it refused the application to order the repayment of the money, and that an order should be made to the sheriff to repay the money to the defendant upon request. *Judgment accordingly.*

ALTA.

S. C.

BIJOU MOTOR PARLORS v. KEEL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. March 7, 1918.

AUTOMOBILES (§ III B—180)—BORROWER—NEGLIGENCE—DAMAGES.

A borrower is not responsible for ordinary wear and tear, but is for negligence; receiving property in good condition and returning it in a damaged condition is *primâ facie* evidence of negligence.

[See annotation 39 D.L.R. 1.]

Statement.

APPEAL from the judgment of Ives, J. Affirmed.

J. R. Palmer, for appellant; *W. S. Gray*, for respondent.

The judgment of the court was delivered by

Hyndman, J.

HYNDMAN, J.:—This is an appeal from the judgment of Ives, J., who awarded damages in favour of the plaintiffs. The facts shortly are as follows: On the afternoon of July 29, 1917, the appellant was driving his own motor car on the way to a ceremony at the Jewish cemetery at Lethbridge. Before going very far he found that his motor was not running properly, so he called at the garage of the respondents in order to have the trouble remedied. After looking over the motor the plaintiffs' mechanic stated that it would take some considerable time to overcome the trouble which would interfere with the appellant's attendance at the ceremony. In consequence the respondents proposed that the motor be left with them and that the appellant take, without charge, one of their motors. After being shewn how to operate the car the appellant drove off with the latter vehicle, several members of his family and two other men. He soon caught up with two other cars going on the same journey forming a small procession.

The three cars proceeded along 8th Ave., and at the corner or near the intersection of 8th Ave. and 9th St. a collision occurred

between the motor and a street car which was running in a westerly direction along 9th St., and as a result the motor car was very badly damaged, and some of the occupants sustained serious injuries.

There was a good deal of evidence at the trial as to how the accident happened and as to the management of the motor and the conduct of the defendant, and the trial judge found as a fact that the defendant was guilty of negligence. In my opinion, there was ample evidence upon which the trial judge might arrive at this conclusion and, therefore, his finding of fact should not be disturbed.

Whether or not, notwithstanding the negligence of the defendant, the motorman on the street car might have avoided the accident, I do not think it material to the action as between the plaintiff and defendant.

It is clear that the defendant was the bailee or hirer from the plaintiff without reward except it be that the consideration for the loan of the car was the repair work by the plaintiff which was to be paid for and which amounted to $19. It is clear that the use of the car was not to be paid for by the appellant otherwise than as above.

The general rule in the case of a hiring is that the hirer is to take reasonable care of the goods hired and is accountable for ordinary neglect. Beal on Bailment, 218, 219. Ordinary neglect has been defined as the want of that diligence which the generality of mankind use in their own concerns, that is, of ordinary care. Beal 17.

Where property is received in good and returned in bad condition, or not returned at all, the bailer is presumed to have acted negligently. The burden is on the bailee to shew that he has exercised such a degree of care as the bailment called for, where the subject matter was in good condition when placed in the hands of the bailee and was in a damaged condition when returned. (See 5 Cyc., 217), *Kearney* v. *London Brighton R. Co.*, L.R. 5 Q.B. 411, 415.

In ordinary circumstances, good faith requires that if the property is returned in a damaged condition, some account shall be given of the time, place, and manner of occurrence of the injury. If, then, the bailee returns the property in a damaged condition,

ALTA.

S. C.

BIJOU MOTOR PARLORS v. KEEL.

Hyndman, J.

and fails to give any account of the matter, the law will authorize a presumption that he has been negligent; because where there is no apparent cause for the accident, and the bailee has possession, he must shew how the accident happened. Beven on Negligence, 3rd (Canadian) ed. pp. 795, 796, 797; Halsbury's Laws of Eng., vol. 1, tit.: Bailment, p. 545, sec. 1109.

In *Blakemore* v. *Bristol & Exeter R. Co.*, 8 El. & Bl. 1035, 1050; 120 E.R., 385, 391; Coleridge, J., said:—

> The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, etc.

The trial judge in the case at bar having found on the evidence that the defendant was guilty of negligence in the operation of the motor car he must be held liable for the damage which resulted therefrom.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

N. S.

S. C.

O'HENDLEY v. CAPE BRETON ELECTRIC LIGHT CO.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Harris, J. February 9, 1918.

NEW TRIAL (§ II—8) — DAMAGES — FATAL INJURIES ACT—JURY—MISDIRECTION BY TRIAL JUDGE—NEW TRIAL.

In an action for damages under the Fatal Injuries Act (R.S.N.S. 1900, c. 178) it is misdirection for the trial judge to instruct the jury to do what they consider fair and reasonable without explaining to them the limitations of the Act, and the principles upon which the amount is to be calculated.

Statement.

APPEAL by defendant from the judgment of Longley, J., in an action under the Fatal Injuries Act (Lord Campbell's Act), R.S.N.S. 1900, c. 178. New trial ordered.

H. McInnes, K.C., and *J. McNeil*, for appellant.

V. J. Paton, K.C., and *A. J. McDonnell*, for respondent.

Ritchie, E.J.

RITCHIE, E.J.:—This is an action under the Fatal Injuries Act which, for all practical purposes, is a re-enactment of Lord Campbell's Act. It is alleged that Alexander O'Hendley lost his life in consequence of the negligence of the defendant company. The action is brought by his widow for and on behalf of herself and her infant children. There is no legal proposition more firmly established than the proposition that in an action of this kind pecuniary loss only is recoverable.

N. S.

S. C.

O'HENDLEY v. CAPE BRETON ELECTRIC LIGHT CO.

Ritchie, E.J.

The trial judge said to the jury:—

What the actual amount of damages would be on account of this man's death is a matter for you to consider fairly and upon your own judgment. My own opinion is that $25,000 would be too high. You are at liberty to take any view you choose and deliver a finding for any amount that you consider fair and reasonable.

This, I think, was obvious misdirection. The jury were directed to do what they considered fair and reasonable without a word being said to them as to the limitations which the law clearly imposes in cases of this kind as to damages.

Paton, K.C., for the plaintiff laid stress upon the use of the word "actual," but that word has not the same meaning which the authorities give to the word "pecuniary," under Lord Campbell's Act. For example, a jury dealing with the words "actual amount of damages" would, I think, be very likely to say at the start, "Well, he had to be buried, that is actual money out of pocket." But the funeral expenses have been held by the courts not to be pecuniary loss within the meaning of the statute.

There appears to me to have been a mistrial. The action is a purely statutory one and, so far as I can see, it was given to the jury without any consideration of the statute. For instance, the jury were not asked to apportion the damages to the persons respectively for whose benefit the action was brought. I merely refer to this as shewing that the statute was lost sight of. The court has the power under a rule of the Judicature Act in that regard to send the case back for a new trial only on the question of damages. In many cases this is a very wholesome rule, but I think this is a case in which it ought not to be acted on because, to my mind, the charge as a whole is not satisfactory. I venture to think that the question as to what constitutes negligence in law was not properly put to the jury. I may also add that the usual, and I think necessary, instructions as to contributory negligence were not given to the jury, and nothing was said as to the proximate or efficient cause of the accident.

The court was asked to dismiss the action. I am of opinion that the case is not one for the dismissal of the action. I refrain from saying more as to this.

In my opinion the case should be sent back for a new trial.

RUSSELL, J.:—I agree.

Russell, J.

HARRIS, J.:—This is a motion for a new trial in a case tried be-

Harris, J.

N. S.

S. C.

O'HENDLEY v. CAPE BRETON ELECTRIC LIGHT CO.

Harris, J.

fore Longley, J., with a jury at Sydney. There was a verdict for $5,000 for the plaintiff in an action under the Fatal Injuries Act, c. 178 of R.S.N.S. The charge of the trial judge on the question of damages was in part as follows (see judgment of Ritchie, E.J.).

It is of course well established that under Lord Campbell's Act (of which our Fatal Injuries Act is practically a copy) the damages are to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of the life of the deceased. It is a pure question of pecuniary loss and nothing more.

The jury are not to take into consideration mental suffering, funeral expenses or cost of mourning.

What the trial judge did was to tell the jury in effect that they were at liberty to find any amount they saw fit without giving them any direction as to the principles upon which they were to make up the amount.

I think this was such misdirection as vitiates the verdict.

I do not agree with the contention that it was merely non-direction which should have been complained of at the time as pointed out by Lord Halsbury in *Nevill* v. *Fine Art, etc., Ins. Co.*, [1897] A.C. 68, at 76. There is also an absence of any satisfactory definition as to the term "negligence" in the charge and I think there should be a new trial. *New trial ordered.*

ALTA.

S. C.

BOUTRY v. NORTH BRITISH & MERCANTILE INSURANCE Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. March 7, 1918.

INSURANCE (§ III—65a)—FIRE INSURANCE POLICY—STATUTORY CONDITIONS ENDORSED—LATER STATUTORY CONDITIONS IN FORCE—LIABILITY.

A policy of fire insurance although purporting to be subject to statutory conditions endorsed thereon, where these have been replaced by later statutory conditions, is in law subject to such later conditions.

Statement.

APPEAL from the judgment of McCarthy, J. Reversed.

A. H. Clarke, K.C., for appellant; *J. W. McDonald*, for respondent.

The judgment of the court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the judgment of McCarthy, J., who gave judgment for the plaintiff for $1,000 on a policy of

fire insurance issued by the defendant company for $1,600. The property insured is described as follows:—"The two-storey frame building, etc., while occupied for dwelling purposes only, situate, etc."

The statement of defence alleged that the policy was subject to the statutory conditions of the Alberta Insurance Act and sets up in particular condition number 14 (*g*), which says, that the company shall not be liable for loss: "Where the building insured . . . becomes and remains vacant and unoccupied for a period of 30 days to the knowledge of the assured without the consent of the company in writing" and alleges a breach. The defence also sets up that the plaintiff, in his application, stated that the building was used for dwelling purposes only and that it was not so used and the policy was not in force by reason of statutory condition No. 1.

The statutory conditions are now found in the Alberta Insurance Act (c. 8 of 1915).

There are some differences in the statutory conditions as they now stand and as they stood formerly (first) under c. 16 of 1903, 1st Sess., and (then) under c. 20 of 1914.

Leave was granted at the opening of the trial to add a defence setting up statutory condition No. 3, as the condition formerly stood and alleging vacancy as a change material to the risk.

The policy was issued on August 10, 1915, and had endorsed on it what purported to be the statutory conditions introduced in 1903. These having been replaced by the statutory conditions introduced in 1914 and taking effect January 1, 1915, it was these latter conditions to which the policy was, as a matter of law, subject as decided by the Privy Council in *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96. Once it is settled that it is the statutory conditions introduced in 1914 which govern it seems to me there is little room for argument.

One of the grounds of appeal is: that the insured building was vacant at the time of the fire and had been vacant and unoccupied for 30 days prior thereto without the consent of the company in writing. This is based upon condition 14 (*g*) already quoted of the Act of 1914.

The building was in fact vacant and unoccupied for a long

ALTA.
S. C.
Beck, J.

time before the fire, without notice to or consent by the company.

On this ground alone, I think, the plaintiff must fail.

I would therefore allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

ONT.
S. C.

TAYLOR v. CITY OF GUELPH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. November 12, 1917.

TAXES (§ III D—137)—COURT OF REVISION—POWER TO REMIT—POWER OF COUNTY COURT JUDGE—ASSESSMENT ACT.

Neither the Court of Revision of a municipality nor the County Court Judge has jurisdiction under the Assessment Act (R.S.O. 1914, c. 195, sec. 118) to remit or reduce taxes which have been paid; the authority to remit is confined to taxes due.

Statement.

APPEAL by the defendant city corporation from the judgment of the Judge of the County Court of the County of Wellington, in favour of the plaintiff, in an action in that Court, tried without a jury.

The plaintiff was the liquidator of the Standard Fitting and Valve Company Limited; he sought to recover the amount he had paid to the defendant city corporation for "business tax" imposed upon the company in 1912, which was $345, less the amount said to be due for the taxes of 1913, $240; and this claim, with interest, was allowed by the Judge of the County Court.

Hugh Guthrie, K.C., S.-G. Can., for appellant corporation.

G. L. Goetz, for respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of Wellington, dated the 31st May, 1917, which was directed to be entered after the trial of the action before the Judge of that Court, sitting without a jury, on the previous 27th March.

The respondent is the liquidator of the Standard Fitting and Valve Company Limited.

The company was assessed in the year 1911 for $25,000 on its real property and for $15,000 for business, and the taxes on that assessment were paid in 1912. The company was similarly assessed in the years 1912 and 1913. These assessments were for the purpose of imposing the taxes for the years following those in

which the assessments were made, and the taxes based on the assessment of 1912 have not been paid; those based on the assessment of 1913 are not in question.

Some time before the 3rd June, 1913—the exact date does not appear and is unimportant—the respondent presented a petition addressed to the Court of Revision, in which it was stated that the company had been in liquidation since the 3rd July, 1911, when it was ordered to be wound up by the High Court of Justice; that since that date the premises in which the business of the company was carried on had been vacant except for the presence of a watchman, and for a short period of employees "finishing up unfinished stock;" and that the company had not carried on business "since the said date;" and the prayer of the petition was, that the Court should remit the taxes paid or to be paid by the petitioner "since the said date."

The decision of the Court of Revision on the petition was given on the 3rd June, 1913, and it was:—

"That the taxes for the present year on the property of the Standard Fitting and Valve Company be reduced to those on an assessment of $10,000, as the factory was not operated during the whole year of 1912 and part of 1911, and as the said company paid full taxes in 1912, but it is understood that this reduction is not to be considered a precedent."

The respondent, being dissatisfied with this decision, appealed to the Judge of the County Court.

The notice of appeal is:—

"That the appellant intends to appeal to the County Judge of the County of Wellington from the decision of the Court of Revision of the City of Guelph with respect to the petition."

The decision of the Judge was given on the 6th August, 1913, and is embodied in an order which, as far as is material to the question before us, reads as follows:—

"It is ordered that for the year 1912 the taxes for business assessment of the said Standard Fitting and Valve Company Limited, in the said City of Guelph, amounting to $345, and that one-half of the amount of taxes for business assessment for the year 1913 of the said company, in the said city (being for the first half of 1913), be and the same are hereby remitted from the amount of taxes due from the said company in the year 1913;

ONT.

S. C.

TAYLOR v. CITY OF GUELPH.

Meredith, C.J.O.

and that, should there be any balance due by the city to the liquidator, the said balance be paid by the city to the liquidator."

These proceedings were taken under the provisions of sec.112 of the Assessment Act, 4 Edw. VII. ch. 23, as amended by 10 Edw. VII. ch. 88, sec. 20, which provides that:—

"112.—(1) The Court of Revision shall, at any time during the year for which the assessment has been made or before the 1st day of July in the following year and with or without notice, receive and decide upon the petition from any person assessed for a tenement which has remained vacant during more than three months in the year for which the assessment has been made, or from any person who declares himself, from sickness or extreme poverty unable to pay the taxes, or who, by reason of any gross and manifest error in the roll, has been over-charged, or whose land has been assessed under section 51; or who has been assessed for business, but has not carried on business for the whole year, or who has been assessed for income from personal earnings and has not earned such income or has died during the year for which the assessment on such income was made; and the Court of Revision may (subject to the provisions of any by-law in this behalf) remit or reduce the taxes due by any such person, or reject the petition; and the council may from time to time make such by-laws, and repeal or amend the same.

"(2) An appeal may be had by any such person or by the municipality from any decision of the Court of Revision under sub-section 1 of this section."*

It is contended by counsel for the respondent, and the learned Judge held, that the effect of the order of the 6th August, 1913, was to remit the business taxes for 1912, and for the first half of 1913, and to leave the decision of the Court of Revision as to the reduction of the taxes for 1913, which was to reduce them to those of the assessment for 1913 on an assessment of $10,000, to stand, with the result that the appellant would have to repay the whole of the business tax for 1912 and half of the business tax for 1913, and would be required to reduce the taxes for 1913 to those on an assessment of $10,000.

* Section 118 of the present Assessment Act, R.S.O. 1914, ch. 195, is substantially the same as the section quoted.

ONT.

S. C.

TAYLOR v. CITY OF GUELPH.

Meredith, C.J.O.

I am unable so to construe the order. In determining the meaning and effect of it, no statement by the learned Judge as to what he meant by it can be looked at; but, so long as the order stands, it must be construed as any other document is to be construed, by giving effect to it according to the meaning of the words in which it is expressed; and, so construing it, the whole of the relief which he gave to the respondent was to relieve him from the business tax of 1912 and of the first half of 1913.

The appeal was from the decision of the Court of Revision, and the whole matter of the petition was open upon the appeal, and was to be dealt with by the Judge.

The decision of the Judge on the appeal, as to matters with which he had authority under sec. 112 to deal, was, no doubt, final and conclusive; but, in so far as he exceeded his jurisdiction, his order is nugatory.

In my opinion, neither the Court of Revision nor the County Court Judge on the appeal from it had jurisdiction to remit or reduce taxes which had been paid. The authority to remit or reduce taxes is confined to "taxes due," and the taxes for 1912 had been paid, and were therefore "not due" by the respondent.

Section 112 is one of a group of sections dealing with the collection of taxes and prescribing the powers and duties of collectors of taxes, and the object of sec. 112 was to enable persons who were liable for and bound to pay taxes on the collectors' roll of the year, to be released from them in whole or in part in the cases which the section mentions; but not to get relief in respect of taxes for previous years, or, in my opinion, of taxes that had been paid.

What has to be taken into consideration is, where the assessment is in respect of real property, the fact that the premises have been vacant for three months during the year for which the assessment is made; and, where it is in respect of business, the fact that the business has not been carried on for the whole of that year; and the authority which the section confers is to remit or reduce the taxes due by the person petitioning, and it confers no authority to require the corporation to repay any that have been paid. The whole scheme of the section is directed to the assessment for the year, and enables the Court of Revisior in effect to reduce it by remitting or reducing the taxes imposed on the basis of it. The word "remit" is used in the sense of ab-

ONT.

S. C.

TAYLOR v. CITY OF GUELPH.

Meredith, C.J.O.

staining from exacting payment of the taxes, or allowing them to remain unpaid (Murray's Dictionary).

The injustice that would result from giving effect to the respondent's contention is manifest. The Court of Revision, as its decision plainly shews, was of opinion that it had no authority to deal with the taxes based on the assessment of 1911, but thought that it could remedy the injustice that had been done by exacting those taxes, by taking it into account in dealing with the taxes based on the assessment of 1912, and accordingly reduced the taxes of 1913 from $40,000 to $10,000—a reduction which had the effect of remitting the whole of the business tax of the year, and also $15,000 of the taxes on the real property.

It is open to question whether the Court did not, in making this reduction, exceed the authority which sec. 112 conferred upon it, and give more relief to the respondent than he had a right to claim.

What the County Court Judge did upon the appeal, according to the respondent's contention, was, notwithstanding that in effect the Court of Revision had remitted the whole of the business tax for 1912 and reduced the taxes of 1913 as I have mentioned, to require the corporation to repay the amount they had received for the taxes of 1912.

By his action the respondent sought to recover the amount he had paid for the taxes of 1912 ($345) less the amount said to be due for the taxes of 1913 ($240); and this claim, with interest, was allowed by the Judge of the Court below.

According to the view of the rights of the parties which I have expressed, the respondent was not entitled to recover anything, but the appellant was entitled to recover upon its counterclaim—which is to recover the whole of the taxes of 1913, less so much of them as was in respect of business—but on the argument counsel for the appellant expressed his willingness to abandon the counterclaim and to consent to its being dismissed.

The judgment of the Court below should, in my opinion, be varied by substituting for the judgment for the respondent, judgment dismissing the action with costs, and leaving the judgment to stand as to the dismissal of the counterclaim, and the respondent should pay the costs of the appeal.

The effect of the abandonment of the counterclaim is, that

the appellant gives up the whole of the taxes for 1913, and therefore more in respect of those taxes than the Court of Revision and the County Court Judge together directed to be remitted; the only real question remaining is as to the jurisdiction of the County Court Judge to direct the remission of the business tax for 1912, which has been paid, and with that I have dealt.

Appeal allowed.

THOMPSON v. DENNY.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 6, 1917.

COSTS (§ I—2c)—APPEAL—OPPRESSIVE CONDUCT.

A respondent who simply declines to do anything to assist an appellant in his appeal is not guilty of oppressive conduct entitling the court to deprive him of the costs of the appeal.

Statement.

MOTION by appellants for leave to abandon their appeal and for an order depriving respondents of the costs of the appeal and ordering them to pay appellant's costs.

E. C. Mayers, for appellant; *G. G. McGeer*, for defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendants appealed from the judgment at the trial finding the question of liability in the plaintiff's favour and directing a reference. Before the appeal books were prepared defendants' solicitor wrote to plaintiff's solicitor a letter suggesting that, as the result of the reference might render the appeal unnecessary, the hearing of the appeal should be delayed, and the expense of preparing appeal books avoided. The plaintiff's solicitors declined to assist the appellants in this way. They took the position that they would neither facilitate the appeal nor waive compliance with the rules, but would simply leave the defendants to pursue their remedy without either hindrance or assistance. Appellants then prepared the appeal books, and kept the appeal in good standing. The result of the reference was in defendants' favour, and the action was dismissed before the appeal came on for hearing. No appeal has been taken from that judgment by the plaintiff. In these circumstances the appellants moved for leave to abandon their appeal and for an order that the respondent should not only be deprived of the costs of the appeal, but ordered to pay appellants' costs thereof; that the court may deprive the respondents of costs for good cause is not denied, but

B. C.
C. A.
THOMPSON
v.
DENNY.
Macdonald, C.J.A.

the power of the court to order a successful party to pay the costs of the unsuccessful party is denied. Once good cause is found, the court becomes possessed of full discretion to make such order as to costs as it deems just in accordance, of course, with the principles and practice of the court. That discretion is as full and absolute as that enjoyed by the Court of Chancery before the Judicature Act.

Mayers, in support of his motion, cited *Myers* v. *Financial News*, 5 T.L.R. 42; and *Williams* v. *Ward* (1886), 55 L.J.Q.B. 566. *Harris* v. *Petherick* (1879), 4 Q.B.D. 611, is another authority on the same subject. In all these cases it was the plaintiff in the action who was ordered to pay the defendant's costs, that is to say, in no case has a successful defendant been ordered to pay the plaintiff's costs of the action, and this I take it is founded upon this principle, that the plaintiff being the aggressor, and having, as it were, dragged the defendant into court, no matter how technical and unmeritorious the defence may have been, the defendant cannot be ordered to pay the costs of the action which was not initiated by him.

In order to see what was the practice of the Court of Chancery it may be useful to refer to some of the old cases. In *Cooth* v. *Jackson* (1801), 6 Ves. Jun. 12, 41; 31 E.R. 913, Eldon, L.C. said:—

> With respect to the costs, if I dismiss the bill I cannot give the plaintiff his costs. Certainly I shall not give the defendant his costs though I do dismiss the bill.

In *Lewis* v. *Loxham* (1817), 3 Mer. 429, 36 E.R. 165, grave doubt was expressed as to whether it would not be contrary to the principles and practice of the court to order a defendant to pay the plaintiff's costs where the plaintiff failed in the cause: See also note (A) to this case.

In *Tidwell* v. *Ariel* (1818), 3 Madd. 403, 409, 56 E.R. 553, Leach, V.C., dismissed the bill without costs. He said:—

> I wish I could give the plaintiff his costs; but the court cannot do this when it dismisses the bill.

In *Dufaur* v. *Sigel* (1853), 4 DeG. M. & G. 520, 43 E.R. 610, Knight Bruce, L.J., at p. 525, said:—

> I have had considerable doubt, and have looked with my learned brothers into several cases upon the question of directing costs to be paid by a defendant where there is neither a fund to be administered nor an estate in dispute, and where a plaintiff's case fails. Without saying that the jurisdiction does not exist, I think it a jurisdiction of considerable delicacy and difficulty.

The order made by the court in this case directed the defendant to pay the costs of some unimportant matters in affidavits, and certain other costs, which he had undertaken to pay, and dismissed the bill without costs.

In *Dicks* v. *Yates* (1881), 18 Ch.D. 76, the Court of Appeal reversed the judgment of Bowen, V.C., which ordered the defendant to pay the plaintiff's costs of the action. The circumstances of that case are peculiar. The plaintiff sued for infringement of copyright. Before the case was heard the infringement had ceased. The vice-chancellor, on hearing the evidence and argument of counsel, and having come to the conclusion that defendant was to blame for not taking steps to end the litigation before trial, said that he would make no order other than that the defendant should pay plaintiff's costs of the action. Defendant appealed, and while it was conceded that an appeal would not lie on the question of costs only, the court admitted the contention of appellant's counsel that to order the defendant to pay the costs was inferentially to find that the plaintiff's action was well founded, whereas, it was not and ought to have been dismissed, and hence if dismissed the court could not order defendant to pay the costs of the action. Jessel, M.R., at p. 85, said:—

> I wish not to be supposed to go further than I intend. I think that the court has a discretion to deprive a defendant of his costs though he succeeds in the action, and that it has a discretion to make him pay perhaps the greater part of the costs by giving against him the costs of issues on which he fails, or costs in respect of misconduct by him in the course of the action. But a judgment ordering the defendant to pay the whole costs of the action cannot, in my opinion, be supported unless the plaintiff was entitled to bring the action. Therefore, I think that the appeal should proceed.

In the same case, James, L.J., said:—

> I should add that there is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there.

After hearing the appeal on the merits the court gave the defendant costs in both courts without further adverting to the alleged misconduct of the defendant.

Where the costs cannot be made payable out of a fund or an estate, and where they are in the discretion of the court by reason of "good cause" or otherwise, the cases, I think, establish the following propositions: (1) A successful party, whether plaintiff

B. C.

C. A.

THOMPSON v. DENNY.

Macdonald, C.J.A.

or defendant, may be deprived of his costs; (2) a successful defendant will not be ordered to pay the plaintiff's general costs of the action, although he may be ordered to pay the costs of certain issues or questions in respect of which he has failed, or in respect of which his conduct has been dishonest or oppressive; (3) in very exceptional cases a successful plaintiff will be ordered to pay the whole costs of the action to an unsuccessful defendant. In considering this case I do not pay attention to the result in the court below. It so happens that defendants have succeeded there. Their appeal at the time they took it was well launched, but it was not a step in the action, it was a new proceeding. They were exercising a privilege or right which the law gave them to have their case reheard in this court, but in this appeal they were the aggressors. They assumed the character of plaintiffs in the appeal, but if they had had their appeal heard and had failed, in my opinion, they could not have been awarded the costs of the appeal, even if they had convinced the court that good cause had been shewn why the costs should not follow the event. They could at best have been released of respondent's costs.

On the second branch of the case, that is to say, whether a good cause has been shewn by the materials before us, I am of opinion that it has not. The respondent simply declined to do anything to assist the appellants in their appeal. Numerous examples might be cited where costs could be saved if one party would consent to waive strict compliance with the rules and practice; but to say that because a party declines to gratuitously facilitate his opponent he is therefore guilty of oppressive conduct, entitling the court to deprive him of costs, is to go a long way further than either authority or principle warrants.

In my opinion, the respondent was not guilty of such conduct, and, therefore, I hold that there has been no good cause shewn for depriving it of the costs of the appeal, not to say ordering it to pay the appellant's costs, either of the appeal or of preparing the appeal books.

I would, therefore, grant the motion permitting the appellants to abandon their appeal, but would give the costs of the appeal and of the motion to the respondent, in other words, the costs should follow the event.

B. C.

C. A.

THOMPSON v. DENNY.

Martin, J.A.

MARTIN, J.A.:—This is a motion by defendant, appellant, for leave to withdraw an interlocutory appeal which has been rendered unnecessary because the defendant has since succeeded at the trial, and to order the plaintiff, respondent, to pay the costs of the appeal.

Though I have no doubt that in certain circumstances there may be "good cause" for which a successful appellant may be deprived of his costs, or even that we could "otherwise order" (to quote the s. 28) him to pay the unsuccessful respondent's costs, yet the difficulty here is that as the appeal has not been heard (in pursuance of our established practice in *Fawcett* v. *C.P.R.* (1901), 8 B.C.R. 219, and later cases, mentioned in the note) it is impossible to say who would have been successful and what were the merits of the abortive interlocutory appeal. While the facts set out in the affidavits in support of this motion shew that the plaintiff's solicitors were dilatory and unaccommodating, yet, I cannot say that they were so to the extent of an abuse of their client's privileges. I think the justice of this case will be met by the usual order in similar circumstances; the appeal to be struck off the list—no order as to costs thereof, or of this motion.

I would add to the cases cited: *Wainwright* v. *Farmer* (1911), 16 B.C.R. 468.

McPhillips, J.A.

McPHILLIPS, J.A.:—I would deny the motion. The appeal should be struck out, making no order as to costs thereof, or of the motion. *Judgment accordingly.*

RAT PORTAGE LUMBER Co. v. HARTY.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. September 28, 1917.

GARNISHMENT (§ II C—15)—OF FUNDS IN BANK.

A bank cannot be garnisheed for an unascertained sum accruing due, and payable to it on behalf of a customer already indebted to the bank, when only the happening of certain contingencies will make the bank owe a portion of the money when paid to the customer.

Statement.

APPEAL by plaintiffs from an order of Masten, J., dismissing an appeal from a local judge, refusing to direct payment to the plaintiff of a fund in the hands of the bank, garnishees, but directing the garnishees to pay the money into court to abide further order.

R. T. Harding, for appellants.

Frank Denton, K.C., and *A. A. Macdonald*, for the bank, respondents.

ONT.
S. C.
RAT PORTAGE LUMBER CO. v. HARTY.
Rose, J.

ROSE, J.:—This is an appeal by the Rat Portage Lumber Company, judgment creditors of James Harty, against the order of Masten, J., in Chambers, dismissing an appeal by thejudgment creditors from an order of the Local Judge at Fort Frances, in Chambers, which dismissed, save as to a sum of $13.60, an application by the appellants for an order that one of the garnishees, the Canadian Bank of Commerce, do pay over a larger sum alleged to be due by the bank to Harty.

Harty, who was a customer of the bank, had contracts, dated the 15th February and 6th January, 1916, with the Canadian Northern Railway Company, by which he was to cut and deliver to the railway company, by the 15th May, 1916, certain specified piling, for which he was to be paid a specified price per foot. By an assignment, dated the 19th July, 1916, he assigned to the bank, as security for all his existing or future indebtedness and liability to the bank, all the debts, accounts, and moneys, due or accruing due or that might at any time thereafter be due to him under those contracts, and also "all contracts, securities, bills, notes, and other documents" held by him "in respect of the said debts, accounts, moneys, or any part thereof." This assignment was sent by the bank to the railway company, and on the 9th August, 1916, the treasurer of the railway company wrote to the bank that certain interests of another bank under a previous assignment had ceased, and said: "It will now be in order for me to accept your assignment, and we are making notation on our records accordingly." On the 27th November, 1916, Harty wrote to the bank saying that he expected the railway company to make payment within the next few days, and asking the bank, after deducting what was due them for advances, to credit the remainder to the "James Harty special account," as he had payments to make in getting out the piling, and wished the money kept apart.

On the 14th December, 1916, the judgment creditors obtained an order attaching all debts owing or accruing due from the garnishees, the railway company and the bank, to Harty. The date fixed by the order for the attendance of the garnishees before the Judge was the 28th December.

On the 28th December, the local manager of the bank made affidavit that the bank were not, at the time of the service of the

garnishee order or on the day of the date of the affidavit, indebted to Harty, but that Harty was indebted to the bank in the sum of $2,453.79 advanced on promissory notes due on the 4th January, 1917, the payment of which was secured by the assignment of the moneys above mentioned, "but the proceeds thereof have not yet been paid to the said bank." He referred to Harty's letter of the 27th November, and added that he was informed by Harty and believed that the claims against the piling, for labour, towage, etc., would absorb any excess that might remain after payment of the bank's claim.

So far as appears, the railway company made no affidavit and gave no evidence—and no officer of the railway company was examined by the judgment creditors; but there is a letter, undated, but apparently received on the 28th December, from the railway company's solicitors to the clerk of the Court, saying: "Certain moneys are due the judgment debtor by the C.N.R., but at this date we are not able to say the exact amount, as certain accounts have to be submitted and audited. We will advise you later the exact amount attached." It does not appear that the further information thus promised was ever given.

On the 15th January, 1917, the bank-manager was cross-examined upon his affidavit. He produced the bank's ledgers containing the accounts with Harty, which shewed, as of the date of the attaching order, at the credit of the "James Harty" account $4.63, at the credit of the "James Harty special" account $8.97, and at the credit of the "cash collateral" account $144.90; he gave particulars of the advances by the bank to Harty, and shewed that, if all the above-mentioned balances were applied in reduction of the amounts advanced, Harty would owe the bank something over $2,500. He told of one payment of $1,008.60 that had been received by the bank from the railway company on the 9th December, 1916, and had gone into the cash collateral account, and had been applied, except the $144.90, in the reduction of Harty's indebtedness; and he also told of an interview with Harty when he had seen an informal statement, prepared, as he thought, in one of the offices of the railway company, shewing that the amount due Harty from the company, after deducting Government dues, was $4,636.54, without taking into account the $1,008.60 paid. His summation of the whole thing

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S. C.

RAT PORTAGE LUMBER CO. v. HARTY.

Rose, J.

was that, if the bank received the amount that he supposed to be coming to Harty from the railway company, Harty would have a balance of $1,302; and he said that Harty had entrusted him with cheques for payments which would dispose of that balance. Harty's instructions to him had been that these cheques were for sums due in respect of services rendered to Harty by the payees in connection with his contracts with the railway company.

Harty also was examined, but I do not think that his examination throws any light upon the matter under discussion. He was not able to say what the railway company owed him.

The date of the hearing of the motion for payment over does not appear; but it is clear that it was before the 22nd February, 1917, because on that day the Local Judge wrote a memorandum that he found that, at the date of service of the attaching order, the railway company were not indebted to Harty in any amount, and that the bank were indebted to him in the sum of $13.60, to which sum the judgment creditor was entitled under the attaching order. The order giving effect to this opinion was not issued at once; it is said because the question of costs remained to be determined. As issued, it is dated the 2nd April, 1917. It does not contain any recital as to who were represented on the motion, or any reference to materials other than the affidavit and examinations above-mentioned, nor does it specifically deal with the claim as against the railway company: it simply directs payment of the $13.60 found due by the bank, and provides for the costs of the bank. We are thus left without any information as to how the matter was considered as regards the railway company.

It is probable that the delay in issuing the order for payment is the cause of the subsequent motion to Masten, J., and of this appeal. After the motion had been heard by Masten, J., and, apparently, at his request, counsel for the bank handed in a memorandum in which it is said that "no change took place in any of the accounts . . . until on and after March 20th, 1917, when the bank, in good faith, acted on the order now appealed from, which, though not then actually issued, was a month old, and had not been appealed from . . . The moneys received by the bank on and after March 20th, 1917, were exhausted by the payment of the debtor's liability to the bank, and the payment

of woodmen's liens for wages, etc., against the fund, except the sum of $13.60." The memorandum contains an argument that the amounts payable to discharge wage-claims were covered by the contract with the railway company, and an assertion that the bank received the money from the railway company on the latter's undertaking to pay those wages. I suppose that the argument that the amounts required to pay wages were "covered by the contract" is based upon a provision in the contract that the piling is "to be free of all charges, dues, and incumbrances." There is no evidence in support of the assertion that the bank undertook with the railway company to pay the wages; but the only evidence that the bank ever received any money from the railway company (other than the $1,008.60 paid on the 9th December) is the admission in this memorandum, and I think it is fair that, if we accept the admission, we should accept the statement as to the undertaking also.

I think I have now referred to all the evidence before the Court except an examination of William Martin, taken on the 2nd April, 1917, not in the garnishee proceedings, but apparently in pursuance of some order, probably in a woodman's lien case. I do not quite know how this gets before us, but all the procedure in the matter has been very loose, and perhaps the examination ought to be looked at. Martin said that a few days before the 2nd April the bank paid a cheque of Harty's in his favour for $775. As far as this examination goes, it corroborates the statement of counsel for the bank that any alteration of Harty's account with the bank took place after the 20th March.

The evidence, which I have reviewed at, perhaps, unnecessary length, makes it clear that neither on the day of the service of the attaching order, nor on the day of the hearing of the motion for an order for payment, did the bank owe any money to Harty; and that when, at a later date, the bank received from the railway company a sum in excess of Harty's indebtedness, the bank had in their hands directions from Harty (given, it is true, after the service of the attaching order) to pay the excess to persons to whom Harty professed to owe it for services in connection with the cutting and delivery of the piling.

Under these circumstances, I think the order of the Local Judge was right, except, perhaps, as to the $13.60; but we need

ONT.
S. C.
RAT PORTAGE LUMBER CO. v. HARTY.
Rose, J.

not trouble about the $13.60, for there has been no appeal against the order for its payment. What Rule 590 provides is that the judgment creditor, upon shewing upon affidavit that some person is *indebted* to the judgment debtor, may obtain an order that all *debts* owing or accruing from such third person to the judgment debtor shall be attached to answer the judgment debt and that the garnishee do *at a time named* shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor. We do not know what was stated in the judgment creditors' affidavit in this case; but it is clear that, if it had correctly stated the facts, it would have said that the judgment debtor was indebted to the bank and that the bank held security for their claim—not that the bank were indebted to the judgment debtor. If the affidavit had so stated the facts, of course the attaching order would not have been made as against the bank. It must have been made upon some misapprehension of the facts; and I think that, when the true state of facts afterwards appeared, it ought to have been rescinded. See *Boyd* v. *Haynes*, 5 P.R. 15. However, it wasnot set aside, but evidence was taken in support of the motion for an order to pay over; and that evidence shewed, as I have stated, that, even at the time of the application to compel payment, Harty continued to be indebted to the bank; so that, even if the state of affairs at the time of that application governed, and not, as I think, the state of affairs at the time of the order *nisi* (Halsbury's Laws of England, vol. 14, p. 92), the Judge was right in dismissing the application. It is true that if, at the time of the service of the attaching order, the bank had owed Harty any sum, an order for payment over might have been made, notwithstanding the fact that the exact amount of the bank's indebtedness remained to be ascertained: *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; *Gilroy* v. *Conn* (1912), 3 O.W.N. 732, 2 D.L.R. 131; but I have not found any case in which it has been held that an attaching order can be made upon proof that if things go well the garnishee will become indebted to the judgment debtor.

In *O'Driscoll* v. *Manchester Insurance Committee*, the judgment debtor was a panel doctor, who had performed service under an agreement with the Insurance Committee, by which the whole amounts received by the committee from the National Insurance

Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; if the total pool was insufficient to meet all the proper charges of the panel doctors, there was to be a *pro ratâ* reduction for each doctor, or if the pool should be in excess of the amount required the balance was to be distributed among the doctors. The judgment debtor, Dr. Sweeny, had, before the service of the order *nisi*, on the 9th April, 1914, "completed the whole of the work for 1913 necessary to entitle him to payment for his services for that year. He had received payments on account, but it would be some time before the accounts were settled and the balance due to him for 1913 ascertained. There was, however, no contingency which could happen to deprive him of his right to payment on the figures being finally adjusted . . . The Insurance Committee were kept in funds for making the necessary payments . . . and when they received all the funds for the year they would be in a position to determine the amount payable to each doctor." Then as to the first quarter of 1914, Dr. Sweeny had completed his services and had become entitled to payment on account for work done, and that right was not subject to be divested by any contingency. Swinfen Eady, L.J., from whose statement of the facts (pp. 511, 512) I have quoted, distinguished the case from those cases in which "the attempt has been made to attach income arising from a fund vested in trustees for a *cestui que trust*. In such a case," says the learned Lord Justice (p. 513), "until the trustees receive the income there is no debt owing or accruing from the trustees to the *cestui que trust*, and consequently there is nothing which can be attached to answer a judgment obtained against the *cestui que trust*. That consideration does not apply to the present case because it is admitted that the Insurance Committee had at all material times ample funds in their hands for the purpose of paying what might be found due to Dr. Sweeny." Bankes, L.J., drew the same distinction. He said (pp. 516, 517): "It is well established that 'debts owing or accruing' include debts *debita in præsenti solvenda in futuro*. The matter is well put in the Annual Practice, 1915, p. 808: 'But the distinction must be borne in mind between the case where there is an ex-

ONT.
S. C.
RAT PORTAGE LUMBER CO. v. HARTY.
Rose, J.

isting debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not.' If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not shew that there is no debt."

Now the case before us seems to be much more like the trustee cases referred to by Swinfen Eady, L.J., than like the *O'Driscoll* case: see *Webb* v. *Stenton*, 11 Q.B.D. 518; *Fellows* v. *Thornton*, 14 Q.B.D. 335. The state of affairs when the attaching order was served was that, if Harty had earned from the railway company more than the amount of the bank's claim against him, and if the railway company did pay the bank, the bank would become indebted to Harty; but the receipt by the bank of the money and the consequent liability of the bank to Harty were, it seems to me, contingencies such as Bankes, L.J., refers to, and not a certainty such as existed in the case of Dr. Sweeny's claim against the Insurance Committee. See also *Chatterton* v. *Watney*, 16 Ch. D. 378.

Then it is said that, even if the case as against the bank be as I have put it, the bank are liable because the money in the hands of the railway company was attached, and the bank took the money with knowledge of the attachment. Even if the bank did come under some liability by reason of the receipt of the money, I do not see how that liability can be enforced upon this appeal, in which we are concerned only with the question whether the bank were indebted at the time of the attachment. But, apart from that consideration, I do not think the claim is established. Even under the English Rule which declares that the attaching order shall "bind the debt" in the hands of the garnishee, the order does not transfer to the garnishor any property in the debt attached: what it does is to enable the garnishor to compel the garnishee to pay an amount equal to the original debt: *In re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99; *Norton* v. *Yates*, [1906] 1 K.B. 112. Therefore, when the bank received payment from the railway company, the bank did not in any sense receive money belonging to the plaintiffs or money impressed with any trust in favour of the plaintiffs; and

this is so even if the learned Local Judge was wrong in holding that the railway company were not indebted to the plaintiffs at the date of the service of the attaching order. I do not suggest that there is any error in his judgment as regards the railway company. There is no appeal before us against that part of the judgment, and we do not even know upon what it was based. It may have been upon the ground that, as between the attaching creditor and the bank, the bank as assignees were entitled, at all events to the extent of their claim: *Glegg* v. *Bromley*, [1912] 3 K.B. 474; but, as I have said, we are not concerned with that question, but only with the propriety of the order as regards the bank.

I would dismiss the appeal with costs.

RIDDELL, J., agreed with ROSE, J. Riddell, J.

LENNOX, J.:—I think the appeal should be dismissed with costs. Lennox, J.

MEREDITH, C.J.C.P. (dissenting):—Upon the argument of this appeal I was in favour of allowing it and ordering payment by the garnishees to the judgment creditors, of such amount, if any, as should be found, upon a reference, to have been properly applicable to the payment of the judgment debt; but some of my learned brothers thought that there might be some legal obstacle in the way of the judgment creditors that might prevent justice being done between the parties, and so we retained the case for further consideration; a consideration which, I am glad to be able to say, has convinced me that there is no such real obstacle. Meredith, C.J.C.P.

Although the proceedings before the local Judge tended more to obscure than make plain the facts of the case, it is really a simple one, in which there can be no controversy as to the material facts affecting the question of liability, though the facts affecting the amount of such liability have been left in a deplorable state of uncertainty, rendering a reference to ascertain that amount unavoidable, if it is to be ascertained.

What the respondents ask us to do really is, to give a ruling which will advertise a simple means by which a just and useful means of enforcing payment of just debts—garnishee proceedings—can be very largely thwarted and rendered quite ineffectual.

ONT.

S. C.

RAT PORTAGE LUMBER CO. v. HARTY.

Meredith, C.J.C.P.

That, it need hardly be said, should not be done if there be any proper means of avoiding it. Public interests require that debtors should be compelled to pay their just debts; and that the Courts should give full effect to all the means which the law provides for that purpose—and, emphatically, that technicalities, and unsubstantial obstacles of all kinds, should be brushed aside. The tendency of the Courts should be, not to narrow, but to widen as much as possible, the usefulness of garnishee proceedings: see *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428; and *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499.

These few indisputable facts govern the whole question of liability:—

The garnishee orders were obtained against, and served upon, both the respondents in this appeal and the Canadian Northern Railway Company, on the 14th December, 1916.

At that time, and for a long time before, the railway company had been indebted to the judgment debtor in the sum of a little more than $4,600; out of which they had, on the 9th December, 1916, paid to the respondents the sum of a little more than $1,000, leaving a balance still due, on that account, of a little more than $3,600.

This sum was not only due but was payable and about to be paid, the delay in payment being occasioned only so that the usual formality in dealing with and paying such accounts, in the railway company's method of carrying on their business, might be observed. They could have been sued for the amount due long before that day. The respondents were bankers of the judgment debtor, and he had, on the 19th July, 1916, assigned to them, as security to them for his existing and future indebtedness to them, all his claims against the railway company in respect of their indebtedness to him before mentioned.

Notice of this assignment, in writing, was given to the railway company, and was accepted by them and noted in their books on the 9th August, 1916.

The sum of a little more than $1,000, before mentioned, was paid by the railway company to the respondents as such assignees of the judgment debtor.

As there was sure, at all times, to be a large balance, payable to the judgment debtor, out of these moneys, and as they were

then about to be paid over by the railway company to the respondents under that assignment, the judgment debtor, on the 27th November, 1916, gave instructions to the respondents to place that balance to his credit in their bank, in a special account in his name, as he had payments to make on account of the work done out of which the railway company's indebtedness to him had arisen, and he wished the money kept in a separate account.

The garnishee summons came on for hearing before the Local Judge apparently on the 22nd February, 1917; but was not finally disposed of until the 2nd April, 1917; and then the order disposing of it merely directed payment, by the respondents to the appellants, of $13.60, besides making some provision as to the costs of the garnishee proceedings.

A minute endorsed on the garnishee summons, made by the Local Judge, dated the 22nd February, 1917, indicates that the learned Judge then found that the railway company was not indebted to the judgment debtor at the time of the service of the attaching order, but that the respondents were indebted to him in the sum of $13.60, to which sum they were entitled in the garnishee proceedings. On the 20th March, 1917, the railway company paid to the respondents, under the assignment before-mentioned, a little more than $3,600, the balance, payable by them, of their indebtedness to the judgment debtor so assigned to the respondents; the appellants appealed against the order of the Local Judge, dated the 2nd April, 1917, and that appeal was heard, and, after procuring further evidence, was considered by Masten, J., who increased the amount payable by the respondents under the order made by the Local Judge by adding to it the sum of $144.60, but in other respects dismissed the appeal; the amounts thus found due were balances appearing to the credit of the judgment debtor in these separate accounts, kept by the respondents, in their book, with him: none of them was affected by the money received by the respondents from the railway company under the assignment before-mentioned, except to the extent of the payment, on the 9th December, 1916, of a little more than $1,000. So that the learned Judge must have considered that the balance of such assigned moneys, received by the respondents on the 20th March, 1917, were not subject to the garnishee proceedings:

ONT.
S. C.
RAT PORTAGE LUMBER CO. v. HARTY.
Meredith, C.J.C.P.

but, if not, then there was really no money attachable, for, though these balances appeared in the respondents' books on the day that the garnishee order was served, yet the judgment debtor was then really in debt to the respondents in a large amount upon notes etc., not matured, and which would be charged against the judgment debtor in these accounts only at maturity. So that the order is wrong in any case.

The simple question upon these facts is: whether the balance of the money due by the railway company to the judgment debtor, which was paid to the respondents under the assignment before-mentioned on the 20th March, 1917—that balance, after payment out of it of all the judgment debtor's indebtedness to the respondents, and after payment out of it also of all lawful charges upon it, having priority to the garnishee order, if any—was money attachable in garnishee proceedings, or which can in any way be reached in such proceedings, or upon this appeal.

As no question of fraud is raised, nor even of insolvency, I cannot think that the money was attachable in the hands of the railway company, for under the assignment they were bound to pay it over to the respondents; the right of action to recover it was theirs, not their assignor's. And, that being so, it follows that, unless it was attachable, or can be otherwise reached, in the hands of the respondents, it was not attachable, and cannot be reached, at all; and, if that be so, all that a judgment debtor need do to defeat garnishee proceedings is to assign to a third person the money coming to him; then the debtor is free, and the assignee is not liable until he receives the money, nor after he pays it over; and, if that be so, it is difficult to see how garnishee proceedings can be made effectual. But, if it really be so, it is very strange that no one has before discovered, and put into effect, this simple method of defeating public policy and the enactment. It would be exceedingly regrettable if we were obliged to give it any countenance: and for two reasons, which seem to me to be very plain, I am quite sure we are not obliged to do so.

At all times after the assignment was taken by the respondents, they were under a legal obligation to get in the money and pay, to the judgment debtor, the balance of it. When the garnishee orders were served, the money was payable to them, and they had already received a little more than $1,000 of it; there was no

uncertainty regarding it or indeed the amount of it: it was money coming to the judgment debtor, and none the less accruing to him because it had to pass through the respondents' hands before he should receive it. I can perceive no good reason why money thus coming to a judgment debtor, and money which the garnishee is under a legal obligation to him to get in, and put into a special account subject to his order, and to pay over to him, may not be attached in garnishee proceedings, though of course no order for payment over can be made until the money has come to the hands of the garnishee: and the cases seem to me to quite warrant that conclusion. In that of *O'Driscoll* v. *Manchester Insurance Committee*, I cannot find that the judgment of the Court of Appeal was based upon any finding of fact that the moneys were already in the hands of the garnishees when the attaching order was served: Swinfen Eady, L.J., puts it thus (p. 511): "The Insurance Committee received from time to time payments of large sums on account from the Insurance Commissioners, and when they received all the funds for the year they would be in a position to determine the amount payable to each doctor."

The rule in the Courts of the United States of America is thus stated in the American and English Encyclopædia of Law, 2nd ed., vol. 14, p. 769: "In order to render the claim not liable to garnishment it is necessary, however, that the contingency should affect the actual liability of the garnishee and be such as may prevent the defendant from having any claim whatever against the garnishee or right to call him to an accounting."

And need I add that this case is not one in which the garnishees were under no obligation to the judgment debtor; that, by reason of the assignment, they were not in the position of one who becomes answerable on the money count for money received for the use of another only when the money has been so received? The respondents were at all times liable to account to the judgment debtor and to pay over the surplus of the moneys received as soon as it was ascertained on such an accounting: and, before the order in question was made—on the 2nd April, 1917—the respondents had received all the moneys due and payable to them under the assignment; and there was apparently a surplus of such moneys in their hands after payment of all their claims

ONT.
S. C.
RAT PORTAGE LUMBER CO. v. HARTY.
Meredith, C.J.C.P.

against the judgment debtor, their customer, of over $1,300, according to the testimony of their manager at Fort Frances. If this money of the judgment debtor, so in the hands of these garnishees—subject to any prior charges upon it, if any—cannot be reached by the judgment creditors in these proceedings, garnishee proceedings, instead of being made effectual by the rulings of the Courts, will be reduced to something like a farce.

Then these moneys, over and above the amount needed to satisfy the respondents' just claims against the judgment debtor, were in truth the moneys of the judgment debtor, the respondents received and held them, in a special account, solely for him and subject to his order; it was his money, and, whether in the shape of "bank-notes," "cheques," or "moneys," was subject to the appellants' writ of execution, which was, to the knowledge of the respondents, in the hands of the sheriff in full force and virtue, binding such things, as well as all other the goods and lands of the judgment debtor in the sheriff's bailiwick: see secs. 10 and 20 of the Execution Act, R.S.O. 1914, ch. 80. And not only had the respondents knowledge of these things, but they knew that these moneys had been attached in the hands of the railway company and in their own hands, and that the garnishee proceedings were in force and might be eventually decided against them when they parted with the moneys, if they have really done so.

In these circumstances, if it be the law that the appellants can have no relief in this Court in these proceedings, if it be the law that a judgment debtor can defeat garnishee proceedings by merely appointing an agent to receive for him the moneys coming to him, and by making an assignment of them to such agent, some one else must say so. I can say only that, if that be the law, there is some good reason for some of the harshest things that have been said against it.

One of my learned brothers seems to find the greater difficulty in the manner in which the appellants' rights should be worked out; but I cannot think it should make any great difference by which door of this Court of Justice the parties have entered, so long as all concerned are in Court and their cases can be fully heard and considered. I decline to aid in turning them out merely so that they may come in some other way.

I would allow the appeal, and make the order which I have mentioned, and would give to the appellants the costs of this appeal; no costs of the proceedings heretofore in the High Court Division. Costs of the reference to abide the event.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

BEAUBIER v. LLOYD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. March 13, 1918.

GARNISHMENT (§ III—61)—AFFIDAVIT—RULE 648—NON-COMPLIANCE—DEFECT.

When an affidavit for a garnishee summons does not comply with r. 648 (Alta.), there is no jurisdiction to issue the summons; it is not a defect which can be cured under r. 273.

[*Mohr* v. *Parks*, 3 A.L.R. 252, followed.]

Statement.

APPEAL by the defendant from the decision of Ives, J. Reversed.

C. F. Jamieson, for appellant; *A. E. Dunlop*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This case is, in my opinion, governed by the decision of this court in *Mohr* v. *Parks* (1910), 3 A.L.R., 252.

A part of the headnote to that decision is as follows:—

Where an affidavit for a garnishee summons does not comply with rule 384 there is no jurisdiction to issue the summons; and it is, therefore, not a case of a defect which can be cured under Rule 538.

This seems to be an accurate digest of that decision on that point. The present rules corresponding to the two there in force are 648 and 273 and, so far as affects the principle involved, there is no change. It was argued in that case, as in this, that the garnishee proceedings may be saved under r. 273, which provides that non-compliance with any rule shall not render any proceeding void unless so ordered, but it may be set aside, amended or otherwise dealt with.

It is clear that the garnishee proceedings may be "set aside" and it seems equally clear that no amendment can be made since the defect is in the affidavit and full effect has been given as if no defect existed. It seems also clear that it cannot be "otherwise dealt with" so as to allow the proceedings to start unless the disregarding of the defect altogether could be called a dealing with it. Therefore, if the case did come within that rule, it would look as though the only course applicable would be a setting aside of the proceedings.

ALTA.

S. C.

BEAUBIER v. LLOYD.

Harvey, C.J.

But as was pointed out in the above case, the defect in the affidavit is not a non-compliance with a rule. It is only the issuing of the garnishee by the clerk that is a disregard of the rule. As stated in that case at p. 257:

> Rule 384, however, does not say that a particular affidavit shall be filed, but what it does say is that if such an affidavit is filed, a garnishee summons may be issued. No such affidavit was filed and consequently there was nothing for the garnishee summons to rest on and there was no jurisdiction to issue it.

In that case the affidavit was not made by a proper person while in this case it is made by the proper person but does not contain what the rule says an affidavit shall contain to warrant the issue of a garnishee summons and no jurisdiction is conferred on the clerk who issues the summons to exercise a discretion to overlook defects. I can see no difference in principle between the two cases.

I would, therefore, allow the appeal with costs and direct that the garnishee proceedings be set aside with costs.

Stuart, J. Hyndman, J.

STUART and HYNDMAN, JJ., concurred with HARVEY, C.J.

Beck, J.

BECK, J. (dissenting):—Ives, J., dismissed an application by the defendant to "strike out the garnishee summons filed herein against the Canadian Bank of Commerce as garnishee and directing payment out of court to the defendant or his solicitors of all moneys paid into court by the said garnishee pursuant to the said summons." This is an appeal from that decision.

A number of points arise:—First: The action is by a landlord against a tenant for rent. The lease reserved, (1) "The clear yearly rent hereinafter mentioned, namely, one-half share or portion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises in each and every year during the term;" (2) "The sum then" (January 1), "current in the neighbourhood per acre, for every acre of the portion hereinafter agreed to be summer fallowed which shall not be summer fallowed as hereinafter agreed by the lessee." There is an express provision to the effect that in regard to the price per bushel to be allowed by the lessor to the lessee in any year for the one-half of crop, the current market price at the nearest shipping point or at such other point as the lessor may properly direct the lessee to deliver the said one-half of crop on the day or days of delivery shall be taken as the price of such grain.

There are items in the statement of claim founded upon the

foregoing provisions of the lease for the value of certain quantities of the produce of the farm and also certain other items which *primâ facie* would properly form items of an ordinary account and which form the subject-matter of an action for a debt or liquidated demand; but it was especially urged that the former class of items, namely, those for the value of a certain portion of the crop reserved by way of rent did not fall within the class of claims comprised under the title "debt or liquidated demand" (see r. 6 (*e*)) so as to authorize the issue of a garnishee summons thereon. (See r. 648.) It seems clear enough that the objection is not well taken.

The subject of "debt" is discussed in Street's Foundation of Legal Liability, vol. 3, "Actions," pp. 127 *et seq.*; and the action of debt for rent at pp. 133 *et seq.* In a note it is said: "Debt lies for rent though the lease call for corn or other chattel." *Cheney's* case, 3 Leon. 260.

This proposition is fully supported by the decision of the Court of Exchequer in the case cited, which is to be found in 74 E.R. 672.

Secondly: The affidavit upon which the garnishee summons was issued is attacked on two grounds, (1) that it does not shew the nature of the plaintiffs' claim; and (2) that it does not give the grounds of the deponent's information and belief that the proposed garnishee was indebted to the defendant. R. 648 requires that the affidavit should "shew the nature and amount of the claim . . . against the defendant." The only statement in the affidavit referable to this requirement is this: "The defendant herein is justly and truly indebted to the plaintiffs in the sum of $1,442.13." Full particulars are set forth in the statement of claim, which, however, is not referred to in the affidavit.

That rule also requires that the affidavit should "state to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant . . . and giving the grounds of such information and belief."

The statements in the affidavit referable to this requirement are these: "To the best of my information and belief the above named garnishee is indebted to the said defendant . . . The grounds of my belief are: The defendant has money on deposit with the said garnishee."

ALTA.

S. C.

BEAUBIER v. LLOYD.

Beck, J.

The affidavit begins with the statement that the deponent is one of the plaintiffs and has a personal knowledge of the matters thereinafter deposed to.

In my opinion, there is here a sufficiently clear and definite stating of the grounds of belief of the deponent of the indebtedness of the garnishee to the primary debtor, namely, his personal knowledge that there was money standing on deposit to the credit of the primary debtor in the books of the garnishee bank.

As to the other objection to the affidavit, namely, that it fails to shew the nature of the claim sued for, it must be admitted, I think, that the affidavit is defective, but at the same time I think the defect is not so fundamental as the defect to which effect was given in *Mohr* v. *Parks*, 3 A.L.R. 252, where it was held that the affidavit was made by a person not qualified to make it. In my opinion, the defect here is a mere irregularity and, therefore, such a defect as to come within the class of case which by r. 273 (the non-compliance rule) is declared shall not render the proceeding void but which may be dealt with as the court sees fit. The affidavit would have been sufficient if it had referred explicitly to the statement of claim which, in fact, gave the required information to the defendant and to the clerk, the only persons interested in knowing.

In my opinion, the defect should be diregarded and the garnishee proceedings allowed to stand. The money has been paid into court by the garnishee and if the garnishee summons were now set aside the plaintiff would appear to be without the remedy which would, apparently, still be available to him had the garnishee not obeyed the exigency of the garnishee summons.

I would affirm the order of Ives, J., and would, therefore, dismiss the appeal with costs. *Appeal allowed.*

ONT.

S. C.

SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 12, 1917.

NEGLIGENCE (§ I B—5)—OF BOARD OF HEALTH—INFECTIOUS DISEASE.

An action under the Fatal Accidents Act for damages for the death of an infant suffering from a communicable disease will be dismissed where there is no evidence to show that the death was caused by the negligence of the authorities in charge, despite the verdict of a jury in favor of the plaintiff.

[*Reed* v. *Ellis*, 32 D.L.R. 592, referred to.]

ACTION under the Fatal Accidents Act, brought by the parents of Martha Simpson, a child of seven, to recover damages for her death by reason, as the plaintiffs alleged, of the negligence of the defendants, the Local Board of Health and the Medical Officer of Health of the City of Belleville.

The action was tried before BRITTON, J., and a jury, at Belleville. The findings of the jury are set out below.

W. C. Mikel, K.C., for the plaintiffs.

S. Masson, K.C., for the defendants.

BRITTON, J.:—The plaintiffs are the parents of Martha Simpson, a girl of seven and a half years of age, who was taken sick on the 26th January, 1916, with a disease that proved to be diphtheria, from which she died on the 2nd February following.

When the Local Board of Health, or the Mayor of Belleville, had notice that Martha had diphtheria, a health officer named Arnott was sent to the house. He put up a board, painted yellow, with the notice to the public that an inmate of the house was suffering from diphtheria. This officer told the mother of Martha that the child must be isolated, explaining that the isolation meant, in the main, keeping Martha in one room, not associating with other members of the family, except the mother, and that the father, while he might go out and attend to his work, was not to hold or caress or come into contact with the child.

The man who put up the sign was told by the plaintiff—mother—that they were without food or fuel. Arnott made a list of things required, and had some of these things supplied. It was known to the defendants that other things later on were required, which were not supplied. After the 26th January down to the death of the child, she was fed principally with milk. There was difference of important character between the evidence of the father and the evidence of the defendant Dr. Yeomans; but, in my view of the case, the decision does not turn upon that difference.

Dr. Yeomans did visit the child about 11 o'clock in the forenoon of the 2nd February, and thought, and so stated, that the patient was improving, that the throat was clearing. He did not anticipate death, which occurred between 8 and 9 that same evening.

ONT.
S. C.
SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

There was no *post mortem* examination. All the medical testimony was that it could not be said that death resulted from anything alleged to have been done or omitted by the defendants or either of them.

At the close of the case, the defendants' counsel moved for dismissal of the action, on the ground that the death was not shewn to have been caused by negligence as alleged.

I reserved my decision, and submitted questions to the jury.

The defendants called witnesses. At the close of the evidence, the defendants' counsel again, upon the same grounds and other grounds, repeated his motion for dismissal of the action.

The questions submitted and the answers thereto were as follows:—

(1) Were the defendants the Belleville Public Board of Health guilty of any negligence which caused the death of Martha Simpson? A. Yes.

(2) If so, what was the negligence, and by whom was any act of negligence committed? Or, if anything was omitted which constituted negligence, by whom was the omission? A. Lack of proper medical attention and nursing and food and fuel.

(3) Was the defendant Dr. Yeomans guilty of any negligence which caused the death of Martha Simpson? A. Yes, as a member of the Board of Health.

(4) If so, what was the negligence? A. For not giving proper attention.

(5) What damages should be awarded if plaintiffs are entitled to recover? A. $300.

I am of opinion that there was no evidence that should be submitted to the jury that anything done or omitted by the defendants, or either of them, could be said to have caused or contributed to the death of the daughter of the plaintiffs.

This action is under the Fatal Accidents Act, and, to come within the provisions of this Act, death must have resulted from something done, or at least from something omitted, which a person, having a duty to perform, neglected to do, and death resulted from such omission.

If the medical men called could not say that death was occasioned or hastened by what is charged against the defendants, then the jury could not say, and so the question should not have been submitted to them.

In *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, it was held that the plaintiff failed, because he failed to prove that the fire which caused the damage came from the defendants' engine. In that case it is said that in every case "there must be evidence from which it can be fairly inferred, not simply guessed, that the damage was caused by the defendant."

Connacher v. *City of Toronto*, an unreported case, was referred to in the *Beal* case (pp. 507, 508.) The plaintiff (Connacher) complained of the failure of the city corporation to cleanse and disinfect the Brock street sewer. It appeared that sewage was allowed to accumulate about the outlet, whereby the premises surrounding the plaintiffs' premises became foul and polluted, and by reason thereof the children of the plaintiff were seized with diphtheria and three of the children died. It was held that the condition was favourable for the propagation of the germs of diphtheria, and it is probable that the germs were so transmitted as to reach the plaintiff's family, and it was probable that the children died as the result of the conditions mentioned. The plaintiff recovered a verdict. On appeal, the verdict was set aside. Armour, C.J., said (as set out in the *Beal* case, at pp. 507, 508): "Assuming . . . that the case were put most strongly against the defendants, and that they were guilty of a nuisance . . . we are unable to hold that there was any evidence from which the jury might fairly and reasonably infer that the sickness with which the plaintiff's family was affected was caused by such sewage. The theory upon which the plaintiff relied was that there might have been the germs of diphtheria in this sewage."

This phase of the case was most interestingly discussed in the *Beal* case, 19 O.L.R. at p. 508.

A somewhat similar case was cited, as having been tried by Mr. Justice Teetzel at Cayuga, in which the germs of typhoid were present, but the proof of exactly where those germs came from, and what the actual result was, was wanting.

Mr. Mikel is quite right in his understanding that the only point for consideration now is, whether there was or was not evidence as to anything done by the defendants, or left undone by them, that caused or contributed to the death of Martha Simpson.

No doubt, the amount of damages given by the jury was quite moderate if the plaintiffs are entitled to recover.

ONT.

S. C.

SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

This action is of very considerable importance so far as it involves an interpretation of the Public Health Act, R.S.O. 1914, ch. 218, especially sec. 52, sub-sec. 2, and secs. 54 and 58.

I have read with care the argument of counsel both for the plaintiffs and for the defendants. If I am wrong, the plaintiffs are entitled to recover to the amount of $300, as found by the jury, and they should be entitled to their full costs on the High Court scale.

After as full consideration as I have been able to give to the case, my opinion is, that the action should be dismissed, but without costs.

The plaintiffs appealed from the judgment of BRITTON, J.

W. C. Mikel, K.C., for appellants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the enactment upon which this action is based be really applicable to this case, then a clear case of negligence has been proved against the defendant the Medical Health Officer of the City of Belleville, quite apart from the incredible story of the male plaintiff, negligence arising from a misunderstanding, by that officer, of his duties. The physician who had, at the instance of the male plaintiff, attended his infant child, in respect of whose death this action is brought, insisted that it was the duty of the Medical Health Officer to attend upon the child, who was suffering from a "communicable" disease, whilst that officer insisted that it was the duty of the physician, and in consequence of these conflicting views the child was without medical attendance for several days; but apparently without being any the worse for it; for, when the Medical Health Officer did at length visit the child, on the morning of her death, he found her recovered from her disease, and apparently well on the way to complete recovery: but she died not long afterwards from what was called "paralysis of the heart," a thing said to be not uncommon in the convalescent stage of such a disease.

But, assuming the enactment to be applicable to the case, and negligence proved, the plaintiffs cannot hold their verdict unless the neglect proved was a breach of a duty which the Medical Health Officer owed to the child or to the plaintiffs; and unless it was really the cause of the child's death.

The trial Judge ruled that there was no evidence upon which

reasonable men could find that the negligence proved was the cause of the child's death, and so dismissed the action notwithstanding the verdict; and so it became unnecessary for him to consider the other question.

The question whether such negligence gives a right of action, such as this, is one of much importance; and any ruling upon it must be one of wide-reaching effect, and so one that ought not to be considered in any case in which a consideration of it is, for any reason, unnecessary. The legislation in question is sec. 58 of the Public Health Act, and is in these words:—

"58.—(1) If any person coming from abroad, or residing in any municipality within Ontario, is infected, or has recently been infected with, or exposed to, any communicable disease to which this section is by the Regulations made applicable, the medical officer of health or local board shall make effective provision for the public safety by removing such person to a separate house, or by otherwise isolating him, and by providing medical attendance, medicine, nurses and other assistance and necessaries for him.

"(2) The corporation of the municipality shall be entitled to recover from such person the amount expended in providing such medical attendance, medicine, nurses and other assistance and necessaries for him, but not the expenditure incurred in providing a separate house or in otherwise isolating him."

Its wide effect, literally, is very apparent. It is not confined, in any respect, to indigent persons, as sec. 52 is: and is compulsory in all cases; no exception is made of any one, no matter how much better cared-for in all respects he might be if left to his own resources, subject to inspection by the public officer in the interest of the public.

The main purpose of the enactment is obviously the protection of the public against the spread of contagious and infectious diseases: the section so expressly provides: "shall make effective provision for the public safety:" but, on the other hand, it must be observed that, if compulsory and applicable to all alike, it would be a great hardship if no action lay for injury caused through the wrong of those so in control of the person injured: for instance, one capable of employing and having the best medical attendance, nursing and care, deprived of all such, and,

ONT.

S. C.

SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Meredith, C.J.C.P.

instead, provided for, in his own home, for instance, by the Medical Health Officer or by the Local Board, and through the negligence of one or other grievously injured.

I do not say these things for the purpose of indicating what interpretation should, in my opinion, be put upon the enactment in regard to the question whether it can be deemed to be so much for the person's benefit as to create a duty to him: they are said in the hope that the somewhat extraordinary enactment may be taken into consideration elsewhere and made plainer and better before it becomes necessary to put any judicial interpretation upon it.

If the section were applicable to such a disease as small-pox only, it might perhaps be workable; but, being applicable to all "communicable" diseases to which the Provincial Board of Health may, under the Public Health Act, by their regulations, make it applicable, many difficulties in giving effect to it may arise. I have mentioned the case of a person receiving the best medical and other care and attendance, who is, notwithstanding, to be isolated by the Medical Health Officer and to be provided by him with medical attendance, medicine, nurses, and other assistance and necessaries; now let me refer to this case. It was the Medical Health Officer's duty, if this case be within the section, to isolate the child and to provide medical attendance, medicines, nurses, and other assistance and necessaries for her, with a right in the municipal corporation, in each case, "to recover from such person the amount expended:" in this case a deceased infant. If all or indeed even few of the common infectious diseases of childhood are brought within the provisions of the section, the lot of the Medical Health Officer and of the municipality might each be a hard one.

But, however that may be, the plaintiffs' verdict cannot, in my opinion, be supported, for want of evidence that any such negligence was the cause of the child's death. As I have said, she was making an apparently good recovery when paralysis of the heart intervened and caused her death; and as to such intervention the evidence was: that it could not be said that the want of anything which the enactment specifies had anything to do with the child's death; that those receiving the greatest care, as well as those receiving little, were alike subject to such

ONT.

S. C.

SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

Meredith, C.J.C.P.

a termination of the disease, when all seemed to be going on well and convalescence reached.

Notwithstanding the energy and care with which this action was prosecuted throughout, no witness was called who testified that, in his opinion, any want of any of these things caused, or even probably caused, the child's death; the opinion-evidence was altogether the other way: every witness, competent to speak as a physician, was against the plaintiffs.

In these circumstances, how is it possible for the plaintiffs to succeed? The fact that the child had not the benefit of those things which the enactment in question requires, in cases coming within it, is a strong circumstance in the plaintiffs' favour; but that circumstance loses its weight in the face of the expert evidence, all one way, of the peculiar character of the child's fatal illness—paralysis of the heart. As was said by some of these witnesses: "If death had occurred from other cause, it might be said that the want of these things was the cause of it; but not when death is caused by paralysis of the heart." A verdict in the teeth of all the medical testimony is one which reasonable men could not, acting without favour, find.

The appeal should be dismissed.

Riddell, J.

RIDDELL, J. (after setting out the facts and the findings of the jury and quoting portions of the reasons for judgment of the trial Judge):—I think the trial Judge was right. In the first place, I think (as at present advised) that the Public Health Act, R.S.O. 1914, ch. 218, is clear; that the provisions of sec. 58 are explicitly "for the public safety:" the reasoning in *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125, applies, and neither the child, during her lifetime, nor the plaintiffs, as the administrators of her estate or otherwise, had or have any right of action.

And outside of the statute there was nothing in the way of "taking charge" of the child by the defendants.

But I prefer not to base my judgment upon these considerations, important as they are—but upon the consideration that, even if there were liability to the plaintiffs for the death of their daughter if due to the negligence of the defendants, there was no evidence to indicate that the death was directly or indirectly, in whole or in part, due to such negligence.

ONT.

S. C.

SIMPSON v. LOCAL BOARD OF HEALTH OF BELLEVILLE.

The cases of *Beal* v. *Michigan Central R.R. Co.*, 19 O.L.R. 502, and the medical cases cited therein, as well as the recent case in this Court of *Reed* v. *Ellis* (1916), 38 O.L.R. 123, 32 D.L.R. 592, make it plain that the causal relation between the alleged negligence and the death must be made out by evidence, and not left to the conjecture of the jury.

I would dismiss the appeal with costs.

Lennox, J.

LENNOX, J.:—I agree, and for the reasons stated by my learned brother Riddell.

Rose, J.

ROSE, J.:—For the reasons expressed by Mr. Justice Britton in the Court below, I am of opinion that the appeal should be dismissed. *Appeal dismissed with costs.*

B. C.

C. A.

CITY OF VICTORIA v. MACKAY.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, McPhillips and Eberts, JJ.A. November 6, 1917.

STATUTES (§ II A—104)—CONSTRUCTION OF—DIRECTORY AND MANDATORY SECTIONS.

Sub-section 142 of sec. 50, c. 32, B.C. Stats. 1906, which empowers the City of Victoria to pass by-laws for the widening of streets, and provides that every by-law shall, before coming into effect, be published . . . and a copy of said publication filed in the Land Titles Office is directory only; non-compliance does not nullify the operation or effect of section 86 of the same Act, which is the imperative section, bringing the by-law into force.

Statement.

APPEAL from the judgment of Murphy, J., on a case stated by arbitrators. Affirmed.

McDiarmid, for appellant; *H. A. Maclean*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal is from the judgment of Murphy, J., on a case stated by arbitrators. The municipal council of the City of Victoria was by c. 32, s. 50 (142) of the Statutes of 1906, empowered to pass by-laws for the widening of streets. That sub-section further provides that every by-law passed thereunder "shall before coming into effect" be published in the "B. C. Gazette" and in a newspaper and that after said publication a certified copy, together with an application to register the same, shall be filed in the Land Registry Office.

The council passed a by-law for the widening of Douglas St., which entailed the taking of a strip of respondent's land. The by-law was not published, nor was application made to file a

certified copy in the Land Registry Office. The parties, nevertheless, proceeded to arbitration; whereupon the appellant, the city, took the position that as such by-law had not been published, or a copy filed as required by said section, it had never come into force and the arbitrators had consequently no jurisdiction to make an award. The arbitration proceedings were initiated by the city by notice of expropriation served on respondent, and this was followed by entry upon and survey of the land taken and by the appointment of arbitrators. The respondent makes no objection to the non-compliance by the city with the provisions of said sub-section. The situation, therefore, is that the city is attempting to take advantage of its own shortcomings. If said s. 142 stood alone its construction would be simple enough. It might very well be read as making publication a condition precedent to the coming into force of the by-law. But it must, I think, be read in connection with s. 86 of the same statute which declares that every by-law passed by the council shall be registered in the office of the County Court by depositing with the registrar a true copy thereof, certified by the clerk of the municipality and under its seal, and such by-law shall take effect and come into force and be binding on all parties as from the date of such registration. This is a most important section. It is from date of such registration that the time limited runs within which applications to quash by-laws may be made to the court. In my opinion, s. 86 is the section which if complied with fixes the date upon which the by-law in question came into effect, and in this view of the section I think sub-s. 142 must be read as directory only. It gives a mandate which, if ignored, may perhaps be ground for setting the by-law aside, if proceedings be taken within the proper time, but it does not nullify the operation or effect of s. 86.

The only other way of reading sub-s. 142 is to confine its provisions to the particular subject with which it deals and to say that by-laws passed under the section of which it is a sub-section are not subject to the provisions of s. 86. But the language does not exclude the application of s. 86. It is not "no by-law passed under this section shall come into effect until published." If that were the language used, there would be great force in the appellant's contention. But the words are capable of a construc-

B. C.
C. A.
CITY OF VICTORIA v. MACKAY.
Martin, J.A.
McPhillips, J.A.

tion in harmony with s. 86, and I think they ought so to be construed.

In this view, it becomes unnecessary to consider the question of estoppel.

I would dismiss the appeal.

MARTIN, J.A., would allow the appeal.

MCPHILLIPS, J.A.:—In my opinion the governing statute law may rightly be said to be s. 86 and s. 251 (4) of the Municipal Clauses Act (c. 32 Stats. of B.C. 1906) and compliance was had with this statute law. Now the contention is, although the appellant is the moving party throughout in these proceedings, that all the proceedings are abortive, because of the fact that sub-s. 142 of s. 50 of the same Act was not complied with in respect of publication of the by-law in the "British Columbia Gazette" and the filing thereof in the Land Registry Office. In my opinion, when the particular facts and circumstances are taken carefully into consideration, the present case is one that excludes the application of sub-s. 142 of s. 50. The statute should not be read as a pitfall. S. 86 is in no uncertain terms and applies to *every* by-law—the enacting language is "be registered in the office of the County Court for the district . . . and such by-law shall take effect *and come into force* and be binding on all persons as from the date of such registration"—it will be observed that sub-s. 142 of s. 50 uses the words "coming into effect," and s. 86 "take effect and come into force." The words "come into force" are important when it is considered that s. 89 and following sections deal with the procedure for quashing by-laws, and s. 90 enacts that the proceedings must be taken within one month after the registration in the office of the County Court. This would seem to be conclusive and as indicating the intention of the legislature. How is it possible to say that a by-law is not in force, when the legislature has said that, upon a certain thing being done, which has been done, it shall "be binding on all persons?" Undoubtedly there is inconsistency here between sub-s. 142 of s. 50 and s. 86; but when s. 86 is found to be the imperative section bringing the by-law *into force* any inconsistency there may be must be passed over, "the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail"—(see *Att'y-Gen'l* v. *Sillem* (1863), 2 H. & C., 431; Pollock, C.B. 515).

B. C.

C. A.

CITY OF VICTORIA v. MACKAY.

McPhillips, J.A.

Then the appellant, in my opinion, cannot, after proceeding to arbitration, now set up the non-compliance with sub-s. 142 of s. 50, the default in the doing of something that it was incumbent upon it to do. In *Wilson* v. *McIntosh*, [1894] A.C. 129, the Judicial Committee quoted with approval the following opinion of Davey, L. J.:—

It is to my mind a clear principle of equity and I have no doubt there are abundant authorities on the principle that equity will interfere to prevent the machinery of an Act of parliament being used by a person to defeat equities which he has himself raised and to get rid of a waiver created by his own acts.

I would also refer to what Sir Arthur Channell said in *Montreal Street R. Co.* v. *Normandin*, [1917] A.C. 170; 33 D.L.R. 195, at 198:—

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

(Also see *Plunkett* v. *Molloy* (1856), 8 Ir. Jur. (N.S.) 83; and *Nowell* v. *Mayor of Worcester* (1854), 9 Ex. 457.

In *De Winton* v. *Brecon*, 26 Beav. 533, 53 E.R. 1004, Romilly, M. R. said, p. 543-4:—

If the court finds a positive inconsistency and repugnancy in the clauses of an Act of Parliament it may be difficult to deal with the case at all but, as far as it can, it must give effect to every clause of it.

It seems to me impossible for a court to say that a by-law is ineffective (s. 50 (142)), or not in force when we have the legislature saying that upon a certain thing being done—*i.e.*, registration in the office of the County Court (s. 86)—"such by-law should take effect and come into force and be binding on all persons as from the date of such registration."

The contention put forward by the appellant, after all that has taken place, and this lapse of time is in my opinion unconscionable, and ought not to prevail unless it is that the court is met with intractable laws, and—must hold—that the by-law is without legal effect, that intractable law I do not find.

I would dismiss the appeal.

Eberts, J.A.

EBERTS, J.A., agreed with MACDONALD, C.J.A.

Appeal dismissed.

ALTA.

S. C.

SIMMONS v. SHEFFIELD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Beck and Hyndman, JJ. March 1, 1918.

COURTS (§ I B 3—25)—AGREEMENT FOR SALE OF LAND—APPLICATION TO CANCEL—POWERS OF MASTER.

Upon an application for cancellation of an agreement for sale of land, the applicant is entitled to such judgment as the material presented by him shews him to be entitled to. The Master has no authority to postpone or adjourn the application upon payment of a less sum than the applicant was legally entitled to.

Statement. APPEAL from the order of Stuart, J., dismissing an application to set aside an order of the Master at Calgary.

A. M. deLong, for appellant.

J. E. Brownlee, for defendant Sheffield.

A. B. MacKay, for defendant Waddell.

Scott, J. SCOTT, J.:—In January, 1913, one Ingram who appears to be still the registered owner of the lands in question entered into an agreement for the sale thereof to the deceased for $4,500. Ingram assigned his interest in the agreement and in the lands comprised to the plaintiff who in July, 1917, commenced this action in which he alleges default in payment of the purchase money and claims cancellation of the agreement and possession of the property or, in the alternative, specific performance of the agreement, he offering to perform the agreement on his part. As against defendant Waddell he claims the removal of a caveat filed by her against the lands.

On October 11, 1917, the plaintiffs gave notice of an application to the Master at Calgary on October 17, for an order directing that the agreement for sale be cancelled and giving the plaintiff possession of the property. This application was adjourned from time to time until December 7, when the Master ordered that the defendant pay to the plaintiff $250 on or before December 17, 1917, and further ordered that the application should stand over until March 15, 1918, when the further claims of the plaintiff would he dealt with. It was on the plaintiff's application to set aside the order that the order now appealed against was made.

In his affidavit filed on the application to set aside the order the plaintiff's solicitor alleges that at an adjourned hearing on November 6, 1917, of the application for judgment the Master directed a further adjournment until December 17, 1917, and

ordered the defendants to pay the plaintiff $450 before December 7, 1917, but it does not appear that any such order was ever taken out.

It was admitted upon the hearing of this appeal that prior to November 6 last, the defendants' solicitor was negotiating with the plaintiff's solicitor to obtain an extension of time for payment and that the latter was willing to grant an extension on payment of $450 within a reasonable time and was satisfied with the terms of the order of that date.

When the application came on again for hearing before the Master on December 7, the defendants stated that they were unable to arrange for the payment of $450, but that they were ready to pay $350, and it was apparently in view of this fact that the Master in his order of that date reduced the amount required to be paid by the defendants. This reduction was made without the consent of the plaintiff or his solicitors.

On the hearing of the application on December 7, the plaintiff was, in my opinion, entitled to obtain such judgment or order as the material presented by him shewed that he had applied for and was entitled to. If he shewed that his claim for cancellation of the agreement for sale and possession of the property was well founded, he was entitled to a judgment to that effect upon such terms as the Master might reasonably direct. A reasonable judgment would be either the usual judgment for specific performance or that, in default of payment by the defendants of the balance of the purchase money with interest and costs in such manner and within such time as the Master might reasonably direct, the agreement should be cancelled and the plaintiff entitled to possession.

In my opinion, the plaintiff alone had had the right to say whether his application for judgment should be postponed or adjourned on payment by the defendant of any sum less than the whole amount due to him and, without his consent, the Master was not justified in directing that the application should be adjourned at the instance of the defendant on payment of a lesser sum.

I would allow the appeal with costs, and direct that the order of the Master be set aside, and that he rehear the plaintiffs' application on two days' notice. *Appeal allowed.*

B. C.

C. A.

ORDE v. RUTTER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. November 6, 1917.

MISTAKE (§ III C—35)—AGENT LOCATOR—TIMBER LIMIT—MISDESCRIPTION —TRESPASS.—TITLE.

Where an agent locator makes a mistake in the description of a timber limit, so that it is not recognized by subsequent locators or in the office of the Surveyor-General, the principal has no right of action against subsequent locators who state the same claim and describe and register it properly.

Statement.

APPEAL by defendant from judgment of Clement, J. Affirmed.

Bass, for appellant; *A. H. McNeill*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I am convinced that Cameron, who staked defendant's claims did, in fact, locate them on Swede Creek not knowing the creek to be so named and believing it to be known as Clyde River. It appears that the creek was never known as Clyde River, but Cameron saw that name written on a blaze and erroneously concluded that that was the name of the stream. Hence, when he described his locations as on Clyde River he erroneously described them.

The plaintiff's agent, Henderson, staked the same ground a few months later without encountering any prior stakes. He described his initial point as follows:

> Commencing at a post marked Ernest Dunsford Orde's N.E. corner post No. 1 limit planted on the west side of Swede Creek about six miles from its mouth where it empties into the Fraser River about 12 miles above the mouth of Goat River, thence, etc.

The Goat River is a well known river and was at the time shown on maps of the district. Cameron was well aware of that fact. The Fraser is one of the largest rivers of the province, so that it was quite feasible for Cameron to have described his location by reference to these two well known rivers. His testimony is that the river or creek on which he staked was the first one east of Goat River, on the same side of the Fraser. Not knowing the name of the creek, he could have given a good description of his staking without naming it.

I think it has been satisfactorily proven that the creek in question was never known as Clyde River, but was for a long time prior to the date in question well known in the locality and in Barkerville, the nearest town thereto, as Swede Creek, and when Henderson's applications for licenses were accepted by the Department of Lands, the name Swede Creek was officially adopted

or recognized, and this stream has since appeared on the official map of the district by that name.

The statute governing the granting of licenses requires the applicant to "describe as accurately as possible the land over which he seeks to obtain such license, especially with reference to the nearest known point, or to some creek, river, stream or other water." That must, I think, be taken to mean some identified creek, river, stream or other water. No one looking at the notice which the locator Cameron posted at the government office in Barkerville pursuant to the Act could identify Clyde River which did not, in fact, exist except in the mind of Cameron. For the purposes of his applications he called the stream Clyde River, without ascertaining the fact that the stream had the well recognized name of Swede Creek. To the general public the notice would convey nothing more than the information that Clyde River might be one of the scores of tributaries of the Fraser in the Cariboo District theretofore unnamed. That Cameron made a mistake in describing the locality is admitted in a letter written by one of defendants apparently on behalf of all of the defendants, and in which he makes a plea to the Department for indulgence on account of the mistake. It is regrettable that the defendants who, I am sure, acted in perfect good faith throughout, must suffer, but of two innocent parties the one on whose side the mistake was made must bear the consequences of it.

It was also urged that the granting of the licenses and the acceptance of the plaintiff's surveys were entirely in the discretion of the chief commissioner of lands and that his discretion cannot be reviewed.

It is not necessary, in view of the conclusion to which I have come on the other points involved, to express an opinion upon this one.

The appeal should be dismissed.

MARTIN, J.A., for reasons stated in writing, was of opinion that the appeal should be allowed. Martin, J.A.

MCPHILLIPS, J.A.:—I have had the advantage of reading the judgment of my brother Martin, with which I entirely agree. I would, therefore, allow the appeal. McPhillips, J.A.

EBERTS, J.A.:—This is an appeal from the judgment of Clement, J., in an action brought by the plaintiff for an injunction Eberts, J.A.

B. C.
C. A.
ORDE
v.
RUTTER.
Eberts, J.A.

to restrain the defendants from entering on or cutting down timber or otherwise interfering with or trespassing upon the plaintiff's timber leases, being lots numbered 11323 to 11331, inclusive, Cariboo District, B.C., and for damages, etc., and for a declaration that defendants have no right, title or interest in the timber contained within the boundaries of said lots.

The facts appear to be shortly these: In the years 1906 and 1907 the desire to secure timber concessions in British Columbia, and particularly that part of British Columbia through which the Grand Trunk Pacific Railway was to pass, namely, between the Tete Jaune Cache and Fort George, on the north and south side of the Fraser River, and the head waters of the same, and commonly known as Upper Fraser River, was very pronounced. Very little was generally known of that portion of the province except the knowledge earned by prospectors for minerals, trappers and timber stakers.

There were in those years only two available means of reaching the country in which the limits mentioned in this action are situated. One, by way of Barkerville, in the County of Cariboo, and at which place the government agency for the County of Cariboo is situated; and the other by way of Edmonton, thence through the Yellow Head Pass to the head waters of the Fraser River, thence by raft or canoe to the site of the property in question.

Timber in that part of the province was evidently being talked of in Cranbrook and Fernie, and the record shows Cameron along with four others left Kootenay and made their way to Barkerville. Any timber staking Cameron was to carry out was to be for a Mr. Bogle, with whom he had made an agreement, and who, it will be seen, was the predecessor in title to the defendants in this action, and who now claim the ownership of the property staked by Cameron. At Barkerville on the way in Cameron seemed to have made very few inquiries, for at line 30, p. 146 of the record, on being asked:

Q. Did you make any inquiries at Barkerville before you went in? A. Tried to glean all the information I could, but I couldn't get any information about the streams or any thing; they did not seem to have any. I inquired of prospectors and everything else.

THE COURT: They knew the Goat River?

A. The Goat River was known, Yes. But they did not seem to have

any more information at Barkerville except what was on the map: the map that I had seemed to give all the information they had. They didn't have anything else that I could find out.

In a former part of his evidence at p. 144 of the record:—

Q. What information had you as to the country to guide you? A. Very little, except what I got from the maps. Q. What maps did you have? A. Well, I had the latest that could be procured at that time, I cannot remember the date of them, but they were the best the government had at that time.

Barkerville is only a village, has but one street, and is the headquarters of the government agent, who gleans all the information he can from prospectors and others of the different "attractive propositions" in the sphere of his authority, and gladly gives same to all inquirers.

However, Cameron and his friends left Barkerville by way of the trail to Goat River which runs into the Fraser from the south. The trail from Barkerville to the Upper Fraser first strikes the upper waters of the Goat. The Cameron party evidently got to the Upper Fraser on or about July 2, 1907.

Cameron was in the Upper Fraser River country from the 2nd to 11th July, 1907, when he finished staking and returning by the same route he went in, came back to Barkerville, and on July 22nd, 1907, says he "made out his papers" and had them sworn to and filed in the government office and then made his way home to Kootenay.

His initial staking notice reads as follows:—

I, James Cameron, intend to apply for a special license to cut timber on 640 acres of land bounded as follows: Commencing at a post planted one mile east of Clyde River, four miles south from the Fraser River, Cariboo District, thence north 80 chains, thence east 80 chains thence south 80 chains, thence west 80 chains. Located 2 July, 1907.

JAMES CAMERON, agent for Michael P. Bogle.

Cameron, on this expedition, staked in all 13 timber claims for the said Bogle, and of which the defendants allege 9 are in conflict with the licenses above mentioned issued to the plaintiff. All of the claims in conflict appear by the record to be tied to the original staking.

One Silas Henderson in February or March, 1907, made an arrangement with the plaintiff to stake timber for him in this locality, and having finished staking for a Mr. Sprague of timber in the Upper Fraser country, found himself in Barkerville in August, 1907. He got information there was timber on Swede

B. C.

C. A.

ORDE v. RUTTER.

Eberts, J.A.

Creek. Swede Creek and Clyde Creek were well known at Barkerville, and named as such, so he was then informed by Mr. Walker, the government agent, and by people who had been hunting and trapping there. Looking over the office files he found that no timber had been staked on Swede Creek up to that time, and on September 4, 1907, again proceeded to the Upper Fraser by the usual trail *via* Goat River, and on September 21 and 22, 1907, staked 10 timber limits for the plaintiff. His initial staking was as follows:—

1. Commencing at a post marked Ernest Dunsford Orde's north east corner post No. 1 limit planted on the west side of Swede Creek, about six miles from its mouth where it empties into the Fraser River about 12 miles above the mouth of Goat River, thence west 160 chains; thence south 40 chains; thence east 160 chains; thence north 80 chains to point of commencement. Located September 21st, 1907.

Nine other locations tied to Orde No. 1 limit were made, posting, advertising, etc., were duly carried out, and from the record the legal requirements for the acquisition of special timber licenses seemingly were duly carried out.

Now, the contention of the defendants is this: that although Cameron in 1907 staked the Bogle claims and described them as on the Clyde River, or Creek, and in his evidence says he described them on Clyde River from the fact of having "run across an old 'stump' with the name 'Clyde River' marked on it—that is where I got the name." (It is a peculiar circumstance, and may be accounted for, but in no part of the record can I find any mention of any witness except Cameron having seen the "old stump" with the name "Clyde River" marked on it). And against that we have the evidence of Henderson and McKale that in 1907 Swede Creek and Clyde Creek or River were well known about Barkerville (the starting point on the trail for all the locators) by those names by many trappers and prospectors, and by Walker, the government agent there, and Swede Creek was known as such by McKale from June, 1906, and by no other name, and he had been continuously in that country since 1905 to the date of trial, with the exception of one year, 1910. He knew Clyde Creek as such from 1907, and he got his knowledge from the government agent in Barkerville. Bamford, in his evidence at p. 103, says that at the time of the issue of the licenses to the plaintiff, he, in reply to the Court, said he had not as yet attempted

to plot out the Bogle claims. "I could not follow them (the Bogle Claims) because the description was not sufficient to place them on the map in their proper position. I didn't know the position of Clyde Creek."

He further says:—

Q. Well if you had had Mr. Cameron's plan in at the time and then taken his measurements as given in his notices, would you have been on your guard then that he had made a mistake as to naming the stream? A. No, I certainly would not. I have no question about the position of Clyde Creek and the other Creek. Q. Swede Creek? A. I had then before me, if there had been any question I would never have let them go out if I thought there was any chance of it being on the same Creek.

And at p. 104 the following appears:—

Q. But apparently he (Cameron) sent you a sketch of Swede Creek? A. No, he sent me a sketch of Clyde Creek. Q. He made a sketch of Swede and thought it was Clyde? A. That is the point. I knew Clyde River from the sketch and I put it on the map as from the sketch. Q. You put it on there because he called it Clyde River? A. Yes.

The plaintiff and defendants have both taken out perpetual timber licenses under s. 6 of the Land Act Amendment Act, 1910. After the issuance of such perpetual special timber licenses the plaintiff caused the lands so staked by Henderson to be surveyed by a duly qualified surveyor, and the same gazetted and accepted by the proper department, and in compliance with the Land Act.

No adverse claim was put in by defendants or any of them.

In considering the whole question, can it be said the defendants have complied with the statutes in force relating to applications for timber licenses?

In the first place, Cameron, who made the original applications, applied for land on Clyde River, a river which did exist, and his description in his first location is so vague that Bamford, the chief draughtsman in the office of the surveyor-general was not able to plot the tracts on the reference map, which he could have done had the sketch described the land as accurately as possible over which he seeks to obtain such license, especially with reference to the nearest point, or to some creek, river, stream or other water, etc.

He knew the mouth of Goat River and could have found out the position of Swede River when at Barkerville on his way in when he could have easily described his stakings as on Swede Creek, or a creek about so many miles south of the Fraser, and

B. C.
C. A.
ORDE
v.
RUTTER.
Eberts, J.A.

which creek where it joins the Fraser is approximately . . . miles from the mouth of Goat River. On the other hand, a short time after Cameron's staking Henderson made his way to the same locality and described his initial location as:—

Commencing at a post marked Ernest Dunsford Orde's n.e. corner post No. 1 limit, planted on the west side of Swede Creek, about six miles from its mouth, where it enters into the Fraser River, about twelve miles above the mouth of Goat River. Thence etc.

Evidently the information got by Henderson from the government agent at Barkerville on his way in as to the position of and name of Swede Creek was reliable and correct. All through the action of the plaintiff's agent Henderson seems to have been correct in carrying out the law. His locations were plotted out on the reference map by the officers of the department before those of the defendants; he has perfected his title by survey and gazetting, and notice to all persons who had adverse claims, and finally had his survey made and was not adversed; a far better case on the merits than the defendants whose predecessors in title made wrong and vague description of their locations, and admittedly so, for in a letter dated October 22, 1912, to the Chief Commissioner of Lands and Works, from A. W. Codd, one of the defendants, he says (*inter alia*) "because of the mistake of the original locators Cameron and McCormick the present supposed owners of the above named timber licenses have been paying in their timber fees when in fact the laws of your country have not been complied with."

The holding and acquisition of timber lands is now governed by the Forest Act, c. 17, 1912. S. 17, recites:—

All special timber licenses heretofore granted and all renewals thereof heretofore issued shall be deemed to have been legally and validly granted and issued, as the case may be; but nothing in this section contained shall affect any legal proceedings now pending respecting any such license or renewal thereof.

In the event of any dispute between holders of special timber licenses as to the areas or timber to which as between themselves the holders of such licenses may be entitled, effect shall be given to priority of location, so that the first locator shall have and take the area and timber comprised in his location; and nothing in this section shall be deemed to validate any special timber license as against any prior Crown Grant lease, special timber license, or pre-emption record.

The disputes in this matter have been brought into Court by seemingly a friendly suit to settle the rights of the parties under

B. C.
C. A.
ORDE
v.
RUTTER.
Eberts, J.A.

the above section. It would appear from the record that both parties staked on Swede Creek, but the defendants' location was not made in accordance with the statutes, and the plaintiff's were, and therefore he should succeed.

I could very reasonably have curtailed my remarks with reference to the merits of this action and concurred with Clement, J., the trial judge, in his construction of s. 17.

The plaintiff's licenses were first issued, and by the statute, vest in the holder all rights of property whatsoever in trees, timber and lumber cut within the limits of the license during the term thereof.

S. 17 says:—"Nothing in this section shall be deemed to validate any special timber license as against any Crown Grant, lease, special timber license or pre-emption record."

The Crown has vested in the plaintiff all the rights of property whatsoever in all trees, etc., within the limits of his licenses, and has accepted his surveys, and how now can he in the face of the statute, be divested and the defendants' licenses validated against his special timber licenses except in some way by the intervention of the Crown?

I am of opinion that the appeal should be dismissed.

Appeal dismissed by an equally divided court.

ONT.
S. C.

OGILVIE FLOUR MILLS Co. v. MORROW CEREAL Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. November 23, 1917.

APPEAL (§ VII A—290)—QUESTION OF FACT—CREDIBILITY OF WITNESSES—FINDING OF TRIAL JUDGE—REVERSAL.

When a question of fact depends upon the credibility of witnesses, the court of appeal will not reverse the finding of the trial judge.

[*Wood* v. *Haines*, 33 D.L.R. 166, referred to.]

Statement.

AN appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiffs, for the recovery of $12,700, in an action for damages for breach of an alleged agreement to deliver a quantity of flour. Varied.

Harcourt Ferguson, for appellants.

Riddell, J.

RIDDELL, J.:—According to the contention of the plaintiffs, the general sales-agent of the plaintiffs' company, Mr. Weeks, met Mr. Morrow, manager of the defendants' company (and in reality the defendant, as he swears) on Thursday the 12th October, 1916, at Montreal—they travelled together to Toronto the same evening. Weeks wanted 20,000 bags of

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Riddell, J.

flour, and some negotiations took place between them: Weeks offered to buy 10,000 bags at $7.05, and another 10,000 bags at $7. Morrow was willing to sell at $7.05, but not quite satisfied to sell the extra 10,000 at $7. Before Weeks went on to London, Morrow getting off at Toronto, it was arranged that Morrow was to "confirm" the sale of 10,000 bags at $7.05, *i.e.*, telegraph whether he would accept the offer of Weeks to buy 10,000 bags at $7.05—and that later on he was to let Weeks know about the 10,000 at $7.

That same day, Morrow, in Toronto, called up Weeks, in London, by telephone and said the 10,000 were all right, whereupon Weeks asked him to "confirm" the sale by wire.

Morrow accordingly wired to Weeks: "We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal also your giving us until to-night on ten thousand more at seven dollars Montreal. Thanks."

At the same conversation over the telephone, Morrow had asked if the offer was still good for the other ten, and he was informed that it was.

Not long after the first telegram, came a second: "Book ten thousand bags seven dollars bulk Montreal October November shipment our option."

The same day, Morrow sent what he calls "confirmation of sale" to the plaintiffs in Montreal.

"Confirmation of Sale.

"Morrow Cereal Company.

"Toronto, Oct. 13th, 1916,

"To the Ogilvie Flour Mills Co. Ltd. "No. 1552.

"Montreal, Que.

"Subject to our terms and conditions

"10,000 98's 90% Patent Ontario Winter Wheat Flour 7.05

"Bulk Basis Montreal

"Date of shipment

6,000 bags October

4,000 bags November

10,000 bags

"Morrow Cereal Company

"per Morrow."

He sent also a corresponding confirmation for 10,000 bags at $7 bulk basis Montreal. ("Bulk basis" means that the purchaser supplies the bags or returns them if the vendor supplies them).

On Saturday the 14th October, and that day or the next, Weeks and Morrow met again in Toronto, and Morrow told Weeks to send the bags to Toronto. Weeks agreed to do so—the bags were sent accordingly, and Morrow was so informed by Weeks about a week thereafter. On the 23rd, the shipping clerk of the plaintiffs sent to the defendants what purport to be confirmations of the purchases: these being received on the 24th October, the defendants wire: "Your acceptance on flour received this morning twelve days after our offer sorry too late heavily oversold." Needless to say, flour had advanced greatly in price). The plaintiffs wired :"What does your telegram of even date mean? We do not understand."

The defendants did not supply the flour: this action was brought, and judgment was given for the plaintiffs.

The story of the defendant (Morrow) is, that the conversation on the train simply amounted to a request by Weeks that Morrow should see what he could do and make an offer—that the telephone conversation between him in Toronto and Weeks in London was, that "subject to certain terms we would be able to sell him 10,000 bags of flour at $7.05," *i.e.*, "subject to them staying out of the market until the 1st of November, as it would give us a chance to get the flour;" that Weeks said he would have to see or telephone Mr. Black, the manager at Montreal, and said, "You send along a wire, and if it is all right we will confirm it back;" that Morrow proposed to offer 10,000 more bags subject to these terms—that Weeks asked Morrow to send him a wire on that, so that he might have something to shew to Mr. Black—and that Weeks was to notify him. He does not deny that on the 14th or 15th he told Weeks to send the bags to Toronto.

Weeks denies the story of Morrow where it differs from his own.

It will be seen that the important question of fact is, were the telegrams of the defendants to London acceptances of offers more or less definite made by Weeks, or were they offers by the defendants which required acceptance?

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Riddell, J.

That will depend upon the credibility of the two witnesses, Weeks and Morrow: the learned trial Judge has accepted the story of Weeks, and I think we cannot say he was wrong.

If I had to pass upon the question without the assistance of the learned Judge's finding, I should have come to the same conclusion, both upon the probabilities and upon the fact that the witness Morrow does not deny what Weeks swore to as to the direction by Morrow to "send the bags" to Toronto—a clear acknowledgment of the existence of a contract involving bags either to be sent or otherwise supplied.

I see no difficulty from the Statute of Frauds.

The damages appear to be rather excessive.

I would dismiss the appeal except as to damages: and refer the question of damages to the Master (unless the parties can agree either as to damages or as to some other referee), who should dispose of the costs of the reference—there should be no costs of the appeal, but the plaintiffs should have the costs of the action.

Lennox, J.

LENNOX, J.:—The judgment in appeal turned upon the question of credibility; and, in considering the appeal, I find no great difficulty in determining what I ought to do. In *Wood* v. *Haines*, 33 D.L.R. 166, 38 O.L.R. 583, recently decided in the Privy Council, Lord Wrenbury, delivering the judgment of the Board, said (p. 169):—

"It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage.

"In the case of documentary evidence, no doubt, the case is otherwise. Their Lordships, however, cannot find in the documents anything to throw doubt upon the story which the plaintiff tells. The documents are all consistent with it, with the sole exception of the letter of the 15th May, 1913, if it be an exception."

The question to be decided here by the learned trial Judge was, which of two witnesses, Weeks, the purchasing agent of the plaintiff company, or the defendant Morrow, ought to be believed: essentially and solely a question of credibility. He

accepted the evidence of Weeks, and—contrary to the evidence of Morrow—definitely found that the telegrams and sale-notes sent by Morrow on the 13th and 14th October were not proposals to sell, awaiting acceptance, but acceptances of verbal offers definitely made by Weeks to Morrow before these documents were dispatched.

He found himself unable to believe that there was an understanding as contended for at the trial—though not set up in the statement of defence—or that the telegrams and writings were conditional proposals to be assented to by Mr. Black before the defendants would be bound; and, accepting the apparently reasonable account given by Weeks of the matter to be taken up by Black, as I think, properly found that the contract became binding upon the defendants upon the receipt by the plaintiff company of the telegrams and confirmations of sale; that the subsequent orders, 279 and 280, were by way of direction as to shipment, numbering of the invoices, &c., and not an alteration or variation of the contract; and he specifically found that, when the defendant (Morrow) repudiated the transaction, "his real objection to carrying out the contracts then made (13th and 14th October) was, that flour had advanced in price. That was the ground and the only ground of his objection." The onus was on the defendants, of course, to prove that the writtings did not express the agreement actually come to.

I cannot find in the documents anything to throw doubt upon the substantial accuracy of Weeks' evidence. They are at least consistent with it, and I would find it difficult to believe that exhibits 1, 2, 3, 4, and 6, and the statement of defence, are consistent with Morrow's story. Reading and carefully weighing the whole evidence, verbal and documentary, I am of opinion that the conclusion come to by the learned Judge is right. But it is not necessary that I should be able to go so far in support of findings of fact, and it is not the proper way to dispose finally of an appeal, where the question of credibility is to determine the result.

In dealing with the questions arising in this action, so fundamentally dependent upon the weight to be attached to the evidence of one or other of two opposing witnesses, either of whom might be right, I cannot think that it is open to me to accept the res-

ONT.
S. C.
OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.
Lennox, J.

ponsibility of saying that I am in a better position, or better qualified, to understand, weigh, and interpret this evidence than the Judge who saw and studied the witnesses and heard the evidence. I think the learned Judge's finding upon these questions ought not to be disturbed.

But it was argued that, even if the telegrams were intended as acceptances of definite antecedent offers to purchase, made by the agent Weeks, and even if they were intended to be the final acts of the parties constituting an agreement or contract, yet they do not sufficiently describe or identify the subject-matter or thing to be sold and purchased to satisfy the requirements of the Statute of Frauds, that "6,000 bags" or "4,000 bags" or "10,000 bags," without more, is indefinite and meaningless; that they were not given a meaning by any evidence as to the situation of the parties, the usages of trade, or the like; and, in this connection, stress is laid upon the opinion of Mr. Weeks as to what constituted the contract, as, for instance:—

"Q. Let me ask you another thing about that. Which contract do you say is the one that binds us here, the contract signed by you or the one signed by Morrow? A. I told you that the telegram was the contract.

"Q. Will you let me see that, please? The telegram does not deal with flour at all, does it? The telegram reads as follows: 'We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal.' A. Yes.

"Q. That does not tell you what you are selling at all? A. That telegram confirmed our conversation.

"Q. If you go by the words of the telegram, you cannot tell what is being sold, except it is bags. This is not what you are relying on, this contract here? A. Yes, sir, I am relying on that."

The answer to all this is obvious. How does it matter what Mr. Weeks' opinion may be as to what constitutes the contract or what he relies on? Courts have never sought nor heeded the opinion of witnesses as to when or how a legal right arises or is defeated, or what does or does not constitute a contract. Mr. Weeks' opinion is irrelevant, can neither limit nor enlarge the rights or liabilities of the parties—he can only effectively depose to facts; and the fact is that as to each lot of 10,000 bags

Morrow followed his telegram by a signed "confirmation of sale" memorandum, addressed and mailed to the plaintiff company, and in each memorandum the subject-matter of the sale, the price, quality, names, &c., are found. It may be that the telegrams alone were not sufficient to bind the defendants, that the bargain was one incapable of enforcement by action. It is idle to argue as to this: the documents are to be read together, as the defendants recognised when framing their statement of defence; and the combined documents, or even the confirmations of the sale-notes alone, are undeniably sufficient within the terms of the statute.

It was pointed out that, if Morrow was not to await confirmation-notes from the plaintiffs, he would be bound, and yet the plaintiffs would not be bound; and that this was the intention "was exceedingly improbable." I am not impressed by this statement. I find no great preponderance of probability or improbability either way. It is by no means an unusual condition in litigation affected by the Statute of Frauds; and every-day experience teaches us that it is exceedingly probable that seemingly improbable things occur.

Aside from all this, if, on conflicting testimony, probabilities are to turn the scale, who can weigh them better than the trial Judge? But, if it must be argued and considered, I am disposed to think that the weight of probability is against the defendants' contention. Morrow would not deny that there was a conversation about becoming an agent on commission, if Black would agree, nor, specifically, that this was not a question to be left open for Mr. Black. He admits that he relied upon Mr. Weeks to stay out of the market if a sale and purchase were arranged.

Is it not "exceedingly improbable" that, if Morrow regarded the "keeping out of the market" until November as a condition and term of the contract, instead of the effect of it, as stated by Weeks, he would have telegraphed, "We confirm sale," and that, knowing that Weeks was not in Montreal, he would voluntarily supplement the telegrams as to each transaction with "confirmation of sale," setting out the conditions admitted by Weeks with particularity, but without one word as to this important condition; that he would have been content with

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Lennox, J.

Weeks simply answering that he had not heard from Black; that he would not have taken some definite action when notified by the transportation company that the bags were at the dock, for his evidence is singularly unsatisfactory at this point: that he would have remained silent during the two or three days that Weeks visited him; that he would find it necessary to consult a lawyer before he had reason to believe that there would be a conflict as to facts; and that he would assign a dishonest reason when he telegraphed his reply? These were of course all matters to be considered by the trial Judge, and no doubt received careful consideration. After weighing the very able argument of Mr. Ferguson, I am not only unable to say that the Judge at the trial was wrong in finding for and awarding damages to the plaintiff company, but I am satisfied, except as to the amount of the damages, that he was right.

With great respect, however, I am of opinion that he erred as to the principle on which the damages should be computed, and that the amount awarded is more than it should be.

The judgment should be vacated, and there should be a reference to the Master to assess the damages, and judgment for the amount found, with costs.

It is a divided success, and there should be no costs of appeal.

Rose, J.

ROSE, J.:—If there was before us nothing but the printed record of the testimony, my finding of fact would be that the defendants' telegrams and "confirmations of sale" were not intended to record a bargain that had been made, but were something to be exhibited to Mr. Black as indicating the bargain that Mr. Weeks would be able to make if the plaintiffs would agree to stay out of the market while the defendants were buying the flour mentioned in the writings. In the evidence of Weeks himself there is much that seems to me to go to confirm Morrow's evidence to this effect.

However, the case does not come before us in that way. It comes with the finding of the learned trial Judge that the telegrams are "an acceptance of the proposition of the plaintiffs;" and, while the trial Judge does not say, in so many words, that he believes Weeks and does not believe Morrow, I agree with Mr. Justice Lennox that the finding that the telegrams were

an acceptance necessarily involves a finding as to the credibility of the witnesses. That it is peculiarly a case in which such a finding ought not to be disturbed is, I think, apparent from the circumstance that the testimony of each witness contains statements that are difficult to reconcile with his statement as to the principal fact, and from the further circumstance that in this Court a perusal of the documents and of the testimony and a consideration of the probabilities has not led to unanimity of belief. The demeanour of one or the other of the witnesses may easily have turned the scale.

I agree with Mr. Justice Lennox that the requirements of the Statute of Frauds are met.

Upon the record as it stands, it would be difficult, if not impossible, to assess the damages, applying the principle that seems to me to be the correct one; and I, therefore, agree that there ought to be a reference. Perhaps it is inadvisable, at this stage, to attempt to lay down the rule that ought to be followed.

I think that there should be no costs of the appeal, and that the costs of the reference should be reserved.

MEREDITH, C.J.C.P.:—The plaintiffs have recovered, in this action, a judgment against the defendants, and $12,700 damages, for breach of an alleged contract to sell and deliver to the plaintiffs, at Montreal, 20,000 bags of a certain kind of flour, for the price of $70,250; and there are two questions in issue between the parties upon this appeal, namely: (1) whether such a contract has been proved in this action; and, if so, (2) whether the damages awarded are excessive.

It ought not to be needful, though it may be excusable, to say, at the outset, that the onus of proof: of the contract; of the breach; and of the damages actually sustained; was upon the plaintiffs; and that, having regard to the amount involved in the contract, if there were one, and of the damages awarded, the plaintiffs' proof should be of a convincing character—that such damages should not be awarded upon uncertain evidence. I do not mean that any different rule is to be applied to cases in which large amounts are involved from those in which small amounts are involved; but I do mean, that it is much more probable that a contract covering a small amount should be made

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

by loose methods, and with little care to preserve evidence of it, than that contracts involving large amounts should be so made: that with keen business-men, such as the parties to the transactions in question in this action were, with men of their character dealing in things involving such a great amount of money, and acting as servants or agents only, it is very improbable that such a transaction, finally concluded, should be left at anything like "loose ends," or otherwise than plainly expressed and well-evidenced in writing over the signature of each.

Without the writings, the action ought to fail, apart from any question of law involved in it, because the assertion made by the one witness for the plaintiffs is fully met by the denial made by the one witness for the defendants, the onus of proof being upon the plaintiffs: such a verdict should not stand on such uncertain evidence.

By reason of the writings, the plaintiffs succeeded at the trial, and upon them they must hold the judgment in their favour if they can hold it at all.

The story of the plaintiffs' witness was: that the two telegrams, sent to him by the defendants' witness, concluded sales made by word of mouth before these messages were sent; and that these messages were sent, at his request, as confirmations of such sales: and that nothing more was to be done, on either side, to make them binding.

The story on the other side was: that no sale was ever effected, or intended to be, by word of mouth or by these telegrams: that they were in truth offers made on the condition that the plaintiffs would "stay out of the market," and so be prevented from causing a rise in the price of the flour to be sold whilst the defendants should be, necessarily, "in the market" buying the flour to fill the contract: that the telegrams were sent at the request of the plaintiffs' witness to enable him to shew the plaintiffs, his employers, that, if they would agree to stay out of the market, they were sure of getting the 20,000 bags of flour, which was all they needed, at the prices named.

If this story be true, the plaintiffs' judgment cannot stand, because: (1) the acceptance of the offer, in the form of a bought note, sent ten days after the offer, was too late; (2) was not an unqualified acceptance, but varied materially from the offer;

and (3) did not comply with the condition regarding keeping out of the market.

The day after the telegrams were sent, the defendants sent to the plaintiffs sold notes in confirmation of the telegrams; but the plaintiffs' witness repudiates these, saying that he knew nothing of them until about 10 days after they were sent, and that even then he did not read them. The reason of this apparently is, that the sold notes would, in the ordinary course of business, require an answer, in the shape of bought notes, to make a binding contract. This is testified to by the defendants' witness, and is not denied by the plaintiffs' witness; and is quite in accord with common sense, for otherwise one side would be bound in law, whilst the other would not. But this repudiation of the sold notes, by the plaintiffs, puts them at a disadvantage in law, greater than any gain the repudiation of them could bring on the question of fact involved. I should add, that the telegrams were sent to the plaintiffs' witness at London; and that the sold notes were sent to the plaintiffs at their head office in Montreal. At that disadvantage because the telegrams alone are quite insufficient to satisfy the provisions of the Statute of Frauds, which requires that the writings shall contain all the terms of the agreement. They do not even shew the commodity referred to in them. It might be potatoes or an hundred and one other things; and if, instead of "bags" only, the words had been "bags of flour," they would still be entirely indefinite in regard to the kind or quality of the flour, though there are different kinds and different qualities. Nor do they indicate who is buyer or who seller. The word "book" would ordinarily be used by a buyer. Both plaintiffs and defendants were both buyers and sellers of flour, and so the case would be quite different from that of the baker and the flour-dealer.

So it seems to me to be very plain: that the case the plaintiffs' witness was so anxious to make is a hopeless one for the plaintiffs; that to come within the provisions of the statute they must rely also upon the sold note; and, relying upon that, they cannot succeed unless they can shew that their bought note was sent within a reasonable time, and also overcome the difficulties in their way created by the variation of its terms from those mentioned in the telegrams and the sold note: quite apart from

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

the question whether the whole negotiations were subject to an agreement on the plaintiffs' part to keep out of the market.

Not only was it proved, at the trial, that the bought notes were essential to the making of a contract, but the plaintiffs themselves, by their conduct, proved it. Why send them if unnecessary? The plaintiffs' witness made a painfully lame attempt to answer that question. He said that they were written by a subordinate employee of the plaintiffs, and introduced the quite too much overworked excuse of the difficulty of keeping capable men in these days of war service; but, after that, he was obliged to admit that the bought notes were actually sent by him in a letter written and signed by him, a letter containing these words: "Also we herewith attach our confirmation of our recent purchase of flour from you." The efforts of counsel for the plaintiffs to help the witness out of his dilemma regarding these things, seem to me to have been successful only in putting the matter in a more unenviable light for the witness:

"Q. How is it that the confirmation orders were sent? A. So that he can put my registration number on an invoice."

A bought note setting out, in all their details, contracts which it confirms, all to give a registration number—and for what purpose the number should be needed by the seller, or why not just mention the number in the letter, we are not told. So too the attempt to wriggle out of the effect of these notes by asserting that they were not signed, though there was a "printed signature," and although he sent them, as "confirmations of our recent purchase," attached to a letter signed by him.

So too both parties were quite too keen and knowledgeable business-men to make it believable that the defendants meant to be bound, or that the plaintiffs, or their witness, could have thought they meant to be bound, to such contracts, though it was obvious the plaintiffs were not. That, having signed nothing, until the bought notes were sent, and so being in no way bound until then, yet these defendants were all the time bound, in a matter in which the price might, and was likely to, vary thousands of dollars in a day. That, the price having gone up thousands of dollars, they could pocket that advance; whilst, if it had gone down, they could, and no doubt would, entrenched

behind the law of the land, laugh at any efforts of the defendants to enforce their purchases of the flour.

The probabilities are overwhelmingly against the plaintiffs. And so much so that, if it were necessary that we should determine the question whether the agreement really was that the contracts should not come into effect unless the plaintiffs agreed "to stay out of the market," as admittedly the defendants desired they should, and very naturally were anxious to make sure that they would, I should find no difficulty in finding that it was.

It was altogether a reasonable desire. The purchases, if effected, would give the plaintiffs all the flour then needed, at all events, their witness said so, admittedly, during the negotiations, and testified to it at the trial. If they came into the market it would probably increase the price which the defendants had to pay in buying, as they should have been obliged to do to fill their contract with the plaintiffs; and the plaintiffs, having all they needed for their own trade, could come in only for speculative purposes. Being business-men, it seems to me more than probable that such a condition would be insisted upon under all the circumstances; it was needed in the defendants' interests, and was likely to be acceded to on the plaintiffs' part if it were true, as their witness asserted, that they had no need, or intention, to go into the market if this purchase was made.

The reference, by the plaintiffs' witness, to something said to have been contained in a letter of the plaintiffs' managing director to this witness, and to have been read by him to the defendants' witness, even if the latter had not denied, as he did, having had any knowledge of it, does not help the plaintiffs—it rather, in my mind, has the opposite effect. It was a statement not only that they would be out of the market, as the defendants desired, but that they had written to some sellers saying so; and, if so, that meant compliance with the defendants' condition, and should have been so stated in sending the bought notes. This letter should have been filed at the trial; and the correspondence between this witness and the plaintiffs between the 12th and 21st days of October, in so far as it related to these transactions, should have been produced for the purposes of discovery in the action; it might throw much light on the questions involved.

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

Nor does the testimony, of the plaintiffs' witness, that he informed the defendants' witness, on the 20th day of October, that the bags, to contain the flour, had been shipped by the plaintiffs to the defendants, really aid the plaintiffs, whilst it does shew the anxiety of the witness to make a point in the plaintiffs' favour, and does tend to shew the danger of depending upon his memory. The defendants' witness denied, first in general terms and then specifically, that he was given any such information, and he added significantly these words to the specific denial: "How could he know?" The significance is this: the plaintiffs' witness testified that the information was given in Toronto on the 20th, though the bags were shipped only on the 19th, at Montreal, and the witness was then in Toronto on his way from the West to Montreal; he had reached Toronto only on that day—the 20th. How could he know? A letter from Montreal posted on the 19th would not be distributed in London, where the witness resided and had been, until the afternoon of the 20th, and, by that time, the witness was in Toronto, on his way to Montreal. But his own letter makes conclusive evidence that he was wrong and the other witness right as to this also. On the 23rd, the plaintiffs' witness, in Montreal, wrote, for the plaintiffs, the letter, before referred to, in which he also said: "We are pleased to advise the empty bags . . . went forward to you last Friday . . ." Why advise again, and advise as if for the first time, not in such terms as: "According to information already given to you, we beg again to inform you," &c.?

It seems to me to be plain, from all the circumstances of the case, that the question of "staying out of the market" was a material one, affecting the making of the contract; and that, in consequence of it, the transaction was kept open till the plaintiffs' witness should return to Montreal, to be closed by him then. He did not return until the 21st, having been in London, and for a few days in Toronto, between the 12th and the 21st: and, upon his return, the matter was taken up by him and concluded by sending the bought notes on the 23rd: and in this respect the notes themselves are significant: in the first place, they were apparently drawn up on the day of or the day after the receipt of the sold notes, signifying that the plaintiffs con-

sidered them essential to the making of the bargains: then they were held until this witness returned, signifying that the question of compliance, or refusal to comply, with the condition, caused delay until the return of the witness; and, being then sent by him for the plaintiffs, signified that he also deemed them essential to the completion of the contract.

So, as I have said, if the case turned upon this question of fact, upon the whole evidence, I should be obliged to find against the plaintiffs.

But, as I have also said, it does not: because, for two reasons, the bought notes did not bind the bargains: (1) they were not sent within a reasonable time, having regard to the character of the flour market at the time, which may be described as quite naturally feverish: the sold notes were not intended to and did not bind the defendants, nor can I think they bound them until withdrawn: having regard to the character of the transaction, the bargain should have been clinched within a reasonable time: and, in any case, (2) the terms of the bought notes varied so materially from those of the sold notes that they could not together make contracts: for instance, in the one there was no provision for any time of *delivery*, there was for time of *shipment* only; a difference of great importance at the time, owing to the great uncertainty as to the time which would be taken up in transportation, that time running from six days to thirty days or more: in the bought notes times for "delivery" only are provided for: a variation in itself enough to prevent any reasonable contention that the parties were "at one." And in this respect, again, much light is thrown upon the question how far the plaintiffs' witness can be depended upon, to support this $12,000 judgment. When confronted with the word "delivery" in the plaintiffs' bought notes, sent by him to the defendants, he delivered himself in this, to me, very unsatisfactory manner: "No, it says 'delivery.' I don't say 'delivered.' 'Delivered' is not 'delivery.' When a man ships his stuff he performs his operation. I don't say he is to deliver that stuff at Montreal. 'Delivery' and 'delivered' are two different things." And, in answer to the next question, he was obliged to admit that the writing required the flour "to be delivered" in Montreal, and at the "city mill siding" in Montreal, the provisions as to delivery at

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

the city mill siding and "per Grand Trunk" being both also obviously material departures from the terms of the sold notes, so obvious that the testimony shewing how these provisions might prejudicially affect the sellers was hardly necessary, though better given than not.

The learned trial Judge seems to me to have been too much affected by the fact that, but for the rise in the price of flour, the defendants would have been willing to carry out their offer; but of course they would, whether it was binding on them or not, for the reason that there would have been profit to them in the transactions; and, for the like reason, they would have been willing to repeat the transactions as often as flour was purchasable by them at a price enabling them to continue making that profit. And, on the other hand, had the price gone down, can any one doubt that, before sending the bought notes, the plaintiffs would have taken advantage of the incompleteness of the transaction, and the want of anything in writing binding them, to avoid the loss? If any one could doubt it, the tell-tale letter of the 23rd October should remove the doubt, in these words: "We beg to confirm exchange of wires: Received: 'Kindly confirm sale of oatmeal feed quick:' Sent: 'Sorry too late to confirm. Very best could do would be one car at twenty-three. Heavily oversold.'" The defendants' witness indicated, in his evidence, that his course in this matter was in accord with and was intended to follow theirs in that matter. There is always some danger of having our views of the weight of evidence unduly affected by our notions of the fairness or unfairness of one side or the other in matters not affecting the legal rights of the parties: see *Borrowman* v. *Drayton* (1876), 2 Ex. D. 15, at pp. 19, 20.

In my opinion, therefore, there was no contract, binding in law, between the parties, and so I would allow this appeal and dismiss the action.

And upon the question of damages I am also of the opinion that the learned Judge erred; erred in principle as well as in amount. He took the price of the flour as agreed upon by the parties in their negotiations for the sale and purchase of it, and deducted that amount from sums actually paid by the plaintiffs for the same quality of the same kind of flour; but the purchases were not deliverable at the same time or upon the same terms as those

which were the subject of the transaction in question. These purchases were for immediate delivery and were all made between the 6th and 24th November, whilst none of the flour in question was required to be delivered, within that time, and none of it might have been so delivered: except as to 6,000 bags, which were to have been "shipped" in October: but might not be delivered until December, all the flour could be shipped, at any time the defendants chose, during the month of November, and so might not have been delivered until January: and during the month of December the market prices fell below the prices agreed on in the transaction in question, and remained below those prices for more than half of the month.

Assuming that there was a binding contract between the parties, then the defendants' repudiation of it gave the plaintiffs the legal right either to stand by it and require fulfilment of it by the defendants, or else to accept the defendants' repudiation of it as a complete breach of it, on their part, and to seek damages for such breach: they chose the latter right, and brought this action for such damages early in November, before any part of the flour might have reached them if the transaction had been carried out strictly in accordance with its terms. How, in such circumstances, should the damages be assessed? Plainly, I should have thought, according to the price the plaintiffs should have had to pay for the flour under a similar contract made within a reasonable time after the breach. It was their duty to take reasonable means to mitigate the damages. Needing and wanting the flour, they should have bargained for it again as if bargaining for it for themselves, not bargaining for the defendants without caring how much it cost them. But, not having done that, they cannot recover more than their actual loss, that is, the loss, if any, based upon what the cost to them was, or would have been if they had then bought, at the time of the failure of the defendants to deliver: they cannot recover more than that if that be less than their loss would have been in the other way: nor can they recover more than their loss would have been in the other way if that would be less than in this way.

The foregoing words were written at the conclusion of the argument of this appeal, and, since that time, the case has received our further consideration and reconsideration, and, after

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

several changes of opinion, we have been unable to agree upon the proper judgment to be pronounced on the main question involved in the appeal: the other members of the Court have eventually reached a conclusion the opposite of that above written on that branch of the case: but we are all agreed that on the subject of damages the judgment in appeal is erroneous and must be set aside, and a new assessment made.

I am obliged to hold to the views first expressed by me, for the reasons which are stated in the foregoing words, words which I leave unaltered, not because there is not much that could be added to them, but because they are enough to shew, in a general way, mainly, the things which led to my conclusion and which now hold me there.

But, on the subject of the power and duty of this Court upon an appeal such as this, I feel bound again to express my views in a general way.

The statute-law of this Province gives, in unmistakable terms, an appeal against a judgment such as this, which is, in fact and law, the judgment of one man only: it gives no appeal from the verdict of a jury, which is the judgment of at least ten out of twelve men.

The right of appeal so given is unqualified; the statute-law makes no difference between questions of fact and questions of law in this respect, nor does it between questions of credibility of witnesses and any other questions of fact or law.

Therefore, if this Court should not entertain an appeal when the question involved is one of fact, or when one of fact as to the credibility of witnesses, it would fail to perform the duty which the law has imposed upon it; and it would deprive the appellants of a right which, in the plainest terms, the law of the Province has given to them. It is this Court's bounden duty to entertain, and to consider with due care, every appeal which the statute authorises.

But it can properly reverse a judgment appealed against only when it is satisfied that that judgment is wrong; and, in considering all questions of fact, proper weight is to be given to any advantages the trial Judge had over the court of appeal in coming to a true finding, as well as to any advantages the court of appeal may have over the trial Judge.

The assertion sometimes, but rarely, made, that the findings of a Judge should have as much weight as the findings of a jury, upon an appeal such as this, are obviously erroneous when applied to the law of this Province; for, as I have said, in the one case an appeal lies and in the other it does not; so that, when trial by jury is selected, it is chosen with the knowledge that upon questions of fact there can be no appeal, and that, when trial by a Judge is chosen, there can be an appeal.

On the question of credibility of witnesses, if that depend mainly on the demeanour of the witnesses, a court of appeal can hardly reverse the finding of the trial Judge in that respect because of the advantages which seeing and hearing the witnesses afforded him, which advantages a court of appeal has not. But few, very few indeed, cases there are in which the demeanour of the witnesses is the controlling feature: the circumstantial evidence and the probabilities of the case are nearly always the best tests of credibility. No Judge is infallible in the matter of demeanour, all men alike may sometimes be imposed upon: demeanour is often deceptive. And, when demeanour is spoken of, more than that of the witnesses may sometimes be helpful in reaching a right conclusion in a court of appeal: for instance, the demeanour of the trial Judge; whether too early in the case he has taken too decided a view in favour of or against one side or other; whether his sympathies have had too much sway: and so on.

To say that a court of appeal will not interfere in any case depending upon conflicting evidence, or upon the credibility of witnesses, is to say that it will disregard the duty imposed upon it by statute, and is to say also that a Judge, one man, acting in a trial court, with its necessary haste, and other disadvantages, shall be the sole arbiter between litigants of all sorts and in all kinds of cases; and to say too that the elaborate appeal-machinery, and the great amount of money spent upon it, is very largely machinery and money wasted, for there are comparatively few cases which do not depend to some extent on questions of fact; and few in which it could not be said, as it is said in this case, that the trial Judge must have discredited the witnesses on the side that lost before him.

No case warrants any such sayings. Such observations as

ONT.

S. C.

OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Meredith, C.J.C.P.

those made in the case of *Wood* v. *Haines*, 38 O.L.R. 583, 33 D.L.R. 166, must be read with the context, and with a full knowledge of all the circumstances of the case in which they were made. It is easy indeed in some cases to quote some words quite accurately which without the context convey a meaning very diffdifferent from, sometimes the opposite of, that intended to be expressed. The context in that case shews that the words relied upon for the respondents were spoken of a case in which there is nothing to go upon but the conflicting testimony: and, in that case, whatever the words mean, that which was done was to deal fully with the question of fact involved and to reach the conclusion that the trial Judge had not erred as to the credibility of witnesses. But, whatever may have been said in any case or by any one, the statute-law of this Province gives a right of appeal against the judgment of a Judge on all questions of fact as well as of law, and that law we must obey: we are paid for obeying it.

If an appellate Judge could thus put all the responsibility on the trial Judge, that method of evading his duty would be the first resort of the indolent, if there ever were or could be such, and the last resort of the sympathetic or prejudiced; if he were unable to give any valid reasons for his conclusion, it would be attributed to the trial Judge against whose decision there is no appeal, because he decided the case in the favour of one side, and consequently must have credited the witnesses on that and discredited those on the other side; and thus would be established the uselessness of the appellate Courts in a great majority of appealable cases.

The result is, that, upon the opinions of the other members of the Court, the appeal must be dismissed on the question of liability; and in accord with the unanimous views of the Court it must be allowed on the question of damages; and there must be a reference to the proper officer to assess the damages upon the proper principle: and, as the other members of the Court do not desire to lay down now the principle applicable to such damages, it would be better if the assessment should be made in both ways, to save another reference, should the Master adopt the wrong method.

Judgment as stated by RIDDELL, J.; MEREDITH, C.J.C.P., *dissenting in part.*

TAINTER v. McKINNON.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. March 13, 1918.

1. DAMAGES (§ III A1—40)—CONTRACT FOR SALE OF GOODS.—BREACH—MEASURE OF DAMAGES.
The measure of damages for breach of a contract for the sale of goods to be delivered on a day certain is the difference between the contract price and the market price on that day.
2. STATUTES (§ II A—95)—GRAIN ACT (Can.)—APPLICATION.
S. 218 of the Canada Grain Act (Can. Stats. 1912 c. 27) applies only to transactions in which the buyer purchases grain in car lots irrespective of quantity; not to purchases of a definite quantity.

Statement.

APPEAL from Greene, District Court Judge of Medicine Hat.

S. G. Bannon, for appellant; *G. F. H. Long*, for respondent.

The judgment of the court was delivered by

Hyndman, J.

HYNDMAN, J.:—The defendant entered into an agreement with the plaintiff in the following words:—

To J. C. McKINNON, . Taber, Alberta, Sept. 29th, 1915.
Lomond, Kinnondale Post Office, Alberta.

I confirm the following purchase from you to-day of one thousand bushels of No. 1 North, at a track price of 72¼c. per bushel, basis in store Fort William, shipment to reach bill of lading destination not later than December 31, ¾c. more for October del. other grades to apply at spread on date of inspection or such date as the Grain Commission shall determine. It is hereby understood and agreed to that should the seller not make delivery of the grain on or before the day appointed that I shall reserve the right to buy a sufficient amount of grain to fill this contract at the market price, and in the event of a loss the seller shall reimburse me. Time is the essence of this contract.

Accepted.

J. C. McKinnon, Seller. CHAS. E. TAINTER, per E. B. T.

At the trial the plaintiff proved the making of the agreement, non-delivery on the date for performance, and the market price of grain on December 31, 1915, but gave no evidence as to whether or not he had purchased wheat elsewhere to fill the contract.

The defendant did not offer any evidence and the trial judge gave judgment for the plaintiff for $283.75 being the difference between the price named in the agreement and the market price as of December 31, 1915.

The principal grounds of appeal are, (1) that the plaintiff failed to prove purchase of other grain to fill the contract and that therefore there was no proof of damage and, (2) that the plaintiff in contravention of the Canada Grain Act delivered the agreement sued on which did not bear on its face the license season or the license number of the plaintiff as a track buyer, or the place of purchase.

ALTA.

S. C.

TAINTER v. MCKINNON.

Hyndman, J.

In my opinion the words, "I shall reserve the right to buy etc., etc.," were inserted for the purpose merely of fixing the measure of damages and in any event do not give the plaintiff any greater or less rights than he would have under the common law and the Sale of Goods Ordinance without the insertion of any such words. It would seem that the words referred to are pure surplusage. The document, I think, should be looked upon as an open contract. Plaintiff's reservation of the right to do that which the law in any event gave him, cannot deprive him of the rights which he had by law unless the words did in fact make a change in the ordinary legal consequences of a breach, in other words, in the case at bar, that it was clearly intended that the purchaser should not be entitled to damages except he purchase the grain elsewhere at a higher price. I do not think any such intention can be inferred.

If I am correct in this matter then the law seems clear that in a contract for the sale of goods to be delivered on a day certain, in the event of a breach by the vendor, the measure of damages is the difference between the contract price and the market price on that day.

Jamal v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175, was a case the converse of the present one. There the vendors agreed to sell shares in a company at a certain price, the date for delivery being the 30th of December 1911. The purchasers failed to pay for the shares or take delivery. The contract note contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of re-selling the shares by auction and any loss arising should be recoverable from the buyer.

Lord Wrenbury said, p. 179:

> It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiffs could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

I have some doubt, however, as to whether the plaintiff would be entitled to recover on the pleadings as framed in the absence of proof of purchase of other grain. Long, however, at the argument made the statement, and it was not controverted, that

ALTA.

S. C.

TAINTER v. MCKINNON.

Hyndman, J.

he asked for the necessary amendment at the trial although there is no record of it in the appeal book. This being the case I would allow such amendment now.

With respect to the other point raised, namely, that the plaintiff failed to comply with the provisions of the Canada Grain Act, I cannot see that there is any merit in this contention. S. 218 clearly does not apply to a case of this nature where the purchase of a definite quantity of grain was made as distinguished from car lots. That section applies only to transactions in which the buyer engages in the purchase of grain loaded on cars irrespective of quantity. The present case is one in which a specific quantity of wheat (viz. 1,000 bushels) is bought for future delivery.

I would dismiss the appeal with costs. *Appeal dismissed.*

VANZANT v. COATES.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Magee, JJ.A., Lennox, J. and Ferguson, J.A. November 12, 1917.

DEEDS (§ II F—65) — VOLUNTARY CONVEYANCE — PRESUMPTION — UNDUE INFLUENCE—ONUS.

If a gift be made by one who is aged and infirm, and dependent on the one to whom the gift is made, equity casts upon the donee the burden of proving that the transaction was fairly conducted, as though between strangers, and that the weaker was not unduly influenced by the stronger. [Review of authorities.]

APPEAL by the plaintiff from the judgment of MULOCK, C.J. Ex., 37 D.L.R. 471, 39 O.L.R. 557. Affirmed. Statement.

George Wilkie, for appellant; *Frank Arnoldi*, K.C., for defendant, respondent.

The judgment of the Court was read by

FERGUSON, J.A.:—This is an appeal by the plaintiff from a judgment of Mulock, C.J.Ex., dated the 26th May, 1917, whereby he dismissed the plaintiff's action for possession of the north half of lot 12, plan 115, registered in the registry office for the county of York, and also set aside the deed under which the plaintiff claimed title, bearing date the 6th October, 1915. The appellant questions some of the findings and conclusions of the learned Chief Justice, but with the following she does not quarrel:— Ferguson, J.A.

"The plaintiff and defendant are the sole children of Elizabeth Coates, deceased. The plaintiff, Frances Rebecca Van-

ONT.
S. C.
VANZANT
v.
COATES.
Ferguson, J.A.

zant, claims title under a deed bearing date the 6th October, 1915, from Elizabeth Coates, her mother. The defendant, George Coates, on several grounds, denies the validity of this deed, and claims title under his mother's will and also by possession" (37 D.L.R. at p. 471).

In 1900 or 1901 Elizabeth Coates (being the owner of the whole of lot 12) told the defendant "that the north half was his; that he might move his house upon it and take possession; and that, acting on this permission, he did move his house upon the north half . . . and that he has ever since resided there and cultivated the land" (p. 472).

"On the 19th December, 1911, the mother executed her will, whereby she devised to the defendant the north half of the lot and to the plaintiff the south half" (p. 472).

"In 1914, the plaintiff began the erection of a house on the south half, and on the 31st August, 1914, her mother, Mrs. Coates, made a voluntary conveyance to her of the south half. Some three or four months thereafter, owing to the intervention of Mr. Mills, Mrs. Coates' solicitor, the plaintiff executed an agreement which was antedated to bear even date with that of the voluntary conveyance, whereby she granted to her mother, during her life, the right jointly with the plaintiff to occupy the said south half, and also covenanted to maintain her. In the spring of 1915, the plaintiff and her mother moved from the old house to the new one of the plaintiff, and they resided there together until the mother's death, which occurred on the 23rd January, 1916" (p. 472).

"I find that the plaintiff . . . excluded the defendant from the presence of his mother for about nine months prior to her death . . . It was during this period of exclusion that the deed in question was procured" (pp. 473-4).

"Mrs. Coates had been paralysed in her right side for two or three years before her death, and was in her seventy-sixth year and in feeble health when she executed the deed by making her mark" (p. 475).

The plaintiff "gave instructions to the solicitor" (not Mrs. Coates' solicitor, Mr. Mills) "for the preparation of the deed; obtained it from him for execution; took it to her mother, read it

to her privately; then sent for the witness to the execution; and afterwards, in the presence of Mrs. Broderick, the witness, read it again to Mrs. Coates, and this time also explained it to her, in order to ascertain 'whether her mother understood it;' and then, in the presence of the witness and Dr. Sheppard, said to her mother, 'Will you sign?' when the mother said 'Oh, yes, Fanny,' etc., and then signed it" (p. 476).

"Mrs. Coates had for some years been in failing health, mentally and physically, and was wholly dependent on her daughter for the care required by a person of her advanced years and feeble health" (p. 480).

"The mother had left her own house, and was living with the plaintiff; she was in her seventy-sixth year, had for some years been paralysed in her right side, and was incapable of taking care of herself. She gradually became more helpless, and throughout the year 1915 was frequently confined to her bed, occasionally only with difficulty moving around the house but not outside of it. The plaintiff recognised her mother's helpless condition, and had for some years lived with and taken care of her, first in her mother's house and then in her own house. She was her nearest relative, and during the last years of her mother's life had been the only person in attendance upon her. As stated by Mrs. Broderick in her evidence, 'Mrs. Vanzant cooked for her and washed for her and if she was sick got a doctor for her and took good care of her.'

"Q. Was she wholly dependent on Mrs. Vanzant? A. Yes.—Q. Entirely so? A. Yes.—Q. And nobody else took any care of her? A. No one else that I know of" (p. 483).

On the question of who employed the solicitor who drew the deed and the question of independent advice, the trial Judge quotes the plaintiff's evidence as follows (p. 475):—

"Q. You employed him? A. Yes.—Q. And you are to pay him? A. Yes.—Q. And he was your solicitor? A. Yes.—Q. Now had your mother any independent lawyer to advise her before she made that deed? A. No, not to my knowledge.—Q. Or any independent person? A. No.—Q. Was it wholly a matter resting on the relations between you and your mother? A. Yes."

The plaintiff gave evidence to shew that the deed was the

ONT.
S. C.
VANZANT v. COATES.
Ferguson, J.A.

voluntary act of her mother—Mrs. Broderick and Dr. Sheppard gave evidence on her behalf detailing the conditions under which the deed was executed. The learned trial Judge has, not only not accepted the plaintiff's evidence as being truthful, or the evidence of the witnesses Sheppard and Broderick as being sufficient to convince him that the deceased did fully understand and appreciate the effect of the transaction and that she acted voluntarily and deliberately freed from the influence of the plaintiff, but finds: "The plaintiff pretends that she was reluctant to accept a gift of the north half, but that her mother really forced it upon her. I do not accept this account of the transaction; but, on the contrary, am of the opinion that it was a result of the plaintiff's undue influence over her mother" (p. 564).

Counsel for the plaintiff argued that undue influence is not a logical conclusion from the refusal of the trial Judge to accept the plaintiff's statement, and urges that there is no evidence to support a finding of undue influence; and he further argued that Equity does not attach to a gift from parent to child a presumption of undue influence such as would attach to a gift from client to solicitor or from ward to guardian; and, also, that the circumstances surrounding the making of the deed of gift did not create or raise a presumption against its validity or cast upon the plaintiff the burden of proving its righteousness.

The judgment appealed from is, in part, based on the rule of Equity that if a gift made to one who holds a position of influence be attacked by him who is the subject of that influence the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as between strangers; that the weaker was not unduly impressed by the natural influence of the stronger: *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462.

In argument Mr. Wilkie urged that the rule did not apply to a gift from parent to child but was confined to well-known fiduciary relationships such as solicitor and client, guardian and ward, principal and agent, and the like.

It is true that proof of the bare fact that the donee is a child of the donor will not (*Beanland* v. *Bradley* (1854), 2 Sm. & G. 339, *Armstrong* v. *Armstrong*, 14 Gr. 528), while proof that the donee at the time of the transaction was the solicitor of the donor will (*Wright* v. *Carter*, [1903] 1 Ch. 27), cast upon the donee

the burden of proof stated by the rule. But the rule is not, I think, confined to well-known legal or family relationships, but extends to circumstances, as well as to persons, and to any transaction in which it is shewn that the person benefited has influence or is in a position to exercise influence over the other party: *Lyon* v. *Home* (1868), L.R. 6 Eq. 655. In the case at bar it is not the relationship of mother and daughter that casts the onus stated by the rule on the plaintiff, but the circumstances of age, infirmity, and dependency of the donor, and the position of influence occupied by the donee, and her acts in procuring the drawing and execution of the deed, and the consequent complete change of a well-understood and defined purpose in reference to the disposition of the donor's property. It is in these circumstances, and in that it has not been found that there was no undue influence, that I think the case at bar is distinguishable from such cases as *In re Coomber*, [1911] 1 Ch. 174, and in appeal at p. 723; *Empey* v. *Fick* (1907), 13 O.L.R. 178, 15 O.L.R. 19; *Taylor* v. *Yeandle* (1912), 27 O.L.R. 531, 8 D.L.R. 733, and *Armstrong* v. *Armstrong* (*supra*). The underlying equitable rule seems to be, that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so, because of their position. As I see it, the question here is not, does the relationship of mother and daughter raise a presumption of undue influence? but, do the circumstances adduced in evidence shew that the plaintiff occupied a position of influence and that the deceased was not a free agent, equal to protecting herself against the plaintiff's influence or domination, or that the plaintiff benefited or profited by her position?

In discussing the rule and its application, Lord Chancellor Brougham in *Hunter* v. *Atkins* (1834), 3 Myl. & K. 113, at p. 139, says: "I have referred to the case of agent, attorney, or steward, as the strongest; as the one to which the jealousy of the Court is at all times the most watchfully awake; and as the one in which alone I believe (except in *Griffiths* v. *Robins* (1818), 3 Mad. 191), you will find the interposition of third parties mentioned, to the effect of holding the want of such interposition a sufficient ground for setting aside the transaction. Where the relationship in which

ONT.

S. C.

VANZANT v. COATS.

Ferguson, J.A.

the parties stand to each other is of a sort less known and definite, the jealousy is diminished."

Griffiths v. *Robins* (*supra*) was a case of an aged female, stricken with blindness, or nearly so, and reduced by her age and infirmities to a condition of entire dependence upon a niece and the husband of that niece, to whom the gift was made; and there, Sir John Leach, V.-C., held that the persons taking the gift were bound to shew that the gift was the result of the free will of the donor *and effected by the intervention of some indifferent person.* That case was referred to in *Hunter* v. *Atkins* (*supra*) as establishing that in such a case a voluntary and deliberate act could be shewn only by proof of independent advice. With that proposition Brougham, L.C., at p. 137 of the report of *Hunter* v. *Atkins*, disagrees, but he does not disagree with the proposition that it was a case to which the rule applied so as to cast upon the donees the burden of proving it to have been a voluntary, deliberate, and righteous transaction.

Cooke v. *Lamotte* (1851), 15 Beav. 234, is another case where the rule was held to apply to a deed of gift to a nephew. Sir John Romilly, Master of the Rolls, at pp. 239 and 240 of the report of that case, says: "The rule in cases of this description is this; where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one."

This case has been frequently referred to and approved in our own Courts; see the recent case of *Kinsella* v. *Pask* (1913), 28 O.L.R. 393, 406. In *Archer* v. *Hudson* (1844), 7 Beav. 551, the rule was applied to a transaction between a niece and uncle; while *Allcard* v. *Skinner*, 36 Ch.D. 145, was an action by a sister of a religious sisterhood against the mother superior.

In *Billage* v. *Southee* (1852), 9 Hare 534, Turner, V.-C., at p. 540, says: "No part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstance in which it is applied. The jurisdiction is founded on the principle of correcting abuses of

confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que* trust—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle."

See also Halsbury's Laws of England, vol. 15, pp. 108, 110, and 420.

A perusal of these and many other authorities has led me to the opinion hereinbefore expressed that the Courts have not limited the application of the rule to any particular defined relationships or sets of circumstances, nor have they differed materially as to its application to any case where it is shewn that the donee is in a position to exercise influence, natural, legal, or otherwise, but that they have required different strengths and kinds of evidence in one relationship, or set of circumstances, to that required in another relationship, or set of circumstances, to satisfy the Court that the act of gift was voluntary and deliberate, and not the result of influence. For instance, the rule applies to both gifts by deed and gifts by will, but the same strong evidence is not required to support a gift by will that is required to support a gift by deed *inter vivos*. As pointed out in *Parfitt* v. *Lawless*, L.R. 2 P. & D. at p. 469, in will cases the donee who holds the position of influence, shifts the onus by proving mental capacity and due execution by an apparently free agent, and the person attacking must then prove undue influence, which in a will case must amount to more than the influence of affection and attachment and of persuasion short of coercion. Whereas in cases of gifts *inter vivos* the proof of due execution of the deed, is not in itself sufficient to shift the onus, for in these cases Equity presumes undue influence, while in will cases it does not; the reason for the difference being that undue influence in cases of gifts by deed may be by the exercise of the natural influence attaching to the position occupied, by the influence of personal advice, or by persuasion not amounting to coercion, while in will cases the influence exercised must amount to coercion destroying free will agency, before it is, in the eyes of the Court, undue influence. The Court does not presume coercion.

ONT.
S. C.
VANZANT
v.
COATES.
Ferguson, J.A.

Even in cases of attacks on gifts *inter vivos*, the strength and species of evidence required to satisfy the onus varies according to the relationship of the parties or the circumstances of the case. For instance, in a solicitor and client transaction, proof of independent advice is now required: *Liles* v. *Terry*, [1895] 2 Q.B. 679; while in our own Courts it is established in *Trusts and Guarantee Co.* v. *Hart*, 32 S.C.R. 553, that proof of independent advice is not necessary to support gifts from parent to child or from principal to agent.

As put by the Lord Chancellor in *Hunter* v. *Atkins*, 3 Myl. & K. at p. 139: "Where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished."

The evidence shews that the plaintiff enjoyed the complete confidence of her mother, and was in a position to influence, and, if she chose, even to dominate and control, her actions; whether she did or did not in this transaction exercise that influence or control is another question, which, as I view the law, it is not necessary to answer, for I think the rule of evidence to be adopted and followed is that stated by Sir John Romilly in *Cooke* v. *Lamotte*, 15 Beav. at p. 241: "If the Court should be unable to arrive at a satisfactory conclusion upon the subject, one way or the other, the instrument cannot stand."

If that be the proper rule of evidence, then the appellant cannot succeed unless we are able to say not only that the learned trial Judge was wrong in finding, "I am of the opinion that it" (the deed of gift) "was a result of the plaintiff's undue influence over her mother," but that the plaintiff has proved by satisfactory evidence that the gift was a voluntary and deliberate act by a person mentally competent to know, and who did know, the nature and effect of the deed, and that it was not the result of undue influence.

The trial Judge has refused to accept as trustworthy the plaintiff's explanations as to why her mother made the deed. Even had he not done so, her evidence, as recipient of the gift, should not, I think, be taken into account: *Taylor* v. *Yeandle* (*supra*), following *Walker* v. *Smith* (1861), 29 Beav. 394.

Under these circumstances, I have no hesitation in saying that the evidence does not satisfy me that the gift was the spontaneous

act of the donor, acting under circumstances which enabled her to exercise an independent will, and that the gift was the result of the free exercise of the donor's will: *Allcard* v. *Skinner*, 36 Ch.D. at p. 171.

I do not consider it necessary to the support of the judgment appealed from that there should be direct evidence to establish that the deceased was not mentally competent, or that she did not understand, or know, what she was doing, or that the deed was the result of pressure or coercion, or that I should agree with the finding: "I am of the opinion that it" (the deed of gift) "was the result of the plaintiff's undue influence over her mother."

It is, I think, enough to agree, as I do, with the finding and conclusions of the trial Judge when he says (37 D.L.R. at p. 483): "These relations between the two" (mother and daughter) "were such that the plaintiff was in a position to exercise undue influence over her mother; and that circumstance, without proof that it was exercised, casts upon the plaintiff the onus of proving its non-existence . . . The plaintiff not having proved the absence of undue influence, the gift fails and must be set aside."

Proof of the age, infirmity, and dependency of the deceased, and the position that the plaintiff occupied in reference to her, would, I think, alone have cast upon the plaintiff the burden of proof required by the rule. But there are other circumstances pointed out in the unquestioned findings of the trial Judge which were circumstances that should, as said in *Tyrrell* v. *Painton*, [1894] P. 151, excite the suspicion of the Court. The deed in question was a revocation of a well-established purpose in reference to disposition of the donor's property, as evidenced by her promise to her son in 1890, repeated later to her grandson, and confirmed by her will of 1911. Such a revocation and change required explanation and clear proof of capacity and freedom of action: see *Dodge* v. *Meech* (1828), 1 Hagg. Eccl. 612, 617: *Blewitt* v. *Blewitt* (1833), 4 Hagg. Eccl. 410, 464.

The deed of gift was drawn by the donee's solicitor for, and on the instructions of, the donee, and she secured its execution. This, as stated in *Barry* v. *Butlin* (1838), 2 Moo. P.C. 480, was sufficient to excite the suspicion of the Court and require that the document should not stand unless the suspicion was removed and the Court satisfied that the document expressed the true will of the deceased.

ONT.
S. C.
VANZANT
v.
COATES.
Ferguson, J.A.

Again, the obtaining by the plaintiff in 1914 of the voluntary deed of the south half of the lot, and the circumstances surrounding the obtaining by Mr. Mills of the subsequent but antedated agreement protecting the old lady, and the fact that Mr. Mills was not called in or consulted in the drawing or making of the deed attacked; concealment in that the deed was not registered when made, or made known to the defendant for nearly seven months after its execution, and for more than three months after the mother's death, although he was in possession of the land; the exclusion of the defendant from his mother's presence, and the obtaining of the deed during the period of exclusion—are all, I think, circumstances of suspicion, calling upon the Court for diligent and zealous inquiry and for satisfactory evidence as to the righteousness of the transaction.

The cases of *Tyrrell* v. *Painton*, *Dodge* v. *Meech*, *Blewitt* v. *Blewitt*, and *Barry* v. *Butlin* (*supra*) are *will cases*, and the onus cast by these suspicious circumstances is held to be shifted by the proof of due execution by a mentally competent and apparently free will agent; but, as pointed out, in a gift *inter vivos* the onus is not so readily shifted. For instance, in *Donaldson* v. *Donaldson* (1866), 12 Gr. 431, a voluntary transaction between father and son was set aside, and it was held that proof of execution and capacity by the donee was not enough, but that in addition the defendant donee was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from or influence by the defendant, as the recipient of the benefit.

Mason v. *Seney* (1865), 11 Gr. 447, 12 Gr. 143, is another case in which deeds of gift from father and mother to son were set aside, and in which Mowat, V.-C., ably reviews the authorities and states the rule as follows (11 Gr. at p. 455): "It (is) necessary for the defendants to establish by clear evidence that the old people really did make the deeds which the defendants claim under; that their nature and effect were fully and truly explained; that they, the donors, perfectly understood them; that they were made alive, by explanation and advice, to the effect, and consequences to themselves, of executing them; and that the deeds were willing acts on their part, and not obtained by the exercise of any of that influence which (the son's) position put it in his power to employ.

ONT.

S. C.

VANZANT v. COATES.

Ferguson, J.A.

It is almost impossible in such a case as the present to establish these necessary particulars, unless the donors have had the benefit of independent professional or other assistance in the transaction."

See also *McDougall* v. *Paille* (1913), 24 O.W.R. 912, 4 O.W.N. 1602, 13 D.L.R. 661.

My attention has been drawn to a recent and instructive decision of the Manitoba Court of Appeal, just reported in the current number of the Dominion Law Reports, *Cripps* v. *Woessner* (1917), 36 D.L.R. 80; in that case the deed of gift was sustained, but a careful perusal of the report shews, I think, that the decision turned on the fact that it was, by the donor's own evidence, shewn affirmatively that he not only executed the documents, but that he knew and understood what he was doing; that they were not the result of the donee's persuasion, acts, advice, or influence, but the result of his own deliberate folly.

The learned trial Judge has found against the appellant, and I cannot say either that his findings of fact are not supported by the evidence, or that in arriving at his conclusions of law he erred in the law or its application to the facts as they appear in evidence.

For these reasons. I would dismiss the appeal with costs.

Judgment accordingly.

HAECK v. CLERMONT AND CHABOT.

QUE.

P. M. C.

Quebec Police Magistrate's Court, Saint-Cyr, P. M., February 28, 1918.

ALIENS (§ III—15)—MINISTERIAL OFFICE—DISQUALIFICATION FROM HOLDING.

An alien is disqualified from being a special constable, under art. 3287 R.S.Q., that being a ministerial office.

[See annotation 23 D.L.R. 375.]

INFORMATION for assault against an alleged constable.

G. Monet, for complainant; *C. A. Wilson*, K.C., for accused.

Saint-Cyr, J.

SAINT-CYR, J.:—On January 14, 1918, a municipal election was held at St. Martin. The complainant, sworn as special constable under art. 3287 R.S.Q., complains that, on that occasion, the accused wilfully resisted and obstructed him in the execution of his duties as agent of the peace, and laid a complaint under art. 169 of the C.C.

Art. 3287 R.S.Q. gives to the police magistrate the right to swear in constables to carry out his orders.

QUE.

P. M. C.

HAECK v. CLERMONT AND CHABOT.

Saint-Cyr, J.

The complainant is a Belgian and never was naturalized. He claims that, on that occasion he acted as a special constable on the above appointment, but without any order from the magistrate who appointed him, and, also, on the verbal demand of one of the officials of the parish, but without any resolution of the municipal council. Apparently, this is the only time that he ever acted as a special constable.

For the accused, the question has been raised that the complainant, not being a British subject, could not be a special constable and, secondly, that he could not be considered as an officer *de facto*, because he had acted as such only once, and that controversy arises as to the only official act he has performed.

We find at R.S.C., c. 77 ss. 4, 5 & 6, what are, in this country, the rights of the aliens. Ss. 4 and 5 give them the right to acquire, hold and dispose of any real and personal property and also to inherit the same, in the same manner in all respects as by a natural born British subject.

S. 6 enacts that nothing in the two preceding sections shall qualify him for any office or any franchise, nor entitle him to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly conferred upon him.

In other words, an alien, in this country, has no right or privilege whatever, except what are granted to him by parliament. And the law has been the same from 13 Vict. c. 44 s. 4 to now.

This is also the opinion of Mignault, Droit Civil Canadien; vol. 1, pp. 131 et 132.

Thus, we see that an alien is not qualified for any office.

Now, must we consider a special constable as an officer?

S. 2 (26) of the Criminal Code declares a constable to be a peace officer employed for the preservation and maintenance of the public peace.

"Officers" (Words and Phrases judicially defined, vol. 6, p. 4924) may be classed into two kinds: public and private. The incumbents of public offices perform duties for and owe obligations to the public, while the incumbents of private do not. Officers are civil, judicial, ministerial, executive, political, etc. An office is a right to exercise a public function or employment and may be classed into civil and military and civil may be classed into political, judicial and ministerial.

The constable appointed under art. 3287 R.S.Q. is surely the

holder of a ministerial office and consequently is not qualified as such, if not a British subject. I may add that these constables, when sworn, must take the oath of allegiance at the same time as they take the oath of office.

The same argument would apply to the constable appointed by municipal councils, because, according to the Municipal Code, arts. 132 and 284, these constables must be considered as officers and as such must have the same qualifications.

Was the complainant an officer *de facto*? As hereinabove stated, apparently the only official act he performed was what he did on this occasion. Authorities seem to say that this would not be sufficient:—

A person may become an officer *de facto* by continually acting as such officer, but he cannot be held to be a *de facto* officer where the only official act shewn to have been performed by him is that in regard to which the controversy arises. Nor does a person acquire such reputation for being an officer as will make him an officer *de facto* where he has done only a few unimportant official acts, has been in office but a short time, and his claim to the office has never been acquiesced in: A. & E. Ency. Vo De facto officers. Vol. 8, p. 784.

But in order to succeed in a prosecution of this kind, the facts must clearly establish that the person resisted was at least an officer *de facto*. Therefore, where a deputy sheriff on being appointed refused to take the oath, and cut the same off from his appointment, and it was not shewn that he had exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, it was held that he was not an officer *de facto*, and that person could not be convicted of an assault for resistance to him. Constantineau on the De Facto Doctrine, p. 302, s. 214; p. 3.

Consequently the complainant in this case, not being an officer in law, or *de facto*, the complaint should be dismissed.

Complaint dismissed.

MEEKER v. NICOLA VALLEY LUMBER Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

VENDOR AND PURCHASER (§ I B—5)—AGREEMENT FOR SALE—CROWN GRANT —CONDUCT OF PURCHASER PREVENTING TITLE BEING OBTAINED.

The purchaser of mill-site property under an agreement for sale whereby the final payment was to be made when the vendor obtained title from the Crown, having taken possession, and subsequently by his own conduct made it impossible for the vendor to obtain the Crown grant, is liable for the balance due notwithstanding the vendor's failure.

[31 D.L.R. 607, affirmed. Leave to appeal to Privy Council refused, February, 1918.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 31 D.L.R. 607, reversing the judgment of Morrison,

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Fitzpatrick, C.J.

J., at the trial, by which the plaintiff's action was dismissed with costs.

Harvey, K.C., for appellant; *Ritchie*, K.C., for respondent.

FITZPATRICK, C.J. (dissenting).—The respondent, plaintiff in the action, by deed dated June 10, 1910, agreed to sell to the appellant: All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia heretofore occupied and used by the said vendor as a sawmill site comprising 108 acres more or less, also eight timber licenses therein described. And all the personal property save as therein mentioned of the vendor situate on said mill site and at other points in said County of Cariboo.

The respondent never owned the land it agreed to sell and admits that it can now never acquire title thereto.

Under ordinary circumstances when a vendor fails to make a good title to property he has agreed to sell the purchaser is entitled to recover back his deposit together with the costs of investigating the title. Further, if he undertakes to sell knowing that he has no title he may be liable in damages to the purchaser for the loss of his bargain.

At first sight, therefore, it seems rather surprising that a vendor who never had even any colour of title should claim not only to be under no liability for the performance of his contract, not only to be entitled to retain the deposit paid on account of the purchase money, but to sue the purchaser for the entire balance of the purchase money.

No doubt other things besides the lands were included in the sale, but in this action at any rate the court cannot decide what is the value of the annual timber licenses assigned or apportion the purchase money even if this were asked, which it is not.

It is of course necessary for the appellant to find some ground on which his claim can be supported, and the only one put forward, so far as I am able to see, is that the appellant by his own acts prevented the respondent acquiring title to the land.

The land was the property of the Dominion Crown and the respondent had made application to the Dominion Government for a homestead grant of it and was in possession at the date of the agreement sued on. The mill had then been recently burned

down and the appellant did not rebuild on the same site. The Minister of the Interior was of opinion that the 108 acres applied for by the respondent were not needed in connection with the mill on its new site and refused the application accordingly.

Now it was not the act of building the new mill which could be said to have prevented the respondent obtaining its grant, but rather the failure by the appellant to rebuild the mill burned down upon its old site. But what was the obligation of the appellant to do this? Clearly he had entered into no express contract to that effect. McPhillips, J., who has delivered the most elaborate judgment in the Court of Appeal, admits that it is necessary to find that "*it was incumbent upon respondent* (the present appellant) *to place the saw mill upon the mill site.*" I can, however, find no ground by which on any principle of law we are justified in imposing such liability upon the appellant when the contract between the parties did not even contain any provision obliging the purchaser to erect a mill at all.

Fitzpatrick, C.J.

The courts can only adjudicate upon the legal rights of litigants and cannot undertake to make such settlement between them as they may think fair without regard to any such rights. In any event, I think it would be difficult to hold that a purchaser agreed to waive his right to have the property contracted for whilst remaining liable to pay the whole of the purchase money.

The trial judge went as far as he properly could in urging upon the parties the desirability of a settlement of the case, and I agree in thinking that this would have been the best course.

The respondent, however, rejected any such suggestion, and I do not see, therefore, that the judge could have made any other disposition of the action than he did.

Although the three judges who sat in the Court of Appeal reversed the judgment, they did so apparently on different grounds as Martin, J.A., in his reasons for judgment says, "*there is no real dispute about the law,*" whilst McPhillips, J.A., says: "*this appeal raises a very difficult question of law.*"

I would allow the appeal with costs.

DAVIES, J.:—I concur in the reasons of Anglin, J., for dismissing this appeal.

Davies, J.

IDINGTON, J. (dissenting):—The respondent on March 21, 1910, gave the appellant an option in writing to purchase eight

Idington, J.

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington, J.

timber claims or limits in British Columbia, and a quantity of timber and lumber and mill machinery and other personal property and a mill site situate at the confluence of Nicola River and Spius Creek containing 108 acres more or less for the sum of $25,000, of which $10,000 was to be paid on or before June 1, 1910.

The recital in said option represented, amongst other things, as follows:—

And the vendors are also the owners of that certain mill site situate at the confluence of the said Nicola River and Spius Creek containing 108 acres more or less.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the said option and either within the time specified or thereabout the balance thereof when the bargain was concluded and an agreement of sale and purchase in writing, dated June 10, 1910, was executed by said parties.

That agreement recited the facts that the vendor had agreed to sell and the purchaser had agreed to purchase the lands and hereditaments, timber licenses issued by the Province of British Columbia, and personal property as thereinafter specified.

Of the property thus specified the first item is as follows:—

All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia, heretofore occupied and used by the said vendor as a sawmill site, comprising one hundred and eight (108) acres more or less.

The receipt of the $10,000 is acknowledged and the balance was to be paid in two years from date together with interest for the first year at six, and the second year at eight per cent. per annum.

Then follows a covenant as follows:—

The said purchaser doth hereby covenant, promise and agree to and with the said vendor that he will well and truly pay or cause to be paid to the said vendor the said sum of money above mentioned together with interest thereon at the rates aforesaid on the days and times, and in the manner above mentioned; and also shall and will pay and discharge all taxes, rates and assessments wherewith the said land and goods and chattels may be rated or charged from and after this date; and also shall and will so long as any portion of the said principal money or interest shall remain unpaid, duly renew and keep renewed the said timber licenses and pay to the Province of British Columbia, all annual or renewal fees or charges which may hereinafter become payable in respect of said timber licenses or any of them. In consideration whereof and of the payment of said sum of $10,000, the said vendor hath

assigned and transferred or caused to be assigned and transferred to the said purchaser, the said timber licenses and all renewals thereof, and hath assigned and transferred to the said purchaser, all the said personal property, goods, and chattels freed and discharged from all encumbrances.

And it is hereby further agreed by and between the parties hereto that the said vendor shall forthwith take all the proceedings necessary to obtain a patent or Crown grant of said lands and hereditaments from the Government of Canada. And the said vendor doth hereby covenant, promise and agree to and with the said purchaser that on the receipt by the said vendor of said patent, the vendor shall and will convey and assure to the said purchaser by a good and sufficient deed in fee simple, the said lands and hereditaments together with the appurtenances thereto belonging or appertaining, free and discharged from all encumbrances, and such deed shall contain the usual statutory covenants. When the said deed shall have been duly executed, the said deed shall be placed in escrow in the Bank of Montreal, aforesaid, and shall be delivered to the said purchaser on the due payment in manner aforesaid, of the balance of said purchase money and interest.

Provided and it is expressly understood and agreed that the said vendor shall not be entitled to the payment of said moneys until the said deed has been placed in said bank as aforesaid.

Upon this covenant so conditioned the respondent sued for the $15,000 with interest from June 12, 1912, although the patent for the mill site had never been procured, and, of course, the conveyance of the said lands in fee simple has never been given as agreed upon.

The trial judge, who heard all the witnesses and was in better position to determine than we can be what weight, if any, is to be attached to such statements of fact as relied upon by the Court of Appeal and in argument by counsel for respondent here for excusing the performance of respondent's agreement constituted as above a condition precedent to the right to recover the said sum of $15,000, held that there was no excuse, that the action was premature, and offered to allow plaintiff to withdraw it without prejudice to pursuing such remedy as it might be advised,

It is somewhat difficult to grasp exactly what is relied upon.

One oft repeated statement is that the appellant, with others, had induced some capitalists to join them in the procuring of the incorporation of a company to take over the purchase and develop the property and it had erected a mill for the purpose of doing so.

In one way the matter is put it is urged that this mill is not on the mill site in question and hence the respondent has become

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington, J.

entitled in law to recover the full price for the property it sold. Surely it is a novel proposition that because a man is a member of a corporate company that erects a sawmill, therefore he has done some wrong to his covenantor and hence the latter has thereby become entitled to disregard his obligations.

Again, when it is shewn that the company has in fact built a mill at least partly on the mill site and has occupied in the carrying out of the project about thirty acres of the said hundred and eight acres for the purposes thereof, it is urged that that part of "the mill site" is not the part where the respondent once had erected a mill which was burnt down, and which it replaced by a portable mill, forming part of the personalty sold to the appellant, and that the expectation of its re-erection exactly on that part of the mill site was so reasonable as to constitute an implication of an obligation that it would be done and hence the omission to do so relieved the respondent from the condition precedent imposed by above contract.

It appears that the original application of the respondent for a patent for the mill site was the result of two similar applications in 1907, each for 100 acres, having been consolidated and converted into an application for two hundred acres being made in 1908.

The application is not produced or its contents proven, but I gather from the evidence that pending the consideration of it by the department, one Ross had located a parcel of land which so cut into that covered by respondent's application as to leave in substance two separate parcels of irregular shape, and approximately equal in quantity which together would measure a total of 108 acres of land with only a small strip of land connecting them.

It was on the northerly one of these parcels that respondent's mill which had been burnt down and said portable mill were respectively placed and used preceding the sale now in question. It is claimed that there was an implied duty resting on the appellant to build, when building, on same site. How can anything of the kind be properly imported into this contract without a shred of expression pointing to such an obligation? There never was imposed any obligation to build any mill or refrain from doing so.

I am unable to understand how there could be implied in the agreement any obligation to erect a mill at all, much less an obligation to erect one upon any particular part of the land in question.

Although the application of the respondent had been before the department for all that time under these circumstances and the urgent need of expediting the business in light of the covenant to do everything to produce a deliverence from the department answering the application, nothing effective seems to have been done.

Let us assume respondent had done everything it could during the three months which elapsed between the completion of the agreement and the time when the company promoted by the appellant was formed, and had come to a decision to build, then the appellant had, I think, no reason to suppose either he or his company had, if ever, any obligation resting upon them to wait longer.

The company was advised by experts to build on the southerly part near where its operation could be most profitably carried on by reason of the facility afforded for forming a pond for storage of logs and other features of the property. Moreover, that was the only way the appellant could find the financial support to build a mill at all.

It is quite evident the appellant's own preference was for the northerly part of the mill site until thus convinced. What else he could do, I fail to see, unless to rescind the contract entirely. He was not bound to that alternative.

The company then proceeded to build but before doing so made an application to the department to be assured by it that a title could be obtained for the land actually needed to be used for buildings and the storage of logs.

The appellant made a declaration on September 13, to facilitate this being done. I think he had a perfect right to do so, at least after the failure of the respondent to get the assent of the department to a grant of the "mill site" it had covenanted to procure. How long must he wait?

The judgment appealed from proceeds upon the assumption that there was a breach of good faith on the part of the appellant by reason of some failure on his part to observe some implied obligation.

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Idington, J.

I cannot find the implied obligation. And if it ever existed 3 months was more than necessary to respondent to have availed itself thereof.

This judgment, appealed from, I respectfully submit, rests upon making a contract for the parties which they did not make for themselves.

Moreover, it is abundantly clear that the whole difficulty arises from the policy of the Department of the Interior which forbade the giving of what might constitute two or more mill sites in its view.

Cowell, later on, endeavoured to get his superiors to waive the objections, but the narrower view was taken and a grant refused.

The appellant cannot, in my opinion, be held bound by reason of the failure to abandon his rights. And the court has, I submit, no right to impose upon him any such obligation.

Again, the respondent relies upon the alleged statement of Cowell that appellant had said something to indicate that he had no use for this northerly part of the "mill site" sold him.

Not only does appellant contradict this, but the evidence establishes clearly he always did so and that in time to correct any misapprehension in the department before ruling upon the application of respondent.

One can easily see how the misunderstanding arose. Speaking of the use of the northerly part as a place in which to erect a mill he could have no use for it, but, in the larger sense, as part of a "mill site," in the sense used by the parties to this contract, he clearly had a use for it or of some equivalent thereof.

The trial judge saw and heard the parties and must have accepted appellant's view of what was said.

I do not think it is of very much importance. However, to try to attach to what was a clear misunderstanding as to something that in either view cannot help here, indicates to what respondent was driven.

It is quite clear from what transpired at the trial that less land than 108 acres would give appellant what he wants. And it is equally clear that the quantity of land he has got does not suffice.

His good faith as well as these facts seem established by the

offer made at the trial to accept 40 acres instead of nearly 80 that is in question and pay the full amount.

Why such a proposition should have been spurned instead of being given a prompt response and ready and willing attempt to bring its acceptance about passes my understanding.

I am of the same opinion as the trial judge that upon this record the respondent has no right to succeed. It allowed the new company and appellant to go on and build the mill it did, well knowing the fact, without a word of remonstrance. If it had remonstrated and proposed a rescission of the agreement, or even tried to enforce that, by reason of all that had preceded and succeeded the contract, it is quite possible evidence might have been adduced (which is not in this record) entitling it to a rescission. Idington, J.

It might even in this case have presented an alternative claim to specific performance, and been granted relief instead of rigidly abiding by that impalpable thing called waiver when there never was any.

If the parties choose to treat the pleadings as if so amended and take a judgment based upon the principles that a Court of Equity should act upon there does not seem much difficulty in dealing with the case. Indeed, I think it is quite reasonable to assume that such is the possible case the appellant must have faced in proceeding to build instead of proposing rescission of the agreement. Quite probably either party would have failed in September, 1911, to have got specific performance with compensation unless as an alternative to rescission of their contract.

It is one for compensation. And the basis proposed by the appellant at the trial might well be kept in view in such a reference as that relief would require.

I do not think we have any power on this record to deal with such alternative and hence need not elaborate the suggestion.

If not acted upon the appeal should be allowed with costs without prejudice to any future action.

DUFF, J.:—On March 21, 1910, the respondent gave the appellant company an option in writing to purchase certain timber limits together with certain timber and lumber and mill machinery and other movable property, and a "mill site situate at the confluence of Nicola River and Spius Creek, containing Duff, J.

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Duff, J.

108 acres more or less," for the sum of $25,000, of which $10,000 was to be paid on or before June 1, 1910.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the option and the residue when the bargain was concluded and an agreement of sale executed, dated June 10, 1910.

The agreement contained the following covenant:—(See judgment of Idington, J.)

I concur with the opinion of the judges of the Court of Appeal for British Columbia that the appellant company is precluded by its conduct from insisting upon exact fulfilment of the condition that the respondent should make title to the parcel of 81 acres, which, by the terms of the contract, was attached to his right to require payment of the last instalment of $15,000. When the agreement was executed all parties contemplated that a title to this property should be acquired under the provisions of the law and the practice of the department governing the granting of mill sites; and without going so far as to hold that, by implication, the appellant company was bound actively to take all steps with regard to actual use of the property and the improvement of it as might prove to be necessary to enable the respondent to comply with the conditions exacted by the department, there appears to be abundant ground for holding that the appellant company, at least, assumed the onus of an obligation to do no act in relation to the property or by any communication with the departmental authorities, which should hinder or be calculated to hinder the respondent in his efforts to obtain a grant of it for the purpose of a mill site.

That must necessarily be so because as it would be the duty of the departmental officers to satisfy themselves upon the subject of the purpose for which the applicants intended to use the property, the conduct and the representations of the respondent's assignee if inconsistent with respondent's representations as to the destination of the property, might gravely compromise or entirely neutralize the respondent's exertions. To apply the test often suggested by eminent judges—it is not possible—having regard to the dictates of common experience—to doubt that if the subject had been mentioned at the time the contract was entered into that the appellant would not have been left free to obstruct by its conduct and declarations the respondent's

application for a grant while retaining in full literal force the condition that the grant should be produced in order to entitle the respondent to receive the final instalment of the purchase money.

This obligation assumed by the appellant was not fulfilled and in consequence, mainly if not entirely, of the non-fulfilment of it, it became impracticable to obtain a grant in the manner contemplated or without the expenditure of a sum of money so much greater than the expenditure that would have been required, if events had been allowed to pursue their normal course, as to make it impossible to require the exact performance of the condition without plainly defeating the intention of the parties.

What is the legal result? Ritchie contends, and the court below has held, that the plaintiff is entitled *ex debito juris* to the sum of $15,000 on the ground that the condition has been purged and a good deal, no doubt, can be said for this view. Indeed, the language of Willes, J., in *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C.B.N.S. 733, cited with approval in *Burchell* v. *Gowrie Collieries Co.*, [1910] A.C. 614, at 626, appears to support it; but the actual decision in *Inchbald's* case, *supra*, was that the plaintiff was entitled to recover such a sum as the jury or the court substituted for the jury, might consider to be reasonable.

On principle, I think that it is the proper result in the present case. The respondent was entitled to recover the sum of $15,000 less an allowance reasonable in all the circumstances.

A reasonable allowance must clearly include the difference in cost to the respondent of obtaining the two sites. Ought it to include more? Ought it to include compensation for the loss of the site of 80 acres or rather for the failure to acquire it? After a good deal of consideration, I have come to the conclusion that it ought not. The appellant had gone into possession of the assets which he had purchased as a *unum quid;* rescission was impossible; and he chose for his own reasons and quite properly to put into operation a plan with respect to the lay out of the property more advantageous as he conceived than the plan their predecessors had been pursuing. The departure from the old plans involved a change in the locality of the mill and together with the declarations made by the appellant's agent led to the

CAN.

S.C.

MEEKER v. NICOLA VALLEY LUMBER CO.

Duff, J.
Anglin, J.

difficulties which have given rise to this litigation. It would not, I think, be just or reasonable from the point of view of the respondent to accede now to the demand of the appellant, that the respondent should be required to compensate him for the value to him in the present circumstances of the 80 acre site, the loss of which or the failure to acquire which was mainly, if not entirely due to the course taken by him in his own interests.

ANGLIN, J.:—The plaintiffs seek to recover $15,000, a balance of $25,000, the purchase money for a mill site with storage pond, etc., comprising 108 acres, some timber limits and other property. A mill situated on the northern end of the site, about a mile and a quarter from the storage pond at the southern end, had been destroyed by fire. At the time of the sale the vendors were operating a portable mill where their permanent mill had formerly stood. The agreement for sale provided that the purchaser should pay $10,000, should take possession of the mill site and limits and should work the latter. The vendors undertook to obtain title from the Crown to the mill site and the $15,000 was to be held until that was done, and thereupon paid over to the vendors.

Acting on expert advice the purchaser, instead of erecting a mill where the vendors had had their mill, built it at the other end of the 108 acres, placing it beside the storage pond in a 30 acre parcel consisting partly of the pond and land included in the 108 acres and partly of 7 or 8 acres additional land in which he procured the rights of a homesteader—one Ross. With the mill at its north end and the storage pond at its south end, the whole 108 acres might not improperly be dealt with as a single industrial site. But with the mill at the south end beside the storage pond the 30 acre parcel formed in itself a fairly complete mill site. At all events the portion of the 108 acres at the north end where the mill had formerly stood was so wholly disconnected and so far away from the 30 acre parcel that the department, on the advice of its agent, refused to regard it and the communicating strip between it and the 30 acres as a part of the mill site on which the new mill and the pond were situated. Hence the vendors were unable to obtain a patent for 81 acres of the original 108 acres as part of an industrial site in connection with the new mill. Upon the evidence, I am satisfied that the purchaser, either because he recognized this impossibility or because, having

regard to the altered situation of the mill, he regarded the 81 acres as practically useless for his purposes, informed the Crown Lands' agent that his company would not require the 81 acres and applied, apparently informally, for a grant of 29.4 acres at the south end, including the seven or eight acres over which he had acquired the rights of Ross. The Crown Lands' agent thereupon wrote the department that, the present company have no further use for the land originally applied for, and I would, therefore, suggest that it should be released and the application cancelled; and he advised a grant of the 29.4 acres.

Upon these circumstances I agree with the judges of the Court of Appeal for British Columbia that the vendors were excused from making title to the 81 acres as a condition precedent to their right to payment of the $15,000 balance of the purchase money.

Although the action is framed simply as a common law action to recover the balance of the contract price, I see no serious objection to treating it as an equitable action for specific performance or other relief, if that be necessary, in order to make a disposition of the case which shall do justice between the parties. As a matter of equity and fair dealing, I think the vendors should give credit to the purchaser for the $5 per acre that they would have been obliged to pay to the Crown in order to obtain a patent for the 81 acres for which their application had been rejected, and also upon the same basis for the remaining 27 acres of the original 108 acres which they undertook to sell, since the purchaser will be obliged to pay the Crown its price upon this latter acreage before he can obtain a patent therefor. In all, $540 should be credited on this account.

With this comparatively slight variation in the judgment *a quo*, I would dismiss the appeal. The appellant should pay four-fifths of the respondents' costs. *Appeal dismissed.*

DIERKS v. ALTERMATT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. March 14, 1918.

1. COURTS (§ II A—155)—CERTIORARI PROCEEDINGS—POWER OF APPELLATE COURT TO REVIEW PROCEEDINGS OF INFERIOR COURT—CIVIL ACTION.

The Appellate Court has power to review upon *certiorari* after judgment the proceedings of an inferior court of civil jurisdiction, not a court of record, where the proceedings are summary in their nature, notwithstanding the existence of a right of appeal.

[*Re Lawler and City of Edmonton*, 20 D.L.R. 710, referred to. See Annotation 3 D.L.R. 778.]

ALTA.

S. C.

DIERKS v. ALTERMATT.

2. CERTIORARI (§ I A—2)—INFERIOR COURT—NON-COMPLIANCE WITH CRIMINAL CODE—APPELLATE COURT QUASHING ORDER.

An Appellate court on *certiorari* will quash an order of a justice under the Master and Servants Ordinance where the proceedings have not complied with the provisions of part 15 of the Criminal Code.

Statement.

APPEAL by defendant from an order of Ives, J., dismissing an application for a writ of certiorari in an action under the Master and Servants Ordinance (Alta.). Reversed.

Hogg and Jamieson, for appellant; *J. Donovan*, for respondent.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—On October 31, 1917, one Walter Dierks and his wife laid a complaint under the Master and Servants Ordinance against one Gus Altermatt before Peter Wendelboe, a justice of the peace, for non-payment of wages and, in effect, for compensation for wrongful dismissal without notice. The justice, after hearing the case, ordered Altermatt to pay the complainants the sum of $112.50. This order was made November 1, 1917. On November 9, Altermatt, through his solicitors, served a notice of motion, under the rules in regard to applications in the nature of *certiorari*, asking that the order be quashed. This motion came on for hearing before Ives, J., during the sitting of the court at Lethbridge when the objection was taken that the proceedings before the magistrate having been essentially civil and not criminal in their nature, and there being a right of appeal, therefore *certiorari*, or proceedings of that nature, could not be taken. The order, which Ives, J., made said,

It is ordered and adjudged that a writ of *certiorari* in aid of motion to quash the said order made under the Master and Servants Ordinance does not lie and his application is therefore refused.

From this order the defendant appealed.

It is evident that the judge simply decided, not as a matter of discretion, that he ought not in the particular case to grant the remedy asked, but that a superior court, as a matter of law, will not review the decision of a lower inferior court exercising a civil jurisdiction where there is by law a right of appeal.

Whatever may be the law upon this point, this court certainly has already granted the remedy in respect of an order under the Ordinance in question in the case of *Lawler* v. *City of Edmonton*, 20 D.L.R. 710, 7 A.L.R. 376, although the objection now raised was not then presented. And I think that there is no doubt that orders made by justices under the Ordinance have often before now been quashed upon *certiorari* although there had been

nothing more than an order for the payment of moneys due as a debt.

There is no doubt that, in the text books at least, very confusing and contradictory statements can be found. For instance, in Chitty's Archbold's Queen's Bench Practice 14th ed., a work dealing only with practice in civil matters, at page 1556 the author, referring to *certiorari*, says,

> It will not in general lie to remove proceedings in an inferior court after judgment.

Two cases are cited, *Rex* v. *Seton*, 7 T.R., 373, 101 E.R. 1027, and *Kemp.* v. *Balne*, 1 D. & L. 885. But in the former case, which was a criminal one, the inferior court was a court of record and the judgment had been upon indictment so that, of course, a writ of error was the proper remedy, as Lord Kenyon said, but he also said,

> In the case of summary proceedings, orders and convictions before magistrates, the proceedings may be removed by *certiorari* after judgment because such proceedings can only be removed by *certiorari*.

In the latter case also the judgment in question was for a debt and had been rendered in a court of record. And although Williams, J., in rendering judgment, said,

> I am not satisfied that any precedent can be found to shew that a *certiorari* can issue after judgment *in a case like this*,

it is obvious that the last five words contain the whole point of his remarks. Indeed the court there might well have recalled the fact, by which no doubt they were at least unconsciously influenced, that there was a statute in existence which decided the matter. The statute 21 Jac. 1, c. 23, which is still in force in England, definitely forbade writs of *certiorari* to inferior civil courts of *record*, unless the application was made at an early stage of the proceedings, and also forbade them in any case where the amount was under £5 and also made other exceptions and limitations. But the statute dealt only with inferior courts *of record* where the proceedings are formal, by plea, demurrer, replication, etc. It left courts proceeding summarily quite untouched. Then, Hals., vol. 10, p. 160, s. 320, says baldly, it does not lie to quash the judgments of inferior courts of civil jurisdiction and refers to *Lawes* v. *Hutchinson*, 3 Dowl. 506, and to a remark by Parke, B., therein. This report is not available and the case is not reported in the revised reports. But it seems almost certain that Lord Kenyon's distinction between inferior courts

ALTA.
S. C.
DIERKS
v.
ALTERMATT.
Stuart, J.

of record and inferior courts of summary jurisdiction and procedure was overlooked for the moment by the writer of the article in Halsbury. The matter is indeed more clearly dealt with in the same article at p. 161, where it is said, "*certiorari* also lies to remove for the purpose of quashing the determinations of persons or bodies who are by statute or charter entrusted with judicial functions *out of the ordinary course of legal procedure* but within the general scope of the common law. The determination of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them." And in a note the author adds—"It is only in this negative way that it seems possible to describe the miscellaneous bodies charged with judicial functions which are amenable to the writ of *certiorari* to quash. The test in each case is whether the writ of error lay. The writ of error lay upon a regular judgment pronounced after trial in the ordinary course of common law procedure, that is in civil cases where writ and formal pleadings preceded the hearing and in criminal cases where an indictment, or its equivalent, with pleadings thereon preceded the hearing."

Yet, in a note at p. 169 the author again, it seems to me, appears to overlook the distinction between courts of record and courts of summary jurisdiction and procedure. He says, "Similarly in the cases of inferior courts of civil jurisdiction it has been suggested that *certiorari* might be granted to quash them for want of jurisdiction (*Kemp* v. *Balne*), *supra, inasmuch as error did not lie upon that ground.* Applications to quash determinations of County Courts were, however, entertained in the cases of *Skinner* v. *Northallerton County Court Judge*, [1898] 2 Q.B. 680, and *R.* v. *Lloyd*, [1906] 1 K.B., 22, without objection being taken on that ground."

With respect to inferior courts of record the statute of James 1, above referred to, in its last section, expressly reserved the right to apply for *certiorari* for want of jurisdiction. This provision of the statute seems, on the face of it, a little inconsistent with the theory that where error lay, that is, in case of regular courts of record, *certiorari* would not lie but here again the distinction has to be kept in mind between *certiorari* before and after judgment.

But I think it is probably necessary to delve further into the niceties of this old time procedure and practice. There are other authorities which I think point quite clearly to the conclusion

that even after judgment *certiorari* will lie to an inferior court of summary procedure exercising civil jurisdiction. In *Queen* v. *Bedwell*, 24 L.J.M.C. 17—a case under a Masters and Servant statute—there is an *obiter dictum* of Lord Campbell, C.J., in which he said, "if the order was made without jurisdiction the party aggrieved might move for a *certiorari*." This shews that in Lord Campbell's opinion *certiorari* would lie at least for want of jurisdiction.

Then in *Bank of Nova Scotia* v. *New Glasgow*, 12 N.S.R. 32, at 37, Sir William Young, delivering the judgment of the Supreme Court of Nova Scotia, said,

> Here (*i.e.*, in Nova Scotia) it is of familiar use addressed to justices of the peace and others after judgment and for small sums and is sustained by the court where sufficient grounds are laid.

Then the matter is dealt with in Short and Mellor's Crown Practice, 2nd ed., at p. 37, where it is said:—

> The great distinction in point of principle between the use of the writ of *certiorari* for the removal of orders and summary proceedings before justices of the peace or other inferior magistrates or officers and for the removal of indictments is, that in the latter case the *certiorari* will not in general lie to remove an indictment for a defect apparent on the face of it especially after judgment, such a defect being properly the subject of a writ of error; but as in the case of orders and summary convictions a writ of error would not lie, the writ of *certiorari* was resorted to in lieu of it, and it was, prior to the statute 20-21 Vict. c. 43 (providing for a case stated), the only means by which a revision of such proceedings by a superior court could be obtained and it will lie in all cases (except where restricted by statute) in which the court may think proper to examine such proceedings as well after judgment as before.

And the author goes on to say, that the provision for a stated case does not of itself take away *certiorari;* and it seems clear that the use of the word "order" as well as "conviction" is intended to cover orders in civil matters for the payment of money.

Our rules in regard to certiorari also are expressly stated to cover civil as well as criminal matters.

I may also refer to the very general and wide statement made by the Privy Council in *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, at pp. 439 *et seq.*, which was a case of a winding-up order made by a Court of Mines in Victoria.

I think, therefore, that, aside from the existence of a right of appeal, this court will review upon certiorari after judgment the proceedings of an inferior court of civil jurisdiction, not a court of record, where the proceedings are summary in their nature.

ALTA.

S. C.

DIERKS v. ALTERMATT.

Stuart, J.

It was contended, however, that the existence of the right of appeal alters the case and absolutely prevents *certiorari*. But, with much respect, I think the view taken by the judge below upon this point was incorrect. Certainly in criminal matters this court has constantly exercised the power of quashing conviction even though a right of appeal plainly existed. And I have found no reason for thinking that the circumstance that the matter in question is a civil one can make any difference. It might, conceivably, make a difference if it should come to the question of exercising a discretion, but so far as the question whether *certiorari* may issue at all or not is concerned there cannot surely be any distinction between civil and criminal matters. A right of appeal is a purely statutory right and unless the statute giving the right of appeal or some other statute takes away *certiorari* then it seems to me the ordinary common law rule will still continue. The contrary view expressed by Lemieux, J., in *Rex* v. *Gallagher*, which was a criminal case, 18 Can. Cr. Cas. 347, was, I think, largely due to the fact that the appeal given in that province is to the Court of King's Bench itself, Crown side, but the weight of authority and practice is the other way. See Crankshaw, 4 ed., pp. 1152-1153.

For myself I see no reason why we should, even as a matter of discretion, make any distinction between civil and criminal matters and as we continually grant certiorari in the latter notwithstanding the right of appeal we ought I think to follow the same practice in civil matters.

The existence of a right of appeal is sometimes said to prevent the exercise of power of *certiorari* as a matter of discretion unless there are exceptional circumstances. See Crankshaw, 1153. But exceptional circumstance may always be said to exist where there is either lack of jurisdiction or such irregularity in the proceedings as touches the substantial rights of the party so that he may be said really to have been aggrieved.

One of the grounds upon which the order was attacked is that after hearing the evidence the justice adjourned the case *sine die* and thereby lost his jurisdiction to deal with it. It was admitted to be the fact that the justice had adjourned *sine die*, had not thereafter given the parties any notice of the time and place at which he was to give judgment and had given his judgment in the absence of the defendant although he had sent word by letter to the parties announcing his decision.

It seems to be fairly well settled that at least in a criminal case the justice by such procedure loses his jurisdiction. *Reg.* v. *Quinn*, 28 O.R. 224, *R.* v. *Morse*, 22 N.S.R. 298, *Reg.* v. *Mitchell*, 17 C.L.T.352. Whether so strict a rule should be applied in a civil matter may perhaps be questionable. It seems however to be unnecessary to rest a decision upon this point in the present case because there are other objections to the procedure which seem to be clearly fatal.

In the first place, there never was any formal order drawn up. What the justice has returned is a document setting forth his reasons for coming to his decision and stating his decision. It is true that it contains words of command, such as "I order him to pay," etc. It is certainly not such an order as a distress could be rested upon because it says nothing about distress.

In the next place, the justice does not appear to have taken down the depositions of the witnesses as they were given. What he has returned is apparently a record made subsequently of what happened before him. In the case of one witness referred to it does not state that she was sworn. At other places in it there are phrases which seem to be argument by the justice himself rather than a plain statement of the testimony. For instance, referring to the defendant at one place the document says, "and could not explain why he did not do so." And again it says, "William Johnson being sworn, qualified as an extensive employer;" and again referring to the evidence of the defendant's son, "he claimed that the notice given by his father was sufficient notice;" and again, "Elsie Dierks being sworn testified to the same effect as her husband."

It is quite apparent that we have here, not the original evidence as it was taken down at the time, but something afterwards prepared. The affidavit of Russell, the solicitor who appeared for the defendant before the magistrate, which is not contradicted, substantiates this and indeed states that no record was taken at the time at all. It is, therefore, apparent that the provisions of the Code applicable to the matter were not observed. This is enough to justify quashing the so-called order or decision. It might even on appeal seriously prejudice a defendant's rights if he was unable in any way to refer to the previous evidence.

Then also there does not appear to have been any preliminary minute of his decision made, as distinct from the so-called "order

ALTA.

S. C.

DIERKS v. ALTERMATT.

Stuart, J.

or decision," as provided by s. 727 of the Code. There is, with the papers, a separate typewritten document purporting to be such a minute but it bears no date and is verified in no manner at all either by certificate or otherwise.

Finally the justice ordered the defendant to pay a month's wages instead of four weeks' wages at the rate agreed upon as the Ordinance provides. This makes in the present case a difference of about $8.

The appeal will therefore be allowed with costs and the order quashed. But I think there should be no costs of the application to Ives, J. The solicitor for the defendant was, to some extent, responsible, at least, for the mistake in regard to the adjournment *sine die*. Furthermore I am inclined to the view that a qualified solicitor appearing before a justice of the peace in this country on behalf of a client ought to be of some slight assistance to the court in matters of formal procedure and while of course doing his best to protect his client's interests on the merits he ought not to be heard very favorably to ask for costs of a motion to quash on the ground of merely formal errors of procedure which he has seen going on before his face and which he has made so far as can be seen no attempt to correct by advice to the court at the time.

The complainants will still have a right, if not to ask the magistrate to proceed again with the hearing of the information, which may perhaps be impossible, owing to lapse of time, though the limitation in s. 4 of the Ordinance might possibly stand in the way only of a new formation, at any rate, to proceed in the District Court to recover whatever is justly due them.

Appeal allowed.

B. C.

C. A.

HOYES v. FRATERNAL ORDER OF EAGLES.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips and Eberts, JJ.A. November 6, 1917.

GARNISHMENT (§ I B—12a)—ASSIGNEE—CREDITORS TRUST DEEDS ACT—DUTY TO DISTRIBUTE UNDER JURISDICTION OF COURT.

An assignee for the benefit of creditors appointed under the provisions of the Creditors Trust Deeds Act (R.S.B.C., 1911, c. 13) is an officer of the court, and subject to the summary jurisdiction of the court; his duty is to distribute the money in his hands in a particular way, and no debt is created which can be the subject-matter of attachment against him as garnishee.

Statement.

APPEAL by plaintiff from an order of Grant, Co.J.

O'Neill, for appellant; *J. P. Hogg*, for respondent.

B. C.
C. A.
HOYES v. FRATERNAL ORDER OF EAGLES.
Macdonald, C.J.A.

MACDONALD, C.J.A.:—The facts are not in dispute. The plaintiff was a creditor of the Vancouver Aerie No. 6, Fraternal Order of Eagles. Greene was their tenant and was in arrears of rent for some $600. The Eagles distrained upon Greene's chattels, whereupon Greene made an assignment to one James Roy for the benefit of his creditors under the provisions of the Creditors Trust Deeds Act. Some days later plaintiff commenced this action in the County Court against the said Order of Eagles and made Greene garnishee.

The assignee was not made a party to the proceedings but the garnishee summons was handed to him by Greene.

The action was commenced and the garnishee summons was served in May, 1916, and in August of the same year the Caledonia and B.C. Mortgage Co., Ltd., commenced an action in the Supreme Court against the said Aerie of Eagles and obtained an order appointing A. M. Creery the receiver of the rents of the premises of which Greene had been tenant to the Eagles at the time of his assignment.

Subsequently to the appointment of the receiver, the assignee paid into court the amount of plaintiff's claim in the County Court action with the suggestion that it was claimed by said receiver.

The County Court Judge directed an issue to be tried to determine the right to the money so paid in as between Creery and the plaintiff. The County Court Judge decided the issue in favour of Creery, and this appeal is from that judgment.

In my opinion the judgment is right: there is more than one obstacle in appellant's path. The assignee is not a party to the garnishee proceedings. The money which he paid into Court was not the money of his assignor, the garnishee, but was money in his (the assignee's) hands for distribution in accordance with the provisions of the said Creditors Trust Deeds Act. It was argued that it was the assignee's duty, having money in his hands for distribution among Greene's creditors, of whom the plaintiff was one, to pay it to the plaintiff as attaching creditor of the assignor Greene. I do not think that contention could prevail, even if there were no adverse claimant, but at all events it cannot prevail against the title of the receiver.

But the result would be the same if the assignee had been named the garnishee. His defence would have been, and the

B. C.

C. A.

HOYES v. FRATERNAL ORDER OF EAGLES.

receiver is entitled to the benefit of that defence, that he was neither a debtor of the defendant, nor a trustee for him of the dividend coming out of the estate.

The assignee is an officer of the court, a statutory officer, subject to the summary jurisdiction of the court: s. 64 of said Act. Collins, L.J., in *Spence* v. *Coleman*, [1901] 2 K.B. 199, at 204-5, said:—

Macdonald, C.J.A.

> A number of cases have been cited, but I need not go through them in detail. The effect of them is, that when it is the duty of some officer of the court to distribute money which is in his hands in a particular way the relation of debtor and creditor is not constituted between him and the person who is entitled to all or some part of the money which is in his hands. He is an officer of the court and his duty is to the court, and no debt is created which can be the subject-matter of attachment against him as garnishee. That is the principle of those cases, and it has been applied to liquidators, trustees in bankruptcy, and the registrar of a County Court.

O'Neill in his very astute argument for the appellant relied on a number of cases, principally *Ex parte Turner* (1860), 2 DeG. F. & J. 354, 45 E.R. 658, but it has been said in several cases since decided that that case cannot be regarded as laying down a general principle of law but must be read in the light of its own very exceptional facts.

I may add that I do not think the question for decision is affected by the wider scope of O. 11, rules 1 and 2 of the County Court Rules as compared with the section of the Common Law Procedure Act, 1854, which governed the earlier decisions.

The appeal should be dismissed.

Martin, J.A. MARTIN, J.A., would dismiss appeal.

McPhillips, J.A. MCPHILLIPS, J.A.:—I am in entire agreement with the judgment of my brother Martin.

Eberts, J.A. EBERTS, J.A., agrees with Macdonald, C.J.A.

Appeal dismissed.

ALTA.

S. C.

SECURITY TRUST Co. v. STEWART.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. March 15, 1918.

CHATTEL MORTGAGE (§ IV B—45)—POSSESSION BY MORTGAGEE—MORTGAGE DEFECTIVE—PRIORITIES.

Possession taken by a mortgagee, under a defective chattel mortgage, in that it did not comply with the requirements of the Bills of Sale Ordinance, (C.O. 1898 c. 43, s. 17 Alta.) saves the mortgagee's rights as against all persons who are not at the time of the taking of the possession either execution or attaching creditors or purchasers or mortgagees for value.

[See annotation 32 D.L.R. 566.]

APPEAL from a judgment of Simmons, J., on a special case respecting a chattel mortgage.

P. A. Carson, for appellant; *A. A. McGillivray*, for respondent.

HARVEY, C.J. (dissenting): I can see no sufficient reason for concluding that when the legislature said that a mortgage would cease to be valid as against the creditors of the mortgagor it meant anything different from what it said. To prefix the word "execution" before the word "creditors" would be a perfectly legitimate amendment but it is only the legislature that has the right to make such amendment.

The reasonings of Chancellor Boyd in *Barker* v. *Leeson* (1882), 1 O.R. 114, and the dissenting judge in *Parkes* v. *St. George* (1884), 10 A.R. (Ont.) 496, and the Chief Justice of Canada in *Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96, appeal to me with much more force than those of the majority judges in *Parkes* v. *St. George*, and it seems to me to be much more in harmony with other legislation we have, such as the Assignments Act and the Creditors Relief Act. Moreover, I do not think the principle enunciated in *McMillan* v. *Pierce* (1917), 37 D.L.R. 242, should apply here. There there had been a decision in Ontario on a similar provision which for 35 years had been the law and the people of this province having assumed that to be the law might be very seriously prejudiced if the law were declared to be different. The present case is quite different. Only 8 years after *Parkes* v. *St. George* declared that it could not be thought that the legislature intended more than execution creditors because the result of the opposite view would lead to great inconvenience, the legislature made the law exactly what the courts thought would result in such inconvenience so that the decision had effect in Ontario, where alone it had authority, for only 8 years. Moreover, it is not a case where persons relying on that state of the law could have put themselves in a position where they would be prejudiced by a declaration that the law is otherwise.

I am, therefore, of opinion that it should be declared that all creditors of the mortgagor are entitled to the benefit of the Act.

Though differing from the reasons of the learned Judge appealed from I would come to the same conclusion and would therefore dismiss the appeal with costs.

ALTA.

S. C.

SECURITY TRUST CO. v. STEWART.

Stuart, J.

STUART, J.:—With regard to the point which was most canvassed upon the argument I have come to the conclusion that this court ought now to follow the decision in *Parkes* v. *St. George*, 10 Ont. A.R. (Ont.) 496. Although I had been aware of the general result of that decision I do not think I had ever read the judgments until after the argument in the present case and even then not until I had examined the statutes in question and given some independent consideration to the subject. Upon then reading the judgment of Burton, J., I am bound to say that I find that he there expressed and developed clearly many of the suggestions that had already occurred to me and with his reasoning, if I may say so, I feel very much inclined to agree.

I am quite well aware of the danger of the court amending a statute and defeating the purpose of the legislature by reading words into it that are not there. But there can be no doubt that the court often is practically bound to read words into a statute. For instance, in the very s. 17 now under consideration every one would, I think, admit that the words "subsequent purchasers or mortgagees" mean obviously "subsequent purchasers or mortgagees *from the mortgagor*" not subsequent purchasers or mortgagees of the goods in question from any person at all no matter who he is. Again in s. 19 which provides for the yearly renewal after the first 2 years refers merely to "purchasers and mortgagees" yet it is obvious, it seems to me, that the court would feel bound to read into this section the word "subsequent." At least I should myself feel justified in doing so because reading the whole statute together that is what it would appear to me the legislature really intended. Another instance will be found in *Town of Castor* v. *Fenton*, 33 D.L.R. 719, 11 A.L.R. 320, where the expression "hereinbefore" had to be read as "hereinafter." I could, I think, suggest another example from s. 1 of the Conditional Sales Ordinance where it is provided that the agreement in question cannot unless registered as provided be set up "as against executions." Of course this means executions directed to the sheriff of the Judicial District where the goods are, not as against all executions *with whatever sheriff filed*. Of course the words mean "executions which would attach upon the goods." Then why not interpret "creditors" here as meaning "creditors who can attack the goods at once?"

In other words, I think there are numerous cases where the court is quite justified in assuming that the legislature did not intend to include absolutely every person or thing that would on the face of them be included within the class indicated by the words used.

I venture also to suggest that it may reasonably be argued that s. 29 of the ordinance might fairly be looked at, in order to gather the intention of the legislature, as part of the process of reading the whole Act together so as to ascertain its general scope which is one well-known rule of interpretation. That section deals with the removal of goods to another registration district. The failure to file there a certified copy of the mortgage within the prescribed time renders the goods "*liable to seizure and sale under execution*" and the mortgage is "null and void as against subsequent purchasers and mortgagees in good faith, etc., as if never executed." I cannot imagine any reason why a different or wider class of creditors should be protected in the case of non-renewal than in the case of removal without re-filing. The legislature has here, I think, been its own interpreter.

I think there is no doubt that the decision in *Parkes* v. *St. George* has for many years been considered among the conveyancers in these territories and provinces as being the law here. It is almost unbelievable that, if that decision had not been generally accepted as the proper interpretation of our own ordinance, there should not have been some attack upon it, some reported case in which it had been rejected. I may say that I spoke just to-day to one of the oldest solicitor-conveyancers in the province, a practitioner of the widest experience, and he assured me at once that the word "creditors" in the ordinance had always been understood to mean "execution creditors."

Then there is the decision in *Rogers Lumber Co.* v. *Dunlop*, 20 D.L.R., 154, 7 S.L.R. 421, where Lamont, Brown and Elwood, JJ., assumed the rule to exist as of course without even referring to *Parkes* v. *St. George*. I think this can only be because those judges in their long practice in the Territories and Saskatchewan always took the rule as settled. Also, Galt, J., of Manitoba, in *Richards & Brown* v. *Leonoff* (1915), 24 D.L.R. 180, and Robson, J., in *Empire Sash & Door Co.* v. *Maranda*, (1911), 21 Man. L.R. 605, both of long experience in the Territories and Western Provinces, followed *Parkes* v. *St. George*. The Terri-

ALTA.

S. C.

SECURITY TRUST CO. v. STEWART.

Stuart, J.

torial Legislature frequently re-enacted the original ordinance, even after Ontario had by statute changed the rule of *Parkes* v. *St. George*, without adopting the Ontario changes.

For these reasons I feel very strongly that we should not depart from, but should follow, *Parkes* v. *St. George*. It should now be left to the legislature to make the change if it is thought desirable to do so. But if the matter were *res integra* I do not feel at all sure that the other view might not have in my mind prevailed.

With regard to the question of taking possession, it seems to me that the position is practically the same as upon the other point. *Parkes* v. *St. George* has long been considered as having decided this point also, although I am bound to say that it was with some difficulty that I discovered in the judgments of Haggarty, C.J., and Osler, J., any very clear enunciation of the principle, at least as a basis of the decision which they were giving. As a matter of fact, in that case the view adopted in the 3 governing judgments in regard to the interpretation of the word "creditors" made it quite unnecessary to refer to the matter of possession at all. They all held that an ordinary creditor had no right to attack the mortgage, and as the plaintiff in the action was a single ordinary creditor, his action was consequently dismissed.

I have furthermore been led to some slight degree of scepticism upon the matter when I observed that cases where possession was taken *before the time limited for registration had expired* as well as cases where the attack was made by a trustee in bankruptcy who could only in any case take goods which were in the "apparent possession" of the bankrupt have frequently been cited in support of the curative effect of taking possession after the time for filing had elapsed. See *Heaton* v. *Flood*, 29 O.R. 87, at p. 95.

But upon principle I think a mortgagee who takes possession of the goods upon default and, as I assume to be the case here, although it is not so stated, by virtue of a clause in his mortgage giving him the right to do so upon default obtains a good title as against all persons who have not up to that time acquired any right to attack his security. The legal title to the goods is in him and he has possession of them and no one then has a right to attack either his ownership or possession. Surely, then, he is in

a position to do what he likes with them subject to any equities of the mortgagor only.

As the case is stated to us, I cannot see that we have any reason for enquiring into the nature of the possession taken by the sheriff as the mortgagee's bailiff. Under our present law the mortgagee did all that he could do independently of judicial authority. This, it may be argued, might have an opposite effect, inasmuch as the mortgagee upon seizure had no further right to do what he pleased with goods owing to the Extra Judicial Sales Act. That Act, however, as is well known, only intended to protect mortgagors against hasty and oppressive action by mortgagees.

I confess to some difficulty in understanding, though it is doubtless my own fault, just what was meant in *Heaton* v. *Flood* by "a new delivery or new transfer by the mortgagor." The mortgagor has already conveyed the legal title and the mortgagee *ex hypothesi* has a legal right to seize. All that I can see can be meant as an *assent* to the seizure by the mortgagor. Just why the mortgagee's rights should depend upon either an assent or some new formal conveyance of what has already been conveyed I am unable to see. True, there may be an equity of redemption which could be released or surrendered or conveyed so as to merge with the legal estate. But why should such formalities be thought necessary to protect the mortgagee? He is not to be at the mercy of his debtor surely. His mortgage gives him the legal property and a right to take possession of the goods and, usually, to sell at a private sale or otherwise. I can see no reason why any claim in equity or under the contract that the mortgagor has to a balance should affect the mortgagee's rights as against other parties. As I read the facts in *Johnson* v. *McNeil*, [1917] 3 W.W.R. 249, the seizure by which it was sought to cure the defective mortgage did not take place until after the plaintiffs' mortgage had been given and, of course, it could not be contended that the defective mortgage was saved as against them. This was also the position in *Marthinson* v. *Patterson*, 20 O.R. 125.

In this view I think it obviously becomes unnecessary to deal with a question of the liquidator's position further than to say of course that the mortgage being good as against all persons who did not occupy a position enabling them to attack it until after

ALTA.

S. C.

SECURITY TRUST CO. v. STEWART.

Beck, J.

the possession had been taken the plaintiff-liquidator simply for that reason is not in a position to attack the mortgage. Other very grave questions might arise if the taking of possession had not any saving effect.

I would, therefore, allow the appeal with costs and direct the question asked to be answered in the affirmative.

BECK, J.:—Briefly, the facts are as follows. The Tregillus Company gave a chattel mortgage dated April 18, 1914, to the Dominion Trust Co., which was duly registered on April 20, 1914.

The Bills of Sale Ordinance (C.O. 1898, c. 43) requires (s. 17) every chattel mortgage to be renewed within 2 years of the filing under penalty that in default the mortgage "shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration."

The mortgage was not renewed—the time for doing so expiring, as will have been observed, on April 20, 1916.

On May 17, 1916, the mortgagee company obtained authority under the statutory provision in that behalf, and directed the sheriff, as bailiff, to make a seizure of the goods comprised in the mortgage which consisted of heavy machinery and apparatus, and a seizure was accordingly made.

On July 31, 1916, a winding-up order was made against the Tregillus Co. and a liquidator appointed.

One question for decision is in effect whether the chattel mortgagee had, notwithstanding the failure to renew but in consequence of his seizure of the mortgaged goods, priority over executions against the mortgagor company, coming into the sheriff's hands subsequent to the seizure by the mortgagee and over the general body of the mortgagor company's creditors now represented by the liquidator.

As I read the trial judge's reasons for judgment he held, (1) following *Parkes* v. *St. George*, 10 A.R. (Ont.) 496, that "creditors" in s. 17 of the Bills of Sale Ordinance, already partly quoted, means execution or attaching creditors and that a taking of possession by a mortgagee under a mortgage merely defective, in creation or preservation, by reason of non-compliance with the ordinance, prevents the rights of creditors subsequent to possession attaching; and (2) following the individual opinion of Meredith, C.J.,

in *Heaton* v. *Flood*, 29 O.R. 87, that the mortgagee's act of taking possession, in order to have that effect, must amount to a new delivery or new transfer by the mortgagor. Then he seems impliedly to have found that there was no such possession and to have held, (3) purporting to follow *National Trust Co.* v. *Trust & Guarantee Co.*, 5 D.L.R. 459, that a liquidator is entitled to take advantage of statutory defects in a chattel mortgage—or, in other words, that a liquidator, in view of the provisions of the Winding-up Act, stands in a position similar to execution or attaching creditors.

The trial judge, therefore, declared that the chattel mortgage was invalid as against the liquidator of the mortgagor company. In *Parkes* v. *St. George* (1882), 2 O.R. 342; reversed 10 A.R. (Ont.) 496, a non-execution creditor, suing on behalf of himself and all other creditors of a chattel-mortgagor, sought to set aside the mortgage solely on grounds of non-compliance with the requirements of the Bills of Sale Act. The trial judge (Boyd, C.), held the action lay. His decision was reversed by the Court of Appeal.

Parkes v. *St. George* was followed by Robson, J., in *Empire Sash & Door Co.* v. *Maranda*, 21 Man. L.R. 605, and by Galt, J., in *Richards & Brown* v. *Leonoff*, 24 D.L.R. 180.

The view accepted in *Parkes* v. *St. George* appears to be that adopted by the courts of all the States of America except New York and New Jersey. Jones on Chattel Mortgages, 5th ed., ss. 178, 178 (*a*).; 6 Cyc, tit. Chattel Mortgages, p. 1070 *et seq.*

The original of our Bills of Sale Ordinance is No. 5 of 1881 passed on June 10 of that year.

In Ontario in 1892 various amendments were made to the Bills of Sale Act by c. 26, none of which have been adopted by our legislature. These amendments so far as they bear upon the question under consideration are: "Creditors" in the expression "void as against creditors" extends to simple contract creditors suing on behalf of themselves and others, and an assignee for the general benefit of creditors as well as execution creditors; (2) "actual and continued change of possession" is to be taken to be such change of possession as is open and reasonably sufficient to afford a public notice thereof; and (3) a mortgage or sale declared to be void as against creditors and subsequent purchasers or mortgagees is not by the subsequent taking of possession to

ALTA.

S. C.

SECURITY TRUST CO. v. STEWART.

Beck, J.

be made valid as against persons who became creditors or purchasers or mortgagees, "*before such taking of possession.*" (Now R.S.O. 1914, c. 135).

This court has said in more than one case that where the Territorial or Provincial Legislature has taken a statute from another province it is reasonable to assume that it has been taken with a knowledge of the sense in which it has been interpreted by the courts of the other province. That rule does not seem to have application here; but it seems to me that it may, as an assistance in interpreting our own ordinance, quite well be assumed also that where the Act of the other province has for a long period of time, since its adoption by this province, received an interpretation by the highest Appellate Court of the other province the legislature of this province may be presumed to have been satisfied to accept that interpretation: see *McMillan* v. *Pierce* (1917), 37 D.L.R. 242, a decision of our own court, and the legislature of this province have introduced amendments with regard to other matters only. The decision in *Parkes* v. *St. George* approves itself to my mind. I am not impressed by the adverse comments —wholly *obiter dicta*—of Strong, C.J., in *Clarkson* v. *McMaster*, 25 Can. S.C.R. 96.

Burton, J.A., was impressed with the inconveniences which would arise from a contrary interpretation. I am likewise impressed. The argument from inconvenience must be given considerable weight where there is room for reasonable doubt.

I think s. 23 of the Ordinance which provides for the correction of errors, omissions, etc., "subject to the rights of third persons accrued by reason of such omissions, etc.," favors the view I have adopted; it does not appear in the Ontario Acts; *i.e.*, it is a new provision introduced by way of amendment in 1895 in its present form (though in a simpler form in 1889) while amendments made in 1892 in Ontario were not introduced. It seems to me that it could not have been intended that the judge's order allowing correction of errors, etc., should preserve any supposed rights of the general creditors who were not in a position actually to cause the mortgage property to be seized under process. See also *Morrison-Thompson Hardware Co.* v. *West Bank Trading Co.*, 16 B.C.R., 33; *ib.* 314.

I would, therefore, accept the decision in *Parkes* v. *St. George*

and hold that possession taken by a mortgagee, under a chattel mortgage defective in not complying with the requirements of the Bills of Sale Ordinance, saves the mortgagee's rights as against all persons who are not at the time of the taking of possession either execution or attaching creditors or purchasers or mortgagees for value.

Then is the liquidator, or the general body of the creditors as represented by the liquidator, in a position to attack the mortgage merely for statutory defects? I think not. The Ontario Act was amended in 1913 so as expressly to include a liquidator (c. 65, s. 2). Previously the Ontario decisions were in conflict but personally I prefer the opinion of Riddell, J., in *Re Canadian Shipbuilding Co.* (1912), 6 D.L.R. 174; 26 O.L.R. 564; (see Mitchell on Commercial Corporations 1490, and Barron & O'Brien, Bills of Sale and Chattel Mortgages (1914) 2nd rev. ed., p. 131).

The special case states that "On May 17, 1916, the mortgagor being in default under the said mortgage, one Fred M. Graham, sheriff of the Judicial District of Calgary, under a warrant of distress from and as bailiff for, Andrew Stewart, liquidator of the Dominion Trust Company (the mortgagee) seized the goods and chattels mentioned in the said chattel mortgage and *holds the same for* the said Andrew Stewart under and by virtue of the said aforementioned chattel mortgage."

This clearly means a taking and keeping of possession by the mortgagee.

The sole question is whether such possession is effective to save the mortgage against attack for statutory defects by subsequent execution creditors or in other words is some new intervening act of the mortgagor necessary to make such possession effective for that purpose, as is the opinion of Meredith, C.J.?

I can find no trace of authority in support of that opinion in such works as Jones on Chattel Mortgages, Cyc. tit. Chattel Mortgages, or elsewhere, and it is, it seems to me, entirely inconsistent with the view of the Court of Appeal in *Parkes* v. *St. George*, for if some new intervening act on the part of the mortgagor is necessary, it is the new act of confirmation of the

ALTA.
S. C.
SECURITY TRUST CO. v. STEWART.
Beck, J.

previous mortgaging, accompanied by an immediate delivery and followed by an actual and continued change of possession, that is the effective thing and not the taking possession by the mortgagor.

Answering the question propounded by the special case, I would say that the chattel mortgage in question is valid as against the creditors (except certain specified execution creditors prior to the taking of possession) of the Tregillus Clay Products Limited and the liquidator (company) acting on its own behalf or on behalf of the creditors. The agreement of the parties determines what follows as a consequence of this decision, except with regard to the costs of the appeal. The appeal being allowed the appellant should have the costs.

Hyndman, J.

HYNDMAN, J., concurred with BECK, J. *Appeal allowed.*

ONT.
S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INS. Co.

Ontario Supreme Court, Appellate Division, Meredith C.J.C.P., Riddell, Lennox and Rose, JJ. November 23, 1917.

INSURANCE (§ III D—66)—COMBINED STORE AND DWELLING—OCCUPIED AS DWELLING—HOUSE UNOCCUPIED—"WHILE OCCUPIED AS DWELLING"—MEANING OF POLICY.

A house occupied as a combined store and dwelling is not "occupied as a dwelling," and if a house is unoccupied at the time of a fire therein it is not injured "while occupied as a dwelling" within the meaning of an insurance policy.

Statement

AN action brought by S. M. Ross, Max Ross, and Becky Langbond, to recover their money-loss by reason of the destruction by fire of buildings which had been insured by the defendants.

The buildings consisted of a row of ten two-storey, brick-fronted, wooden buildings. The building at one end of the row was, as to the first storey, a shop, and, as to the second storey, a dwelling. The other nine buildings were dwellings. The insurance was evidenced by ten policies dated the 9th May, 1913, one on each building, identical in form and in amount, $1,200, for the term of three years from the 8th May, 1913. The policies were renewed for a further term of three years, by renewal receipts dated the 3rd May, 1916. The buildings were destroyed by fire on the 29th August, 1916. Four or five of the dwellings

were, at the time of the fire, and had been for some months before, unoccupied. There was a clause in the policies which apparently limited the insurance so as not to cover the buildings unless occupied as dwellings.

The action was tried by BRITTON, J., and a jury, at Toronto.

The questions left to the jury were arranged under two heads: questions framed by *R. McKay*, K.C., counsel for the defendants; and questions framed by *H. J. McDonald*, counsel for the plaintiffs. The questions and answers were as follows:—

Mr. McKay's Questions.

1. Did the plaintiffs insure the corner-store representing it as a dwelling? A. No.

(*b*) Was this a material representation?

2. Were the vacancies which existed in the houses a material change in the risk? A. No.

3. Was the statement in the proof of loss that the plaintiffs were the owners of the property, and that no other person except John Mooney had any interest therein at the time of the fire, false to the knowledge of the parties making the declaration or any of them? A. No, not intentionally.

4. What was the amount of the loss by fire on each of the properties, namely, each of the houses and the store? A. $1,200 for each of the ten policies or $12,000 in all.

Mr. McDonald's Questions.

1. Was there any concealment or misrepresentation by the plaintiffs material to the risk at the time the policies were placed? If so, in what respect? A. No.

2. Was the risk which the defendants took when the policies were placed materially increased by reason of any of the insured premises being vacant at the date of the fire? A. No.

3. Did the plaintiff S. M. Ross give the deed to Joe Shifman as security for a loan? A. Yes.

4. Was S. M. Ross entitled, at the date of the fire, to a reconveyance of his interest in the said lands? A. Yes.

5. Did the defendants, within a reasonable time, take objection to the sufficiency of the proofs of loss of the assured? A. No.

(*b*) Were such proofs furnished in good faith? A. Yes.

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Meredith, C.J.C.P.

6. Did the plaintiffs commit fraud or perjury in the making of the declaration attached to the said proofs? A. No.

Upon these answers, the trial Judge directed judgment to be entered for the plaintiffs for the recovery of $12,000; and the defendants appealed from the judgment. There was also a cross-appeal by the plaintiffs for the allowance of interest.

R. McKay, K.C., and *Shirley Denison*, K.C., for appellants.

H. J. McDonald and *C. W. Moorehead*, for plaintiffs.

MEREDITH, C.J.C.P.:—The plaintiffs, having insured houses against injury by fire whilst occupied, seek, as to some of them, to recover, in this action, compensation for injury to these houses by a fire which occurred when they were unoccupied. How is it possible that they can so recover? The "subject-matter" of the insurance was occupied houses, no others were within the insurance contract. The bargain which the parties made is the only bargain which the Court can enforce.

Mr. McDonald exhausted all possible contentions in support of the claim: but none of them comes anywhere near dislodging the defendants from their stand upon: "That is your contract."

No application in writing was proved, or appears to have been made, for the insurance; nor has any verbal application inconsistent with the words of the policies been proved. It is true that the insurance was for a fixed period, at a fixed premium; and that the houses were not insured during all that period: but that was the bargain; and there was nothing unlawful in it. Whether reasonable or not, was a question for consideration before making it, not after the loss.

I can perceive no greater right to recover in this case than if the plaintiffs were suing for a loss which occurred before the policy came into force, or after it had run out.

As to the unoccupied houses, the appeal should be allowed and the action dismissed.

As to the occupied houses, the defence is, mainly, that the vacancy of the other houses caused a change material to the risk, which avoided all the policies, because no notice of it was given to the insurers, as required by the statutory condition 2*.

*R.S.O. 1914, ch. 183, sec. 194, condition 2: "Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; * * *."

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Meredith, C.J.C.P.

But the case was tried by a jury, and they found that the change was not material to the risk, and so the policies were not avoided by that condition.

And sec. 156, sub-sec. (6), of the Insurance Act, R.S.O. 1914, ch. 183, provides that such a question shall be a question of fact for the jury.

It cannot, however, be a question of fact for the jury if there is no evidence to go to the jury: that is, if there is no evidence upon which reasonable men could find in any but one way: but I am not prepared to say that this is such a case. There was evidence that the fire actually started upon one of the occupied premises, and there were other circumstances which bring the sub-section of the Act, to which I have referred, into effect.

Other objections made against the plaintiffs' claim were overruled upon the argument; objections which were of so little moment that it is not needful that they be dealt with again now.

The judgment should stand as to the occupied houses, that is, those occupied as dwelling-houses only.

The appellants should have their costs of the appeal; and the respondents their costs of the action.

Having regard to the objections to the proofs of loss and other circumstances, the case is not one for the allowance of interest upon the amount of the loss, before judgment: no adjustment of the loss could ever have been made by the insurers with the insured except on the basis of payment in respect of unoccupied as well as occupied houses.

Riddell, J.

RIDDELL, J.:—The plaintiffs owned a piece of land on Keele street, in the township of York, and determined to build a block thereon, "nine houses and on the corner a store."

Having first insured in the Merchants Insurance Company, a "builder's risk," they subsequently insured in the defendants' company, receiving in May, 1913, ten separate policies, one on each building, although the block was continuous.

One Kenen, who describes himself in his advertisement as a "general insurance underwriter," acted as the go-between, it does not appear in what capacity: there does not seem to have been any application in writing; so that we are driven to determine the rights of the parties by the policies issued.

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Riddell, J.

Each of the policies reads, $1,200 "on the two-storey . . . building and additions . . . while occupied by ..... as a dwelling and situated No. ——— on the east side of Keele street . . . plan 1612 . . . known as house No. 1" (or 2 &c.); and each policy is for three years.

The corner "house" was, on the ground-floor, a store; the upper storey, a dwelling: all the other houses were dwellings only.

While all the houses were occupied at some time, several had lain vacant for months at the time of the fire.

A fire occurred in August, 1916, which almost completely destroyed the block—the policies had been, in the previous May, renewed for three years.

Proofs of loss were delivered (these it is argued are insufficient) —an action was brought, which resulted in a judgment for the plaintiffs for $12,000. The defendants appeal.

In the view I take of the case, there is no need of passing upon the sufficiency of the proofs of loss or upon the application here of sec. 199 of the Insurance Act, R.S.O. 1914, ch. 183—as at present advised, I should not allow the defects complained of to defeat the plaintiffs' claim.

But there are other and formidable objections which I think prevent the plaintiffs' recovery:—

1. The insurance is specifically upon each of the houses "while occupied as a dwelling." The Supreme Court of Canada in *London Assurance Corporation* v. *Great Northern Transit Co.*, 29 S.C.R. 577, authoritatively laid it down that such language is not a condition, but a description of the subject-matter of the insurance. The word there in question was "whilst," here it is "while," but we must not in such cases draw subtle distinctions. It is clear that the houses which had been vacant for months were not "occupied as a dwelling"—there is no question here of a mere temporary vacancy such as might occur between outgoing and incoming tenants.

In *Langworthy* v. *Oswego and Onondaga Insurance Co.* (1881), 85 N.Y. 632, the insurance was from the 15th August to the 15th October, upon the plaintiff's hop-house "while drying hops" —the New York Court of Appeals held that, though the fire took place between the given dates, as the plaintiff had ceased drying hops, he could not succeed.

Another consideration applies to the corner-house. A store below, a dwelling above, it cannot be said to have been "occupied as a dwelling"—so that, irrespective of sec. 192 (1) of the Insurance Act, for this house the plaintiffs cannot recover. Another consideration applying to the vacant houses will be stated later under head 2.

2. As to the houses which were occupied as dwellings at the time of the fire, the fact, if it be a fact, that they had been vacant at some time does not vitiate their insurance: there is no reason why the insurance should not as it were be dormant during the vacancy, to revive on such occupation when renewed: *Ring* v. *Phoenix Assurance Co.* (1888), 145 Mass. 426, at p. 427.

I think, however, statutory condition 2 applies: "Any change material to the risk, and within the . . . knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; . . . ."

It is of course clear that the material change need not be in the insured property itself—to use a terminology very common in such cases, the increase may be external.

In *Lomas* v. *British America Assurance Co.* (1863), 22 U.C.R. 310, where the condition was, "if . . . the risk shall be increased by any means . . . " the Court said (p. 317): "It was the duty of the plaintiff to give notice of any change or increase of risk arising from the erection of new buildings or from any other cause."

Reid v. *Gore District Mutual Fire Insurance Co.* (1854), 11 U.C.R. 345, is to the same effect; *cf. Heneker* v. *British America Assurance Co.* (1863), 13 U.C.C.P. 99; *Allen* v. *Massasoit Insurance Co.* (1868), 99 Mass. 160; and many other cases.

The evidence is overwhelming and uncontradicted that, when any of the houses became vacant, the risk of fire was materially increased—"an empty building from a fire insurance point of view is an undesirable risk." This, without notice, voids the insurance on the vacant houses: but it has, in my opinion, a further effect. These houses are all in one block, with a continuous roof—it goes without saying that anything which would increase the risk for one house would increase the risk for the others.

This was no mere temporary increase of the risk as in *Gates*

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Riddell, J.

v. *Madison County Mutual Insurance Co.* (1851), 5 N.Y. 469; *Townsend* v. *Northwestern Insurance Co.* (1858), 18 N.Y. 168; *Planters' Insurance Co.* v. *Sorrels* (1872), 1 Baxt. (Tenn.) 352; *Allemania Fire Insurance* v. *Pitts Exposition Society* (1887), 11 Atl. Repr. 572 (Pa.), etc., etc.

As at present advised, I should not give effect to the objection based upon an alleged transfer of interest: *Holbrook* v. *American Insurance Co.* (1852), 1 Curtis (U.S. Circ.) 193; *Commercial Insurance Co.* v. *Scammon* (1888), 123 Ill. 601; *Blackwell* v. *Insurance Co.* (1891), 48 Ohio St. 533; and similar cases.

I think the findings of the jury must be set aside, and the action dismissed with costs here and below.

Lennox, J.

LENNOX, J.:—Insurance policies, like other contracts, are to be interpreted and their effect determined in the light of surrounding circumstances. The conclusions I have come to as to matters of law will be better understood if I first refer to certain matters of fact which appear to be reasonably clear, and not in conflict with the findings of the jury. The tenements were all vacant, and there was builders' work to be done on each of them on the 8th May, when the policies were issued. The first to be occupied was the combined store and dwelling, and this was not occupied until about the end of May: Langbond's evidence. This was known to the company at the time, as appears from the evidence of the company's Canadian representative, W. A. Medland; for, although he was not in Canada at that time, he deposes to it as a fact, and in such case it is right to assume that from records in his office, communications with reliable officers, or in some way, he was justified in making the statement, or admission, if it is to be regarded as an admission.

From this evidence I have concluded, contrary to the inference I was about to draw, that the blank in the policy, following the words "while occupied by," was not intended to be filled up by a name; that, as he says, it is intended for insertion of the word "owner" or "tenant" as the case might be.

Whether it was intended that the operation of the policy was in each case to be in suspense until the dwelling became actually occupied by a tenant—which would be in harmony with the words "while occupied as a dwelling," and not quite consistent

with the premium being immediately paid and running from the date of the policy, if it was so—or, regarding the building operations as practically completed and looking to almost immediate occupation, it was understood that the policies would take full effect at once, is perhaps not quite clear. The evidence of Mr. Medland would appear to indicate that, according to the practice of this and other companies, under circumstances such as we have here, a reasonable time, not usually exceeding three months, is allowed the assured to complete the building operations and secure tenants, and the liability of the company arises upon delivery of the policy. A fire did not occur until after the completion of the whole work, or until all the dwellings had been occupied for a time, but the question is indirectly of consequence in considering whether it is open to the company to set up vacancies as changes "material to the risk" and as avoiding the policies upon the occupied dwellings. Why the permit, if intended, was not in writing, as is usually the case, was not explained, and the question was not asked. The war was not then on; and, as to the form of the policies, no one perhaps, in the rush of 1913, anticipated subsequent vacancies of long duration.

The row or block was planned and built as nine dwellings and one combined store and dwelling at the south end. This house—store and dwelling—was occupied from about the end of May, 1913, until the happening of the fire, and was never occupied exclusively as a dwelling. The form in which it was planned or built determines nothing—there was nothing in that *per se* to prevent its being occupied according to the wording of the policy. If described as a store or store and dwelling, it would only have been insured for a year—it *could* only be insured for a year (Insurance Act, sec. 192)—and at many times the rate for one year that is charged for a dwelling for three years, and the rating of several dwellings to the north would also have been increased: all this by reason of the increased risk of fire: evidence of T. H. King.

Of the numerous grounds of defence taken upon the argument, I find it necessary to refer to four only:—

(1) Was the insurance avoided as to all the dwellings or the vacant dwellings by reason of vacancies, without notice, as changes "material to the risk, and within the control or knowledge of the assured," under statutory condition 2?

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

LENNOX, J.

I have had the advantage of reading the judgment of my learned brother Riddell; but, with deference, I am of opinion that this condition does not apply. The fact that the view I entertain upon this point is in conflict with the very weighty argument of a more experienced member of the Court necessarily robs me of the confidence I would otherwise feel in what I am about to say; still, although in the end I reach the same result, I prefer to rest my judgment upon other grounds.

All the dwellings were vacant, to the knowledge of all parties, when the contracts were entered into, and the specific contract and limit of the company's liability as to each dwelling is, I think, inconsistent with holding that subsequent vacancies are to have a secondary effect as to other dwellings not declared or provided for in any of the policies. It was not a change as to any of the dwellings from the condition existing at the date of the contract, and it was not "any change increasing the risk" of the company as to the specific dwelling vacated, but a change terminating all liability, according to the literal meaning and express language of the policy, upon that dwelling.

As to my own opinion, I cannot say that I would be likely to entertain any serious doubt that a vacant dwelling, alongside other dwellings, under one undivided roof, is not calculated to increase the risk of destruction by fire of the adjoining or neighbouring dwellings in the same block; but there is here the double answer: the statute (sec. 156 (6)) provides that the question of materiality in a jury case is a question of fact for the jury; the question was properly submitted, the jury have found adversely to the company; and, if material, it was for the company by their contract to limit their liability by proper provisions.

By statutory condition 8 it is provided: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing, the particulars wherein the policy differs from the application." Conversely, in this case, it must be presumed that the applications were in accordance with the policies, for there is no evidence as to the character of the applications, and there is a finding that there was no misrepresentation.

The company contend that the insurance on each dwelling

was for so long only as it continued to be occupied in the way described. If this contention is well-founded, is it not open to the plaintiffs to reply—and unanswerable as against the company, for it is the language of the contract:—"The dwellings were all vacant, and the company insured each when and while occupied as a dwelling, and not otherwise. It was inevitable, and necessarily contemplated, that the dates when occupation would begin and the duration of occupancy would not be coincident under the ten policies, and there was no change, material or immaterial, after the making of the contracts. What happened was the specific thing provided for by the policies in terms, and the company cannot add terms." I cannot think that this defence is open to the company: see *McKay* v. *Norwich Union Insurance Co.*, 27 O.R. 251, at p. 260.

(2) Are the plaintiffs entitled to recover for loss in respect of the vacant dwellings? I do not think they are. What their rights might have been if the fire had occurred before the dwellings became occupied, I need not consider. The provisions of the policies are as clear and definite as language can well be. "Loss or damage by fire" (as to each dwelling)" . . . while occupied by..... as a dwelling." There is, to my mind, no room for argument that the dwellings unoccupied, and as a matter of fact untenanted, at the date of the fire, were covered by insurance when the fire occurred. The question of mere temporary vacancy does not arise. To prevent misapprehension, I am of opinion that No. 6, tenanted by Bremmer, under an agreement with Mrs. English, although he had not moved in his furniture, was, at the date of the fire, occupied as a dwelling within the meaning of the policy upon that dwelling.

(3) Are the plaintiffs entitled to recover for loss in respect of the combined store and dwelling, which was, I understand, occupied when the fire occurred? The answer is obvious. There was no insurance upon a "store" or "store and dwelling" at any time.

(4) Are the plaintiffs entitled to recover at all? I regret the conclusion I feel forced to come to as to this question. Mr. McKay very frankly stated that the company did not desire to escape from payment of the loss sustained by the plaintiffs in respect of the occupied dwellings, but very properly contended that,

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Lennox, J.

if the plaintiffs would not accept what the company believed to be an equitable basis of settlement, it was right in that event that the plaintiffs should only get what they are found to be entitled to as a matter of law. I think I was right in inferring that the company would be willing, on a settlement, to accept the jury's figures, $1,200, as the loss for each occupied dwelling. Much as I regret the result, I cannot find fault with the company's attitude. Perhaps it may yet be found possible for the parties to come together.

The jury were asked: "Did the plaintiffs insure the corner-store representing it as a dwelling?" And they answered, "No." There was no evidence to support this finding, if the jury meant more by this than to say that the plans provided for, and the structure was evidently adapted to be used as, a store; or that, although capable of being used as store, the plaintiffs, at the time of applying for insurance, intended to use the south end of the block, for the time being at all events, as a dwelling only, and so did not fraudulently misrepresent the character of the risk: and, as I have said, and as the learned Judge said at the trial, the form of the structure does determine the uses to which it may subsequently be put or limited. But, if they meant more than this—as, for instance, that the plaintiffs applied to have it insured as a store or as a store and dwelling—the finding is not only unwarranted, as unsupported by evidence, but is refuted by the proper inferences to be drawn from the evidence and the undisputed facts and circumstances deposed to and disclosed at the trial, and cannot be allowed to stand in the way of disposing of the appeal upon the legal question submitted to this Court. But I do not regard this finding as presenting even an apparent difficulty, and I find no ground for a new trial for this or any other cause. The south end of the block was insured as a dwelling, to be occupied as a dwelling only, and was used and occupied as a grocery-store and dwelling without notice to the company. It was a change or alteration in the character of the occupation provided for in the policy, to the knowledge of and effected by the plaintiffs, after the placing of the policy. What I have to consider and endeavour to determine is: Was this a "change material to the risk" assumed by the company under the policies covering the dwellings to the north of the store, was it a change

"within the control or knowledge of the assured," and did it "affect" and does it avoid the policies on these dwellings or any of them, within the meaning of the second statutory condition? Thinking over this matter again and again, and giving it the very best consideration I am capable of, I feel compelled to come to the conclusion that what was done was a change material to the risk undertaken by the company in respect of the dwellings connected with the store by continuous outside walls, foundations, and an undivided roof, and that it "affected" and substantially increased the risk assumed by the company as to all of them. It is not necessary to determine as to all of them. Several of the dwellings in the north end of the block, numbers 5, 7, 8, 9, and 10, according to some of the witnesses, were unoccupied at the time of the fire, and I have expressed my opinion that the plaintiffs' claim fails as to the unoccupied dwellings because they were not covered by insurance at the time of the fire: I make no finding and express no opinion as to the exact number of unoccupied dwellings.

It is not denied that what was done was within the control and knowledge of the assured, nor was it asserted that notice was given. Every case must turn upon its own facts; but, in this case, even a sluggish exercise of common sense is enough to shew that to increase the risk of accidental fire in a peculiarly inflammable tenement, in a block of 140 feet—all one structure—built in the way this block was built, must increase the risk of destruction of the whole collection of tenements: and that user as a store involves additional hazards, higher premiums, and a shorter term of insurance, both by statute and the practice of companies, was abundantly established and not contradicted. The jury were not asked for a finding upon this point. Assuming, as I do assume, intelligence and honesty—if asked, they could only have found in one way. If the record is correct, the questions were submitted as "Mr. McKay's questions" and "Mr. McDonald's questions." With sincere respect for the very able and experienced Judge who heard the case, I venture to suggest, with deference, that this is, perhaps, not the best method of leaving the questions to the jury. It is, I think, important that the jury should not be in a position to identify any question as

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Rose, J.

emanating from a particular source, and in fact that the less they know as to the effect of their answers the better.

I think the findings of the jury must be set aside, and judgment entered dismissing the action, and with costs here and below, if asked.

ROSE, J.:—The plaintiffs S. M. Ross (or Rass) and Max Ross, with one Morris Langbond, erected a row of ten two-storey, brick-fronted, wooden buildings, in Keele street, Toronto. The building at one end of the row was, as to the first storey, a shop, and, as to the second storey, a dwelling. The other nine buildings were dwellings. When the buildings were complete, or nearly complete, the builders, through one Kenen, placed with the defendants the insurance in question in the action. The insurance is evidenced by ten policies, one on each building, identical in form and in amount—$1,200. The date of the policies is the 9th May, 1913; the term, three years from the 8th May, 1913. The policies were renewed for a further term of three years, by renewal receipts, dated the 3rd May, 1916. The buildings were destroyed by fire on the 29th August, 1916, apparently nothing being left except the concrete foundations.

In April, 1914, Morris Langbond transferred his interest in the buildings and in the insurance to his wife, the plaintiff Becky Langbond, the transfer being assented to by the defendants.

Proofs of loss, sworn to by the plaintiffs, were delivered on or about the 13th October, 1916. It is said that the company's adjuster called the attention of the plaintiffs' adjuster to certain supposed defects in them; but there was no formal demand for further or better proofs, and the only formal communication from or on behalf of the company was a letter from their solicitors, dated the 12th December, 1916, saying, simply, that the company disputed the claim.

Several questions of law arise. These I will deal with seriatim, stating in connection with the discussion of each such facts, other than the foregoing, as seem to me to be necessary for the understanding of the question.

It will be convenient to deal first with the defences depending upon the fact that four or five of the dwellings were untenanted at the time of the fire, and for some months before.

What is commonly called "the written portion" of the policies, i. e., the portion containing the description of the subject-matter of the insurance, consists of a printed slip with blanks, some of which are filled in, which slip is pasted into a blank space in the policy following the words stating the term and the amount. The slip is headed "Dwelling House Form:" there are blanks, properly filled in, for the amount of the insurance, and for the description and location of the property, and also the following: "*while occupied by* ..... *as a dwelling*," the words that I have put in italics being printed, and nothing being written on the dotted line. It is argued, upon the authority of the *Baltic* case, *London Assurance Corporation* v. *Great Northern Transit Co.*, 29 S.C.R. 577, that the effect of these words is that, while the term of the insurance is three years, there may be, as in the *Baltic* case, periods, longer or shorter, during the term, in which the building, being unoccupied, is not covered. I do not think this argument is sound. In the policy on the *Baltic* there was a carefully worded description of the subject-matter, and the Court, giving due effect to all parts of that description, held that the words, "whilst running on the inland lakes, rivers and canals during the season of navigation," meant exactly what they said, so that if, e. g., the ship, during the season of navigation, happened to be running on the high seas, she would not be covered at that time. Here ten buildings, obviously intended for renting, some or all of them untenanted, are insured for three years: it is not known how soon tenants will be found for them or for those of them that are vacant: it is probable that, even if tenants are found for all of them, there will be times during the three years when one or more of them will be without tenants: the company contend that the contract is that as to each building the risk begins, not on the day mentioned in the policy as the commencement of the term, but on some later day when a tenant moves in, and continues, not for three years, but only until the first tenant goes out, re-attaching with each new tenancy, for the period of such new tenancy. The *Baltic* case shews that it is perfectly competent to the company to make such a contract; but it does not shew that an insurance company, contending for such a construction of its policy, makes out its case unless the words that it has used clearly express that limited contract rather

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Rose, J.

than a contract for the three years simply. Now consider the words used. The term, three years, is clearly stated. Then comes this slip with the printed words "while occupied by ..... as a dwelling." The form is apparently one prepared by the company with the idea that it may be used in case it is intended that the building shall be covered only while it is occupied by some person to be named or described, *e. g.*, "the owner," "a tenant," "John Doe." The company does not fill in the blank. Is it not the fair inference that the company decided that in this case it would not make any use of that portion of the form, and would leave the insurance to be what in the main portion of the policy it was stated to be, viz., an insurance for the whole term of three years? Is it not true that, instead of the complete and carefully worded document that the Court had to construe in the *Baltic* case, you have a blank form which the company whose form it is are asking you to complete or alter so that it may bear a meaning favourable to the company? In order to give to the form the meaning contended for, must not one either strike out the word "by" and draw a line through the blank, so as to make the reading "while occupied as a dwelling," or insert the words "some one," so as to make it "while occupied by some one as a dwelling?" It may be that the writer of the policy thought that, by issuing it with the blank space, he was indicating that the building would be covered only while occupied as a dwelling, but that it mattered not who the occupant was; or it may be that the prominent thing in his mind was that the building should not be occupied except as a dwelling, and he may have left the space blank because he did not desire to stipulate that there should be occupancy; or, again, he may have intended, as I have before suggested, to make no use at all of that portion of the form. However, speculation as to what was intended is beside the mark: the important thing is that, looking at the whole document, I cannot say that I am satisfied that it says that the building is covered only "while occupied" or "while occupied as a dwelling."

So much for the unoccupied dwellings. The case as to the building at the end of the row, shop below and dwelling above, depends upon somewhat different considerations. Without resorting to the words "while occupied by ..... as a dwelling,"

it is plainly to be seen from all the circumstances of the case—the use of the "dwelling-house form," the granting of insurance for three years, instead of for only one (Insurance Act, 2 Geo. V. ch. 33, sec. 192, R.S.O. 1914 ch. 183, sec. 192), the low premium, $10.80 for three years, instead of $25 for one year—that this building was treated as being something quite different from what it was. How this happened does not appear: there was no written application for the insurance: Kenen, the man through whom it was placed, was out of the country at the time of the trial, and no evidence was forthcoming as to what, if anything, he told the company's agents: there was no evidence of any inspection of the premises on behalf of the company; but, however it happened, it seems to be clear that the parties were never *ad idem*, in so far as this building is concerned. I think, therefore, that the risk never attached, and the plaintiffs cannot recover on the policy. It follows that the premium ought to be repaid.

Another use that is sought to be made of the vacancy of some of the houses, is to treat it as a "change material to the risk," within the meaning of the second statutory condition, and so avoiding the policy—either the policy covering the unoccupied house, or, as Mr. McKay contends, all the policies, the vacancy of any one house in the row affecting the risk covered by each policy. Evidence was given, and was not contradicted, that in the case of houses such as these vacancy does increase the hazard, and the case of *McKay* v. *Norwich Union Insurance Co.*, 27 O.R. 251, was relied upon as a decision that vacancy occurring, and continuing for some time, is a change to which the statutory condition applies. However, unless the buildings were insured as occupied, that case does not help the defendants. There was there one policy covering seven houses. Six of the houses were occupied by tenants when the policy was written: the seventh was unoccupied, but it was stated that the applicant intended to occupy it. Some of the six became and continued vacant, and this was held to be a change material to the risk, and to avoid the policy, because no notice was given to the company; but Street, J., delivering the judgment of the Divisional Court, was careful to "point out that the vacancy of the house which the insured intended to occupy himself would not have avoided the policy as a change material to the risk, because the company

ONT.
S. C.
ROSS
v.
SCOTTISH UNION AND NATIONAL INSURANCE CO.
Rose, J.

must be taken to have accepted the risk knowing that this particular house was unoccupied." So here, the houses, or most of them, were unoccupied when the policies were written, and any "change" that took place occurred when tenants moved in: the defence, however, is not based upon the houses becoming tenanted, but upon their becoming untenanted, i. e., upon their reverting to the condition in which they were originally; and that, I conceive, cannot be the "change" to which the condition refers. It is true that there is no evidence that, when writing the policies, the company knew that the houses were vacant; but they were there to be seen; and, in the absence of proof that they were represented as being occupied, the company cannot be heard to say that they were insured as occupied, so that when vacant they were something different from the real subject-matter of the insurance. Perhaps, I ought to point out that, when Street, J., in the passage above quoted spoke of the company being taken to have accepted the risk knowing that one of the houses was unoccupied, he was referring to the fact that, although the assured had stated in the formal application that the house was occupied by himself, a covering letter from the agent to the company stated the real fact. I do not think that the jury's finding that there was no change material to the risk can be disturbed.

This brings me to another point based upon the 8th statutory condition. It is said that the policy treats these as occupied houses, and that, as the policy is deemed to be intended to be in accordance with the terms of the application, we must take it that there was an untrue representation, in the application, that the houses were occupied. Perhaps I am extending the argument somewhat. It may have been directed more particularly to a representation that the corner-building was a dwelling only, and not a shop; but, whether in the larger or the more restricted form, I think the answer to it is, that the 8th condition is obviously intended for the protection of the assured, who, in virtue of it, is entitled to assume that he has got the insurance for which he applied, and that it cannot be used for the purpose for which it is put forward here: see *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296, at p. 301, 30 D.L.R. 265.

By a deed, absolute in form, dated the 12th August, 1917, and duly registered, the plaintiff S. M. Ross conveyed to one

Joe Shifman all the grantor's undivided one-third interest in the property insured. The conveyance is expressed to be "for certain good and valuable consideration and the sum of one dollar." Upon evidence which, if believed, justified the finding, the jury found that the deed was given as security for a loan, and that at the time of the fire Ross was entitled to a reconveyance. There appears to have been such a reconveyance before the trial.

By a second mortgage, dated the 12th May, 1915, and duly registered, the plaintiff B. Langbond conveyed her undivided interest to one Newdich, as security for a loan of $505.14. The mortgage had not been discharged at the time of the fire.

The defendants contend that the deed from Ross to Shifman avoided the policy, under the third statutory condition, and, alternatively, that, as in the proofs of loss no mention was made either of that deed or of the mortgage from Langbond to Newdich, but, on the contrary, the plaintiffs swore that the property belonged to them, and that on one else, except the first mortgagee, had any interest therein, their claims were vitiated under the 20th condition.

As to the first point: if the document had been in form a mortgage, the question would not have arisen: *Bull* v. *North British Canadian Investment Co.* (1888), 15 A.R. 421; *Imperial Fire Insurance Co.* v. *Bull* (1889), 18 S.C.R. 697; and I think it makes no difference that the form was that of an absolute conveyance. This was the decision of the New York Court of Appeals in *Barry* v. *Hamburg-Bremen Fire Insurance Co.* (1888), 110 N.Y. 1.

As to the second point, the jury have found that the statement as to title was not "intentionally" false, to the knowledge of the plaintiffs, or any of them. The evidence would not justify us in disregarding this finding, and the objection fails.

The defendants contend that there ought to be a new trial because more than three witnesses entitled to give opinion-evidence were examined on behalf of the plaintiffs, without the leave of the trial Judge, applied for before the examination of any of such witnesses: Evidence Act, R.S.O. 1914, ch. 76, sec. 10. I think the decision upon this point turns upon the question whether the witness M. Langbond gave opinion-evidence. He was the builder

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Rose, J.

of the houses. He swore that it had cost over $11,000 to build the houses. Then there was put to him the question, "Will you tell me from your knowledge as a builder, could you erect the same premises, in the same condition, and with the same material on the 29th August, 1916, for the same amount of money?" And his answer was "No." So far, I think, he was merely stating the well-known fact that labour and materials were more expensive in 1916 than in 1913, and I do not think the evidence can properly be called opinion-evidence; but counsel then shewed him the schedule attached to the proofs of loss, and said, "I am asking you what you had to do with that schedule, if anything." And he proceeded to say: "After the fire I had to go over—I had to figure up my proof of loss, and I didn't want to undertake myself to figure it, knowing the fact that I will have to be a witness in the box. I had several adjusters which I know personally, Mr. Russell Wright of the Canadian Adjusting Bureau, we had several conversations between us. We couldn't agree on some questions. They said it will be necessary I will produce this to the Court. I took only as a helper Mr. Graner, knowing he is my countryman, I can figure with him and explain better the situation how it is, because he knows my language, and I know his language, and we was over together all the details of the erection of the houses, and we figured it up to the best knowledge, to the lowest figures what we could, and we made up the estimate that we couldn't build the houses less than over $14,000." Counsel continued: "When you say that you couldn't build the houses less than over $14,000 to-day, I want you now to say whether you could build them for any less than this on the 29th August, 1916." And the witness answered, "I could not."

This is close to the line, but I think it is really opinion-evidence as to what the cost would have been in 1916, given by a witness, a builder, "entitled according to the law or practice to give opinion-evidence" concerning matters about which one in his trade would be supposed to have knowledge: *Rice* v. *Sockett*, 27 O.L.R. 410, 8 D.L.R. 84. I think, therefore, that there must be a new trial of the question as to the amount of the loss. Taking this view, I refrain from any discussion of Mr. McKay's last point, that, upon the evidence as it stands, the amount awarded is excessive.

ONT.

S. C.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Rose, J.

The only other matter to be discussed is the plaintiffs' cross-appeal in which they claim interest from the 13th December, 1916. In so far as this claim depends upon the day mentioned being the sixtieth day after the delivery of the proofs of loss, I think it fails, because the proofs were defective, in that they did not set forth "the incumbrances on the subject of insurance:" statutory condition 18(*c*); but on the 12th December the defendants repudiated all liability, thereby precluding themselves from objecting to the insufficiency of the proofs: *Morrow* v. *Lancashire Insurance Co.* (1899), 26 A.R. 173; *Adams* v. *Glen Falls Insurance Co.* (1916), 37 O.L.R. 1; *Glen Falls Insurance Co.* v. *Adams* (1916), 54 S.C.R. 88, 32 D.L.R. 399: the plaintiffs became entitled to sue, as upon a breach of contract, and, as at present advised, I do not see why they should not have interest from the 13th December upon such sum as they recover: *City of London* v. *Citizens Insurance Co.*, 13 O.R. 713; *Michie* v. *Reynolds* (1865), 24 U.C.R. 303; *Toronto R. W. Co.* v. *Toronto Corporation*, [1906] A.C. 117. However, that point ought not to be finally determined until the amount of the loss has been ascertained.

I would allow the appeal and dismiss the action in so far as the policy covering the shop is concerned: as to the other policies I would direct a new trial as to the amount of the loss: and I would give the defendants the costs of the appeal. The costs of the former trial ought to be to the plaintiffs: the costs of the new trial in the discretion of the trial Judge.

Judgment as stated by the Chief Justice.

LAW AND McLEAN v. SAWYER-MASSEY.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Scott, Beck, and Hyndman, JJ. March 13, 1918.

PRINCIPAL AND AGENT (§ III—36)—COMMISSIONERS—ACCEPTED AND FILLED SALES SECURED.

An agent under an agreement whereby he is to receive a commission "on each accepted and filled sale . . . which he has *secured* either with or without the traveller's assistance" is not entitled to a commission for simply introducing a prospective purchaser to the travelling agent and doing nothing further to promote the sale.

[*Law and McLean* v. *Sawyer-Massey*, 38 D.L.R. 333, affirmed.]

Statement.

APPEAL from a judgment of Stuart, J., in an action to recover an agent's commission under a written contract of agency. Affirmed.

ALTA.

S. C.

LAW AND MCLEAN v. SAWYER-MASSEY.

Harvey, C.J.

A. M. Sinclair, for appellant; *A. H. Clarke*, K.C., for respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—In 1913 the plaintiffs were local agents at Carmangay for the defendants under a written contract of agency. A sale of machinery was made to McKay Bros., residing at Carmangay, in 1913, and this action is to recover the agent's commission on the sale. The amount claimed in the statement of claim is $650, but on the trial it was stated that it was agreed that the proper claim was $551. My brother Stuart, who tried the action, dismissed the plaintiffs' claim.

The sale was not made by or through the plaintiffs but, according to the evidence, Law introduced one Maib, a travelling agent of the defendants, to one of the McKays as a probable purchaser. Maib took McKay to the head office at Regina where the negotiations for a sale were held and a price fixed for the machinery, though the contract was not concluded until McKay returned as he wished before binding himself to satisfy himself more definitely as to crop prospects, the machinery being a threshing outfit. This was about the beginning of August and shortly after his return the order for the machinery was given and sent direct to the head office at Regina.

Law states that McLean had told him he had had some negotiations with the purchasers and had practically made a sale. There is no evidence, however, that this was so, neither McLean nor Maib being present at the trial and the one of the purchasers who did the negotiating not having any recollection that McLean had spoken to him on the subject. Thus, as far as the evidence discloses, all the plaintiffs did to procure this sale was the bringing of the vendors and purchasers into contact for the purpose of a sale and the forwarding of a report subsequently as to the financial standing of the purchasers, though how the latter came about is not disclosed by the evidence.

While what took place might under some terms of agency when the agent is only required to find a purchaser entitle him to a commission the trial judge was of opinion that under the terms of the contract in question, which required the agents to secure a purchaser to become entitled to a commission, the plaintiffs had failed to make out a case entitling them to judgment.

Law states that he applied several times for the commission

and it appears that almost immediately after the sale Maib wrote the defendants stating that the plaintiffs had given no assistance and were not entitled to a commission and the defendants replied asking if the plaintiffs so understood it and stating that they had sent in a report. Apparently this was taken as a hint by Maib to speak to them for it appears from a memorandum in one of the defendants' exhibits that Maib later asked the defendants to pay the plaintiffs half the commission, which was refused. This was in August, 1913, and by the terms of the contract the purchase price was payable in four equal annual instalments of $1,250 each in November, 1913, 1914, 1915 and 1916, for which promissory notes were given. By the terms of the agency contract the agents were entitled to receive commission certificates representing their share of commission in respect of notes given by the purchasers, which commission certificates were payable when the notes were paid. The plaintiffs, therefore, if entitled to commission, would have been entitled to receive four such certificates, each for one-quarter of their commission which would have been payable when the notes were paid, but as far as appears no steps were taken, other than I have indicated, to press their claim until this action was begun in February 1917.

The trial judge, quite fairly I think, commented on this.

It may perhaps have no direct bearing on the question whether the plaintiffs were in fact legally entitled to a commission but it it has some bearing on the question whether they honestly thought they were and as they knew what they had done it would then have some bearing on whether they had done sufficient to entitle them in their opinion to a commission. However, even though they might be said to have secured the purchaser within the terms of the contract, there are some other provisions of the contract which call for consideration before it can be said that they are entitled to the commission.

The list price of the machinery sold was something near $5,800 and the sale was made at $5,000, to which the price was reduced. It is provided by the agency contract that, "All cuts in prices . . . and all donations will be deducted from the agent's commission." If it be contended that this only intends to apply to reductions made by the agent himself to secure the sale, reference must then be made to another clause which provides that,

ALTA.

S. C.

LAW AND MCLEAN v. SAWYER-MASSEY.

Harvey, C.J.

"If any machinery or repairs are sold for less than the current price list by the agent or any officer or employee of the company . . . the acceptance of any such sale by the company shall not entitle the agent to the commissions above set forth but such reduction in price . . . shall be deducted from the agent's commission." There is also a provision reserving the right of the company to sell to anyone applying to it at Winnipeg or Regina, etc., in which case the agent shall have no claim for commission unless he has previously notified the company in writing of his having carefully canvassed the purchaser.

There is much to be said in favour of the view that the sale to McKay Bros. falls under this last provision, but it is not necessary to decide that, because it seems to me that it clearly comes within the provision which requires deductions in price to be charged against the commission and the deduction in this case being more than the commission the latter would be entirely wiped out. It may be said that this is an unreasonable and oppressive provision and enables the company to deprive the agent of his commission, but the obvious answer is that it is what the parties have agreed to and the court has no power to alter it. But a little consideration shews that it may not be so unreasonable after all. If the agent really makes the sale and not merely finds a person who subsequently becomes a purchaser, then any reduction in price is made by arrangement between him and the purchaser and it is by no means unreasonable for the principal and agent to agree that the commission shall be payable only when it is earned by the agent by his bringing about a sale through his own efforts, though this contract goes beyond that and permits the payment of a commission in some cases when the agent does not accomplish that much, and it is in respect of such latter cases only that the limitation applies.

It seems clear, therefore, that the plaintiffs fail in their attempt to shew that they are entitled to a commission according to the contract.

At the trial an application was made to amend by claiming in the alternative compensation by way of *quantum meruit*. The trial judge refused to permit the amendment but said that in view of the fact that they had performed some services he would make an allowance to them by limiting the defendants' costs to $50 and disbursements.

ALTA.

S. C.

LAW AND McLEAN v. SAWYER-MASSEY.

Harvey, C.J.

I think he was unquestionably right in refusing to allow the amendment and it could be of no benefit. It is clear that the provisions of the contract which prevent the plaintiffs from receiving any commission under the contract would be entirely nullified if they were permitted to obtain commission by way of compensation. It is immaterial what it is called. The contract provides under what circumstances the plaintiffs shall be entitled to be paid and it has been frequently decided and it seems obvious that to allow compensation which cannot be claimed under the contract is to declare a contract existing between the parties different from the one they have made themselves.

A cross-appeal is entered against the trial judge's disposition of the costs and I think this cross-appeal must succeed, for, as I have indicated, it was really for the purpose of giving the plaintiffs something to which they were not legally entitled. It is then not a question of judicial discretion in determining who should pay costs, which discretion ordinarily will not be reviewed, but one of an improper allowance. I can see no reason why the defendants who have successfully contested the plaintiffs' claim should not be entitled to the ordinary costs payable upon such a result.

I would, therefore, dismiss the appeal with costs and allow the cross-appeal with costs and direct that the judgment be amended by striking out the limitation imposed in respect to the costs.

Appeal dismissed.

Re HALL.

N. S.

S. C.

Nova Scotia Supreme Court, Chisholm, J. September 24, 1917.

EXTRADITION (§ I—6)—EXTRADITABLE OFFENCES—FORGERY—UTTERING FORGED PAPER—SUBSTITUTION—DESCRIPTION.

When a requisition for the crime of forgery is amended by changing the offence to that of "uttering forged paper," also extraditable, and the fugitive is surrendered for the latter offence, his right not to be tried for any other crime or offence than for the one extradited has not been violated; the warrant of surrender is conclusive as to the offence charged, and the offence therein is sufficiently described if set out in the general words of the extradition treaty.

Statement.

APPLICATION under the Liberty of the Subject Act for the discharge of a prisoner extradited from the United States under the Ashburton Treaty, on the ground, (1) that he was not extradited for the offence for which he is now held, and (2) that the offence was not sufficiently described in the warrant of surrender. The

N. S.

S. C.

RE HALL.

Statement.

Canadian Department of Justice made a requisition upon the government of the United States for the extradition of the applicant for the crime of forgery. The fugitive was brought before a commissioner in Boston, and counsel for the Attorney-General of Nova Scotia altered the charge by substituting for forgery a charge of uttering forged paper. The commissioner, after due investigation of the matter, committed the fugitive to jail and reported to the Secretary of State at Washington that a *primâ facie* case was made against the fugitive for uttering forged paper. The Secretary of State issued a warrant of surrender for the crime of uttering forged paper. The Secretary of State of Canada then issued a warrant of *recipias* and the fugitive was brought to Halifax, where, after investigation before a local justice, he was committed for trial for uttering a forged paper.

W. J. O'Hearn, K.C., for prisoner; *A. Cluney*, K.C., for Crown.

Chisholm, J.

CHISHOLM, J.:—This application is made under the provisions of c. 181 of the R.S.N.S., 1900, of Securing the Liberty of the Subject. The applicant, Hall, is a prisoner in custody in the common jail at Halifax, under a warrant of commitment for trial for an indictable offence. The said warrant of commitment is as follows:

To the constable of Halifax County and to the keeper of the County Jail at Halifax in the said County of Halifax.

Whereas, J. Edward Hall was this day charged before me W. B. MacDonald, one of His Majesty's Justices of the Peace in and for the said County of Halifax, on oath of Frank Hanrahan of Halifax and others, for that he the said J. Edward Hall at Halifax, in the County of Halifax, and Province of Nova Scotia, on the 24th day of February, A.D., 1917, knowing a certain document, to wit, a certain cheque dated at Halifax aforesaid on the said 24th day of February, 1917, drawn on the Canadian Bank of Commerce, Halifax branch, payable to one J. Edward Hall or order, for the sum of one hundred and forty-two dollars and fifty-six cents, and purporting to be signed by one F. L. Stailing, to be forged did use, deal with and act upon the said document as if it were genuine and said Hall having been committed to stand his trial for said offence.

These are therefore to command you the said constable to take the said J. Edward Hall him safely to convey to the County Jail at Halifax aforesaid and there to deliver him to the keeper thereof together with this precept. And I hereby command you, the said keeper of the said County Jail to receive the said J. Edward Hall and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this 18th day of July in the year 1917 at Halifax in the County aforesaid.

(Sgd.) W. B. MacDonald, stipendiary (Seal).

Magistrate and a justice of the peace in and for the County of Halifax.

N. S.
S. C.
RE HALL.
Chisholm, J.

On May 2, 1917, on the complaint of the British Vice-Consul at Boston, in the District of Massachusetts, in the United States of America, made at Boston aforesaid, before William A. Hayes, a commissioner for said district, that the prisoner did unlawfully and knowingly forge at Halifax, aforesaid, a certain cheque for $175.63, a warrant was issued by said commissioner for the arrest of the prisoner. Subsequently, on the application of counsel for the Attorney-General of Nova Scotia, the complaint was amended by striking out the said charge of forgery of said cheque and substituting a charge of uttering the said cheque knowing it to have been forged; and adding charges of having uttered other forged cheques knowing them to have been forged, among them the cheque for $142.56 mentioned in the above recited warrant of commitment. After proper investigation, the said commissioner on May 29, 1917, committed the prisoner to the East Cambridge jail without bail, to await the order of the President of the United States; and on the same day made a report to the Secretary of State at Washington in the terms following:

Sir: I, William A. Hayes, 2d, United States Commissioner at Boston, within and for the District of Massachusetts, do hereby certify that I am a commissioner duly authorized by the District Court of the United States for the said District of Massachusetts, to issue warrants for the arrest of fugitives from justice of foreign governments, between which and the United States there are treaties and conventions of extradition, under chap. 66 of the United States Revised Statutes. I do also hereby certify that the said John Edward Hall alias F. L. Sterns alias J. Edward Hall was brought before me at Boston aforesaid in said district pursuant to a warrant of arrest, issued upon the complaint of John Philip Trant, British Vice-Consul at Boston, Massachusetts, on May 3, A.D. 1917. I find by his own admission that the defendant is John Edward Hall. I find that the evidence produced against the said John Edward Hall alias F. L. Sterns alias J. Edward Hall is sufficient in law to sustain the charges and to justify his commitment for the crime of uttering forged documents, and participation therein, for the purpose of being delivered up as a fugitive from the justice of the Dominion of Canada, pursuant to the provisions of said treaty, and the defendant is committed to the East Cambridge jail without bail, to await the order of the President of the United States in the premises, pursuant to section 5270 of the Revised Statutes of the United States.

In witness whereof I hereunto set my hand and seal at my office in Boston, in said district, this 29th day of May, A.D. 1917.

(L.S.) (Sgd.) William A. Hayes, 2nd, United States Commissioner, etc., etc:

It appears from a letter of E. L. Newcombe, K.C., the Deputy Minister of Justice for the Dominion of Canada, which was

N. S.

S. C.

RE HALL.

Chisholm, J.

produced on this application, that the requisition made by the Department of Justice of Canada upon the United States authorities for the surrender of the prisoner was for the offence of forgery.

On June 8, 1917, the Secretary of State at Washington issued a warrant of surrender or rendition, which is as follows:

DEPARTMENT OF STATE.

To all to whom these Presents shall come, Greeting:

Whereas, His Excellency Sir Cecil Arthur Spring-Rice, Ambassador Extraordinary and Plenipotentiary of Great Britain, accredited to this government, has made requisition in conformity with the provisions of existing treaty stipulations between the United States of America and Great Britain for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of John Edward Hall alias F. L. Sterns alias J. Edward Hall, charged with the crime of utterance of forged paper, committed within the jurisdiction of the British Government.

And whereas, the said John Edward Hall alias F. L. Sterns alias J. Edward Hall has been found within the jurisdiction of the United States and has by proper authority and due form of law been brought before William A. Hays, 2nd, Commissioner in Extradition for the District of Massachusetts, examination upon said charge of utterance of forged paper.

And whereas, the said Commissioner has found and adjudged that the evidence produced against the said John Edward Hall alias F. L. Sterns alias J. Edward Hall is sufficient in law to justify his commitment upon the said charge, and has, therefore, ordered that the said John Edward Hall alias F. L. Sterns alias J. Edward Hall be committed pursuant to the provisions of said treaty stipulations,

Now, therefore, pursuant to the provisions of section 5272 of the Revised Statutes of the United States, these Presents are to require the United States Marshal for the District of Massachusetts or any other public officer or person having charge or custody of the aforesaid John Edward Hall alias F. L. Sterns alias J. Edward Hall to surrender and deliver him up to such person or persons as may be duly authorized by the Government of Great Britain to receive the said John Edward Hall alias F. L. Sterns alias J. Edward Hall to be tried for the crime of which he is so accused.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 8th day of June A.D. 1917, and of the Independence of the United States the 141st.

(L.S.:) (Sgd.) ROBERT LANSING, Secretary of State.

Following the warrant of surrender, the government of Canada issued a Warrant of Recipias on June 16, 1917. It is as follows (omitting unnecessary formal parts):

To Frank Hanrahan of Halifax, in the Province of Nova Scotia.

Chief of Police, greeting:—

Whereas, J. Edward Hall alias Sterns now stands charged with the crime of forgery committed within the jurisdiction of Canada;

And Whereas under a treaty between Great Britain and the United States of America signed at Washington on the ninth day of August, one

thousand eight hundred and forty-two, the ratifications whereof were exchanged at London on the thirteenth day of October in the same year, and a Convention supplementary to the said treaty between the same high contracting parties, concluded at Washington on the twelfth day of July, one thousand eight hundred and eighty-nine, the ratifications whereof were exchanged at London on the eleventh day of March, one thousand eight hundred and ninety, and a further Convention supplementary to the said treaty concluded at Washington on the thirteenth day of December, one thousand nine hundred, the ratifications whereof were exchanged at Washington on the twenty-second day of April, one thousand nine hundred and one, a requisition has been made upon the proper authorities of the United States for the delivery up to justice of the said J. Edward Hall alias Sterns, a fugitive from the justice of Canada;

And Whereas the said J. Edward Hall alias Sterns is now held in custody by the United States authorities at Boston, in the State of Massachusetts, one of the United States of America, to await his surrender to Canada;

Now know ye that I the Most Noble Victor Christian William, Duke of Devonshire, Governor-General and Commander in Chief of the Dominion of Canada, as aforesaid, do authorize you the said Frank Hanrahan to receive from the proper authorities in that behalf of the United States of America, the said J. Edward Hall alias Sterns, so charged as aforesaid, and in your custody safely to keep and bring within the Province of Nova Scotia and deliver to the proper authorities there to be dealt with according to law.

Given under my hand and seal at arms, at Ottawa, this sixteenth day of June, in the year of Our Lord one thousand nine hundred and seventeen and in the eighth year of His Majesty's reign.

By Command (Sgd.) THOMAS MULVEY, Under Secretary of State.

Counsel for the prisoner now applies for his discharge from custody on two grounds:

1. Because the prisoner is held for trial for the offence of uttering a forged document, and he was not surrendered for trial for such offence; 2. Because the prisoner was surrendered on a general charge.

As to the first objection, the contention is that the prisoner was not surrendered for uttering of forged paper, because the requisition made by the Department of Justice of Canada was for the surrender of the prisoner for trial for the offence of forgery, a charge which was abandoned by the prosecuting counsel before the commissioner at Boston. I think the prisoner's counsel will agree that in any view of the case it cannot be reasonably contended that the surrender was for trial for forgery. To make the prisoner properly triable for the crime of uttering of forged paper, the counsel argues, there should have been a further requisition from the authorities at Ottawa asking for his surrender for trial for that offence; and the act of the Secretary of State, in issuing his warrant of surrender, was, in the absence of such further requisition, irregular, and null and void.

N. S.

S. C.

RE HALL.

Chisholm, J.

The Extradition Treaty of 1842, art. X., is as follows:—

It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their Ministers, officers or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of . . . forgery or the utterance of forged paper, committed within the jurisdiction of either shall seek an asylum or shall be found within the territories of the other; provided, etc.

By art. III. of the Supplementary Convention of 1889, the following provision is made:

No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

If the prisoner was not surrendered for the crime of uttering forged paper, then, it is argued, he is not triable for that crime, and his detention is illegal. *Rex* v. *Nesbitt* (1913), 11 D.L.R. 708, 21 Can. Cr. Cas. 251; *Ex parte Browne* (1906), 148 Fed. R. 68.

The question then comes down to this: For what offence, if any at all, was the prisoner surrendered by the United States authorities to the Canadian authorities?

If he had been kidnapped or by any similar trick conveyed into the jurisdiction of the demanding country, he cannot avail himself, on an application of this kind, of the rights which the treaty gives a fugitive. In such a case the treaty is not called into operation. *Ker* v. *Illinois* (1886), 119 U.S. 436; *King* v. *Walton* (1905), 10 Can. Cr. Cas. 269.

(The Judge here quoted an extract from the judgment in *Ker* v. *Illinois*, and continued.)

I do not think the Crown can successfully contend that the prisoner was brought back to Canada by agencies outside the provisions of the treaty; and the cases cited in which extradition proceedings under the treaty were not set in motion or acted upon have no application to this case.

Mr. O'Hearn argues, with much ingenuity, that the offence for which the prisoner was surrendered was determined once and for all by the requisition made by the Department of Justice of Canada, in which surrender was asked for the offence of forgery; that, therefore, it was not competent for the Commissioner at Boston to hold the prisoner or, at all events, that it was not competent for the United States Secretary of State to direct his surrender

for any treaty offence other than forgery. In other words, that there has been a violation of the terms of the treaty on the part of the Secretary of State in directing the prisoner's surrender for the offence of uttering forged paper in the absence of a requisition from the Minister of Justice for extradition for that offence. The act of the Secretary of State is the act of his government.

(Extract from Moore on Extradition (1891), p. 549; extract from *Re Stupp*, 12 Blatch. 501.)

The Secretaty of State at Washington had before him the requisition for the surrender of the fugitive for the offence of forgery; he had also the record of the proceedings before the commissioner, shewing the amendment of the charge and the substitution of a new offence, as well as the report of the Commissioner shewing a *primâ facie* case against the prisoner of the offence of uttering a forged paper. He might have declined to issue a warrant of surrender for the latter offence. "In one case" says the editor of 19 Cyc. 79, note 69, "the refusal to grant the surrender was based upon the fact that the charge for which the extradition magistrate had committed the accused was not embraced in the requisition of the foreign government for the extradition of the fugitive. Mr. Gresham to Mr. Guzman, Oct. 26, 1894, Mss. notes to Salvador, Dept. State."

In the present case, the Secretary of State might, in the exercise of his discretion, have refused the warrant of surrender on the same ground. In point of fact, he exercised his discretion and granted the warrant. He thus declared in clear terms the sovereign will of his nation to be that the prisoner be surrendered to the Canadian authorities for trial for the offence of uttering the forged documents set forth in the report of the extradition commissioner, a crime included in the treaty; and I do not see how the solemnly declared intention of the surrendering nation, in such circumstances, can be successfully challenged in the courts of either country.

Following the warrant of surrender, and made necessarily with knowledge of what it directed, we have the writ of *recipias* issued by His Majesty, the supreme authority in the demanding state, authorizing an officer therein designated to receive the prisoner from the proper authorities in the United States and to bring him to Nova Scotia to be there dealt with according to

N. S.

S. C.

RE HALL.

Chisholm, J.

law, that is, to be dealt with in respect of the offence for which he was surrendered by the United States. A second requisition asking for the prisoner's surrender for trial for uttering forged paper would merely indicate that the Canadian authorities desire to try the prisoner for the offence for which the United States had already signified their willingness to surrender him; and whatever office a second requisition would perform, was, in my view, performed by the writ of *recipias*, and the removal of the prisoner to Canada. It cannot very well be claimed, under such circumstances, that the prisoner was offered by one country to the other for trial for a particular offence and received by the other country for trial for a different offence.

In the case of *Hall* v. *Patterson* (1891), 45 Fed. Rep. 332, the question of the offence for which the applicant was extradited from Canada was discussed, and Green, J., used the following language in regard to the warrant of surrender issued by the Canadian authorities:

> The complaint of the petitioner is that his rights have been disregarded in being subjected to a trial upon a charge different from that alleged against him in Canada and to answer which he was surrendered by the Canadian authorities. What was the charge upon which he was thus surrendered? The very best evidence of the nature and character of that charge is to be found in the official statement thereof as made by the surrendering authorities in the warrant of surrender. The warrant speaks purposely on this subject in tones that cannot be misunderstood or contradicted. It expresses as well the conclusion of the foreign government as to the nature of the act charged as its judgment of the advisability and the duty of the surrender. The Great Seal affixed thereto imports absolute verity of the statements. The surrender is made only because the act or acts alleged therein render the defendant actor liable to extradition. There may have been many other acts, criminal in their nature . . . . against the defendant. To him they are absolutely of no consequence. That act alone which the surrendering government declares in its warrant of surrender as within the purview of the treaty is the act which has to be met and answered. To this petitioner, therefore, it matters not what complaints were made against him in Canada, the vital matter with him is to know what complaint was considered by the Canadian authorities as justifying his extradition. The warrant is the criterion as well as the measure of his peril.

Moore, at p. 301 of his work on Extradition, sums up the law as follows:

> A fugitive criminal, when arraigned in the country which has obtained his surrender, may allege that the judicial or other proceedings which resulted in his extradition were irregular and not in accordance with law. That is a plea which cannot be entertained. The method in which a foreign govern-

ment may execute its laws does not concern the tribunals or the government of the country which obtains the extradition.

See also 12 A & E. Ency. (2nd ed.), 598; 19 Cyc. 78, sec. 3; *Ex p. Phelan*, 6 Mont. Leg. N. 261.

The second ground urged by the prisoner is that he was surrendered on a general charge of uttering forged paper and that that is not sufficient; that the crime should be described with more particularity. It is due to the prisoner that the record should sufficiently indicate the offence for which he was surrendered, so that he may not be surrendered for one offence and tried for another. The warrant of surrender taken with the report or certificate of the extradition commissioner in the present case, gives the prisoner all the notice he requires for his protection. It is not necessary that the warrant should describe the offence with the same precision as an indictment. The charge may be described in general terms in the words of the treaty: *Ex p. Cadby*, 26 N.B.R. 452; *Ex p. Terraz* (1878), L.R. 4 Ex. 63; *Ex p. Piot*, 15 Cox C.C. 208; *Rex* v. *Buck* (1916), 35 D.L.R. 55; 14 Hals. 409.

In my opinion the warrant of surrender issued by the supreme authority in the surrendering state determines, where a physical surrender is made in accordance with its directions, the offence for which the fugitive is surrendered. In the present case, it is uttering forged paper, a treaty offence, and it is mentioned in sufficient terms in the warrant.

The application must fail. *Application dismissed.*

Re TAGGART.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. November 23, 1917.

INFANTS (§ I C—10)—CUSTODY OF CHILD'S INTEREST.

The custody of a child will not be given to a mother against the child's interest.

APPEAL from the judgment of Sutherland J. Statement.

The judgment appealed from is as follows:—

SUTHERLAND, J.:—The applicant, Margaret Taggart, is the mother of the infant Mary Frances Stella Taggart, and is seeking for an order that the custody of the infant be given to

ONT.
S. C.
RE
TAGGART.

her. The application is opposed by Hannah Taggart, an aunt of the infant, with whom the child is living, and who is a sister of the child's father.

There are four children, of whom Mary Frances Stella Taggart, the infant in question, is the eldest, having been born on the 13th February, 1908, and the other children being Margaret Phyllis, born on the 7th June, 1911, John Douglas, on the 21st January, 1913, and Marion Patricia, on the 24th January, 1917.

The father was a Protestant and the mother a Roman Catholic, and it appears by the evidence that all of the said children were baptised in the Roman Catholic Church, with, as the mother says, her husband's sanction.

In the material filed in opposition to the motion it is, however, suggested that in his lifetime he objected to the children being brought up Roman Catholics and desired that they should be brought up Protestants. Apparently there had been some difficulties between husband and wife, because in a letter written by him on the 1st December, 1913, to a sister of his, there appear suggestions that his wife was addicted to the use of liquor, and a suggestion that he did not want his daughter Stella (or Estelle) taken back to the mother. The letter seems to have been written in anticipation of a trip he was contemplating to Toronto, where Hannah Taggart lives.

In January, 1916, he came to Toronto, bringing Stella with him, and they took up their residence with Hannah Taggart. In April or May following, Margaret Taggart, the wife, came to Toronto, and husband and wife and the other two children lived together, but not at the home of Hannah Taggart, though the daughter Stella still remained with her.

Apparently there was still some friction, because in the summer of 1916 the father went to the officers of the Juvenile Court, Toronto, and left with them a written and signed statement as follows:—

"This is to certify that I wish my child Estelle to remain under the guardianship of my sister, as I consider it better both from a physical and moral standpoint, also it is the child's own desire."

In an affidavit filed on this motion, made by one Florence

Fee, an information officer of the Juvenile Court, she says, among other things:—

"4. At the time I interviewed the said Taggart, I inquired of him why he was leaving the other two children with his wife, and he told me that his reason for taking Stella away at the present time was, that she was old enough to understand matters, and the other two children, he thought, at that time were too young to take away, but he expressed his intention of doing so as soon as they became old enough."

Matters continued in this position until the death of the husband in February, 1917. The mother is now anxious to obtain the custody of her daughter Stella.

The aunt, Hannah Taggart, has a comfortable home, being half owner with her sister of an eight-roomed semi-detached brick house in Manning avenue, Toronto; is apparently well able to support, maintain, and educate the child; and, so far as appears, a suitable person to look after her.

The mother, after her husband's death, received $500 insurance, and is now living in Gould street, in a house leased by her sister, Mrs. McIntyre, who rents rooms; and another sister, Mrs. Daly, and her husband, and a brother and his wife, also live at the same place. The mother is working and earning $7 a week.

Upon the material it would appear that the habits of the wife, as far as the use of liquor is concerned, are not of the best. While it is desirable that the mother and all the children should be together under ordinary circumstances, it is not at all clear to me that the mother has or can furnish the child with a home, care and supervision, such as she ought to have. It is apparent, on the other hand, that, in the home where she now resides with her aunt, all these are being furnished and will continue to be.

I do not think that the material shews that the husband abdicated his right or intended to abdicate his right to have the child brought up in the Protestant religion, in which he professed to believe; and I think it is apparent upon the material that his wish in this respect will be carried out if she remains where she is, but will not be if the mother obtains the custody of her. During his lifetime, the child had been continuously with Hannah Taggart from January, 1916, to February, 1917.

ONT.

S. C.

RE TAGGART.

The interest of the child herself is, of course, a matter of the gravest importance; and I cannot but conclude, upon the whole material, that the mother is not a suitable person to whom to commit the custody of the child, or that it would be in the latter's interest to take her away from the care and custody of her aunt, Hannah Taggart.

Reference to *Hawksworth* v. *Hawksworth* (1871), L.R. 6 Ch. 539, at p. 542; *In re Scanlan Infants* (1888), 40 Ch. D. 200; *Re Faulds* (1906), 12 O.L.R. 245; *Re Gefrasso* (1916), 36 O.L.R. 630, 30 D.L.R. 595; *Re Clarke* (1916), 36 O.L.R. 498; *Re D'Andrea* (1916), 37 O.L.R. 30, 31 D.L.R. 751.

The application will therefore be refused. I make no order as to costs; and the order dismissing the application may contain a term permitting the mother to see the child at such reasonable intervals as the parties can agree upon; if they are unable to do so, I may be spoken to.

J. M. Ferguson, for appellant.

Harcourt Ferguson, for Hannah Taggart, the respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The learned Judge at Chambers, after anxious consideration of this case, in all its features, refused the application, deeming it better, under all the circumstances of the case, that the present custody and care should not now be disturbed.

Under what may be sufficiently described as ordinary circumstances, the home of young children, whose father is dead, should be with their mother, all together: see the Infants Act, sec. 28.*

But this case is not one of such ordinary circumstances; the mother has not a home of her own, or any means of supporting and educating her children, except such as she can earn by her labour at house-work. She is living with her own mother and sister, and it is to this joint home that she desires to take the child away from the home where she now is and for some time passed has been—a home in which unquestionably the child is in all respects well cared for.

*28.—(1) On the death of the father of an infant the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

The father, in his lifetime, removed the child from his own home to that in which she now is, and did so because he deemed it better for the child on account of the mother's intemperate habits.

There has been much controversy, upon this application, as to whether it is true that the mother was and is addicted to the excessive use of intoxicating liquor. In the interests of the child, it seems to me to be enough that the father thought so so firmly that he removed the child from his own home on account of it, and that very credible persons have testified to it in these proceedings.

The child being in well cared for circumstances now, and having been placed there by her father, and having remained there until his death, with the consent, or at all events without objection on the part of, the mother, and she being now able to support the child only by going out to work, I cannot think it to be in the child's interest that the Court should take the chances of the assertions of intemperance being wrong. It is not as if the ruling of the Court now must be irrevocable: there is nothing to prevent a future application should the mother consider herself able at any time to dispel any doubts as to her temperate habits.

Again, the purpose of the mother seems to be mainly to bring up the child in her own religious faith; and that I cannot think she has any right to do. The general rule is, that children are to be brought up in the religious faith of their father; and I can find nothing in this case to take it out of that rule.

The mother has testified to the baptism of the children in the Church of her religious faith without objection on the part of the father, and generally she seeks to establish a consent on his part to their being taken from him to go with her in the matter of religion. But no consent, tacit or expressed, would be legally binding upon him; and, whilst the children were very young, it might seem to him unimportant. The important thing is, that, when the child in question became of that which would probably be considered by him an impressionable age, at all events an age which he considered a discerning one, he removed the child from all her mother's religious influences and placed the child under religious influences according to his own faith,

ONT.
S. C.
RE TAGGART.
Meredith, C.J.C.P.

in which she has ever since continued and now is; and did so without objection by the mother, thus proving that there was no such consent on his part as the applicant contends for, or else that it was revoked effectually.

The statute law of this Province has not encroached upon a father's right respecting the religious faith in which his children shall be brought up, it has expressly preserved it: the Infants Act, sec. 36*; see also *In re Scanlan Infants*, 40 Ch. D. 200, and *In re Storey*, [1916] 2 I.R. 328.

I would dismiss this appeal.

Riddell, J.

RIDDELL, J.:—At the conclusion of the argument of this appeal, I was of the opinion that the best interests of the child called for an allowance of the appeal: further consideration and a careful perusal of the evidence have confirmed me in that view.

I thought, however, that the provisions of R.S.O. 1914, ch. 153, sec. 36, might prevent this being done; this I now think is not the case.

I find nothing of binding authority compelling us in the present instance to prevent this mother having the custody of her child—the custody is the only matter in question here, though it is plain that the *odium theologicum* (notoriously the most bitter of all) enters largely into the contest for the custody. Having had the opportunity of reading the careful and exhaustive judgments of my learned brethren, I do not think I can add anything of value.

Agreeing as I do with my brother Rose in the law and the facts, I think this appeal should be allowed.

Lennox, J.

LENNOX, J.:—This is an appeal by Margaret Taggart, widow of William L. Taggart, late of the city of Toronto, deceased, from an order of Mr. Justice Sutherland, dismissing the application of Margaret Taggart for the care and custody of her eldest child, the infant above named.

Margaret Taggart was married to William L. Taggart in the city of Ottawa in the year 1907, and there was issue of the marriage, and still living, the infant above named, usually known as Stella, born on the 13th February, 1908, Margaret Phyllis,

*36. Nothing in this Act shall change the law as to the authority of the father in respect of the religious faith in which his child is to be educated.

on the 7th June, 1911, and two younger children. The husband died in Toronto on the 25th February, 1917. He was a Protestant; the wife, Margaret Taggart, is a Roman Catholic. It is sworn to and not denied that the marriage was solemnised by a Protestant clergyman; and, on the other hand, it is not denied that all the children were baptised in the Roman Catholic Church. For some time, while the family lived at Ottawa, Stella attended the Rideau street convent as a pupil. I understand this to be a Roman Catholic institution. I do not know whether she was a day-pupil or not.

For the most part, I think the husband and wife have lived together, but it is evident from a letter written by the husband to his sister that they did not always get on well together, and that at the date of the letter, the 1st December, 1915, he was dissatisfied with his wife's conduct and manner of living, was determined that Stella should never again live with her mother, and that he contemplated the possibility of having to separate from his wife.

Before 1915, Mrs. Taggart had visited her husband's sisters, and it is said was drinking, and neglecting her children, on some of these occasions. She came again in November, 1915, and it is said came in an intoxicated condition and kept liquor in the house. Her husband had written that she was going to do better. One of the sisters wrote her brother, and thereupon he wrote the letter referred to, insisting on Stella being kept in Toronto with his sisters; but, notwithstanding this, her mother took her back to Ottawa.

It was contemplated that Mrs. Taggart and her children would visit Hannah Taggart for a considerable length of time, and it is alleged that the visit terminated abruptly through the misconduct and uncleanliness of Mrs. Taggart.

In part, this letter is as follows:—

"I am in receipt of yours of Nov. 29th, and am very sorry indeed, but not surprised, at your experience with Margaret. I know she is a booze-fighter, which is one of the reasons why I was so anxious to get her away from her (here?), thinking that possibly you might reclaim her, which I am aware is no light task, but you will never do it by fighting her. . . . . .

"Whatever you do, don't let her take Estelle back. . . .

ONT.
S. C.
RE TAGGART.
LENNOX, J.

Hold Estelle anyway; tell her that Daddy will soon be up to stay with her. She is old enough now to appreciate the comforts she has in Toronto. I'm afraid Margaret's days of living with me are about numbered, and am sorry to say so; but, if she doesn't brace up now, she is not likely to get another chance."

In January, 1916, in pursuance of his declared determination to separate Stella from her mother, the husband brought her to Toronto and placed her in the care and custody of his sister, Hannah Taggart, and she remained with her until the death of her father, and is still there. It is from this custody that the mother seeks to remove her.

From January, 1916, until April or May, the husband made his home with his sister Hannah, and his wife remained in Ottawa. After that time, he and his wife lived together in Toronto until his death in February, 1917; but, notwithstanding this, Stella continued to live with her aunt.

Florence Fee, an information agent of the Juvenile Court, swears that in the summer of 1916 William L. Taggart, the father of Stella, delivered to her (the affiant) at the Juvenile Court, to be filed of record there, and there is of record in the Court, a document or writing in these words:—

"To the officers of the Juvenile Court, Toronto, Ont.

"This is to certify that I wish my child Estelle to remain under the guardianship of my sister, as I consider it better both from a physical and moral standpoint, also it is the child's own desire.

"W. L. Taggart,
"Father."

This is said to be in the father's handwriting.

From the cases it would seem that moral welfare includes the spiritual or religious instruction of a child.

[The learned Judge then quoted three consecutive paragraphs from the latter part of the reasons for judgment of SUTHERLAND, J., *supra.*, beginning, "Upon the material it would appear."]

With these conclusions of fact I entirely agree.

I have come to this conclusion after a very careful perusal and study of all the material before the Court. In a case of this kind, where the Judge of first instance has to depend solely upon written evidence—unlike a case in which witnesses are orally

examined before him, and the weight to be attached to the evidence is inevitably affected by the demeanour of the witnesses—we are in as good a position, if we go into the question with the same care, as the Judge in Chambers, to form an opinion as to the merits of the application, and the propriety or impropriety of transferring the custody of the infant to her mother.

A radically different attitude is to be assumed by an appellate Court, where the trial Judge has based his findings upon the credibility of witnesses examined before him, as I endeavoured to shew in *Ogilvie Flour Mills Co. Limited* v. *Morrow Cereal Co.* (1917), 39 D.L.R. 463, only the other day.

The application in the Court below was disposed of on questions of fact alone; and the affirmative finding that the applicant is not a proper person to have the custody of her daughter, and that it is not in the interest of the daughter that she should be cared for and educated by her mother, if properly made upon the evidence, was clearly a sufficient reason for dismissing the application; and, in my opinion, the conclusion reached was properly come to upon the evidence.

But it is not by any means the only reason that can be properly assigned. There is at least one other important question of fact upon which there is no finding, and there are many matters of law with which I think it is my duty to deal. There is the vital, and, as unfortunately so often happens, vexed, question of the religious training and education of the infant, and the alleged wish and intention of her father that his daughter should be brought up as a Protestant, to be carefully considered. As I have said, the mother is a Roman Catholic; whatever religious instruction she gave the child while she cared for her was in that faith; and she will be educated and brought up in that faith if given to the mother. It is reasonable and natural it should be so. As to the Protestantism of the father, I fear it must be admitted that it is reasonable to infer—to borrow the expression of Mr. Justice Anglin in the *Faulds* case—that he was only "an indifferent Protestant;" but, at all events, he was married by a Protestant clergyman—a matter, in the circumstances, of decided significance; and presumably he died in that faith, for it must be presumed until the contrary is shewn; and it is a reasonable presumption, too, for he was buried, from the house occupied

ONT.

S. C.

RE TAGGART.

Lennox, J.

by his wife and her sisters, by a Protestant clergyman. Unless the father has abandoned his children or abdicated his *primâ facie* right to their control, the religious faith of the father has from time immemorial been recognised by the Courts as the religious faith of his children during infancy. It is not that the Court will take upon itself the impolitic and impossible task of declaring that any one Christian faith is *per se* to be preferred or favoured above another. As said by Lord O'Hagan in *In re Meades* (1871), Ir. R. 5 Eq. 98, 106: "It does not determine as to the relative value of the various Christian creeds, or lean to one more than another. That is beyond its province, and it must deal amongst them all with a perfectly equal and impartial hand."

It is alleged that before their marriage it was agreed between the husband and wife that the children of the marriage should be brought up in the Protestant faith, but Mrs. Taggart swears to the very opposite of this, and, assuming honesty on both sides, she is better qualified to depose with certainty as to what was understood or agreed upon than anybody else. But, legally speaking, except in so far as it might give colour to his subsequent conduct and be argued as affording evidence of subsequent definite abdication of his parental right of control, it is of little consequence; for, as stated in Halsbury's Laws of England, vol. 17, p. 112, para. 261: "In the absence of good reason to the contrary a father has the right to determine in what religion his infant child shall be brought up, and he cannot effectually deprive himself beforehand of that right by an agreement to the contrary, either before and in consideration of marriage or otherwise." Many authorities are referred to, and among them the oft-quoted cases of *In re Scanlan Infants*, 40 Ch. D. 200, and *In re Agar-Ellis, Agar-Ellis* v. *Lascelles* (1878), 10 Ch. D. 49.

It was argued on appeal that this right does not continue after the father's death, but no authority was cited for this proposition, and the argument is not well-founded. The father can in his lifetime effectively determine the faith in which his infant children shall be brought up after his death: *Hawksworth* v. *Hawksworth*, L.R. 6 Ch. 539, *per* James, L.J., at p. 542; *per* Mellish, L.J., at pp. 544, 545; *Austin* v. *Austin*, 34 L.J. Ch. 499; and the

right of the father gives him the right to delegate his authority to another person: *Ex p. McClellan* (1831), 1 Dowl. 81.

If the father has left no instructions or directions on the subject, the Court will direct that his children shall be brought up according to his religious faith: *In re Montagu* (1884), 28 Ch. D. 82; *Hawksworth* v. *Hawksworth, supra;* and *Re Chillman Infants* (1894), 25 O.R. 268, a judgment of Mr. Justice Street, in a case in many respects similar to this. It differs in this respect, that the applicant, to whom custody was awarded, was testamentary guardian under the father's will, that the mother was permitted to retain the children and educate them in her faith for two years after their father's death and until her own death, that she gave directions in writing, and the father gave none, at all events he gave no direction in writing. But these similarities and differences need not be taken into account. The learned Judge based his decision upon the then recently decided case in the English Court of Appeal, *In re McGrath Infants*, [1893] 1 Ch. 143, and the judgment of Lord Justice Lindley, in which the Lord Justice, at p. 148, said:—

"As regards religious education it is settled law that the wishes of the father must be regarded by the Court and must be enforced unless there is some strong reason for disregarding them. The Guardianship of Infants Act, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. . . The wishes of the father if not clearly expressed must be inferred from his conduct. If the father is dead it will be naturally inferred that in the absence of evidence to the contrary his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the Court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in the father's religion unless it can be shewn to be for the welfare of the child that the rule should be departed from, or the father has otherwise directed."

There is nothing in conflict with these cases in *McNabb* v. *McInnes*, 25 Gr. 144; in fact, the opening words in the judgment of Proudfoot, V.-C., affirm without qualification that not only must the infant be brought up in the Protestant faith, the father

ONT.
S. C.
RE TAGGART.
Lennox, J.

being a Protestant, but more than this, according to the tenets and discipline of *the* Protestant Church to which he belonged, that is, that "the father of the infant was a Presbyterian, and it is the duty of the Court to see that the child is brought up in the same faith." The decision turned upon the finding that attendance at a Church of England school would not in any way interfere with or prevent the infant from being brought up as a Presbyterian, and that upon the evidence it appeared that the course being pursued was in the interest of and for the benefit of the infant.

Although the decision in *In re Ross* (1876), 6 P.R. 285, is not binding upon this Court, the reasoning of the very learned and experienced Judge (Wilson, J.) who pronounced it, is peculiarly pertinent to the question I am now discussing. The manner, too, in which the custody was vested in the respondent in that case and in this was substantially the same. See also *In re Carswell* (1895), 6 P.R. 240, a judgment of Gwynne, J.

I have derived very great assistance from a careful study of the singularly careful and able judgment—if I may say so with great respect—of Anglin, J., in *Re Faulds*, unanimously affirmed in the Divisional Court, 12 O.L.R. 245, referred to upon the argument of this appeal, and the numerous cases therein referred to; and this case establishes the paramount right of the father upon a much broader basis than anything contended for here. In *Re Faulds*, the father and the mother at the time of their marriage were Protestants. The infant was placed in the custody and care of her maternal grandmother when she was three years old; she was brought up as a Protestant, and was eleven years old at the date of the application. The father in the meantime had become a Roman Catholic, and Mr. Justice Anglin, after a most careful examination of the authorities, and a Divisional Court unanimously upon appeal, as I have stated, recognised the right of the father to resume the custody of his child and to direct her religious education, albeit it was not the religious faith in which she was born or in which she had been brought up until then, or, presumably, in which she had been baptised.

There is still the question of fact as to the father's wishes, if indeed that is necessary to be considered in view of the cases

I have referred to, and particularly the judgment of Lord Justice Lindley in the *McGrath* case. As to the father's conviction that Stella ought to be permanently separated from her mother, and that this was necessary for the physical, moral, and spiritual welfare of the child, and that he was determined that she should be brought up as a Protestant, there is no room for doubt if his letter already quoted from, and the notice on file in the Juvenile Court, were sincere and honest, and the affidavits of Miss Littlehales and Miss Fee are truthful; to say nothing of other affidavits by persons who might be said to be interested witnesses. I see no reason for doubting the sincerity or good faith of the father or the truthfulness of these two young ladies. Miss Littlehales was cross-examined upon her affidavit, but not upon the statement contained in the fifth paragraph. It goes unchallenged.

It is suggested that the father was not in a fit mental condition to decide as to the custody or religious training of his child. The affidavits of those with whom he was employed shew that he was; and throughout, even on the material filed in support of the application, his acts and conduct were those of a non-aggressive, thoughtful, and decidedly rational man. He was "exceedingly tolerant," and evidently avoided controversial discussions.

It is argued that the father abdicated his right, and the baptism of Stella and the other children—the mother says with her husband's consent—and Stella's attendance at a Roman Catholic school, are the circumstances relied on as establishing this contention. My brother Sutherland decided that there was nothing that could be construed as an abdication of the man's parental right: I quite agree that there was not—and there certainly was not in view of the decision in the *Faulds* case. I am not of those who regard the rite of infant baptism as a matter of little consequence, but the cases in which the doctrine of abdication, or the forfeiture of the father's right to determine the religious faith of his children, has been denied, are not like this case; they are cases in which the welfare of the child demanded that fixed religious convictions ought not to be, could not safely be, disturbed, or the character of the father or his surroundings was an insuperable barrier to the relief claimed, or the control of the father will be injurious to the child, "exceptional cases," as pointed out by the Chancellor in *Roberts* v. *Hall* (1882), 1 O.R. 388, 405, and

ONT.
S. C.
RE TAGGART.
LENNOX, J.

in which "the policy is inverted," as said by Sir John Romilly in *Swift* v. *Swift* (1865), 34 Beav. 266, 271. As to the attendance at school, it is common knowledge that the daughters of many *ultra*-Protestants have been educated, and I presume are being educated, at the convents and other educational institutions of the Roman Catholic Church; and, as for the baptism, I am far from thinking that this should be regarded as an unequivocal renunciation or abdication of the father's right, a final act by which he should be precluded from subsequently saying that his child should be educated according to the religion he professed, to say nothing of his right to change his mind as the father did find it right and his duty to change his mind, in the *Faulds* case. Indeed, the most formal and solemn agreement of the father to relinquish the custody and control of his children is generally revocable at the suit of the father claiming to avoid it: *St. John* v. *St. John* (1805), 11 Ves. 526. There may be cases in which, having regard to the welfare of the child, the Court may refuse to assist him, as in *Swift* v. *Swift*, 34 Beav. 266, 4 DeG. J. & S. 710. But, as said by Chancellor Boyd in *Roberts* v. *Hall*, 1 O.R. 388, at p. 404: "The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy." See also the comparatively recent case of *Re Hutchinson* (1912), 26 O.L.R. 601, where my brother Riddell collected and reviewed the cases upon this branch of infancy law.

It is not difficult to understand the supineness, the "passive resistance" it may be, of this "exceedingly tolerant" man, or that, surrounded as he always was by his wife's relatives, he would be patient and long-suffering for the sake of peace. I can find nothing more in point than the language of Lord Justice Mellish in the *Hawksworth* case, where he says, L.R. 6 Ch. at p. 545: "I fear that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in that religion instead of the religion of its father"—observations which were quoted with approval by Lindley, L.J., in giving judgment in *In re McGrath*, [1893] 1 Ch. at

p. 151. The father was careful to remove his daughter from the care and influence of her mother before she was eight years of age. As to his wishes and purpose, we are not left in doubt.

I think the appeal should be dismissed with costs.

ROSE, J.:—The applicant is by nature and by statute—R.S.O. 1914, ch. 153, sec. 28—the guardian of the infant, and, as such, is entitled to its custody and to the assistance of the Court in the assertion of her right, unless the Court is constrained to withhold its aid, having regard either to the welfare of the infant and the conduct of the mother—sec. 2—or to the religion of the deceased father, or to his wishes in respect of the religious faith of the child—see sec. 36. The respondent contends that, having regard to all these things, the Court ought not to interfere, but ought to leave the infant in the custody of the aunt. Regarding the welfare of the child, the respondent asserts, what seems to be true, that the child is well cared for where she is. The respondent also asserts that the mother is not in a position to give the child a comfortable home, and that her habits are such as to make it undesirable that the child should be with her.

"The Court will not interfere with" (the mother) "arbitrarily, and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do:" *per* Lindley, L.J., in *The Queen* v. *Barnardo*, [1891] 1 Q.B. 194, at p. 211; and the evidence as to the mother's inability and unfitness properly to maintain the child ought to be examined critically with a view to seeing whether the respondent has sustained her attack: see *Re Gefrasso*, 36 O.L.R. 630. The respondent is not in a position to call upon the mother to establish her ability and fitness, as she would be if she were a legal guardian—*In re McGrath*, [1893] 1 Ch. 143, at p. 147—or, if sec. 4 of the Apprentices and Minors Act, R.S.O. 1914, ch. 147, applied: *Re D'Andrea*, 37 O.L.R. 30, 31 D.L.R. 751.

However, without attaching any great weight to this question of onus, I have come to the conclusion that it is not safe to rely upon the affidavits filed upon behalf of the respondent. These affidavits contain much that is hearsay, and that the witnesses would not have been allowed to depose to at a trial: they display an animus, and a willingness to make extreme statements, that

ONT.
S. C.
RE TAGGART.
Rose, J.

cause one to view with suspicion everything that is contained in them; some of them consist principally in the statement that the facts stated by the child's aunt, Hannah Taggart, are true, although Hannah Taggart's affidavit contains some statements on information and belief, the name of the informant not being given, and some statements, not said to be on information and belief, but which, obviously, cannot be within her knowledge, e.g., that her brother never attended his wife's church and never consented that his children should be brought up in his wife's religion; one affidavit, that of the minister of the church attended by Hannah Taggart, deposes to an occurrence which Hannah Taggart on her cross-examination says the deponent did not witness; another affidavit tells a story, which I find it very hard to believe, about an occasion on which the mother invited the deponent to drink with her at a very respectable hotel in Toronto.

It may be, as was suggested by Dodd, J., in *In re Story*, [1916] 2 I.R. 328, at p. 353, that these affidavits were drafted for the witnesses, and do not shew them at their best; but, whether they shew them at their best or at their worst, I cannot think that they ought to be taken as a sufficient foundation for a holding that the applicant's habits are such as to disentitle her to the custody of her child. However, these affidavits do not stand uncontradicted. Apart from the applicant's denial of the charges, there are the cross-examination of Hannah Taggart and certain affidavits from witnesses, some of whom, no doubt, are by reason of their relationship prejudiced in favour of the applicant, but others of whom cannot be supposed to be so prejudiced. The cross-examination seems to me greatly to weaken, if it does not quite destroy, Hannah Taggart's evidence that the applicant was sometimes drunk; and drunkenness is the main accusation. Miss Taggart is a total abstainer, and, as far as she knows, all her relatives have always been total abstainers, and I am inclined to think that she is not quite competent to distinguish between taking a drink and becoming drunk. At all events, it seems dangerous to rely upon her statement that Mrs. Taggart's condition on a certain occasion, was "a good illustration of the way she got while she was drunk," when we have the evidence of an acquaintance (Mrs. Bolton) who, speaking of that occasion, says, "Mrs. Taggart came over and kissed me, and I know that she

was not drunk, and, so far as I could see, there was no sign of her having taken intoxicating liquor of any kind," and the evidence of another lady, Mrs. Middleton, an officer of the Women's Branch of the Independent Order of Oddfellows, who, in connection with the relief work of that society, called on the same occasion, talked to Mrs. Taggart for several minutes, and says: "I could see no sign of liquor whatever about her. She was not, as far as I could see, to any extent under the influence of liquor, and had not, as far as I know, been drinking liquor of any kind. She appeared quite normal." There is other evidence both ways, as to the particular occasion, just as there is other evidence, both ways, as to the plaintiff's general character for sobriety, and I refer to the one occasion merely to shew that there is much to be said against accepting the judgment of those who find fault with the applicant's conduct at a time as to which theirs is not the only evidence, and to draw the inference, which I think ought to be drawn, that it is equally dangerous to accept their judgment as to her behaviour, generally, or on occasions as to which no evidence but theirs is forthcoming.

There is much evidence, from persons who had good opportunity for observation, that the applicant is of good character and sober habit; probably this evidence, being general, is not to be accepted without question; but, on the whole, it strikes me as being quite as reliable as the evidence to the contrary effect.

One other matter is to be referred to in this connection. In November, 1915, the applicant, who was then living with her husband in Ottawa, came to Toronto to visit her husband's sisters, bringing her three children with her. While she was here, the husband wrote to one of his sisters a letter in which he used some very coarse language and said that his wife was a "booze-fighter," and that he wanted his sister to try to reclaim her, that he desired his sister to hold Estelle (Stella), and that he feared his wife's days of living with him were about over, and that if she did not "brace up" then she was not likely to get another chance. Mrs. Taggart returned to Ottawa, taking the children. Then, in January, 1916, Taggart came to Toronto, bringing Stella and taking her to his sister's house. He lived with his sister for a time until his wife came to Toronto, when he and she again lived together until his death in February, 1917, Stella

ONT.
S. C.
RE TAGGART.
Rose, J.

remaining with the aunt—whether, as the mother says, with her consent, or, as the aunt says, without it, is not clear. While Mr. and Mrs. Taggart were so living together, and about June, 1916, Taggart told an information officer of the Juvenile Court that his wife drank and neglected the children, and that that was why he had left Stella with her aunt, and he also sent to the society a memorandum that he wished the child to be under the guardianship of his sister, as he considered it "better both from a physical and moral standpoint." I take it that neither the letter, the statement to the information officer, nor the memorandum, is evidence against the wife: but they have been received, perhaps because it was thought that they might be considered in a matter in which the Court is called upon to exercise its discretion. However, they are not evidence on oath, and are subject to three remarks: first, that Taggart did, after the letter, live with his wife; second, that it is suggested that he was suffering from the disease which caused his death and which may have made him irrational; and, third, that a man who would write about his wife, using the language that I have referred to but have not quoted, is not likely to be genuinely solicitous about the moral influences surrounding his children. The letter, at all events, is perhaps indicative as much of some feud with his wife's relatives as of a deliberate judgment upon the character of the wife.

"The Court must exercise this jurisdiction with great care, and can only act where it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but —I will not say 'essential,' but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded:" *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, 242. "Misconduct, *or* unmindfulness of parental duty, *or* inability to provide for the welfare of the child, must be shewn before the natural right can be displaced:" *In re O'Hara*, [1900] 2 I.R. 232, 240; *Re Faulds*, 12 O.L.R. 245.

If the foregoing quotations correctly set forth the way in which the Court ought to proceed, I think we should say in this case that no such misconduct on the part of the mother has been made out as will disentitle her to the aid of the Court. In *The Queen* v. *Barnardo*, [1891] 1 Q.B. 194, the mother's wishes pre-

vailed, although her life was for some years open to reproach, her habits were rough, her means of living were slender and precarious, and, if judged by an austere standard, she was certainly not the person one would select to take care of and educate a boy of eleven or twelve years old. Lord Coleridge, C.J., said (p. 199): "We have not, however, to select, and her moral shortcomings are, in our opinion, very far short of the point which would justify a Court in depriving her of the custody and control of her child, if she had it, and if the sole question before us were whether or not she was to be continued in the enjoyment of it."

So much for the mother's character. Now as to her ability: she has to earn her own living and is not making much money; she lives in a house in Toronto, leased by a sister, who rents some of the rooms to lodgers; there also live there another sister and her husband and a brother and his wife; a sister who lives in Ottawa says she is worth between $20,000 and $30,000 and is quite willing to give the applicant "any assistance she may require to maintain and educate Stella;" her mother, who also lives in Ottawa, says that she is "willing and able to see that Stella is well looked after and educated." Mrs. Taggart swears that her other three children are living with her, and are comfortably looked after by her and her sisters; that her mother and sisters help her; that a brother in Ottawa, who is well off, has promised to help her to educate and maintain her children; and that, through her own efforts and the assistance she will get from her brothers and sisters, she will be quite able to maintain her children, including the one in question. This statement is not denied. Miss Hannah Taggart and one of her sisters own a house in Toronto said to be worth $4,500, mortgaged for $800; they rent a portion of it to another sister and her son, and they have a niece boarding with them. What income Miss Hannah Taggart has does not appear, but she says she is "able and willing to keep Stella and send her to school and educate her according to her station in life." Upon this evidence it is probable that the infant's material wants will be no better supplied by her mother than by her aunt; but, putting it as favourably as possible for the aunt, it does not appear that the child will be so much better cared for by the aunt that she ought, on that account, to be kept away from her mother.

ONT.

S. C.

RE TAGGART.

Rose, J.

To adopt the language of Lord Ashbourne, C., in *In re O'Hara*, [1900] 2 I.R. 232, at pp. 238, 239: "Even if the question was the balance of one home against another, that is a topic to which I would not attach much weight; possibly, if she were to be left with" (her aunt) "her clothes and food might be a little better; but that is not the point. The point is that a mother, who has honestly striven to discharge her duty, is asking to have the custody of her child; and . . . . . her position as the mother cannot be disregarded, except for the strongest reasons."

The most difficult question in the case is the application of the rule that "the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances," (should) "see that the child is brought up in the religious faith of the father, whatever that religious faith may have been:" *Hawksworth* v. *Hawksworth*, L.R. 6 Ch. 539, 542. The rule is undoubted. How is it to be applied? If it has ever been applied by taking the child away from the surviving mother, or by refusing to aid her in her assertion of her right to the custody, that application of it was in some case other than those that have been referred to. In the *Hawksworth* case there was simply a direction that the mother should bring up the child in the father's religion. In *In re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49, an action brought by the father, there was simply an injunction restraining the mother from causing the children to practise her religion. In *Austin* v. *Austin*, 34 L.J. Ch. 499, the child was left with the surviving mother, but there was a declaration that, when the child became capable of receiving religious instruction, it ought to be educated in the father's faith, and a direction that, when it attained the age of seven, further application should be made respecting the guardianship and education and religious instruction. In *In re Montagu*, 28 Ch. D. 82, the application was by testamentary guardians appointed by the father. No order was made as to the custody of the children, but there was a declaration that they ought to be brought up in the religion of the father. In *In re Scanlan Infants*, 40 Ch. D. 200, the Court appointed guardians of the faith of the deceased father to act with the mother,

and made a direction that the children should be brought up in that faith.

In *In re Nevin*, [1891] 2 Ch. 299, the father, a Protestant, and the mother, a Roman Catholic, were both dead, and the child was in the custody of a Protestant cousin of the mother, to whose care she had been commended by the father, and with whom she had been left by the mother, who survived the father. The application was for the purpose of giving effect to an ante-nuptial agreement that the child should be a Roman Catholic. Really all that was decided was, that the agreement did not bind the father, and that the Court was not obliged to do what it was satisfied was not for the child's benefit—to take her away from a kind friend for the mere purpose of having her brought up in another branch of the Christian religion.

In *In re McGrath*, [1893] 1 Ch. 143, the father and mother were Roman Catholics, but after the father's death the mother changed her religion. There were five children. The eldest boy, with the father's consent, had been sent to a Protestant institution, and at the date of the application professed himself a Protestant. The eldest girl, who would soon be in a position to earn her own living, made the same profession. The application was to remove a Protestant guardian, appointed by the mother for the three younger children, or to appoint additional guardians, upon the guardian appointed by the mother undertaking to bring the children up as Roman Catholics. The children being without property, the Court had no power to provide a scheme for their education, and it refused to change the guardian. The rule as to the child being brought up in the father's religion was recognised, and it was pointed out that a consequence of that rule sometimes is that a widow finds herself "compelled to bring up her child in a religion which she abhors;" but it was also pointed out that the rule "is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequences to themselves." Taking all the circumstances into consideration, including the circumstance that to make the order would cause the younger children to be brought up in a religion different from that of their eldest brother and eldest sister, the Court refused the application, and did not exact the

ONT.

S. C.

RE TAGGART.

Rose, J.

undertaking which the guardian was willing to give rather than have the children removed.

In *Re Faulds*, 12 O.L.R. 245, the father was applying for the custody of his child, and the Court enforced his right. There is a reference to some of the cases which express the reluctance of the Court to separate brothers and sisters.

Re Clarke, 36 O.L.R. 498, 31 D.L.R. 271, was a case in which it was held that the father, under all the circumstances, was precluded from capriciously and against the interest of the children revoking certain adoption agreements he had entered into, and resuming the custody of the children.

In *In re Story*, [1916] 2 I.R. 328, the applicant was the father, the respondent was the mother. The interests of the children were best served by leaving them with the mother, and the Court refused to remove them from her custody. The parents were of different religious beliefs, but the Court was not "asked to make any order as to the religious instruction of the children, counsel for the applicant recognising how futile it would be to attempt to compel the mother to instruct the children in any other religion than that in which she herself (believed), and in which they (had), with the father's express consent, been baptised." Gibson, J., thus states the law (p. 343): "The Court is not at liberty to consider what religion is best for the infant; it can only decide as to its well-being, as a whole, acting as a judicious parent, without bias. If the interest of the child, so considered, is incompatible with the exercise of the paternal right, the former must prevail."

I do not find in the cases anything at variance with Mr. Justice Gibson's statement just quoted, which seems to put the law succinctly and accurately.

Now in this case we have the facts that the evidence fails (in my opinion) to shew that the mother is not a fit person to have the custody of the child; that it is not shewn that any great material advantage will accrue to the child from being left with her aunt; that, other things being equal, a child is best cared for by its mother; that the other children are with the mother; and that, if the child remains where she is, she will probably develope an aversion to her mother and become estranged from her sisters and her brother, both by her surroundings and by her religious beliefs. I think that her interest demands that she should be

restored to her mother; and, recognising, as in the *Story* case, the futility of ordering a woman whose circumstances are such as those of the applicant to cause the child to be brought up in the father's religion, I would make no direction as to education. *In re McGrath*, already referred to, seems to me to be a strong authority for the adoption of this course.

If Miss Hannah Taggart so desired, leave might be reserved to her to apply, in case at any time she thinks she has satisfactory evidence that the mother is so living as to make it undesirable that this child or any of the other children should be taken from her.

The Court being divided, the appeal was dismissed with costs.

[January 18, 1918. Upon motion by Margaret Taggart, the same counsel appearing, the Court (MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.) granted leave to appeal to the Supreme Court of Canada.]

CANADIAN MOLINE PLOW Co. v. TRCA.

Alberta Supreme Court Appellate Division, Harvey, C.J., and Scott, Stuart, and Beck, JJ. March 2, 1918.

CONTRACTS (§ I C—10)—PROMISE BY THIRD PARTY—CONSIDERATION—RIGHT OF ACTION.

A promise or undertaking by a third party to a debtor to pay his debt does not give the creditor any right of action against the promissor.

APPEAL by plaintiff from an order made by Hyndman, J., at the trial. Affirmed. Statement.

Muir, K.C., for appellant; *W. J. Loggie*, for respondent.

The judgment of the Court was delivered by

SCOTT, J.:—One Davies who carried on business at Crossfield as a dealer in agricultural implements was indebted to the plaintiff in the amount of a judgment recovered by it against him and was also indebted to the defendant in $2,600 being the amount of two promissory notes made by him to the defendant. On June 26, 1913, Davies and the defendant entered into the following agreement in writing:— Scott, J.

Crossfield, Alberta, June 20, 1913.

I, George O. Davies, agree, to sell to Jos. Trca, all the goods owned by me and located on lots 11 and 12 and lot 24 B 2 aside from those supplied by the International Harvester Co. or goods on commission the price to be the company's invoice price and freight to Crossfield.

Jos. Trca to assume amount due Can. Moline Plow Co. covered by judgment.

ALTA.

S. C.

CANADIAN MOLINE PLOW CO. v. TRCA.

Scott, J.

Jos. Trca to purchase thresher outfit for the sum of $2,000 and agree to pay G. O. Davies balance owed by him not to exceed $850.

Jos. Trca to take over lot 24 blk. 2 at the price of $2,900 subject to the mortgage of $1,000. Difference between inventory and amounts assumed (including amount owed on thresher and promissory notes from Davies to Trca) to be settled by lots owned by Jos. Trca.

(Signed) Jos. TRCA; GEO. O. DAVIES.

On April 7, 1915, Davies assigned to the plaintiff all his estate, right, title and interest "in and to the amount due the said Canadian Moline Plow Co., and assumed by the said Joseph Trca in the said agreement between Davies and him "together with the full benefit and advantage thereof" with full power and authority to enforce the same "subject to the conditions of the said agreement."

The trial judge held that it was clear that there never had been any settlement between the defendant and Davies, that the agreement must be construed as a whole, that it was not competent for Davies to select any particular clause of it regardless of its terms and conditions and possible rights of the parties, that the defendant was entitled to set up as against the plaintiff the defences and equities which would have been available to him as between him and Davies up to the date of service of notice of the assignment, that it was impossible to say whether or not the defendant would be required to fuifil the stipulation referred to in the claim and that that would only be decided in an action or issue between him and Davies. He, therefore, ordered that judgment should be stayed pending the result of such action or issue.

One of the grounds of appeal is that under the agreement between Davies and the defendant, the plaintiff's judgment became a first charge upon the goods sold to the defendant and that he was entitled to payment of his own claim against Davies only after payment of the judgment.

I cannot find anything in the words of the agreement indicating that it was the intention of the parties that the judgment was to be a first charge upon the proceeds of the goods which formed part of the subject matter of the agreement nor is there anything in the evidence pointing to that conclusion.

The fact that the judgment may have been obtained for the price or part of the price of those goods and that the defendant

may have known that such was the case would not constitute the judgment a charge upon the proceeds unless he specifically agreed thereto.

A further contention of the appellant is that, by the terms of the agreement, the defendant took the goods as trustee for the payment of the judgment out of the proceeds thereof and that the plaintiff as the beneficiary could have sued the defendant without any assignment from Davies.

No authority has been cited in support of this contention, nor can I find any which even suggests that a mere promise or undertaking by a third party to a debtor to pay his debt constitutes his creditor a *cestui que trust* or gives him any right of action against the promissor.

It may, I think, be assumed that Davies, by assigning to the plaintiff his rights under the agreement, could not give it any greater right than he himself possessed under it. If he had taken proceedings to compel the defendant to pay the plaintiff's judgment the latter would undoubtedly be entitled to raise by way of defence that Davies had not performed the agreement on his part. There is ample evidence to support the finding of the trial judge that matters between them which are referred to in their agreement and thereby left unsettled have never been settled between them. It is also shewn that Davies never had any title to the lands which, by the terms of the agreement, he was bound to convey to the defendant.

Until these matters are adjusted and settled between them, it cannot be ascertained whether the defendant should be called upon to pay the whole or any part of the plaintiff's judgment. They cannot be settled and adjusted in this action unless Davies is made a party to it.

The defendant contends that the assignment to the plaintiff being for only part of the contract between him and Davies, is of no effect, as part only of a contract is not assignable and cites *Associated Portland Cement Manufacturers &c.* v. *Tolhurst*, [1902] 2 K.B. 660, in support of that contention.

In that case Collins, M.R., says, at p. 668:

> On the other hand, it is equally clear that the benefit of a contract can be assigned and, wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and can be put in suit by the assignee after notice.

ALTA.

S. C.

CANADIAN MOLINE PLOW CO. v. TRCA.

Scott, J.

I have already stated that unless Davies is made a party to the action it cannot be determined whether he has done all that was required to be done by him in order to entitle him to demand the payment of the plaintiff's judgment. If he is made a party, and it is found that he had fully performed the agreement on his part, I see no reason why an assignment by him of even one of several obligations on the part of the defendant should not be permissible.

I am of the opinion that the trial judge was right in the order that he made, and I would dismiss the appeal with costs, and direct that, unless the plaintiff add Davies as a party within one month, the action shall be dismissed with costs without further order. *Appeal dismissed.*

ALTA.

S. C.

DICKSON v. PODERSKY

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. March 2, 1918.

INTERPLEADER (§ I—10)—EXECUTION CREDITOR—PRACTICE.

In interpleader proceedings the execution creditor should be made the plaintiff regardless of where the possession of the goods is.

[See annotation 32 D.L.R. 263.]

Statement.

APPEAL by the plaintiff, the execution creditor, from an order of McCarthy, J., dismissing an appeal from the order of the master in so far as it directed that the appellant should be the plaintiff in an interpleader issue directed between him and the wife of the defendant the claimant of certain goods seized by the sheriff under the plaintiff's execution.

A. Stuart, K.C., for appellant; *H. A. Friedman*, for respondent.

The judgment of the court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The defendant and another were the tenants of the plaintiff in 1914 and 1915, as merchants of second-hand goods. In the latter year the defendant moved out, leaving his co-tenant in possession. He transferred all his stock in trade to his father who after a short time transferred it to defendant's wife who under a registered co-partnership with another carried on business for about a year from July 15, 1915, in the town of Vegreville under the name of "Vegreville Auction Rooms." Thereafter alone, but under the name of "Edmonton Auction Rooms," she carried on business in Edmonton from July 12, 1916. In December, 1916, she changed the name to "Podersky

& Co." and thereafter carried on business under that name, the registered certificate shewing that no other person had any interest in the business.

In July, 1916, the defendant again became a tenant of the plaintiff in the old premises which he had formerly occupied and for some months carried on business as a dealer in second-hand goods and furniture, the business of the "Edmonton Auction Rooms" being carried on at the same time on other premises.

In November, 1916, the defendant advertised his business for sale, and the plaintiff, who had brought an action against him for rent, sought to obtain an attachment of the goods on the ground that he was attempting to defraud his creditors. In this he failed, but in March, 1917, he obtained a judgment against him, and in August under the execution issued upon that judgment the sheriff seized the goods in the store of Podersky & Co. The claimant claimed them and the sheriff applied for an interpleader order.

The objection made on behalf of counsel for the plaintiff is that, the goods being in the actual possession of the defendant, the claimant should have cast on her the burden of shewing they are hers and be made the plaintiff in the issue. It may be observed, however, that though the master in his reasons says: "The business seems to have been conducted by Louis Podersky (defendant) and apparently he was in charge when the seizure was made," there is not a word of evidence in the appeal book to shew that the defendant had any connection with the goods except the statement in the claimant's affidavit in which she says, "that the defendant Louis Podersky in this action has no interest, title or claim whatsoever to the said business of Podersky & Co., and is merely acting as my agent, employee, and attorney in connection therewith."

In *Farley* v. *Pedlar* (1901), 1 O.L.R. 570, Lount, J., said: "It is well settled law that when the claimant is in possession of the goods at the time of seizure the execution creditor is made plaintiff in the interpleader issue." In that case a business was carried on under a partnership name of which the claimant was registered as the sole member, but her husband, the execution debtor, was employed in the business and had a power of attorney from her, and the execution creditor was made the plaintiff in the issue.

ALTA.

S. C.

DICKSON v. PODERSKY.

Harvey, C.J.

This decision was followed as late as 1916, by Middleton, J., in *Young* v. *Spofford*, 32 D.L.R. 262, in which it was held that the wife was in possession because she was the owner of the house in which the goods were.

Many cases were cited to shew that in some circumstances, according to the practice, a wife claiming goods in the apparent possession of her husband the judgment debtor should be called on to prove her right to the goods and therefore should be made plaintiff in the issue, but as I have already stated there is nothing in the record to shew that such a state of facts exists here. The affidavit of the sheriff's officer upon which the application was made gives no hint of where the goods were when seized and beyond the statement of the claimant there is nothing to suggest that the execution debtor ever had anything to do with them because there is nothing that would warrant any inference that any of them are part of the goods transferred by the debtor two years before. The statement by the master was probably based in the nature of the argument before him, and upon the argument before us I supposed that the evidence shewed that the husband was in actual charge of the business when the goods were seized and only afterwards upon a perusal of the evidence have I found it otherwise. It seems clear, therefore, that the Master's order was right, but I am of the opinion that it would be wise to lay down the general rule that upon a claim being made under such circumstances as justify an issue being directed the execution creditor should be made plaintiff. It is true that has not been the practice of the past, the rule that has been applied being that when the goods were in the possession of the execution debtor the claimant should be made plaintiff, but the only reason for this is that the burden should be upon such a claimant to prove that the goods are his and not those of the debtor's as they seem to be. There is no reason why that burden should be in any way changed by the fact that the execution creditor is the plaintiff. Actions constantly come to trial when it appears from the pleadings that the burden is on the defendant, and in many other cases, such as a promissory note case, upon the plaintiff proving what is little more than a formality the burden passes to the defendant. Nearly all the cases cited shew that in cases of controversy on this point upon an application for interpleader

the respective rights are investigated to a greater or less extent with no result, except to determine who should be plaintiff. In the present case nearly all the facts I have set out would be immaterial, and all the evidence to establish them would be unnecessary, and such appeals as we are now considering could not arise if the practice were as I have suggested. When the issue comes to trial all these facts require to be proved again, and it would seem much more reasonable to leave the whole matter to the trial unless some prejudice will result. It is clear, however, that the execution creditor has no right against the goods of anyone but the execution debtor, and there seems no reason why the person who has had the right and the duty to prosecute his claim up to judgment should not continue with the same right and duty to establish his claim under that judgment. He is the one who is especially concerned in seeing that the case is expeditiously prosecuted and there is therefore some advantage to him in being plaintiff. Under our present law and practice of evidence if he prove at the trial such facts as on an application for interpleader would be sufficient under the past practice to cause the claimant to be made plaintiff because on him rests the burden of proving his rights to the goods, that burden will then pass to the claimant and if he can establish such facts on the application for interpleader he can equally do so on the trial of the issue.

As far back as 1856, Crompton, J., said, in *Edwards* v. *English*, 7 El. & Bl. 564 at 566, 119 E.R. 1355 at 1356: "The object of an issue is to inform the conscience of the Court. It cannot for that purpose be material which party is made plaintiff," and in the latest case, *Young* v. *Spofford*, *supra*, Middleton, J., dealing with the same subject, says, "as a rule nothing is more idle than these discussions as to the form of an interpleader issue."

I agree entirely with these views, and I think much unnecessary concern will be avoided and no prejudice result from adopting a general practice of making the execution creditor the plaintiff in the issue regardless of where the possession of the goods is.

I would dismiss the present appeal, and with costs since as I have stated the order is in accordance with the past practice.

Appeal dismissed.

ALTA.

S. C.

SHEWCZUK v. BREEKO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. February 28, 1918.

REPLEVIN (§ II C—30)—SECURITY UNDER RULES 469 and 472—FAILURE TO ESTABLISH CLAIM—DAMAGES.

A plaintiff who replevies goods and gives the security required under Rules 469 and 472 (Alta.), undertakes an obligation to pay such damages as the defendant may suffer if the plaintiff fails to establish his claim.

Statement.

APPEAL from a judgment of Morrison, Co.J. Reversed.

G. B. O'Connor, K.C., for plaintiff.

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

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The action was for a declaration that a pair of oxen of the plaintiff's was being unlawfully detained by the defendant, and an order for their return or in the alternative "execution to seize the said oxen as the subject matter of a specific article sold" or in the further alternative "payment by the defendant for the use of the said oxen during the time they were unlawfully detained and used by him at the rate of $5 per day."

The plaintiff obtained an order of replevin and replevied the oxen. The defendant by his defence maintained that he had purchased the oxen from the plaintiff and that he had offered to pay the balance of the purchase price which had been refused, and he counterclaimed for damages for the taking and detention by the plaintiff under the replevin proceedings at the rate of $5 per day, and for a return of the oxen. The evidence was conflicting and the trial judge came to the conclusion that the oxen had been sold by the plaintiff to the defendant and he so declared and gave judgment for the plaintiff for $100 without interest and with costs, but "no costs of the replevin action." He also dismissed the counterclaim without costs and declined to find a lien in favor of the plaintiff, but declared the oxen liable to the execution of the plaintiff on the judgment as being the subject matter of the claim.

This latter declaration was, of course, simply a declaration, applying to the facts of the case, of the provisions of s. 4 of the Exemptions Ordinance, which declares that no article shall be exempt from seizure the price of which forms the subject matter of the judgment. The plaintiff, however, took out a formal judgment by which it was adjudged "that the oxen the subject matter of the action be declared the property of the defendant,

but subject to the payment to the plaintiff of the sum of $100 together with taxed costs of the action."

The sale was made in December, 1916, when $60 was paid, and the balance of $100 was to be paid in 2 weeks. The action was begun on February 15, 1917, and was tried on August 29, 1917, judgment being delivered on October 4, 1917. The oxen were replevied on the commencement of the action and it is admitted that they never got back into the defendant's possession.

The defendant has appealed and the plaintiff also has cross-appealed. It is, however, admitted by counsel for both parties, that they cannot expect this court to reverse the trial judge's finding of fact on the conflicting testimony. It is also admitted by the plaintiff's counsel that the formal judgment is wrong in declaring a lien on the oxen, and he states what is not denied, that on January 15, 1918, 2 months after the notice of appeal, and 3 days before the opening of the sittings of the Appellate Division at which the appeal was to be argued, plaintiff's solicitor wrote to defendant's solicitors, offering to consent to an amendment of the judgment in this respect. It may be observed, however, that probably all the costs of appeal up to the argument had by this time been incurred, and this ground of appeal had been distinctly raised in the notice of appeal. The chief argument, however, on this appeal is concerned with the defendant's counterclaim for damages by reason of his being deprived of the oxen by the plaintiff.

Plaintiff's counsel contends that there is no cause of action unless malice is shewn because the plaintiff took them by process of the courts. It appears to me that that argument is clearly met by the rules of court which permit the taking. A plaintiff who sets up such a claim as this plaintiff is given the extraordinary right of having it assumed that his claim is good so as to give him immediately the relief to which he will ultimately be entitled if he makes out his case, but it is only done upon the condition that he secures the defendant against loss in the event of his failure to prove his case. This security may be given either by a bond or by a payment of money into court as provided by rr. 469 and 472. The money is by r. 469 security for the same purpose as the bond which by r. 473 is declared to be to secure the prosecution of the action, and the return of the property replevied if

ALTA.

S. C.

SHEWCZUK v. BREEKO.

Harvey, C.J.

ordered and "such damages, costs and expenses as the defendant shall sustain by reason of the issue of the replevin order if the plaintiff fails to recover judgment." Having regard to these rules, I feel no doubt that a plaintiff who replevies goods thereby undertakes an obligation to pay such damages as the defendant may suffer, if he fails to establish his claim. If *Harper* v. *Toronto Type Foundry Co.*, 31 O.R. 422, is applicable, I would not feel disposed to follow it, but prefer to accept the view of Mayne on Damages (8th. ed.), p. 502. It is then said that the defendant's right of action must be on the bond which is made to the sheriff and by r. 472 is assignable to the defendant. I do not think this position is tenable either. If the liability is secured by paying money into court, there can be no bond to assign or be sued on and clearly the defendant could not get payment out until he had obtained judgment for his damages. In the present case there is nothing on the record to shew whether the security is by way of bond or of payment in, but even if it were by way of bond while perhaps the defendant could have no recourse against the sureties named in the bond without obtaining an assignment of it and suing on it, it would by no means follow that to support a claim against the plaintiff the defendant needs an assignment of it. The case is somewhat analogous to a claim for damages by reason of an injunction improperly obtained. The defendant in that case secures damages by reason of the undertaking given by the plaintiff to be answerable for damages, but that undertaking is not given to him but to the court when the injunction order is issued, and there is no question of assigning it to the defendant to enable him to have the advantage of it. The bond in a case of replevin is given to the sheriff as an officer of the court and the condition of it declares a liability to the defendant but not to the sheriff.

I think, however, it is not necessary to decide this point, both because it does not appear that there is a bond in this case and because no such ground of defence is set up to the counterclaim, the defence being simply a denial of the facts and of the damage.

I think, therefore, that the defendant's claim for damages should be considered. The trial judge in his reasons for judgment simply dismisses the counterclaim without costs.

The plaintiff's claim was that the oxen had not been sold. The defendant's contention was that they had been bought, and that the time for payment of the balance had been extended to March 1.

It was admitted by counsel for the plaintiff at the trial that the defendant's solicitor had offered to pay the $100 before or shortly after that date. The defence and counterclaim is dated March 17, and the reply April 14. The case came to trial on August 29, and judgment was given on October 4, and as already indicated the trial judge found against the plaintiff's claim and in favor of the defendant's contention in the main action, but though the defendant succeeded in the questions in issue he w a ordered to pay the costs of the action and refused any damages though he had been deprived of the use of his oxen for nearly eight months.

The case establishes that the defendant's damages were substantial though it may be a little difficult to ascertain from the evidence what they actually amounted to.

On this point the pleadings are of some value. The statement of claim alleges that: "The defendant has continuously since on or about the said December 11, 1916, used the said oxen for his own purposes, hauling mining timber and firewood and earning therewith $5 per day," and claims an accounting and $5 a day for the use of the oxen. The allegation is not denied by the defence, and is therefore admitted and the counterclaim which was delivered after the oxen had been replevied alleges "that at the time of the said wrongful and unlawful seizure by the plaintiff of the said oxen, the defendant was earning $5 per day with the said oxen, supplying timber, under contract which the defendant then had, and by reason of the wrongful and unlawful seizure of the said oxen the defendant has lost the said sum of $5, and is continuing to lose the said sum of $5 per day," and claims $5 per day and $50 for expenses to Edmonton.

In the reply to the above allegation of the counterclaim "the plaintiff says that if the defendant was earning the sum of $5 per day by the use of the said oxen, then the said earnings so earned by him are the property of the plaintiff." The reply also contains a denial that the defendant has suffered damages of $5 per day or any damages.

ALTA.

S. C.

SHEWCZUK v. BREEKO.

Harvey, C.J.

The plaintiff's evidence is that he was hauling timber when the oxen were taken, and that he spent 2 or 3 days in securing a team of horses to do the work, and that after he had hauled one carload he had to get another team. He had to pay $25 for the use of the horses for a carload which was about $4 or $5 per day, but he said that a team of horses could haul about twice as much as a team of oxen.

It is quite apparent that the value of the use of the oxen is in no way compensated for by the interest on the $100, and indeed it is probable that the reason the trial judge allowed no interest on that sum was because of the fact that the plaintiff could have had it if he had been willing to take it soon after the action began.

I think, therefore, that the appeal should be allowed, and judgment given the defendant for damages. The difficulty is in ascertaining the amount of the damages. Of course, an enquiry might be directed, but I doubt that the defendant ought to be granted that privilege. He set out to prove his damages at the trial, and no objection was made or any suggestion that there should be a reference to ascertain them, yet he stopped when he proved the damages for the first few days. He did shew that he paid $25 for the use of a team of horses to load one car, and that he then obtained another team. The work of getting out timber, however, on which he was engaged, and for which he seemed to have an especial need for the team would probably not continue after the winter though no doubt he would have some other need for them after. Having regard to the allegations of the pleadings and this evidence and the fact that it was nearly 8 months that the plaintiff had the oxen before judgment and allowance of a larger sum might seem quite justified, but I think that without disregarding these facts yet keeping in mind the value of the oxen the sum of $75 would be a fair amount to allow the defendant.

The judgment being opened up the question of costs which was argued is open for consideration though usually the discretion of the trial judge in the disposition of costs will not be interfered with. In the present case, however, I think the trial judge overlooked the fact that the defendant had succeeded at the trial on all the issues raised and, therefore, unless there were some special circumstances, he was entitled to his costs. The plaintiff obtained a judgment for $100 which was a debt and for which he

ALTA.

S. C.

SHEWCZUK v. BREEKO.

Harvey, C.J.

could have obtained judgment on the small debt procedure. There was no defence to his claim for that so that no trial was necessary.

I would therefore allow the defendant's appeal with costs, and direct that judgment be entered for the plaintiff for $100 with the costs as of an undefended small debt action, and that the defendant have judgment for the return of the oxen and for $75 damages on his counterclaim, and that he have the full costs of the action, the one to be set off against the other, and the defendant to have execution for the difference in his favour.

Judgment accordingly.

ALTA.

S. C.

RIPKA v. GEORGETOWN COLLIERIES LTD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Hyndman, JJ. March 12, 1918.

APPEAL (§ XI — 720) — APPLICATION FOR LEAVE — WORKMEN'S COMPENSATION ACT — ADDUCING NEW EVIDENCE.

An application for leave to appeal from the award of an arbitrator under the Workmen's Compensation Act (1908, c. 12, Alta.) will not be granted, where the affidavits filed shew that it is in reality an application for a new trial, so that further evidence may be adduced, and not an appeal on a matter of law.

APPLICATION for leave to appeal from the award of an arbitrator in an action under the Workmen's Compensation Act.

R. Ure, for appellant; *J. E. Brownlee*, for respondent.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—Ripka, being an employee of the respondent and a workman within the meaning of the Compensation Act, was seriously injured by an accident on January 13, 1916. Through his solicitor, Mr. Ostlund, he took proceedings under the Act to have compensation awarded him. His Honour Judge Winter heard the case on Monday, January 12, 1917. The respondents had filed an answer wherein they took nearly every possible objection to the application, but upon the hearing, as is evident from the reasons for judgment, the respondents admitted that the applicant was originally entitled to compensation and confined themselves to contentions, (1) About the proper amount to be awarded, and (2) As to alleged misconduct by the applicant while in the hospital whereby his complete and earlier recovery was prevented. They also paid into court as an alternative defence the sum of $77.25, saying that this was sufficient to satisfy the plaintiff's claim.

ALTA.

S. C.

RIPKA v. GEORGETOWN COLLIERIES LTD.

Stuart, J.

The applicant was represented by his solicitor upon the hearing. On February 22, 1917, the arbitrator filed a written judgment in which he reviewed the evidence and came to the following conclusion:

> From the facts above given I find that the present condition of the applicant's limb is due to his wilful misconduct in removing the splints; that if he had not done so his limb should have been fully restored by September 30, 1916, judging from the healthy bony union of the fractured bones and that his full earning capacity would have then been regained.

He, therefore, allowed the applicant compensation at the rate of $19.80 per week from the date of the accident to September 30, 1916, which amounted to $376.30. But inasmuch as the respondents had allowed the applicant credit for goods supplied from their store and for rent, and had made him certain payments in cash to the total amount of $286.51, he directed that this latter amount together with the amount paid into Court should be credited against the compensation awarded, and that the balance, $12.54, should be paid to the applicant as well as his costs.

On March 20, 1917, upon the application of the workman an order was made to which the company consented for the payment out of Court to the solicitor for the workman of the money which had been paid in. Whether the balance of $12.54 and costs has been yet paid does not appear.

Some time in January, 1918, Mr. Ure, a solicitor of this Court, made a motion before me in Chambers on behalf of the workman for an order giving leave to appeal from the award of the arbitrator. Instead of disposing of the application, I suggested that it be made directly to the Appellate Division. Accordingly, a notice of motion, returnable before this Division, was served upon the solicitors for the company. In this notice two things are proposed to be asked for: (1) An immediate order remitting the award in question to the arbitrator "for reconsideration of the question of the amount of compensation which should be awarded to the applicant in respect of the incapacity caused to him by the accident and calling his attention to section three of the first schedule attached to the Workmen's Compensation Act, and also to sections thirteen and sixteen of the said first schedule;" and, (2) An order for leave to appeal from the award.

There does not seem to be any authority in the Act for making the first order asked for, and with respect to that the application should be dismissed.

With respect to the leave to appeal, the first consideration is, of course, the rather long lapse of time. According to the rules applicable the time for appealing expired on March 14, 1917.

In his affidavit sworn on February 5, 1918, the applicant states that it was only near the end of March, 1917, that on consulting Ure he was informed of the actual result of the arbitration proceedings, that Ure had urged him to get his original solicitor Ostlund, whose office is in Lethbridge, to enter an appeal, that he had intended seeing Ostlund, but that on account of his broken limb he was unable to move about, and that he had been in the general hospital at Calgary most of the time, and was there at the date of the affidavit. There is an affidavit of Dr. Deane, the physician in attendance on the applicant, which strongly confirms his statements, and shews that Ure had, several times during the summer of 1917, urged Dr. Deane to make a final report on his patient's condition, but that he had not yet been able to do so.

So far as the lapse of time is concerned, I should be inclined, in such circumstances, to allow the applicant to enter appeal, notwithstanding the expiration of the time allowed and the long delay. But some consideration ought also to be given to the merits of the proposed appeal. Under the statute, an appeal is allowable only upon a question of law. The questions of law proposed to be argued upon the appeal were clearly and fully disclosed and argued before us upon the present application. Indeed, the applicant has really had all the benefit of an appeal, except with respect to form. Everything is before us except the notes of evidence taken by the arbitrator. Inasmuch as there was no contention made, or suggested as intended to be made upon the proposed appeal, that there had been no evidence upon which the arbitrator could reasonably make the findings of fact which he did make, it seems to me that the absence of the notes of evidence is immaterial.

The two mistakes in law which it is contended were made by the arbitrator are, first: that upon an original application to fix compensation and the amount of weekly payments the arbitrator had no power to fix a limit of time at the expiration of which the payments should cease, but that an employer who desires to have an order made ending the payments, must make a separate

ALTA.

S. C.

RIPKA v. GEORGETOWN COLLIERIES LTD.

Stuart, J.

application for a review under s. 13 of schedule 1 to the Act. This is no doubt true with respect to fixing a date in the future when the payments shall cease, which clearly cannot be done. But it is, I think, otherwise with respect to a date in the past.

S. 13 reads as follows:

> Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

It was contended that the arbitrator should have merely fixed the amount of the weekly payments to be made and left it to the employer to apply at once for a review under this section, and this even in a case such as the present where the time at which the employer contended that the payments should be stopped had already long gone by when the original application was being heard. The result of this argument, if it is sound, would obviously be that the weekly payments would have had to be paid up to the date of the review, and as there is no provision in s. 13 above quoted, or in any other part of the Act, for making an order that the workman repay amounts already paid him, even if such an order would be very effective, it would follow that the workman would have received money to which he evidently had not been really entitled at all. Even an application for review made forthwith after filing of the award would not in the present instance have remedied this, unless, of course, the employer refused in the meantime, which would be at his peril as to execution, to obey the award. In *Gibson* v. *Wishart*, [1915] A.C. 18, the House of Lords held that upon an application to review the arbitrator or judge could fix a date even anterior to the date of the filing of the application for review at which the incapacity had ceased and at which, therefore, the weekly payment should cease, and doubts were expressed as to whether if payments had been made subsequently to that date these could be recovered, but this point did not need to be decided as no such payments had, in fact, been made.

The result that actual payments made could not be recovered might no doubt follow in a case like this from the words of a statute creating purely statutory rights and procedure unless something had been inserted in the statute to prevent it, and it

would perhaps not be altogether strange to find that the point had been overlooked by the draughtsman of the Act. But in my opinion, it was not overlooked. S. 3, sub.-s. 3, of the Act says:

> If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, including any question as to whether the employment is one to which this Act applies, or as to whether the person injured is a workman to whom this Act applies, or as to the amount or *duration* of compensation under this Act, the question if not settled by agreement shall, subject to the provisions of the first schedule to this Act, be settled by arbitration in accordance with the second schedule to this Act.

The employer by s. 3 (*b*) of his answer, which was filed on February 2, 1917, it seems to me very distinctly raises the question of the duration of the compensation. That clause alleges: "that if there is now *or has been since the 7th day of September, 1916*, any total or partial incapacity or any injury to the applicant, the same is attributable to the serious and wilful misconduct of the applicant and did not result in death or permanent injury." It is also mentioned in par. 1 (*b*) of the answer.

I cannot conceive anything which would more clearly raise the question of the duration of the compensation. Of course No. 8 of the Workmen's Compensation Rules provides that "an application for the settlement shall not be made unless and until some question has arisen between the parties and such question has not been settled by agreement." It may be said, perhaps, that therefore matters contained in the application and answer thereto ought not to be considered as shewing that a question as to the duration of the compensation had arisen which had to be arbitrated and which was, therefore, within the jurisdiction of the arbitrator. But the application was not made until November 23, 1916, and as the documents before us shew that the employers had ceased by September 30, 1916, to make any cash payments and to allow the workman any credit in their store or for rent, I think the only reasonable inference is that a question as to the duration of compensation had, in fact, arisen before the application, although, naturally, it would not be directly mentioned in the application among the questions which had arisen. In his application the workman admitted having received on account of compensation the sum of $215.30, and when we find that on September 30, the employer ceased making any further allowances and then an application is made near the end of November, there

ALTA.

S. C.

RIPKA v. GEORGE-TOWN COLLIERIES LTD.

Stuart, J.

can be no further doubt that a question as to the duration of the compensation had already arisen when the application was made. Some such point as this seems to have been in the mind of Lord Sumner in his judgment in *Gibson* v. *Wishart*, *supra*, at p. 41.

The circumstances seem, therefore, conclusive as to the general authority of the arbitrator to deal with the question of the duration of the compensation. In none of the cases cited to us were the facts similar to those existing in the present one.

It was argued, however, that the arbitrator had no authority to deal with the question of the serious and wilful misconduct of the workman in the manner adopted in this case. The contention was that the words of s. 3, 2 (*c*) of the Act only refer to serious and wilful misconduct of the workman as having caused the original accident and injury and that there is nothing in the Act giving the arbitrator power to consider serious or wilful misconduct at a later time as being the real cause of the continuance of the incapacity and, therefore, to fix the limit of the duration of the weekly payments at a time when but for such subsequent serious and wilful misconduct, the incapacity would have ceased.

In my opinion, however, it is not necessary to determine whether s. 3 2(*c*) has any application to subsequent serious and wilful misconduct, because it seems clear that upon a proper interpretation of s. 1 (6) of the first schedule the arbitrator has power to take wilful misconduct subsequent to the injury into consideration. That section says that "where total or partial incapacity for work results from the injury" a weekly payment *during incapacity* shall be awarded. If the arbitrator finds that the incapacity presently existing was not really the result of the original injury, but due to some other cause for which the workman was responsible, he cannot declare that the incapacity "results from the injury." Cases in which some event intervened for which the workman was not reponsible, such as heart disease, are clearly distinguishable. Even the case of imprisonment as a penalty for a defence which once came up for decision was decided in the workman's favour, apparently because, although the imprisonment would, of course, involve a sort of incapacity, and was at least remotely due to the man's own wilful act, yet it did not destroy the continuing physical incapacity existing in the man's body and was an incapacity through legal restraint of

his liberty and his wilful misconduct which led to it, had no direct relation to his physical condition. In *Warncken* v. *Moreland & Sons*, [1909] 1 K.B. 184, Fletcher Moulton, L.J., in the Court of Appeal, said:

> A workman must behave reasonably, and if the incapacity or the continuance of the incapacity after a certain time is due to the fact that he has not behaved reasonably then the continuing incapacity is not a consequence of the accident but a consequence of his own unreasonableness.

And there are numerous cases where an unreasonable refusal by the workman to follow medical advice or to submit to an operation has been held sufficient to justify the judge in ordering the payments to cease at the date of such conduct. It is true that most of these cases have come up upon applications for a review, but I am quite unable to see any intelligible reason for a distinction on that ground. The judge is only allowed to order weekly payments "during the incapacity," that is, an incapacity which is the result of the injury. If he finds that after a certain date the incapacity was due to the workman's own unreasonable conduct then it cannot be the result of the injury. Nor is there any distinction in this regard between acts of omission and acts of commission. Practically the same situation as arose here existed in *David* v. *Windsor Steam Coal Co. Ltd.*, 4 B.W.C.C. 177. A collier was injured in 1907, and without any award or recorded agreement received compensation for 3 years, when the employers refused to pay any longer. He then applied for compensation, and it was refused on the ground that the man had been loafing so long that his muscles became soft and that this was the real cause of his incapacity. The only ground of attack made by a King's counsel was absence of evidence to justify the finding. There was no suggestion in the Court of Appeal that anything legally irregular had been done.

I think, therefore, the arbitrator made no mistake in law in deciding that an incapacity existing after September 20, 1916, was not the result of the injury and in ending the payments as of that date.

It was further contended that the judge should not have made an order that the weekly payments should absolutely cease as of that date, but should have made what has come to be known in the English practice as a suspensory order, that is, an order either making the weekly payments merely nominal after that

ALTA.

S. C.

RIPKA v. GEORGETOWN COLLIERIES LTD.

Stuart, J.

date or containing the phrase "until further order" so as to leave open the question of *a* possible future revival of substantial payments upon a review.

In *Taylor* v. *London and N.W. Ry. Co.*, [1912] A.C. 242, the House of Lords decided that the contention that whenever the arbitrator is convinced that the incapacity of the workman will never recur, he is still bound to make the order merely suspensory, was unsound. The judgments intimated, indeed, that a suspensory order could properly be made, but they are very clear and decisive upon the point that there is no obligation so to do, and that if the payments are by the award definitely ended at a certain past date there is nothing illegal in the award merely on that account.

As I pointed out in the beginning, there was no suggestion made that the applicant desired to appeal because the arbitrator had come to his decision upon evidence which was not sufficient to support his finding, nor that the applicant was not aware that the point of his own subsequent serious and wilful misconduct was going to be raised on the hearing. It was distinctly raised in the answer filed, and, indeed, it is clear from the judgment that the matter was the chief subject of enquiry at the hearing.

What the affidavits filed on behalf of the applicant really suggest, is that there is available for the applicant evidence which was not adduced at the hearing, going to shew that he or his parents is or were subject to epileptic fits and that his misconduct in tearing off the splints and bandages was not due to his *wilful* act, but rather to involuntary action on his part, arising from epileptic infirmity. This really amounts, not to an appeal on a matter of law, but to an application for a new trial so that further evidence may be adduced. Whatever it might have been proper to do in such circumstances in an ordinary action at law, there is certainly no authority in the statute for such an application.

Finally, the applicant contended that the arbitrator had made a mistake in law in setting off against the total amount of the weekly payments allowed the amount of the credits given on store account and for rent. It seems to me that a sufficient answer to this contention is furnished by the application itself, which was filed by the workman. Therein he admits that "The

applicant has since the date of the accident received from the respondent compensation to the extent of $215.30." The sum of $363.76 allowed against him by the arbitrator consisted of $77.25 paid into court and $286.51 for cash, rent, and store account. An examination of the statement of this amount filed shews that the applicant must have treated some of his charges for rent and store account as being payments on account of compensation, because neither the cash and the rent alone, nor the cash and the store credits alone, are sufficient to make up the amount admitted to have been received on account of compensation. In any case, I think the terms of s. 3 of the first schedule of the Act are wide enough to permit the arbitrator to have regard to these payments, benefits or allowances. It may be that in technical strictness he should have taken the amount in court of $77.25 and the balance of $12.54, which he directed to be paid, added them together and divided the sum by the number of weeks between the date of the accident and September 20, 1916, and then awarded a weekly payment of the small sum thus arrived at, which would be $2.43 a week. But if it was an error at all, it was an error only in form, very like the error which existed in *Taylor* v. *London N.W.R. Co.*, *supra*, and it furnishes no real ground for leave to appeal. With respect to the provisions of s. 16 of the first schedule which says that no "claim shall be set off" against the amount of the weekly payments awarded. I think that this must be read with s. (3) and that the "claim" referred to in the former is not intended to be such as would come within the words "payment, allowance, or benefit which the workman may receive from the employer *during the period of his incapacity*" as set forth in the latter section.

I think, therefore, the application must be dismissed with costs. *Application dismissed.*

DOUGLAS v. MUTUAL LIFE ASS. Co.

Alberta Supreme Court, Harvey, C.J., and Beck, Stuart and Hyndman, JJ. March 7, 1918.

MORTGAGE (§ VI A—70)—FORECLOSURE—LAND TITLES ACT—EXTINGUISHMENT OF DEBT.

An order under s. 62*a* of the Land Titles Act (Alta.), for foreclosure of a mortgagor's interest in mortgaged lands, extinguishes the mortgage debt, and the mortgagee is thereafter precluded from proceeding against the mortgagor upon the covenant or upon collateral security.

[*Fink* v. *Robertson*(1907), 4 C.L.R. 864, (Australia) especially referred to. See Annotation 14 D.L.R. 301.]

ALTA.

S. C.

DOUGLAS v. MUTUAL LIFE ASS. CO.

Harvey, C.J.

APPEAL from a judgment of Simmons, J., 38 D.L.R. 459, in an action for the return of certain insurance moneys. Reversed.

C. T. Jones, for appellant; *A. H. Clarke*, for respondent.

The judgment of the court was delivered by

HARVEY, C.J.:—The plaintiff's action is for recovery of the amount of a policy of life insurance upon the life of her deceased husband, payable to her. The defence is that the defendant has applied it upon a mortgage debt created by the plaintiff in respect to which the policy was assigned to the defendant as collateral security. The fact is that the mortgage, which was given in 1911, became in default, and proceedings were taken by the mortgagee under the provisions of s. 62*a* of the Land Titles Act, and no sale being effected an order of foreclosure was obtained from the registrar on December 20, 1916, which was registered 2 days later when a certificate of title of the mortgaged lands was granted to the defendant. On February 1 following, the insured died and the policy became payable, and on proofs of death being given, the defendant applied the insurance moneys on the mortgage debt.

A case was stated on the above facts and was argued before Simmons, J., who decided in favour of the defendant, and the only question on this appeal is whether, in view of the foreclosure proceedings, the debt was still subsisting so that the defendant was entitled to apply the insurance moneys upon it.

The statement of defence alleges that the amount unpaid on the mortgage, including taxes and fire insurance, at the time of the insured's death was $13,888.05, and its affidavit of value at the time of the issue of the certificate of title a few weeks before placed the value of the lands at $16,350, and the defendant by its defence expresses its willingness to permit the plaintiff to redeem but alleges that the lands are worth much less than the amount of the defendant's claim.

There is no doubt that under a common law mortgage the debt did not become extinguished by a foreclosure order, and the judge, after a most carefully and exhaustively reasoned judgment, came to the conclusion that the same result follows under our mortgage.

As is well known, the old mortgage, which has been known for hundreds of years, was a conveyance of the land to the mortgagee,

subject to certain rights on the part of the mortgagor. If the mortgagor failed to pay according to the terms of the mortgage he lost his rights and the mortgagee became the absolute owner of the lands without more.

The Court of Chancery as a Court of Equity, however, permitted the mortgagor, even after forfeiture of his rights by default in payment, to come in and redeem by paying the amount of the mortgage debt, whereupon he became entitled to a reconveyance of the land. This was the first interference with the common law rights of the parties. It was soon apparent, however, that this left the mortgagee at a disadvantage, for though in law he owned the land, it might be taken away from him at any time. He then appealed to a Court of Equity, which gave him relief by way of an order of foreclosure, limiting the time within which the mortgagor must redeem and finally foreclosing his right to redeem upon his failure to redeem within the time specified. There was no necessity to do anything to vest the land in the mortgagee, because he already had it by the mortgage; it was only necessary to assure him in it as against the mortgagor's right to redeem by foreclosing his equitable estate in the land, which had become known as an equity of redemption. The purpose of the order of foreclosure, then, was not to realize the debt, and it was apparently not till 1852, by 15 and 16 Vict. c. 86, s. 48, that any right of sale existed upon a suit for foreclosure. That provision permitted the court to grant a sale instead of foreclosure at the request of the mortgagee or mortgagor, but the mortgagor could not have it against the will of the mortgagee without the deposit of sufficient money to pay the expenses of the sale, and up to the present the usual order *nisi* for foreclosure does not provide for sale (see Seton on Decrees, 7th ed., p. 1825).

It was apparent that there was nothing in the order of foreclosure or in the reason for it which interfered with the common law covenant to pay contained in the mortgage and the result was that the mortgagee might sue notwithstanding a foreclosure order, but again the Court of Equity when appealed to declared that he could not have both the money and the land and that his proceedings on the covenant must have the effect of giving the mortgagor another right to redeem.

Now, when our first Torrens Act, The Territories Real Prop-

ALTA.

S. C.

DOUGLAS v. MUTUAL LIFE ASS. CO.

Harvey, C.J.

erty Act, was passed in 1886, following the precedent of the original Torrens Act of South Australia and the Acts of the other Australian Colonies, it adopted the terms "Mortgage," "Order of Foreclosure" and "Equity of Redemption," but an examination of the provisions of the Acts shows that not one of them had the meaning which for centuries had been given to it. A mortgage was declared to be only a security and not to have the effect, even when registered, of passing any estate in the land. Under the old system the land passed to the mortgagee who held it as security. Under the new system he had nothing but a charge, the mortgage itself being the security. It is thus apparent that the mortgagor's estate in the land under the new system was not an equitable one at all and could not properly be described as an equity of redemption, and his right to redeem was, of course, not an equity to redeem but a legal right even when not considered as a duty to pay. It is apparent also that an order of foreclosure without more under our mortgage would accomplish nothing in the way of vesting the land in the mortgagee and its effect for that purpose was accomplished by the statutory provisions, and later when it was obtained in an action by a vesting order being coupled with it.

If, instead of adopting these old, well-recognized terms with these established meanings new terms more appropriate to the facts had been employed, some confusion might have been avoided.

The foreclosure order granted under the original Act and under our present Act is only granted after a failure to sell the land for the purpose of realizing the mortgage debt and unquestionably seems, therefore, to be for the purpose of realizing the debt. Certainly the mortgagee becomes the owner of the land not by a conveyance from, or any act of, the mortgagor, nor by the order of any Court of Equity for the purpose of putting an end to the mortgagor's right to redeem, but in pursuance of the powers given to the mortgagee for the purpose of enabling him to realize on his security. In other words, since he cannot get the money to pay his debt he is given the land for that purpose.

He need not take it, of course. It is entirely in his discretion, and certainly if he does not take it and cannot get the money by a sale of the land the mortgage debt is not satisfied, but I find it difficult to see in what other way he can be deemed to acquire the land than in payment for the debt.

In *Town of Ca* v. *Fenton* (1917), 33 D.L.R. 719, 11 A.L.R. 320, this court held that when a town took land under forfeiture proceedings upon a failure to realize the taxes on a sale it took it in satisfaction of the taxes. I dissented from that decision but solely on the ground that by a late amendment to the Act which authorized the acquisition of the land by the town it seemed to me an intention was expressed that it should hold it merely as security. There seems to me to be some analogy in principle between such a case as that and the present. But, fortunately, we are not without direct authority on the question. In *Fink* v. *Robertson* (1907), 4 C.L.R. 864, the High Court of Australia decided, and thereby settled for the Australian States, that the taking and registering of an order of foreclosure under provisions in almost the exact terms of those of our Act material to the case, constitutes an extinguishment of the debt. There is an exhaustive reasoned judgment dealing with the different provisions of the Act and coming as it does from the highest court of the country where the Torrens system originated and has had its most general application, it is entitled to the highest consideration. Moreover, the reasoning appears to me to be unanswerable, and I adopt it without hesitation.

It is suggested that the decision in *Williams* v. *Box* (1910), 44 Can. S.C.R. 1, is in the defendant's favour, but I fail to see that it is in any way inconsistent with the views I have expressed. In that case a certificate of title had issued on an order of foreclosure obtained by a mortgagee under the statutory provisions under conditions which if obtained in court would have justified the court in setting aside the foreclosure order at the instance of the mortgagor. The question there was whether the court had power to set aside the order and the certificate of title on the application of the mortgagor, and it was decided that it had. It is apparent that that has nothing whatever to do with the question whether the mortgagee in taking a foreclosure order and a certificate of title upon it takes it in satisfaction of his debt. That, of course, has no bearing here because the defendant admits its readiness to have its certificate of title cancelled, and the order opened up.

For the reasons I have given, I think the mortgage debt was extinguished by the taking and registering of the foreclosure order and that the defendant therefore having no debt owing to

ALTA.

S. C.

DOUGLAS v. MUTUAL LIFE ASS. CO.

Harvey, C.J.

it upon which to apply the insurance moneys, was bound to pay them to the plaintiff, the beneficiary under the policy.

I would, therefore, allow the appeal with costs and direct that judgment be entered for the plaintiff for $4,789.78, with interest from May 9, 1917, as agreed by the stated case, with costs. It was suggested on the argument that there had been some error in arriving at this amount. If so, and the parties cannot agree on the amount, it may be settled by a single judge.

Appeal allowed.

BADGER v. TOROSOFF.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

CONTRACTS (§ I D—60)—*Sale of wheat—Offer and acceptance.*]—Appeal by defendant from a judgment in an action for breach of contract. Reversed.

Russell Hartney, for appellant; *B. H. Squires*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.:—On August 14, 1916, the defendant signed the following document:

Asquith, Sask.

I hereby agree to ship one thousand bus. of wheat to be delivered at Fort William by October 31st to B. J. Ostrander & Co. at 142¼ less freight and commission. I accept $1.00 to bind contract.

Witness, Russell Badger. Elia Torosoff.

Paid $100.00 deposit.

The document was taken by the plaintiff as agent for D. J. Ostrander & Co. At the time it was taken, the defendant gave the plaintiff $100.

The defendant did not deliver the wheat. On October 31, the closing price of No. 1 Northern wheat on the Winnipeg Exchange was 1.86⅞. On March 17, 1917, Ostrander & Co. assigned to the plaintiff their right to damages from the defendant for his failure to deliver said wheat. The plaintiff then brought this action, claiming as damages the difference between the value of 1,000 bushels at 1.42¼ and at 1.86⅞, or $446.25. On this he gives the defendant credit for $100 deposited when the agreement was signed.

In answer to the plaintiff's claim, the defendant alleges that it was agreed between himself and the plaintiff that, if he delivered

SASK.

S. C.

the wheat, the $100 paid was to be returned to him, but if he did not he was to forfeit it, and having forfeited it he was not liable for anything more.

The defendant is a Doukhobor who cannot read English, and his evidence had to be taken, for the most part, through an interpreter. He testified that the plaintiff explained the transaction to him as follows: "Now, company take $100 deposit, and if you go and ship out you can get your $100 back, if not, you lose the $100."

The Judge of the District Court who tried the action gave judgment for the plaintiff, holding that the defendant had contracted to deliver the wheat and had failed to do so, and was, therefore, liable in damages for the difference between what the wheat was worth on October 31 and what the company had agreed to pay for it under the contract. With reference to the defence that the defendant was liable only for the $100 deposit, he said: "I make no comment on the $100. It does not enter into this contract."

In this, I think the trial judge erred. If the plaintiff made the statement above quoted, as testified to by the defendant, it is a good defence. The meaning of that language is that the defendant, if he failed to deliver, would lose his $100, and, by implication, that was to be the measure of his liability. Therefore, before judgment could be given against the defendant, it was necessary to have a finding as to whether or not such statement was made. The plaintiff admits part of it, and the circumstances to my mind are strongly corroborative of the defendant's testimony. This necessitates a new trial at least.

Counsel for the defendant, however, contends that on the evidence the defendant is entitled to judgment; that, even assuming that the trial judge had found against him on the defence as above set out, the plaintiff must fail on the ground that the contract was unenforceable for want of mutuality.

If the contract was not binding on the company it, of course, cannot be enforced against the defendant. It is admitted that the plaintiff was the agent of the company to buy wheat upon contract, but it was contended that all that meant was that he had authority to have a farmer execute a contract form which constituted an offer on his part, but which had to be approved by

SASK.

S. C.

the company to constitute a binding contract. The document sued on was taken in the form in which it appears because the plaintiff did not have on hand one of the company's forms which he was authorized to have farmers sign. A form, however, was put in evidence; the last part of it is as follows: "Dated and signed at Asquith this 14th day of August, 1916. We hereby agree to accept the above contract and terms thereof."

Referring to this form, the plaintiff in his evidence said: "Every contract I drew up, that is what I had. This is the proper contract form that we used, that is what the company sent me."

This being the form of contract into which the plaintiff had authority to enter, I am of opinion that it was not binding upon the company until it was assented to by it or on its behalf. To my mind it is clear that, although the plaintiff was the agent of the company to obtain the signature of farmers to such contracts, the company was reserving to itself the right to accept or reject the proposal. There was, so far as the evidence discloses, no acceptance in this case of the defendant's offer. No member of the company was called to testify nor is there any evidence that the company ever saw it before the defendant had delivered his wheat elsewhere. Had the price of wheat fallen and had the defendant sought to force the company to accept delivery, the company was in a position to say that it had never agreed to take the wheat at the price mentioned. On the evidence before us, this, in my opinion, would have been a good defence. The defendant's offer never having been accepted by the company there was no binding contract.

The appeal should, therefore, be allowed with costs and the action dismissed with costs. *Appeal allowed.*

STEELE v. CAPE BRETON ELECTRIC Co.
(Annotated).

N. S.
S. C.

Nova Scotia Supreme Court, Russell and Longley, JJ., and Ritchie, E.J.
March 12, 1918.

TRIAL (§ II B—45)—NEGLIGENCE—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

Absence of evidence from which a jury can reasonably find that there was negligence on the part of the defendant which caused the accident justifies the trial judge in withdrawing the case from the jury and dismissing the action.

Statement.

APPEAL from a judgment of Harris, J., withdrawing the case from the jury and dismissing an action claiming damages for negligence. Affirmed.

V. J. Paton, K.C., and *A. J. Macdonnell*, for appellants.

H. McInnes, K.C., and *J. McNeil*, for respondent.

Russell, J.

RUSSELL, J.:—The deceased was a passenger on the "Electronic" ferry steamer going from Sydney to North Sydney. On the lower deck on which the passengers enter the steamer there is a ladies' cabin and from that deck there is a companion way to the deck above it where there is a cabin and an adjoining smoking room. A narrow passage-way runs along on both sides of the lower deck to the stern, where there is a grating to cover the quadrant, which is a triangular structure used in connection with the working of the helm. This grating is, of course, for the purpose among others of preventing passengers from stumbling over the quadrant. Near the after end of the two passage-ways is a narrow passage connecting them, but they extend aft beyond the cross passage-way and a person crossing from one side to the other would, it is suggested, be as likely to step up and across the grating as to make use of the narrow crossing. The rail on the outside of the passage-way is two feet six high, which is of course reduced to about half that height more or less if the grating be taken to be part of the floor or deck.

The deceased was seen passing the engine room along the passage-way and exchanged some words with the engineer, very soon after which he was seen struggling in the water when it was probably impossible to rescue him and would have been impossible had the most expeditious and efficient means been at hand and available for the purpose. It seems entirely reasonable and

N. S.

S. C.

STEELE v. CAPE BRETON ELECTRIC CO.

Russell, J.

permissible to conclude that he fell over the rail, whether at the grating or between that and the place where he was last seen it is impossible to say.

The case was withdrawn from the jury and the question is whether there was any evidence that should have been put to the jury. That seems to depend upon the question whether a jury could reasonably have found that the passenger had a right to be where he was, whether it might be reasonably concluded that he had fallen over the rail, whether the rail was of reasonably sufficient height to afford the proper security.

There was no warning against the use of the lower passageway. On the contrary the warnings that were posted amounted to an implied invitation or at least an implied permission.

Whether the rail was of the requisite height does not seem to me to be a question of law. If it had been breast high I should have said that no reasonable jury could have said the height was not sufficient. If it had been only a foot high I should have concluded that no sensible juryman could say it was high enough. Whether at the actual height, which does not bring it up to the thigh of an average man, it was a sufficient security, seems to me to be a fair question for determination by a jury.

But it is argued that even if the rail had been properly found by the jury to be too low there was no evidence to shew that the negligence of the company in failing to provide a suitable railing had anything to do with the accident. I am unable to concur in this opinion. One of the plaintiff's witnesses, Robert Scott, says that he saw the deceased when he was standing by the rail of the engine room and that was where he passed him. The witness went to the upper deck and sat where he could have seen the deceased if he had come up from the lower deck, but he did not see him come up. I think the jury could reasonably have come to the conclusion from this evidence that the deceased had fallen into the water from the lower deck and not from the upper deck. Another witness, William Fuller, said he saw the deceased about amidships on the lower deck, that the deceased passed the witness going aft, and it was only a few minutes between the time when the deceased passed the witness and the giving of the alarm that there was a man overboard. I do not see how anything could ever be proved by circumstantial evidence if it could not be inferred from

evidence such as this that the man had reached the water by getting over the rail on the lower deck. I think they would have a right to assume that he did not commit suicide by deliberately climbing over the rail. Suicide is a crime and would never be presumed. In *Evans Co. Ltd.* v. *Astley*, [1911] A.C. 674, the question was whether a man who had been killed when climbing from a truck running along a railway track into a van which it was following buffer to buffer was killed in the course of his employment. That depended upon the question whether he was climbing over for the purpose of making use of the steps that went from the van in order to attend to the points at the stop that the truck and the van were approaching, or for some idle purpose of his own. There was no evidence whatever to shew what his intention was, but Lord Loreburn said that if the more probable conclusion was that for which the plaintiff contended and there was anything pointing to it then there was evidence for a court to act upon. That the applicant must prove his case was conceded, but that did not mean that he must demonstrate his case. Any conclusion short of certainty might be miscalled conjecture or surmise, but "courts, like individuals, habitually act upon a balance of probabilities."

The case of *Wakelin* v. *L. & S.W.R. Co.*, 12 App. Cas. 41, has been cited for the defendant company. But if the rail had been only a foot in height, or there had been no rail at all, everything that has been or can be said by way of applying the *Wakelin* case to this could have been said with the same propriety as it can be in the actual case before us. Would it have been said, if there had been no rail at all, that there was nothing to go to the jury because nobody could say for certain that the deceased had not jumped overboard? The case of *Wakelin* was withdrawn from the jury because there was nothing to shew whether the train had run into the deceased or the deceased had run against the train. That case does not seem to me to present any analogy to the present. I can think of no competing possibility in this case such as there was in the *Wakelin* case. The man must have fallen over the rail. If the rail was insufficient there is evidence of negligence which should have been submitted to a jury. Both Lord Watson and Lord FitzGerald in the *Wakelin* case decline to adopt the view of Lord Esher that it is incumbent on the plaintiff to make a *primâ*

N. S.

S. C.

STEELE v. CAPE BRETON ELECTRIC CO.

Russell, J.

facie case for the absence of contributory negligence. That is an issue the burden of which is on the defendant.

There was some evidence tending to shew that the deceased had been drinking. There was no evidence that he was drunk. I do not, therefore, stop to inquire whether this part of the evidence tends to throw a greater burden of care upon the company or to bring upon those who represent the deceased a countervailing burden of contributory negligence.

I think the case should have been submitted to a jury.

Ritchie, E.J.

RITCHIE, E.J.:—Roderick Steele was a passenger on the defendant company's boat, the "Electronic," from Sydney to North Sydney. In some (as I think) unaccountable way he got overboard and was drowned. The action is under the Fatal Injuries Act and the company is charged with negligence. The trial judge withdrew the case from the jury on the ground that there was no evidence of negligence. The question is, was he right in so doing, that is to say, was there as a matter of fact any evidence of negligence and, if so, was there any evidence that the negligence caused the accident? The counsel for the plaintiff seemed to regard the case of *Evans & Co.* v. *Astley*, [1911] A.C. 674, as changing the law in regard to what is evidence to go to a jury. A careful reading of the case convinces me that it makes no change in the law. A jury is not and never was at liberty to decide a case on mere conjecture or surmise, but when a jury has sufficient evidentiary facts the balance of probabilities can properly be acted on. There is nothing new about this; it has always been the law. In very many cases to require certainty as to the proper inferences of fact would be to require the unobtainable, but to call this lack of certainty, conjecture or surmise is, as Lord Loreburn says, a misnomer. The alleged negligence relied on at the argument was: 1. That the rail on the boat was not sufficiently high. 2. That there was undue delay in launching a boat to rescue the deceased, the number of the crew being insufficient for the purpose.

The law is that carriers of passengers are required to take all due care having regard to the nature of the contract to carry passengers; the words "due care" mean a high degree of care; in other words, that degree of care which is reasonable under the circumstances.

Turning to the facts, the first question I deal with is was the

rail so low that it makes a case of negligence? It was two and a half feet high; not high enough for an ocean-going steamer, but, apart from any evidence on the subject, I think reasonably and sufficiently high for a small steamer plying between Sydney and North Sydney. Evidence was received that after the accident a wire was placed above the rail. This, under the decided cases, was clearly not evidence and must therefore not be taken into consideration. A witness was allowed to express his opinion that the rail was not safe. This also was clearly not evidence and I exclude it from my consideration. It is the province of either the judge or the jury to draw all inferences from facts. It follows, therefore, as a general rule, that a witness must state only facts and that his mere personal opinion is not evidence. To this rule, of course, there are several well understood exceptions of which the opinion given in this case is not one. I cannot discover that there is any evidence of negligence in regard to the rail.

Dealing with the question of the grating it was, I think, at a place where it was obvious that passengers were not supposed to go. There is no evidence that the deceased was there, but however this may be there is no evidence that the grating had anything to do with the accident, and the same is true in regard to the rail.

The only remaining question is as to whether or not there is any evidence of negligent delay in getting the boat to the rescue.

It is not suggested that the boat was deficient in any way, but it is said that there was undue delay caused by the number of the crew being insufficient to launch the boat with the quickest possible despatch. It is not suggested that the number of the crew was not sufficient for the working of the steamer; therefore this charge of negligence must mean that a steamer of the class of the "Electronic" plying in the daytime between Sydney and North Sydney must carry extra hands for the sole purpose of launching a boat with the quickest possible despatch in an emergency. I am of opinion that not carrying the extra hands under the circumstances of this case is no evidence of negligence. I feel that I must not get away from that which is responsible. It may well be that such a requirement would make the continuance of the service impossible from a financial point of view. I think it is clear that as soon as it was known that the deceased was overboard the captain, crew and passengers did all that could be done to lower the boat

N. S.

S. C.

STEELE v. CAPE BRETON ELECTRIC CO.

Ritchie, E.J.

and to go to the rescue with the least possible delay. There is no evidence of any negligence in this regard. So the alleged negligence comes back to the proposition that the "Electronic" was bound to carry three sailors for whom there would be no work except to assist in lowering the boat in the case of an emergency, and this, as I have indicated, is not a reasonable proposition under the circumstances.

But assuming that there was negligence in not having the rail higher, the cause of the deceased falling overboard is still an absolute mystery. The day was fine; the water was smooth; there was, so far as the evidence discloses, no sudden lurch or anything of that kind which would throw a man capable of taking care of himself overboard; there is nothing to account for the accident. Under such circumstances the authorities are clear that the Judge was right in taking the case from the jury.

In *Wakelin* v. *London and S.W.R. Co.*, 12 App. Cas. 41:—

A railway line crossed a public foot-path on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head-lights, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line. An action on the ground of negligence . . Held that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was therefore no case to go to the jury and that the railway company were not liable.

The foregoing is copied from the head-note.

I am unable to distinguish between getting on the line without evidence as to how the man got there and getting into the water with the same lack of evidence.

Lord FitzGerald, at p. 50, said:—

There was evidence also intended to establish negligence on the part of the defendants, in the absence of due and proper precautions for the safety of the public using that foot-path. It seems to me that there was evidence of negligence, but it did not go so far as to establish that such negligence led to the death of Wakelin. It fell short of proving that the immediate and proximate cause of the calamity was the negligence of the defendants. We are left to mere conjecture as to whether it was the *causa causans* and that we cannot resort to. The plaintiff undertook to establish negligence as a fact, and that such negligence was the cause of her husband's death. She failed to do so and the proper course to have adopted at the close of the plaintiff's case was to have directed a verdict for the defendants.

N. S.

S. C.

STEELE v. CAPE BRETON ELECTRIC CO.

Ritchie, E.J.

In the *Montreal Rolling Mills Co.* v. *Corcoran*, 26 Can. S.C.R. 595, the *Wakelin* case is referred to as laying down the rule of law prevailing under English jurisprudence. In the *Corcoran* case death was caused by Corcoran getting caught in machinery which it was alleged was not properly guarded, but there was no evidence as to how the accident happened. There is exactly the same lack of evidence in this case. The court in the *Corcoran* case was composed of Sir Henry Strong, C.J., Gwynne, Sedgewick, King, and Girouard, JJ. The judgment of the court was delivered by Girouard, J. The rule was laid down as follows, at p. 600:—

> All cases of this kind, therefore, involve the determination of certain facts, which must be proved by direct evidence, or by presumptions weighty, precise and consistent. It is this proof that is entirely wanting in this case.

I am very strongly of opinion that this deliverance is applicable to the case at bar.

Quoting again from Mr. Justice Girouard's judgment, he said:

"Lord Chief Justice Coleridge said in *Smith* v. *Baker:* if there were five hundred acts of negligence and none of them caused the injury to the plaintiff, such acts of negligence would not give a cause of action. Here it was wholly left in doubt as to how the plaintiff was injured. It was the plaintiff's duty to make that clear."

The judge adds: "This decision was reversed by the House of Lords but on another point."

I also refer to the case of *Canadian Cotton Mills Co.* v. *Kervin*, 29 Can. S.C.R. 478.

The appeal, in my opinion, should be dismissed with costs.

LONGLEY, J.:—I concur with Ritchie, J.

Appeal dismissed.

Annotation.

ANNOTATION.

NEGLIGENCE—EVIDENCE SUFFICIENT TO GO TO THE JURY IN NEGLIGENCE ACTIONS.

In any action of negligence, it is apparent on the authorities that it is the province of the judge to determine at the close of the plaintiff's case, whether or not there is any evidence of negligence on the part of the defendant. If there is none, in his opinion, the same rule which applies to all cases must apply, and a non-suit will be ordered. If, in his view of the facts, there is some evidence of negligence, the case goes to the jury, limited by the consideration as to whether such negligence was the cause of the injury complained of. In other words, the negligence of the defendant must be relevant to and connected with the issue. This is the elementary stage.

Annotation.

Then comes the second question: Was the plaintiff himself guilty of contributory negligence? If the judge thinks there are facts in support of this contention, and there is no evidence of the defendant's negligence, a non-suit will be directed, as it is manifest the plaintiff could not recover under such circumstances. If there is negligence proved against the defendant, and contributory negligence on the part of the plaintiff shown either by himself or his witnesses, the defence is called upon, and the whole case will be submitted to the jury.

To determine under what circumstances cases of negligence will be left to the jury, a review of some of the more important of the later authorities may be consulted with advantage. Indeed, it is only by taking apt extracts from the judgments in such cases, that one can obtain anything like a fair idea of the position of the law in regard to such matters, and the principles enunciated by high authority will be found much more useful to the reader than all the comments made by a writer not speaking with binding force. A summary of the law on the point in question, therefore, properly follows this general introduction.

The first case calling for special attention is *Gee* v. *Metropolitan R. Co.*, L.R. 8 Q.B. 161, decided in 1873.

The plaintiff got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station; the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. Held, that there was evidence, and the jury having found for the plaintiff, the verdict ought to stand.

Blackburn, J., at p. 166, said: "Then was the plaintiff conducting himself in such a way as amounted to want of ordinary care? As to that, I can only say it was a question for the jury, and they were right in the verdict they have found."

Kelly, C.B., said, at p. 168: "If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of the paintiff, that must always be a question for the jury, and it is not a case for a non-suit."

And at p. 170: "I am of opinon that there was evidence for the jury to consider whether the defendant's servants had not, when this train left the station from whence it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened, there was evidence to go to the jury that they failed in the performance of that duty . . . here was evidence that this door was not properly fastened; for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go to the jury, upon which they were justified in finding that there was negligence on the part of the defendants."

Per Martin, B.: "It seems to me that you cannot shut out from the consideration of the jury whether or not a man may not do wrong, and know that he is doing wrong, in putting his head or hand out of the window."

The case of *Jackson* v. *The Metropolitan Railway Company*, L.R. 10 C.P. 49, follows in 1874. The facts of this case were these: The plaintiff was a passenger on the defendant company's car; the car entered an overcrowded

Annotation.

station, with an insufficient staff of porters to control the conduct of the people there assembled; the carriage had an excessive number of passengers in it, and more attempting to intrude, whereby those who were lawfully seated therein were placed at a disadvantage; a porter slammed the door just as the train was entering the tunnel, and the hand of the plaintiff, in consequence, as he swore, of the inconveniently crowded state of the carriage, was crushed in the hinge.

Per Brett, J.: "If the court think that there is any evidence upon which the jury might reasonably act, they cannot set aside the verdict as being against the weight of evidence. . . . There being evidence, then, which it was proper to submit to the jury, and they having found for the plaintiff, even though I myself might have entertained a different opinion, I do not feel myself at liberty to interfere with this finding."

In 1878, the case of *Dublin W. & W. Ry. Co.* v. *Slattery*, L.R. 3 App. Cas. 1155, was decided by the House of Lords. Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. (It was a rule of the railway company that the express train should always sound a whistle on approaching the station, and the conflicting evidence in this case was as to the sounding of the whistle.)

Held, that this was a case which was properly left to the jury, for that where there was a contradictory evidence of facts, the jurors and not the judge must decide upon them.

Dissenting, Lords Hatherley, Coleridge and Blackburn, who thought that where there was not, in the first instance, uncontradicted evidence to establish the right of a plaintiff to a verdict, the judge might direct a non-suit, or a verdict for the defendant, and that there was here enough to show, even on the undisputed facts, that the mischief had been the result of S.'s own negligence, and that a non-suit or a verdict for the defendants ought to have been directed.

As stated by Lord Cairns, L.C.: "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company that caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *Metropolitan R. Co.*, 3 App. Cas. 193, an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed, with his eyes open, on his own destruction." (Lord Cairns goes on to speak of the facts in the present case and continues): "Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they ought to have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the deceased was the *causa causans* of the accident. . . The question is whether the evidence being such as I have described, the judge ought to have taken the case out of the hands of the jury in the first instance. I am not aware of any authority for this being done, and none of the cases cited in the course of the argument can, in my opinion, be looked on as an authority

Annotation.

for such a course." (After expressing dissatisfaction at the result of this litigation, his Lordship goes on to state): "But I cannot seek to prevent this by proposing to your Lordships, on the only part of the case which is brought for your determination, to do what it appears to me would seriously encroach upon the legitimate province of a jury."

Lord Penzance: "The proof of the defendant's negligence is upon the the plaintiff, the proof of contributory negligence lies upon the defendants: Upon either of these issues it is competent to the judge to say negatively that there is not sufficient to go to the jury; but it is no more competent to him to declare affirmatively that one of them is proved than the other. In fact, there is no case that I am aware of, and certainly none was cited relating either to actions of this kind or any other form of action, in which the facts and the proper conclusions of facts to be drawn from them being in dispute, the judge has been entitled to tell the jury that they were bound to find the issue proved."

Lord O'Hagan, on the questions of negligence and contributory negligence: "As questions of fact they were proper to be submitted to the jury; and the learned judge who tried the cause was bound, in my opinion, so to submit them." . . . "I have no doubt, notwithstanding the conflict of judicial opinion, that the judge was not at liberty to direct, whatever may have been, in his opinion, the preponderance of proof on the one side or the other." . . . As to contributory negligence, "The circumstances establishing such negligence, and the inferences to be drawn from them, were equally and exclusively for the consideration of the jury. It was for the jury to find the facts, and to draw the inferences of fact, and the judge would, in my mind, have transcended his jurisdiction in finding the former or making the latter." . . . "I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other. In such circumstances the judge may speak strongly, and point out plainly what is the duty of the jurymen; and, if they ignorantly or perversely disregard his counsel, and find without evidence or against evidence, the injured party has his remedy, and the law is prompt to rectify the wrong."

A later case decided in 1883 is *Davey* v. *London & South Western R. Co.*, 12 Q.B.D. 70. This was an action brought against a railway company for injuries received in crossing their tracks. The plaintiff admitted that before crossing he looked one way along the track but did not look the other, and that if he had done so he must have seen the engine approaching. The engine driver did not whistle. The plaintiff was non-suited at the trial.

Held, by Brett, M.R., and Brown, L.J. (Baggallay, J., dissenting), that the non-suit was right, as although there was evidence of negligence on the part of the defendants, yet upon the undisputed facts of the case the plaintiff had shown that the accident was solely caused by his omission to use the care which any reasonable man would have used.

Brett, M.R., said at p. 72-3: "Therefore it seems to me clear that without the assistance of the jury, one must come to the conclusion that the plaintiff according to his own showing, was guilty of a want of reasonable care, which was one of the causes of the accident. . . Under these circumstances the learned judge at the trial was, in my opinion, justified in not leaving the case to the jury."

Annotation.

Bowen, L.J., said, at p. 76: "It seems to me to be important to draw the line clearly between the functions of the judge and the functions of the jury. It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views. . . The plaintiff has to make out that there has been some default or neglect on the part of the defendants, which was the *causa causans* of the accident."

Also at p. 78: "I wish to say that in *Dublin, Wicklow & W. Ry.* v. *Slattery*, 3 App. Cas., 1155, the question for the House of Lords was whether the learned judge at the trial should have non-suited or not, and that the question divided itself into two parts: first, whether there was evidence of negligence in the railway company to go to the jury, and secondly, whether, even assuming there was such, that was negligence which could have caused the accident, or whether there was not some clear contributory negligence on the part of the plaintiff as rendered it impossible for a reasonable man to suppose the accident was caused by anyone except the plaintiff himself."

One of the most important cases is *Smith* v. *S. E. R. Co.*, [1896], 1 Q.B. 178. The plaintiff's husband was run over and killed by a train of the defendants. It was held in an action by the plaintiff under Lord Campbell's Act, to recover damages in respect of her husband's death, that there was upon the facts evidence to go to the jury of negligence on the part of the defendants by which, and not by any negligence on his own part, the death of the husband was caused, and therefore the judge at the trial was right in not withdrawing the case from the jury.

Lord Esher, M.R., said at p. 182: "The question in this case seems to reduce itself to this: Could the judge properly have directed the jury as a matter of law that negligence on the part of the deceased was proved? It is an admitted proposition of law that, if there is no evidence of some material fact which forms an essential part of the plaintiff's case, then the judge is bound to withdraw the case from the jury."

Lopes, L.J., at p. 186: . . . "The case strikes me in this way. The deceased appears to have known the crossing and the practice then with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting in his lodge and was making no attempt to signal any train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train? On consideration I have come to the conclusion that on this question there was evidence for the jury, and if I had been trying the case, I do not think I could have withdrawn it from the jury."

Kay, L.J., at p. 188: "I think there was evidence for the jury of negligence on the defendant's part . . . I venture to say with all respect to those who hold a different opinion, that as long as we have trials by jury, and jurors are judges of the facts, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on the one side and the other was exactly equal. The House of Lords seems to consider there might be such cases."

The judgment in *Wakelin* v. *London & S.W. Ry. Co.*, 12 App. Cas. 41, is appended to the case above reported for the benefit of the profession.

Annotation.

In our own courts, there is the important case of *Morrow* v. *C.P.R.*, 21 A.R. (Ont.) 149, decided in 1895, wherein it was decided that where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury.

The plaintiff was run into while crossing the defendants' line, and was severely injured, his horse killed and waggon broken. He charged many acts of negligence: not ringing the bell, not sounding the whistle, etc., etc., which the defendants denied, and not in terms pleading contributory negligence.

Burton, J.A., at p. 152, said: "Whether the evidence be strong or weak, or in the opinion of the judge incredible, it is equally the province of the jury to decide upon it, and as has been said by a learned judge, the judge would be arrogating to himself, if he were on that account, on the trial of a question of fact, to withdraw the evidence from the jury, and decide on it himself. . . He might hold in a proper case that there is no evidence for the jury of contributory negligence, but the moment that the question arises as to whether the injury resulted from the negligence of the defendants or the plaintiff, or in other words, the moment it appears that the facts and the proper inferences from the facts are in dispute, it becomes a question for the jury.

See also Osler, J.A., at p. 153: "But as there was a jury, it was their province to decide the question, arising upon disputed facts, whether the defendants were guilty of negligence causing the accident, and the further question arising in the same way, whether the plaintiff was guilty of contributory negligence."

His Lordship, after referring to *Brown* v. *G.W.R.*, 1 Times L.R. 406 and 614, and *Wright* v. *Midland*, *Ib.* 406, 412, continued: "As regards the *Davey* case, the Master of the Rolls in both the cases just cited, says, 'If it pleases anybody to hear it, I have doubted, ever since I gave that judgment whether my brother Baggallay and my brother Manisty were not more right than we were (*i.e.*, himself and L.J. Bowen), I have doubted whether even in that case we ought to have taken it from the jury."

Among the more recent Canadian decisions the following may be noted: *Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 Can. S.C.R. 478, wherein it was held that where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent for the judge to leave the case to the jury.

In this case a workman in a cotton mill was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. The negligence charged was the want of a fence or guard around the machinery contrary to the provisions of the Workmen's Compensation Act.

Held, Gwynne, J., dissenting, that whether the omission of such statutable duty could or could not form the basis of an action, at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident.

In *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, the appellant, who was in the service of the respondent company, was seriously injured by an explosion at the company's works. There was no direct evidence to

Annotation.

show how the explosion occurred. It seemed to have originated in an automatic machine used for filling shells or cartridges with powder and shot. It was the appellant's duty to keep the shells with which the machine was fed supplied with shot and wads. The explosion was instantaneous. The flash communicated through a supply pipe with a powder box fixed on the outside of the wall of the room in which the machine stood. The box was placed there so that in the event of an accident, the explosion might expend itself in the open air. However, for some reason or other, the box had been strengthened externally, and the force of the explosion took effect inwards. The wall was blown in, the machine knocked to pieces, and the room entirely wrecked.

The jury found that the explosion occurred through the fault and neglect of the company "by their neglect to supply suitable machinery," and by their neglect to take proper precautions to prevent an explosion. They also found that the injury of which the plaintiff complained was not "in any way caused by his own fault, neglect, or negligence."

The Privy Council held that an order of the Supreme Court of Canada setting aside the verdict—on the ground that there was no exact proof of the fault which certainly caused the injury—must be reversed. Proof to that effect might be reasonably required in particular cases. It is not so where the accident is the work of a moment, and its origin and course incapable of being detected.

Hainer v. *G.T.R. Co.*, 36 Can. S.C.R. 180: In this case three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track and were struck by a passenger train coming from the opposite direction to that of the freight train, and killed. The passenger train was running at the rate of forty-five miles an hour, and it was snowing slightly at the time. On the trial of actions under "Lord Campbell's Act" against the railway company, the jury found that the death of the parties was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal, which held that the deceased had a right to cross the track, and there was no evidence of want of care on their part and the same could not be presumed, and though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved and their finding was justified.

In the case of *Rear* v. *Imperial Bank of Canada*, 13 B.C.R. 345, decided by the Court of Appeal for British Columbia in 1908, the facts were as follows:—A clerk of one bank presented at another bank a cheque of a customer of such last mentioned bank but at the wrong ledger keeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the cheque had no account.

Held, by the Court of Appeal (Irving, J., dissenting), that the trial judge was right in taking the case from the jury and dismissing the action for want of sufficient evidence. This decision was upheld by the Supreme Court of Canada, 42 Can. S.C.R. 222.

In *Beck* v. *C.N.R. Co.*, 2 A.L.R. 549, decided in 1910, the facts were as follows:—The deceased was a passenger on the defendant's railway. At a

Annotation.

certain point there was a defective bridge over which it was dangerous to run a train. At this bridge passengers were taken from one train and were obliged to walk across a part of the bridge and board another train at the opposite side. The defendant was intoxicated and asleep when the train arrived at the bridge. His companion shook him and told him it was time to transfer. The deceased paid no heed. As the passengers left the car, the conductor noticed the deceased and that he was drunk and asleep, but made no effort to wake him or to transfer him to the other train. Shortly after this, and while the train still stood on the bridge, one of the railway employees heard a splash in the water of the river. Some days afterwards the body of the deceased was found some 12 miles below the bridge. The face bore marks of a severe bruise, which was, according to the evidence of the coroner and undertaker, sustained before death. Harvey, J., at the trial, non-suited the plaintiff.

Held, on appeal (Stuart, J., dissenting), affirming the judgment of the trial judge, and distinguishing the cases of *McArthur* v. *Dominion Cartridge Co.* and *Hainer* v. *G.T.R. Co.*, *supra*, that there was no evidence to go to the jury that the death of the deceased was caused by any negligence of the defendant company.

Toll v. *Can. Pacific R. Co.*, 1 A.L.R. 318, 8 Can. Ry. Cas. 294 (1908), affirming 1 A.L.R. 244. *Held*, that in an action for negligence, it is not improper to receive evidence as to what may have been done by the defendants subsequently to remedy the defects or dangers complained of, but the jury should be warned that such evidence taken by itself is no evidence of negligence. If there be no other evidence of negligence the case should be withdrawn from the jury.

In the case of *McKenzie* v. *Township of Chilliwack*, 8 D.L.R. 692, [1912] A.C. 888, decided by the Privy Council in 1912, the facts were as follows:—The deceased was burned to death on October 27, 1906, while confined as a prisoner in a lock-up within the respondent's township. It was alleged that this was due to the negligence of the defendant in not causing some person to be constantly in and about the said building, and to be constantly in charge thereof. The question was, whether there was any evidence on the part of the defendants fit to be left to the jury. After much hesitation the trial judge left the case to the jury, who found negligence against the municipality and awarded damages. Subsequently, on motion for the defendants, the trial judge dismissed the action without costs, and this decision was upheld both by the Court of Appeal for British Columbia and the Privy Council, upon the ground that upon the facts proved at the trial there was no evidence whatsoever of negligence on the respondent's part fit to be left to the jury.

In *Root* v. *Vancouver Power Co.* (1912), 2 D.L.R. 303, 17 B.C.R. 203, the plaintiff was injured by sticking his pick in some dynamite in a tunnel of the defendant company. There was no evidence of how the dynamite happened to be there beyond the inference that it was from a previous blast, and the plaintiff did not shew that there had been no inspection after the blast. The jury gave a verdict for plaintiff on the ground, that as the defendant company had not proved that such inspection was made, they were therefore guilty of negligence. The trial judge set aside the verdict as a finding tantamount to negativing negligence, and as wrong in that it was an attempt to throw upon the defendant company the burden of disproving negligence

in the first place. This view was sustained by the Court of Appeal for British Columbia. **Annotation.**

Cooper v. *London Street R. Co.* (1913), 9 D.L.R. 368, 15 Can. Ry. Cas. 24. The Ontario Supreme Court (appellate division) held that where there is reasonable evidence upon the whole case, whether adduced by the plaintiff or the defendant, upon which the jury could find in the plaintiff's favour in an action of negligence, the case should not be withdrawn from them and a non-suit directed. In this case the facts were as follows: The plaintiff, an elderly woman, alighted from a street car of the defendant's, and in attempting to cross the road behind that car was struck by another car travelling in the opposite direction, and as she alleged at an excessive rate of speed. Meredith, J.A., in delivering the judgment of the Appellate Court, said that there were just two question raised: whether there was any evidence adduced at the trial upon which reasonable men could find as the jury did (1) that the defendants were guilty of negligence, and (2) that the plaintiff was not also guilty. In the opinion of the learned judge, there was evidence upon each point which precluded a non-suit or that each finding was supported by evidence upon which reasonable men might find as the jury did on each of these questions.

In *Cochran* v. *Lloyd*, 11 D.L.R. 721, decided by the Supreme Court of New Brunswick in 1913, it was held that the trial judge should not non-suit the plaintiff or withdraw the case from the jury where there is materialevidence as to the actual facts, but such evidence is conflicting, even although the evidence may be very strong on one side and weak on the other; or where the material primary facts are undisputed but two different inferences may be reasonably drawn by different minds from those facts; or whenever some ground exists on which a jury may reasonably find a verdict either way.

See also *Starratt* v. *Dominion Atlantic R. Co.* (1913), 11 D.L.R. 607, where it was held that where from all the evidence submitted the jury might reasonably have found the existence of the contract for the breach of which damages were claimed, it is error for the judge to take the case from the jury and to direct judgment for the defendant.

Maitland v. *Mackenzie* (1913), 13 D.L.R. 129, 28 O.L.R. 506. Held by the Ontario Supreme Court (appellate division) that an action for injuries received by a collision with an automobile cannot be taken from the jury where the circumstances create a statutory presumption under s. 7 of 8 Edw. VII. (Ont.) c. 53, R.S.O. 1914, c. 207, that loss or damage was sustained by the negligence or improper conduct of the owner or driver of an automobile on a highway, although evidence adduced in rebuttal of such presumption may preponderate.

Charles v. *Norton Griffiths Co. Ltd.* (1913), 15 D.L.R. 177, 18 B.C.R. 179. In this case a workman employed in building construction and conveying building material upon an uncaged elevator was crowded so close to the edge of the overloaded elevator that his heel projected and was caught and injured by coming in contact with the end of a bolt sunk in the wall of the elevator shaft. The court held that there was a *primâ facie* case to go to the jury, and it could not properly be withdrawn from their consideration. The jury might properly find upon the evidence that the proximate cause of the accident was the employer's failure to have the elevator caged for such work; or his negligence in leaving the bolts projecting in a dangerous way, and would not necessarily have to attribute the injury to the negligence of

Annotation. the fellow servant in charge of the elevator in permitting the overloading.

In *Ramsay* v. *Toronto R. Co.* (1913), 17 D.L.R. 220; 30 O.L.R. 127; Mulock, J., who delivered the judgment of the Appellate Court, reversing the judgment of Lennox, J., at the trial, applying the principle expressed in *Cooper* v. *London Street R. Co.*, *supra*, held that if the facts which are admitted are capable of two equally possible views which reasonable people may take, and one of them is more consistent with the case for one party than the other, it is the duty of the judge to let the jury decide between such conflicting views.

See *Dame Irwin* v. *Grand Trunk R. Co.*, 47 Que. S.C. 32, where the court held that in a trial before a jury for damages resulting from an accident, the presiding judge was not justified in withdrawing the case from the jury if there was some proof of negligence, even although that evidence was only made by presumptions. Also *Temple* v. *Montreal Tramways*, 23 D.L.R. 587 (1915), decided by the Quebec Court of Review, that under the Quebec practice it is sufficient to put to the jury the question whether there was negligence and in what it consisted, and it is not necessary to detail specific faults.

Villani v. *City of Montreal* (1916), 29 D.L.R. 321, 49 Que. S.C. 469. *Held*, that negligence is a mixed question of law and fact, and is, therefore, a proper subject to be determined by a jury under the court's instructions, their findings, if in accordance with the pleadings and evidence, are final and cannot be disturbed.

Pruett v. *G.T.R. Co.* (Can.), [1917] 2 W.W.R. 662. Held that wherever a plaintiff seeking damages from a jury for injuries alleged to have been caused by negligence, relies on more than one negligent act or omission, the trial judge should impress upon the jury that any alleged negligence not found will be taken to be negatived and that any negligence found, in order to avail the plaintiff, must also be found to have been a cause of the injury sustained.

Jackson v. *B.C. Electric R. Co.*, 38 D.L.R. 145 (B.C.): In an action for damages for negligence, s. 55 of the Supreme Court Act, R.S.B.C. c. 58, is not complied with, in a charge to the jury which states merely abstract principles of law; the jury must be told how that law should be applied to the facts as the jury finds them.

See also *Jones* v. *Canadian Pacific R. Co.* (1913), 13 D.L.R. 900; *Cottingham* v. *Longman*, 15 D.L.R. 296; *Thacker Singh* v. *C.P.R. Co.*, 15 D.L.R. 487; *Cook* v. *G.T.R. Co.*, 19 D.L.R. 600; *Owen* v. *Saults*, 28 D.L.R. 287.

These cases contain the important decisions affecting this branch of the law. The distinctions drawn are in many instances exceedingly fine. However clearly the law may be stated, there must be an element of uncertainty in non-suiting the plaintiff. This is apparent when we consider the respective functions of the judge and jury. The judge has power to non-suit on the ground that there is no evidence of negligence to go to the jury. To decide this he must necessarily be the judge of what is negligence before he can give an opinion that none exists, and yet the ordinary question submitted to the jury is "was the defendant guilty of negligence causing the plaintiff's injury?" The judge on a non-suit says, "there is no evidence of negligence." Is not this, after all, essentially the question for the jury? The question of negligence being one of degree, the tribunal that draws the line in the first instance must determine a negative, but in order to do so,

it strikes one forcibly that the affirmative must be relatively considered before a negative conclusion can be reached. **Annotation.**

There must be some criterion as to what is or is not negligence, and by that criterion the judge determines whether there is any evidence of negligence. Much will depend on what his mind adopts as negligence or the test of it. This is an affirmative act, and this would seem to be within the province of the jury. To the jury, the evidence may clearly establish the wrongful act or omission on the part of the defendant. It should be for them to decide. They are surely the judges of what constitutes negligence in fact. But the doctrine contained in the foregoing cases leaves it to the judge to fix his standard of what is negligence in fact, and also places on him the responsibility of saying the evidence does not fall within the lines of the standard and therefore is not evidence of negligence at all.

The action of negligence is peculiar and exceptional. It is impossible to distinguish the evidence from the negligence, because the negligence must be an inherent element of the facts proved. The question then is, "Do these facts show negligence?" This, one would think, ought to be a jury question, but the judge has the power to put the question another way, "Is there any evidence of negligence?" and applying his judgment to the facts before him, may say there is none and thus determine the case.

ROBERT BELL ENGINE & THRESHER Co. v. FARQUHARSON. **SASK.**

S. C.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

SALE (§ III C—15)—CONDITIONAL SALE—THREATENING PURCHASER—PURCHASER JUSTIFIED IN REGARDING SALE AS ENDED—RECOVERY OF PURCHASE PRICE.

Threatening the purchasers in a conditional sale of a chattel with serious consequences if they use it goes to the root of the contract and justifies the purchasers in regarding it as ended; the sellers cannot recover the purchase price.

APPEAL by defendant from a judgment of a trial judge in an action on promissory notes, given in payment of a chattel which the defendant had been forbidden to use. Reversed. **Statement.**

P. H. Gordon, for appellant; *F. L. Bastedo*, for respondent.

The judgment of the court was delivered by

LAMONT, J.:—The plaintiff's claim is upon two promissory notes for $200 each, one due December 1, 1914, and the other December 1, 1915. These notes were given on account of the purchase price of a separator sold by the plaintiffs to the defendant in September, 1913. **Lamont, J.**

The defence is, that the agreement, under which the notes were given, provided that the property in the title to the separator should remain in the plaintiffs until the notes were paid, but that, until default was made in the payment of the notes, the

SASK.

S. C.

ROBERT BELL ENGINE & THRESHER CO. v. FARQUHARSON.

Lamont, J.

defendants were to have possession of and the right to use the machine; that, before either of the notes became due, the plaintiffs by notice deprived the defendants of the use of the machine, and that this notice was accepted by the defendants as a determination of the contract.

The facts as disclosed by the evidence are: That in September, 1914, before either of the notes became due, the plaintiffs learned that the defendants had made some arrangement with one Caswell, to whom they were indebted, by which Caswell was to collect the earnings of the machine. Upon becoming aware of this fact, D. J. MacDonald, the plaintiffs' salesman and collector, called upon the defendants and demanded security for payment of the above notes. The defendants declared that the notes were not due, and refused to give security. On October 10, 1914, MacDonald, on behalf of the plaintiffs, sent the defendants the following notice:

Western Hotel, Eyebrow, Sask.

We are to notify you that after this date that you are not to operate the separator sold you last year until such time as you make a settlement with us for same. We know where the machine is and if moved from there we will make it a serious matter for you. D. J. MACDONALD, Moosejaw.

At the time of receiving this notice, the defendants were threshing on the farm of one Humphreys. After receiving it they did not operate the machine, nor did they even remove it from the place where it was sitting. They ceased operating on account of the instructions received in the letter.

The agreement provided that the plaintiffs should have the right to resume possession if the defendants made default in payment, or allowed any execution against them to remain unsatisfied, or if they refused to give security upon their land.

After sending the letter above referred to, the plaintiffs did nothing with the machine, but left it sitting just where the defendants left it. The evidence shews that it has now become worthless, by reason of having been stripped of all important parts.

The District Court Judge before whom the matter came held that the letter did not amount to a retaking of possession, that it was only a collector's bluff, and he gave judgment for the plaintiffs. From that judgment the defendants appeal.

The question to be determined is; Was the letter of October

10 such a repudiation of the contract as justified the defendants in considering it at an end, or did it constitute repossession of the machine under the terms of the agreement, or, was it simply a collector's bluff to which the defendants should have paid no attention?

The principles governing the right of one party to a contract to treat the contract at an end for breach by the other party of its provisions is laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, as follows: "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But, I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

See also *Rhymney R. Co.* v. *Brecon*, 49 W.R. 116.

Under the contract in this case, all that the defendants obtained was the possession of the separator and the right to its use. The letter of October 10 forbade them the use of the machine. If they could not use it, it was absolutely useless to them, for the sole object of its purpose was to use it in threshing. Deprivation of its use therefore went to the root of the contract and justified the defendants in considering the contract at an end, unless the contract itself gave the plaintiffs the right to deprive the defendants of its use. The contract did this only in case the plaintiffs repossessed the machine in accordance with the terms therein set out. In the result, it makes no difference, in my opinion, if the letter be held to amount to a repossession. If the defendants were justified in considering the contract at an end, and they so consider it, the contract became rescinded and no action can be maintained by the plaintiffs for the purchase money.

If the letter is held to constitute a repossession, the plaintiffs are in precisely the same position, because they cannot now restore the machine to the defendants in the condition in which it was on October 10, which they must be able to do in order to maintain an action for the balance of the purchase price.

SASK.

S. C.

ROBERT BELL ENGINE & THRESHER CO. v. FARQUHARSON.

Lamont, J.

In *Harris* v. *Dustin*, 1 Terr. L.R. 404, the court *en banc* of the North-West Territories held that the purchaser of an article under a sale conditioned upon the property in the article remaining in the vendor until paid for, was entitled to treat the contract as rescinded if the vendor took possession of the article and neglected to take proper care of it. In giving the judgment of the court, Wetmore, J., at p. 414, said:

> The question is, has the vendor so dealt with the article as to justify the buyer in considering that the vendor had rescinded the contract and in treating it accordingly? If the vendor wishes to hold the buyer to his agreement and enforce his claim against him for the price, he has simply the right to hold the article and he is bound to take care of it. The buyer has a right to insist that he shall not use it, and that he shall not allow other persons to do so, and that he shall take care of it. If he has got to take it back, he has a right to receive it just in the same condition as it was when taken out of his possession.

The separator in question in this action is now worthless and cannot be returned to the defendants in the same condition as it was when the letter was written. The plaintiffs therefore cannot recover the purchase money unpaid.

The argument that the letter of October 10 was merely an agent's bluff and should not have been taken seriously by the defendants cannot, in my opinion, be given effect to.

The plaintiffs having forbade the defendants the use of the machine and threatened them with serious consequences if they did use it, cannot now be heard to say that the defendants should not have believed them. The property in the separator was in the plaintiffs. It was their machine. Being their machine, they had ability to deprive the defendants of its use. They had agreed to allow them to use it until default was made in payment, but, if they refused to carry out the agreement, the defendants' remedy was damages for breach of contract; they could not compel the plaintiffs to let them have the use of the machine. The letter was a clear intimation that the plaintiffs were not going to be bound by their agreement to permit the defendants to use the machine until default was made in payment of the notes. Now they come into court and say, "We did not mean what our letter said; the defendants ought to have known that we didn't mean it." In my opinion they are bound by that letter, and, when the notice therein contained was acquiesced in by the defendants,

SASK.

S. C.

ROBERT BELL ENGINE & THRESHER CO. v. FARQUHARSON.

Lamont, J.

the agreement was at an end, and the action on the notes fails for want of consideration.

It was also urged that MacDonald had no authority as agent of the plaintiff company to send the letter of October 10, and that the company are therefore not bound by it.

This contention also fails. MacDonald's authority was to sell machines and collect the purchase money. The letter of October 10 was the assertion of a right which was to continue until the defendants made settlement. The obtaining of settlement being part of the agent's duty, MacDonald was certainly at least within the apparent scope of his authority in endeavouring to obtain the purchase money in that manner.

The appeal should, therefore be allowed with costs, the judgment below set aside and judgment entered for the defendants with costs.

Appeal allowed.

Re YOUNG AND GLANVILLES Ltd.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. April 5, 1918.

STATUTES (§ II A—95)—CALGARY CHARTER ACT—AMENDMENT—BY-LAW INTERPRETATION.

The Act to amend the Calgary Charter Act ((1917) Alta., c. 45, s. 19) which provides that a by-law to enforce the early closing of retail shops, shall, before coming into force, be submitted to the "electors" and carried by a "majority vote" of said electors requires that the by-law be carried by a majority of the electors actually voting, not of those entitled to vote.

A special provision of the legislature in regard to the submission of a by-law to the electors, avoids the necessity for compliance with the general provisions relating to the same class of by-law.

Statement.

MOTION to quash a conviction by a Police Magistrate under a by-law to regulate and govern the closing hours of retail shops in the City of Calgary.

A. M. Sinclair, for applicant; *W. T. D. Lathwell*, for informant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is a motion to quash a conviction made by the Police Magistrate of Calgary under by-law No. 1918, intituled: "A by-law to regulate and govern the closing hours of retail shops in the City of Calgary." It was passed on April 16, 1917. There was a somewhat similar previous by-law, No. 1875, and the second by-law contained a clause saying: "If any inconsistency shall exist between this by-law and by-law No. 1875, the provisions of this by-law shall prevail."

ALTA.

S. C.

RE YOUNG AND GLANVILLES LTD.

Beck, J.

The earlier by-law was passed in purported pursuance of the Early Closing Act (c. 23 of 1911-12).

S. 19 of c. 45 of 1917, an Act amending the Calgary Charter, enacted:—

19. Notwithstanding any provision contained in the Early Closing Act being c. 23 of the Statutes of Alberta 1911-12 and amendments thereto, the *city council* of the City of Calgary shall forthwith pass a by-law in accordance with the provisions of this section and put the same into effect, and the said by-law shall be and remain in effect up to and until September thirtieth, 1917;

Provided, however, that the said by-law shall be submitted to the *electors* of the said City of Calgary, entitled to vote for mayor, on the date of the annual elections for 1917, and upon being carried by a *majority vote* of the said *electors* the said by-law shall thereafter remain in full force and effect

Then follow provisions detailing the terms of the by-law to be passed by the council and eventually to be submitted to the electors.

Substantially the objections taken to the by-law are three:

(1) It is said that the proper interpretation of the provision quoted is that to effect the passing of the by-law there was necessary a vote of a majority of all the persons qualified as electors, or at least of all those registered as such, and not merely a majority of those electors who actually voted.

In the American work "Words & Phrases Judicially Defined" under titles, "Elector," "Qualified Elector," "Voter," "Majority," and in *Re Denny*, 51 L.R.A. 722, and *Jenkins* v. *Elgin*, 21 U.C.C.P. 325, a variety of expressions are found which are discussed. The intention of the legislature is variously interpreted. The interpretation of the same expression is properly influenced not only by its context but also by the time, place, circumstances and purpose of the vote. Taking the words isolated, there is a clear distinction made between "electors" and "voters." Where a vote is to be taken upon some subsidiary question at the same time and place as a regular election, the statutory provision sometimes makes it plain that there must in order to carry it be a majority vote in favor of the subsidiary measure of all those voting at the election, and not merely a majority of a lesser number voting on the subsidiary measure. In the legislative provisions in question here, it is contended that the intention is that, in order to carry the early closing by-law, there must have been the vote of a majority of all those entitled to vote. There is a

good deal to favour such a construction, but on the whole, I am not satisfied that the legislature intended more than that the by-law should be carried by a majority of the electors actually voting; anything more than this is so unusual that I feel satisfied that if it was intended it would have been made unquestionably clear; and, if I may be allowed to express an opinion, it seems to me that in a number of cases where a radical change in a long existing and approved system is proposed to be introduced some such guarantee that the new system is in truth the wish of the people to be subjected to it might well be required.

(2) Another exception taken to the by-law is that it is repugnant to the Factories Act ((1917), c. 20.)

It is to be noted that this Act was passed at the same session of the Legislature and assented to on the same day as the Act ((1917), c. 45) amending the Calgary Charter which imposed upon the city council of the City of Calgary the obligation of submitting the very by-law now in question to the electors of the city and declared that "upon being carried by a majority vote of the said electors the said by-law shall thereafter remain in full force and effect.

It is said that inconsistencies exist between the two; but if there are such inconsistencies that both cannot stand together—an enquiry into which I think it unnecessary to enter—the conclusion would, in my opinion, be not that contended for, but that the Factories Act, or its inconsistent provisions, would be ineffective within the limits of the City of Calgary in accordance with the principle embodied in the maxim *generalia specialibus non derogant*.

(3) The remaining objection to the by-law is the alleged omission of certain statutory requirements relating to the submission of this class of by-law as well as an incorrect designation of the number of the by-law. The by-law was as already stated passed by the council on April 16, 1917. This was in pursuance of the mandate of the legislature already mentioned. Presumably it was in actual operation from that time until September 30, 1917. Under these circumstances, it seems to me that the further mandate of the legislature that the said by-law should be submitted to the electors on the date of the annual elections for 1917, being a special provision, avoided the necessity for com-

ALTA.

S. C.

RE YOUNG AND GLANVILLES LTD.

Beck, J.

pliance with the general provisions relating to the same class of by-law, and that not more was required than that the electors should have notice, concurrently with the proper notice of the annual elections, that a vote would be taken upon the by-law in accordance with the legislative requirement—a notice which was in fact given, save for the error in number. The error was not one at all likely to mislead any one and the error was not carried into the ballot paper.

These being my views upon the questions raised, I would refuse the motion to quash with costs. *Motion refused.*

B. C.

S. C.

WESTERN UNION FIRE INS. Co. v. ALEXANDER, LOGGIN AND HOLMES.

British Columbia Supreme Court, Gregory, J. April 2, 1918.

COMPANIES (§ V F 2—253)—APPLICATION FOR SHARES—NO ALLOTMENT—TRANSFER OF OTHER SHARES—REPUDIATION—LIABILITY.

Persons who apply to a company for shares upon which application no allotment is made, but to whom shares originally issued to others are transferred, are not liable as contributories if they repudiate the shares promptly upon learning the facts.

Statement.

APPLICATION on the part of certain named individuals to vary the registrar's report placing them upon the list of contributories.

Maclean, K.C., for applicants; *Bourne*, for liquidator.

Gregory J.

GREGORY, J.:—The matter has been brought before me in a most unsatisfactory manner—first, on June 30, 1916, being the last day before vacation, and at the very end of an all-day sitting in chambers. For want of proper material, I directed a re-argument, and it is again on March 1, 1918, brought up, but, through some accident, the transcript of proceedings before the registrar is still missing. The following facts are, however, admitted:—

The above-named all stand in the same position. All applications were made direct to the company, through the General Securities Co., its fiscal agents, and were for shares in the capital stock of the company. No allotment of shares was ever made by the company; in fact, the company never dealt with the application, but the applicants eventually received share certificates for shares which had been previously allotted and issued to other persons, presumably the promoters of the company. The applicants

were duly registered on the books of the company as the owners of the respective shares so received by them. The company went into liquidation. The applicants did not learn, until after the liquidation, that they had never been allotted or received the shares they applied for, but had in fact received shares transferred from other shareholders. They lost no time in repudiating any liability.

Prior to the liquidation there had been two abortive attempts to re-organize the company, and, to facilitate such re-organization, the applicants had executed assignments or transfers in trust of their repective shares.

Maclean, for the applicants, relied on *Re Bankers Trust and Barnsley*, 21 D.L.R. 623, 21 B.C.R. 130; *Bankers Trust* v. *Okell*, 27 D.L.R. 63, 22 B.C.R. 436; and *Fitzherbert* v. *Dom. Bed Mfg. Co.*, 23 D.L.R. 125, 21 B.C.R. 226. Neither of the *Bankers Trust* cases appears to me to have any application to the present case, for, in each of them, the company had undertaken to issue shares which had no existence and so, naturally, there could have been no contract. In *Fitzherbert* v. *Dom. Bed Mfg. Co.* there had been no liquidation, and the contest was between the shareholders and the company, while here it is between the applicants and the liquidator representing the creditors of the company.

Bourne, for the liquidator, cited *Allan* v. *McLennan*, 23 B.C.R. 515, 31 D.L.R. 617, *Stone* v. *City & County Bank* (1877), 3 C.P.D. 282, and *Oakes* v. *Turquand* (1867), L.R. 2 H.L. 325.

He urged that *Allan* v. *McLennan* is indistinguishable from the present case in principle, and, therefore, the registrar's report must stand, but I came to the very opposite conclusion. He, I think, entirely overlooks the ground upon which the courts failed to grant Allan the relief he claimed against the bank. The trial judge stated that there was no direct contractual relation between Allan and the bank, and adds "the bank is a total stranger to the transaction in question;" and on appeal McPhillips, J., who was the only judge who discussed this phase of the question, said, at p. 625:

> The rescission, of course, in any case, would only have been as between the respondent (Allan) and McLennan. There was no contract between the respondent and the defendant bank to rescind.

B. C.

S. C.

WESTERN UNION FIRE INS. CO. v. ALEXANDER, LOGGIN AND HOLMES.

Gregory, J.

In that case there were circumstances which made Allan believe he was dealing directly with the bank and buying unissued shares, but the court held that, as a matter of fact, he was dealing with McLennan's agent for the purchase of McLennan's shares and he, though McLennan was an officer in it, had never authorized McLennan's agent to represent himself as the bank's, and so, of course, the bank could not be held responsible for the agent's representations, and the creditors of the bank would have the same right to hold the shareholder.

There was no contract between the bank and Allan; and in the case at bar there is no contract between the company and the defendants. It is true that, as in *International Casualty Co.* v. *Thompson* (1912), 48 Can. S.C.R. 167, 11 D.L.R. 634, an application had been made to the company for shares and shares had been received, but not the shares applied for, the application in that case, as here, had never been accepted by the company, or shares allotted by it, and as Duff, J., says, at p. 653: "there was no contract between the plaintiff and the company."

The case of *Fitzherbert* v. *Dom. Bed Mfg. Co.*, *supra*, is as to some of the shares there considered much like the present case; shares had been applied for and share certificates received; but they were for promoters' shares, not those applied for; the application had never been accepted by the company, and Macdonald, C.J.A., says, at p. 126: "The plaintiff's application to the defendant to be allotted 250 shares was not accepted, *and no contract* between them was made." And that is the position here.

It is urged that the fact that the company is in liquidation, and no steps to obtain relief were instituted until after the order for liquidation was made disentitles the applicants to relief on the ground that the rights of creditors have intervened, and it would be inequitable to grant relief now at the expense of the creditors, and no doubt that is the law in cases where there has been a direct contract between the company and the shareholders, although prior to liquidation the shareholder would have the right to have the contract set aside on the ground that there was misrepresentation or other fraud on the part of the company or its agents. Such contracts are held to be voidable, but they are voidable *contracts*, while here there is no contract at all. There is nothing to be either affirmed or avoided.

In *Oakes* v. *Turquand*, *supra*, there was a real contract though

voidable—the application for shares had been accepted and shares issued.

And so also there had been a direct application for shares, an allotment and issue in *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64; *Lawrence's* case (1867), L.R. 2 Ch. App. 412; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Taite's* case (1867), L.R. 3 Eq. 795; *Peel's* case (1867), L.R. 2 Ch. App. 674; in fact, in every case that I have looked at where the principle has been applied.

It is also argued that the applicants, having assigned their shares in the abortive efforts to effect a re-organization of the company, are now estopped from setting up that they are not shareholders; but I see no force in the argument; there is no contract between them and the company; and as soon as they became aware that the shares they had received were not part of the unissued capital, they promptly acted.

The registrar's report must be varied and the names of Alexander, Loggin and Holmes struck off the list of contributories.

Costs follow the event. *Report varied.*

REX. v. MARTIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. November 23, 1917.

INDIANS (§ I—1)—OFFENCES OUTSIDE RESERVATION—PUNISHMENT.

An Indian is punishable as other persons are for offences outside a reservation against provincial legislation.

Statement.

APPEAL by the defendant from an order of SUTHERLAND, J., in Chambers, of the 1st August, 1917, dismissing the defendant's motion for an order discharging him from close custody in the common gaol at Hamilton.

The appeal was based upon the following grounds:—

(1) That the evidence at the trial shewed the defendant to be an Indian, and so not subject to the Ontario Temperance Act.

(2) That the Judge in Chambers should not have rejected an affidavit shewing that the defendant was an Indian.

(3) That no distress warrant was issued nor any return made before the commitment of the defendant to gaol in default of sufficient distress.

(4) That the proceedings at the trial were contrary to natural justice, in that the defendant was not given an opportunity to make his defence.

ONT.

S. C.

REX v. MARTIN.

Meredith, C.J.C.P.

(5) That no authority to impose hard labour in default of payment of the fine imposed was given, nor did the magistrate's minute of conviction shew an award of hard labour.

J. B. Mackenzie, for appellant.

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

MEREDITH, C.J.C.P.:—The real question involved in this appeal is: whether the Ontario Temperance Act applies to Indians; for, if not, the magistrate who made the "conviction" in question was without jurisdiction; and so there is really no conviction; and the appellant should have been discharged from custody in these *habeas corpus* proceedings.

In such a case sec. 95* of the Act cannot prevent this Court from so ruling. That section applies to "an application to quash a conviction made under this Act;" but an act done without jurisdiction—by whatever name it may be called—cannot be a conviction under the Act; and no one can really think that the Legislature meant the section to apply to anything but a conviction made by a person having jurisdiction under the Act, for an offence within its provisions, committed by a person to whom it is applicable.

A general right of appeal to this Court, in *habeas corpus* proceedings, is given by the Ontario Habeas Corpus Act, R.S.O. 1914, ch. 84, sec. 8: a right curtailed by sec. 95 of the Ontario Temperance Act, but only in cases of convictions under that Act.

If, then, Indians be within the provisions of the Ontario Temperance Act, the conviction was one made under the Act, and sec. 95 deprives the appellant of the general right of appeal, because the certificate of the Attorney-General provided for in it has not been made.

That the appellant is an Indian was sufficiently proved at the trial, if such the proceedings before the magistrate can fairly be called; and, if it had not been so proved, there is no good reason why it might not be satisfactorily proved in these proceedings.

*95.—(1) An appeal to the Appellate Division of the Supreme Court shall lie from any judgment or decision of a Judge of the Supreme Court, upon any application to quash a conviction made under this Act, or to discharge a prisoner who is held in custody under any such conviction, whether such conviction is quashed or the prisoner discharged, or the application is refused; but no such appeal shall lie unless the Attorney-General of Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed.

There was no contest, of any kind, before the magistrate, upon that subject. Indeed I gather, from the report of the proceedings before him, that he was satisfied from the man's appearance that he was an Indian, and that he asked the question, "Are you an Indian?" only to have that which was apparent confirmed by the man's oath.

That an Indian who commits an offence against a provincial law, beyond the limits of an Indian reserve, may be convicted and punished just as all other persons may, is made plain by such cases as *Rex* v. *Hill*, 15 O.L.R. 406, and *Rex* v. *Beboning* (1908), 17 O.L.R. 23.

That being so, the appeal fails altogether: it is not open to this Court to entertain the appeal upon the other grounds relied upon by Mr. Mackenzie: they do not involve the question of jurisdiction which I have mentioned.

But, regarding the question of failure to attempt to levy by distress before imprisonment, I may point to the fact that for the offence of which the appellant is found guilty the penalty is a fine of not less than $200, "and in default of immediate payment" imprisonment for not less than three months: see secs. 58 and 41: and that secs. 101 and 102 have wide curative effect; and to the powers conferred upon magistrates by secs. 744 and 745 of the Criminal Code, made applicable to provincial officers by sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, which in turn is made applicable to the Ontario Temperance Act by sec. 72.

The appeal fails, and should be dismissed.

It is now—some length of time after the foregoing opinion was written—said that Mr. Mackenzie's perseverance has procured some sort of a consent from the Attorney-General of Ontario that the question whether an Indian is liable to the penalties of the Ontario Temperance Act may be considered in this case; but, for the reason before given, I do not consider any consent or certificate of the Attorney-General necessary for that purpose, and so do not stop to inquire whether such consent or certificate is a compliance with the provisions of sec. 95 of the Act.

RIDDELL, J.:—This is an omnibus motion, but it is in substance an appeal from the judgment of Mr. Justice Sutherland, reported in (1917) 40 O.L.R. 270. Riddell, J.

ONT.
S. C.
REX
v.
MARTIN.
Riddell, J.

Objection was taken that by sec. 95 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, no appeal lies "unless the Attorney-General of Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed." The Attorney-General has informed us that the question of the application of the Ontario Act to this defendant is of such importance. If I may say so without presumption, I think the decision of the Attorney-General most proper: while no one in such a position would desire to allow an appeal to be taken on technical objections or mere matters of form, the Government cannot desire that a conviction should stand where the convicted person is not in law under the prohibition of the law at all.

I would dismiss the appeal, if necessary, on the ground taken by Mr. Justice Sutherland, viz., that this defendant has not shewn that he is an "Indian" within the meaning of the Indian Act, R.S.C. 1906, ch. 81, sec. 137.

But, even had he shewn that he was "of Indian blood reputed to belong to a particular band," and so was an "Indian" within the meaning of sec. 137* of the Dominion Act, I do not think his case at all advanced.

We are bound by *Rex* v. *Hill*, 15 O.L.R. 406, to hold that an unenfranchised Indian is subject to provincial legislation in precisely the same way as a non-Indian, at least where, as here, he is out of his reservation; we also must hold that legislation such as the present is not legislation concerning Indians, however much Indians may be affected in common with the rest of His Majesty's subjects.

I think the language used by the Judicial Committee in *Canadian Pacific R.W. Co.* v. *Corporation of the Parish of Nôtre Dame de Bonsecours*, [1899] A.C. 367, 372, 373, may well be applied here *mutatis mutandis:*—

"The British North America Act, whilst it gives the legislative control of the Indian defendant *quâ* Indian to the Parliament

*Section 137 of the Indian Act provides that "every Indian or non-treaty Indian who . . . has in his possession . . . . any intoxicant, shall, on summary conviction . . . . be liable to imprisonment . . . . or to a penalty . . . . or to both penalty and imprisonment . . . ;" and, by sec. 2 (*f*), "Indian" means (among other things) "any male person of Indian blood reputed to belong to a particular band," and "non-treaty Indian" means "any person of Indian blood who is reputed to belong to an irregular band," etc.

of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. . . .It therefore appears . . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct *quâ* Indian would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *quâ* Indian, but provided generally that no one was to sell, etc., liquors, then the enactment would . . . . be a piece of legislation competent to the Legislature . . .," even though he—not in his status *quâ* Indian, but under the general words—should come within the prohibition.

In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

In *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, it was held that the Province could debar a Japanese from the franchise, although "naturalization and aliens" came within the powers of the Dominion.

It is not without significance that, were effect to be given to the defendant's contention, any Indian might sell or give any amount of intoxicating liquor anywhere in Ontario to any one who was not an "Indian" *simpliciter* or a "non-treaty Indian." It is obvious that the whole purpose and intent of the Dominion legislation is the protection of the Indian, who is believed to be peculiarly susceptible to, and likely to be injured by, the use of intoxicants. The Ontario legislation is for the protection of everybody in Ontario; and I do not think that the Dominion legislation is exclusive.

The defendant being no longer in custody, *habeas corpus* does not lie; *Re Bartels* (1907), 15 O.L.R. 205, 10 O.W.R. 553, and cases cited: *cf. Re Beck* (1916), 32 D.L.R. 15 (Court of Appeal, Manitoba).

I would dismiss the motion with costs.

LENNOX and ROSE, JJ., agreed in the result.

Lennox, J.
Rose, J.

Appeal and motion dismissed with costs.

N. S.

S. C.

KIZER v. MORSE.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ. March 12, 1918.

JUDGMENT (§ VI A—255)—MORTGAGE—REGISTRATION—NOTICE OF JUDGMENT—PRIORITY.

One who has actual notice of a judgment or compensation order cannot gain priority by obtaining a mortgage of the property and having it registered before the judgment or order has reached the registrar.

Statement. APPEAL from a decision of the trial Judge: that a mortgage cannot by registration gain priority over an unregistered compensation order (or judgment) of which the mortgagee had actual notice. Affirmed.

H. Mellish, K.C., for appellant; *J. Irvin*, K.C., for respondent.

Russell, J. RUSSELL, J.:—The plaintiff procured a compensation order on March 14, against one James F. Blinn, who had just been convicted of obtaining $71 from him by false pretences. The statute under which such an order is made gives it the same effect as a judgment. The order was initialled by the defendant who was the barrister by whom the prisoner had been defended. On the following day, with knowledge of the compensation order having been made, he took a mortgage from the prisoner for his fees and succeeded on placing it on the registry before the plaintiff's compensation order reached the registrar. The decision of the trial judge is that the mortgage cannot gain any priority over the compensation order of which the defendant had actual notice.

In *Tunstall* v. *Trappes*, 3 Sim. 286, 57 E.R. 1005, the headnote reads:—

> Notwithstanding the West Riding Registry Act directs that no judgment shall affect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it.

Shadwell, V.C., at the hearing, said, at p. 1013:—

> I had a general notion that where a party had notice of a judgment it would bind him, notwithstanding the express words of the Registry Acts. But I will not decide the point until I have had an opportunity to consider it.

On a subsequent day he said that notice to the solicitor was actual notice to the client and reaffirmed the view expressed on the former day.

It will be observed that the statute referred to in that case was much stronger against the judgment creditor than ours which merely enacts in affirmative terms that a judgment shall bind lands after registry. The statute in the case referred to by

Shadwell, V.C., said expressly that it should not bind land until registered, notwithstanding which it was held to have priority over a conveyance with actual notice.

The appeal must, therefore, be dismissed with costs.

LONGLEY, J.:—I concur.

DRYSDALE, J.:—This is a contest between a judgment creditor and a mortgagee. It seems that one Blinn was charged with receiving money under false pretences; that in connection with the criminal charge duly had under the Code Blinn was found guilty, and ordered to pay the money so falsely received; that after the judgment in the criminal court in which there did not seem to be any doubt about the money received, Blinn was adjudged to pay to the complainant the money. This contest arises over a circumstance that after judgment was delivered in the County Criminal Court Blinn took advantage of the situation, and having invested the money in real estate immediately subsequent to the judgment, mortgaged it to his solicitor, Morse, who took the mortgage with knowledge of all the circumstances.

It is contended in this connection that Mr. Morse, being counsel for the alleged criminal, accepted a mortgage on the real estate of Blinn intended to defeat the judgment of the court involving Blinn with the money. It is, I think, undoubted on the case that Blinn received the money under false pretences, invested it in land and mortgaged the land to his solicitor, who took the mortgage with full knowledge that the land represented the money fraudulently received, that is to say, the contest in this connection arises between the right of the mortgagee under the mortgage to claim priority as against the judgment rendered in the criminal suit against Blinn. I am not prepared to subscribe to the doctrine that the judgment in the criminal action before registration makes the judgment a lien, because, I think, that our legislation that directs when a judgment shall be a lien properly governs as against the English authorities cited. I think, however, that Mr. Morse, who is a party to all the transactions in the way of knowing what happened at the trial, should not get the benefit of the statute in asserting that his mortgage takes precedence of the recorded judgment.

I would decide that the mortgage to Morse should be decreed not to have precedence of the judgment in the criminal action.

Appeal dismissed.

ALTA.

S.C.

WILSON v. PATTERSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. April 5, 1918.

1. SPECIFIC PERFORMANCE (§ IA—9)—VENDOR AND PURCHASER—KNOWLEDGE THAT VENDOR CANNOT PERFORM.

Specific performance of an agreement for sale of land with abatement will not be granted where the vendor has expressly represented that he was not the owner of all the land conveyed and could not sell all of it without having his act ratified.

2. ASSIGNMENT (§ III—33)—VENDOR AND PURCHASER—DEFAULT OF PURCHASER—ABANDONMENT OF CONTRACT—ASSIGNMENT BY PURCHASER—RIGHTS OF ASSIGNEE.

A purchaser under an agreement of sale of land, who defaults under circumstances which justify the vendor in believing that the contract has been abandoned, cannot by making a merely speculative assignment of his interest place his assignee in any better position.

[See annotation 14 D.L.R. 503.]

Statement.

APPEAL from the judgment of Ives, J.

A. E. Dunlop and *W. V. Poapst*, for appellant.

W. S. Ball, for respondent.

Harvey, C.J.

HARVEY, C.J.:—In my opinion, the judgment of the trial judge, Ives, J., should not be disturbed, for the plaintiff cannot succeed.

The claim is for specific performance and the relief consequent thereon. The agreement included two and a quarter sections. The defendant is and was the owner in entirety of only one quarter and of a half interest in an additional section and a half, not having any interest whatever in the other two quarter sections.

This being shewn, the plaintiff who is the assignee from the original purchaser asks that he be given specific performance in respect to the interest which the defendant has with proper abatement of the purchase price. No doubt relief may be given in this form in a proper case, but this does not appear to be such a case.

The contract contains no covenant of title nor any provision for compensation.

The defendant swears that during the negotiations, and before the contract was completed, he told the purchaser that he did not own all the land. This is not controverted in any way and must be taken therefore as established.

In *Rudd* v. *Lascelles*, [1900] 1 Ch. 815, at 818, Farwell, J., said:—

In my opinion the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation,

rests on the equitable estoppel referred to in *Mortlock* v. *Buller*, 10 Ves. Jun. 292, 32 E.R. 857, namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety . . . This *cy près* execution was a purely equitable remedy. This view is borne out by the judgment of Giffard, L.J., in *Castle* v. *Wilkinson*, L.R. 5 Ch. 534.

In *Mortlock* v. *Buller*, *supra*, Lord Eldon, L.C., at p. 315, says:—

> If a man having partial interests in an estate chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have he has a right to that and to an abatement; and the court will not hear the objection by the vendor that the purchaser cannot have the whole.

The statement of Giffard, L.J., in *Castle* v. *Wilkinson*, at p. 537, is as follows:

> All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple.

Likewise in *Barker* v. *Cox* (1876), 4 Ch. D. 464, Bacon, V.C., at p. 469, says:

> The rule of court is plain, that if a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand.

It is apparent from these dicta that the right to obtain specific performance with abatement is limited to the cases where there is a representation of ability to convey. In the present case there was no such representation, express or implied, but, on the contrary, there was an express representation by the vendor that he was not the owner of all the land, and therefore could not sell all of it without having his act ratified. The contract was not to sell part, but to sell all, and while the courts have in effect made and enforced a different contract in the cases indicated it is apparently done only upon the principles specified.

I would, therefore, dismiss the appeal with costs.

ALTA.

S. C.

WILSON v. PATTERSON.

Stuart, J.

STUART, J.:—In this case the written agreement which was dated August 26, 1916, provided that the defendant vendor should sell to the plaintiff's assignor the land in question for the price and sum of $30 per acre to be paid as follows:—Five thousand dollars ($5,000) by a promissory note bearing even date herewith payable fifteen (15) days from date to the order of the vendor.

Subsequent payments were to be, first, the proceeds of the crop growing on the land from which certain specified expenses were to be deducted, these proceeds being estimated at $23,000 and, secondly, the balance was to be divided into 3 annual instalments. The agreement also contained the following provision:—

Whereas *the agreement between the parties was* that the said $5,000 represented by the note mentioned herein *was to have been paid in cash on this date and the purchaser is unable to procure* the cash for such payment; and whereas the vendor may lose an opportunity of selling the said land to other purchasers, it is agreed and understood between the parties that if for any reason the purchaser fails to fulfil his part of the agreement and make the payments as agreed upon on December 20, 1916, that he shall in any event pay the said $5,000 to the vendor which sum shall be forfeited to the vendor and the purchaser shall have no right to recover back the said $5,000 or any part thereof nor set up as a defence his failure to complete the purchase of the said land.

In my opinion, the only proper conclusion to be drawn from the words above quoted from the agreement is that, with respect to the payment of the note, time was intended by the parties to be of the essence of the agreement. The document itself says in effect that by their agreement (that is, plainly their oral agreement) it was intended that there should be a cash payment of $5,000 but that, as the purchaser could not pay immediately, it was provided in the agreement that the time for this down payment should be extended for fifteen days and a note given for it. Then the provision that even if the purchaser should never go on with subsequent payments his obligation to pay the $5,000 should still stand and that when paid it could never be recovered back, points clearly to the intention that the $5000 was to be considered as a pledge of good faith just as a deposit is considered.

In *Barclay* v. *Messenger*, 43 L.J. Ch. 449, Jessel, M.R., decided that where by an agreement time is originally made of the essence of the agreement an extension of the time to another definite date makes the substituted time also of the essence of the agreement. That decision has never been directly questioned as far as I can ascertain, although the decision in *Kilmer* v. *B.C.*

Orchard Lands Ltd., [1913] A.C. 319, 10 D.L.R. 172, as explained in *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, and *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, would appear to do so. But we have here a question not of the extension of a time fixed in the agreement and declared to be of the essence of the contract, but a question whether the time fixed in the agreement which was never extended was really intended to be of the essence. And upon that question we are looking at the words used in the agreement itself as expressing the reason why the particular limit of time was fixed.

The parties declare that it was originally intended that $5,000 was to be paid down. The down payment is always considered to be essential to the conclusion of the contractual relationship: *Cushing* v. *Knight*, 46 Can. S.C.R. 555, 6 D.L.R. 820. Then when the parties declare that as the purchaser was unable to pay the down payment at once it is agreed that 15 days shall be given for that payment, I think it is perfectly obvious that their real intention was that time should still be essential with respect to it. I do not consider it at all important that the additional form of a promissory note was provided for. It is very customary among people from the United States as is well-known. It may be said that on the face of the agreement it is said that the giving of the promissory note is to be payment. But that again is a question of the real intention of the parties as it can be gathered from the whole document, and it seems clear to me that it was by no means intended that the giving of the note was to constitute payment and that the obligation on the note was the sole form in which there existed any obligation to pay. It may be asked whether the purchaser could have insisted on title if he had paid everything else but the note. Could he have insisted that the purchase price had been paid or could the vendor not have still withheld title until he got his $5,000? Or if he had given title would he have had no lien whatever for unpaid purchase money? There is a separate and substantial agreement in the last clause that the purchaser "shall in any event pay the said $5,000." If it had been paid by the giving of the note what could that clause possibly mean?

It seems to me that it was clearly intended that the vendor could on his part insist on the payment of the note if he felt so

ALTA.

S. C.

WILSON v. PATTERSON.

Stuart, J.

inclined without necessarily being bound to complete the sale on his part if the purchaser had by his conduct deprived himself of the right to specific performance. The agreement refers to a reason for this. It is said that the vendor "may lose an opportunity of selling the said land to other purchasers." Can it be contended in the face of this expression that even though the note remained unpaid the vendor was still bound to refrain from selling to other purchasers, in other words, that he was still bound by the agreement? Or was the vendor bound to try and find out the whereabouts of a purchaser who had given him a fifteen day note for a down payment and then disappeared, and serve a notice upon him making time of the essence of the contract? I do not think the vendor was placed in that position by virtue of the agreement.

I do not fail, I think, to appreciate the force of the contrary argument which might be rested upon the terms of the concluding clause of the agreement, which is this: that obviously the parties intended the agreement to continue in force although the note was not paid at maturity because the words used seem so to indicate inasmuch as they speak of the possibility of a default on December 20th, and say that even if there is such a default (which could not be if the agreement did not continue) nevertheless the $5,000 must be paid. But this argument overlooks the obvious thought of the parties that they were creating a right of forfeiture. If the $5,000 had been paid in cash at the execution, they would have said, no doubt, that upon default in subsequent instalments the $5,000 should be forfeited. Then when they found themselves compelled owing to the purchaser having no money to pay down at all to substitute for such a down payment which would be subject to forfeiture for subsequent default, a mere obligation in a fifteen day note they clearly, it seems to me, were merely striving to create a forfeiture in another form namely, that the purchaser was to be bound by the obligation on the note even though in the event he got nothing whatever for it. And the fact that they provided for this forfeiture in case of a subsequent "default" should, in my opinion, be interpreted merely as a provision for the case of delay on the part of the vendor in suing upon the note, that is, if the time for filing a defence to an action upon it (and a "defence" is actually spoken

of in the clause) should happen to be later than Dec. 20th then the purchaser was not to be allowed to say as a defence that he had neither paid nor offered to pay on the 20th, that, therefore, the whole agreement, including the obligation on the note, was at an end.

Therefore, although there is undoubtedly much in the expressions used in the last clause to suggest the other view, I think, on the whole, that it was the intention of the parties that the $5,000 should be paid at the maturity of the note or otherwise the contract would be off just as in the case of a failure to pay a cash payment provided for in the agreement.

There are other things also in the agreement which, I think, support this view. Undoubtedly the parties intended that the grain, at the date of the agreement growing upon the land, should go with the land. The purchaser was to get the benefit of the proceeds and apply them on the purchase price. The agreement said:

> The vendor is to cut and stook the said grain and haul the same from the thresher to the railway or the granary as the case may be and shall be paid out of the proceeds of said grain before any amount is applied on the purchase price thereof the sum of $2.00 per acre for cutting and stooking and the sum of 1c. per bush. per mile for hauling the same.

Now, some things are to be observed with respect to this clause. The vendor is to cut and stook, and to get $2 an acre for it. Then he is not bound to do anything more apparently until the threshed grain is to be hauled to a railway or granary. Then he must haul it for 1c. per bush. per mile. Now it is surely pertinent to ask the question, who was to engage a thresher, pay for the threshing and haul the grain from the stooks to the threshing machine? There is no obligation upon the vendor to do any of these things. Neither is there any obligation upon the vendor to make the bargain for the sale of the grain. I quite perceive that it may be said that the parties obviously intended that the vendor should do all these unexpressed things, and bear the cost, except the threshing, himself. But it is to me at least not clear at all. Who really was to pay for the threshing? Ultimately it would be the purchaser if the cost of threshing was to be deducted before the amount of credit on the purchase price could be ascertained, because on this theory it would increase the ultimate amount he would have to pay. Then certainly

ALTA.

S. C.

WILSON v. PATTERSON.

Stuart, J.

he would be a person who was interested in making the threshing bargain. So also with respect to the sale of the grain. He was a person deeply interested in the price obtained. I can see nothing in the agreement authorizing the vendor to sell the grain when and how and to whom he pleased without reference to the purchaser. Neither am I at all clear as to who was to arrange for and pay for the threshing.

The agreement says that $23,000 was to be paid on or before 20th December, "a portion of which payment *shall be made* out of the crop now growing upon the said land." Does not this indicate that the purchaser was really to *do something* in the way of making a payment out of the crop, that is, that the crop was his, but he was to use the proceeds of it in the specified way, the proceeds thus being impressed with a charge in the vendor's favor? Then why was the vendor to become liable to a thresher in any way for the cost of threshing? The agreement does not charge him with the duty of threshing even in the first instance as it does with the duty of cutting, stooking and hauling.

These considerations point, in my mind, very strongly to the view that the purchaser was expected to be about the place as owner at least when threshing and selling was to be done, and it seems clear that he was not expected or intended to assume any such important position if he had not paid a cent upon the contracts and was in default upon his note.

The evidence shews that on December 20, the purchaser's assignee, the plaintiff, served a notice on the vendor demanding an account of the proceeds of the crop. Now generally a person who is liable to account is held to have known or to have been in duty bound to know if he did not actually know, while he was doing the things for which he should account, that he was bound to account. Did the vendor know when he was getting the grain threshed and was selling it that he was bound to account to his vanished purchaser? He had no means of knowing whether the man was ever going to turn up again or not, or whether he was acting for himself or for this other man. The service of this demand was, I am bound to say, just about as cool a demand in the circumstances as I could well imagine.

Even if time is not expressly made of the essence of the contract, the circumstances may be such as to shew that it was of

ALTA.

S. C.

WILSON v. PATTERSON.

Stuart, J.

the essence. Fry on Specific Performance, 5 ed., par. 1079-1086.

Considering all the circumstances to which I have adverted, and although there is undoubtedly much in the expressions used in the last clause of the agreement to suggest the other view, I think, on the whole, that in this case time was of the essence of the contract in respect of the payment of the $5,000 note just as in the ordinary case of the initial or down payment.

And, even if it were otherwise, I think, in any case, the circumstances, to which I have referred, are important in another aspect. The non-payment of the note, the total absence of communication by the defaulting purchaser either with respect to the note or with respect to the threshing and marketing of the grain, his entire disappearance and failure even to reveal his whereabouts seem to me to have justified the vendor in believing that the contract had been abandoned, and in threshing and selling the grain entirely as his own which he apparently did. The purchaser was able to write to his wife about October 1st, but he did not write to the defendant, and the evidence does not shew that his stroke occurred until after the maturity of the note.

Specific performance is an equitable remedy. I do not think the assignor was in a position to ask for the exercise of the equitable jurisdiction of the Court in his favour, and I do not think that by making a merely speculative assignment of his rights to the plaintiff he could put his assignee in any better position.

Since preparing the foregoing, I have read the judgment of the Chief Justice, in which I also fully concur.

I think the appeal should be dismissed with costs.

BECK, J., concurred with Harvey, C.J. Beck, J.

HYNDMAN, J., concurred with Stuart, J. Hyndman, J.

Appeal dismissed.

MAN.

C. A.

BIFROST v. HOUGHTON.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. March 25, 1918.

STATUTES (§ IG 2—82)—MUNICIPAL ASSESSMENT ACT (MAN.)—CONSTRUCTION OF—IMMATERIAL OMISSION—COMPARISON OF MANITOBA AND ONTARIO ACTS.

The Municipal Assessment Act (R.S.M. 1913, c. 134) although in part adopted from the Ontario Act, differs from it in that it contemplates that resident and non-resident owners shall be put upon a practical equality; the omission of the assessor to insert the word "non-resident" in the column for names of owners as required by s. 20 of the Manitoba Act is a formal not a material matter, and when the address is inserted after the name the defect is cured by s. 63 of the Act.

[*Berlin* v. *Grange*, 1 E. & A. 279, distinguished.]

Statement. APPEAL by plaintiff municipality from a judgment of Curran, J. dismissing an action to recover taxes. Reversed.

A. C. Campbell, for appellant; *M. G. Macneil*, for respondent.

The judgment of the court was delivered by

Cameron, J.A. CAMERON, J.A.:—The question for decision in the action is thus stated by the trial judge in his judgment: "In the 1912 roll in the second column headed 'name' he entered the defendant's name opposite each parcel, and in each of the columns headed 'occupant' and 'non-resident,' he placed a stroke which indicated that A. C. Houghton, the name in column 2, was an occupant and also a non-resident, an inconsistent and impossible condition. No entry at all is made in the column headed 'owner' in which, according to s. 20, the word 'non-resident' should have been written. In 1913 roll, the defendant's name is entered in the second column opposite each parcel of land, but no entries at all appear in the succeeding columns headed 'owner,' 'tenant,' 'occupant,' 'resident,' 'non-resident,' and 'owner' (name and address). The 1914 roll is the same as the 1913 roll in respect of the lack of entries in these columns. The omission in the 'owner' column of the word 'non-resident' is claimed by the defendant's counsel to be a fatal defect, because he contends that s. 20 is an imperative enactment."

Curran, J., expresses himself as strongly in favour of the plaintiff's moral right to recover, but felt constrained, in view of the decisions in several cases in which he cites, particularly the well-known case of *Berlin* v. *Grange*, 1 E. & A. 279, 286, to hold the action not maintainable.

It appears to be the fact that the defendant appeared before the Court of Revision to explain the facts as to the ownership of the lands, and to protest against the amount of the assessment.

The decision in *Berlin* v. *Grange* was based on the conclusion drawn from the wording of the Act there in question that the assessor had no right or authority whatever to place the name of a non-resident owner on the roll at all, unless such non-resident owner had given the notice required. The effect would be that the name, though on the roll, was the same as if not there, and therefore there could be no action against him. It is important therefore to examine these statutory provisions under which the land, but not the name, of a non-resident who has not given the notice required, was placed on the roll, and compare them with our own. The Act, c. 182, 16 Vict., under which *Berlin* v. *Grange*, was decided, makes clear provision for the duty of the assessor in making his entries on the roll in cases of non-resident owners of unoccupied lands. When he resides within the municipality, or resides outside the municipality and has given notice to the assessor that he desires to be assessed on the roll for such unoccupied lands, he is to be entered on the roll, but if not a resident, and he gives no such notice, such unoccupied lands (but not the names of owners), are to be entered and shall be designated "lands of non-residents" (s. 8). By s. 22 the assessors shall place the lands of non-resident owners, who have not required their names to be entered, to be entered separately under "non-resident lands." If the land is not sub-divided it shall be designated by its boundaries, and if subdivided, they shall do the same, unless they can obtain information as to the sub-divisions when they are to enter such lots by "their numbers and names (of the lots, that is) and without the names of the owners."

The above provisions were carried forward in the Ontario legislation, and are to be found, with modification, in the Ontario Act of 1877, to be found in Harrison's Municipal Manual. See ss. 3, 18, 19, 30. The law remained that the only power to assess the owner as owner, when a non-resident, was at his request. Harrison's Manual, p. 731. It was on these provisions that the decision in *Berlin* v. *Grange* and other cases was founded. The general curative clause in s. 26 of the Act of 15 Vict. (subsequently re-enacted and enlarged by s. 65 of the Act of 1877), was held not to apply where the assessor had exceeded his jurisdiction, and the subsequent confirmation of the roll by the Court of Revision was considered of no avail and as not precluding the owner from asserting the invalidity of his assessment.

MAN.

C. A.

BIFROST v. HOUGHTON.

Cameron, J.A.

It will be found on examination that our statutory provisions, which were in part adopted from the Ontario Act with alterations that render them somewhat obscure, are different. S. 12 of our Municipal Assessment Act, c. 134 R.S.M., provides that the assessor shall make an assessment roll after diligent enquiry and after his best judgment, in which he shall set forth all the information and particulars in order to comply with schedule A. in the case of a rural municipality. We have no such specific directions as are embodied in the Stat. of 16 Vict., s. 22, relating to non-resident lands. Nor have we the specific provisions contained in s. 14 of the Ontario Act of 1877. There we find clearly set out in the section itself the various particulars in detail to be set down by the assessor. The schedule in the Ontario Act applies only to cities, towns and villages. Col. 2 of the above s. 14, of the Ontario Act, requires to be set down the "name and post office address of the taxable party." Col. 6 requires to be set down the "name and address of the owner, where the party named in col. 2 is not the owner." Now schedule "A" in our Act is the form of the assessment roll for rural municipalities, and is to contain in col. 2 the "name"; in col. 8 is to indicate if "resident"; in col. 9 if "non-resident" and col. 10 if "owner" with name and address. Now what information must be set forth under "name," and what under "owner" in schedule A? This is not altogether plain, and the difficulty arises from the adoption by our legislature of the form prescribed by s. 14 of the Ontario Act of 1877 without including the further provisions in that Act for the separate and distinct assessment of non-resident lands, the owners of which have not signified their wish to be assessed. But if we look at the provisions of the Ontario Act, s. 14 above, and at the form given in schedule B of our Act, which is applicable to cities, towns and villages, I think we can see a solution of the difficulty. It was obviously not the intention of the legislature that identically the same information should be given under the columns "name "and "owner" in assessments of rural municipalities. It seems to me, therefore, that the intention of the legislature was that the assessor must, under s. 12, enter under "name" in the roll the name of the taxable party in the case of rural municipalities as in the case of cities, towns and villages, and that as in the Ontario Act under the column "owner" the name and address of the owner is to be given

when the party entered under "name" is not the owner. In entering the name of the owner where he did, therefore, the assessor in this case was duly complying with s. 12 of our Act.

Now s. 20 of our Act provides that in the case of lands of non-residents (whether occupied or not) the assessor shall insert the word "non-resident" in the column for names of owners (that is in the column marked "owner" not in the column marked "name") opposite the description of the lands, except where the Act requires the name to be entered. Where the lands are unoccupied, they *may*, by s. 23, be denominated "lands of non-residents" unless the owner resides in the municipality or gives notice. This notice is to be given to the clerk and a list of such persons is to be given by him to the assessor, but I find no further direction as to what he is to do with them except under s. 12. But in the case of unoccupied lands, owned by non-residents, there is no positive direction that the assessor shall enter them separately or differently in any respect from the lands of residents. All unoccupied lands, if the owner is outside the municipality, and does not give notice, *may* be assessed as "non-resident lands." But the assessor is given a discretion to act according to his best judgment. The Upper Canada and Ontario Acts contain the word "shall," see s. 14 of the Ontario Act of 1877, and s. 8 of 16 Vict., where the expression is "shall be denominated" lands of non-residents. So far as I can see, the assessor in this case was not going contrary to the express provisions of the Act in refusing to denominate these lands as the lands of a non-resident.

Our Act contemplates, as it seems to me, that resident and non-resident owners be put upon a practical equality. No separate place on the assessment roll is indicated in our Act where non-resident owners who have not given notice are to be grouped as they are in the upper Canada and Ontario Acts, with special information set forth. All owners, resident or non-resident, must be entered in the one roll consecutively with number, name and the other information. There are special provisions in the Upper Canada and Ontario Acts for the collection and application of the taxes of non-residents when these become overdue. Our Act makes no such provisions.

Let me further call attention to s. 17 of the Act of 16 Viet. By that section it is provided that when any non-resident who

MAN.

C. A.

BIFROST v. HOUGHTON.

Cameron, J.A.

requires his name to be entered the assessor shall enter his name and write opposite to it the words "non-resident" and no such non-resident shall be entitled to vote. There is nothing like it in our Act. The names of the non-residents have generally, if not universally, been entered as in such cases, and by s. 60 of the Municipal Act, owners, whether resident in the municipality or not, are electors. The list of electors is to be made up from the assessment roll under s. 3 of the Municipal Electors' Act. Upon reflection these last mentioned provisions are most important, and it evidently is contemplated that the names of all non-residents shall be entered on the assessment roll.

I would deduce from the foregoing considerations that the provisions in our Act with reference to non-resident owners are of no greater importance than the information as to religions, births, deaths, etc., and other information of a statistical character. In their results they have no practical importance. It seems to me that the assessor has complied with the Act in entering the name of the defendant as the taxable party and a non-resident in the assessment roll of 1912, and as to the omission to make the entry "non-resident" in the rolls for 1913 and 1914, that is merely formal and not a material matter, and is, I think cured by the entry of the address of the defendant as I point out later. The name of the defendant as the taxable party is there. I therefore am of the opinion that the decision in *Berlin* v. *Grange*, 1 E. & A. 279, and the other cases cited from the Ontario courts, do not apply in the light of the provisions of our Act, which differ so widely from those before the courts in those cases.

If however, I am in error in this, we have to consider the curative provisions in ss. 63 and 85, which are as follows:—

63. No assessment shall be invalid by reason of any defect in form, or by reason of omission of assessable property therefrom, or by error in any of the notices provided for in sections 64, 66 and 67, or by the non-return of the roll at the times specified, or by reason of any land occupied being wrongly entered as unoccupied or unoccupied land as occupied, or by reason of any land belonging to persons whose legal domicile or place of business, or the legal domicile or place of business of whose agent is in the municipality, or who have given the notice required by s. 23, being entered as land of non-residents or *vice versa*.

85. The assessment roll as finally passed by the court of revision shall, except in so far as the same may be further amended on appeal to a judge of a County Court having jurisdiction in the municipality, be in force, and be valid and binding on all parties concerned, notwithstanding any defect,

error or mis-statement committed in or with regard to such roll, or any defect, error or mis-statement in the notices required, or any omission to deliver, publish or transmit such notices.

S. 63 applies directly in the case of the assessment roll for 1912, where the defendant is designated as "occupant" and "non-resident." The entry under "occupant" can clearly be rejected. That the designation of non-resident does not appear under "owner" is surely immaterial. Strictly speaking this section would hardly cover in words the failure to enter the defendant as "non-resident" because in the cases of the assessment rolls of 1913 and 1914 there is no entry at all. But the evident intention is that such errors should be considered merely defects of form.

It is of importance to note in all cases on the assessment rolls, after the name of the plaintiff, his address is given, in 1912 under the column "address" "c/o Houghton Land Corpn. (Ltd.) Winnipeg," and in 1913 and 1914 the same entry appears. Surely this is an indication of the plaintiff's non-residence, to the same effect as if it were stated "lives outside the municipality" or "lives in Winnipeg," sufficient to comply with the terms of the Act.

S. 85 is substantially the same as s. 65 of the Ontario Act of 1877, which is taken from the Act of 16 Vict. s. 26.

The former view that provisions respecting taxation and the collection of taxes were confiscatory in their nature and therefore were to be most strictly construed has been radically changed by the decision of the Privy Council in *Toronto* v. *Russell*, [1908] A.C. 493. Before that time while the Canadian decisions had generally been in accordance with that in *Berlin* v. *Grange*, *supra*, favouring a meticulously strict construction of the governing statutes, they were not uniformly so. In *Scragg* v. *London*, 26 U.C.Q.B. 263, it was held by Hagarty, J., Draper, C.J., concurring, that a person assessed for property, exempt by statute from taxation, who has appealed to a Court of Revision, is bound by their decision. Alluding to the language of the statute there in question (our s. 85) he says: "Language more apparently indicating the establishment of a rule of decision to govern all cases, and bar all question as to the further liability to assessment, could, we think not easily be used." In *McCarrall* v. *Watkins*, 19 U.C.Q.B. 248, Robinson, C.J., held that the neglect to appeal precluded a party from raising the question as to the legality of his assessment after-

MAN.

C. A.

BIFROST v. HOUGHTON.

Cameron, J.A.

wards. The judgment of Hagarty, J., in *Scragg* v. *London*, was subsequently differed from by the Court of Appeal in *Nickle* v. *Douglas*, 37 U.C.Q.B. 51. The decision in *Haisley* v. *Somers*, 13 O.R. 600, was arrived at by Proudfoot, V.C., "with some hesitation."

But these decisions, based on the rule of strict construction, have, as I have stated, been overruled by the decision in *City of Toronto* v. *Russell*, the effect of which is thus stated by Duff, J., in *Cartwright* v. *Toronto*, 50 Can. S.C.R. 215, 219, 20 D.L.R. 189, at 192:—

> The effect of these passages in my judgment is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption, that all such statutes are *primâ facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provisions in such statutes must be construed . . . with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

I might call attention here to s. 13 of our Interpretation Act, c. 105 R.S.M. Every Act shall be deemed remedial and shall receive such fair, large and liberal construction as will best insure the attainment of the object of the Act, according to its true intent, meaning and spirit.

In *Minto* v. *Morrice*, 4 D.L.R. 435, 22 Man. L.R. 391, it was held that the requirement of the statute that if land is unpatented it is imperative that the assessment roll should so state and without that entry an action will not lie against the owners. The importance of this requirement is obvious, and the case has no application. It does not appear that *Toronto* v. *Russell*, [1908] A.C. 493, was cited on the argument.

In *McCutcheon* v. *Minitonas*, 7 D.L.R. 664, 22 Man. L.R. 681, 685, the court followed *Toronto* v. *Russell*. I ventured to state my opinion of the effect of that decision at p. 690: "that legislation is not to be regarded as vicious, but, on the contrary, as meritorious and beneficial, and the action of the person, properly liable to taxation in common with others, who undertakes to resist or escape from payment of his share of taxes, and thrusts the burden of them on his fellow citizens is not to be unduly favoured by the courts. These principles are to be gathered from the recent case of *Toronto* v. *Russell*, and, apart from the question of authority,

they commend themselves as founded on sound reasoning and on a due regard for the public interest.

It is true that in *Toronto* v. *Russell*, *supra*, *McCutcheon* v. *Minitonas*, *supra*, and *Cartwright* v. *Toronto*, *supra*, the judgments concerned legislation passed to cure possible defects in past transactions. But whether the curative legislation is retroactive or anticipatory in its character cannot affect in the slightest the principles underlying the legislation, which are to be applied in giving it its due effect.

I am, clearly, of the opinion, therefore, that the errors, omissions and misstatements on the assessment rolls in this case, and, after all, it comes down to the slight matter of the omission in the "owner" column of the word "non-resident" as the trial judge states, are effectively remedied by ss. 63 and 85 of the Act. This action is, therefore, in my judgment, properly brought, and judgment must be entered for the plaintiff for $513.99, being the net amount of the taxes for 1912, 1913, and 1914, without penalties. The judgment of the trial judge must be reversed and the appeal allowed with costs in this court and the King's Bench.

Appeal allowed.

Re NOVA SCOTIA TRAMWAYS AND POWER Co.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. March 12, 1918.

STREET RAILWAYS (§ I—1)—FRANCHISE—ACT INCORPORATING—TICKETS "FOR THE BENEFIT OF THE WORKING PEOPLE"—CONSTRUCTION.

The Act incorporating the Nova Scotia Tramways and Power Co. (N.S. Acts 1914, c. 180, s. 22, as amended by 1917, c. 53, s. 2) providing that the company shall "for the benefit of the working people" issue tickets at a certain price to be used during special hours, subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve; does not justify the Board in making an order requiring the company to issue such tickets for the benefit of any person presenting them who boards the cars during those hours.

Statement.

APPEAL by the Nova Scotia Tramways and Power Co. from an order of the Board of Commissioners of Public Utilities, requiring the company to issue tickets at a certain price for the use of "any person" between certain hours.

W. H. Covert, K.C., for appellant; *S. Jenks*, K.C., for the Board of Public Utilities; *B. W. Russell*, for the Trades and Labour Council.

N. S.

S. C.

RE NOVA SCOTIA TRAMWAYS AND POWER CO.

Russell, J.

RUSSELL, J.:—In the Act incorporating the Nova Scotia Tramways Co., Ltd., it was provided by s. 22, that within 3 months from the date of the conveyance from the predecessors of the company:

> The company shall for the benefit of the working people issue return tickets for use in the city of Halifax at a price to give eight single trips for twenty-five cents good one way during such hours of the day and for return during such hours of the day and subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve.

Under this provision, tickets were issued for use at an early hour in the morning when few persons other than "working people" would wish to make use of the cars. But the privilege was not in fact confined to working people because the loss to the company occasioned by the sale of such tickets to others than workers would be negligible, and it was not deemed worth while to discriminate between working people and other patrons of the service.

In 1917, the following clause was substituted for the clause referred to in the Act of 1914:

> The Nova Scotia Tramways and Power Co., Ltd., shall, for the benefit of the working people, issue tickets for use in the City of Halifax at a price to give eight single trips for twenty-five cents during such hours at noon and evenings and subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve.

Under this provision, an order has been made by the Board to the effect that tickets at the reduced rate must be received from anybody, whether belonging to the working classes or otherwise, who enters the cars of the company between 12 o'clock noon and 2 o'clock in the afternoon, or between 5 o'clock p.m. and 7 o'clock p.m. on weekdays with modifications of the regulation for Sundays. The decision is defended on the contention that, while the order is to be made for the benefit of the working people, it does not follow that the tickets issued under the provisions of the section should be used exclusively by the working people. It is argued that the Board may impose on the company a regulation for the benefit of the working people by providing for an undiscriminating reduction of the ordinary fares during those hours in which the cars are more likely to be used by the working people than during the remaining hours of the day. The contention is plausible, and it is enforced by the suggestion that if the legislature had intended to restrict the

contemplated issue of cheap tickets to the working people it was easy enough to say so. Yet I cannot come to the conclusion that it was the intention of the statute in the words used to empower the Board to extend the benefit of cheap transportation to the whole community without discrimination, during any hours they should see fit to select. If the phrases had been placed in a slightly different order the intention would appear more clearly that the privilege was to be confined to the "working people." If it had read: "The Nova Scotia Tram. Company shall issue tickets for the benefit of the working people for use in the City of Halifax" at a reduced price the meaning would appear to be clear that the working people, and they only, were intended to enjoy the privilege provided for. If the clause had provided that for the benefit of school children the company shall issue tickets for use in the City of Halifax at a reduced price, I think it would not be contended that a regulation would be justified in extending to the whole community the privilege of travelling on reduced fares during the hours when children were likely to be going to or returning from school.

It has been further argued that the Board had power under the Public Utilities Act to make such an order as it deemed just in respect to the fares to be charged on the cars of the company. To this the sufficient answer seems to be that the order in question here does not purport to be made under any such general authority and would not have been so made without a proper investigation. The order is made in execution of the authority conferred by s. 22 of the Act of 1914, as amended by the Act of 1917, and if it is not justified by that Act it cannot stand. My opinion is, for the reasons given, that it is not within the powers conferred upon the Board.

Drysdale, J.

DRYSDALE, J.:—This involved the decision of the Board of Commissioners of Public Utilities, and it seems that the Board of Commissioners authorized the tram company to issue tickets regardless of people during certain hours based on the idea that the tram company should issue tickets for the benefit of the working people at a reduced rate, and this notwithstanding hours or people. Under the statute the tram company shall issue tickets for the benefit of working people for use in the city at a price of eight single tickets for 25 cents. The interpretation

N. S.

S. C.

RE NOVA SCOTIA TRAMWAYS AND POWER CO.

Drysdale, J.

of the Commissioners seems to be that the Utilities Commission have taken upon themselves the right to say that, although the statute requires the company to issue tickets for the benefit of working people, they can say that as between themselves and all people they are complying with the statute when they direct that tickets shall be issued to all people at certain prices.

I am of opinion that the statute confines the Public Utilities Commission to make regulations respecting working people's tickets. In this we were pressed to say what a working people's ticket meant. I think it is no part of the duty of the court to interpret the statute as to what a working peoples' ticket means, and, for myself, I decline to define it. This, I think, is a matter between the company and the legislature. Undoubtedly the company is obliged to issue working people's tickets at a less rate than to the ordinary traveller, but who a working man may be within the Act is not a matter for the Courts unless it arises.

I think the Board of Utilities Commissioners exceeded its powers in giving sanction to the low rate to all people between certain hours.

Ritchie, E.J.

RITCHIE, E.J.:—This is an appeal from a decision and order made by the Nova Scotia Board of Commissioners of Public Utilities. The statutory enactment which is presented for consideration is as follows:—

> The Nova Scotia Tramways and Power Company, Limited, shall, for the benefit of the working people, issue tickets for use in the City of Halifax at a price to give eight single trips for twenty-five cents during such hours at noon and evenings and subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve.

Under this statutory authority the Board made the following order:—

> The Board orders and directs that the company shall from and after July 15, 1917, issue in strips of a distinguishing colour and sell for twenty-five cents, eight tickets each of which tickets shall be good for one trip in the City of Halifax to any person presenting the same who shall have boarded or entered a passenger car of the company within the following hours, to wit, between 12 o'clock noon and 2 o'clock p.m. and between 5 o'clock p.m. and 7 o'clock p.m. on week days; and between 12 o'clock noon and 10 minutes after 1 o'clock p.m. and between 5 o'clock p.m. and 10 minutes after 6 o'clock p.m. on Sunday.

This is the operative part of the order, and is, therefore, that which is appealed from.

It goes without saying, that the only authority which the

N. S.

S. C.

RE NOVA SCOTIA TRAMWAYS AND POWER CO.

Ritchie, E.J.

Board had to make the order is that which the statute gives them. The legislature has said in so many words that cheaper tickets are to be issued "for the benefit of the working people;" the Board has undertaken to say that the cheaper tickets are to be for the benefit of "any person presenting them."

It does not require argument to demonstrate that this order cannot be upheld; all that is necessary is to look at the statute, and it clearly appears that the Board in making the order have not followed its terms which make provision for cheaper tickets to "working people." The Board has gone beyond this, and provided in effect for cheaper tickets during certain hours for every man, woman and child in the city of Halifax.

The Deputy Attorney-General invited the court to define the words "working people." I think it would be unwise to make a pronouncement in advance before the question arises; definitions are dangerous things. If the company decide that a man is not a working man, and, therefore, refuse to sell him a ticket and an action is brought, it will then be the duty of the court to decide whether the company's construction of the words "working people" is right or wrong.

In my opinion the appeal should be allowed.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion of Drysdale, J.

Appeal allowed.

UNION BANK OF CANADA v. BENSON.

SASK.

S. C.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

BILLS AND NOTES (§ V 2—118)—BONÂ FIDE HOLDER—NOTE GIVEN FOR CHATTEL—CHATTEL DEFECTIVE—REJECTION BY PURCHASER.

The holder of a bill in due course for value is not affected by his knowledge at the time he acquired the bill that it was given for a chattel so defective as to justify the rejection thereof by the purchaser.

APPEAL by plaintiff from a judgment of a Dist. Ct. Judge in an action on a promissory note. Reversed.

The judgment of the court was delivered by

Elwood, J.

ELWOOD, J.A.:—The facts of this case material to this appeal, and as found by District Court Judge, are as follows:

The Hammond Stooker Ltd. manufactured a certain farm implement known as a stooker, which they sold to the Hammond Stooker Sales Co. composed of one man, H. R. Lyons. This company in turn appears to have sold these implements direct to farmers. The stooker manufactured in the year 1914 had

SASK.

S. C.

UNION BANK OF CANADA v. BENSON.

Elwood, J.

proved a failure. Some time prior to August 4, 1915, Lyons applied personally to the manager of the North End Branch of the plaintiff bank at Winnipeg for an advance or loan to enable him to carry on the business referred to. Although this manager of the bank had not previously done business with this man it appears that he was aware that these stookers had not been satisfactory in the year 1914, and advised Lyons, for that reason, that he did not care to handle the business. Lyons, however, went into the matter fully with the manager, and stated that, while the stookers had been a failure in the previous year, certain improvements had been made and the machine now did what it was claimed to do. Lyons confirmed his statement by producing a copy of an advertisement which he claimed had been accepted and published in the "Grain Growers Guide," a reliable journal issued in the interest of the farmer and which only accepted advertisements which were known through careful inquiry to be signed by trustworthy persons. Lyons also produced what purported to be a copy of the "Canadian Thresherman," giving a 2 page write-up on these stookers, and stating that the stooker had been tried out at an experimental farm and was highly satisfactory and would do the work claimed. On the strength of these statements the bank manager made no further inquiries, but agreed to accept the business, and made certain advances in cash to enable the company to purchase these stookers, and carry on the business. It was agreed that the stookers should be shipped to their destination, and that at the same time the Sales Company was to hand the plaintiff a sight draft for the cash payment attached to a bill of lading, and a straight promissory note, made out for signature in favour of the Sales Company, to be forwarded to its local branch, or some other local branch at the point where the stooker was shipped; the party making the purchase would then attend at the local bank, make the cash payment, sign the notes, receive the bill of lading, and, on presenting same, take delivery of the stooker which had been shipped to the order of the plaintiff.

When the note was returned to the bank at Winnipeg, the manager had the same endorsed by the Sales Company to the bank, which took possession of the same as collateral security for the moneys advanced. The hypothecation of this note as security was provided for under an agreement in writing.

SASK.

S. C.

UNION BANK OF CANADA v. BENSON.

Elwood, J.

The defendant says that he first saw this stooker at the office of the local agent of the company at Oxbow, Sask., and promised to purchase one provided it would work. There is no evidence of anything further having taken place until the defendant went to the bank, paid $25, signed the notes sued on, got the bill of lading and took delivery of the machine. The machine was subsequently found incomplete, and unfit to perform the work which it was intended to do, and the defendant returned the machine to the Sales Company, as he had a right to do. The notes were endorsed to the plaintiff, and on these notes this action was brought.

The District Court Judge held that the plaintiff, in view of the knowledge of its manager with respect to the working of the stookers in 1914, must be charged with knowledge that the stooker sold was unfit for the purpose for which it was purchased, and that the sale was invalid under the Farm Implement Act, c. 28 Stat. of Sask. (1915), and ordered judgment for the defendant, dismissing the plaintiff's claim with costs.

S. 58 of the Bills of Exchange Act, c. 119 R.S.C. (1906) is as follows:—

Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

2. Every holder of a bill is *prima facie* deemed to be a holder in due course; but if, in action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

The acceptance, issue and negotiation of the notes sued on was not affected with fraud, duress, force or fear, or illegality. At the most, there was a breach of warranty on the part of the Sales Company.

It was contended on behalf of the appellant that the effect of s. 4, c. 26 of the statutes of 1916 is to so amend s. 9 of the Farm Implement Act as to prevent a sale such as the one in question from being invalid.

In the view that I take of the matter, it is, however, not necessary to express any opinion on the effect of that amendment as applied to the circumstances of this particular case, because I have come to the conclusion that, even if the sale were invalid,

SASK.

S. C.

UNION BANK OF CANADA v. BENSON.

Elwood, J.

that would not affect the position of the plaintiff. It will be noted that s. 58 of the Bills of Exchange Act does not deal with invalidity, but illegality, and, clearly, the sale was not illegal, even if it were invalid. Assuming that the sale were invalid, then it seems to me that the plaintiff is not prevented from recovering. See *Fitch* v. *Jones*, 5 El. & Bl. 238, 119 E.R. 470, and *Lilley* v. *Rankin*, 56 L.J.Q.B. 248.

I am of the opinion that the plaintiff cannot be charged with any knowledge of the defects in the machine sold, but, even if it were to be charged with such knowledge, then, it seems to me, that the above case is ample authority for the proposition that the plaintiff having given value for the notes is not affected by such knowledge. There can be no question to my mind, under the facts, that plaintiff did give value, and was a holder in due course in good faith. The result is that, in my opinion, the appeal should be allowed with costs, and judgment entered for the plaintiff against the defendant for the plaintiff's claim and costs. *Appeal allowed.*

ALTA.

S. C.

MERCHANTS BANK v. THOMSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Simmons, JJ. April 8, 1918.

TRUSTS (§ 1 A—1)—CO-DEBTORS—MONEY RECEIVED FROM AND DEPOSITED IN BANK—CHEQUE DRAWN BY TRUSTEE—PAYABLE TO DRAWER AS AGAINST LIQUIDATOR.

Money received from certain co-debtors, and deposited in a bank, against which the trustee has drawn a cheque, is impressed with a trust and is payable to the drawer as against the liquidator of the trustee.

Statement.

APPEAL by defendant from the judgment of Hyndman, J., at the trial in an action to recover money in a bank. Affirmed.

N. D. Maclean, for appellant; *S. B. Woods*, K.C., and *S. W. Field*, for respondent.

Harvey, C.J.

HARVEY, C.J., concurred with Beck, J.

Stuart, J.

STUART, J.:—I agree that this appeal ought to be dismissed with costs. There is nothing in the evidence to shew the date upon which the winding-up order in England was made nor even when, exactly, the receiver was appointed. This was, I think, a matter of defence, and in the circumstances, we ought to assume that the cheque was presented to the Bank of Montreal before either of these events occurred. It was, if I remember rightly, suggested

on the argument that the receiver had been appointed before the dishonour of the cheque and it may be that this was intended to be taken as admitted. In any case I think the date of the appointment of the receiver was immaterial.

There is no doubt that the plaintiff was entitled to judgment against the Canadian Agency Ltd. for the amount of the cheque. See Bills of Exchange Act, s. 130 (*a*). But mere judgment against the Canadian Agency Ltd. is not now, of course, sufficient for the plaintiff's purpose, owing to the winding-up proceedings. The plaintiff wishes to secure the actual fund which lies in the Bank of Montreal.

The simple position is that Evans and Cairns owed the plaintiff some money. The former personally and the latter by his agent, the Western Canada Mortgage Co. Ltd., placed the necessary funds in the hands of the Canadian Agency Ltd. in order that the latter might pay the two debts. The Canadian Agency Ltd. deposited the funds in their current account in the Bank of Montreal and gave the plaintiff a cheque for the amount. The Canadian Agency Ltd., in forwarding this cheque, stated, though not very accurately, the purpose for which it was sent. They themselves owed the plaintiff the same amount and their letter left it open to the plaintiff to believe that it was their own debt they were paying and not that of Evans and Cairns. But notwithstanding this, I think the effect of what was done was to impress the money in the hands of the Bank of Montreal with a trust in favour of the plaintiff. Neither Evans, Cairns, nor the Western Canada Mortgage Co. Ltd. ever did withdraw their substantial direction to the Canadian Agency Ltd. to hand the money over to the plaintiff. The Canadian Agency Ltd. held the money for that express purpose. They put it in a bank where it still is and gave an order on that bank to pay it to the plaintiff which order was presented to the bank. It seems to me to be impossible now to say that the plaintiff has no claim upon the specific money. Equity regards that as done which should have been done. There is no doubt that, so far as the material discloses, the Bank of Montreal should have paid the cheque.

There is no claim made by the defendant liquidator that the money should be made available for the general body of the creditors of the insolvent company. No such defence is raised

ALTA.

S. C.

MERCHANTS BANK v. THOMSON.

Stuart, J.

in the pleadings and I think it should be disregarded. With regard to the contention that the money was paid to the Canadian Agency Ltd. because it was money really due to them and not either to Eby or to his assignee, I think the true position was that under the agreement of May 25, 1911, Cairns and Evans had a right to pay their share to the vendor directly, or, at any rate, a right so to control their own money as to be certain that it reached the vendor. This, I think, they did when they paid their money to the Canadian Agency Ltd. Their payments were made upon the undoubted understanding that the very money handed over should be sent on to the vendor or his assignee. The Canadian Agency Ltd. had made no payment at all when Cairns and Evans gave it their money and, therefore, there is no support upon the facts for the theory advanced that they were merely paying a debt which they owed to the Canadian Agency Ltd.

Furthermore, it may, perhaps, not be irrelevant to point out that the plaintiffs proved all the facts alleged in their statement of claim and that this Appellate Division, in an unreported decision, has already decided that these facts constitute a good cause of action. There would, therefore, certainly, to say the least, be a grave inconsistency in coming to any other decision now.

Simmons, J.

SIMMONS, J., concurred with Stuart, J.

Beck, J.

BECK, J.:—This is an appeal from Hyndman, J., given at the trial.

The judgment was in favour of the plaintiff bank, which was declared to be entitled to a certain sum of money lying to the credit of the Canadian Agency Ltd. in the Bank of Montreal. The facts are as follows:—

O. M. Biggar became the purchaser of certain land under agreement dated June 7, 1911, from one Eby. Biggar immediately made a declaration of trust declaring that he held the land in trust for the Canadian Agency Ltd., that company having paid the first instalment payable under the agreement of purchase and having agreed to indemnify him against all further liability on the agreement. The purchase price was $47,134.50, payable $11,783.62 down and the balance in 5 equal annual instalments of $7,070.17 on June 7, 1912, '13, '14, '15, '16, with interest at 7%.

As expressed in a document which bears date May 25, 1911, but which clearly was executed not earlier than June 30, 1911.

the Canadian Agency Ltd. assigned 40% of its interest in the lands mentioned to one Cairns and 10% to one Evans, these assignees assuming a proportionate liability under the agreement of purchase, and doubtless refunding a like proportion of the instalment already paid. To this document the Western Canada Mortgage Co. Ltd. was a party and agreed to advance as required the moneys required to meet Cairns' share of the purchase money as the instalments fell due.

Accompanied by a memorandum dated September 30, 1913, signed by himself, Eby, the vendor, deposited with the Merchants Bank at Battleford, Saskatchewan, the Biggar agreement together with the duplicate certificate of title for the lands comprised in it, and assigned all moneys payable under the agreement to the bank. This assignment was made as security for an indebtedness owing by Eby to the bank. The assignment contained a power of attorney in favour of the bank manager at Battleford authorizing him to enforce the agreement and transfer the land, etc.

The dispute in this case is over moneys provided for the payment of the instalment of purchase money which fell due on June 7, 1914, namely, principal, $7,070.17; interest, $1,484.73; total $8,554.90; of which there was payable by: the Canadian Agency Ltd., 50%, $4,277.45; Evans, 10%, $855.49; Western Canada Mortgage Co., for Cairns, 40%, $3,421.96; total $8,554.90.

Evans was manager of the Canadian Agency Ltd. and president of Western Canada Co. Ltd. The Canadian Agency Ltd. kept several accounts in the Bank of Montreal, Edmonton, distinguished by numbers and used, doubtless, with full knowledge of the bank for several separate designated purposes.

The ordinary current account of the Canadian Agency Ltd. was No. 1 account; No. 3 account was the account of the moneys belonging to the Western Canada Mortgage Co.

Had there been sufficient moneys to the credit of account No. 1, Evans, doubtless, as on previous occasions, would have issued a cheque upon that account payable to the Merchants Bank, Battleford, for the whole sum of $8,554.90. That not being so, what he did was this: On Saturday June 6, the day before the payment was due, he issued his own personal cheque on the Bank of Montreal, Edmonton, for his share of the amount, $885.49; he also, as representing the Western Canada Mortgage Co., issued an

ALTA.

S. C.

MERCHANTS BANK v. THOMSON.

Beck, J.

office *præcipe* directing the issue of a cheque on the Canadian Agency Co. account No. 3, in favour of the Canadian Agency Ltd. for $3,421.96, indicating that it was for 40% of payment due Eby on June 7; and he also caused a cheque to be issued by the Canadian Agency Ltd. against account No. 1 payable to the order of the Merchants Bank, Battleford, for $4,277.45, and on the same day sent it (not marked or certified), to the Merchants Bank, Battleford, enclosed in a letter written in the name of the Canadian Agency Ltd. reading as follows:—

Enclosed please find our cheque for $4,277.45. This is just half the amount which is due to Mr. Eby on June 7 and which you have given notice to Mr. Biggar has been assigned to you. It is really a syndicate that is interested in this property and the owners of the half interest in that syndicate have not yet put us in funds to meet their share of the payment. We presume you will grant us a reasonable extension while we are communicating with them on the subject.

Notwithstanding that the terms of this letter did not fit the facts, it is not questioned that the cheque enclosed was the means adopted to transmit not the Canadian Agency's own money but the moneys deposited with it to pay the other half of that instalment.

Evans' cheque for $855.49 was deposited to the account No. 1 of the Canadian Agency and paid on Monday June 8; so also the Canadian Agency cheque on account No. 3 for $3,421.96, being the Western Canada Mortgage Co. or Cairns' share.

The Canadian Agency cheque on account No. 1 for $4,277.45, sent by Evans to the Merchants Bank in the letter of June 6, was transmitted by the Merchants Bank, Battleford, to its branch at Edmonton and though stamped "Merchants Bank of Canada; Paid. June 10, 1914. Third teller. Edmonton, Alta." was on presentation to the Bank of Montreal, Edmonton, "refused payment" and has never been paid.

The claim of the plaintiff the Merchants Bank is that the money the proceeds of Evans' cheque $855.49 and the Canadian Agency account No. 3 for $3,421.96 deposited in the Canadian Agency account No. 1, as being moneys paid to the Canadian Agency for the express purpose of paying to the Merchants Bank as assignees of Eby, is one-half of the instalment payable on June 7, by Biggar to Eby.

It seems to me that the position taken by the plaintiff bank is sound. The money represented by the two cheques was placed

ALTA.

S. C.

MERCHANTS BANK v. THOMSON.

Beck, J.

in the hands of the Canadian Agency for a specific purpose. Possibly if the matter had gone no further the depositors might have requested a return of the money and the deposit might properly have been looked upon as constituting a mere agency. But when, the deposit having been made for a specific purpose, that purpose was so far carried out that (1) the money deposited was sent by way of cheque to the designated beneficiary; (2) the money deposited was placed to the credit of the bank account against which the cheque was drawn for the purpose of meeting the cheque and (3) that money was lying to the credit of that account when the cheque was presented, there can, I think, be no question that the affair had passed beyond the stage of agency into that of a trust, which was irrevocable and effective.

It seems to me that the principles involved are quite clear and call for no extended reference to the authorities. The questions, as well as the authorities referred to during the argument, are discussed in Godfroi on Trusts, 3rd ed., c. 6. The first proposition is that a complete disposition, whether by way of gift or trust, is irrevocable. To this there is an apparent exception, namely, that if there is an assignment for the benefit of all or a body of creditors, such an assignment is to be deemed a trust in name only, a revocable mandate of agency, until a beneficiary has accepted the benefit of the trust which he may do by acquiescing in its provisions. The authorities urged upon us by the appellant seem all to fall under the so called exception rather than the rule, and in any event there is no suggestion of a revocation.

I think the plaintiff was entitled to succeed. The trial judge has so found. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

GERMAN v. CITY OF OTTAWA.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

NEGLIGENCE (§ 1 D—70)—SLIPPERY SIDEWALK—FAILURE TO SAND OR HARROW.

Failure to sand or harrow a slippery sidewalk before 9 a.m. when the conditions requiring it only arose on that morning is not "gross negligence," for which a city is liable under the Ontario Municipal Institutions Act, R.S.O. 1914, c. 192, s. 460(3).

[34 D.L.R. 632, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 34 D.L.R. 632, 39 O.L.R. 176, reversing the judgment at the trial in favour of the plaintiff.

CAN.

S. C.

GERMAN v. CITY OF OTTAWA.

Idington, J.

Belcourt, K.C., for appellant; *Proctor*, for respondent.

FITZPATRICK, C.J. (dissenting).—I concur with Idington, J.

DAVIES, J.—I concur with Anglin, J.

IDINGTON, J. (dissenting):—The trial judge gave effect to the claim of the plaintiff by finding that the respondent had been grossly negligent of its duty in relation to the ice on the sidewalk which caused the appellant to fall and thereby suffer serious injury. The Court of Appeal reversed that decision and much was made of the opinion judgments of the Chief Justice in appeal and of Lennox, J., on the part of the court, relative to the question of what constitutes gross negligence within the meaning of the Municipal Act, s. 460, sub-s. 3.

Meredith, C.J., in attempting to define what might be claimed as and to define "gross negligence," said:—

> If the same condition of the sidewalk, or a like condition, as that which existed when the respondent fell upon it had continued for a considerable number of days, negligence, and even gross negligence, would have been proved if that condition could practicably have been prevented.

I cannot agree with this definition, and to the implications therein when applied to streets in a thickly populated part of a city like Ottawa.

In every case in which the term "gross negligence" has to be considered, regard must be had to all surrounding circumstances in which the city or municipality is placed in relation to the work in question and the reasonable requirement for prompt and efficient service in relation to the maintenance thereof in good repair. What might be gross negligence in a densely populated part of a city like Ottawa might not be gross negligence, or perhaps negligence at all, in a rural municipality possessed of a highway over which there might not be a traveller for days at a time.

Parties concerned in litigation dependent upon the section in question might be well advised on either side to be ready to present more direct evidence of the surrounding facts and circumstances than are made clearly to appear in this case. What exists of common knowledge available to a judge and what inferences may be drawn from the evidence that was given I think must be held sufficient in this case to enable us to pass upon the judgment in question.

At all events I think the trial judge must be presumed to have been in quite as good a position to determine the crucial fact

of whether there was "gross negligence" or not as any appellate court. We have some evidence as to the extent of Ottawa and some general knowledge of the size and general character of the city, and I think we may also be able to use our stock of common knowledge relative to the vicissitudes of climatic conditions in Ottawa.

Along with that we have evidence directly bearing upon the conditions existent in what is sometimes referred to in Canada as a January thaw.

It is explained that on Monday there was rain and thaw as there had been for 5 or 6 days preceding it. On Tuesday there seemed to come a change which any rational human being fit to appreciate the fact and to be in the service of the city in charge of a large part of its streets ought to have recognized immediately a freezing temperature which in all human probability, following the rain of Monday and preceding days, would render the sidewalks in Ottawa on Wednesday morning what the witnesses have referred to as a "glare of ice."

The evidence of the foreman and other witnesses seems to put beyond doubt the facts that whilst there were nine men engaged on Monday and a corresponding team force for the district in which the sidewalk in question exists, there were assigned to the duty there to be done on the Wednesday on which the accident took place only five men and little, if any, team force.

Then it is to be observed that it is conclusively proven that it was raining very much on Monday, some of the respondent's witnesses going so far as to say that it had been raining all day on Monday, and others saying 24 hours rain on Monday, and others again that the sidewalks in some places were flooded. I incline to think some of the expressions relative to the extent of the amount of rain and thaw on Monday were possibly exaggerated, yet I cannot get rid of the impression that it was one of those days when the sanding process would result in little good by reason of the rain and thaw washing it away. Whether washed away or not, certainly the conditions of Monday and the preceding days were clearly likely to prepare for the condition of things that did happen, of a freezing up on Tuesday afternoon and night which demanded, instead of a relaxing of effort and reduction of the staff of men to half of those engaged on Monday,

CAN.

S. C.

GERMAN v. CITY OF OTTAWA.

Idington, J.

that there should have been an effort to increase them, or at all events keep the force going.

A perusal of the entire evidence in the case leaves my mind much puzzled with what the foreman in charge of the sidewalk in question really was about.

The assistant city engineer tells of the force over the city having been doubled for these three days including Wednesday.

The city's street superintendent gives the figures for the entire city shewing the employment of 53 men on Monday and a corresponding increase in team force, that on Tuesday there were 51 men and 16 horses and sleighs, and that on Wednesday there were only 45 men and 17 horses and sleighs.

It would be obvious from the consideration of these figures that the reduction of man force over the entire city would seem to have come almost entirely out of the force employed for St. George's Ward. Why there should be this remarkable falling off under the circumstances when it did not seem to occur to other superintendents to do anything like that (but on the contrary practically to maintain their whole force) is not explained and is inexplicable upon any other ground than that there was gross negligence on the part of those concerned in failing to appreciate the conditions they had to contend with on Wednesday morning.

The evidence is most unsatisfactory as to what they were doing on Wednesday and does not in any manner explain away the evidence of the appellant and Mr. Burns as to the condition of the street they had to travel on.

It is made clear by Mr. Burns that from the moment he stepped out of his house and took a survey of the street and the sidewalk, that he decided the centre of the road was the safest place to go on account of the ice on the sidewalk. I think evidence of that kind is of unquestionable force and worth a great many guesses on the part of civic employees as to what they thought they possibly did on that day, or some other day, or what they must have happened to be doing by reason of something else having happened.

Just by way of illustration of how that part of the city was being attended to I may refer to the evidence of Mr. Chapleau, who was called for the defence. He tells us that he had 'phoned to the city hall to have some water removed from the street in order that he might get out of his house by other means than by laying down a

plank to travel upon. His 'phoning brought no response in the way of service until the next day.

That incident, to my mind, illustrates what were the probable conditions permeating the force at the time in question. But not only that day but for eight years previously had Mr. Chapleau had occasion to make the like call, and yet in face of such experiences spread out upon the record in this case, counsel for the city sees fit to make it a ground of complaint against appellant that neither he nor Mr. Burns had called the attention of the city authorities to the state of the sidewalk.

Perhaps this incident and Mr. Chapleau's experience illustrate better than anything else in the case how wretchedly in some parts of the city the business of taking charge of the sidewalks has been managed. And I think it is from incidents like that that inferences may be drawn as to the general condition of the service.

If that fairly illustrates the nature of the service that was being given, then so much more reason for finding that there was gross negligence. We are furnished by witnesses for the defence with evidence of the kind of energy that was expected to be applied when sanding the sidewalk would be of any avail. They would seem to have been required to get up at two o'clock in the morning and be on duty at five o'clock, as they swear they were on Sunday night and Monday morning.

The changed condition on Tuesday afternoon and night demanded something akin to the like energy on Wednesday morning if the people were to be permitted to use the sidewalks with safety.

No doubt many thousands have to tread the streets of Ottawa between 6 and 7 o'clock in the morning, and so on at various times till the hour when men like the plaintiff and the civil service part of the population proceed to work. Yet we are told, and it is conclusively established, I think, that there was no sanding done upon the sidewalk in question before nine o'clock on the day of the accident, and I doubt if there ever was that day. If that does not constitute "gross negligence" under such circumstances what would? It certainly would not have been "gross negligence" for the pathmaster in a country district to have delayed that long, but for a city such as Ottawa to be told that it is permitted

CAN.

S. C.

GERMAN v. CITY OF OTTAWA.

Idington, J.

by statute to neglect a service so obviously needed for the safety and comfort of those using its streets is, I most respectfully submit, to encourage that neglect of duty, only too obviously often apparent on the part of municipal authorities in our Canadian towns and cities.

Again, with great respect, I submit that Lennox, J., was under a misapprehesion of fact when he speaks of what was done as follows:—

> It is shewn that a double force was employed, that the fires were lighted at two o'clock and the men and teams were at work on the streets by four o'clock on Monday morning and kept regularly on at work until the time of and after the accident, doing all that they could do, and as to ordinary level streets doing more, I venture to think, than the statute demands.

It was admitted in argument as already stated that this force which was applied on Monday was cut down on Wednesday morning to consist of 5 men instead of 9. I fear there has been a misapprehension in the court below of the actual facts as they appear when properly analyzed, and hence the reversal of the trial judge's judgment.

The conditions on Wednesday, I repeat, demanded more men, more sand and more energy. The battle on that morning was not the hopeless task that the men were sent to face on Monday, if the description of things that some give is correct, but it was a condition of things that required prompt energetic action with sand or harrowing or whatever might produce the best result most speedily, and enable the citizens to travel the streets at the time of day they needed them.

I think the judgment appealed from should be reversed, and that of the trial judge be restored with costs throughout.

Duff, J.

DUFF, J.,—The appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Seriously injured by falling on an icy sidewalk on the south side of Besserer St., east of Charlotte St., in the City of Ottawa, "a trifle after 9 o'clock" on the morning of Wednesday, February 2, 1916, the plaintiff recovered judgment against the municipal corporation for $2,250 damages after a trial before Britton, J. That judgment was unanimously reversed, and the action dismissed by the Second Appellate Division. The plaintiff now appeals to this court. Our right and our duty to review the evidence, to form our own conclusions upon it, and to reverse the judgment of the provincial appellate court, if satisfied that upon

the whole case the respondent should be held liable, is undoubted. But it must clearly appear that the judgment of the Appellate Division was erroneous before we can reverse it. *Demers* v. *Montreal Steam Laundry Co.*, 27 Can. S.C.R. 537.

In Ottawa the municipal corporation does not, as is the case in many other Ontario cities, impose upon property owners the duty of dealing with snow and ice so that the sidewalks on which their property fronts shall be kept passable and reasonably safe for pedestrians. It undertakes to perform that work itself. The system adopted is to remove the snow by horsedrawn plows and to deal with danger from slippery surfaces by harrowing them or sanding them. As the trial judge said:

> The city has a difficult and expensive proposition, involving the expenditure of large sums of money to keep miles of streets in a reasonably safe condition.

As said in the Appellate Division by the Chief Justice of the Common Pleas, a judge of many years' experience:

> It was well proved and not denied that the appellants' methods and means for the performance of this duty were good. I should have no hesitation in saying, more than such as are ordinarily provided, and during this exceptional week, ending on the day of the accident, the usual road-gang had been doubled, and according to the testimony of those connected with it, testimony that is not questioned by other testimony or by any circumstances, there had been unusual vigilance and care during that trying weather.

As put by Mr. Justice Lennox:

> It is not pretended that the appellants did not make reasonable and careful preparation in advance to meet winter conditions, or that their system was improper or inadequate. This was not a sidewalk of exceptional character nor was it a place of peculiar hazard. It was like other miles and miles of streets in Ottawa, a level, ordinary walk.

The plaintiff's complaint is not that the system was defective, but that there was gross negligence on the part of civic employees, as put by the trial judge: "in not doing what it was intended should be done."

That at the time of the unfortunate occurrence the sidewalk was in an extremely dangerous condition is not controverted. Whether the failure of the city employees to prevent that condition arising or to remove it before 9 a.m. on Wednesday, February 2, amounted to "gross negligence" (defined by this court as "very great negligence"; *Kingston* v. *Drennan*, 27 Can. S.C.R. 46, at 60); which is the statutory condition of the defendants' liability (R.S.O. c. 192, s. 460 (3)), is, therefore, the vital question

CAN.
S. C.
GERMAN
v.
CITY OF
OTTAWA.
Anglin, J.

involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it. It is obvious that the state of the weather immediately prior to the accident, and the relative situation of the place where it occurred must be taken into account in determining whether there was such a failure to take advantage of reasonable opportunity to prevent or remove the admitted danger, as amounted to gross negligence.

There is no direct evidence that the city's servants had any actual or specific notice of the existence of the danger at the locus of the accident. But it would be absurd to suggest that they should not have realized at least the probability, if not the certainty, of its existence from early on Wednesday morning. Having regard, however, to the preceding weather conditions, it is also practically certain that similar danger must have existed at a great number of other places upon the five hundred miles of sidewalks in the city—of which some forty or fifty miles were in St. George's Ward—many of them carrying much heavier traffic and therefore more urgently demanding attention than the part of Besserer St. in question, near the eastern limit of the city, upon which traffic is comparatively light. As stated, there is nothing in the record to suggest that this place was one of special hazard which called for preferential care or treatment. In view of these facts and assuming the adequacy of the city's system, which is not attacked, if the duty to remove the danger at the point in question arose only on the Wednesday, I should not be prepared to hold that failure to fulfil it before 9 o'clock in the morning was such gross negligence as entailed liability to the plaintiff. As put by the ward street foreman, Hackland: "St. George's Ward has a lot of hills and we have to sand them oftener than we sand the level streets. . . . We were looking for dangerous spots and probably had not reached that spot," *i.e.*, where the plaintiff fell.

I have not overlooked the fact that the nine men who had been employed on Monday and Tuesday were reduced to five on Wednesday morning. This may have been a mistake. But there is no evidence that if the services of the nine had been retained the place in question would or should have been reached

by the sanding men before 9 o'clock on Wednesday morning. I rather think it would not, as places where there is heavy traffic and hills where danger is to be expected demanded attention first. The reduction of the staff, if negligence at all, has not been shewn to have caused the accident, and I think that in any case it probably could not be designated "gross negligence." If, therefore, there was not gross negligence in the failure to sand or harrow the spot in question if the condition requiring it only arose on the Wednesday morning, it becomes material to consider the evidence of the conditions which prevailed on the preceding days, and especially on the Tuesday, in order to determine whether sanding or harrowing should have been done on that day.

The plaintiff himself says that for 6 days before he was injured there had been rain on and off, and his witness Burns says: "It was raining for 3 or 4 days around that period . . . a very heavy downpour of rain."

Although the plaintiff and Burns both stated that there had been no attempt to sand the sidewalks on Besserer St. east of Charlotte St. for 6 or 7 days before the accident, I am satisfied that they were mistaken. The positive and clear testimony of Lewis and Sauvé convinces me that they sanded these sidewalks on Monday, January 31. The evidence establishes that it rained heavily on that day, and it is quite possible that the sand had been washed away or, more likely still, that it had sunk to the bottom of the water lying on the sidewalks and had thus disappeared before the plaintiff and Mr. Burns, who presumably went down town early in the morning, returned later in the day—possibly after dark in the afternoon or evening—or that it escaped their attention for some other reason. I am equally satisfied that the sanding done on Monday, however efficient at the time, proved wholly ineffectual to prevent the condition of glare ice which undoubtedly existed on Wednesday morning. No doubt because he realized that if the duty to sand or to harrow arose only on the morning of the accident, it would be almost impossible to maintain that there had been any negligence on the part of the civic employees—still less gross negligence—Mr. Belcourt strenuously contended that sanding should have been done on Tuesday, and, in order to establish this, he insisted that on that day there was frost and that, at all events in the after-

CAN.
S. C.
GERMAN
v.
CITY OF
OTTAWA.
Anglin, J.

noon, the sidewalks were frozen up. The plaintiff's own statement is that it began to get colder on Monday or Tuesday. The great weight of evidence, however, is that the thaw continued on Tuesday. The official weather record from 8 p.m. Monday to 8 p.m. Tuesday is:—Night, overcast and mild; Day, cloudy, clearing, wind and a little colder—temperature, maximum, 41°: minimum, 26° Fahrenheit. From 8 p.m. Tuesday to 8 p.m. Wednesday:—temperature, maximum, 26°, minimum, 12°; and Thursday, temperature, zero. This record of a steadily falling thermometer makes it clear that the frost began some time before 8 p.m. on Tuesday and warrants the inference, in my opinion, that it began about nightfall. This conclusion is borne out by the statement of the plaintiff's witness, Burns, that "it turned cold on Tuesday night." The foreman, Hackland, says, "it was tightening up a little that day." During Tuesday his men were engaged in opening gully grates, digging trenches to let water off the sidewalks, picking bad spots and doing some sanding.

S. J. Chapleau, who resides on the north side of Besserer St., about opposite where the plaintiff fell, tells us that there was "a lot of water" on the sidewalk opposite his house, and that on the Wednesday morning he had to procure a plank in order to cross this water when leaving his house. It was let off by a trench dug later on that day by city workmen in compliance with a request made by Chapleau at noon on the previous day.

While there is no evidence that it rained on Tuesday, it would seem not improbable that there was water on the sidewalks so that sanding or harrowing them would have been futile. The sand would have sunk to the bottom of the water and the grooves made by harrowing would have been filled up. As put by the Chief Justice of the Common Pleas:

> There is no evidence that sanding on Monday or on Tuesday would have prevented the condition existing at the time of the accident. So too, as to harrowing, the marks would be washed out or filled in by the rain or melted snow and ice each day and frozen over each night, . . . What (sand) was not washed off would have sunk in the water and be useless in the morning, if put there even the day before.

Referring to the sanding done on the Monday, the trial judge said:

> It may well be that water flowing from the south or following a rain froze over the sand so that none was in sight, and was not then of any use to render the walk more safe for persons walking on the street.

There is nothing to shew that sanding done on the Tuesday would not have been equally ineffecutal. In my opinion the evidence rather indicates that it would.

Making due allowance for the exceptional weather conditions with which the civic employees had to contend, I am not convinced that the conclusion of the Appellate Division, that it was not established that the dangerous condition of the place where the plaintiff fell was attributable to gross negligence on the part of the defendants' servants, is so clearly erroneous that we should reverse it. On the contrary, an independent study of the evidence has led me to the same conclusion.

Appeal dismissed.

ROBINSON v. DODGE.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A.
March 25, 1918.

NEGLIGENCE (§ I C 2—50)—TRAIL OVER PRIVATE PROPERTY—FENCING PROPERTY—DUTY OF OWNER TO USERS.

A person using a trail over private property, and over which the public has acquired no right of way, is a bare licensee and the only duty of the owner of the premises towards him is to give him warning of any concealed danger or trap of which the owner knows; the construction of a barbed wire fence along the boundary of the land is not in the nature of a trap.

APPEAL by defendant from a county court judgment, in an action for injuries caused by driving into barbed wire enclosing a trail over private property. Reversed. Statement.

H. V. Hudson, for appellant; *P. C. Locke*, for respondent.

PERDUE, J.A.:—The plaintiff in this action claims compensation for injuries caused to his wife, horse and buggy, in an accident occasioned by the building of a barbed-wire fence by defendant across a trail. The defendant obtained a lease of a block of land in the village of Darlingford to be used for pasture. One of the terms of the lease was that defendant should fence the land. He obtained possession on May 14, 1917, and on the following day he commenced building a barbed wire fence around the block. There was a trail across the land which the public had used for some 14 years. The defendant ran his barbed-wire fence across the trail on the west and north boundaries of the land. There was a good public road along both these sides. The fence was completed on Saturday, May 19. Defendant Perdue, J.A.

MAN.

C. A.

ROBINSON v. DODGE.

Perdue, J.A.

put a tin can and a piece of canvas on the fence where it crossed the trail on the west side, and hung an old coat on the fence where it crossed the trail on the north side. The plaintiff, with his wife and child, was driving home in a buggy from the village after dark on Saturday night, and turned on to the trail on the west side of the road. He was not aware of the fence and did not see it, having entered the village by another trail. His horse struck the fence and went through it, breaking three strands of wire. The buggy was overturned, and the plaintiff's wife received injuries which incapacitated her for some time, and caused expenditure for medical services. The horse was cut by the barbed-wire and the buggy was injured.

No permission appears to have been given to drive over the trail in question. The owner of the land, the defendant's landlord, says that he constantly warned people not to use it. Clearly the public had acquired no right of way over the land. They followed the common practice in this province of taking a short cut over vacant land, without asking permission to do so. Persons so doing are at the highest bare licensees. Those who were forbidden to drive over the land became trespassers. The highest claim that the plaintiff could shew to the use of the trail was a mere tacit permission on the part of the owners of the land. This might make him a licensee, but it gives him no right. It would constitute an excuse or license for being upon the land so that he might not be regarded as a trespasser. See *Bolch* v. *Smith*, 7 H. & N. 736. In the case of a bare licensee, the only duty of the owner of the premises towards him is to give him warning of any concealed danger of which the owner actually knows. *Gautret* v. *Egerton*, L.R. 2 C.P. 371; *Latham* v. *Johnson*, [1913] 1 K.B. 398. The occupier of the land must not place a trap upon the land. I cannot consent to the argument that the construction of the barbed-wire fence along the boundary of the land was in the nature of a trap. The plaintiff was bound to use ordinary care when driving along the highway. He was bound to use extra care when he left the highway in the night time intending to drive across the land occupied by the defendant. Plaintiff evidently drove into the fence at considerable speed. He broke a gap right through the fence so that a man who came after him drove through it without difficulty. In the daylight

the fence could readily have been seen and an accident avoided. The fact that the plaintiff chose to drive along the trail in the dark, when he could not see obstructions, does not assist him. He made the attempt at his own peril; *Latham* v. *Johnston*, *supra*, at p. 411.

It was argued for the plaintiff that the use of barbed-wire was the employment of something dangerous in its nature, and liable to do harm to any man or animal coming in contact with it, that it was in fact similar to the use of a spring gun, or the placing of a dangerous animal in a field which persons were in the habit of crossing. I cannot, however, regard the erection of a barbed-wire fence by the occupier along the boundary of his land for the purpose of protecting it as improper or in excess of his lawful rights. I take the following passage from Salmond on Torts, 4th ed., p. 406:

> Although it is not lawful to defend one's land by means of a spring gun or a mine of dynamite, it is lawful to protect it by means of spikes or broken glass upon the top of a wall, or by a barbed-wire fence, or by a dog accustomed to bite mankind, unless, presumably, the dog is so savage and so powerful as to be likely to cause serious bodily harm.

The use of barbed-wire for fencing is almost universal in this province. I could not justify myself in holding that it is a dangerous material to use in constructing a fence for the protection of land. To use it for fencing purposes along public highways in a city or town, where it might cause injury to passers-by, might be objectionable. But in the present case the fence was erected around land which was to be used for pasture, and was in fact farm land. There was no intention on the part of the defendant to injure anyone. He was compelled to fence his land, and he chose barbed-wire as the most readily available and efficient material for the purpose. I would refer to the remarks of Holmes, J., giving the judgment of the Supreme Judicial Court of Massachusstts in *Quigley* v. *Clough*, 53 N.E.R. 884, in discussing the use of barbed-wire for fences. Defendant in the present case attempted to give warning that the fence had been constructed across the trail. In daylight the means of warning he adopted, although crude, would no doubt have been sufficient, but on a dark night nothing except a light would have been effectual. Was he bound to undergo that trouble and expense to keep persons off his land who had no right to

MAN.

C. A.

ROBINSON v. DODGE.

Perdue, J.A.

Cameron, J.A.

be there? I can find no authority for answering the question in the affirmative.

I would allow the appeal, set aside the judgment in the County Court, and enter a judgment for the defendant. The defendant is entitled to costs in the County Court, and to the costs of the appeal.

CAMERON, J.A., (after setting out the facts) said: The law governing the liability of the owners and occupiers of premises to trespassers, licensees and invitees respectively has frequently been discussed in courts of England. The cases of *Deane* v. *Clayton*, 7 Taunt. 489, 129 E.R. 196, *Bird* v. *Holbrook*, 4 Bing. 628, 130 E.R. 911; and *Hott* v. *Wilkes*, 3 B. & Ald. 304, 106 E.R. 674; *Hounsell* v. *Smyth*, 7 C.B.N.S. 731, 141 E.R. 1003; and *Wilkinson* v. *Fairrie*, 1 H. & C. 633, are frequently referred to.

In *Lewis* v. *Ronald*, 101 L.T. 534, the plaintiff, a fishmonger's assistant, was delivering fish to a tenant of the defendant. He had never been on the premises before and was injured by falling down a staircase in the dark. It was held by the County Court Judge there was no evidence of negligence, inasmuch as there was no invitation to the plaintiff to walk down a staircase which was in darkness. This was affirmed on appeal. Darling, J., says, p. 537: "I can see no invitation to anybody to walk about on the staircase when it is not lighted. As Lord Blackburn said in the earlier case, he chose to do it." In this *Lewis* v. *Ronald* case, the County Court Judge, whose decision was upheld, laid down the following principles, which strike me as deserving consideration:

> To say then that the person deliberately entering a place which is in absolute darkness can never recover is going too far; but there must at least be evidence that the entry in these circumstances was at the invitation or with the knowledge of the defendant, or should have been anticipated by him, and also evidence of a condition of things which the plaintiff could not reasonably have expected.

This view was adopted by the Divisional Court of Appeal, and it seems to me a convincing statement of the evidence required on the part of the plaintiff to establish his case in such circumstances.

The law is exhaustively reviewed and its principles are authoritatively set forth in *Latham* v. *Johnson*, [1913] 1 K.B. 398, by Farwell and Hamilton, L.JJ. There a child was injured by the

fall of a stone on the lands of the defendants to which the public were allowed access, and it was held that the defendants were not liable. It was stated by Farwell, L.J., that in the case of a licensee the grant to go upon land creates no right, but merely affords an answer to the charge of trespass.

> It is a mere permission, and those who take it must take it with all chances of meeting with accidents, p. 404.

And he cites with approval the dictum of Willes, J., in *Gautret* v. *Egerton*, L.R. 2 C.P. 371:

> To create a cause of action, something like fraud must be shewn . . . To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty.

It is said by Hamilton, L.J., at p. 411:

> The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious, they run the risk of them. In darkness, where they cannot see whether there is danger or not, if they will walk, they walk at their peril.

It will be noticed that the principles laid down in this case apply with much force to the facts now before us.

It is the fact that barbed wire is extensively and commonly used for fencing in the rural parts of this province where timber is scarce. According to the evidence, on several of the lots in Darlingford, barbed wire was used for fencing, and in other cases Paige fencing and tough wire, facts which must have been known to all in the vicinity. Such fences are constantly in course of construction upon premises not heretofore fenced. It is a matter of no surprise to one driving over a prarie trail to find it blocked by a barbed wire fence. There is little vacant land in the province (outside the municipalities where their erection may be prohibited) that is not liable at any time to be enclosed with barbed wire fencing. The defendant had spent 5 days in constructing this fence, visible for a considerable distance to anyone who chose to look in its direction. He says he knew it had been used by the public "occasionally" and he put up warning signals at the points where the trail entered the premises. What more would he reasonably be expected to do? He was not required by law even to put an upper rail on the fence, which in the dark would not have necessarily acted as a warning, and it does not seem a reasonable inference that it would have averted the accident in this case, because the plaintiff was undoubtedly driving his horse rapidly, otherwise it would not have exercised

MAN.

C. A.

ROBINSON v. DODGE.

Cameron, J.A.

such force as to burst through the fence. In the absence of a by-law, I can see nothing to justify us in holding that the defendant was required to go to the expense of putting on this upper rail, and that he must be responsible in damages if he fails to do so.

Was the defendant's duty to erect posts or wooden obstructions on the trail outside the barbed-wire fence? These would be unnecessary in daylight, obviously. There is nothing to shew any such practice or custom in the vicinity or elsewhere. To require this would be to put the defendant to additional expense and labour. Can we say that the absence of such obstacles or protection, clearly not necessary in the daytime, is evidence of a breach of a positive duty on the part of the defendants? I cannot conceive that it would be so generally recognized.

Was it the defendant's duty to hang lighted lanterns on the fence where intersected by the trail? We have no evidence of any such practice or custom in the vicinity or elsewhere. If he should have done this, for how long during the night, and for how many nights, should the lights be continued? A quarter section of land crossed by several trails might be fenced. Would all the intersections have to be indicated by lanterns? On this very block there were two trails, one of them used in the spring. Counsel for the plaintiff hesitated to affirm any such duty on the part of the defendant. To require such a duty would be to impose a new obligation on owners, involving trouble and expense, an obligation which in some cases, perhaps many, would be found difficult and practically impossible to perform.

It is a reasonable presumption that parties who attempt to drive across another man's premises in the dark must know that they are taking some risks. That is the view of Hamilton, L.J., in *Latham* v. *Johnson*, as above quoted. If they do not think about possibilities and fail to exercise caution, the caution which the circumstances would, to some degree at least, require, then it would be strange if the owner of the property had to bear the loss due to driver's carelessness or thoughtlessness. There was a proper road available around the lots in question, of which the plaintiff was aware. This road it was perfectly open to him to take. There was no allurement or inducement on the part of the defendant. Quite the contrary was the case. There was no concealed trap, everything was open to the traveller's vision,

and it was through no breach of positive duty on the part of the defendant that the plaintiff incautiously diverted his horse from the road to the trail in the dark. In my opinion, there was no obligation resting on the defendant to do anything more than he did in giving warning.

The law in the United States is thus set forth in Shearman & Redfield on Negligence, par. 705:—

> They (persons entering under a bare license) take all risks upon themselves and have no right to complain of any defect on the premises, even though caused by the direct act of the owner (for example, a pit sunk in the land), unless the act is malicious or is committed with notice of the fact that strangers are likely to approach and without any effort to warn them of the danger, under circumstances which justify the belief that the owner was indifferent to the injuries which might happen to them.

Two cases are alluded to in the foot-note to the above: *Carskaddon* v. *Mills*, 31 N.E. 559, and *Morrow* v. *Sweeney*, 38 N.E. 187, which would seem to favour the plaintiff's contention in this case.

It is to be noted, however, that in both these cases the strand of wire which caused the injury was stretched for the purpose of preventing the use of the track or road and no other. It was expressly intended as a dangerous barrier or obstruction. Thus the facts involved in these Indiana cases bring them within that class of actions known as spring gun cases of which *Bird* v. *Holbrook*, *supra*, is an example.

In *Quigley* v. *Clough*, 45 L.R.A. 300, the Supreme Court of Massachussetts held that a barbed wire fence placed diagonally across a lot to prevent persons taking a short cut across the grass does not make the owner liable to a person who by mistake after dark left the street, walked on the grass and was injured. Holmes, J. (now of the Supreme Court of the United States), says, answering the argument for the plaintiff that the defendant was liable on the principle of liability for spring guns: "Barbed wire is well known and has been widely used for fencing, as more efficient than common wire. Not only does experience not warrant saying that the use of it upon a man's own land, upon which he has a right to expect people not to trespass, shew an expectation that they will come there, and an attempt to hurt them when they do, but everyone knows the contrary—that barbed wire has been used by hundreds of people who had no

MAN.

C. A.

ROBINSON v. DODGE.

Cameron, J.A.

malicious intent. It is or has been a common article of commerce, and the use of it simply shews an intent to make it more difficult to pass the line of the fence." The learned justice also draws the distinction between an active source of harm, such as a vicious stag as in *Marble* v. *Ross*, 124 Mass. 44 (or a vicious horse, as in *Lowery* v. *Walker*, [1911] A.C. 10), and an inert object such as a fence intended to prevent trespassing. It is of course to be noted that *Quigley* v. *Clough* was the case of a trespasser not a licensee.

Lowery v. *Walker*, *supra*, was mainly relied upon by plaintiff's counsel, but it is, in my opinion, inapplicable to the facts before us.

On the authorities and in view of the circumstances of the case, while I have a reluctance to interfere with the judgment of the County Court Judge, I have come to the conclusion that there has been shewn no breach of positive duty on the defendant's part such as entitled the plaintiff to damages.

I would set aside the judgment appealed from, and enter judgment for the defendant with costs of appeal and of the County Court.

Fullerton, J.A.

FULLERTON, J.A., ((dissenting) after setting out the facts, said):

There does not appear to be any English or Canadian case directly in point. I think one who has been in the habit of using a trail to the knowledge of the owner of land cannot be regarded as a trespasser. He must come within the category of a licensee, and as such be entitled to some protection.

The general rule is that a license to go on land creates no right but serves merely as a defence to an action for trespass. The licensee must take the land as he finds it. He is, however, entitled to assume that if any alteration is made which may involve danger to him in the ordinary use he is making of the land, the owner will give him some notice of the same.

In *Latham* v. *Johnson*, [1913] 1 K.B. 398, Farwell, L.J., defines "concealed trap" as something added to the condition of the ground as it was when the license was given in a way likely to be dangerous and without giving notice to the licensee.

In *Lowery* v. *Johnson*, [1911] A.C. 10, the defendant owned a field which he knew the public were in the habit of crossing. He put into this field a savage horse, which attacked and injured a person who was crossing the field. The House of Lords held that the defendant was liable. In this case Lord Loreburn, L.C., said, at p. 12:

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

Allison v. *Haney*, 62 S.W. Rep. 933, was a case of a plaintiff being injured by running into a wire fence under circumstances similar to those in the case in hand. Conner, C.J., at p. 934, said: "If appellee was the owner of the land, it may be true that he was authorized to so use it as best subserved his own interest; but, in so doing under the circumstances alleged, the law would require him to at least use ordinary care and prudence to avoid injury to others. The owner of property, of whatsoever kind or character, is burdened with the duty to so use it as that injuries likely to result to others shall not be inflicted; and we think it is a question for the jury or court, as the case may be, to determine whether, under all the facts, appellee was guilty of such negligence as to render him liable in damages."

In *Abilene Cotton Co.* v. *Briscoe*, 66 S.W. Rep. 315, the plaintiff was injured by running into a wire fence placed on a road which he had been in the habit of using to the knowledge of defendant. Hunter, J., at p. 316, said: "For, if we concede that the road was all on appellant's lot, it was in constant use by the public, and he knew it, and it would have been negligence under the facts stated to have put it there when he did, without, on that night at least, placing danger signals on it, or by some other means to warn the public away."

In a province where wire fencing is used to such an extent as in Manitoba, it may seem a hardship to compel a man who fences in a trail across his land to give notice to the public. On the other hand, where owners permit such trails to be used by the public, they must know that fencing them without giving reasonable notice may result in a serious accident. I cannot distinguish the case of a man fencing a trail without notice from the case of a man putting a savage horse in a field which he permits the public to use. The fence, if anything, is more likely to cause injury than the horse.

MAN.

C. A.

ROBINSON v. DODGE.

Fullerton, J.A.

The defendant attempted to give notice by putting a coat on the fence at one point, and a piece of canvass and a piece of tin on the fence at the point where the accident happened. The trial judge held this an insufficient notice.

I would dismiss the appeal with costs.

Appeal allowed

SASK.

C. A.

THE KING v. TSCHETTER.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

THEFT (§ I—1)—MORTGAGED LANDS—DEATH OF MORTGAGOR—LETTERS OF ADMINISTRATION NOT APPLIED FOR—OCCUPATION OF LAND BY WIDOW—SEIZURE OF CROPS UNDER MORTGAGE—SALE BY WIDOW—THEFT.

A widow who continues to live on land owned and mortgaged by her husband before his death, where letters of administration have not been applied for or granted, is a trespasser; her position is not affected by the Devolution of Estates Act, and crops grown by her on the said land do not belong to the estate of the deceased and are not distrainable under either the attornment or the license clause of the mortgage.

Statement.

Case stated to the court *en banc* by Haultain, C.J., in regard to a charge of theft of crops seized by a mortgagee, as follows:—

One Paul Tschetter, the registered owner of the land hereinafter mentioned, did by mortgage dated January 21, 1913, and registered in the Land Titles Office for the Saskatoon Land Registration District on January 23, 1913, as number AE-3133, mortgage in favour of the Edinburgh Canadian Mortgage Co. the north east quarter of s. 4, tp. 33, r. 24, west of the 2nd m., in the Province of Saskatchewan, to secure the sum of $1,600 with interest at the rate of 8% per annum, payable as mentioned in the said mortgage.

The said Paul Tschetter, mortgagor, died intestate in or about the month of December 1914. Letters of administration have not been applied for, nor issued to the widow, or to any other party respecting the estate of the said Paul Tschetter.

Katie Tschetter, widow of the late Paul Tschetter, since the death of the said Paul Tschetter, has continued to and now is residing on the said land, has cultivated and worked the same and so residing on the said land cultivating and working the same, she planted in the spring of 1917 a crop of oats and wheat and supplied the seed, and labour to put it in, harvest and thresh the said crop.

The following payments have been made on the said mortgage: Nov. 30, 1914, by Paul Tschetter, $237.60; Apr. 3, 1916, by Katie Tschetter, $85.00; Apr. 25, 1916, by Katie Tschetter, $42.50; Dec. 20, 1917, by proceeds of seizure, $404.26.

On or about September 19, 1917, there was still due and owing on the said mortgage the sum of $1,921.18 for principal and interest, including interest from December 1, 1916, on the amount due at that date. The amount of interest overdue on September 19, 1917, was the sum of $250.37.

The mortgage hereinbefore referred to contained the two following provisions:—

SASK.

C. A.

THE KING v. TSCHETTER.

Statement.

"And for the purpose of better securing the punctual payment of the interest on said principal sum I, the mortgagor, do hereby attorn tenant to the mortgagee for the said lands from the day of the execution hereof until the principal money and interest are fully paid, whether at or after the maturity thereof, at a yearly rental equivalent to the annual interest secured hereby to be paid in the manner and upon the days and times appointed for payment of the said interest, the legal relation of landlord and tenant being hereby constituted between the mortgagee and the mortgagor.

"Provided also that the mortgagee may at any time after default in payment hereunder enter into and upon the said lands or any part thereof and determine the tenancy hereby created without giving any notice to quit, but it is agreed that neither the existence of this clause nor anything done by virtue thereof shall render the mortgagee a mortgagee in possession so as to be accountable for any moneys except those actually received.

"And further that if I shall make default in payment of any part of the said principal or interest at any date or time hereinbefore limited for the payment thereof, it shall, and may be lawful for, and I do hereby grant full power, right and license to the mortgagee to enter, seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of demise of the said lands as much of such principal or interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent."

The said mortgagee instructed its bailiff to effect a seizure of the said crop on the said land as aforesaid, on or about September 19, 1917, and at the same time did give its said bailiff a distress warrant.

On or about September 22, 1917, its said bailiff entered the said premises and effected a seizure of 740 bushels of oats grown on the said lands, and at that time resting thereon in the stook.

On or about October 15, 1917, the accused, at the request of the said Katie Tschetter, their mother, and knowing the same was under seizure, removed the said 740 bushels of oats, which had then been threshed, from the said land and sold them to the Saskatchewan Co-Operative Elevator Co.'s agent at Wolverine, and the proceeds of the same were handed over to the said Katie Tschetter.

A charge was preferred against the accused at the jury sittings of the Supreme Court at Saskatoon on or about February 5, 1918, for theft, and a verdict of guilty returned by the jury.

On application of counsel for the accused, the Hon. Chief Justice granted leave to state a case to be heard at the next sittings before the court *en banc*.

1. Had the Edinburgh Canadian Mortgage Co. any special property or interest in the oats in question sufficient to make a sale of the same by the accused a criminal offence?

Or, in the alternative: (*a*) Did the Edinburgh Canadian Mortgage Co., by virtue of its mortgage, have a legal right to seize the oats in question which were not the property of the mortgagor? (*b*) If the Mortgage Company had no right to seize the oats in question, would the drawing them away and selling them by the accused constitute the offence of theft?

Mackenzie, K.C., for the Crown; *T. A. Lynd*, for defendant.

SASK.

C. A.

THE KING v. TSCHETTER.

Newlands, J.

NEWLANDS, J.:—*P. E. Mackenzie*, K.C., who appeared for the Crown, claimed that the widow of Paul Tschetter by intermeddling with the estate made herself an executrix *de son tort*. The only evidence of her intermeddling was her entry upon his land and putting in the crop in question. He based this claim upon the fact that the Devolution of Estates Act, c. 43, R.S.S. (1909), provided by s. 21, that land in Saskatchewan should descend to the personal representatives of the deceased owner and be distributed as if it were personal estate, and by s. 140 of the Land Titles Act, which provides that where the owner of land for which a certificate of title has been granted dies, such land shall vest in his personal representative.

In both Acts the reference to the "personal representative" is to the executor or administrator of the deceased.

Apart from the provisions in these Acts, an administratrix *de son tort* is one who intermeddles with the personal—not the real—estate of the deceased.

In Williams on Executors, p. 183, he says:—

If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor he thereby makes himself what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort*.

Before the Devolution of Estates Act, the personal representative as such had nothing to do with the real estate of a deceased.

Williams on Executors, p. 484, says:—

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator. By the laws of this realm, says Swinburn, as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements and hereditaments.

The Devolution of Estates Act provides that land shall descend and be distributed as personal property. But it nowhere makes land personalty. In fact, it distinguishes all through between the two. In s. 2 (1) and (2) it defines real and personal property:—

1. "Real property" extends to and includes messuages, lands, rents and hereditaments whether of freehold or any other tenure whatsoever and whether corporeal or incorporeal and any undivided share thereof and any estate, right or interest other than a chattel interest therein;

2. "Personal property" extends to and includes leasehold estates and other chattels real and also moneys, shares of government and other stocks or funds, securities for money not being real property, debts, *choses in action*, rights, credits, goods and all other property whatsoever other than real property as above defined;

SASK.

C. A.

THE KING v. TSCHETTER.

Newlands, J.

In s. 3, which makes the real estate liable for the debts of the deceased, it provides that the personal property shall be exhausted before resort is made to the real property.

I am, therefore, of the opinion that the widow, by putting in a crop on the land of the deceased, did not become an executrix *de son tort*, but was a trespasser, and the crop she raised upon the land having been planted, cut and threshed by her, did not belong to the estate of the deceased, and it was, therefore, not distrainable under either the attornment or the license clauses of the mortgage.

The crop, as against the mortgagee, being the property of the widow and having been removed by the accused by her direction, they are not guilty of theft and the questions should be answered accordingly.

Lamont, J.A.

LAMONT, J.A., concurred with Newlands, J.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the result arrived at in this matter by my brother Newlands, and I just wish to add a few observations to what he has said.

The statute dealing with executors *de son tort* appears to be 43 Eliz. c. 8. It will be observed that the statute was passed in order to prevent the conveyance of the intestate's goods to the defrauding creditors. So far as land is concerned, no conveyance can be made except by the person clothed with authority to convey, and no amount of intermeddling with the land by an unauthorized person can deprive the creditors of their right to resort to the land for payment of their debts.

I think it is quite clear that the statute does not make the widow in the case at bar an executor *de son tort*, and that her position in that respect is not affected by our Devolution of Estates Act.

Judgment accordingly.

GRAND TRUNK R. Co. v. MAYNE.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

CARRIERS (§ II G—70)—PASSENGER STEPPING OFF TRAIN—INVITATION TO ALIGHT—NEGLIGENCE.

A conductor of a passenger train, who after telling a passenger that the next stop is his station, "where you get off," opened the door guarding the steps of the car, and allowed the passenger to go down the steps from which the passenger stepped off, while the train was still going at a high rate of speed, was not guilty of negligence; the conductor was entitled to assume that the passenger would act with ordinary prudence and discretion.

[34 D.L.R. 644, reversed.]

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Fitzpatrick, C.J.

APPEAL from the Appellate Division of the Supreme Court of Ontario, 34 D.L.R. 644, 39 O.L.R. 1, affirming by an equal division of opinion the judgment at the trial in favour of the plaintiff. Reversed.

D. L. McCarthy, for appellants; *Phelan*, for respondent.

FITZPATRICK, C.J.:—This is the case of a passenger on appellants' railway who, when approaching his destination, left the seat he occupied in the car and proceeding to the end platform either stepped off or fell off the train and was killed. The train was at the time running at a speed of about 20 miles an hour. The respondent is the widow, who was present at the accident with her children, and by her action she claims damages for her husband's death which, she says, was caused by the negligence of appellants' servant, the conductor of the train. The particular acts of negligence set forth in the statement of claim are: (a) the conductor indicated to the deceased that he had reached his station and could safely alight and did in fact invite the deceased to alight when he could not do so, and (b) the conductor should have prevented the deceased from going upon the platform while the train was in motion and he should have warned the deceased and neglected to do so.

The obligation of the company was without delay and with due care and diligence to carry the passenger to his destination. S. 284 (*c*) Railway Act, R.S.C. (1906), c. 37. The fact of the casualty once established, it was the duty of the company to give an explanation of the accident consistent with performance on their part of their statutory obligation to safeguard their passengers with all practicable care and skill. The passenger, on his part, was obliged to use reasonable care.

The negligence found by the jury consisted in "the conductor not remaining at the door of the car until the train stopped," and they also negatived all negligence on the part of the deceased.

The theory of the respondent at the argument here was that the conductor so conducted himself as to lead to the deceased getting off the train at the time he did; and the reply on behalf of the appellant was that, accepting the story told by the respondent, the accident was attributable directly to the negligence of the deceased and that the conductor was fairly entitled to assume that *primâ facie* the deceased would conduct himself with ordinary prudence and discretion.

It is somewhat difficult to connect the negligence found by the jury with either of the two causes of the accident alleged in the statement of claim. But the verdict must be reasonably construed; and I think that, read in the light of the pleadings, the evidence and the judge's charge, it means that the jury were of the opinion that it was the duty of the conductor, having notified the deceased that he was approaching his destination, to be careful to prevent him from going on to the platform, which was a dangerous place when the trap covering the steps which the deceased would use to alight from the car had been removed.

If I could agree with Ferguson, J.A., who said: "the deceased may have been misled by the conductor's action into the belief that the train was at its destination," I would have less difficulty in accepting the verdict, because I assume the judge means that the conductor gave deceased the impression that the train had stopped and he could alight in safety. But I can find nothing in the evidence to justify that inference. To call out the name of a station, is merely an intimation that the train is approaching that station, and the speed at which the train was moving, which must have been apparent to any one exercising the slightest care, was in itself sufficient to destroy any impression that the train had reached the station and come to a standstill, and then only would the deceased be justified in attempting to leave the train. Further, the conductor was not under any obligation to assume that the passenger would be so void of common sense and prudence as to endanger his own safety as the deceased certainly did. According to the story of the respondent, the conductor was standing on the platform when the deceased passed by him to go down the steps with two bundles, one in each hand. The car was then going at a speed of 20 miles an hour and swaying from side to side under the pressure of the brakes, and it is said that the conductor in allowing the deceased to pass on down the steps did not exercise that vigilance and care for the safe conveyance of the company's passenger which, in the circumstances, the statute imposed upon him and that he should have stopped him at the door. But the conductor, as I have already said, might fairly assume that the passenger would act with ordinary prudence and discretion, and it was almost impossible for any one to imagine that a sane man with any regard for his own safety would have gone down the car steps having both hands fully occupied with the bundles he was carrying.

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Fitzpatrick, C.J.

Of course the evidence, as in all similar cases, is conflicting. But the jury, who were absolute masters of their own determination in that respect, chose to believe the story of the widow and her children, and I have accepted their conclusion although I would have felt disposed to believe the version of the facts given by the conductor as more consistent with all the other admitted circumstances. The respondent said that when the deceased came on board he asked the conductor to let him know when they reached Dunbarton—his station—which was only a flag station; but there is no evidence, as was assumed below, that he placed himself in the special care of the conductor. The latter gave the engine-driver the proper signal to stop at that station and subsequently called out: "Dunbarton is the next stop." Later on he came up to the deceased and touching him on the shoulder said: "Dunbarton is the next stop."

This cannot, in my opinion, be construed as an invitation to alight; at most it was an intimation to the passenger that he should prepare to get off. In a very few moments after, the deceased followed by his family moved towards the door of the car and there, according to the story of the respondent, stood the conductor on the platform. He had previously removed the trap in the platform floor which covered the steps leading off the car. It is a fair inference that the deceased—as I have already said—accepted this as some evidence that he might alight in safety. But was he justified in either attempting to alight or placing himself in a position of danger when the car was moving at a speed of 20 miles an hour and swaying backward and forward, as I have already described? To hold that it was the duty of the conductor to foresee that the passenger would be so imprudent and reckless as to attempt to alight from the car in such conditions is to impose a burden on railway officials greater than the law requires, and that is what the verdict means when the jurors say that the conductor should have prevented the deceased from coming out of the car, *i.e.*, should have treated him like an irrational being.

The appeal should be allowed with costs if the company deems it advisable, in the circumstances of this case, to collect them.

Davies, J.

DAVIES, J. (dissenting):—The contention on the part of the plaintiff respondent was that the conductor having been informed by the deceased of the station Dunbarton, at which he desired to

get off, had opened up the vestibule, had informed the deceased that, "this is Dunbarton where you get off" and had generally by his conduct actively created in the mind of the deceased the belief that the train had reached Dunbarton and that he and his family could safely alight, when as a fact the train was still moving at a rapid speed and had not then reached Dunbarton station.

The appellant contended that upon the evidence and upon the jury's findings there was not in law or in fact an invitation for the deceased to alight when he did, and that all that took place only amounted to an intimation by the conductor to the deceased that the next station was his station and an invitation to alight when the train stopped. They further contended that the deceased so regarded it as was clear from the evidence, because when the conductor told the deceased "this is Dunbarton, this is where you get off" the children immediately made a move in anticipation of getting off, and the deceased told them to resume their seats, which they did until they were told to come along.

Though I do not attach very much importance to this latter contention, I think it only fair that the whole evidence on the point should be considered, in which case it would seem that a few moments after telling the children "not to move till the train stopped" he said to them "all right now come on" or "now come on" shewing that he believed that the train had then stopped.

The conductor did not immediately leave these passengers the moment he told the deceased "this is Dunbarton where you get off," but remained standing for some moments in the passageway three or four seats down and "looking at some people or something on the south side of the car." It was when the conductor, after so waiting in the aisle, started for the door that the deceased gave the children the order "all right, now come on," and the inference I draw from the evidence on this point is that the deceased inferred the conductor was waiting for the stoppage of the train, and when he started for the door the deceased assumed he did so because, as he thought, the train had either stopped or was about stopping. I do not think, however, this incident is a controlling one upon the real issue between the parties, but the jury were entitled to believe the plaintiff's evidence on the point of the conductor having waited in the aisle or gangway for some time after giving notice to the deceased as before mentioned, in preference to that of the

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Davies, J.

conductor, and it explains the other evidence as to the deceased and his family closely following the conductor along the aisle or passageway out into the vestibule.

There was no specific finding by the jury in words that there was an "invitation to alight" nor did the respondent contend that there was. The invitation to alight was a reasonable inference to be drawn from the conductor's conduct and actions and is rather a question of law to be drawn from the question of fact found by the jury.

The jury found that the negligence of the conductor consisted "in not remaining at the door of the car until the train stopped."

They further found that the deceased was not guilty of any contributory negligence.

The question then arises as to what is the fair and necessary inference to be drawn from these findings under the proved facts.

The Chief Justice, who tried the case, upon the findings of the jury directed judgment to be entered for the plaintiff respondent for the damages found. The appeal court was equally divided in opinion, two of the judges being to dismiss the action on the ground, as I understand the judgment of Riddell, J., with whose reasons Rose, J., concurred, that there was no invitation to alight on the conductor's part and no negligence found for which the company could be held liable, and two, Lennox and Ferguson, JJ., for sustaining the judgment of the trial judge on the jury's findings.

Owing to this judicial difference of opinion, I have found it necessary to give the evidence most careful attention, and have reached the conclusion that the finding of the jury as to the negligence of the conductor under the peculiar facts and circumstances detailed in the evidence was justified and that on such finding the appellants are liable.

These findings of negligence on the conductor's part, and of no contributory negligence on the part of the deceased, must be read and construed in light of the facts.

I am inclined to think that one material fact proved, if the evidence of the widow and daughter is accepted, was overlooked by the judges who favoured the dismissal of the action, and that fact was that the conductor did not open the outer door of the vestibule until after he had notified the deceased the second time, touching him on the shoulder and saying, "this is Dunbarton. This is where you get off."

The importance I attach to this fact will be seen later on. I think the conclusion must be drawn from the jury's findings that they accepted the evidence of Mrs. Mayne and of her daughter in preference to that of the conductor on all points where such evidence differs or cannot be reconciled.

After reading the evidence carefully over and accepting that of Mrs. Mayne and her children when at variance with the conductor's, which the jury must have done to make the findings they did, I draw the following conclusions of fact: That after the conductor had first gone through the car and called out: "Dunbarton is the next stop," he went through the car door, lifted the trap door in the vestibule, but left the outer vestibule door closed. That he then returned into the car, touched the deceased on the shoulder, saying to him, "Dunbarton station. This is where you get off" and remained standing for a few moments in the passageway of the car near to or alongside of deceased, looking at something or some passenger on the other side of the car. That he then started for the door, and that when he so started the deceased believing the car had stopped said to the children, whom he had previously warned not to move till the car stopped, "all right now, come on."

He himself at once got up and followed the conductor carrying the baby in his arms. The wife and children started to follow him, and she, finding the parcels she had to carry too heavy, called him to give her the baby and take the parcels instead, which he at once did. With the parcels in hand described as "a big parcel tied with a piece of rope or string round it" and a valise, he immediately followed the conductor who was some few feet only ahead and who passed out of the car door into the vestibule and *then opened the outer vestibule door*. The widow in her evidence stated explicitly that she followed close after her husband and when she had just reached the car door heard the conductor then open the outside vestibule door and saw him, after doing so, step back into the vestibule right to the edge of the platform and that he did not step over on to the platform of the next car. He stood there and the deceased, as she stated, then "went out of the car door and I followed him and he went down and stepped right off." She adds: "We thought we were to the station and the train had stopped."

The widow herself was in the act of descending the steps following her husband when the conductor stopped her.

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Davies, J.

Now if the jury believed, as they had a perfect right to do, these statements of fact, confirmed as they substantially were by the eldest daughter Gertrude and in large measure by the boy Archie, they would amount to an invitation to the deceased to alight. The first calling out by him "Dunbarton is the next station" was certainly not such an invitation, and was not contended to be such but the subsequent personal intimation to the deceased when the conductor touched him on the shoulder and said, "this is Dunbarton station, this is where you get off" followed by his conduct and actions in going down the aisle or gangway of the car just a few feet ahead of the procession of the deceased, his wife, and the children, who were following him, his entry into the vestibule and opening of the outer vestibule and then standing lantern in hand on the edge of the vestibule platform leaving room for the deceased to pass out was, it seems to me, a distinct invitation for the deceased man and his family to alight. They were persons unaccustomed to railroad travelling, as the deceased had informed the conductor, and the latter's action and conduct would reasonably be understood by these persons to be an invitation to alight.

In the light then of the facts as proved by the plaintiff and her witnesses, the jury's finding that the conductor's negligence was in not remaining by the door of the car until the train stopped is easily understood. It means: You should not have spoken and acted as you did, because you led these passengers astray, but you should have stood at the door of the car until the train stopped and so prevented their alighting.

If the conductor believed, as he says he did, that the car had not stopped, but was going at a rapid rate of speed, then his conduct and actions as sworn to are inexplicable on any other theory than that of carelessness and negligence.

The facts and circumstances, as I understand and appreciate them from the evidence, and which the findings of the jury shew they believed, were such as distinctly called for such an act of prudence on the conductor's part as the jury suggest, namely, his standing by the door of the car till the train stopped, or some equivalent action which would have prevented the calamity which occurred.

The controlling question is whether there was evidence from

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Davies, J.

which the jury might fairly find that the conductor was guilty of negligence in not having prevented the deceased from attempting to alight when he did. The action which the jury say he should have taken so as to prevent him would certainly have been effective. There was no evidence that any other passengers desired either to alight at this flag station or to get on the train there, nor was there any evidence that the conductor's duties required his presence elsewhere. If they did and he could not remain in the doorway, then he was bound after opening the outer vestibule door and knowing that the train had not stopped, to give the family who were about to alight from the train, and as to whose ignorance of railway travelling, in my opinion, he had full knowledge, clear warning not to alight when they attempted to do so. He neither interposed his physical body before the deceased so as to prevent the deceased alighting, nor gave him any warning not to alight, nor was his presence required elsewhere. He simply stood by on the vestibule platform and allowed the man carrying a valise and a large parcel, to go down the steps with the outer door open, without any warning whatever. His suggestion, on cross-examination, as an explanation of his silence and inaction, that he thought the man might have been going into the first-class coach, was evidently not accepted seriously by the jury, and I must say that, looking at all the facts and circumstances, it was a most unreasonable if not absurd one. I think this case must be decided on its special facts, and not upon the law which, it is contended, applies to the duties which, under ordinary circumstances and with respect to ordinary passengers, conductors owe to them with regard to alighting from trains.

My judgment is that this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J. (dissenting):—When the somewhat confusing facts presented by the evidence herein, as dealt with in the conflicting opinion of the judges in the Appellate Division have been sifted and tested by the process of fair argument before us, there is found in them, I think, a case for the jury to try and in the result found such a judgment as appealed against.

They found the deceased came to his death through the negligence of the appellant.

They found further that the deceased had not been guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened.

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Idington, J.

It seems quite clear from this latter finding that the jury must have accepted the version of the relevant facts as given by respondent and two of her children and rejected whatever the conductor said in evidence in conflict therewith.

On the evidence of the latter it would be difficult to acquit deceased of negligence.

On the evidence of and on behalf of the respondent it was easy to come to the honest conclusion that deceased had been misled by the words and acts of the conductor into the belief that the train was stopping, and the way clear to get out.

Dunbarton was a mere flag station. The present tense used by the conductor speaking in relation to it must have meant, if anything, the station. It was not the case of a conductor coming into a large city or town, when the same expression used to a passenger could not reasonably be interpreted as an invitation to alight or do so in a few seconds. But spoken of, or relative to, a mere flag station or platform, they could only mean that the spot was at hand and the train stopping, and hence the only thing to do was to get ready and get off.

The every-day traveller might use his own sense of motion and use his own judgment of the fact, but the untravelled and quite inexperienced man would trust the words and acts of the conductor. There can be little doubt that deceased as result thereof trusted himself thereto and stepped off relying thereon.

The respondent swears she thought the train had stopped and the jury quite evidently implicitly believed her. She was mistaken, but evidently that was the impression she had got from what the conductor had said and done till she realized that her husband was off.

I cannot understand why the conductor seeing such a man as deceased stepping out laden with packages and his hands thus tied, on a train going at the rate of 20 to 25 miles an hour, remained dumb so long.

Moreover there is no evidence of any one else than deceased and his wife and seven children wanting to get off at that station, or any one likely to get on the train there.

The night was very dark and feelings of common humanity alone demanded a little attention on his part to such a party. His sole duty to them and his employers demanded it. And if he

had given the slightest heed thereto the accident never would have happened. He should, if heeding that duty, have seen by a glance at the movement of the whole family that they must have misunderstood him or were pursuing a most dangerous course.

He says he crossed over to open the trap and vestibule door in the next car. There is not a vestige of evidence of any need therefor.

I must doubt him in that regard till he saw deceased had stepped off and the jury may have disbelieved him in that as they evidently did in regard to other things.

All these and other considerations of what the evidence discloses which it is needless to dwell upon in detail, must be borne in mind when we come to consider the only difficulty in the case.

What I refer to is the peculiar form of the answer defining the negligence the jury find the appellant answerable for.

I should be sorry to lay down as a rule of law that the conductor must always stand at the door of the car until the train is stopped. I should be equally sorry to say that the finding was and is incomprehensible.

I think it stands for nothing more or less than that under all the attendant circumstances, including especially the misleading nature of his invitation to be ready instantly to alight and inducing a procession in obedience thereto, it was his duty to have guarded the door of the car from being used as it was used.

Many other forms of expression might have been used indicating, as this doubtless was intended to indicate, the neglect of that duty I have signified above as devolving upon him, under said circumstances.

I think the language used is quite capable of being understood as expressing that neglect of duty imposed on him to have due care of those in his charge, and that his neglect in that regard was in law the neglect of the appellant.

I am of course aware that the train was 12 minutes behind time, and had little time to waste on a flag station, and of the pressing anxiety to make haste, but that rendered it all the more incumbent on him in charge to see that no chance of harm should come to the helpless and inexperienced ones who were being hastened, possibly beyond their usual pace.

I agree with the opinion of the learned and long experienced

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Anglin, J.

trial judge and the judges of the Appellate Division supporting his judgment.

I think the appeal should be dismissed with costs.

DUFF, J.:—The appeal should be allowed and the action dismissed with costs.

ANGLIN, J.:—The facts are deposed to by the plaintiff and her two children and the railway conductor. Without inputing deliberate perjury to the conductor, the inaccuracy of several of his answers, and the flippancy of one of them may well have led the jury to reject his version of what occurred where it differed materially from that of the plaintiff, and I think we must, for the purposes of this appeal, assume that the story of the plaintiff and her children is correct. It should, however, be noted that, although the unfortunate Mayne was not accustomed to travelling, there is no evidence that the conductor had been apprised of that fact. The contrary view taken by one of the judges of the Appellate Division, 34 D.L.R. 658, 39 O.L.R. 12, probably to some extent influenced his judgment in favour of the plaintiff.

Ferguson, J.A., who reached the same conclusion, very succinctly, and, upon the assumption that the plaintiff's story is correct, I think accurately, states the material facts as follows:—

> The deceased, his wife and seven children, entered the train at Whitby destined for a flag station called Dunbarton. The deceased requested the conductor to let him know when they were at that station; accordingly, as the train approached Dunbarton the conductor came through the car and called out: "Dunbarton is the next stop." Shortly afterwards the conductor returned and touching the deceased on the shoulder said, "this is Dunbarton, this is where you get of." The deceased was entitled to conclude from these words that he had arrived, but he appears to have construed them only as a notice to get ready at once to get off, because, on the children rising to go, the father told them to "sit still till the train is stopped" but almost immediately afterwards he said, "now, come on," and all started for the door. As the wife and husband reached the car door the conductor stepped out and in the hearing of the husband and wife and perhaps in the sight of the husband, who was ahead, opened the trap door in the vestibule and the outside door, and there in sight of both stepped back, whereupon the deceased walked down the steps.

Two difficulties in the plaintiff's way are that it is almost incredible that a man in possession of his faculties, however inexperienced in travelling, could, when on the platform of a car running 20 to 25 miles an hour, have been under the impression that it was stationary; and that the finding of the jury, if taken

literally, would impose upon the conductor a duty which certainly did not exist.

A suggestion that Mayne did not intentionally step off the car, but that, laden with a valise in one hand and a bulky bundle in the other, he lost his balance and fell off, is excluded by the evidence of the plaintiff and of the conductor, who both aver that they saw him step off.

The improbability that a man in possession of his faculties when on the platform of a car in a train running 20 or 25 miles an hour, with the accompanying noise and motion, would not have realized that it had not stopped is perhaps little, if any, greater than that of such a man, if aware that the train was moving, stepping off it on a dark night into space. Yet one or other of these improbable theories must be accepted. The jury, in negativing contributory negligence, evidently preferred the former. The plaintiff and her two children who followed the deceased—the wife, according to her own story, having actually begun to descend the steps after him—say that they were under the belief that the train had stopped. It is possible that the father's preparations for alighting and his concern for his wife and children and the parcels under his charge so absorbed his attention that he actually failed to realize that the train was still in rapid motion. It may be, as put by Ferguson, J.A., that, by the conductor's action in raising the vestibule trap, opening the outer door, placing the hand-bar in position, and then stepping back to the edge of the platform, Mayne was misled, notwithstanding the evidence of his senses, into a belief that the train was at its destination and stopped. Difficult as it is to conceive of this having been his state of mind, having regard to the testimony of the wife and children as to their own belief and to the unlikelihood of his having knowingly stepped off a rapidly moving train, it seems to me impossible to say that the jury was clearly wrong in assuming that in fact it was. If so, it was for them to determine whether Mayne's failure to appreciate the actual conditions amounted to negligence. They have found that it did not and I am not prepared to set that finding aside.

But the finding of negligence on the part of the conductor involves greater difficulties. In the first place, it is perfectly clear upon all the evidence that it was his duty before reaching the station to prepare for his passengers alighting by raising the trap,

CAN.

S. C.

GRAND TRUNK R. CO. v. MAYNE.

Anglin, J.

opening the vestibule door and putting the hand-bar in place. To do this work after the train had stopped is quite impracticable. It should, however, be done as late as possible before the actual stop in order that the safeguard of the closed trap and vestibule door may not be taken away earlier than is necessary. The conductor, therefore, could not, consistently with his duty, after notifying Mayne that the station then being approached was his stopping place, have "remained at the car door until the train stopped." If that be the necessary meaning of the jury's finding it cannot be supported.

The findings of the jury must, no doubt, be read in the light of the plaintiff's allegations, the evidence and the judge's charge, and should be given any interpretation of which they are reasonably susceptible and will enable the court to support them. The relevant allegation of negligence is that "the conductor should have prevented the deceased going upon the platform while the train was in motion" and "should, under the circumstances, have warned him" of his danger. The trial judge, paraphrasing this allegation, said:—

> The plaintiff claims that there was on the part of the conductor a failure . . . to warn the man when it must have been manifest to the conductor that he was in a position of danger, that the conductor should have realized and recognized that danger, and done all he could to avert it by shouting, by springing and stopping the man.

I think the jury's finding may—and, if necessary to sustain it, probably should—be taken to mean that after raising the trap and opening the vestibule door the conductor should have placed himself in the car door to prevent passengers coming out on the platform before the train had stopped.

It may be that, if strictly discharging his duty, a conductor should, if it be practicable to do so, prevent passengers coming on the platform of a car until the train has actually stopped. Had Mayne been thrown from the platform, or had he fallen from it as a result of his losing his balance while standing there, allowing him to come upon the platform might possibly be said to have been negligence *dans locum injuriæ*. But that is not at all this case. Allowing Mayne to come upon the platform was not the proximate cause of his injury; it was at most a remote cause or cause *sine qua non*. But for his proceeding to alight his coming on the platform would have been harmless, and, having regard to

CAN.
S. C.
GRAND TRUNK R. Co. v. MAYNE.
Anglin, J

the custom of travellers on this continent (disclosed by the evidence and a matter of common knowledge, as was pointed out by the trial judge) when a train is approaching a station, to move to the car door and to pass out to the vestibule platform with their hand luggage before the train has stopped, even had the unfortunate passenger fallen or been thrown from the platform, I am not at present prepared to say that failure to prevent his coming out upon it would have amounted to actionable negligence. But this remote cause need not now be further considered.

If the jury intended to find that the conductor's fault consisted in having failed to prevent Mayne proceeding to alight from the vestibule platform, they certainly have not said so, and I think their finding is not reasonably open to that interpretation. But, if it is, it involves the idea that the conductor realized or should have realized that it was Mayne's intention to attempt to alight, notwithstanding that the train was in rapid motion, in time to have interfered to prevent his doing so. The conductor had properly notified him, as requested, that he was nearing his station. That is all his notification amounted to and the evidence makes it clear that it was so understood. He, no doubt, had reason to expect that Mayne and his family would thereupon prepare to alight and, having regard to the custom to which I have alluded, that they would probably move to the door of the car and come out upon the vestibule platform with their luggage before the train had stopped. The opening of the trap and vestibule door were not meant as an intimation that the train had stopped, and that it was safe to alight immediately, and, while Mayne may have so regarded them, it by no means follows that the conductor knew or should have known that such an erroneous and extremely improbable impression would be thus created. I am unable to follow counsel for the plaintiff in his contention that the mere fact that Mayne came out on the platform and turned to the car steps should have made it apparent to the conductor that it was his intention to proceed forthwith to alight. The moment that intention became apparent to him it would, I think, have been the conductor's duty, having regard to the statutory obligation of the company to "carry and deliver all traffic with due care and diligence," to have endeavoured to prevent its being carried out.

CAN.
S. C.
GRAND TRUNK R. CO. v. MAYNE.
Anglin, J.

It is to me unthinkable, that if he had even a suspicion of the intention of the deceased to alight, this conductor of thirty years' experience would have stood idly by and allowed him to step off to almost certain death. It is, I think, clear that the conductor failed to realize the deceased's intention until too late to prevent him stepping off, though he succeeded in stopping the wife who was following him. The question therefore is, should the conductor have realized sooner than he did and in time, by a shout of warning or by physical intervention, to have prevented its execution, that it was Mayne's intention, under the impression that the train had stopped, to attempt to alight from it while actually moving at a rate of 20 or 25 miles an hour—or rather, is there any evidence upon which a reasonable jury could so find? After giving to this, for me, vital question a great deal of anxious consideration, I find myself unable to say that there is. Why should the conductor have anticipated anything so utterly improbable?

On the ground, therefore, that there is no evidence to warrant a finding of negligence on the part of the conductor, I would allow this appeal. *Appeal allowed.*

MAN.
C. A.

HAMELIN v. NEWTON.

Manitoba Court of Appeal, Perdue, Cameron and Fullerton, JJ.A. March 25, 1918.

COURTS (§ II A—171)—KING'S BENCH ACT—RULE 220—TRUSTEE—POWERS OF COURT TO ADD PARTY DEFENDANT.

Under rule 220(2) and s. 25(*k*) of the King's Bench Act the court has power to add a party defendant at the request of a defendant trustee, who is willing to render an account of his dealings with the property but who does not know to whom the accounting should be made, where that is the real issue to be tried.

Statement.

APPEAL from the judgment of Galt, J. Reversed.

A. C. Ferguson, for appellant; *A. B. Hudson*, K.C., and *H. N. Baker*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This is an appeal from Galt, J., who reversed an order made by the referee. The facts are fully set out in the judgment from which the appeal is brought. Briefly, they are as follows: On February 17, 1908, the defendant gave to the plaintiff a declaration of trust acknowledging that he held a one-half interest in certain lands (less expenses and unpaid purchase money) in trust for the plaintiff and that he would deed the same to her as soon as it was "in shape." She complains of certain

dealings in the land by defendant and she asks for an accounting, payment of money found due to her from defendant, a declaration that she is entitled to a lien upon the lands still unsold and other relief. The defendant says, in his statement of defence, that the plaintiff had knowledge of, and consented to, the dealings with the properties referred to in the statement of claim, that he is ready and willing to render an account of his dealings with the property, but that he is not sure to whom the account should be rendered. He alleges that the interest in the said properties really belonged to the plaintiff's husband who requested defendant for personal reasons "and, as defendant understood, for merely temporary purposes and not with the idea that the plaintiff should be treated as the real owner of such interest, to give the acknowledgment referred to." The defendant then avers that one McLeod alleges that the interest of the plaintiff and of her husband in the matters referred to have been assigned to him, McLeod, and that he is entitled to any accounting or other matters referred to in the statement of claim. Defendant further states that he is ready and willing to give the plaintiff an account of his dealings with the said properties and moneys received or to be received in connection therewith, if he is furnished with a release from McLeod and from plaintiff's husband.

The defendant made a motion to the referee for an order adding McLeod as a party defendant with the purpose of having it determined in the action whether the defendant or McLeod is entitled to the properties and moneys in question. The motion was supported by an affidavit of defendant. McLeod was willing to be made a party defendant and he appeared before the referee and expressed his consent to this being done. On the hearing of the appeal before Galt, J., McLeod gave a similar consent. The referee ordered that McLeod should be made a party defendant, that the statement of claim should be amended accordingly and that the name "Newton" should be inserted immediately after the word "Defendant" wherever it appeared in the statement of claim, except in the style of cause, with liberty to the plaintiff to further amend the statement of claim if so advised. It was also directed that the order and amended statement of claim should be served on McLeod. On appeal to Galt, J., this order was reversed.

MAN.
C. A.
HAMELIN
v.
NEWTON.
Perdue, J.A.

The application to the referee was made under r. 220 (2) and s. 25 (*k*) of the King's Bench Act. Clause (2) of r. 220 is as follows:—

(2) The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the court or judge to be just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the action, be added.

The above provision is found in O. 16, r. 11 of the English Act.

In the present case the defendant does not deny his liability to give an account of his dealings with the trust property and expresses his willingness to do so if he is protected against McLeod's claim. He therefore asks that McLeod should be made a party to the suit so that the latter may be bound by the judgment to be rendered in the cause. The rule in question enables the court or judge to add the name of a party whose presence before the court may be necessary in order to enable the court *effectually and completely* to adjudicate upon and settle *all questions involved in the action*. Now the claim of McLeod is involved in the action. It has been raised by the defendant and is one of the questions to be contested. If the plaintiff succeeds in the suit McLeod's claim will not necessarily be disposed of, unless he has been made a party, and further litigation may ensue between him and the defendant, or between the plaintiff and McLeod.

Galt, J., seems to have been much impressed by a letter dated May 1, 1911, written by defendant to the plaintiff at a time when, as the judge finds, the defendant was aware that McLeod verbally claimed an interest in the lands by way of assignment from the plaintiff's husband. The letter in question tells the plaintiff that she will eventually get $6,300 and interest from the property. But neither the judge nor this court can on this application adjudicate upon the questions that arise in the action. It is shewn that McLeod has asserted and still asserts a claim to the trust property. The statements in the letter may be capable of explanation, or, when the full facts are known, the statements may appear in a very different light.

The judge also comments on the fact, as it is stated, that McLeod has taken no steps to enforce his security. But if McLeod took the assignment from the plaintiff's husband as a security in respect of dealings which, as it is said, took place between them and which have not yet been closed out, the delay in taking proceedings is explainable.

The judge further says:

> It is difficult to see upon what grounds the plaintiff can be compelled against her will to add McLeod as a party defendant. The plaintiff makes no claim against him, and he has made no effective claim against either the plaintiff or the defendant.

Now as to the first of these statements it is only necessary to point out that it is not the plaintiff who is called on to add McLeod as a party. The defendant has requested the court under the rule to do so for his protection. As to the second statement it is not necessary that the plaintiff should make a claim against McLeod. The real issue will be, to which of them shall the defendant account. Whether McLeod's claim will be effective or not can only be ascertained at the trial.

Norris v. *Beazley*, 2 C.P.D. 80, a case decided in 1877, was relied on by plaintiff as an authority against the granting of the order made by the referee. That was an action on a bill of exchange given for the purchase of a ship. The defendant sought to add a company as defendants, on the ground that the transaction was entered into by him as agent or trustee for the company. When the agreement was made the company was only in process of formation. The application was refused. In *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, Lord Esher, M.R., says in regard to *Norris* v. *Beazley*, *supra:*

> It is to be observed that it was decided at an early stage of the decisions with regard to the meaning of the Judicature Acts, and, though I do not say that the actual decision was wrong, I do not think that all the statements made in the judgments could now be supported.

In the *Montgomery* case a cargo had been placed by a shipowner with a warehouseman with notice of a lien for freight. The consignees, who were merely agents of the shippers for the sale of the cargo, in order to get possession of it, deposited the amount with the warehouseman with notice to retain it. The shipowner brought an action against the consignees for a declaration of title to the money. The shippers of the cargo were added as defendants, under O. 16, r. 11, by Mathew, J., in order that

MAN.

C. A.

HAMELIN v. NEWTON.

Perdue, J.A.

they might counterclaim against the plaintiff for short delivery and injury to cargo. This order was confirmed by the Court of Appeal. In giving judgment Lord Esher said, p. 324:

> Here the matter before the court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants and the company whom it is sought to add as defendants, and who were the defendant's principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the court under such circumstances to affectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject matter out of which several disputes arise, all parties may be brought before the court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials.

Kay and A. L. Smith, L.JJ., expressed themselves to the same effect.

In *Dix* v. *Great Western R. Co.*, 34 W.R. 712, the railway company had entered into separate covenants with three persons to make one and the same road. Dix commenced an action for specific performance. Kay, J., on the application of the company, notwithstanding the objection of the plaintiff, made an order under the above rule that the other two parties be added as defendants. This was done on the ground that it was impossible for the court "effectually and completely to adjudicate upon and settle all the questions involved" without the presence of all the covenantees.

In *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch. 911, a case relied upon by the plaintiff, G. and C. were the trustees of a settlement. C. died and X., his legal personal representative, lived in Ireland. The *cestui que trust* brought an action against G., alleging a breach of trust by him and C. and claiming payment by G. of the amount lost by the breach. A third party notice and leave to serve it on X. in Ireland had been set aside by the Court of Appeal, without prejudice to an application by G. under O. 16, r. 11. It was held by Buckley, J., that X. ought not to be added as a defendant against the plaintiff's wish. Now in that case the two trustees were jointly and severally liable. G. was liable and plaintiff elected to sue him alone. C., the other trustee, was dead, his legal personal representative was outside the jurisdiction, and could not be reached by a third party notice: See *McCheane* v. *Gyles* (No. 1), [1902] 1 Ch. 287. The judge shewed that under the rule the person sought to be added either "ought

to have been added," or that his "presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." The judge was of opinion that he could not hold that the plaintiff should have joined X. as a defendant or that her presence was necessary to enable the court to decide whether G. was liable for a breach of trust. I cannot see how this decision has any bearing on the question now before this court.

In *Byrne* v. *Brown*, 22 Q.B.D. 657, the Court of Appeal affirmed an order adding a party defendant where the original defendant claimed indemnity from the party so added. I would also refer to *Pilley* v. *Robinson*, 20 Q.B.D. 155, and *VanGelder* v. *Sowerby Bridge, etc., Society*, 44 Ch.D. 374.

In the case now before the court the sole defendant is a trustee who is willing to account to the plaintiff in respect of the trust. But he has notice from McLeod that the latter claims an interest in the trust. All that the defendant requests is protection. He is willing to account to the proper party but wishes to avoid being called upon to pay twice. If McLeod is made a party defendant the court can effectually and completely adjudicate upon and settle all questions involved. McLeod will have to make good the claim he has made or be barred in respect of it.

With great respect, I see no reason why the defendant should not be granted the protection he requests.

I would allow the appeal and restore the order of the referee. The costs of the appeals to Galt, J., and to this court should be to the defendant in any event of the cause.

CAMERON, J.A., concurred with Perdue, J.A. Cameron, J.A.

FULLERTON, J.A.:—This is an appeal from Galt, J., who set aside an order made by the master adding one McLeod as a party defendant to the action. Fullerton, J.A.

The plaintiff claims that defendant has disposed of certain lands in which she had a half interest and asks for an account, payment of any balance found due her on the taking of such account, and other relief.

The defendant in his defence alleges his willingness to account, but says that the half interest in said lands claimed by plaintiff really belonged to her husband who requested the defendant for

MAN.

C. A.

HAMELIN v. NEWTON.

Fullerton, J.A.

personal reasons and as the defendant understood for merely temporary purposes and not with the idea that plaintiff should be treated as the real owner of such interest to give the plaintiff a certain declaration of trust dated February 17, 1908, in which defendant acknowledged that he held a half interest in said lands in trust for the plaintiff. Defendant further says that said McLeod alleges that the interest of the plaintiff and of her husband in said lands has been assigned to him and that he is entitled to an accounting from the defendant.

The order of the master was made under the authority of rule 220, (2) of the Rules of the Court of King's Bench, which reads as follows:—(See judgment of Perdue, J.A.)

O. 16, r. 11 of the English Judicature rules contains language similar almost word for word to our rule 220 (2).

On the argument a number of English cases dealing with the construction of the last mentioned rule were cited. While exactly similar facts are not to be found in any of these cases, it appears to me that the principles to be gathered from the case of *Montgomery* v. *Foy*, [1895] 2 Q.B. 321, govern the present case. There a shipowner sued the consignee of goods for a declaration that he was entitled to an amount deposited with a warehouseman in respect of freight under the Merchant Shipping Act. The consignee was merely an agent of the shipper. The court added the shipper as a defendant in order that he might counterclaim against the shipowner damages for short delivery and injury to cargo. Lord Esher, M.R., in his judgment, at p. 324, said:—

> It appears to me that the words of the rule are large enough to allow of the joinder of the British Saw Mills Co. (the shipper) as defendants in this case. I think the question arising between them and the plaintiff is a "question involved in the cause or matter" within the meaning of the rule. The plaintiff claims the whole amount deposited in respect of the freight; but the amount to which he is entitled may be diminished by his being liable to pay to the defendants, whom it is sought to add, damages for breach of the same contract under which the freight is claimed.

In the present case if McLeod establishes the counterclaim: which he doubtless intends to plead, for a declaration that the husband of the plaintiff was the real owner of the land and transferred it to him, the plaintiff must fail.

The object of the rule is to avoid as far as possible all multiplicity of legal proceedings. See s. 25 (*k*) of The King's Bench Act.

Referring to the corresponding English rule, Lord Esher, in the last mentioned case, said, at p. 324:—(Extract cited in judgment of Perdue, J.A.)

On the hearing before the master in the present case an assignment from the husband of the plaintiff to McLeod, dated April 1, 1908, was produced and treated as part of the material on which the application was founded. The assignment was given as security for an advance of $10,000, and includes the lands in question.

McLeod himself also appeared and consented to be added as a defendant.

It was suggested on the argument before us that the defendant should have applied for an interpleader order.

R. 896 provides that "Relief by way of interpleader may be granted:—(*a*) When the person seeking relief . . . is under liability for any debt, money, goods or chattels, etc." Here the plaintiff sued defendant for an accounting, payment of the amount found due on the taking of such account and for other relief. I very much doubt if the defendant can be regarded as a person under liability for "any debt" within the meaning of the above rule. Even if an application would lie under the interpleader rules the court could, under r. 902, add the claimant as a party defendant to the action.

The defendant is quite willing to account, but desires to account to the right party. Having notice of the assignment to McLeod, he may some time in the future be compelled to fight an action brought by McLeod for an account.

I can see no possible reason for placing him in that position as we will if we refuse his application to add McLeod and I think the words of r. 220 are large enough to enable the court to make the order.

I would allow the appeal with costs and restore the order of the master. *Appeal allowed.*

SASK.

S. C.

CANADA HAIL INS. Co. v. McISAAC.

Saskatchewan Supreme Court, Appellate Division, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. March 27, 1918.

INSURANCE (§ III A—48)—HAIL INSURANCE—DELIVERY OF POLICY.
A policy sent to a company's local agent, countersigned by him, and ready for delivery, is in law delivered as an operative policy, and the parties thereto are bound thereby, the company for the risk assumed, and the insured for the premium.

Statement. APPEAL by defendant from a judgment at the trial in an action on a promissory note given by the defendant to cover a premium for hail insurance. Affirmed.

J. M. Hanbidge, for appellant; *T. D. Brown*, K.C., for respondent.

The judgment of the court was delivered by

Elwood, J.A. ELWOOD, J.A.:—The defence is that the policy for which the promissory note was given was never delivered to the defendant, and that there was no consideration for the promissory note.

One E. V. Harlow, the agent of the plaintiff company, through whom the insurance was effected, gave evidence on commission and the following are some of the questions and answers in his examination:

Q. Did you receive the policy from the company for the defendant, which policy is made a part of this question and this deposition and marked exhibit "B?" A. Yes, sir. Q. By whom was the policy countersigned, if by anyone? A. By me. Q. Did the defendant call for the policy? A. No, sir. Q. Did you ever send the policy to him by anyone, if so, by whom? A. Yes, sir. By L. A. Harlow. Q. State whether or not the defendant ever notified you that he wished to cancel hail insurance policy exhibit "B?" A. No, sir, Q. After the policy in suit had been issued by the company, what was first done with it, if you know? A. It was mailed to me. Q. After you received the policy about how long then was it until you saw the defendant? A. About a year. Q. About how long after you had received the policy from the company until you delivered it to L. A. Harlow as stated? A. Not exceeding 30 days. Q. What instructions did you give L. A. Harlow at the time you delivered the policy to him with respect to the policy? A. I requested him to give the policy to defendant Isaacs. Q. When did you next see the policy after you delivered the policy to L. A. Harlow? A. Next day. Q. What was done with it then if you know? A. It was kept by me. Q. Whether on that next day the policy was returned to you by L. A. Harlow? A. Yes, sir. Q. How long after that did you retain the policy? A. I retained it about a year and a half. Q. Then what did you do with it? A. I left it then with J. B. Harlow. Q. Did you come to Indiana shortly after delivering the policy to J. B. Harlow? A. Yes, sir. Q. L. A. Harlow and J. B. Harlow are brothers of yours? A. Yes, sir. Q. They now live in Canada? A. Yes, sir. Q. Were J. B. Harlow and L. A. Harlow acting as agents for the Hail Insurance Co. to your knowledge? A. No, sir. Q. At the time L. A. Harlow

returned the policy to you as above stated, what information did you receive, if any, as to why he had not delivered the policy to the defendant? A. I learned from him that the defendant was not at home when he took it to deliver it to the defendant.

The policy was apparently forwarded by the plaintiff to E. V. Harlow, to be countersigned by him, and to be delivered to the defendant. There was no other condition attached to the delivery of the policy. The policy itself contained a provision that it should not be valid until countersigned by plaintiff's authorized resident agent, and, as stated above, it was so countersigned.

A number of cases were cited, on behalf of the appellant, for the proposition that until delivery to the defendant the policy did not become effective, but in none of these cases was there an unconditional delivery. For instance, in *Confederation Life* v. *O'Donnell*, 13 Can. S.C.R. 218, the policy was delivered in *escrow*. In *Buck* v. *Knowlton*, 21 Can. S.C.R. 371, the judgment went on the ground that the assured never authorized a policy such as that which was issued, and that the policy was delivered in *escrow*.

Donovan v. *Excelsior Life*, 31 D.L.R. 113, was cited as authority for the contention of the appellant, but it seems to me, from a reading of that case, that it is clear authority for the proposition that where a policy is delivered to an agent of the company without any condition attached, simply for delivery to the assured, that the company is liable on the policy. In that particular case, the company wrote to its manager as follows:

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

Davies, J., at p. 113, says as follows:

> Now I take it as clearly decided by this court, in the case of *North American Life Assur. Co.* v. *Elson*, 33 Can. S.C.R. 383, that if the letter contained nothing more than the first two statements: "we have accepted this application and are issuing policy," just as soon as the policy was executed and posted to the general agent, the contract of assurance would have been complete.

SASK.

S. C.

CANADA HAIL INS. CO. v. MCISAAC.

Elwood, J.A.

And, at p. 119, Idington, J., says:—

The findings of fact by the trial judge and maintained by the Court of Appeal have reduced anything involved in this appeal to the bare question of law relative to the delivery of the policy in question. The delivery of the first policy can certainly not be maintained as complete in face of the terms of the letter of March 18, 1912, by the general manager to the provincial manager. If the conditions set forth in that communication had been complied with, then it would be fairly arguable that the company had intended to deliver the policy.

And at p. 120:—

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

And Anglin, J., at p. 120, says as follows:—

The present case is in several particulars distinguishable from *North American Life Ins. Co.* v. *Elson*, 33 Can. S.C.R. 383, relied on by the appellant, notably in that in the case now at bar the policy was sent to the company's agent not for unconditional delivery, as in the *Elson* case, 33 Can. S.C.R. 383, but to be delivered only upon conditions stated in the letter from the company to their agent referring to it.

In *Xenos* v. *Wickham*, L.R. 2 H.L. 296, at 309, Baron Pigott is reported as follows:—

It seems, therefore, to be reduced to this, viz: Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his Touchstone, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors, vol. i, C. 4, p. 54, and by the whole context shews that it is a question of intention. He afterwards, *ibid.*, p. 57 says, that "Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed."

Doe d. Garnons v. *Knight*, 5 B. & C. 692, is an authority most satisfactory on this subject, and it is only necessary to quote one passage from the judgment of the court as delivered by Mr. Justice Bayley. He says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew that he did not intend it to operate immediately it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to shew that the defendant did intend it to be unqualified, and a deed in full operation.

The head-note to *Roberts* v. *Security Co. Ltd.*, [1897] 1 Q.B. 111, is as follows:—

SASK.

S. C.

CANADA HAIL INS. CO. v. MCISAAC.

Elwood, J.A.

A proposal for an insurance of goods against loss by burglary having been made by the plaintiff to the defendant company on December 14, 1895, the seal of the company was affixed to a policy in conformity with the proposal at a meeting of the directors upon December 27, and the policy was signed by two directors of the company, and their secretary. The policy recited that a premium had been paid for an insurance against loss by burglary from December 14, 1895, to January 1, 1897, and purported to insure the plaintiff's goods accordingly. It contained a provision that no insurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. Upon the night of December 26, or early in the morning of December 27, a loss of goods included in the policy by burglary had taken place. The policy remained in the hands of the company, and nothing was paid by way of premium:—

Held, that the policy constituted a completed contract of insurance; that by the recital therein the defendants had waived the condition for prepayment of the premium; and therefore that the policy had attached.

In the *North American Life Assur. Co.* v. *Elson*, 33 Can. S.C.R. 383, it was held that the policy took effect from the date upon which it was mailed to the company's agent.

The evidence here clearly shews that the policy was mailed by the company to its agent to be countersigned by the agent and to be delivered to the defendant without any condition attached. The policy was countersigned, and it seems to me that the result of the authorities is that the company was clearly liable to the defendant on the policy, and that there was, therefore, a consideration for the promissory note sued on.

The appeal, therefore, in my opinion, should be dismissed with costs. *Appeal dismissed.*

FAFARD v. CITY OF QUEBEC.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ., October, 9 1917.

MUNICIPAL CORPORATIONS (§ II G—222)—HIGHWAYS—MAINTENANCE—REASONABLY SAFE CONDITION FOR PERSONS USING ORDINARY CARE.

A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

[See annotations 34 D.L.R. 589, 39 D.L.R. 4.]

Statement.

APPEAL from Court of King's Bench, Quebec, 35 D.L.R. 661. Affirmed.

Bernier, K.C., and *Dion*, for appellant; *Taschereau*, K.C., and *Morin*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—It is scarcely necessary to say more than that the appellant has failed to shew any cause of action

CAN.

S. C.

FAFARD v. CITY OF QUEBEC.

Fitzpatrick, C.J.

against the city. The claim seems to be based on the fallacious idea that someone must be to blame for every accident that occurs and that as it is shewn in this case that the appellant was not herself in fault, the city or the driver of the automobile or both must be liable to her for the injury she sustained.

There is no standard of perfection set for the condition of highways even if such were ever attainable. There is no limit to what might be done for ensuring greater safety. Every hill would have to be levelled and every valley filled, the roads widened, the most suitable paving used, the ways lighted and fenced or as is claimed here protected by stone walls and all liable to be altered at any time to suit the varying modes of vehicular traffic. It is an extravagant and impossible idea. If a wall were built here capable of withstanding the impact of an automobile running against it a claim might next be brought because it was not strong enough to resist a traction engine or a twenty-ton steam roller.

Suppose that motor omnibuses, such as are to be seen in London, New York and other large cities, were to be started in Quebec City, can it be suggested that the corporation is bound to make every road safe for these ponderous vehicles or to be liable for the consequences of their running away down a steep hill. The descent of the Côte de la Négresse is safe enough for ordinary traffic as is proved by the fact that there have been no accidents upon it during the many years it has been open. It is for those introducing a new kind of vehicle to see if the road is suitable for it to travel upon. If the risk were thrown upon the corporation no road could be left open that was not safe for all kinds of traffic. It would mean closing practically every street in the city; an obviously fantastic and absurd conclusion.

A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

Moreover, it is only common sense to distinguish between highways and by-ways. Precautions that might well be required to be taken on a much travelled main thoroughfare would often be quite uncalled for on an unimportant and little frequented side street. The city cannot be held liable because every street is not equally safe for all possible purposes of traffic.

The claim is not properly for non-maintenance of the highway but for non-construction of a wall to prevent vehicles which have run off the road falling over the adjacent cliff.

Fitzpatrick, C.J.

Again, the public are not to be treated as children and forbidden to go down a hill for fear they should do something reckless and injure themselves. Certainly there is no duty imposed upon a municipal corporation to have such care of them. Everyone is bound to have a reasonable care of his own safety. The descent of a steep hill can never be as safe as a road on the level.

The declaration does not allege any defect in the road and I agree with the trial judge that none such was shewn to exist. Even if the construction of the road was inadvisable in that there was a slight inclination to the outside, this was intentional on the part of the engineer who laid out the road and for the reason stated in the evidence. There was, therefore, no negligence for which the respondent could be under any liability.

The appellant says that the driver chose to go by this precipitous and narrow way because it was the shortest. How can that excuse his taking a road which he knew, or ought to have known, was, in any case, unsuitable and difficult for an automobile and especially so on a dark and wet night?

It is said that the driver was not licensed to ply for hire in the city and there would seem to be ground for strong suspicion that he was not only an unqualified but an incompetent man. He had only been driving for a few days .

It is not desirable to say anything concerning the driver, in this suit to which he is no party, except, in as far as necessary to shew that the cause of the accident is attributable to other than the negligence and fault of the respondent.

The quotations made in the appellant's factum from works on the subject of automobiles appear to be rather the views of the writers as to what the law on the subject ought to be; they seem to be aspirations to conditions which do not obtain at present. In any event, they afford no authority which can govern our decision here.

The appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—I would dismiss the appeal.

I think the circumstances shew clearly that the relation between the plaintiff and the chauffeur she hired to drive her was that of

CAN.
S. C.
FAFARD v. CITY OF QUEBEC.
Davies, J.

mistress and servant. *Quarman* v. *Burnett*, 6 M. & W. 499, 509, 151 E.R. 509.

He was not a licensed chauffeur to carry passengers, though he held a license to drive a motor *as owner*. He was an inexperienced chauffeur and going down the steep hill at the time and under the circumstances was, as found by Pelletier, J., guilty of gross imprudence and stupidity.

I agree with the trial judge, Dorion, that the effective cause of the accident was the driver's negligence.

As Carroll, J., says, the accident was due to bad direction given to the car and defective management. This is a pure question of fact and one with which, having been found against plaintiff by both courts, this court will not interfere.

Under all circumstances I would dismiss appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—It seems clear to me that the highway, at the place in question, was neither constructed nor safeguarded in such a manner as it should have been for the traffic respondent invited there, and being thus negligent in its duty, it should be held liable to appellant for damages thereby caused to her.

The driver's error in judgment, while doing his best in ways approved by experts, cannot be said to constitute such negligence on the part of appellant as to deprive her of any part of the damages primarily attributable to the respondent's neglect of duty.

The want of notice under the statute was properly disposed of by the trial judge.

I, therefore, think the appeal should be allowed and judgment be entered for the sum claimed with costs throughout.

Duff, J.

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

Anglin, J.

ANGLIN, J. (dissenting):—As the law stood when the plaintiff was injured, the City of Quebec probably could not exclude automobile traffic from any of its public streets (R.S.Q., 1909 art. 1423). But it probably was within its discretionary powers to close entirely to vehicular traffic any road which could not be safely used for all such traffic. If not, however, or if public convenience in this particular case rendered it undesirable to adopt a measure so drastic, it was at least the clear duty of the municipal corporation, opening and maintaining such an admittedly dangerous highway as La Côte de La Négresse, to have taken all reasonable pre-

cautions in its construction and in providing safeguards to minimize its perils.

In my opinion, the construction of a street leading down the side of a cliff of a pavement with an incline outwards from the cliff-side to the edge of the precipice, at a point where the roadway on a steep descent turns sharply on itself at an angle of about 180 degrees, was grossly improper, and manifestly increased greatly the danger for descending traffic—already very serious. That this method of construction may have lessened the grade for ascending vehicles does not afford an adequate excuse for adopting it. Surface water could have been otherwise provided for. Such faulty engineering cannot be too strongly condemned.

If a municipal corporation in the exercise of a statutory power to open, construct and control highways, such as the City of Quebec possesses, sees fit to open a highway along the edge of a precipice which renders its lawful use dangerous to travellers unless protected by railing or barrier, such protection, reasonably sufficient to meet the requirements of the situation, must be provided and its absence or insufficiency will be deemed a defect in construction. The Legislature of Quebec has recognized such an obligation in art. 788 of its Municipal Code (New, art. 478). The light board fence which the municipality had constructed along the edge of the highway adjoining the precipice had been more than once broken through and repaired, but not strengthened, before the plaintiff was injured. It certainly did not fulfil the requirements of the law. On the contrary, it was calculated to lull travellers into a false sense of security, if it did not constitute a veritable trap, and, although the corporation may not have been under a statutory obligation to maintain its highways in repair, amounted, in my opinion, to actionable fault, if it was the cause of injury.

If the trial judge in *Deguise* v. *La Corporation de N. D des Laurentides*, 50 Que. S.C. 31, to which he refers in the present case, intended to hold that where the duty to maintain city streets in good repair exists it does not now require that they shall be kept reasonably fit and safe for the use of automobiles, I am, with respect, unable to accept his view. Motor traffic is lawful and has now become so common and ordinary, at all events on

CAN.

S. C.

FAFARD v. CITY OF QUEBEC.

Anglin, J.

streets in cities and towns and on the main country thoroughfares, that where there is a duty to maintain such highways in repair it involves keeping them in such a condition that they can safely be used by automobiles. *Att'y-Gen'l* v. *Great Northern R. Co.*, [1916] 2 A.C. 356, 366, 371; *Davis* v. *Usborne*, 28 D.L.R. 397, 36 O.L.R. 148. In the present case, however, the inadequacy of the guard fence was a defect which rendered the use of La Côte de La Négresse unnecessarily and unreasonably dangerous for horse-drawn vehicular traffic descending it. It is, therefore, unnecessary to consider, in connection with that defect, any additional burden arising from the advent of automobiles. As put by Pelletier, J.:—

"It is clearly proved and admitted by both parties that this hill is dangerous, even very dangerous. It is one of the reasons invoked by the defendant, who insists before us upon the fact that the driver of the automobile, in which the defendant was, knew well the dangers of the hill and that he should not have ventured there especially on a rainy night.

"Not only is the hill dangerous, because it turns suddenly at a spot where the slope is steep, but it is dangerous also because it runs along a precipice on the edge of the promontory between the upper and the lower parts of the city, there being no protection wall, and lastly because the street paved with blocks instead of inclining towards the promontory bends towards the precipice."

The evidence also satisfies me that both these faults were contributing causes of the injury sustained by the unfortunate plaintiff. The liability therefor of the defendant corporation follows.

The defendants, however, contest the status of the plaintiff to maintain this action because she employed an unlicensed chauffeur and they plead as contributory fault on her part alleged negligence of the chauffeur in venturing to drive down a hill which he knew, or should have known, to be very dangerous on a rainy night and in mismanaging his automobile on the grade.

I am not convinced that negligent mismanagement of the automobile is proved. I rather think it is not.

Although the driver should have known the dangerous character of the road, it would seem to be at least questionable whether the defendant municipality, which invited traffic upon it, can set up this defence.

But any such negligence, whether in choice of route or in the driving of the car, was that of the chauffeur, and, under the circumstances of this case, his negligence, if proven, in my opinion, cannot be imputed to the plaintiff. She hired him as a public carter. She had no means of knowing and no reason to suppose that he was not duly licensed and fully qualified for the duties which he undertook. She exercised no control over his choice of route or his method of driving or managing his car. She merely summoned by telephone from a public cab-stand a person whom she understood to be a licensed cabman to drive her to her physician's office. Beyond telling him her destination she gave him no orders or instructions. In my opinion, the doctrine of identification cannot be invoked under such circumstances either to render the passenger answerable for fault or negligence on the part of the driver to other persons whom he might injure or bring her within the doctrine of *faute commune* when she seeks to recover damages from a third person through whose fault, operating conjointly with that of the driver, she has been injured. The driver was not a person under her control: neither was she a "master or employer," nor he a "servant or workman" within the purview of art. 1054 C.C. The plaintiff's responsibility for faults of the driver appears to have been taken for granted in the provincial courts. No authority supporting that view is cited in the judgments below; nor did counsel for the respondent refer to any in this court. After some research I have found none. With respect, I think it is erroneous, and that the true principle under the civil law of Quebec, as under English law, is to be found in the decision of the Court of Exchequer in *Quarman* v. *Burnett*, 6 M. & W. 499, 151 E.R. 509, approved by the House of Lords in *Mills* v. *Armstrong* (*The Bernina*), 13 App. Cas. 1. See too *Roby* v. *Kansas City Southern R. Co.*, 41 L.R.A. (N.S.) 355, a decision of the Supreme Court of Louisiana, *Little* v. *Hackett*, 9 Davis Supr. Ct. U.S. 366, cited with approval by Lord Herschell in the *Bernina* case, and *Adams* v. *Glasgow & S. W. R. Co.*, 3 Court sess. Cas. 4th Ser. 215.

Neither can the plaintiff's right of recovery be challenged, in the absence of proof of knowledge on her part, because the chauffeur, though licensed to drive his automibile as a private conveyance, and also to drive a horse-drawn carriage as a public

CAN.

S. C.

FAFARD v. CITY OF QUEBEC.

Anglin, J

carter, had not obtained a license to drive an automobile as a public chauffeur. No duty was cast upon her to enquire into his qualifications.

Under the civil law as under the English system, where an injury is caused by the negligence operating conjointly of two or more wrongdoers, each is liable to the person injured for the entire damage sustained. Fuzier-Herman, Rep. vbo. Responsabilité, No. 1113.

Finally the defendant sets up the plaintiff's failure to give the notice prescribed by art. 561 of its Act of Incorporation. The trial judge, however, held the plaintiff excused from giving this notice for reasons which he deemed valid. The law entrusts to his discretion the determination of his sufficiency for such reasons. While that discretion is, no doubt, subject to review on appeal, its exercise should not be lightly interfered with. I certainly cannot accede to the defendants' contention that the excuse for failure to give notice within the prescribed thirty days must be "somewhat equivalent to irresistible force." No doubt the excuse put forward and accepted in this instance falls short of meeting that test. But the plaintiff was confined to bed for several months after the accident. For more than one month, *i.e.*, until after the expiration of the time fixed by the statute for giving the notice, she was paralyzed and unable to move in her bed. She appears to have been under a vague impression that the chauffeur had taken steps towards obtaining indemnity for her from the city. She did not understand the importance of the notice of injury or its necessity.

There is every reason to suppose that the municipal authorities learned of the accident immediately after it occurred, and there is no suggestion that the plaintiff's failure to give them formal notice caused the slightest prejudice or inconvenience to the defendants.

The judges of the Court of Appeal expressed no disapproval of the course taken by the trial judge in accepting the plaintiff's excuse. Had they thought it clearly wrong, it is highly probable that they would have said so. Indeed they would probably have disposed of the case adversely to the plaintiff on this ground rather that upon the merits. Under these circumstances, I am not prepared to say that the trial judge clearly erred in not

rejecting the plaintiff's excuse for her failure to give the notice within the period prescribed by the statute.

Although in subsequently giving notice to the defendants the plaintiff placed her claim for damages at $1,500 it seems tolerably clear that she did not even then fully appreciate the seriousness of her injuries. She had, in my opinion, proved damages to the extent of the $2,500 claimed in her action and I think it would be unfair and a denial of justice to hold her bound by the smaller figure stated in her notice. The fact that she so limited her original demand, however, affords some evidence of her good faith.

I am, with respect, for these reasons, of the opinion that the plaintiff's appeal should be allowed with costs in this court and in the Court of King's Bench and that judgment should be entered in her favour for $2,500 with costs in the Superior Court.

Appeal dismissed.

RAMEY v. MARCUS.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. March 12, 1918.

BILLS AND NOTES (§ V A—105)—ACCOMMODATION MAKER—EXONERATION.

An accommodation maker of a note is entitled to exoneration by the principal debtor from liability on the note, even before payment of the note is demanded, and may obtain a declaration to that effect in an action against the principal debtor.

Statement.

MOTION to set aside a verdict for plaintiff and for a new trial in an action by plaintiff to recover the amount of a judgment recovered against him in an action on a promissory note alleged to have been made by plaintiff at defendant's request and for the accommodation of defendant, on the grounds of misdirection and non-direction to the jury by the trial judge.

B. W. Russell, for appellant; *J. J. Power*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff's case is that he was the accommodation maker of a promissory note in favour of the defendant, and that he was sued on the note and judgment recovered against him on which he has, since the date of the present action, been obliged to pay $4 by an order of a commissioner under the Collection Act, with other monthly payments to follow. The plaintiff has recovered judgment against the defendant for the amount of the note with interest, and part of the costs incurred in defending hopelessly the suit brought against him by the holders of the note.

N. S.

S. C.

RAMEY v. MARCUS.

Russell, J.

No authority has been given for such an action or such a judgment. The usual action by an accommodation maker is for money paid to the use of the accommodated party, but this action cannot be maintained until the maker has paid the money on the note. The verdict must of course be set aside with costs of the appeal.

But the plaintiff claims a right to exoneration. This is an equitable remedy "where a surety has actually paid or satisfied the principal's obligation or any part thereof." And it is said by Pomeroy's Equity Jurisprudence, 2nd ed., sec. 1417, that he may also maintain a *quia timet* suit in equity before any payment. He says in his note:

> After the obligation becomes payable the surety before he has paid it and whether he has been sued by the creditor or not may maintain a suit in equity against the debtor—in the nature of a bill *quia timet* to compel him to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance and neglects or refuses to do so. The creditor is, of course, made a co-defendant.

Assuming the principles as to exoneration of a surety to be applicable, and that the plaintiff is in a position to maintain such a *quia timet* action, the creditor should be a party, and if any decree were made, it should be that the defendant pay the money to the creditor, not as has been adjudged in this action, that he should pay three or four hundred dollars to the plaintiff from whom the creditor might never get it.

I think the plaintiff should have leave, should he see fit, to add the creditor as a party and have a new trial on amended pleadings. The verdict seems to be opposed to the impressions of the judge on the facts, and the charge itself is susceptible of a misunderstanding on the part of the jury. There was evidence that $111 was due from the plaintiff to the defendant which was part of the consideration for the note. The plaintiff's evidence was opposed to this. The trial judge left the question to the jury in such a way that they might easily infer his legal opinion to be that unless there was some further consideration to make up the whole amount of the note, which was for $250, there would be no liability on the plaintiff in connection with the note. At the argument the counsel for the defendant abandoned his attack on the verdict as against the weight of evidence, but insisted that there had been such a presentation of the law as would amount

to a misdirection. I think there was clearly room for a misunderstanding on the part of the jury and that it would be an error were we to base any final judgment in the cause on the implied finding by the jury that there was no consideration for the note.

CHISHOLM, J.:—The plaintiff made a promissory note for $250 in favour of the defendant, which the latter indorsed to the Bank of British North America. The note and indorsement are as follows:

$250. Due Nov. 28/10. HALIFAX, N.S., May 23rd, 1910.

On Nov. 25th, 1910, after date, I promise to pay to the order of S. L. Marcus, at the Union Bank of Halifax, the sum of Two hundred and fifty dollars. Value received. G. R. RAMEY.

(Indorsed.)

No. 5304. (Sgd.) S. L. MARCUS, (Sgd.) O. COHEN & Co.

For collection on account of the Bank of British North America, (Sgd.) L. ELMSLEY, manager.

The bank sued the plaintiff on the note, and he entered an appearance in the action, whereupon the bank proceeded under the provisions of Order XIV of the Judicature Act to set aside the appearance and enter up judgment for the amount claimed. The chambers judge granted an order setting aside the appearance and directing that judgment be entered for the amount of the note and interest thereon, and the costs of the application. The defendant in that action (the present plaintiff) then appealed to the court *in banco* and the appeal was dismissed with costs. Subsequently the judgment debtor was examined before a commissioner who directed him to pay the amount due to the bank in instalments of four dollars a month, to be followed by imprisonment in the event of failure to pay the instalments.

The plaintiff, after the above-mentioned proceedings were had, brought the present action against the defendant claiming that the said note was made for the accommodation of the defendant.

In his pleadings the plaintiff claims, "as against the defendant, exoneration in respect of the said judgment, and a judgment therefor with costs." The costs claimed are not only the costs of the judgment of the bank, but also the costs of the defendant's solicitor in relation to all the proceedings brought by the bank in its action. The defendant denies that the note was made for his accommodation, and alleges that at the time of the making of the note the plaintiff was indebted to him in the sum of $250 for goods sold and delivered and money lent (the goods being

N. S.
S. C.
RAMEY
v.
MARCUS.
Chisholm, J.

bottles of the value of $111.76). The defendant sets up the further plea that he is not responsible in any event for the costs incurred by the plaintiff in his fruitless resistance of the bank's claim.

The action was tried before Longley, J., with a jury, and the jury returned a verdict in favour of the plaintiff for the amount of the note and interest.

The defendant now moves for a new trial on the ground: (1) of non-direction by the trial judge in that he did not direct the jury that a just account for $111.76 was good consideration for the note of $250, or, in the alternative, that such an account was good consideration *pro tanto;* and (2) that he misdirected the jury in directing them, in effect, with respect to the points as to which non-direction is complained of.

The main questions for our determination are: first, whether the verdict of the jury by which it was found in effect that the plaintiff made the note entirely for the accommodation of the defendant is a verdict which should or should not stand; and, secondly, if the verdict must stand what form of relief is the plaintiff entitled to thereunder?

Now, as regards the ground of non-direction, above mentioned, the record shews that counsel for the defendant abstained from asking the trial judge to give the direction of the omission of which he now complains. The rule laid down by Halsbury, L.C., in *Nevill* v. *Fine Art and General Ins. Co.*, [1897] A.C. 68, at 76, is, that if counsel abstains from asking for the direction when he has an opportunity to do so, he will not be heard later to complain of it on an application for a new trial.

As to misdirection, the defendant complains that: "The trial judge misdirected the jury in directing them (a) in effect, that it was necessary to find that the plaintiff owed the defendant the full sum of $250 before they could find a verdict for the defendant; (b) that the plaintiff would not be responsible for want of consideration if he owed the defendant the sum of $250.

What the trial judge did in fact say on the point in question was:—

> If this $111 and certain other bottles, which he could not tell in 10 years time, were to be considered as a fact and a note was given on the faith of it, the plaintiff would have the right to pay that note as he would not be responsible for want of consideration at all.

As I understand that direction, it is that if the jury should be satisfied that the plaintiff owed the defendant $111 for the bottles, and the note was given on the faith of that indebtedness, the plaintiff would be liable for the amount of the note, and could not avail himself of the plea of want of consideration at all. If that is a fair interpretation of the language of the trial judge, and the one which a jury would put upon his words, I do not see that the defendant had anything to complain of. It raises the question of the genuineness of the claim for $111; and I take it that the jury in their deliberations passed on that claim, and disbelieved the evidence of the defendant with respect to it.

The verdict, in my opinion, so far as it fixes the amount of the defendant's liability to the plaintiff should stand, and the application for a new trial should be dismissed. The order for judgment on the verdict should be set aside for reasons which are hereinafter mentioned.

The question next arises as to what plaintiff's rights against the defendant are. He made the note for the accommodation of the defendant, and he became thereby the guarantor of the defendant's liability to any person to whom the defendant might indorse it. What then are the rights of a surety against the principal debtor?

In DeColyar on Guarantees (3rd ed., 1897) it is stated, p. 299:

The most important right which a surety possesses before any payment has been demanded of him is, that after the debt has become due he may compel the debtor to exonerate him from his liability by at once paying the debt. To obtain this relief a surety must formerly have had recourse to a Court of Equity; and he should now resort to the Chancery Division, as being, since the Judicature Acts, the appropriate tribunal in such cases.

"Although" says Lord Keeper North in *Randaugh* v. *Hayes*, 1 Vern. 189, 23 E.R. 405, "the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the orignial bond, this court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hang over him . . . Subsequent cases have fully recognized this view and, notably, the very recent case of *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, where the right of one co-surety to be indemnified by another, before payment of the common liability, was established."

In 15 Hals. Laws of England, at p. 519, the law is stated in these terms:—

The surety may, even before payment has been demanded of him or the principal debtor, call on the latter to exonerate him from liability, if the creditor has a right to sue the principal debtor and refuses to exercise it (and

N. S.

S. C.

RAMEY v. MARCUS.

Chisholm, J.

apparently also in other cases), and may obtain relief from liability under his guarantee, although he has not paid. If his claim to be indemnified is denied, he can obtain a declaration that he has a right to be relieved from liability, which relief is not limited to cases where the creditor has a right to sue the debtor which he refuses to exercise. The surety is also entitled to have a sufficient sum set aside to meet the claim for an indemnity.

The cases of *Ascherson* v. *Tredegar Dry Dock Co. Ltd.*, [1909] 2 Ch. 401, is in point. The head note is as follows:—

Where there is an actual accrued debt secured by a guarantee and one of several co-sureties is liable, and admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him by paying off the debt.

This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor. . . . and, semble, neither the creditor nor the co-sureties need be parties.

It has been the law of the court for very many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved (p. 406).

In *Johnston* v. *Salvage Association*, 19 Q.B.D. 458, at 460, Lindley, L.J., said:—

In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability.

And in *Hobbs* v. *Wayet*, 36 Ch. D. 256, Kekewich, J., at 259, said:—

I think that a man who accepts a liability, and who is therefore entitled to be indemnified directly the cloud appears—I am using a metaphor which I find made use of in that case—however small the cloud may be, is entitled to go to the man who made the request and say: "I am entitled to be indemnified," and if the right to indemnity is denied he has a right to come to this court and obtain a declaration that he or his testator's estate is entitled to be relieved from that liability.

I think the plaintiff is entitled to exoneration, and should have a declaration that he is entitled to be indemnified. There are cases where payment will be directed by the principal debtor to the surety. *Lacey* v. *Hill*, L.R. 18 Eq. 182, at 191, *per* Jessel, M.R. But I do not think that in this case the court should so decree. The plaintiff apparently is financially worthless, and if the defendant should pay him the amount of the note and interest, the plaintiff might apply the money to his own uses, and the defendant would have no effective remedy against him.

There will be no costs to the plaintiff either on the trial or on the motion for a new trial. In the action, up to the time when the issues were presented to the jury, the plaintiff claimed an

amount largely in excess of what he was entitled to, and he claimed judgment for that amount. On the argument before the court *in banco* he continued to press for such judgment. Both plaintiff and defendant failed in so many of their contentions, both on the trial and on the argument before the court *in banco*, that I think no costs should be given to either party.

Chisholm, J.

DRYSDALE, J. and RITCHIE, E.J., concurred with CHISHOLM, J.

Drysdale, J. Ritchie, E.J.

Judgment accordingly.

WALKER v. WALKER.

Manitoba Court of Appeal, Perdue, Cameron, Haggart and Fullerton, JJ.A. April 15, 1918.

DIVORCE AND SEPARATION (§ II—5)—IMPERIAL STATUTE IN FORCE IN MANITOBA—JURISDICTION OF COURTS.

The laws of England, relating to matters within the jurisdiction of Canada, as they stood on July 15, 1870, were given force in Manitoba by s. 1, c. 33, 51 Vict. (Dom.); these included the English divorce laws, and the Manitoba Court of King's Bench has full power to administer these laws.

[Review of legislation and authorities; *W.* v. *W.*, 35 D.L.R. 207, reversed.]

Statement.

APPEAL by petitioner from an order of Galt, J. dismissing a petition to the Court of King's Bench praying for an order declaring a marriage null and void. Reversed.

Donovan & Scott and *A. C. Campbell* for plaintiff; *John Allen*, Deputy Attorney-General for the Province of Manitoba, upholding the jurisdiction of the court.

C. P. Wilson, K.C., also appearing on behalf of the Province of Manitoba, *contra*.

The judgment of the Court was delivered by

Perdue, J.A.

PERDUE, J.A.:—In this case a petition was presented to the Court of King's Bench praying for an order declaring that a marriage which had taken place between the petitioner and respondent was null and void. The parties were married in England, in 1902, and are both domiciled in this province. The petition was heard before Galt, J., who found that a sufficient case was made out for the annulment of the marriage under the Imperial Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85; provided that the statute is in force in this province and that the court has jurisdiction in the matter. As this is the first case in which it has been claimed that the English divorce law (or any law relating to divorce), was in force in Manitoba, he thought

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

that the question of jurisdiction should be decided by the highest court, rather than by a single judge. He therefore dismissed the petition. From that decision the petitioner has appealed to this court.

The respondent did not appear on the hearing before Galt, J. On the argument before this court, Mr. John Allen, Deputy Attorney-General appeared for the Att'y-Gen'l of Manitoba and, with Campbell and Scott, for the plaintiff, supported the claim of jurisdiction. C. P. Wilson, K.C., at the request of the Attorney-General, appeared for the defendant. The Minister of Justice of Canada was notified of the argument, and answered that he did not wish to be represented.

It has been held by the Court of King's Bench in this province that when Manitoba entered Confederation the laws in force in the territory out of which the province was formed were the laws of England of the date of the Hudson's Bay Co.'s charter, May 2, 1670, in so far as the same were applicable to the country: see *Sinclair* v. *Mulligan*, 3 Man. L.R. 481, affirmed in appeal, 5 Man. L.R. 17. There was also a body of local laws in existence —the ordinances or enactments of the Council of Assiniboia, a territory extending around Fort Garry, which last place was situated on a part of the site of the present city of Winnipeg. There was also in Assiniboia a General Court, presided over by a judicial officer, which administered the laws in the territory. The jurisdiction of that court extended as far as the Rocky Mountains, and included all the territory comprised in the Province of Manitoba. See *Sinclair* v. *Mulligan*, *supra*, at p. 488. Both the Council of Assiniboia and the General Court were created by the Hudson's Bay Co. under the wide powers of government and administration conferred upon it by its charter.

The province was admitted into Confederation on July 15, 1870. See Manitoba Act, 33 Vict. c. 3 (Can.), and Imperial order in council of June 23, 1870, admitting Rupert's Land into the Dominion of Canada.

The Imperial Act, 31 & 32 Vict. c. 105, known as the Rupert's Land Act, 1868, authorised Her Majesty to accept the surrender of the lands, privileges and rights of the Hudson's Bay Co. and to admit Rupert's Land into the Dominion of Canada, and declared that after its admission the Parliament of Canada might

establish within the territory all necessary laws, ordinances, etc., and constitute such courts as might be necessary, but added the proviso that, until otherwise enacted by the Parliament of Canada, "all the powers, authorities and jurisdictions of the several courts of justice now established in Rupert's Land, and of the several officers thereof, and of all magistrates and justices now acting within the said limits, shall continue in full force and effect therein:" S. 5.

In pursuance of the powers given by the Rupert's Land Act, the Parliament of Canada passed the Act for the temporary government of Rupert's Land, 32 & 33 Vict. c. 3 (D), which by s. 5 provided that, "all the laws in force in Rupert's Land and the North West Territories at the time of their admission into the Union shall, so far as they are consistent with the British North America Act, 1867, with the terms and conditions of such admission approved by the Queen under s. 146 thereof, and with this Act, remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor under this Act." The public officers or functionaries were also to retain office (s. 6). The operation of this Act was by s. 36 of the Manitoba Act, 33 Vict. c. 3 (D), extended and continued in force until January 1, 1871, and until the end of the session of parliament then next ensuing. The Act 32 & 33 Vict. c. 3 was declared valid by Imperial statute, 34 & 35 Vict. c. 28, s. 5.

In 1874 the Legislature of Manitoba in introducing, as far as its powers extend, the laws of England as they stood on July 15, 1870, declared that nothing in the enactment should affect any civil right acquired or existing under the laws of Assiniboia on that date: 38 Vict. c. 12, s. 1.

Up to the decision in *Sinclair* v. *Mulligan*, *supra*, it was generally believed that the laws of Assiniboia, which were in force in Manitoba at and after the union, had introduced all the laws of England of a recent date applicable to the condition of the colony unless subsequently altered or repealed. See cl. 53 and cl. T. of the laws of Assiniboia, printed at pages lxxviii and lxxix of vol. 1 of the Consolidated Statutes of Manitoba, 1880. By cl. 53 (April 11, 1862), it was declared that "in place of the laws of England of the date of the Hudson's Bay Co.'s charter, the laws of England of Her Majesty's accession so far as they

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

may be applicable to the condition of the colony, shall regulate the proceedings of the general court, till some higher authority or this council itself shall have expressly provided, either in whole or in part, to the contrary." Cl. T. (January 7, 1864) amended cl. 53 and extended it to include all such laws of England of subsequent date as might be applicable to the condition of the colony, also the existing laws of England from time to time "in so far as the same are known to the court." The decisions of the Court of King's Bench down to *Sinclair* v. *Mulligan*, supported the general view as to the effect of the above legislation. In *Canadian Bank of Commerce* v. *Adamson*, 1 Man. L.R. 3 the full court of King's Bench held that the English Bills of Exchange Act, 18 & 19 Vict. c. 67, was, by virtue of the above legislation, in force in Manitoba. In *Keating* v. *Moises*, 2 Man. L.R. 47, in a suit to cancel a patent, Taylor, J., held that up to April 11, 1862, the laws of England of the date of the charter of the Hudson's Bay Company were those in force in Manitoba; that on April 11, 1862, the law of England of the date of Her Majesty's accession was introduced, that on January 7th, 1864, the law of England, as it stood at that date, was the law of Assiniboia. These decisions were not questioned until *Sinclair* v. *Mulligan* was decided.

It is not necessary, even if it were open to us in this case, to question the validity of the decision in *Sinclair* v. *Mulligan*. The above discussion is only given to show the doubts that prevailed until the Dominion Parliament interfered by 51 Vic. c. 33 (which I shall deal with later on), and finally declared what laws coming within its legislative control were then in force, and had been in force in Manitoba, since the time that province entered Confederation.

On April 14th, 1871, the Parliament of Canada passed an Act, 34 Vic. c. 13, by which the Statutes of Canada passed in the first, second and third sessions of Parliament were made applicable, with certain exceptions, to the Province of Manitoba. By c. 14 of the statutes passed in the same session, 34 Vic. (D), a number of existing statutes of the Dominion, relating to crimes and offences and to procedure in criminal matters, were extended to, and given force and effect within, the Province of Manitoba. By 38 Vic. c. 12, sec. 1 of the statutes of Manitoba, the legislature

of the province declared that the Court of Queen's Bench of Manitoba should decide all matters of controversy relative to property and civil rights according to the laws of England as such laws existed and stood on July 15, 1870, "so far as the same can be made applicable to matters relating to property and civil rights in this province." English rules of evidence, practice and procedure as of July 15, 1870, were also introduced by the same section. This Act came into force on July 22, 1874. See 38 Vic. c. 12, s. 1; Con. Stat. Man., 1880, c. 31, s. 4; R.S.M. 1913, c. 46, s. 11.

It will thus be seen that the province after Confederation introduced the laws of England relating to property and civil rights in so far as the powers of its legislature extended. The Dominion made certain of its own statutes applicable, but there was still left untouched a most important body of law relating to subjects coming under s. 91 of the B.N.A. Act, which could only be dealt with by the Parliament of Canada. With the exceptions already mentioned, chiefly relating to criminal matters, nothing was done by Parliament for a number of years to introduce into Manitoba the great body of English laws, statutory or otherwise, coming under the classes of subjects mentioned in the above section 91. The older provinces had brought with them, when they entered Confederation, modern laws relating to these classes of subjects, but if *Sinclair* v. *Mulligan* was well decided, the laws in force in Manitoba relating to the subjects referred to in s. 91 were, with the exception above mentioned, those in force in England in 1670.

When the decision in the above case was pronounced, the serious condition in which the laws of the province had been left was at once apparent. Here was a young and progressive country already a great producer of food stuffs and other products, rapidly developing in every way, whose inhabitants were carrying on a considerable trade, both within and without the province, and were daily engaged in important business transactions involving modern methods and principles, yet left, in respect to many important subjects, with the system of laws of two hundred years before, a system which, for instance, did not recognize the negotiability of promissory notes. In addition, the laws regulating trade and commerce, and those relating to banking, cheques,

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

interest, legal tender and other subjects, were left either in the condition in which they were in England in 1670, or in so doubtful a state as greatly to interfere with business transactions. It was not only the absence of various laws necessary in a modern community that was objectionable, but also the presence, in the English laws of that period, of penal enactments in regard to religious observances and of laws affecting the status of certain persons and classes of persons, usury laws, and other enactments, unsuitable to, and in many cases, positively detrimental to the citizens of a province of the Dominion.

Each of the provinces originally comprised in the Dominion had, prior to Confederation, not only the powers of legislation now possessed by a province, but also those relating to matters which now come under the exclusive legislative authority of the Parliament of Canada. Each of these provinces had adopted a modern system of jurisprudence which, together with its own provincial courts and functionaries, the province brought with it on entering Confederation: B.N.A. Act, s. 129. After a province entered the Union its legislature could only enact laws on subjects allotted to it for legislation. The Province of Manitoba after being admitted to Confederation introduced, in so far as it possessed the power, the general laws of England as they were on July 15, 1870. But if a complete introduction of the English laws of that date were to be made, as far as they were applicable to the conditions of the province, parliament would have to come to the assistance of the legislature of the province. It was under these conditions and in view of this state of the law in Manitoba that the Act 51 Vic. c. 33 (D.) was passed by parliament and brought into force on May 22, 1888. This Act is intituled, "An Act respecting the application of certain laws therein mentioned to the Province of Manitoba," and is as follows:—

For the removal of doubts, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said Province and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada

2. Whenever, between the said day and the first of March, one thousand eight hundred and eighty-seven, interest was payable in the said province by the agreement of parties or by law and no rate was fixed by such agreement or by such law, the rate of interest was six per centum per annum.

3. Nothing in the first section of this Act contained shall affect any action, suit, judgment, process or proceeding pending, existing or in force at the time of the passing of this Act.

It is claimed on behalf of the plaintiff, that the body of the laws of England, as they stood on July 15, 1879, introduced into Manitoba by s. 1 of the above Act, included the English divorce law of that date and made it a part of the laws of Manitoba. If *Sinclair* v. *Mulligan* was well decided, it cannot be contended that there was any divorce law in force in Manitoba prior to the passing of the above Act. In 1670, divorce was exclusively within the jurisdiction of the Ecclesiastical Courts in England, and there was no machinery for applying and enforcing that law in Rupert's Land. The jurisdiction of the courts in this province, if any, to entertain the petition in this case could only be derived through the medium of the Act above set forth. There has been no prior or subsequent general Act of the Dominion Parliament as to divorce.

It is claimed that the Act (51 Vic. c. 3) was not intended to generally introduce the laws of England of July 15, 1870, relating to subjects which came within the legislative authority of the Parliament of Canada and which were applicable to the provinces. It is urged that it was not intended to introduce the law of divorce into Manitoba, because Parliament had declined to pass a divorce law applicable to the whole Dominion. It is said that the only purpose of the Act was to clear up doubts as to the law of promissory notes, the negotiable nature of which was not recognized by the English law of 1670. These doubts, it is said, were raised, and were the only doubts raised, by the decision in *Sinclair* v. *Mulligan*. That case, however, concerned the validity of a verbal bargain and sale of land which took place prior to the transfer of Rupert's Land to Canada. It was held in that case that the laws in force in the province as to the transfer of land, at and prior to the time when the province entered Confederation, were those of the date of the Hudson's Bay Company's charter. If the doubts referred to in the preamble to the Act only referred to

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

promissory notes, why was not the Act confined to these? It clearly refers to interest also, s. 2 being a specific provision excepted from the general application of s. 1. The Act also introduced the criminal law of England as of July 15, 1870, except as amended by Dominion enactment before or after the passing of the Act. By the Criminal Code, R.S.C. 1906, c. 146, s. 12, it is declared that: "The criminal law of England as it existed on the fifteenth day of July, 1870, in so far as it is applicable to the Province of Manitoba, and in so far as it has not been repealed, as to the province, by any Act of the Parliament of the United Kingdom, or by this or any other Act of the Parliament of Canada, and as altered, varied, modified or affected, as to the province, by any such Act, shall be the criminal law of the Province of Manitoba." The authority given for this section is s. 1 of the above Act, 51 Vic. c. 33.

The above cited s. 12 of the Criminal Code shows that one of the "doubts" to be removed by 51 Vic. c. 33 was that concerning the criminal law in force in Manitoba. On the revision of the statutes in 1906, s. 1 of 51 Vic. c. 33 was introduced into the Criminal Code as an enactment affecting or forming a part of the subject of the Code. The revision is to be construed as declaratory of the law contained in the Acts for which it is substituted. See 6 & 7 Ed. VII. c. 43, s. 7.

But in addition to the subjects of promissory notes and criminal law to which the statute 51 Vic. c. 33 admittedly applies, we find s. 1 of that statute set out in full in c. 99, s. 6, of the Revised Statutes of Canada, 1906, intituled the "Manitoba Supplementary Provisions Act." It is there inserted as having a general application. The revision came into force over eighteen years after the Act (51 Vic. c. 33) was passed.

There were many other laws which we may reasonably conclude were intended to be introduced into Manitoba by the same Act (51 Vic. c. 33) or respecting which the intention was that the Act should remove all doubts in regard to their being in force. For example, the Habeas Corpus Act (31 Car. II. c. 2) was passed after the date of the Hudson's Bay Co.'s charter. It is reasonable to suppose that it was intended to introduce that Act into Manitoba. Again, we find in the Acts passed at the first three sessions of the Dominion Parliament or at subsequent

sessions, and made applicable to Manitoba, many references to banks and banking, extending their charters to the whole of Canada, and permitting them to issue notes and to lend money on promissory notes, bills of lading, etc. Nothing, however, is said as to the negotiable nature of these instruments or of the laws governing them, and no attempt is made to give to them or any of them the qualities then possessed by them in the older provinces of the Dominion. Before the statute of 3 & 4 Anne, c. 9, there was great doubt as to the negotiability of promissory notes, whether made payable to order or to bearer. See the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*, L.R. 10 Ex. 337, for a history of these instruments. Bank notes came into use and received legal recognition still later. See *Miller* v. *Race*, 1 Burr. 452, 97 E.R. 398; *Goodwin* v. *Robarts*, p. 350. Bills of lading also derive their efficacy from general mercantile usage and were ratified by judicial decision in *Lickbarrow* v. *Mason*, 2 T.R. 63, 100 E.R. 35. The subject of bills of lading has been regarded as one coming under Dominion legislation: R.S.C. 1906, c. 118. Lord Cockburn, in giving the judgment of the court in *Goodwin* v. *Robarts*, points out that these instruments as well as cheques on banks and certain other negotiable instruments, derived their negotiability from the law merchant and had their origin, at no very remote period in mercantile usage, and were then adopted into law by the courts (p. 352). It is safe to say that none of these instruments were recognized by law in 1670, and that almost all the mercantile law of England originating in the custom or usage of merchants has grown up since then.

It follows from the foregoing fact, if the decision in *Sinclair* v. *Mulligan* was good law, most momentous questions were raised in respect of subjects upon which the Parliament of Canada alone could legislate. Clearly the safest method to adopt was to follow the course taken by the provincial legislature, and introduce the body of the laws of England as they stood at the date when the province entered Confederation, in respect of matters exclusively under federal authority, subject to necessary exceptions and qualifications. If there were any English laws which parliament might deem it impolitic to introduce, those laws might be excepted from the general provision. It would be almost impossible to take the opposite course and declare specific-

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

ally by name what laws, statutory or otherwise, were introduced so that the exceptions, such as they might be, would be indicated by their omission from the list. We find certain exceptions to, and qualifications of, the general application of s. 1 of the Act, contained in the section itself, but divorce or any law relating to it is not included in these exceptions.

"Marriage and Divorce" forms one of the classes of subjects assigned exclusively to the legislative authority of the Parliament of Canada: B.N.A. Act, s. 91, No. 26. It can scarcely be conceived that this important class of legislation was completely overlooked and that by inadvertance it was not excepted from the general effect of the enactment, if it was intended to except it. One can well conceive that parliament would consider it better that the laws of England respecting marriage and the capacity to contract marriage, as they stood in 1870, should be in force in the province, rather than those of 1670. If the marriage laws of England should be introduced, why not also the divorce laws?

But it is urged that parliament has never passed a general divorce Act applying to the whole of Canada, and that in the same session in which the Act in question (51 Vic. c. 33) was passed, a proposal to introduce such a general measure was rejected. This is used as an argument that parliament did not intend to apply the English Divorce Act to Manitoba. It is well known that any proposal to pass general divorce legislation in Canada would meet with strong opposition in at least one of the original provinces of the Dominion. But when parliament was introducing the laws of England in general into the new Province of Manitoba, there would not necessarily be the same objection against including the divorce law with the other laws, as no other province would be affected. New Brunswick, one of the original provinces of the Dominion, had before the union a divorce law which it brought with it. So also British Columbia, which entered Confederation later than Manitoba, brought with it its own divorce law: *Watts* v. *Watts*, [1908] A.C. 573. When parliament proposed the passing of 51 Vict. c. 33, we may assume that it had knowledge of the decision of the Supreme Court of British Columbia, pronounced in 1877, which declared that the divorce law of England had been introduced into that province by a general provision similar to

the one then before parliament: see *S.* v. *S.*, 1 B.C.R., Part 1, p. 25. The fact also that a general divorce law was before parliament at the session, 51 Vict., would be likely to put it upon its guard respecting divorce legislation.

But, aside from these considerations, we must interpret s. 1 of the statute, 51 Vict. c. 33, according to the established rules of interpretation. The great fundamental principle is:—

> In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther: *per* Lord Wensleydale in *Grey* v. *Pearson*, 6 H.L. Cas. 61 at 106, 10 E.R. 1234.

The above canon of construction has been followed again and again and has been called the Golden Rule for the interpretation of statutes: see Maxwell on Statutes, 5th ed., pp. 3-5.

> Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words: See Maxwell, 5th ed., pp. 5-6, and the numerous authorities there cited.

Again, citing from the same writer:—

> In short, when the words admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature, and to construe them according to its own notions of what ought to have been enacted. . . . To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute; it is, to expound it. The question for him is not what the legislature meant, but what its language means; what it has said it meant: Maxwell, 5th ed. p. 8. See also Craies' Stat. Law, 4th ed., pp. 65-71. The above is amply supported by the authorities cited.

In one of the latest and most authoritative decisions as to the rules to be observed by courts in interpreting statutes, Viscount Haldane, L.C., said:—

> My Lords, we have heard, in the course of this case, suggestions as to the merits of the conflicting points of view and as to the reasonableness, in interpreting the language of Parliament in the Trade Disputes Act of 1906, of presuming that the legislature was acting with one or other of these points of

MAN.

C. A.

WALKER v. WALKER.

Perdue, J.A.

view in its mind. For my own part, I do not propose to speculate on what the motive of parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense. *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A.C. 107, 113.

I would also refer to the statement of Lord Macnaghten, in the same case, at pp. 117-118, of Lord Atkinson, at pp. 121-122, and of Lord Shaw of Dunfermline, at p. 126.

Looking at the statute before us and considering it in the light of the authorities, we find that it is capable of only one meaning. It introduces a great body of laws under a general comprehensive description, the exceptions, such as they are, being mentioned. To say that it includes the law of promissory notes and not that of divorce would be to read something into the statute. The first part of s. 1 down to the word "Manitoba" introduces "the laws of England relating to matters within the jurisdiction of the Parliament of Canada." Divorce is one of these matters. Unless the latter part of the section excludes that subject, it is included in the laws so introduced.

Then there is the qualification, "in so far as the same are applicable to the said province." It is to be noticed that the word "are" is used, not "were." But even if we should confine the question of the applicability of the divorce law of England to the condition of Manitoba in July, 1870, I think that an affirmative answer must be given to that question. It has been held by the Privy Council that a general enactment similar in effect to the one now in question had introduced the English divorce law into British Columbia: *Watts* v. *Watts*, [1908] A.C. 573. The enactment under consideration in that case was first contained in a proclamation published in 1858 and applied to the mainland of British Columbia. After the union of the colony of British Columbia with the colony of Vancouver Island, and prior to

Confederation with Canada, the English Law Ordinance, 1867, repealed the proclamation and enacted that the civil and criminal laws of England as the same existed on November 19, 1858, "and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia. I can see no material difference between the language used in the above and that contained in the statute in question in the present case. The use of the double negative in the ordinance does not, I think, widen its scope as compared with the language used in the statute. At the most it may effect the onus of establishing that a particular law is applicable to the province.

Lord Collins, in giving the judgment of the Privy Council, approved and adopted the reasons given by the majority of the court, in *S.* v. *S.*, 1 B.C.R. Pt. 1, 25, and by Martin, J., in *Sheppard* v. *Sheppard*, 13 B.C.R. 486, for holding that the English Divorce and Matrimonial Causes Act, 1857, had been introduced into British Columbia.

Gray, J., one of the majority of the court in *S.* v. *S.*, when dealing with the question whether the statute is or is not applicable to British Columbia, uses these words: "I am afraid it must be conceded the principle is not, from local circumstances, inapplicable; adultery is not an impossibility in British Columbia. Impotency, consanguinity within the forbidden degrees are not impossibilities. No sane man will question that in cases of marriage these are wrongs for which there should be a remedy." He then points out that prior to 1857 there was no court in England vested with power to dissolve marriage while such powers had been given by local legislatures in New Brunswick in 1791, and in Nova Scotia even before that date. His conclusion was that the principle of the English Divorce and Matrimonial Causes Act, 1857, was not inapplicable (that is to say, that it was applicable) in British Columbia. Crease, J., arrived at the same conclusion. See also the exhaustive discussion of the question by Martin, J., in *Sheppard* v. *Sheppard*.

Now, if the law of divorce was applicable to British Columbia in 1858, it was certainly applicable to Manitoba in 1870. There were, I understand, white settlers in Manitoba before there were any in British Columbia. The official report of the population of Manitoba in 1870 was 12,228. See Censuses of Canada, vol.

MAN.
C. A.
WALKER
v.
WALKER.
Perdue, J.A.

4, page 380. In 1871 it had increased to 25,228: see Canada Year Book, 1915, p. 65. But in the year 1888, when 51 Vict. c. 33 was enacted and came into force, the population of the province had greatly increased and constituted a modern, progressive community. There can be no question that the English divorce law was "applicable," in the sense of capable of being applied to Manitoba in 1888, and for many years prior thereto.

The next question is whether there is a court in this province so constituted that it possesses the jurisdiction and the requisite machinery to carry out the powers contained in the English Divorce and Matrimonial Causes Act, 1857.

The General Court of Assiniboia was established by the Hudson's Bay Company many years before Confederation. It took cognizance of civil cases to any amount and also of criminal cases. It was, at all events, a *de facto* court which pronounced and executed its judgments. See *Queen* v. *Lepine;* printed copy in Provincial Library, p. 27; Charge to the First Grand Jury of Manitoba by Recorder Johnson (afterwards Chief Justice Sir F. G. Johnson, of Montreal) reported in *The Manitoban* of May 20, 1871, on fyle in the Provincial Library; "Rise of Law in Rupert's Land," by Mr. Archer Martin (now Mr. Justice Martin, of the Supreme Court of British Columbia), 1 Western Law Times (1890), 93-100. However doubtful the origin and jurisdiction of that court may have been, its "powers, authority and jurisdiction" were continued in full force and effect by the Imperial Parliament in the Rupert's Land Act, 31 & 32 Vict. c. 105, s. 5, "until otherwise enacted by the Parliament of Canada." It was recognized and given jurisdiction in treasons, felonies and indictable offences: 34 Vict. c. 14, s. 2 (D); see also 32 & 33 Vict. c. 3, s. 6 (D). In the first session of the Manitoba Legislature it was empowered to exercise in the province all the functions and possess all the powers and authority of the newly created Supreme Court of the province until a judge should be appointed to the latter court: 34 Vict. (Man.) c. 2, s. 39. The Supreme Court created by the last mentioned Act, it was declared, "shall have jurisdiction over all matters of law and equity, all matters of wills and intestacy, and shall possess such powers and authorities in relation to matters of local or provincial jurisdiction, as in England are distributed among the Superior Courts of Law and Equity, and of Probate:" s. 1.

In the second session of the legislature (February, 1872) the name of the Supreme Court was altered to that of the "Court of Queen's (or King's) Bench." The Court was made to consist of a chief justice and two puisne judges and appellate jurisdiction was conferred upon it. See 35 Vict. (Man.) c. 3, secs. 1 & 2. By c. 4 of the Acts passed in the same session the general court was empowered to further exercise the powers and authority of the Supreme Court and of the Court of Queen's Bench.

By 38 Vict. (Man.) c. 12, s. 2, it was enacted that:—

The said Court of Queen's Bench, being a court of record and possessing original and appellate jurisdiction, shall possess and exercise all such powers and authorities as by the laws of England are incident to a Superior Court of Record of Civil and Criminal jurisdiction, in all matters Civil and Criminal, whatsoever, and shall have, use, enjoy, and exercise all the rights, incidents and privileges as fully to all intents and purposes as the same were on the day and in the year aforesaid (15th July, 1870) possessed, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, at Westminster, or by the Court of Chancery at Lincoln's Inn, in England.

This Act was assented to July 22, 1874.

In the Consolidated Statutes of Manitoba, 1880, there is substituted in the above s. 2 of 38 Vict. c. 12, for the words "in England," at the end of the section, the following words: "or by the Court of Probate or any court in England having cognizance of property and civil rights, and of crimes and offences," Con. Stat. Man., 1880, c. 31, s. 3. This last mentioned section has been continued in the various revisions of the statutes down to the present time: see Rev. Stat. Man. 1913, c. 46, s. 10.

The Court of Queen's Bench was empowered to "hold plea in all and all manner of actions and suits and proceedings, whether at law, in equity, or probate or howsoever otherwise, as well criminal as civil, real, personal and mixed, or otherwise howsoever." The practice and procedure in the court should also be regulated and governed by the rules of evidence and modes of practice and procedure as they existed in England on July 15, 1870, except as afterwards changed: Con. Stat. Man. 1880, c. 31, s. 3; R.S.M. 1913, c. 46, s. 11.

It would appear from the above that at the time Manitoba entered Confederation there was an existing court which was intrusted with power to administer the laws in the province, both civil and criminal. At all events, since July 22, 1874, the Court of Queen's Bench possessed sufficient jurisdiction and ma-

MAN.
C. A.
WALKER
v.
WALKER.
Perdue, J.A.

chinery to exercise the powers contained in the Imperial Divorce and Matrimonial Causes Act, as it stood, with amendments, on July 15, 1870. Since July, 1874, the Manitoba court appears to have possessed powers and equipment fully as extensive and complete as that possessed by the Supreme Court of British Columbia when *S.* v. *S.* was decided. Since the decision of *Watts* v. *Watts* in the Privy Council, I cannot see how any question can arise as to the capacity of the Court of Queen's Bench (or King's Bench as it has been since the death of Her Majesty Queen Victoria) to fully administer the Imperial Divorce Laws if they are in force in Manitoba. All that was said in *Watts* v. *Watts* by the Privy Council, and in the cases to which it gave its approval, in regard to the powers of the British Columbia Courts and as to the applicability of those laws to that province will, it appears to me, apply quite as forcibly to Manitoba.

The judges of the Court of King's Bench have power to make general orders and rules for prescribing and securing the due performance of their duties and for settling the forms, practice and procedure and adapting them to the circumstances of the province and for other purposes. See Con. Stat. 1880, c. 31, s. 20; R.S.M. 1913, c. 46, s. 53. This power could be made use of in applying the Imperial Divorce Law to Manitoba, if that law is in force here.

It does not appear to me that it is important to enquire whether there was or was not a court in existence in Manitoba on July 15, 1870, which possessed the powers and machinery for carrying out the provisions of the Imperial Divorce Law, if a court possessing these requirements was afterwards created: see *S.* v. *S.*, *supra*, at pp. 31-34, 54-58; *Sheppard* v. *Sheppard*, 13 B.C.R. 507, 512; *Corporation of Whitby* v. *Liscombe*, 23 Grant 1, 14, 28-29. The law would remain as part of the law of the province, although there was no court in the province possessing jurisdiction and equipment to enforce it. Courts are not the law, they are only the instruments for administering and enforcing the law.

Mr. Wilson strongly urged that where the Dominion Parliament passes legislation conferring new jurisdiction, it is necessary to constitute a new court or confer new powers on an existing court. This question was considered by the Privy Council in *Valin* v. *Langlois*, 5 App. Cas. 115, affirming the decision of the Su-

preme Court of Canada, 3 Can. S.C.R. 1. That case dealt with the power of the Dominion Parliament to commit to existing provincial courts power to determine election petitions, in the case of controverted elections to seats in the House of Commons of Canada. These were matters exclusively within Dominion jurisdiction. After discussing the effect of the 14th sub-section of s. 92 of the B.N.A. Act, read with the 41st section of that Act, Lord Selborne said (pp.119-120):

> If the subject matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament, and that which is excluded by the 91st s. from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The only material class of subjects relates to the administration of justice in the provinces, which, read with the 41st s., cannot be reasonably taken to have anything to do with election petitions. There is, therefore, nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.

His Lordship held that the words of the Controverted Elections Act created a new court of record and not the old court with some super-added jurisdiction to be exercised as if it had been part of its old jurisdiction (p. 121).

In enacting the Controverted Elections Act, parliament was dealing with a matter concerning the election of its own members, a matter which formerly was dealt with, not by the courts of justice, but otherwise, and one specially reserved to it by s. 41 of the B.N.A. Act. As Lord Selborne shows (p. 118), the presence of that section indicates that the determination of the right to seats in parliament does not fall within the import of the words in sub-s. 14 of s. 92:—

> The administration of justice in the province, including the constitution, maintenance, and organization of the provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

Therefore, a new jurisdiction was conferred on the provincial courts, together with a new procedure, and these courts were created new courts of record for the trial of election petitions. But if a divorce law has been introduced into Manitoba, the application of that branch of the law would form part of the "administration of justice in the province." Marriage in this province is a civil contract. See *S.* v. *S.*, *supra*, p. 30. Actions

MAN.
C. A.
WALKER v. WALKER.
Perdue, J.A.

for breach of promise of marriage are entertained by the Court of King's Bench in this province: R.S.M. 1913, c. 46, s. 49. Actions for dissolution of that contract would naturally fall within the jurisdiction of the provincial courts. "Divorce" naturally comes under civil rights and may concern property also, and it would have properly come under the legislative jurisdiction of the province as a part of property and civil rights, if it had not been specially allotted to that of the Dominion. It follows that it was not necessary to create a new court and supply new procedure for the trial of divorce cases in Manitoba. The existing court of King's Bench has the necessary power and machinery, if the law of divorce has been introduced.

Although legislation in respect to divorce is assigned to Dominion jurisdiction, that subject, like several others specially assigned to the same authority, might be administered by the provincial courts, in the absence of a special court for the purpose created by the Dominion Parliament. Bills of exchange and promissory notes fall within the exclusive authority of the Dominion for purposes of legislation; yet actions upon such contracts are brought in the provincial courts. The expression "Banking" in sub-s. 15 of s. 91 of the B.N.A. Act is wide enough to embrace every transaction coming within the legitimate business of a banker: *Tennant* v. *Union Bank*, [1894] A.C. 31. Yet suits arising out of such transactions come within the jurisdiction of, and are tried in, the provincial courts. Although parliament might have created a special Divorce Court, it has not done so, and the administration of "Divorce" would therefore be left to the provincial courts.

Again, it is urged that if the statute introduced divorce, it must also have introduced the bankruptcy law of England. That is a grave question in itself and one which is not before us on this appeal. Two questions, however, at the outset, occur to me: firstly, was the English Law of Bankruptcy applicable to Manitoba; secondly, did the repeal of the Insolvency Act by the Dominion Parliament in 1880 (43 Vict. c. 1) operate in such a manner as to prevent the Imperial Act from being introduced under the restriction contained in the last four lines of s. 1 of 51 Vict. c. 33?

Another contention is that because no suit for divorce has been

MAN.
C. A.
WALKER v. WALKER.
Perdue, J.A.

brought in the Manitoba courts, although the above statute was passed nearly thirty years ago, the right to bring such suit has lapsed by non-user. But the power, if any, conferred in this regard is intended for the public benefit and cannot be lost by non-user. *The King* v. *Steward and Suitors of Havering Atte Bower*, 5 B. & Ald. 691, 106 E.R. 1343; *S.* v. *S.*, 1 B.C.R., *supra*. I do not think that, because the powers which it is now claimed the Act conferred have never until now been invoked by an applicant for divorce, a valid inference can be drawn against the existence of those powers. The question involved in this suit has often been discussed in legal circles, but divorce is a matter of so serious a nature and beset with such momentous consequences that those who could afford the great cost of obtaining a private Act of parliament chose that procedure rather than incur the doubt which existed until it could be removed by an authoritative decision.

I think the principles laid down in *Watts* v. *Watts* by the Privy Council apply in the present case, and that in regard to the question of the introduction and administration of the law of divorce, there is no fundamental difference between the conditions in British Columbia and those in Manitoba. For the reasons given in that case, I think that the jurisdiction exists in the Court of King's Bench for Manitoba, and can be exercised by a single judge.

I would allow the appeal upon the question of jurisdiction and would remit the case to the trial judge to receive evidence and dispose of the petition upon the merits.

I might be permitted to say that this case was argued ably and exhaustively by Mr. Allen and Mr. A. C. Campbell, representing the Crown and the appellant, and by Mr. Wilson, K.C., for the respondent.

Cameron, J.A.

CAMERON, J.A.:—In this proceeding the question of the jurisdiction of the Court of King's Bench of this province to entertain a petition for divorce arises. A petition was filed by Catherine Walker asking that her marriage with Edgar Stanley Walker be declared null and void. It came before Mr. Justice Galt, who dismissed it, on the ground that he did not feel disposed to assert jurisdiction in a matter of such great importance not heretofore exercised or recognized by the Court of King's Bench. The

MAN.
C. A.
WALKER
v.
WALKER.
Cameron, J.A.

point in issue is whether or not that court has, in respect of matrimonial offences committed in this province, jurisdiction under the provisions of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which came into force in England, January 11, 1858, and amending Act (21 & 22 Vict. c. 158), which came into force August 2, 1858.

A similar question has, as is well known, been raised with reference to the jurisdiction of the Supreme Court of British Columbia and finally and authoritatively determined by the judgment of the Judicial Committee of the Privy Council, affirming that jurisdiction. The history of this litigation is to be found in *Sharpe* v. *Sharpe*, 1 B.C.R. 28; *Scott* v. *Scott*, 4 B.C.R. 316; *Watt* v. *Watt*, 13 B.C.R. 281, *sub nom. Watts* v. *Watts*, [1908] A.C. 573; and *Sheppard* v. *Sheppard*, 13 B.C.R. 486. In the judgment of the Privy Council, delivered by Lord Collins, the reasons given in the judgments of Gray and Crease, JJ., in *Sharpe* v. *Sharpe*, and that of Martin, J., in *Sheppard* v. *Sheppard* placed the question of the jurisdiction of the Supreme Court of British Columbia beyond question and the judgment of Clement, J., who had declined to follow *Sharpe* v. *Sharpe* and *Scott* v. *Scott*, was reversed.

The Ordinances and Acts relevant to the subject in British Columbia are set forth by Gray, J., in *Sharpe* v. *Sharpe*. He places much importance on the Ordinance, passed in 1867, after the union of the colony of British Columbia and Vancouver Island, which says:—"From and after the passing of this Ordinance the civil and criminal laws of England, as the same existed on November 19, 1858, so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia." The conclusion of the court was that the above Acts of the Imperial Parliament were not inapplicable to British Columbia on the date mentioned, and that the words of a subsequent Ordinance passed in 1869 constituting the Supreme Court of British Columbia were sufficient to give it jurisdiction under the said Imperial Acts. The adoption of this view by the Privy Council put the question at rest so far as British Columbia is concerned.

In *Sheppard* v. *Sheppard*, at p. 495 *et seq.*, Martin, J., deals with the differences between the legislation and the circumstances affecting the question in Manitoba and those affecting it in British

Columbia. Previously, when a member of the Bar of this province, that learned judge had traced the history of the rise of law in Rupert's Land in the Western Law Times, vol. 1, pp. 49, 73, 93.

In *Sinclair* v. *Mulligan*, 3 Man. L.R. 481, Killam, J., held that the laws, as to the transfer of property prior to the incorporation of this territory with Canada, were the laws existing in England prior to the date of the charter of the Hudson's Bay Co., May 2, 1670, so far as such laws were applicable to the condition of the country and that the Statute of Frauds was not in force, not having been passed until after the date of the charter. In his judgment at p. 487 *et seq.*, he examines the provisions of the charter, the enactments of the Council of Assiniboia, states the view of Recorder Thom and deals with the various historical facts and the Imperial, Dominion and Provincial legislation which brought him to this conclusion. In particular, at p. 493, he sets out and discusses Article LIII. of the enactments of the Council of Assiniboia of April 11, 1862, which provides:—

> In place of the laws of England of the date of the Hudson's Bay Co.'s charter, the laws of England of Her Majesty's accession, so far as they may be applicable to the colony, shall regulate the proceedings of the general court, till some higher authority or this Council itself shall have expressly provided, either in whole or in part, to the contrary.

The judgment of Mr. Justice Killam was affirmed by the full court, consisting of Taylor, C.J., and Dubuc, J. Taylor, C.J., referred to the *Can. Bk. of Commerce* v. *Adamson*, 1 Man. L.R. 3, where the full court had held that the laws of England were introduced into this country by the Council of Assiniboia, by its Ordinance or enactment of January 7, 1864, amending the Ordinance or administration of justice of April 11, 1862, as given above, by declaring the laws of England as of January 7, 1864, the laws of Assiniboia. The contention in that case was that the provincial statute, C.S.M. c. 3, s. 4, introducing the laws of England, could not affect bills of exchange and promissory notes which were within the field of Dominion legislation. The chief justice did not consider himself bound by that decision or by his own judgment in *Keating* v. *Moises*, 2 Man.L.R. 47, and in the end agreed with the view of Killam, J. But Dubuc, J., expressed an opinion that the Council of Assiniboia intended and meant to introduce the general law of England and that there was no wish or object to alter the simple procedure then in use in the general court or

MAN.

C. A.

WALKER v. WALKER.

Cameron, J.A.

to introduce the English procedure without the officials and machinery; but their aim was to bring in the modern laws of England. I have been of the impression, as have others, that the view expressed by Mr. Justice Dubuc, was reasonable and convincing. But, no doubt, we must regard the decision in *Sinclair* v. *Mulligan* as binding. For my part, I can see little, if any, distinction between the Ordinance of Assiniboia of 1862 or that of 1864, and the Ordinance of British Columbia of 1867. That of 1862 says: "The laws of England . . . so far as they may be applicable to the colony." That of 1864 (quoted by Taylor, C.J., in *Sinclair* v. *Mulligan*, 5 Man.L.R. 22), says: "the laws of England not only of the date of her present Majesty's accession, so far as they may apply to the condition of the colony," and such laws subsequent to the accession "as may be applicable to the same." The British Columbia Ordinance speaks of the laws of England "so far as the same are not from local circumstances inapplicable." The difference is that while the Assiniboia Ordinances are positive in wording, British Columbia gets the same result by a double negative. The language of all these Ordinances seems most comprehensive. Whether affirmative or negative words are used is a matter of indifference when jurisdiction is given. If it were not for the decision in *Sinclair* v. *Mulligan*, I can see no escape from the conclusion that, without reference to the Dominion Statute, 1888, c. 33, s. 21, now to be found in the R.S.C. 1906, c. 99, s. 6, precisely the jurisdiction in divorce which was held by the Privy Council in *Watt* v. *Watt*, *supra*, to exist in the Supreme Court of British Columbia, is also for practically the same reasons to be found in our Court of King's Bench, as the successor to the General Court of Assiniboia.

By the British North America Act 1867, under the heading "Distribution of Legislative Powers," "Powers of Parliament," by s. 91 it is stated that it shall be lawful for the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within those exclusively assigned to the legislatures of the provinces; and that for greater certainty it is declared that the exclusive authority of parliament extends to the subjects mentioned in the section, including: sub-s. (26) "Marriage and Divorce." By s. 92 the provincial legislature may exclusively make laws in relation to

the matters therein specified, including: sub-s. (12) "The solemnization of marriage in the province."

C. 33, 51 Vict. (1888) is entitled, "An Act respecting the application of certain laws therein mentioned to the Province of Manitoba," and in the enacting clause declares that it is intended "For the removal of doubts." S. 1 provides:—

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said province and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said province, or of the Parliament of Canada.

S. 2 provides for the fixing of the rate of interest when not fixed by agreement between 1870 and 1887, and s. 3 saves the right of parties in litigation.

The above s. 1 is re-enacted in s. 6 of c. 99 R.S.C., entitled "An Act respecting the Province of Manitoba," which is in three parts. Part I., headed "General," deals (s. 3) with swamp lands in the province, (s. 4) with a land grant to the University of Manitoba, (s. 5) with the rate of interest as in the Act of 1888, and (6) is as follows:—

6. Subject to the provisions of this Act, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the province, in so far as applicable to the province, and in so far as the said laws have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom, applicable to the province, or of the Parliament of Canada.

Now it is difficult to imagine language more comprehensive than that of this s. 6. It seems impossible to say that any of the laws of England relating to matters within the jurisdiction of the Dominion Parliament, in force on July 15, 1870, so long as the same are applicable to this province, are not in force here, for here we have the Parliament of Canada, having jurisdiction in the premises, expressly so enacting. Had any member of the House of Commons suggested in the debate on the bill that the effect of it, if it became law, would be to introduce the English law of divorce into this province, and had the Minister of Justice, who introduced the bill, assented to this statement, I have no

MAN.

C. A.

WALKER v. WALKER.

Cameron, J.A.

doubt that the question now before us would never have arisen. It may well have been that the subject of divorce was not one of the definite objects with which the bill, on which the enactment in question was based, was originally introduced. Had that been one of the declared objects, quite possibly the form of the enactment might have been modified, as we cannot altogether shut our eyes to the record of the Parliament of Canada on the subject of divorce. Special bills have been passed granting relief to aggrieved parties in divorce cases, but no general legislation has been passed of any kind and every attempt to create a divorce court (including one made in 1888 when the statute, c. 33, before referred to was passed) has been thrown out of parliament. Even a bill relating to the Court of Divorce and Matrimonial Causes in New Brunswick, intended merely to make provision for the administration of that court in the case of disability of the judge thereof from relationship or otherwise, introduced into the House of Commons by the then Minister of Justice, was withdrawn upon the vigorous opposition to divorce manifested by the members of the House. The history of the attitude of the Canadian Parliament is dealt with in Gemmill on Divorce, pp. 22 *et seq.*, and of the grounds on which it is based at pp. 28, 29.

But in construing the language of the provisions of a statute we are required to "exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems its natural sense," per Lord Chancellor Haldane, in *Vacher* v. *London Society of Compositors*, [1913] A.C., p. 107. Lord Macnaghten, at p. 117, cites with approval "the universal rule" stated by Lord Wensleydale in *Grey* v. *Pearson*, 6 H.L.C., at 106, that:—

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument.

To depart from the ordinary sense of the terms used, says Lord Macnaghten:—

> It must be shewn either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed.

See also Lord Atkinson, at p. 121; Lord Shaw, at p. 126, and Lord Moulton, at p. 127. It was held that the plain words of the section in the Trade Disputes Act, 1906, were not modified by extrinsic considerations or by the terms of other sections of the Act. The meaning, therefore, of the enactment in question, expressed as it is in words devoid of ambiguity, must be determined by the ordinary rules of interpretation. Craies' Hardcastle, 4th ed., 65. In Halsbury, XXVII, 148, it is said that "When the words of an enactment are clear inquiry into its history . . . is to be deprecated. When the meaning is not clear such inquiry may be made."

It is clear that the criminal law of England as it existed on the date mentioned was introduced by the enactment referred to though it might have been alleged that it was not generally understood that such was the intention of the section. In brief, I can see no way of evading its direct, positive and comprehensive terms, which plainly include the subject of divorce, which admit of no ambiguity, and, in my humble opinion, can be made subject to no such reservation, based on extrinsic considerations, as that urged on the argument before us.

As to the applicability of the English law to this province, there can be no question in view of the decision in the British Columbia cases to which I have referred. Nor can there be any question as to the authority of the Dominion Parliament to give a provincial court jurisdiction in matters within the legislative domain of the Parliament of Canada. This is well settled, notably by the judgment of the Judicial Committee in *Valin* v. *Langlois*, 5 App. Cas. 115.

It was argued by Mr. Wilson that the Dominion Parliament had not established divorce courts in this province by any legislation. Now as to the criminal law introduced by s. 6, provincial criminal courts were already in existence under legislation passed by the Dominion Parliament. But there are no express provisions in s. 6 constituting the Court of King's Bench in this province a criminal court. He admitted, however, that if the law of England relating to divorce had been expressly transferred to this province, its courts would have jurisdiction. But I cannot see how it can make any difference whether there are used in the statute express terms or general language which covers whatever

MAN.
C. A.
WALKER
v.
WALKER.
Cameron, J.A.

might be included in those express terms. Surely if the law of England relating to divorce is made the law of this province, the jurisdiction of the court must be necessarily implied. It has never been deemed necessary to give our provincial courts jurisdiction in that part of the law of England relating to bills of exchange introduced into this province by the above enactment.

Another consideration points to a comprehensive construction of this enactment. It may be that the objection taken to such a construction would apply, with some force, to the section as originally passed in 1888. But after the lapse of eighteen years the original section is re-enacted in the revision of 1906. In that period attention had been directed to the comprehensive terms of the original section which were all that time before the public. I notice that in *Sheppard* v. *Sheppard, supra*, decided in 1908, Mr. Justice Martin, in discussing the difference between the position of the courts of this province as compared with that of British Columbia courts, makes reference to s. 1 of the above Act of 1888, though that section had then been embodied in the revision of 1906. It would seem to me that this deliberate re-enactment of s. 1 of the Act of 1888, in the words under the heading set forth, after the original section had been so long in force, makes it even more clearly imperative to construe the section as it stands and give the words the meaning they plainly convey without reference to extraneous or historical facts and circumstances.

I think the appeal must be allowed.

NOTE.—The foregoing judgments were read by the late Chief Justice Howell, who was a member of the court which heard the argument of the case. He expressed his agreement with the conclusions arrived at in the judgments and intended to put his reasons therefor in writing, but, through failing strength, was unable to do so.

CAN.
S.C.

DUPLESSIS v. EDMONTON PORTLAND CEMENT CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

BILLS AND NOTES (§ V B—138)—*Holder in due course—Notice—Consideration.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division, 11 A.L.R. 58, affirming the judgment of Hyndman, J., at the trial, 28 D.L.R.

748, and maintaining the respondent's (plaintiff's) action with costs.

This action is on a promissory note given by the defendant (appellant) to the plaintiff (respondent). The appellant alleged misrepresentation and lack of consideration. The Supreme Court of Alberta held that the defendant had not discharged the burden upon him of proving that the plaintiff was not a holder in due course.

On the appeal to the Supreme Court of Canada, the court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed.

Edwards, K.C., for appellant.

POPE v. THE ROYAL BANK.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

COMPANIES (§ V C—189)—*Shares held in family—Trust—Representations to bank.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division, 11 A.L.R. 68, reversing the judgment of Simmons, J., at the trial and maintaining the respondent's (plaintiff's) action with costs.

The defendants (appellants), the father and three sons, were the shareholders of the West View Ranch Company. The plaintiff (respondent) had a judgment against one of the defendants who was the holder of only one share in the company. The action was brought to enable the plaintiff-respondent to enforce its judgment against a quarter interest in the company which, it alleges, the judgment debtor had, according to representations made by the latter and his father to the bank plaintiff, in order to obtain a loan from it.

The trial judge found in favour of the defendants; but the Supreme Court of Alberta held that the representations made to the bank could not be withdrawn to its prejudice.

On an appeal by the defendants to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

Aimé Geoffrion, K.C., for appellants.

G. H. Montgomery, K.C., and *H. H. Hyndman*, for respondent.

CAN.
S.C.

MONTREAL TRAMWAYS Co. v. MULHERN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 13, 1917.

STREET RAILWAYS (§ III B—25)—*Negligence—Causal connection between injury and occurrence.*]—Appeal from the judgment of the Court of King's Bench, Appeal Side, 26 Que. K.B. 456, maintaining the verdict for the plaintiff (respondent) at the trial.

The husband of the respondent, while a passenger on a street car belonging to the appellant, sustained severe bodily injuries resulting in his death, when the car became uncontrollable and crashed down the grade into another car in the rear. The deceased survived the accident some months, and the injuries did not at first appear to be serious. The appellant contended that the respondent had failed to prove that the death was attributable directly to the accident.

The case was tried before a mixed jury, and a verdict was entered for the plaintiff with damages assessed at $6,693, which verdict was maintained by the Court of Appeal.

The defendant appealed to the Supreme Court of Canada which, after hearing counsel on its behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed.

Rinfret, K.C., for appellant.
Callaghan, for respondent.

CANADIAN COLLIERIES v. DIXON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

MASTER AND SERVANT (§ II A—110)—*Negligence—Defective system—Timber—Inspection.*]—Appeal from the judgment of the Court of Appeal for British Columbia, 36 D.L.R. 388, 24 B.C. R. 34, maintaining the verdict at the trial in favour of the plaintiff (respondent).

This action was brought by the plaintiff on behalf of herself and children for damages occasioned by the death of her husband through the negligence of the defendant company. The deceased was in their employ, and while on the way out of one of the tunnels of a mine belonging to the company defendant, a cave-in occurred which caught the deceased and killed him. The tunnel, at the

point of the cave-in, was timbered and the plaintiff alleged a defective system of inspection.

The jury found against defendant and assessed damages to the amounts of $3,000 to the widow and $3,000 to the children.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal maintaining the verdict was affirmed.

Appeal dismissed.

Nesbitt, K.C., for appellant; *Farris*, K.C., for respondent

CITY OF REGINA v. WESTERN TRUST Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

MASTER AND SERVANT (§ V—340)—*Workmen's compensation—Failure of common law action—Application for compensation—Liability of municipal street railway.*]—Appeal from the judgment of the Supreme Court of Saskatchewan *in banco*, 30 D.L.R. 548, affirming, the court being equally divided, the judgment of Newlands, J., at the trial, 24 D.L.R. 26.

The respondent company, as administrators of the estate of one Thomas Cook, brought an action at law against the defendant (appellant) to recover damages for the death of the said Cook, while in the defendant's employ. The jury brought in a verdict for the plaintiff; but the trial judge reserved his decision on a motion for judgment and subsequently dismissed the action with costs. The plaintiff, after serving a notice of appeal, abandoned his appeal and made an application, before the same trial judge, to have compensation assessed under the Workmen's Compensation Act. This was granted and the plaintiff was awarded $2,000 damages.

The principal contentions of the appellant were: 1. That the respondent's right to compensation was conditioned upon the determination in the common law action that the defendant was liable under the Act. 2. That the application for assessment was not made immediately after the judgment in the common law action, as required by the Act, and that, the appeal having been abandoned, the respondent lost the right to apply, which the statute gave in case of an unsuccessful appeal. 3. That the appellant's street railway was not a railway within the meaning of the Act.

CAN.
S.C.

On appeal to the Supreme Court of Canada, the judgment of the trial judge, as affirmed by the Supreme Court of Saskatchewan, was again affirmed. *Appeal dismissed.*

Blair, K.C., for appellant; *P. M. Anderson*, for respondent.

NELSON v. CANADIAN PACIFIC R. Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

RAILWAYS (§ II A—10)—*Negligence—Railway yard—Switch stand too close to rail.*]—Appeal from the judgment of the Supreme Court of Saskatchewan *in banco*, 35 D.L.R. 318, reversing the judgment of Haultain, C.J., at the trial and dismissing the plaintiff's (appellant's) action with costs.

This action is one brought to recover damages by the plaintiff-appellant for injuries sustained by him in consequence of his falling or being thrown from a car in the Moosé Jaw yard of the defendant company, while engaged as a switchman. The defendant's negligence complained of and found by the jury was in having a switch stand "too close to the rail." The trial judge entered a verdict on the jury's findings for the damages found by them, which verdict was set aside and the plaintiff's action dismissed by the Appeal Court of Saskatchewan. That court held that there was no evidence showing that placing the switch where it was placed was contrary to any order of the Board of Railway Commissioners, or was not according to good railway practice; and, moreover, that the accident was due to plaintiff's own negligence.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, maintained the appeal with costs, Fitzpatrick, C.J., and Davies, J. dissenting. *Appeal allowed.*

P. M. Anderson, for appellant.

ST. LAWRENCE FLOUR MILLS Co. v. STEWART.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. November 28, 1917.

MASTER AND SERVANT (§ II C—185)—*Circular saw-guard—Contributory negligence.*]—Appeal from the judgment of the Court of King's Bench, Appeal Side, 26 Que. K.B. 476, reversing the

judgment of Greenshields, J., at the trial and maintaining the action of the plaintiff-respondent with costs.

The respondent, a millwright, was employed as such by the appellant in a large flour mill. While he was operating a circular saw, his left hand was suddenly turned into the teeth of the saw. The respondent took an action in damages for $10,000, alleging that the accident occurred because there was no guard over the saw, when the appellant should have had one installed. The appellant denied any liability for the reasons that the respondent had, for a long time before the accident, control of the saw, that he was himself aware of the necessity of a guard and that he had never complained or asked that one should be installed.

The trial court dismissed the action on the ground that the respondent was alone responsible for the accident. But this judgment was reversed by the Court of Appeal who held that the appellant was also, though in a less degree, liable and, on account of contributory negligence, assessed damages at $2,000.

The defendant appealed to the Supreme Court of Canada, which, after having heard counsel on behalf of both parties, reserved judgment and subsequently dismissed the appeal, Davies, J., dissenting. *Appeal dismissed.*

J. E. Martin, K.C., and *John Hackett*, for appellant.

Vipond, K.C., for respondent.

RUR. MUN. OF SHERWOOD v. WILSON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

TAXES (§ III D—135)—*Assessment—Power to revise.*]—Appeal from the judgment of the Supreme Court of Saskatchewan, 30 D.L.R. 539, affirming the judgment of Elwood, J., at the trial in favour of the respondents (defendants).

On December, 27, 1915, the Local Government Board of the Province of Saskatchewan made an order reducing the assessment of some lots belonging to respondents. The appellant contends that the Board had no power to make this order so as to affect the assessment for the year 1915.

The trial judge held that the Local Government Board had power, under s. 1 of c. 9 of the Statutes of Saskatchewan, 1914,

CAN.
S.C.

at any time during the year, to reverse and adjust assessments made in that year. This judgment was affirmed by the Court of Appeal.

The plaintiff appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed.

Sampson, K.C., for respondents.

TELEGRAM PRINTING Co. v. KNOTT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

LIBEL AND SLANDER (§ III A—95)—*Trial—Misdirection—Admissibility of evidence—Damages—Excessiveness.*]—Appeal from a decision of the Court of Appeal for Manitoba, 32 D.L.R. 409, 27 Man. L.R. 336, affirming the judgment at the trial in favour of the plaintiff.

The plaintiff brought action against the Printing Co. claiming damages for a libellous publication charging him with an attempt to extort money for the issue of municipal licenses. On the trial the jury found the publication libellous and a verdict for the plaintiff with $1,500 damages was sustained by the Court of Appeal. The defendant company appealed to the Supreme Court of Canada urging misdirection, wrongful admission of evidence and excessive damages as grounds for reversing the judgment below.

The majority of the court dismissed the appeal with costs. Davies, J., held that the damages were excessive and that there should be a new assessment and Duff, J., dissented on the ground that the appellants were entitled to a trial by jury and the case had never been properly tried. *Appeal dismissed.*

R. A. Pringle, K.C., and *Manning*, for appellants.

Nesbitt, K.C., for respondent.

TOWN OF OAKVILLE v. CRANSTON.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

HIGHWAYS (§ IV A—154)—*Non-repair—Pitch hole in snow.*]—Appeal from a decision of the Appellate Division of the Supreme

CAN.
S. C.

Court of Ontario, 10 O.W.N. 315, affirming, by an equal division of opinion, the judgment at the trial, 10 O.W.N. 175, in favour of the plaintiff.

The plaintiff while riding in a cutter through the Town of Oakville was thrown out and injured. At the place where the accident occurred there was a "pitch hole" in the snow which was the cause of it. An action for damages was tried without a jury and the trial judge held that the road was not in a proper state of repair and that the municipality was liable. His judgment was affirmed on appeal.

The Supreme Court of Canada after hearing counsel and reserving judgment dismissed the appeal, Davies, J., dissenting.

Appeal dismissed.

H. J. Scott, K.C., and *W. A. Chisholm*, for appellant.

James Lawson, for respondent.

NICHOLS v. McNEIL.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. June 22, 1917.

HUSBAND AND WIFE (§ II F—90)—*Conveyance by wife—Possession of property—Execution.*]—Appeal from a decision of the Supreme Court of Nova Scotia, 50 N.S. R. 67, reversing the judgment at the trial in favour of the plaintiff.

The plaintiff, Nichols, received from one Mrs. Churchill a deed of a hotel property in Digby, N.S., and a bill of sale of the contents. The defendant, McNeil, obtained judgment against Mr. Churchill and seized the personal property in the hotel in execution thereof. In the plaintiff's action claiming damages for trespass by such seizure the Supreme Court of Nova Scotia held that Mrs. Churchill never had title to the personal property nor possession thereof other than her husband's possession and dismissed the action.

The Supreme Court of Canada after argument reserved judgment and on a later day dismissed the appeal with costs.

Appeal dismissed.

Rogers, K.C., for appellant; *Mellish*, K.C., for respondent.

B. C.
S. C.

Re CANADIAN EXPLOSIVES AND LAND REGISTRY ACT.

British Columbia Supreme Court, Gregory, J. January 19, 1918.

REGISTRY LAWS (§ III A—10)—*Registration of Crown grant—Lease or charge.*]—Petition by the Canadian Explosives, under the provisions of s. 114 of the Land Registry Act, R.S.B.C., 1911, c. 127, for an order directing the registrar to register in the charge book a lease of a certain portion of the foreshore of James Island, from the Crown to the Canadian Explosives, for the term of 21 years.

L. Crease, K.C., for applicant; *J. G. Gwynne, contra.*

GREGORY, J.:—The registrar objects to registering the same on the ground that the fee in the said foreshore has not been registered.

It is admitted that the fee is in the Crown; and it is not denied that heretofore registration has been granted in similar cases; but the registrar contends that s. 29 imperatively requires that before any charge can be registered the fee must first be registered and the Crown is not so registered, nor is there any way in which the subject can compel the Crown to so register its title. I confess I can see no object in registering the title of the Crown which presumably is the absolute owner of all lands and interests therein which it has not disposed of.

Mr. Crease, for the company, contends that the Land Registry Act governs and controls only the acts of subjects between themselves, and the Crown is not affected by the provisions of any statute unless expressly stated so to be: Interpretation Act, R.S.B.C., 1911, s. 27. I do not see how that disposes of the question, for the company claims the right to be registered under the provisions of s. 29, and it must bring itself within the provisions of that section. It is not suggested that any other section of the Act or any other law gives it the right to registration.

S. 29 certainly appears to require that the fee shall first be registered, but on a close examination of the section, this, I think, is not so, particularly when the history of the section is considered.

The section has been amended many times and now appears in its final form as s. 7, c. 15, statutes of 1912, as amended by the statutes of 1914, c. 43, s. 16.

In considering the history of the section, it is unnecessary to go back beyond the Consolidated Statutes of 1888, c. 67, s. 19,

B. C.
S. C.

under which (with a few exceptions which still prevail) any estate less than a fee could unquestionably be registered. This section was continued by the Revised Statutes of 1897, c. 111, s. 24. The amendment of 1905, c. 31, s. 13, does not affect the question here, but by the statute of 1906, c. 23, s. 25, it was provided that the *indefeasible or absolute fee* must be registered or registration applied for before any person claiming any less estate could register the same.

Before the passage of this provision everyone at all familiar with the practice of the Land Registry Office knows that it was not necessary to have a complete chain title registered, and that any person claiming any registrable estate could have the same registered by merely producing to the registrar title deeds showing a complete chain of title from the Crown or from the last registration—these title deeds were then taken away again without registration of the intervening title—with the result that the books of the Land Registry Office were far from complete, and the government lost the fees which would have been received had those intervening titles been registered. This was a great evil and the Act of 1906 was passed to remedy it. An attempt had been made in 1905 to cure this by c. 31, s. 45, of the statutes of that year, providing that no instrument executed thereafter should pass any estate or interest, etc., until the same was registered, but that statute was not fully effective as it only related to instruments executed after it came into force.

The statute of 1906 was found to go too far as it prevented the registration of a charge having its title root in a grant from the Crown of an estate less than a fee, and the statute of 1911 was passed, c. 31, s. 7 of which provided for the registration of such a charge when the fee "or any less estate, including leaseholds, granted by the Crown" is registered, or registration of the same applied for.

All these provisions were consolidated in the Revised Statutes of 1911, c. 127, s. 29 (which came into force in 1912), when the section was redrawn and the words "including leaseholds" introduced by the 1911 amendment were omitted. I attach no importance to this as it is clearly a mere verbal change introduced by the commissioners who compiled the revision in order to make the section more concise; nothing is taken from the section, for

B. C.
S. C.

"leaseholds" are certainly included in the words "any less estate." The section was again redrawn in 1912, c. 15, s. 7, when some verbal changes and additions were made to it which do not affect the present dispute. It seems clear to me that all these amendments were made with a view of remedying the evil already referred to and not with a view of cutting down the right to register. The intention was to compel private individuals to register all their title and not to reduce the number of registrable titles, and strength is given to this, I think, by the amendment of 1914, c. 43, s. 16, which restricts the right to register a charge to *any person* "not *entitled to be registered in fee.*" If entitled to be registered in fee he must first register his fee under the provisions of s. 14.

The language of the section as it stands to-day clearly recognizes the registration of an estate less than a fee granted by the Crown; for it says: "When the *fee . . . or any less estate* granted by the Crown, has *been registered* or registration thereof *has been applied* therefor, any person," etc., may apply for registration of a charge on such estate. There is no provision outside of this section for the registration of any estate less than a fee. How, then, can it be registered except under this section? If the Canadian Explosives should to-day mortgage its lease and the mortgagee should apply for registration of his mortgage, he would bring himself strictly within the language of the section and would be entitled to registration.

If the petitioner's lease is not registered it might become a nice question how it could protect itself against trespassers in view of s. 104 of the Land Registry Act, which provides that "No instrument . . . shall pass any estate or interest either at law or in equity . . . until the same shall be registered in compliance with the provisions of this Act," etc., but it will be time enough to deal with such a question when it arises.

The prayer of the petition must be granted and the registrar-general directed to register the petitioner's lease as a charge.

Petition granted.

CREED v. JONES BROS. & CO.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and Brown, JJ. November 24, 1917.

ACCOUNT (§ I—1)—*Surety—Lien on goods for storage—Loss of goods by fire—Liability.*]—Appeal by plaintiff in an action for the balance of an account for the storage of goods. Affirmed.

J. A. Allan, K.C., for appellant; *B. M. T. C. Wakeling*, for respondent.

The judgment of the Court was delivered by

BROWN, J.:—The plaintiff's claim herein is for the sum of $406, alleged to be the balance due from the defendants to Potters Ltd. for storage of goods. The plaintiff claims as assignee of Potters Ltd.

It appears that one Tripp, who was a sales agent of the defendants, stored certain of the defendants' goods with Potters Ltd. As between Tripp and the defendants, Tripp had no authority to store the goods in question at the defendants' expense. The following extract from the defendants' letter to Tripp indicates that Tripp was to stand that expense himself:—

> Now if you will send in a list of what cases you think will sell we will make up a car and send it forward to you, you paying the storage on the cases and we will carry the stock in Saskatoon without any charge for interest, etc., allowing you your regular commission when the sale is made.

Tripp himself made the arrangements with Potters Ltd. for storage space, the account was charged to Tripp in the books of the company and was supposed to be paid monthly. Monthly accounts were rendered to Tripp, and these accounts included storage charges, not only for the goods of the defendants, but also for goods belonging to Tripp himself, and others belonging to other firms represented by Tripp. These accounts were not paid, but were from time to time settled for the time being by Tripp's own personal note.

Potter, the then president of the storage company, in giving his evidence as to the contract, says.—

> Q. Did you carry them on the security of Tripp? A. We carried them on the security of the goods in storage. The goods were the security to the account, and thought if Tripp did not pay the storage charges then Jones Bros. would sooner than see the goods sold for storage charges.

It was only after long default in payment on Tripp's part, and after the account as against him was considered doubtful, that Potters Ltd. sent a statement of the account to the defend-

SASK.

S. C.

ants. The goods while in the possession of Potters Ltd. were destroyed by fire, with the result that they could not realise their claim by way of lien on the goods, and hence this action.

I am of opinion that the trial judge correctly interprets Potter's evidence when he says:—

> Potter, who was then president of the storage company, gave evidence to the effect that they carried the account on the security of Tripp with the additional factor that they had a lien on the goods, and were satisfied that, rather than see the goods sold, Jones Bros. would pay the storage charges.

On the whole, the evidence, in my opinion, indicated clearly that the credit of the defendants was not in any way pledged by Tripp, and that the storage company did not in any way rely on same or intend to rely on same. They looked in the first instance to Tripp for payment, and, in the event of his failure, then to the goods. That being so, it does not seem necessary to cite authority to shew that the storage company cannot now recover from the defendants simply because the security on which they relied has failed them.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

IMPERIAL ELEVATOR & LUMBER Co. v. VILLAGE OF PONTEIX.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and McKay, JJ. November 24, 1917.

MUNICIPAL CORPORATIONS (§ II C—50)—*Village Act—Powers as to "building"—Fence around park and grandstand—By-law.*]—Appeal by defendant from the judgment of Elwood, J., in favour of plaintiff, in an action for the price of lumber. Affirmed.

Taylor, K.C., for appellants; *J. W. Corman*, for respondent.

HAULTAIN, C.J.:—I agree with the trial judge that par. 13 of s. 145 of the Village Act (ch. 86, R.S.S. 1909) would empower the village council to spend money exceeding $300 in amount on fencing a park without a referred by-law.

I am also of opinion that a grandstand is not a building, and does not come within the provisions of par. 2 of the section. The fencing of a park and erection of a grandstand would, in my opinion, be necessary incidents to the establishment and operation of a park, and may reasonably be included in the power given be par. 13 of the section.

SASK.

S. C.

A ticket office would not come within that paragraph, but is a building according to the meaning and subject to the provisions of par. 2.

There is no evidence to shew the proportion in which the money was expended upon the several things mentioned. The trial judge goes on the assumption that less than $300 worth of the lumber was used for the grandstand and ticket office, but there is no evidence to that effect. There is also no evidence that a park was ever acquired or established, and there must be a park in existence to justify this expenditure. There might have been land acquired at a time when the "Stampede" was the most immediate object in view, but that would not prevent the land from being a park if it was ultimately and permanently devoted to that purpose.

All these questions seem to have been the main subject of consideration at the trial, and nearly the whole of the argument on appeal on both sides was devoted to them. I cannot find anything in the pleadings which raises the questions turning on the construction of the Village Act, and counsel for the appellant village asked to be allowed to amend for that purpose and for a new trial. I do not think that a new trial should be granted. The defendant village has no defence to the action, except that which is proposed to be raised at this stage of the proceedings by amendment.

The grounds of this new defence were well known to the village council when this action was begun, but it was satisfied to resist the plaintiffs' claim and go to trial on other grounds, which have failed. There has been no surprise and there is no new evidence which was not available at the time. The defendant did not offer any evidence, but its counsel asked for dismissal of the action on the grounds now sought to be raised by amendment. That was the time when the amendments should have been asked for and might reasonably have been granted. The defendant might then have called witnesses to show that no park was acquired or established and that the expenditure was actually made for purposes and to such an amount that a referred by-law was necessary. But counsel was evidently satisfied that there was sufficient evidence to establish the facts upon which he sought to base his argument.

SASK.

S. C.

I think, therefore, that the appeal should be dismissed with costs.

NEWLANDS, J. (dissenting):—I am of the opinion that the defence should be amended and a new trial ordered with costs to plaintiff.

BROWN, J.:—There is no merit whatever in this appeal. The defendant village got lumber to the value of $1,814.10 from the plaintiffs under resolution of the council, and by their overseer and secretary-treasurer and under their seal executed a note or agreement in payment of same. The plaintiffs brought action for the price of the lumber and, alternatively, on the note or agreement.

The only defence set up by the pleadings is a denial of the allegations contained in the statement of claim, a contention that the note or agreement was signed without authority and that, in any event, such authority was *ultra vires* the council. The plaintiffs having proved the purchase and delivery of the material, were, in my view, under the pleadings entitled to judgment.

Evidence was given by the plaintiffs' witnesses at the trial to shew that the bulk of the lumber was used in the construction of a fence enclosing a park, that some of it was used in the erection of a grandstand and ticket offices, used in connection with such park. No witnesses were called on behalf of the defendants.

I find, from the appeal book, that Marcotte, who acted as counsel for the defendant village at the trial, made the following contention at the close of the plaintiff's case:—

> I would ask for the dismissal of this action as against the village of Ponteix. Nothing has been shewn that a by-law has been passed according to s. 145 (2), c. 86. It has not been shewn that such vote was taken and voted by the electors so that the council was certainly acting beyond its powers.

The trial judge held that under sec. 145 (13) (which section was in force at that time, but has since been repealed), no by-law was necessary insofar as the lumber that was used in the construction of the fence was concerned, and being of the opinion that the value of the lumber used in the construction of the grandstand and ticket offices did not exceed $300, he allowed the plaintiffs' full claim.

I agree with the trial judge that a fence is a necessary incident to the establishment of a park, and that, therefore, the lumber used for such fence could be purchased under the powers given.

SASK.

S. C.

by sub-s. 13 aforesaid, without the necessity of a referred by-law. I am also of opinion that a grandstand, such as was constructed in this case, must also be considered as a necessary incident to the establishment and operation of a park, and should not be considered a building within the meaning of that term as used in sub-s. (2) of said s. 145.

If there is any portion of the plaintiffs' claim which would not be included in sub-s. 13, it must, in my opinion, be limited to the value of the material that was used in the construction of the ticket offices, and the evidence indicates that this material did not exceed in value $12.80.

Counsel for the defendant village contended in argument before us that the lumber was sold and fence erected solely for a "Stampede"—that there was no evidence that any land had been acquired for park purposes of the village, and that the purchase of the lumber was, therefore, *ultra vires* the council. These questions were not raised by the pleadings or at the trial, and the evidence which has any bearing whatever on them is very inconclusive and merely incidental to the action as tried.

It is urged on behalf of the defendants that a new trial should be granted, so that these questions might be thoroughly gone into, and the actual facts with reference thereto be discovered. It is clear to me that such a request cannot be entertained. The defendants could, had they so desired, have raised all these issues at the trial; that they did not do so stands to their credit. I prefer to think of it in that light, rather than take the view that the omission was an oversight.

The appeal should, therefore, be dismissed with costs.

McKAY, J. concurred with HAULTAIN C.J.

Appeal dismissed.

ROGERS LUMBER YARDS v. STUART.

Saskatchewan Supreme Court, Newlands, Elwood and McKay, JJ. November 24, 1917.

EXECUTION (§ II—15)—*Distribution—Creditors' Relief Act—Sheriff's sale of land—Priorities—Costs.*]—Appeal from the judgment of a District Court in a proceeding under the Creditors' Relief Act. Reversed.

SASK.

S. C.

H. J. Schull, for appellant; *H. Y. Macdonald*, K.C., for respondent Townsend; *C. R. Moore*, for respondent R. G. Howe.

McKAY, J.:—The facts in this case are shortly as follows: On November 5, 1914, Hugh Townsend, one of the respondents, purchased and received a transfer from Peter A. Atkinson, an execution debtor, of the north-east quarter of s. 22 in tp. 7 in r. 22 west of the 2nd m. This transfer was registered on March 27, 1915, subject to certain mechanics' liens, and an execution of William Smeltzer and an execution of Rogers Lumber Yards, Ltd.

On February 27, 1915, one month before the registration of the said transfer to Townsend, Massey-Harris Co., Ltd., filed an execution against the lands of Atkinson, the execution debtor.

Subsequent to the registration of the said transfer to Townsend on March 27, 1915, other parties filed executions against the lands of Atkinson, the execution debtor, among them the respondents Broatch and Howe.

The above mentioned land was, on November 3, 1916, sold by the sheriff of the judicial district of Weyburn to said Townsend, one of the respondents, for $601, already registered owner, under and by virtue of the said execution of Rogers Lumber Yards, Ltd. and the said sale was by order December 15, 1916, confirmed, and the registrar of the Assiniboia land registration district, within whose land registration district the said land was situate, was ordered to issue a new certificate of title to the sai l land in the name of said Townsend, free from all encumbrances, saving and excepting the said mechanics' liens and the said Smeltzer execution.

After paying his own costs and those of his solicitors as taxed, the sheriff still has in his possession a balance of the said purchase price, amounting to $467.40. This sum not being sufficient to pay all the executions in his hands, the said sheriff, under s. 13 of the Creditors Relief Act, c. 63, R.S.S. (1909), applied to the District Court Judge to settle a scheme of distribution.

The District Court Judge directed that the amount of the Rogers Lumber Yards, Ltd., execution, as realised from the sale of the above land, be distributed *pro rata* between the said Rogers Lumber Yards, Ltd., Massey-Harris Co., Ltd., George Broatch and R. G. Howe, executions, the balance remaining in the sheriff's hands after such distribution to be paid to said Townsend.

Costs of the application to be costs to Townsend, Massey-

Harris Co., Ltd., Broatch and Howe, and to be paid out of the amount directed to be distributed. From this judgment the appellant appeals.

The only parties represented by counsel on the argument of this appeal were the appellant and respondents Townsend and Howe.

On the argument, appellant's counsel quite rightly admitted that Townsend was entitled to all moneys over and above what would satisfy the amount of the appellant's execution, apart from the question of costs.

The only questions for disposal, therefore, are the questions of distribution, if any, among the execution creditors, and costs.

As to the question of distribution, the execution creditors, subsequent to the Rogers Lumber Yards, Ltd., are, in my opinion, not entitled to share in the amount realized under this latter execution.

As above stated, Atkinson sold and transferred the land in question to Townsend on November 5, 1914, and, by virtue of this transfer, the land then ceased to be the property of the execution debtor, but it continued subject to the Rogers execution, and, as these other executions in question against Atkinson were long subsequent to the date of this transfer, they did not attach any interest in the land (*Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282), and although these other executions were in the sheriff's hands at the time of the realizing of the amount under the Rogers execution, they are not entitled to share, as the money levied upon the Rogers execution was not levied "upon an execution against the property of the debtor," Atkinson. It was Townsend's property.

S. 3 (*a*) of c. 63 R.S.S., the Creditors Relief Act, under which the execution creditors, respondents claim, reads:—

(*a*) In case a sheriff levies money upon an execution against the property of a debtor he shall forthwith enter in a book to be kept in his office open to public inspection without charge a note or memorandum stating that such levy has been made and the amount and date thereof and the money levied shall at the expiration of two months from the levy unless otherwise ordered by a judge, be distributed ratably amongst all execution creditors whose writs were in the sheriff's hands at the time of the levy or who shall have delivered executions to the said sheriff within the said two months or within such further time as may be ordered by a judge subject, however, to the provision hereinafter contained as to the payment of the costs of the creditor under whose writ the amount was levied.

SASK.

S. C.

Provided that if money is realized by sale of lands for which a certificate of title has been granted, the said period of two months shall be computed from the date of confirmation of the sheriff's sale under the said Act.

The question raised in this appeal was before the court *en banc* of the North-West Territories in *Massey Manufacturing Co.* v. *Hunt* and the *McCormick Co.* v. *Hunt*, 2 Terr. L.R. 84, in which case it was held that the subsequent execution creditor was not entitled to share. See also *Howard* v. *High River Trading Co.*, 4 Terr. L.R. 109; *Edmonton Mortgage Co.* v. *Gross*, 3 A.L.R. 500. S. 3 (*f*) of the Creditors Relief Act, reads as follows:—

(*f*) In the distribution of moneys under this Act creditors who have executions against goods or lands or against goods only or lands only shall be entitled to share ratably with all others any moneys realized under execution either against goods or lands or against both.

This sub-section, in my opinion, is limited to the moneys that are liable to distribution according to sub-s. (*a*), namely, moneys realised upon an execution against the property of a debtor, and not "any moneys realised." This, to my mind, is quite clear from the opening words of this sub-s. (*f*), when it says "In the distribution of moneys *under this Act*." This can only mean in the distribution of moneys liable to distribution under this Act, and the only moneys liable to distribution under this Act are those referred to in sub-s. (*a*). And as the moneys realised upon the Rogers execution herein were not realised under an execution against the property of the judgment debtor Atkinson, the execution creditors subsequent to Rogers Lumber Yards, Ltd., are not entitled to share under sub-s. (*f*), and this applies to executions against goods as well as lands, and, therefore respondent Howe fails in his execution against goods.

With regard to the costs:—

S. 13 of the Act under which the sheriff applied to settle a scheme for distribution provides that:—

Where the money levied is insufficient to pay all claims in full and the sheriff is *bonâ fide* in doubt as to how the proceeds should be distributed . . . the sheriff . . . shall apply to a judge in chambers for a summons calling upon all parties interested to attend . . . to settle a scheme of distribution.

All the facts required to exist by virtue of above section to entitle the sheriff to make the application, exist in the case at bar, and when the summons granted came up for hearing before the learned District Court Judge the following appeared before him, by their counsel: the appellant and the respondents Towns-

send, Broatch and Howe, and apparently the sheriff and Smeltzer. As a result of the order made, the appellant appealed and succeeded in his appeal. That order, so far as costs are concerned, directed "costs of this application to be costs to Townsend, the Massey-Harris Co., Ltd., Broatch and Howe, and to be paid out of the amount directed to be distributed as aforesaid."

The appellant was entitled to the amount of its execution without any distribution *pro rata*, and without any deduction for costs, as directed.

The respondents Broatch and Howe appeared on the hearing to settle the scheme for distribution, and claimed to share *pro rata*, and, although there is nothing to shew that they in the first instance caused the sheriff to apply for the summons, they were apparently prepared and desirous of availing themselves of the benefits if any that would accrue to them as a result of this application, and, as they are the only parties appearing who ultimately fail in this application, I think they should pay the costs incurred. I do not think the Massey-Harris Co., Ltd., should pay any costs as it did not appear before the District Court Judge and the order was made in its absence.

Although the notice of appeal purports to appeal against costs awarded to the sheriff, I find nothing in the judgment appealed from awarding costs to the sheriff.

The appellant will be entitled to its costs of the application in the court below against respondents Broatch and Howe, and the appellant will be entitled to its costs of this appeal against respondents Townsend, Broatch and Howe, as it succeeds on the question of the deduction of these parties' costs from the amount of its execution, and, as to Broatch and Howe, also on the question of distribution *pro rata*.

The result is that the appeal will be allowed as above indicated and the order or direction of the District Court Judge will be varied accordingly.

NEWLANDS, J.:—I concur with this judgment excepting that part which gives costs against Townsend. I think there should be no costs as against him.

ELWOOD, J.:—I concur in the written judgment.

Appeal allowed.

SASK.

S. C.

THE KING v. ZARKAS, ANTONIO AND KORTES.

Supreme Court of Saskatchewan, McKay, J. January 7, 1918.

BAIL AND RECOGNIZANCE (§ I—11)—*Estreat—Sufficiency of affidavit—Acknowledgment—Notice to sureties—Order of judge.*]—Motion to discharge recognizance.

F. G. Atkinson, for the Crown; *A. M. Panton*, for defendants, Antonio and Kortes, the sureties.

MCKAY, J.,:—This is a motion on behalf of the defendant sureties under s. 1110 of the Criminal Code for an order discharging the recognizance entered into between His Majesty the King and the defendants, wherein the said defendants acknowledged themselves to owe to our Sovereign Lord the King the several sums following, that is to say Chris Zarkas $1,000, Bill Antonio and Paul Kortes the sum of $500 each, conditioned on the appearance of the aforementioned Chris Zarkas at the sittings of the Supreme Court to be held at the town of Battleford in the Province of Saskatchewan on April 19, 1917.

On the following grounds:—

1. That the defendants Antonio and Kortes exerted themselves to the fullest degree to comply with the said recognizance and did everything in their power and that they could be called upon to comply with the provisions of the said recognizance.

2. The affidavit of the acting local registrar, Wilde, on the estreat was not sworn before a justice as is required by s. 1103 of the Criminal Code of Canada.

3. That it does not appear in any way that the recognizance was properly acknowledged.

4. That notice of said recognizance was not at any time given to the sureties above named or to any of them.

5. The said recognizance was estreated without any previous written order in that behalf of the judge who presided at the Court at the time said recognizance was so estreated.

Or in the alternative for an order setting the matter down for the next sittings of the Supreme Court *en banc* to be holden at the City of Regina in the Province of Saskatchewan.

At the time of the argument, I refused to make an order setting the matter down for the next sittings of the Supreme Court *en banc*, and decided to hear the motion.

1. With regard to the first objection, affidavits were read, made by the defendants Antonio and Kortes to the effect that on October 10, 1916, they were informed that Zarkas had left the town of North Battleford and the jurisdiction of this court,

SASK.

S. C.

and on October 11, 1916, informed the chief of police and magistrate of North Battleford, and the sheriff, of the above matters, and the police magistrate issued a warrant for the arrest of Zarkas. It appears, however, that Zarkas could not be found and was not arrested. The sureties entered into the recognizance conditioned that Zarkas would appear for his trial at the court to be holden at Battleford on April 19, 1917, otherwise they would forfeit the sum of $500 each, and it was owing to their entering into said recognizance that Zarkas was let out on bail. Zarkas did not appear and the sureties have not produced him, and I cannot, under the circumstances, discharge the recogniaznce, on the facts disclosed in the affidavits.

2. As to the second objection: s. 1103 (2), relied upon for this objection, reads as follows:—

> Any justice for the county is hereby authorized to administer such oath.

This subsection was originally taken from C.S.U.C., c. 117, (9), when the sections of the then Interpretation Act dealing with oaths was not as comprehensive as the present, which I refer to later. It is to be noted that this subsection does not say the clerk shall take the oath before such justice, but that the justice is authorized to administer the oath. In other words, it does not restrict the taking of this oath before the justice only. And I think this is important when we consider s. 25 of the Interpretation Act, ch. 1, R.S.C. 1906, which reads, in part, as follows:

> 25. Whenever by any Act of Parliament . . . an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered, may be given by anyone authorized by the Act . . . or by a judge of any court, a notary public, a justice of the peace, or a commissioner for taking affidavits, having authority or jurisdiction within the place where the oath is administered.

By the Act itself, the subsection above quoted, a justice for the county is authorized to administer the oath, but, under the above section of the Interpretation Act, others are also authorized to administer such oath, one of whom is a commissioner for taking affidavits, who administered the oath in this case, and in my opinion he had authority to do so by virtue of above section, and this objection cannot be sustained.

3. As to the third objection: The recognizance filed in Court

SASK.
S. C.

recites that the said defendants Antonio and Kortes personally came before the undersigned Alder Brehaut, justice of the peace for the Province of Saskatchewan, and severally acknowledged themselves to owe to our Sovereign Lord the King the sum of $500 each, etc., which recognizance purports to be signed by said justice.

In view of this recognizance so reciting, in my opinion this shews that the recognizance was properly acknowledged and the onus is on the defendants to shew that they did not properly acknowledge it. I may also add that in their affidavits they both state they "went bond for Chris Zarkas in the town of North Battleford, etc." This objection I also dismiss.

4. As to the fourth objection: This objection was apparently intended to refer to the notice of recognizance at one time required to be given to sureties under s. 81 of the Criminal Procedure Act, c. 174, R.S.C. 1886, when entering into the bail bond, but no such notice is now required by the Criminal Code, and, even while such notice was required to be given under the old law, it was "decided that an omission to give such notice did not constitute a ground for relieving the bail from their recognizance."

The Queen v. *Schram*, 2 U.C. Q.B. 91.

I therefore hold that his objection—in so far as such notice is concerned—cannot be maintained.

But it is possible for this objection to have been intended to refer to the notices required by English Crown Office Rules 113 and 115 (old numbers 124 and 126), which are as follows:—

R. 113. No recognizance shall henceforth be forfeited, estreated, or put upon the estreat roll without the order of the court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indictment or presentment of the argument of any order or conviction or other proceeding having stood over where such indictment has been made a remanet or such indictment or order has stood over by order of the court, or by consent in writing of the parties.

R. 115. Whenever it has been made to appear to the court or a judge that a party has made default in performing the conditions of any recognizance into which he has entered, filed in the Crown Office, the court or a judge upon notice to the cognizor and his sureties, if any, may order such recognizance to be estreated into the Exchequer without issuing any writ of *scire facias:*

And in fact this objection was argued as if it refered to the notice required by r. 115.

This objection of want of notice is not new. It was raised in 1893 in the case of *The Queen* v. *Creelman*, 25 N.S.R. 404, where three of the judges—the majority—held it was necessary to give the notice as required by the Nova Scotia Crown Rules 84 and 86, corresponding to the English Crown Office Rules 124 and 126 (now 113 and 115). The other two judges held it was not necessary to give notice, as the Act provided for a complete procedure.

The same point was again raised in 1903 in *Re Frederick Barrett's Bail*, 7 Can. Cr. Cas. 1, where the Court was equally divided.

In *Re Burns Bail*, 17 Can. Cr. Cas. 292, the objection was that the notice required by Nova Scotia Crown Rule 84 calling upon the bail to perform the condition of the recognizance had not been given. The majority of the Court in this case held it was not necessary to give such notice. I may say that notice of the application to estreat was given to the bail as required by the r. 86.

The want of notice was again raised in 1914 in *Rex* v. *Sullivan*, 18 D.L.R. 535, 23 Can. Cr. Cas. 174, a Yukon case, where they have not made any rules under s. 576 of the Code, and in that case the judge held that notice was not necessary. See p. 538.

Our court has made Crown Practice Rules under s. 576 of the Criminal Code, but has not made any express rules with regard to estreating recognizances as was done in Nova Scotia, but our r. 46 reads as follows:—

> 46. Where no other provision is made by these rules, the procedure and practice shall, as far as may be, be regulated by the Crown Office Rules for the time being in force in England.

I am of the opinion, however, that we do not incorporate the English Rules 113 and 115 above referred to, as they would be inconsistent with the procedure laid down in the Criminal Code for enforcing recognizances, for the reasons given by Townshend, J., in the *Barrett* case, at pp. 3-8, and also for the reasons given by Meagher, J., in the *Creelman* case, which reasons were adopted in the *Burns* case, where the majority of the judges held notice was not necessary. These reasons being, to state them briefly, that

SASK.

S. C.

our Criminal Code provides a complete procedure for enforcing recognizances, "and that any other, such as the Crown Rules, would be inconsistent with its terms," and that the procedure provided by the Code does not require any notice to be given before the forfeiting or estreating of the recognizance, but that the opportunity of being heard, which is given to the sureties by the Crown Office Rules before forfeiting or estreating, is given under the Code after estreating by virtue of sections 1109 and 1110 (formerly 921 and 922).

Townshend, J., in the *Barrett* case, at p. 6, after referring to the different sections of the Code, says:—

> When we have as here, in the statute, complete procedure for the enforcement of the forfeited recognizances, as well as the hearing of the parties, it would seem plain enough that resort to another and different procedure under the Crown Rules is not justifiable. The explanation of the misunderstanding which has arisen is, I think, easily to be seen. Our Crown Rules were copied almost verbatim from the English Crown Rules. In England they have no such statute as sections 916, 919, and 922 (now 1102, 1103, 1104, 1105, 1106, 1108, 1109, 1110) and it was therefore necessary to provide the method laid down in s. 86 of the Crown Rules. In drawing the Crown Rules for this province this difference could not have been noticed, or it must have been assumed the statutes were identical.

For the above reasons I am of the opinion it is not necessary to give notice to the sureties before forfeiting or estreating the recognizances and, therefore, dismiss this fourth objection.

With regard to the fifth objection: Counsel for defendants relied upon s. 1095 (2) of the Criminal Code in support of this objection. But this subsection does not apply to the recognizance under consideration. It is to be noted that ss. 1094 and 1095 refer only to certain recognizances, not all recognizances.

S. 1094 refers only to the following kinds of recognizances:— 1. Any person bound by recognizance for his appearance to prosecute or give evidence on the trial of any indictable offence. 2. Or to answer for any common assault. 3. Or to articles of the peace. 4. Or for whose appearance (for the above) any other person has become so bound.

Then s. 1095 refers to "such" recognizances, that is, the class of recognizances mentioned in s. 1094, and it has been held that these sections are confined to those recognizances only.

> The provision of the law that "no officer of the court shall estreat or put in process a recognizance without the written order of the judge before whom the list has been laid" . . . applies only to recognizances to appear

SASK.
S. C.

to prosecute, or to give evidence, or to answer for any common assault, or to articles of the peace, and does not apply to the recognizance in this case. Armour, C.J., in *Re Talbot's Bail*, 23 O.R. 65, at 71.

S. 1094 and 1095 originated in s. 120 of the Consolidated Statutes of Canada (1889), c. 99, which was adapted from the Criminal Law Act (1826), 7 Geo. IV. (Imp.), c. 64, s. 31. The beginning of this s. 31 shews why these special provisions with regard to these recognizances were introduced, namely, that the practice of indiscriminately estreating recognizances for the appearance of persons to prosecute or give evidence, etc., had been found in many instances productive of hardship to persons who had entered into the same.

I may also add that s. 1096 provides a different procedure for enforcing recognizances given on *certiorari* proceedings.

Then, apart from the above, dealt with by ss. 1094, 1095 and 1096, all other forfeited recognizances appear to be dealt with by ss. 1102, 1103, 1104, 1105, 1106.

See also *Re Frederick Barrett's Bail*, *supra*, at p. 4.

The recognizance in question is a recognizance to appear for trial under a charge of indecent assault upon a female, and comes under this latter class, and not under those dealt with by secs. 1094 and 1095, and therefore it was not necessary for the judge to give a written order before the officer of the court could estreat or put in process the recognizance in question. The verbal order of the judge given in open court is sufficient. This objection therefore is dismissed. *Motion dismissed.*

MORTIMER v. FESSERTON TIMBER Co.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith C.J.O., and Magee, Hodgins and Ferguson, JJ.A. June 12, 1917.

ASSIGNMENT FOR CREDITORS (§ VII A—55)—*Assignments and Preferences Act—Mortgage—Action to set aside—Parties.*]—Appeal by defendant company from the judgment of Boyd, C., in an action to set aside a mortgage made by the defendant Smith to the defendant company.

G. W. Mason, for appellant; *Gideon Grant*, for respondent.

HODGINS, J.A.:—Appeal by the defendant company from the judgment of the late Chancellor Boyd, declaring that the respondent, assignee, is entitled to hold as trustee for creditors

ONT.
S. C.

the mortgage given by the debtors to the appellant company, and that the mortgage is available for the ratable payment of all creditors of the firm of Richard Smith & Son.

This judgment is based upon the finding of the learned trial Judge that the meeting between the debtors and their three principal creditors at the Walker House in Toronto on the 21st July, 1914, resulted in an arrangement by which the three creditors formed themselves into a committee to look after the affairs of the debtors upon the basis that all the creditors were to be paid *pro ratâ*.

This finding rests upon contradictory evidence. Two of the creditors are clear that it was advisable to avoid an assignment, and that an agreement as found by the Chancellor was made at this meeting. Carter, the third creditor, and his salesman, Brooks, deny any binding arrangement, and in this they are supported by Richard Smith and his son. But indications are given throughout the evidence that those that were present at the meeting did not part without some definite understanding. Carter, president of the appellant company, admits that he knew that other people were refraining for a month or so on account of the discussion at the Walker House, while Smith and his son say that, when the mortgage was demanded, the reason given was, that the appellant company had not been getting its proper proportion of the payments, and that the appellant company was to get the same proportion as the other creditors—"that was the understanding." Carter says "perhaps" this was what he said. Smith adds, "If we could clean Mr. Carter up to a certain extent he would release the mortgage;" and repeats this again while professing inability to state what amount, if any, was agreed upon. Mr. Carter was not called to deny this. I do not find this latter bargain developed in the evidence. Smith junior, in answer to a question as to discharging the mortgage when something was paid on it, replies that "there was an agreement attached to it. I don't know about that."

In the mortgage itself, however, appears this clause: "It is further declared and agreed that this indenture is subject to the provisions of an agreement bearing even date herewith made between the mortgagee and the mortgagor, and which said agreement is incorporated herein."

ONT.

S. C.

It would be impossible, I think, upon the whole evidence, to disturb the finding of the Chancellor. There was before him a choice between a loose and informal assent by the three creditors at the request of the debtors to wait a while, and a more definite arrangement by which those most largely interested agreed to supervise the debtors' affairs and to see that all creditors were treated alike. The latter alternative has been accepted, and is consistent with the subsequent action of all parties.

Upon the argument it was pointed out that the respondent, as assignee, was only empowered by the statute to take action to set aside transactions made or entered into in fraud of creditors or in violation of the Assignments and Preferences Act, R.S.O. 1914, ch. 134. It was said that this transaction was not covered by that provision. It may be that the preference which was given by this mortgage, while unjust if regarded in the light of the arrangement of the 21st July, 1914, is not strictly within the provisions of the Act. It is not necessary to determine that now, because the assignee would, at all events, succeed to the right of the debtors to be relieved from the mortgage, upon payment of whatever was the stipulated amount referred to in the evidence of Smith.

Application was made to add a creditor as a party plaintiff and to amend by claiming in this action relief on behalf of all creditors. I see no reason why this should not be granted, if provision is made for carrying out the arrangement originally made, as found by the Chancellor, *i.e.*, payment *pro ratâ* to all the creditors, except the small ones, who might be paid in full. This is not a case of a plaintiff having no claim at all, and another being substituted.

I quite realise the force of the objection that the three agreeing creditors did not in fact take the trouble to see that they and the other creditors were dealt with, after the arrangement was made, in accordance with it. No trust, however, had been created; there was nothing for it to operate upon, as the assets remained the debtors'. It would of course be impossible to make any present order requiring the creditors not before the Court to refund, nor direct them to account for moneys received in the ordinary course of business, without actual notice of the arrangement. But that does not touch the point that the appellant company, in face of

ONT.
S. C.

its agreement, has obtained an advantage which is inconsistent with the relation it has been found to occupy. If it intended to fend for itself, it was bound to terminate the situation to which it was committed. The arrangement between the debtors and these creditors was intended for the benefit of the body of creditors, but it included, so far as the three were concerned, a self-denying ordinance, restricting each to *pro ratâ* payments, in consideration that the others refrained from pressure or suit against the debtors. This consideration was sufficient to uphold the bargain. No other creditors may have had knowledge of the arrangement, but it existed nevertheless, in full force, and would benefit them if loyally acted upon. It is sufficient to disable any one of the three creditors from securing an advantage which could only be gained owing to the restraint imposed on the other two parties.

There is no difficulty in determining that, so far as it can be done, the security shall form part of the assets which it is the duty of the respondent to distribute *pro ratâ*. An account can be taken of the creditors' claims on the 21st July, 1914, and those who elect to take advantage of the scheme then settled upon can prove their claims with the respondent. If any have received more than their proper proportion, they must, unless they agree to refund, be excluded from the benefit of the security. While the two other creditors who participated in the agreement are not before the Court, they, like the appellant company, can be compelled by the respondent to account upon similar terms, if they do not do so voluntarily. The difficulties in working out this relief afford no reason for not granting it so far as it can be done.

The judgment as entered does not carry out the underlying idea to be found in the opinion expressed at the close of the case. It would be unfair to the appellant company if the mortgage were vested in the respondent for the benefit of creditors upon the basis existing at the date of the assignment, if in fact the appellant company had not then received its right proportion in reduction of its claim.

The proper course will be to declare that the respondent will hold the mortgage in the first place to equalise the claims of creditors as existing on the 21st July, 1914, having regard to the foregoing, and excepting the small creditors who may have been paid in full, taking into account the payments made, but excluding

from consideration goods supplied after that date and payments specifically applied thereon, and then for the general benefit of all creditors who file claims with the assignee. His allowance of the claims so far as this security is concerned will depend on their accounting for their due proportion of overpayment, if any.

The exact modification in the terms of the judgment may be spoken to when the parties have worked out in a general way the financial difference which this will occasion in the respective claims of the appellant company and the other creditors. The proposed creditor may be added as a party plaintiff on filing his consent.

There should be no costs of this appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

FERGUSON, J.A. (dissenting):—This is an appeal by the defendant the Fesserton Timber Company Limited from a judgment pronounced by the late Chancellor, after a trial at Toronto non-jury sittings, on the 17th November, 1916.

On the appeal, the respondent applied for leave to add a creditor of Richard Smith & Son as a party plaintiff.

The grounds of action are concisely declared in the statement of claim, which reads as follows:—

"1. The plaintiff is an assignee residing and carrying on business in the city of Niagara Falls, in the county of Welland, and the defendant company is a corporation having its head office in the city of Toronto, in the county of York, and the defendant Smith resides in the city of Niagara Falls, in the county of Welland.

"2. For some time prior to July, 1914, the above named Richard Smith and Richard J. Smith carried on business as general contractors and lumber-merchants in the city (formerly the town) of Niagara Falls, in the county of Welland, under the firm name and style of Richard Smith & Son.

"3. In or about the month of July, 1914, the said Richard Smith & Son were indebted to a large number of creditors, amongst others the defendant company, in the sum of $28,000 and upwards, and in order to complete certain contracts were required to incur further liability to about the sum of $13,000, and, by reason of said indebtedness and said contractual obligations, were requesting the defendant company and other creditors for an extension of time within which to pay such indebtedness.

ONT.
S. C.

"4. Pursuant to such request, one W.W. Carter, president of the defendant company, together with others, namely, John Donogh, W. R. Stephens, and J. McNab, was duly appointed and requested by and on behalf of the creditors of the said Richard Smith & Son to advise the said Richard Smith & Son from time to time with regard to carrying on the business of the said firm, and to act for and on behalf of the creditors of the said firm in carrying on their said business in the same respect as inspectors of an estate being liquidated by an assignee pursuant to the Assignments and Preferences Act.

"5. On or about the 1st day of February, 1915, the defendant company, well knowing the financial obligations of the said Richard Smith & Son, and that the said firm were in fact, as the plaintiff alleges, in insolvent circumstances and unable to pay their debts as they became due, in fraud of the other creditors of the said Richard Smith & Son, obtained from the said defendant Richard Smith a certain mortgage, made by the said defendant Richard Smith and wife to the defendant company, and bearing date the 1st day of February, 1915, as collateral security for the sum of $4,806, and in respect of all and singular that certain parcel or tract of land situate, lying, and being in the city (formerly the town) of Niagara Falls, in the county of Welland, and being composed of lots 5, 6, and 35 according to plan number 747, which mortgage was duly registered in the registry office in the county of Welland on the 17th day of February, 1915, as number 8846 for the city of Niagara Falls.

"6. The plaintiff alleges that the said Richard Smith & Son were on the 1st day of February, 1915, insolvent and unable to pay their debts as they became due, to the knowledge of the defendants, and that the defendant company stood in a fiduciary relationship to the said Richard Smith & Son and the other creditors of Smith & Son by reason of the appointment of its president, W. W. Carter, as set out in paragraph 4 hereof.

"7. The plaintiff further alleges that the mortgage made to the defendant the Fesserton Timber Company Limited as aforesaid was made by the said defendant Richard Smith as a partner of the firm of the said Richard Smith & Son, at a time when the said firm was in insolvent circumstances and unable to pay its debts in full, and was made with the intent to give the said de-

fendant the Fesserton Timber Company Limited an unjust preference over the other creditors of the said Richard Smith & Son, and the said mortgage had the effect of giving the said defendant a preference over the other creditors of the said Richard Smith & Son.

"8. That on or about the 5th day of January, 1916, the said Richard Smith & Son, under and by virtue of a certain indenture made pursuant to the Assignments and Preferences Act, made an assignment of all their estate to the plaintiff for the general benefit of their creditors.

"9. The plaintiff therefore claims:—

"(1) A declaration that the said mortgage is fraudulent and null and void as against the creditors of the said Richard Smith & Son.

"(2) That the said mortgage be set aside.

"(3) In the alternative, for a declaration that the plaintiff is entitled to hold the said mortgage as trustee for and on behalf of the creditors of the said Richard Smith & Son and as assignee for the benefit of creditors of the said Richard Smith & Son under and pursuant to the Assignments and Preferences Act.

"(4) Such further and other relief as to this Court shall seem meet or the nature of the case require."

The learned trial Judge did not find for the plaintiff on the cause of action alleged in paragraphs 5, 7, 8, but on that stated by paragraphs 2, 3, 4, and 6. The material part of the Chancellor's finding is:—

"The cardinal and important point in this case is, that a meeting was called in July of 1914, by Messrs. Richard Smith & Son, of Niagara Falls, Ontario, who were in financial difficulties and desired to get the advice of their *chief creditors* at the time, and an invitation was given to them to attend the meeting.

"The meeting was held on the 21st July, 1914, at the Walker House, Toronto, and it is of importance to consider what the result of the meeting was.

"What was the effect of that meeting? It is quite true, as it is argued, that there was no formal committee or inspectorship proposed. But the real meaning of the thing was, that these three creditors (as I think the expression is put up by Mr. Eckhardt), the firms of the Donogh Lumber Company, the Laidlaw Lumber

ONT.
S. C.

Company, and the Fesserton Timber Company, constituted or formed themselves into a committee to look after the affairs of Smith & Son. They were going to see if their claims and the claims of the other creditors could not be looked after, and so avoid the calamity of an assignment, which at that time, they said, would have been fatal to all their hopes.

"It was part of the agreement arrived at at that meeting, I have no manner of doubt, that the creditors were to be paid *pro ratâ*. That is Mr. Eckhardt's expression.

"I consider it as not fair play, not playing the game, when three merchants, honest and honourable men, meet together and make an arrangement such as this with a fellow-merchant that he is to pay ratably, making no preferences, and one of their number obtains the advantage of a mortgage on all the real property of the one man or of the one firm. I think there is a strong claim for equitable dealing in this case, and I think the security should be made available for the benefit of all creditors. There will be judgment accordingly."

The declaration of relief granted by the formal judgment reads as follows: "1. This Court doth declare that the mortgage in the pleadings mentioned is available for the ratable payment of all creditors of the above named Richard Smith and Richard J. Smith, carrying on business under the name and style of Richard Smith & Son, and that the plaintiff is entitled to hold the said mortgage as trustee for and on behalf of and as assignee for the benefit of the said creditors, and doth order and adjudge the same accordingly."

Reading the evidence and exhibits in the light of the surrounding circumstances, as outlined in the transcript of evidence, I would not myself arrive at the same conclusions as the trial Judge, but there was evidence on which he could make the finding he did. He had the advantage of observing the demeanour and manner of the witnesses; it is not always what is said, but at times the way it is said, that impresses, and should impress, the trial Judge

In the opinion of the Privy Council in *Wood* v. *Haines* (1917), 38 O.L.R. 583, 33 D.L.R. 166, this Court is reminded of the importance of keeping that in mind, and of not lightly accepting the responsibility of differing from the trial Judge when his findings

ONT.
S. C.

are based on the credibility of witnesses. In view of this rule thus re-stated by the Privy Council, I accept the Chancellor's findings of fact.

As I read the findings, it is an essential part of the agreement as found that *all* creditors, except the small ones, should be paid ratably and proportionately on the basis of their claims at the date of the making of the agreement in July, 1914. Therefore the agreement (if effective) bound the debtors not to pay, and bound not only the three creditors present at the meeting when the agreement was made, but *all other creditors* (except the small ones), not to receive payment, other than ratably and proportionately. It is not alleged or proved that the *other creditors* (and there were a number of them) either expressly or impliedly assented to or even knew of the alleged agreement, and I cannot see how such an agreement can be held to be binding upon and effective or enforceable against either the three who made it, or the other creditors who were to benefit or be restricted by it, until it was completed by the acceptance of the other creditors. The subsequent conduct of the parties is inconsistent with there being any assent or effective agreement.

The exhibits shew that between the date of the agreement in July, 1914, and the assignment for the benefit of creditors in January, 1916, payments by the debtors were not made ratably and proportionately. In July, 1914, the Royal Bank was a creditor for $5,000; at the date of the assignment it had been paid in full. Counsel for the appellant company prepared and put in a memorandum of payments made to the other creditors down to May, 1915. This memorandum appears to be in accordance with the evidence and exhibits, and is as follows:—

"For evidence as to how payments were actually made subsequent to statement of July 23/14 (exhibit 2) see statement of January 27/15 (exhibit 6), statement of May 22/15 (exhibit 1), amount of creditors' account as shewn in statement of July 23/14 (exhibit 2) being subject to the corrections shewn in evidence of McNab, pages 129 and 130.

"The claims of the Fesserton Timber Company, of which Mr. Carter is president, the Donogh Lumber Company, and the Laidlaw Lumber Company, which was represented by Mr. Eckhardt, from time to time, were as follows:—

ONT
S. C.

	July 23/14	Jan. 27/15	May 22/15
Fesserton	$6,950	$4,806	$4,707
Donogh	3,300	2,209	1,882
Laidlaw	1,805	1,105	1,112

"The percentage of reduction of the three claims up to January 27/15 was respectively 20.7%, 33%, 38.8%. The subsequent percentage of reduction of these claims up to May 22/15 was respectively 2%, 14.8%, 0%. The average reduction for the whole period from July 23/14 to May 22/15 was as follows:— 32.26%, 43%, 38.4%.

"As to the other creditors, it would appear that a number were entirely paid off before the fire, and that some large accounts were almost paid off. For instance, J. M. Divers' account on July 23/14 was $1,189. On January 27/15, this had been reduced to $191.94, and on May 22/15 to $100. John Fenderson's account upon the said dates was respectively $736, $400, $250. Knight Manufacturing Company's account on the same dates was respectively $500, $150, $51. The bank appeared as a creditor on each of the said three statements," and is now paid off.

Can it be conceived that the bank, which has received payment in full of its claim for $5,000, Divers, who has received $1,100 out of a claim of $1,200, Fenderson, who has received $500 out of $750, and Knight, who has received $450 out of $500, were bound by that agreement and can now be forced to accept ratable distribution on the basis of their claim in July, 1914, or would elect to do so; or that the plaintiff and the defendants, even with the assistance of a favourable Court, can force them to do so? I think not. And, clearly, to attempt to do so in their absence is, to my way of thinking, impossible. Even the two creditors with whom the defendants are alleged to have entered into the agreement are not parties to the action. The creditors, other than the appellant company, cannot have their cake and eat it too. It would be unfair for them to have the benefit of the payments and securities obtained by the appellant company unless they account to it and give it the benefit of the payments they have received. If it was part of the agreement that *all creditors* should be paid ratably and proportionately, it would be a most material alteration, going to the very purpose and root of the transaction, to give effect to the agreement as to only one, two, or three creditors,

and to give the agreement no effect as to the numerous other creditors; and it would be neither fair nor equitable to permit, say the creditor Divers, to receive the benefit of the appellant company's security to obtain a further payment on his claim on which he had already been paid over 90 per cent. as against 32 per cent. paid the appellant company. I am, therefore, of the opinion that the plaintiff in respect of the cause of action upon which the Chancellor granted relief, should, for the following reasons, fail: (1) that it would be inequitable to make the agreement effective as to the appellant company and not as to all other creditors; (2) that the agreement cannot be carried out in the absence of or without the consent of all creditors; (3) that the payments made contrary to the terms of the agreement and the debtors' insolvency have made it impossible to perform the agreement; (4) that in any event these breaches of the agreement took away from the debtors, and the plaintiff as their assignee, any right they might have had to ask specific performance; (5) that, in the action as at present constituted, it is not now, if possible, fair to conclude without a trial that the other creditors had a right to enforce the contract and have not by subsequent acts or happenings lost that right or made it inequitable for them to enforce the contract.

The other cause of action of the plaintiff, alleged in paragraph 7 of his claim, and on which it is sought to uphold the judgment, was not expressly dealt with by the learned trial Judge. To succeed on that cause of action, the plaintiff must shew: (1) insolvency; (2) knowledge by the creditor of insolvency; (3) unjust preference; (4) intent on the part of the debtor to prefer; (5) concurrence in such intent on the part of the creditor; and, as the assignment was not made within 60 days, the onus was on the plaintiff, and pressure was an answer.

I do not here intend to set out the evidence on which I rely in arriving at my conclusions; but, after a perusal of the evidence and exhibits, I am of opinion that neither the debtors nor the creditor considered the debtors insolvent; both thought that, if given time, the debtors would, in the absence of unforeseen or unfortunate happenings, such as the fire which subsequently occurred, pull through with a substantial surplus, and neither had any intent to give or receive a preference. The debtors yielded

ONT.
S. C.

to the creditor's request for the collateral security, and the creditor made the request to protect it against the debtors paying the others before it, as it alleged, and as the facts shewed, was being done, and as against accident and unforeseen happenings such as the fire, believing however that all was well and would be well with the debtors.

The authorities shewing what the attacking party has to make out are well collected and digested in Mr. R. S. Cassels' work on the Ontario Assignments Act, 4th ed. (1914), pp. 10 to 15. I think the plaintiff has, on this cause of action, also failed to make out a case for relief.

There remains to be dealt with the application to add a creditor as a party plaintiff.

The assignment for the benefit of creditors (exhibit 7) grants to the assignee "all their (the debtors') personal property which may be seized and sold under execution and all their real estate, credits, and effects." Section 8 of the Act says that an assignment in this form shall vest in the assignee "all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except" exemptions from seizure, etc. Therefore, if Smith & Son were parties to the agreement (and I so read the finding), that assignment is wide enough to vest in the plaintiff, Smith & Son's right to enforce it; and, in that view, it is not necessary to add a party. But, if Smith & Son, having had the right to enforce the contract, by breach lost that right, and I think that, by making payments other than ratably and proportionately, they did lose it, or, if Smith & Son were not parties to the agreement, then I am of opinion that the assignment did not vest in the assignee a creditor's right to enforce it. It is only by sec. 12 of the Act, if at all, that a creditor's cause of action can be vested in the assignee, and that section is limited to actions not for enforcement of agreements but for rescission of agreements entered into in fraud of the creditors or in violation of the Act; and the agreement as found or alleged cannot be said to be an agreement entered into in fraud of the creditors; and, therefore, if the plaintiff cannot maintain his action by virtue of an assignment of the right to do so from Smith & Son, he would have no cause of action on the agreement, and to grant his application would be contrary to the principle stated

ONT.
S. C.

by Mr. Justice Riddell in *Colville* v. *Small* (1910), 22 O.L.R. 426, where he stated (p. 429) "that the Rules" (206 and 313, of which the present Rule 134 is a consolidation) "never were intended to cover a case in which the actual plaintiff has no cause of action, but it is suggested some one else may have."

For these reasons, I would refuse the application to add a party plaintiff, with costs, and would allow the appeal with costs and dismiss the action with costs.

Judgment of the Chancellor affirmed, with a variation; FERGUSON, J.A., *dissenting.*

Re HARMSTON v. WOODS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Rose, JJ. June 22, 1917.

APPEAL (§ III F—98)—*Extension of time for appealing—Jurisdiction of court—Title to land—Removal of cause.*]—Motion by the plaintiff to extend the time for appealing from the order of Middleton, J., 39 O.L.R. 105, dismissing an application for a mandamus to compel a County Court Judge to try the action in a Division Court.

J. E. Lawson, for applicant; *A. E. Knox*, for defendant.

The judgment of the Court was read by

MEREDITH, C.J.C.P.:—The plaintiff sued the defendant, in a Division Court, for damages for unlawfully entering the plaintiff's house and assaulting him.

When the case came on for trial the defendant objected to the jurisdiction of the Court in so far as the action was for trespass to land, and the Judge, giving effect to the objection, "nonsuited" the plaintiff, he having declined to proceed with his action denuded of the claim for trespass to land.

The plaintiff thereupon applied to a Judge of the High Court Division of this Court, in Chambers, for a mandamus requiring the Division Court Judge to try the action as brought: but that Judge, being of opinion that Division Courts have no jurisdiction in actions for trespass to land, whether or not any question of title to land was involved, dismissed the application.

That application was made and dismissed in the month of March last.

ONT.
S. C.

In the following month of April, the same question was considered in this Court, in the case of *McConnell* v. *McGee*, 37 D.L.R. 486, 39 O.L.R. 460, and it was then held that Division Courts have jurisdiction* in actions of trespass to lands, except when some right or title to them comes in question; and the judgment of the Judge at Chambers in this case was overruled.

The time for appealing against the order made in Chambers in this case, dismissing the plaintiff's application for a mandamus, having expired before the ruling in it was overruled, the plaintiff now seeks an enlargement of the time for appealing against the order dismissing his application, so that he may have his action in the Division Court now tried; and, if that were necessary, and could be allowed here, there seems to be no good reason why it should not be done; no great length of time has elapsed, and nothing else has happened which would make it unfair to the defendant to be obliged to go to trial now; and, according to the judgment of this Court in the case of *McConnell* v. *McGee*, an injustice was done to the plaintiff in preventing him having his case tried in the Division Court. The shorter and better way, if any were really necessary, would be to commence a new action in the Division Court; but that is not safely open to the plaintiff, because that action might be barred by the limitation clause of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, sec. 13.

But there should be no need of any appeal or motion in either Division of this Court. The Division Court Judge will doubtless, upon having his attention called to the fact that he has jurisdiction, and that the ruling to the contrary in this case has been overruled, try the action, if no right or title to land comes in question in it; and, if it do, will have due regard to the provisions of sec. 69 of the Division Courts Act.†

It will be time enough to make this motion after the Division Court Judge has again refused to try the case, a thing which should be very improbable.

And, should it be necessary to make again such a motion as

* See sec. 62 (1) (*a*) of the Division Courts Act, R.S.O. 1914, ch. 63.

† See R.S.O. 1914, ch. 63, sec. 69, providing for the transfer to the Supreme Court of Ontario of an action in a Division Court wherein the title to land comes in question.

ONT.
S. C.

this, it had better be made where there is power to grant it—in the High Court Division.*

No order can be made here except upon an appeal.†

* See Rules 176, 492.

† By Rule 773 (*f*), made by the Supreme Court of Ontario on the 7th December, 1917, Rule 492 was amended by adding clause (6) as follows:—

(6) Notwithstanding the provisions of Rule 176, the time limited by this Rule may, either before or after its expiry, be extended only by a Judge of the Appellate Division. An application to extend time may be referred to a Divisional Court.

BRODERICK v. McKAY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 5, 1917.

BASTARDY (§ I—5)—*Maintenance—Form of affidavit of affiliation — Construction of Illegitimate Children's Act—"Really."*]—Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of York, dismissing an action brought by the mother of an illegitimate child against the reputed father for necessaries supplied to such child. The action was dismissed by the County Court Judge, on the ground that the affidavit of paternity filed by the plaintiff did not comply with the Illegitimate Children's Act, R.S.O. 1914, ch. 154,* sec. 3, in that it did not declare that the defendant was "really" the father, but merely that he was the father, of the child, following the decision of the Court of Queen's Bench in *Jackson* v. *Kassel* (1867), 26 U.C.R. 341.

* Sections 2 and 3 of the Act are as follows:—

2.—(1) Any person who furnishes food, clothing, lodging or other necessaries to any child born out of lawful wedlock may maintain an action for the value thereof against the father of the child, if the child was a minor at the time the necessaries were furnished, and was not then residing with and maintained by his reputed father as a member of his family.

(2) Where the person suing for the value of the necessaries is the mother of the child, or a person to whom the mother has become accountable for the necessaries, the plaintiff shall not be entitled to recover unless the fact of the defendant being the father is proved by other testimony than that of the mother, or her testimony is corroborated by some other material evidence of that fact.

3. No action shall be sustained under the next preceding section unless it is shewn upon the trial thereof that while the mother of the child was pregnant with, or within six months after the birth of the child, she had voluntarily made an affidavit before a Justice of the Peace for the county, district or city in which she then resided declaring that the person afterwards charged in the action is *really* the father of the child, nor unless such affidavit was deposited, within that time, in the office of the clerk of the peace of the county or district, or of the clerk of the council of the city.

ONT.
S. C.

C. H. Porter, for plaintiff.

H. H. Shaver, for defendant, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by

MEREDITH, C.J.O.:—Mr. Porter has argued this case very fully and ably; but it is necessary in order to give effect to his contention that we should overrule the well-considered judgment of a strong Court, as far back as 1867, which is conclusive against him, *Jackson* v. *Kassel*, 26 U.C.R. 341, a case too which has been spoken of with approval at a later date by a Judge of the Court of Appeal: *Northcote* v. *Brunker*, 14 A.R. 364, 378. I do not think we can do that. The correctness of the decision has stood unchallenged for 50 years, and during that time there has been no suggestion that it was wrongfully decided.

It is not without significance, too, that the Legislature, with the knowledge of that decision, has made no change in the Act. One would have thought that, if the Legislature has been of the opinion that the word "really" added nothing to the section, it would have been stricken out; instead of that, the section has been re-enacted in each of the revisions of the statutes that have been subsequently made.

The appeal must be dismissed. *Appeal dismissed.*

BUCKLEY v. VAIR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O. and Maclaren, Magee, Hodgins and Ferguson JJ.A. October 15, 1917.

APPEAL (§ IX—695)—*Interest on money demand—Discretion of lower Court—Appeal "as to costs only"—Appeal joined with other parts of judgment.*]—Appeal by defendant from the judgment of a Co. Ct. Judge in favour of the plaintiff, in an action in that Court, brought to recover a sum of money alleged to be due to the plaintiff as commission on the sale of land.

M. Wilkins, for appellant; *W. Lawr*, for respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 9th June, 1917, of the County Court of the County of Grey, which was directed by the Senior Judge after the trial before him, sitting without a jury, on the previous day.

The appeal is rested on the grounds: (1) that interest on the

ONT.

S. C.

respondent's claim was improperly allowed; (2) that the learned Judge erred in awarding the costs of the action to the respondent.

The discretion exercised by the learned Judge in allowing the interest ought not to be interfered with: the case of *Toronto R.W. Co.* v. *Toronto Corporation*, [1906] A.C. 117, is conclusive against the appellant on this branch of the appeal.

The appeal as to costs is, therefore, an appeal as to costs only, within the meaning of sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56, which section, by the provisions of sec. 32 of the County Courts Act, R.S.O. 1914, ch. 59, is applicable to County and District Courts, and does not lie without the leave of the Judge, which has not been obtained.

An appellant cannot, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of these provisions: *Harpham* v. *Shacklock* (1881), 19 Ch.D. 207, 215; *Llanover* v. *Homfray* (1881), 19 Ch.D. 224, 231, 232; *Bew* v. *Bew*, [1899] 2 Ch. 467, 472.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

SHAW v. HOSSACK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October, 22, 1917.

INTEREST (§ II B-65)—*Money Lenders Act—Harsh and unconscionable transaction.*]—An appeal by the plaintiffs from the judgment of CLUTE, J., 36 D.L.R. 760, 39 O.L.R. 440. Reversed.

A. A. Macdonald and *W. J. McCallum*, for appellants.

J. M. Ferguson, for the defendant D. C. Hossack, and *D. J. Coffey*, for the defendant L. E. Hossack, respondents.

The judgment of the Court was delivered by

MEREDITH, C. J. C. P. :—If the judgment pronounced, recently, in this Court in the case of *McCabe* v. *Jeffrey*,* were right, the judgment in this case is wrong, and this appeal

*McCABE v. JEFFREY

Two actions were brought by Alexander McCabe against John McNee Jeffrey.

In the first action, by his statement of claim, delivered on the 19th February, 1917, the plaintiff alleged as follows:—

(2) By transfer of charge bearing date the 30th November, 1914, and registered on the 4th December, 1914, as No. 104580, the defendant transferred and assigned to the plaintiff a certain charge or mortgage, dated the

ONT.
S. C.

should be allowed. Each case, such as these, must be determined mainly upon its own facts; and so a judgment in one may not be authoritatively binding in another: but in this case the circumstanc-

31st July, 1913, from one Brown to the defendant, in consideration of $1,000.

(3) The said indenture of charge contained a proviso that the plaintiff would, upon payment to him of $1,000 on the 30th November, 1915, with interest thereon as therein mentioned, re-transfer the charge to the defendant.

(4) By an agreement in writing of the 30th November, 1915, between the plaintiff and defendant, signed, sealed, and delivered by the defendant, the defendant covenanted that he would, on or before the 30th November, 1916, pay to the plaintiff the sum of $1,000 with interest thereon at the rate of 8 per cent. per annum from the 30th July, 1915.

(5) The said agreement further contained a covenant on the part of the defendant that, if default were made in payment of the said moneys by the defendant to the plaintiff on or before the last-mentioned date, the defendant would release to the plaintiff all his (the defendant's) right, title, and interest in and to the charge referred to in para. (2).

(6) The plaintiff had always been ready and willing to perform the said agreement; and, upon default made by the defendant in payment of the said moneys, in pursuance of the agreement, the plaintiff asked the defendant to perform his part of the agreement, by executing an absolute transfer of the charge, free from any apparent claim of him (the defendant), but the defendant had neglected and refused and still neglected and refused to do so.

And the plaintiff claimed specific performance of the agreement, etc.

The defendant, by his statement of defence:—

(1) Admitted paras. 1, 3, 4, and 5 of the statement of claim, but denied all the other allegations of the plaintiff.

(2) Alleged that the plaintiff was a money-lender, not registered under the provisions of the Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, and that the loan thereinafter mentioned was illegal, by virtue of sec. 11.

(3) The consideration mentioned in para. 2 of the statement of claim was erroneous: the consideration for the conditional transfer of the charge therein referred to was $800 (less legal fees and commission), which the plaintiff lent to the defendant; the sum of $1,000 mentioned therein as the amount required to redeem the mortgage included $200 by way of interest on the said loan for one year.

(4) Between the 30th November, 1914, and the 30th November, 1915, the plaintiff received on account of the said mortgage the sum of $269.10.

(5) The plaintiff by duress caused the defendant to enter into the agreement referred to in para. 4 of the statement of claim, which agreement was harsh and unconscionable; and, in view of principal and interest charged and of the amount already received by the plaintiff, the cost of the loan was excessive, and the terms thereof were oppressive, harsh, and unconscionable.

(6) The plaintiff neglected and refused to furnish the defendant with any statement of moneys received by him in connection with the said transaction; the defendant believed, however, that the plaintiff had received since the 30th November, 1915, the further sum of $50, which, added to the sum of $269.10, would amount to $319.10.

The defendant prayed:—

(1) That pursuant to sec. 4 of the Ontario Money-Lenders Act, the Court would reopen the transaction and take an account between the plaintiff and the defendant, and, pursuant to clause (*d*) of that section set aside wholly the agreement referred to in para. 4 of the statement of claim; and, subject to the payment to the plaintiff of the amount found due to him, if any amount should be so found, set aside the conditional transfer of charge mentioned and declare such charge vested in the defendant.

(2) In the alternative, that the plaintiff be declared a money-lender, and that the loan be declared illegal and void, and the said charge vested in the defendant.

ONT.

S. C.

es seem to me to be as strong against the defendant as they were in that case, and in some respects perhaps stronger.

There was no greater reason for finding that the plaintiff in this case was a "money-lender" than there was in the other case: nor for finding that the rate of interest agreed to be paid

The second action, begun on the 16th March, 1917, was brought to recover $1,425, principal and interest alleged to be due by the defendant under an agreement contained in a transfer of charge dated the 12th May, 1915, from the defendant to the plaintiff, whereby the defendant covenanted to pay the plaintiff $1,250 one year from the 1st May, 1915, with interest at 8 per cent. per annum.

The defences set up were the same as or similar to those in the first action.

June 6 and 8, 1917. The actions were tried together by LATCHFORD, J., without a jury, at Toronto.

R. T. Harding, for the plaintiff.

H. D. Gamble, K.C., and *A. C. McNaughton*, for the defendant.

June 8. LATCHFORD, J. (after hearing argument):—The plaintiff is not a person whose business is that of money-lending. Then he is not a person who carries on the business of money-lending in connection with any other business. He is a retired merchant, who bought property in the city of Toronto, as a result of the sale of his business in Grand Valley, in the county of Wellington. He had some moneys then at his disposal, after having invested in real estate in the city. In answer to an advertisement he lent money to the defendant. He lent money on several other occasions. What he did, does not, in my opinion, constitute him a money-lender. The business of money-lending is carried on distinct from other businesses at times, and at other times carried on in connection with other businesses. In neither aspect presented by the definition is the plaintiff a money-lender. I had occasion to consider recently who is and who is not a money-lender, and my conclusions were as stated now.

I think cases like this really present very little difficulty. The defendant had two charges on certain properties in the northern part of the city, where the land is under the Land Titles Act. These charges are similar to mortgages, and similarly dealt with. The charges which the defendant owned were second charges or mortgages upon the property. Such charges have at times considerable value, at times very little value. Their value depends on a great many factors; on the value, first of all, of the property, on the amount of the first mortgage, on the saleability of the property, and on other factors not necessary to mention. The defendant, requiring money, sought the intervention of an agent, Christie, who is said to procure loans for people. He made an offer in writing to Christie, stating the amount he was willing to pay, or rather the bonus he was willing to allow if a certain amount, $800, was lent him upon the charge. After much difficulty, Christie got in touch with the plaintiff by means of an advertisement, and procured the advance which the defendant desired. It was, it may be said, excessive that a bonus of $200 should be stated in the agreement to be payable by the defendant to the plaintiff in consideration of the advance of $800, but the case was one of risk and of supply and demand. There was difficulty in negotiating such a doubtful security as the defendant had for sale. He did not pay $200. He agreed to pay it. He has not paid it yet. He has paid but very little upon the agreement. When money became payable under the terms of the agreement originally entered into, the defendant was not in a position to pay it. The plaintiff was pressing for his money. The defendant then made another agreement, and the loan was extended for a year. That year has expired, and the loan has not been paid. The plaintiff now comes into Court and says: "I ask the assistance of the Court to compel the defendant to do what he contracted to do—

ONT.

S. C.

was excessive and the transaction harsh and unconscionable, if the learned trial Judge meant so to find, although he has not said so. And the male defendant is a man who, having regard to his various professions and experiences, must have been well able to protect his own and his co-defendant's interests in all things, as well as in procuring these loans upon the best terms, for them, that were obtainable.

what he contracted to do with full knowledge of all the circumstances, what he contracted to do because he could not make a better bargain with any one else." I think the plaintiff is entitled to have that bargain enforced. There is nothing unconscionable about it. The bonus may be considered large, but the security, despite all that has been said, depended on so many factors that it was not a good security. I think that the defendant should be ordered by this Court to perform the agreement which he undertook to perform; he so undertook with full knowledge of all the circumstances, and without any duress, such as is alleged, on the part of the plaintiff. He should, however, have some avenue left open to him to escape from the possible consequences of being compelled to carry out his agreement. I therefore direct that, if he does not execute an absolute assignment as agreed within one month from this date, or pay such amount as is due under his agreement — that amount to be fixed by a reference if the parties cannot agree in computing it—the declaration of this Court shall be and is that the property be absolutely vested in the plaintiff. The plaintiff is also entitled to his costs of suit.

Then in regard to the other case, what I have said applies in large part. The circumstances were but slightly different. Here, as in the other case, the defendant knew what he was doing. He was negotiating a security of doubtful value for the best price he could get for it. It may or may not have any value; it is impossible to say. The property has been offered for sale and has not been sold, and the result may be that the plaintiff will lose altogether the amount he advanced. There will be judgment in the second case for the amount claimed, $1,425, less a credit of $95, or $1,330, with interest from the 1st February, 1917, and costs of suit.

The defendant appealed from the judgment of LATCHFORD, J., in the two actions.

September 28. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

H. D. Gamble, K.C., and *A. C. McNaughton*, for the appellant.

R. T. Harding, for the plaintiff, respondent.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—We are all of opinion that the learned trial Judge reached a right decision in each of these cases. No fault can be found with his findings that, upon the whole evidence adduced, the plaintiff failed to establish his allegations that the defendant was a "money-lender" subject to the provisions of the Money-Lenders enactments, or either of them. Like many others in various walks in life—farmers, merchants, gentlemen, and judges, for example—the plaintiff invested and lent such surplus moneys as he had, without the assistance of any solicitor or experienced money-lender. Such transactions are generally few and far between, and such as, in this Province, no one would think of calling a business. To require all such persons to be registered under the Money-Lenders enactments would be straining their provisions to that which I am sure would very generally be considered an absurd extent: and one quite needless for the prevention of the mischief at which the enactments were aimed, a mischief not widespread in this Province, and indeed seldom observable except perhaps in its larger cities: see *Litchfield* v. *Dreyfus*, [1906] 1 K.B. 584.

ONT.

S. C.

The appeal is allowed; and the plaintiffs are to have judgment upon their claims according to the terms of the contracts in question.

Appeal allowed with costs and judgment to be entered for the plaintiffs with costs.

Nor was any such evidence adduced upon which we can well reverse his findings, against the defendant, upon his allegations that "the cost of the loan was excessive and that the transaction was harsh and unconscionable." The terms of the loan were in no sense forced upon the defendant by the plaintiff, nor even suggested by him: and the parties were fully "at arms' length," indeed entirely strangers to one another. The terms were offered by the defendant to any taker; and were offered by him through an experienced broker or agent, who sought a lender by public advertisement. It is not suggested that better terms could have been had from any one else; on the contrary, the acts of the defendant and his broker shew that they could not. Indeed there is no evidence upon which it could be well found that "the cost of the loan was excessive" or that "the transaction was harsh and unconscionable;" and both must exist to bring the case within the Ontario enactment: see *Carringtons Limited* v. *Smith*, [1906] 1 K.B. 79.

A discount, or interest at the rate, of 25 per cent. may or may not be an excessive cost of a loan; it all depends upon the circumstances of the case; and a fair test generally is: could it have been procured for less? The circumstances of this case disprove, rather than prove, the defendant's allegation in this respect. A glance over some of the later cases decided in the Courts of England shews that where the plaintiff succeeded on this ground the Court allowed from 15 per cent. to 30 per cent. as a fair rate: see *Wolfe* v. *Lowther* (1915), 31 Times L.R. 354.

The appeal is dismissed. *Appeals dismissed.*

SECURITY TRUST Co. v. STEWART.

ALTA.

S. C.

Alberta Supreme Court, Simmons, J. January 12, 1918.

CHATTEL MORTGAGE (§ II D—29)—*Failure to file renewal within statutory period—"Creditors"—Execution creditors—Liquidator—Effect of possession.*]—Issue between liquidator and creditors of mortgagor and liquidator of mortgagee as to chattels seized by latter under an invalid chattel mortgage.

A. A. McGillivray, for plaintiff; *P. A. Carson*, for defendants.

SIMMONS, J.:—On April 18th, 1914, Tregillus Clay Products, Ltd., gave a chattel mortgage to the Dominion Trust Co., Ltd., which was duly registered on April 20, 1914. No renewal statement was filed by the mortgagees within the 2 years from the registration with the result that s. 17 of the Bills of Sale Ordinance declared that from and after April 20, 1916, the said mortgage ceased to be valid against creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith for valuable

ALTA.
S. C.

consideration. On May 17, 1916, the mortgagor, being in default under the mortgage, the defendant liquidator caused a warrant of distress to issue to the sheriff as his bailiff, who seized the mortgaged chattels.

On July 31, 1916, Tregillus Clay Products, Ltd. was declared insolvent and a winding-up order issued, and the Security Trust Co., Ltd. was appointed liquidator of the estate, assets and effects of the company.

Tregillus Clay Products, Ltd. is indebted in large sums of money to many different creditors, and there are no assets of the company other than the chattels referred to in said mortgage.

Before the said seizure there were in the hands of the sheriff certain executions against the goods and lands of the Tregillus Clay Products, Ltd.

The defendants admit that on April 20, 1916, the said mortgage ceased to be valid against said execution creditors.

The defendant claims, however, that the said chattel mortgage is still valid against all other creditors than those who reduced their claims to executions and the plaintiffs deny its said validity.

The issue is whether the terms *creditors* in s. 17 of the Bills of Sale Ordinance includes creditors only who have reduced their claim to an execution or all creditors of the mortgagor.

S. 17 first appears as s. 9 in the Ordinance of the N. W. T. No. 5, 1881, and was copied from the Ontario statute, 20 Vict. c. 3, s. 8, 1857, c. 45, s. 10 U.C. Consol. Statutes.

There was a divergence of judicial opinion regarding the interpretation of this section in the Ontario Courts until the Court of Appeal settled the law in *Parkes* v. *St. George*, 10 A.R. (Ont.) 496, and the term creditors was restricted to mean creditors who had reduced their claims to executions.

This case was decided in 1884 some 3 years after the section in question was adopted in the Territories—Ordinance No. 5 of 1881, s. 9—so that I am of the opinion that the principles of adoption can not be applied when the Act was introduced into the Territories.

In 1892 the Ontario Act was amended and "creditors" in the section was declared to include all creditors.

The principle upon which *Parkes* v. *St. George*, *supra*, was decided proceeded upon the ground that to include ordinary

creditors would, in effect, give to them a power to restrain the disposition of his property *bonâ fide* by a debtor on behalf of a creditor or one who claimed as a creditor.

The creditor might never be able to reduce his claim to an execution. A perfectly solvent debtor would be hampered in a serious way in carrying on a perfectly legitimate business if such a power to anticipate the right of execution arose.

The principle upon which this view rests has much to commend it, and although the use of the term "creditors" without any word of limitation, would suggest a wide interpretation, I think the court should not imply a wider meaning than is necessary to carry out what would seem to be necessary, having in view the purpose of the Act, which was to provide by means of registration for a statutory notice to dealings with removable chattels.

Two subsidiary questions arose in the argument: one was whether the defendant liquidator had the right to contest the validity of the mortgage as against the creditors of the mortgagor, and the other as to whether the taking of possession by the mortgagee had any curative effect upon the omission to file the statutory renewal.

I think the first question should be answered in the affirmative and the second one in the negative.

I decided the second question against the claim of the mortgagees in *Johnson and Boon* v. *McNeil*, [1917] 3 W.W.R. 249, and the *National Trust Co.* v. *Trust and Guarantee Co.*, 5 D.L.R. 459, decided by Teetzel, J., in the Ontario courts deals fully with the first question, and I adopt the view given effect to in that judgment. *Judgment for plaintiff.*

[Reversed on appeal. See p. 518.]

IMPERIAL BANK OF CANADA v. WESTERN SUPPLY & EQUIPMENT Co.

Alberta Supreme Court, Simmons, J. January 14, 1918.

ASSIGNMENT (§ III—25)—*Of Draft—Validity—Registration—Priorities—Security to bank—Garnishment—Bank Act—Preference.*]—Interpleader issue between the plaintiffs and defendants as to the right to the proceeds of a draft drawn at Cranbrook, August 19, 1916, for $502.11 by the Wattsburg Lumber Co. Ltd., at Cranbrook, B.C., upon the Birney Lumber Co. Ltd., of Calgary, payable to the order of the Imperial Bank of Canada.

ALTA.
S. C.

G. H. Ross, for plaintiff.

J. J. Macdonald, for defendants.

SIMMONS, J.:—The Imperial Bank of Canada claim this amount under an assignment of March 17, 1913, executed by the Wattsburg Lumber Co. in favour of the bank, and in the alternative, under a security given by the Wattsburg Lumber Co. to the Imperial Bank, pursuant to s. 88 of the Bank Act, dated June 27, 1916.

The defendants claim the said assignment is void under the Assignments Act of Alberta, c. 6 of 1907, as a fraudulent preference, but they did not support this claim by any evidence, and it therefore fails.

The defendants claim that the said assignment was not registered pursuant to an Act respecting assignments of the Province of British Columbia. This Act, however, was passed in 1916, being c. 5 of the statutes of British Columbia, subsequent to the date of said assignment.

The said assignment, however, was registered on March 26, 1913, pursuant to s. 102 of the Companies Act of British Columbia, as shewn by ex. 4 filed herein, and the transaction is not affected by the Act of 1916.

The defendants, however, claim that neither the alleged assignment nor security above mentioned is sufficient to cover the moneys in question, and this is really the material issue.

The defendants urge against the security pursuant to s. 88 of the Bank Act, that it is not sufficient to cover the moneys in question, because it was not taken for a present and future indebtedness. I do not think I need deal with that question, as the common law assignment of March 17, 1913, is sufficient to pass the property in question to the bank and the same is still in force and effect.

The Wattsburg Lumber Co. was incorporated in 1908, to carry on the business formerly carried on by Watt, and was financed by the Imperial Bank of Canada. In 1911 the indebtedness was approximately $160,000 which increased in 1913 to $170,000. In 1914 the business of manufacturing lumber was suspended, owing to an absence of market for the manufactured product, and remained closed until 1916. The overhead charges in the meantime were very heavy, and the bank advanced money

ALTA.
S. C.

amounting to about $20,000 per year to preserve the property, including timber licenses, insurance, etc., with the result that in 1916 the indebtedness had materially increased, reaching, in 1917, $250,000.

The defendants served garnishee summons upon the Birney Lumber Co. on September 22, 1916, and on the same day, but at a later hour, the Birney Lumber Co. received notice from the Imperial Bank of Canada of the assignment of March 17, 1913. Although the notice was not received until a time subsequent to the serving of the garnishee summons, yet the equitable interest in the property had passed to the bank under the assignment, and the defendants cannot, therefore, claim the moneys. *Grant* v. *McDonell*, 39 U.C.Q.B. 412, and cases cited on p. 1216 of Holmested's Ontario Judicature Ordinance.

In the result, I find the plaintiff bank entitled to the moneys in question and cost of the issue. *Judgment for plaintiff.*

WESTHOLME LUMBER Co. v. CORP. OF CITY OF VICTORIA.

IMP.
P. C.

Judicial Committee of the Privy Council, Lord Parker of Waddington, Lord Strathclyde and Sir Walter Phillimore, Bart. October 16, 1917.

CONTRACTS (§ II D4—185)—*Agreement to do work—Misconception—Misrepresentation—Changes in plans.*]—Appeal from the British Columbia Court of Appeal. Affirmed.

The judgment of the Board was delivered by

LORD STRATHCLYDE:—The appellants carry on business as contractors in the Province of British Columbia, and in December, 1911, they undertook the construction of a waterworks system between Sooke Lake and the City of Victoria in that province, a distance of about 20 miles. The contract is expressed in writing. It is lengthy and elaborate in its provisions, and *inter alia* contains the following clause:—

46. Understanding. The contractor hereby distinctly and expressly declares and acknowledges that, before the signing of the contract, he has carefully read the same, and the whole thereof, together with, and in connection with, the said plans and specifications; that he has made such examination of the contract and of the said plans and specifications, and of the location where the said work is to be done, and such investigation of the work required to be done . . . as to enable him thoroughly to understand the intention of same . . . and distinctly agrees that he will not hereafter make any claim or demand upon the purchaser based upon or arising out of

IMP.
P. C.

any alleged misunderstanding or misconception on his part of the . . . stipulations . . .

of the contract. It may be observed, in passing, that it was not maintained, on behalf of the appellants, that they laboured under any misconception regarding the work which they were called upon to perform. For upwards of a year they continued in the performance of the work, and from time to time received payments to account, all under and in terms of the contract. Finally, although they abandoned the work on April 14, 1913, they did not abandon the contract. On the contrary, they insisted upon being allowed to go on and complete the work in terms of the contract. And never, until the writ in this action was issued, did they say or suggest that the work which they had executed, or desired to continue to execute, was not work under the contract. These simple and undisputed facts seem to their Lordships to be fatal to the appellants' present contentions. For what they seek in this action is (1) to have the contract set aside on the ground that they were the victims of fraudulent misrepresentation, but for which they never would have entered into the contract; (2) to have $500,000 damages on account of the fraud practised upon them; and (3) to have a *quantum meruit* for the work actually performed by them under the contract, on the ground that, as they now say, it was essentially different from the work they undertook. The case was tried on a number of issues, mainly, if not entirely, irrelevant, before Murphy, J., in the Supreme Court of British Columbia, and after a prolonged enquiry, in which the judge was assisted by two assessors (engineers), the action was dismissed. The contractors appealed, but the Judges of Appeal unanimously sustained the judgment of the trial judge. Their Lordships see no reason to differ from the conclusion arrived at by both Courts of British Columbia. It would be idle to review the facts and the reasoning on which the able and exhaustive judgments appealed against rest. The main ground on which the challenge here of the validity of the contract was based was that the route which the pipe was to traverse had not been surveyed at the time when the plans and sections were issued to the contractors, and that the route actually chosen and followed differed from the route contemplated when the contract was made. To use the words of Galliher, J.:—

IMP.
P. C.

There was no location of the line upon the ground. There was insufficient *data* upon which what I understand as an approximate estimate of quantities could be based, and in a country of the nature of that through which this waterworks scheme was being constructed, any material change in location might, and actually in this case did, greatly alter quantities.

But from the very outset of the work and throughout its whole course the contractors knew very well that the pipe was not to follow the precise route shewn on the plans. It appears that there were certain stakes in the ground which indicated the general location of the line of pipes, within reasonable limits. The stakes were not prepared for that purpose; but they served the purpose. And the whole line was staked as rapidly as the work required and in advance of the contractor's requirements. This was the method pursued without the smallest objection on the part of the contractors, who for their work done from time to time claimed and received payments to account on the basis of the unit prices set out in their tender. It is true that the diversion of the line from that shewn on the plans may have largely increased the quantities of work done, and also its character. More excavation and specially more rock excavation than was shewn in the specifications may have been rendered necessary. But this was not fraudulent misrepresentation, and certainly was not misrepresentation, but for which the contractors would never have engaged to perform the work. The best evidence of that is that, from the beginning and throughout, they saw exactly what they were called upon to do, and they did it without protest or remonstrance, never once suggesting, until this action was raised, that it was not contract work they were performing all the while. Under these circumstances it is impossible to resist the conclusion reached by the judges in the Court of Appeal that—

For months before that time (the time when the contractors were finally obliged to abandon the work) they knew of all the matters which they now complain of as fraudulent, but took no steps and made no complaint about fraud being practised upon them—in fact, they must be taken to have affirmed the contract after full knowledge.

In truth the appellants were not the victims of any fraudulent misrepresentation whatever, and made no complaint because they had none to make. Increased quantities and more rock work merely added to the contractors' profirs, as the trial judge advised by his assessors found. To speak of a contractor being cheated by being asked, with his eyes open, to undertake such work

IMP.
P. C.

is idle. The conduct of the appellants throughout makes it clear that they considered all the work they actually performed, down till the date when they ceased operations, was work done under the contract, which assuredly it was. The conclusions drawn by the trial judge from the evidence, oral and documentary, seem to their Lordships to be sound, and no serious attempt was made to impugn them. It was agreed by counsel for the respondents that nothing decided in this action will affect any claims which the appellants may have under the contract or the respondents' counterclaim. But inasmuch as the respondents' engineer, Meredith, seems to have been personally much mixed up in the controversies which have arisen under this contract, counsel for the respondents undertook that a neutral engineer would be named in place of Meredith to decide such questions as by the contract are referred to the determination of the engineer. This undertaking was, of course, given subject to the understanding that the respondents' rights under the Contract of Indemnity, dated December 2, 1912, were in no way affected thereby. Their Lordships will therefore humbly recommend His Majesty to refuse the appeal and to affirm the judgments appealed against. The appellants will pay to the respondents the costs of the appeal.

Appeal dismissed.

WALKER v. WALKER.

Page 731, ante.

Leave to appeal direct to the Privy Council was granted May 5, 1918.

INDEX.

ACCOUNT—
Surety—Lien on goods for storage—Loss of goods by fire—Liability 767

ADULTERY—
As crime—Jurisdiction of magistrate 24

ALIENS—
Ministerial office—Disqualification from holding 495

ALTERATION OF INSTRUMENTS—
Materiality—Promissory note—Signature 320

APPEAL—
Application for leave—Workmen's Compensation Act—Adducing new evidence 593
Extension of time for appealing—Jurisdiction of court—Title to land—Removal of cause 793
Interest on money demand—Discretion of lower court—Appeal "as to costs only"—Appeal joined with other parts of judgment ... 796
Oppressive conduct—Costs 421
Question of fact—Credibility of witnesses—Finding of trial judge—Reversal 463

ARBITRATION—
Conclusiveness of award 214

ARREST—
Without warrant—Provincial liquor law 111
Writ of capias—Money claim—Arrest of Debtors Act—Invaliaity of affidavit 407

ASSESSMENT—
See TAXES.

ASSIGNMENT—
Lien note—Endorsement—Parties 398
Of draft—Validity—Registration—Priorities—Security to bank—Garnishment—Bank Act—Preference 803
Vendor and purchaser—Default of purchaser—Abandonment of contract—Assignment by purchaser—Rights of assignee 642
Vendor and purchaser—Payment of purchase money—Notice—Caveat 39

ASSIGNMENT FOR CREDITORS—
Assignments and Preferences Act—Mortgage—Action to set aside—Parties 781
Claims—Amendment—Preferred claim—Estoppel 140

AUTOMOBILES—
Borrower—Negligence—Damages 410
Defective highway—Primary negligence—Non-compliance with statute—Registration—Number plates 1, 4
Duty when approaching horses 86

BAIL AND RECOGNIZANCE—
Estreat—Sufficiency of affidavit—Acknowledgment—Notice to sureties—Order of judge 776

BAILMENT—
Dogs—Exhibition kennel club—Liability of officers 202

BASTARDY—
Maintenance—Form of affidavit of affiliation—Construction of Illegitimate Children's Act—"Really" 795

BILLS AND NOTES—
Accommodation maker—Exoneration 725
Bona fide holder—Note given for chattel—Chattel defective—Rejection by purchaser 661
Holder in due course—Notice—Consideration 756
Money received from and deposited in bank—Cheque by trustee—Trusts 664

BROKERS—
Grain exchange—Margin transactions—Cr. Code sec. 231 56
Sale of real estate—Partial payment of price—Receipt by agent—Variation of terms 396

CAPIAS—
See ARREST.

CARRIERS—
Passenger stepping off train—Invitation to alight—Negligence 691

CASES—
Att'y-Gen'l of Man. v. Man. License Holders, [1902] A.C. 73, applied 124
Att'y-Gen'l of Ont. v. Att'y-Gen'l of Can., [1896] A.C. 348, applied .. 124
Bank of Toronto v. Harrell, 31 D.L.R. 440, 23 B.C.R. 202, reversed .. 262
Beamish v. Richardson, 23 Can. Cr. Cas. 394, 16 D.L.R. 855, 49 Can. S.C.R. 595, applied 56
Berlin v. Grange, 1 E. & A. 279, distinguished 650
Brousseau v. The King, 26 Que. K.B. 164, affirmed 114
Buxton v. Baughan, 6 Car & P. 674, followed 324
Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, affirmed .. 396

CASES—*continued.*

Clark v. Hepworth, 34 D.L.R. 177, affirmed 395
Cranston v. Town of Oakville, 10 O.W.N. 315, affirmed 763
Davis, R. v., 7 D.L.R. 608, 20 Can. Cr. Cas. 293, followed 111
Desjardins v. Mignault, 23 Rev. Leg. 85, affirmed 400
Dixon v. Canadian Collieries, 36 D.L.R. 388, 24 B.C.R. 34, affirmed. 758
Edmonton Portland Cement Co. v. Duplessis, 11 A.L.R. 58, affirmed 756
Fafard v. City of Quebec, 35 D.L.R. 661, 26 Que. K.B. 139, affirmed .. 717
Ferrara v. National Surety Co., 27 D.L.R. 518, 22 B.C.R. 15, reversed 175
Fraser v. Fraserville, 34 D.L.R. 211, [1917] A.C. 187, followed 214
German v. City of Ottawa, 34 D.L.R. 632, 39 O.L.R. 176, affirmed .. 669
Grace v. Kuebler, 33 D.L.R. 1, affirmed 39
Hingston v. Bénard, 32 D.L.R. 651, affirmed 137
Hutchings v. Can. Nat. Fire Ins. Co. (No. 3), 33 D.L.R. 752, affirmed 401
King, The, v. Archibald, 35 D.L.R. 560, affirmed 166
King, The, v. Giroux, 26 Que. K.B. 323, affirmed 190
King, The, v. Murphy and Gould, 27 D.L.R. 405, 16 Can. Ex. 81, reversed 370
Knott v. Telegram Printing Co., 32 D.L.R. 409, 27 Man. L.R. 336, affirmed 762
Law and McLean v. Sawyer-Massey, 38 D.L.R. 333, affirmed 547
Loach v. B. C. Electric R. Co., 23 D.L.R. 4, [1916] 1 A.C. 719, followed 49
MacAuley v. Jacobson (1906), 37 N.B.R. 537, distinguished 407
Mah Kong Doon v. Mah Cap Doon, 37 D.L.R. 50, affirmed 234
Mayne v. Grand Trunk R. Co., 34 D.L.R. 644, 39 O.L.R. 1, reversed.. 691
McMurrer, R. v., 18 Can. Cr. Cas. 385, approved 111
Mohr v. Parks, 3 A.L.R. 252, followed 439
Montreal Tramways Co. v. Mulhern, 26 Que. K.B. 456, affirmed 758
Nelson v. Canadian Pacific R. Co., 35 D.L.R. 318, reversed 760
Nichols v. McNeil, 50 N.S.R. 67, affirmed 763
Nicola Valley Lumber Co. v. Meeker, 31 D.L.R. 607, affirmed 497
Palmason v. Kjernested, 36 D.L.R. 448, affirmed 237
Paul, Re (No. 2), 7 D.L.R. 25, 20 Can. Cr. Cas. 161, followed 111
Payne v. The King, [1902] A.C. 552, followed 380
Provincial Treasurer of Alberta v. Toronto General Trust Co., 32 D.L.R. 524, 11 A.L.R. 138, affirmed 380
Reardon v. Franklin, 35 D.L.R. 380, 51 N.S.R. 161, affirmed 176
Royal Bank v. Pope, 11 A.L.R. 68, affirmed 757
Security Trust Co. v. Stewart, 39 D.L.R. 801, reversed 518
Shaw v. Hossack, 36 D.L.R. 760, 39 O.L.R. 440, reversed 797
Sheppard v. Bulletin, 27 D.L.R. 562, reversed 339
Sherwood, Rur. Mun. of, v. Wilson, 30 D.L.R. 539, affirmed 761
Stewart v. St. Lawrence Flour Mills Co., 26 Que. K.B. 476, affirmed. 760
Vanzant v. Coates, 37 D.L.R. 471, 39 O.L.R. 557, affirmed 485
W. v. W., 35 D.L.R. 207, reversed 731
Western Trust Co. v. City of Regina, 30 D.L.R. 548, affirmed 759

CERTIORARI—

Inferior court—Non-compliance with Criminal Code—Appellant court quashing order 510
Municipalities Act—By-laws—Regularity of proceedings 296

CHATTEL MORTGAGE—
Failure to file renewal within statutory period—"Creditors"—Execution creditors—Liquidator—Effect of possession 801
Possession by mortgagee—Mortgage defective—Priorities 518

COMPANIES—
Application for shares—No allotment—Transfer of other shares—Repudiation—Liability 632
Meetings—Notice—Waiver 313
Shares held in family—Trust—Representations to bank 757
Transfer of shares—Veto—Ultra vires 401

CONDITIONAL SALE—
See SALE.

CONFLICT OF LAWS—
Marriage—Marital rights 152

CONSTITUTIONAL LAW—
Keeping intoxicating liquor for export 124

CONTRACTS—
Agreement to do work—Misconception—Misrepresentation—Changes in plans 805
Building contract—Alteration—Non-disclosure—Discharge of surety 175
Building contracts—Crown—Forfeiture 76
Company—Transfer of shares—Specific performance 176
Impossibility of performance—Strike 308
Promise by third party—Consideration—Right of action 581
Sale of land—Fraud—Liability of agent—Rescission 395
Sale of wheat—Offer and acceptance 606

COSTS—
Appeal—Oppressive conduct 421

COURTS—
Agreement for sale of land—Application to cancel—Powers of master 454
Certiorari proceedings—Power of appellate court to review proceedings of inferior court—Civil action 509
King's Bench Act—Rule 220—Trustee—Powers of court to add party defendant 706
Power to appoint guardian—Infant residing without province 177

CRIMINAL LAW—
Adultery—As crime—Jurisdiction of magistrate 24
Brokers—Grain exchange—Margin transactions—Cr. Code sec. 231. 56
Counselling to commit offence 114
Eavesdropping—As criminal offence 54
Election to speedy trial—Jurisdiction 190
Opium and Drug Act—Conviction under—Validity of 377
Summary convictions—Illegality of arrest without warrant 111
Summary conviction—Plea of guilty followed by denial of an essential ingredient of the offence 117
Trial—Minor inaccuracies 99

CROWN—
Negligence—Public work—Canal—Flooding—Release 95
Negligence—Public work—Post office—Elevator 27

DAMAGES—
Contract for sale of goods—Breach—Measure of damages 483
Expropriation—Compensation—Riparian rights 107
Fatal Injuries Act—Misdirection to jury—New trial 412
Highways—Non-repair 762
Negligence—Injury avoidable notwithstanding contributory negligence 49
Replevin—Security under R's. 469, 472—Failure to establish claim .. 588
Slippery sidewalk—Failure to sand or harrow—Negligence 669

DEEDS—
Construction of—"Cede"—"Transfer" 134
Voluntary conveyance—Presumption—Undue influence—Onus 485

DEPOSITIONS—
Use at trial of depositions of absent witness taken on preliminary enquiry 99

DIVORCE AND SEPARATION—
Imperial statute in force in Manitoba—Jurisdiction of courts 731

EAVESDROPPING—
As criminal offence 54

EVIDENCE—
Hearsay statements of third person—Negligence 127
Misdirection by judge—New trial 171
Sufficient to go to the jury—Negligence 615
Workman's Compensation Act—Adducing new evidence on appeal .. 593

EXECUTION—
Distribution—Creditors' Relief Act—Sheriff's sale of land—Priorities—Costs 771

EXECUTORS AND ADMINISTRATORS—
Release of, under seal—Limitations Act 259

EXPROPRIATION—
Compensation—Canal—Riparian rights—View—Water 107
Compensation—Minerals—Quarry of rock 207

EXTRADITION—
Extraditable offences—Forgery—Uttering forged paper—Substitution—Description 551

FISHERIES—
Municipal regulation—License—Mandamus 166

FORECLOSURE—
See MORTGAGE; VENDOR AND PURCHASER.

FORGERY—
Uttering forged paper—Extradition 551

FRAUD AND DECEIT—
Misrepresentation—Actionability 262
Real estate agent—Option—Principal and agent 400

GARNISHMENT—
Affidavit—Rule 648—Non-compliance—Defect 439
Assignee—Creditors Trust Deeds Act—Duty to distribute under jurisdiction of court 516
Of funds in bank 425

GUARDIAN AND WARD—
Appointment and removal—Domicile 177

HIGHWAYS—
Highway Improvement Act (Ont.)—Powers of County Council—Roads in village 328
Maintenance—Negligence—Municipal corporations 397
Maintenance—Reasonably safe condition 717
Non-repair—Pitch hole in snow 762

HUSBAND AND WIFE—
Community—Right of action 152
Conveyance by wife—Possession of property—Execution 763

INCOMPETENT PERSONS—
Expenditures—Charitable purposes 368

INDIANS—
Offences outside reservation—Punishment 635

INFANTS—
Custody of—Child's interest 559

INSURANCE—
Combined store and dwelling—Occupied as dwelling—House unoccupied—"While occupied as dwelling"—Meaning of policy .. 528
Fire insurance policy—Statutory conditions endorsed—Later statutory conditions in force—Liability 414
Hail insurance—Delivery of policy 714
"Infants"—Children—Grandchildren 294
Registered letter—Money enclosed—Tender—Ontario Insurance Act 221

INTEREST—
Money Lenders Act—Harsh and unconscionable transaction 797

INTERPLEADER—
Execution creditor—Practice 584

INTOXICATING LIQUORS—
Inspector—Discretion as to granting licenses 187
Keeping for export—Jurisdiction of Province—Constitutional law .. 124
Possession of liquor for purpose of exportation—Enabling statute—Ultra vires 397
Seizure and destruction—Conviction for keeping—Subsequent inquiry for forfeiture order—N.S. Temperance Act 60

JUDGMENT—
Mortgage—Registration—Notice of judgment—Priority 640

LAND TITLES—
Crown grant—Lease or charge—Registry laws 764

LANDLORD AND TENANT—
Repairs—Flooding—Vis major—Act of God 137

LIBEL AND SLANDER—
Charging corruption—Fair comment 339
Election—Parish priest—Candidate 326
Trial—Misdirection—Admissibility of evidence—Damages—Excessiveness 762

LIENS—
Animal placed in stable—Lien for keep 324

LIMITATION OF ACTIONS—
Executors and administrators—Release of, under seal 259

MANDAMUS—
Fisheries—Municipal regulation—License 166
Right to remedy 130

MASTER AND SERVANT—
Circular saw-guard—Contributory negligence 760
Negligence—Defective system—Timber—Inspection 758
Workmen's compensation—Action for rent or capital 239
Workmen's compensation—Failure of common law action—Application for compensation—Liability of municipal street railway .. 759

MINES AND MINERALS—
Gold commissioner—Mining recorder—Powers 370

MISTAKE—
Agent locator—Timber limit—Misdescription—Trespass—Title 456

MORTGAGE—
Action to set aside—Assignments and Preferences Act..... 781
Foreclosure—Land Titles Act—Extinguishment of debt..... 601
Registration of—Notice of Judgment—Priority..... 640
War Relief Act—Applicability..... 237

MOTOR VEHICLES—
See AUTOMOBILES.

MUNICIPAL CORPORATIONS—
Assessment Act—Construction of..... 650
Highways—Maintenance—Reasonably safe condition for persons using ordinary care..... 717
Unshored excavation caving in—Error in judgment of foreman—Negligence..... 306
Village Act—Powers as to "building"—Fence around park and grand-stand—By-law..... 768

NEGLIGENCE—
Automobile—Borrower—Damages..... 410
Contributory—Circular saw-guard—Master and servant..... 760
Defective system..... 758
Dogs—Exhibition—Bailment..... 202
Evidence—Statements of third person..... 127
Evidence sufficient to go to the jury in negligence actions..... 615
Municipal corporations—Unshored excavation caving in—Error in judgment of foreman..... 306
Of Board of Health—Infectious disease..... 442
Passenger stepping off train—Carriers..... 691
Public work—Canal—Flooding—Injury—Crown..... 95
Public work—Post office—Elevator—Crown..... 27
Railways—Switch stand too close to rail..... 760
Slippery sidewalk—Failure to sand or harrow..... 669
Street railway—Cars not securely braked—Release by children..... 242
Street railways..... 758
Trial—Sufficiency of evidence to go to jury..... 609, 615
Trail over private property—Fencing property—Duty of owner to users..... 679
Ultimate negligence—Injury avoidable notwithstanding contributory negligence..... 49

NEW TRIAL—
Damages—Fatal Injuries Act—Jury—Misdirection by trial judge—New trial..... 412
Misdirection..... 171

PARTIES—
Interest of assignor as party—Lien note—Endorsement—Equitable assignment..... 398
Rules of practice—Fusion of law and equity—Equity to prevail—Right of assignee to sue in own name..... 284

PARTNERSHIP—
Receivership—Dissolution—Lease of premises 234

PRACTICE—
Execution creditor—Interpleader 584

PRINCIPAL AND AGENT—
Commissioners—Accepted and filled sales secured 547
Real estate agent—Option—Fraud 400
Sale of land—Fraud—Liability of agent—Concealment—Rescission 395
Sale of land—Purchase by agent 237

PRINCIPAL AND SURETY—
Building contract—Alteration—Non-disclosure—Discharge of surety 175
Discharge of surety—Extension of time 33

RAILWAYS—
Negligence—Railway yard—Switch stand too close to rail 760

RECEIVERS—
Appointment of—Effect of on partnership 234

REGISTRY LAWS—
Registration of Crown grant—Lease or charge 764

REPLEVIN—
Security under rules 469 and 472—Failure to establish claim—Damages 588

SALE—
Conditional sale—Threatening purchaser—Purchaser justified in regarding sale as ended—Recovery of purchase price 625
Contract for sale of goods—Breach—Damages 483
Principal and agent—Commission—Accepted and filled sales 547

SOLICITORS—
Lien on money paid into court—Settlement of action 133

SPECIFIC PERFORMANCE—
Vendor and purchaser—Knowledge that vendor cannot perform 642

STATUTES—
Calgary Charter Act—Amendment—By-law interpretation 629
Construction of—Directory and mandatory sections 450
Grain Act (Can.)—Application 483
Municipal Assessment Act (Man.)—Construction of—Immaterial omission—Comparison of Manitoba and Ontario Acts 650
Opium and Drug Act—Validity of convictions under 377
Provincial and Dominion both legislating—Conflict—Dominion enactment to prevail 300

STREET RAILWAYS—
Franchise—Act incorporating—Tickets "for the benefit of the working people"—Construction 657
Negligence—Brakes on cars released by children 242
Negligence—Causal connection between injury and occurrence 758

SUCCESSION DUTY—
See TAXES.

SUMMARY CONVICTIONS—
Illegality of arrest without warrant—jurisdiction of magistrate 111
Jurisdiction—Plea of guilty followed by denial of essential ingredient of the offence—Shewing cause why conviction should not be made 117

TAXES—
Assessment—Actual value 148
Assessment—Power to revise 761
Court of Revision—Power to remit—Power of County Court Judge—Assessment Act 416
Increment tax—Value of land 20
Succession duties—Mortgages—Situs 380

TENDER—
Registered letter—Money enclosed—Sufficiency 221

THEFT—
Mortgaged lands—Death of mortgagor—Letters of administration not applied for—Occupation of land by widow—Seizure of crops under mortgage—Sale by widow—Theft 688

TRESPASS—
Agent locator—Misdescription of property—Mistake 456
Mortgaged lands—Death of mortgagor intestate—Occupation by widow—Theft of crops 688

TRIAL—
General verdict—Specific questions 262
Grand jury—Criminal law—True bill found—Election for speedy trial 190
Libel and slander—Misdirection—Damages—Excessiveness 762
Negligence—Sufficiency of evidence to go to jury 609
Reading charge to jury as a whole—Minor inaccuracies 99

TRUSTS—
Co-debtors—Money received from and deposited in bank—Cheque drawn by trustee—Payable to drawer as against liquidator 664

VENDOR AND PURCHASER—
Agreement for sale—Crown grant—Conduct of purchaser preventing title being obtained 497
Agreement for sale of land—Application to cancel—Powers of master 454

VENDOR AND PURCHASER—*continued.*
Husband and wife—Conveyance by wife—Possession of property—Execution ... 763
Partial payment—Receipt by agent—Variation of terms—Brokers ... 396
Payment of purchase money—Assignment of vendor—Notice—Caveat ... 39
Promissory note for unpaid purchase price—Owner of note—Vendor's lien ... 284

WAR RELIEF ACT—
See VOLUNTEERS AND RESERVISTS RELIEF ACT.

WITNESSES—
Evidence—Refreshing memory—Consistency of statements ... 154

WORDS AND PHRASES
"As to costs only" ... 796
"Building" ... 768
"Cede" ... 134
"Cohen Frères, per" ... 320
"Creditors" ... 801
"Electors" ... 629
"For the benefit of the working people" ... 657
"Futures" ... 56
"Gross negligence" ... 669
"Guilty" ... 117
"Having opium in his possession without lawful or reasonable excuse" 117
"Infants" ... 294
"Majority vote" ... 629
"Non-Resident" ... 650
"Occasioned by spring floods and freshets" ... 95
"On each accepted and filled sale . . . which he has secured, either with or without the traveller's assistance" ... 547
"Or other minerals" ... 207
"Public work" ... 27, 95
"Really" ... 795
"Shall not approach" ... 86
"Sufficient cause why he should not be convicted" ... 117
"Transfer" ... 134
"Uttering forged paper" ... 551
"Where you get off" ... 691
"While occupied as dwelling" ... 528

WORKMEN'S COMPENSATION—
See MASTER AND SERVANT.
Action for rent or capital—Master and servant ... 239