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EDITED BY

W. J. TREMEEAR

C. B. LABATT *and*

EDWIN BELL

ASSISTED BY A STAFF OF EDITORS

CONSULTING EDITOR

E. DOUGLAS ARMOUR K.C.

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WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME.

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OLLMAN v. CITY OF HAMILTON.

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April 18.

Ontario Supreme Court, Middleton, J. April 18, 1913.

1. DRAINS AND SEWERS (§ I—6)—PRIVATE DRAINS—HIGHWAY REPAIR—INTERFERENCE.

Where water which is the drainage of the plaintiff's own land, augmented by some slight flow of surface water from adjacent streets, is collected in a ditch constructed by the plaintiff and thence discharged on to a public highway, the defendant municipality responsible for the repair of the highway is not responsible for damages resulting to the plaintiff's lands by reason of its repairing the road and diverting the flow of the surface water into the channel in which it would naturally flow.

Statement

ACTION for damages for flooding the plaintiff's land, tried before MIDDLETON, J., without a jury, at Hamilton.

Judgment was given for the defendant.

W. M. McClemont, for the plaintiff.

S. F. Washington, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—Mrs. Ollman, the plaintiff, has a life estate in about five acres of land, in Hamilton, upon which she carries on business as a brick-maker. The property is bounded by Macklin street, King street, Paradise road, and Hunt street; the latter not being opened out; and, according to the plans, is crossed by Athol street and Dufferin street. A deep ravine extends across the north-west portion of the land and to the west.

In the summer of 1911, a building was erected in this ravine, almost immediately opposite Paradise road where it crosses the ravine. This building contained the machinery for the manufacture of bricks, a furnace-room, and drying-room; the furnace and tunnels to carry the heat to the drying-room being some seven or eight feet below the level of the soil at the bottom of the ravine: the floors of the machine-room and of the drying-room being on a level with the surface of the soil there.

In the spring of 1912, water from the thawing of the snow upon the plaintiff's own land and the unopened streets which she uses for her own purposes, together with some water from Macklin street and possibly from King street where these streets adjoin her property, flowed through a ditch upon the lands and was emitted upon Paradise road just about at the bank of the ravine, flowed down the slope of the road a short distance, and

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then re-entered the plaintiff's own land and flooded the buildings at the bottom of the ravine, doing considerable damage. It is for this that the action was brought.

Some five or six years ago, an endeavour was made to grade Paradise road where it crosses the ravine. The crests of the hills were cut down, and the earth therefrom was used to construct an embankment at the lowest place. No complaint is made of this; and any injury that was sustained from the construction of the embankment would not have been the subject of arbitration.

On the western part of the southern portion of the plaintiff's land, the whole surface has been removed for the purpose of using the clay to make bricks. This has resulted in cutting down the top of the high land by about eight feet. The water from this land would naturally flow to the north, seeking the ravine; but a ditch has been constructed which intercepts this water before the ravine is reached. As the excavation of the clay progressed from time to time, this ditch was lowered; and it is now much below what is said to have been an original natural watercourse draining the water to the west.

When this ditch neared Paradise road—the water flowing in a westerly direction—a channel some years ago existed through a high bank on the plaintiff's land east of the road. The course of this channel has recently been changed—it is said because of some small cutting made to enable teams to drive up on to the plaintiff's land for the purpose of obtaining some earth to be used in repairing the road; and the water now passes through a channel three or four feet deep, cut through this bank where the teams passed, and is discharged on the surface of the road.

In the spring of 1912, this water had cut a channel across the road and was flowing into the ravine west of Paradise road. This water flowing across the road made the place most dangerous to passers-by; in fact, quite impassable. The city officials being notified, men were sent to the place. They had some suspicion that the water had been intentionally diverted across the road. This was denied by the sons of the plaintiff. It appears that part of the bank beside the road had fallen into the channel along the roadside where the water would otherwise have gone. All that was done by the city officials was to remove this obstructing earth, so that the water continued to flow, as it would otherwise have done, down the side of the roadbed, and to repair the roadbed. When opposite the building in question, the water made for itself a channel down the bank, and did the damage.

I fail to see that by removing this fallen earth and by filling in the channel cut across the road, the defendants were guilty

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of any misconduct. Since this occurrence, a box drain has been placed in the road. This conducts the water across the road, and the water flows into the ravine west of the embankment. This has prevented the occurrence of any further injury.

To me the case seems plain. The water in question was the drainage of the plaintiff's own land, augmented by some slight flow of surface water from King and Macklin streets, confined in this ditch constructed by the plaintiff herself, and allowed by her to flow on to Paradise road. All that the defendants did in the spring of 1912 was to remove the earth that had fallen and to fill the excavation that had been made, so that the water which the plaintiff had thus brought on the road would flow in its natural course either down the road or back into the ravine on the plaintiff's land.

The action will be dismissed. Costs must follow the event if they are demanded. In view of the fact that the city officials might well have constructed the box drain in the first instance, and might well have made a ditch which would have carried the water beyond the building, the defendants will probably see their way clear not to exact costs.

There is on the record a counterclaim and a counterclaim to the counterclaim. No evidence was given as to these matters, and as to them there will be no order and no costs—and this will not prejudice the rights of either party as to these matters.

Judgment for defendant.

HARNOVIS et al. v. CITY OF CALGARY.

(Decision No. 2.)

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March 31.

Alberta Supreme Court, Harvey, C.J., Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. NEGLIGENCE (§ II F—120)—NEGLIGENCE FOLLOWING CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Notwithstanding the contributory negligence of the plaintiff, if the facts establish primary negligence on the part of the defendant and the injury in question occurs through the ultimate negligence of the defendant, the latter is responsible in damages for personal injuries resulting from such negligence. (*Per* Harvey, C.J., and Walsh, J.)

[*Halifax Electric Tramway Company* v. *Inglis*, 30 Can. S.C.R. 256, followed; *Harnovis* v. *City of Calgary* (No. 1), 7 D.L.R. 789, affirmed by an equally divided Court.]

Statement

APPEAL by defendant from judgment of Beck, J., *Harnovis* v. *City of Calgary* (No. 1), 7 D.L.R. 789, awarding plaintiffs damages for personal injuries.

The appeal was dismissed and judgment below varied by an equal division of the Court.

H. C. B. Forsyth, for the plaintiffs.

D. S. Moffatt, for the defendants.

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Harvey, C.J.

HARVEY, C.J.:—I agree with my brother Walsh that this case is governed by *Halifax Electric Tramway Co.* v. *Inglis*, 30 Can. S.C.R. 256.

The finding by the trial Judge of primary negligence on the part of the defendants and of ultimate negligence causing the accident, notwithstanding the plaintiff's contributory negligence, appears to me to be based on evidence which quite justifies such finding and which, therefore, should not be disturbed by a Court of Appeal.

I would, therefore, dismiss the appeal with costs, and vary the judgment below as directed by my brother Walsh.

Stuart, J.
(dissenting)

STUART, J. (dissenting):—We have here again another case of the unwary wayfarer in a crowded modern city with its street cars and automobiles who doesn't know enough to keep his wits about him in crossing a street, and the energetic motorman of a street car who feels inclined to "let it rip" with the car, as the motorman here said, when he gets what he thinks is a good chance.

In my view of the case I do not think we are absolutely bound to dismiss the appeal because of the decision in *The Halifax Electric Tramway Company* v. *Inglis*, 30 Can. S.C.R. 256. In that case there were jury findings which the Court could not very well override if there was any evidence upon which they could reasonably be made. The trial here was by a Judge alone, and it seems to me we are more at liberty to form an opinion of our own as to whether either party was negligent or not. Then again, in the *Halifax* case the whole affair occurred upon a down grade, which furnishes some slight ground of distinction upon the facts.

There can be no doubt that the plaintiffs in driving heedlessly forward across the track without looking as they did were grossly negligent. But at any rate it can be said that owing to their omission to look they were not aware of the actual imminent presence of danger until they were struck. On the other hand, the motorman is shewn to have known of the possibility of danger some time, however short or long, before it actually occurred. And my inference from the evidence is that he allowed a short time to elapse before he did anything—a time during which he was acting on the assumption that the plaintiffs would either stop or turn north on Second street east. The motorman's evidence is not exactly that he supposed from the first moment he saw the plaintiffs that they would turn north, as it is put by the learned trial Judge. It is rather that he supposed when he first saw them coming "at a good rate of speed" that they would either stop or turn north. This means only that he supposed they would know enough to keep out of his way and that he went forward a little before taking any

measures at all on his part to avoid an accident. At the beginning of his evidence the motorman Pettit said:—

We was coming up out of the subway and as soon as I noticed the waggon I expected that they would turn up Second street towards Eighth avenue, either that or stop the horse. The horse was travelling along at a good rate of speed when I first saw them. I shut the power off as soon as I saw them coming, but was unable to stop the car.

Now that evidence on the face of it would apparently suggest that he shut the power off the first moment he saw them, but there are other expressions which lead me to believe that what he meant by the words "when I saw them coming" was "when I saw that they were coming on and not either stopping or turning north."

At another place he says:—

I expected they would turn up the street or stop the horse before I approached.

At another place he was asked and he answered as follows:—

Q. You said you expected them to turn down Second street east? A. No.

And again:—

Q. And you thought they were going to turn down Second street east? A. I didn't think that, but they could have avoided that accident by turning down there if they had seen the car.

And again:—

Q. And still you bring back the recollection that they had gone along Second street so often that you thought they would do so this night? A. No, I didn't. I thought they were going to turn down Second street east when they saw me coming.

Now the inference I make from this is that a short period of time did elapse between the motorman's first sight of the horse and his attempt to stop. It is true that he did in his evidence in several places say that as soon as he saw them he turned the power off and put on the brakes, but I think the proper inference to draw from his evidence as a whole is the one I have stated. On the other hand, it must be remembered that this period of inaction on the part of the motorman must have been an exceedingly short one. I do not think the motorman can be charged with negligence in not seeing the plaintiffs at the very first moment it was possible to see them, because a motorman has to look several places and watch a number of things. It is perhaps a little difficult to take as absolutely correct the motorman's evidence, which is to the effect that he was about 30 feet south of the line of Ninth avenue when he first saw the plaintiffs' horse and waggon. But wherever he was when he first saw them, I can find nothing in the evidence to shew that he was negligent in not seeing them sooner. It is difficult to say also just where

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the plaintiffs were when he did first see them. It is more probable that the motorman is correct when he says that they were about 40 feet from the car track, because even if we allow some 15 feet as the distance north of the south line of Ninth avenue at which they were travelling, it would still mean that they travelled 40 feet while his car was travelling 45 feet. Or if we allow something for the swerve to the left made by the horse, it may be that we should add five or six feet more to the former distance. But even then it is difficult to see how the horse could have been travelling practically as fast as the car. Now, as I say, I think it is probable that the motorman's estimate of the distance of the horse from the track when he saw them is very likely to be correct. Because he must, according to his story, have seen them first at such a place as would still leave in doubt their probable intention as to direction. And I do not think this could have been very far east of the west line of Second street. If they had got much over on to Second street without shewing signs of turning, the motorman would not have thought of that as a possible intention on their part. So I think as the streets are 66 feet wide, his estimate of their distance from the car track when he first saw them as 40 feet is probably fairly accurate. If we assume that the car was going only twice as fast as they were, then it is evident that he must have been some 90 feet from the place of the accident when he saw them, instead of 45 feet or thereabouts. This, of course, assumes that his turning the power off and applying the brakes did not diminish his speed at all. I recognize the difficulty and uncertainty of any calculation of this kind, but it is evident that the period from the time when the motorman first saw the plaintiffs until they were struck could not have been more than a few seconds in any case. If it was a distance of 90 feet which he covered, and he was going, say, 10 miles an hour, it would take only between nine and ten seconds. It is with regard to events and actions happening within such a period as that that we are called upon to turn the balance of responsibility for the accident in question either one way or the other.

Now, for my part I do feel that a Court ought not to attach blame to a motorman for assuming, at least for a moment, for three or four seconds, that the driver of a horse and waggon is not going to drive heedlessly in front of him. And even if he was to blame, I think that blame must be taken to be part of the primary negligence to be attached to him, and not as part of that secondary negligence which is said to give rise to liability to damages on the part of a defendant in spite of the plaintiffs' negligence. In my opinion it is only any failure in reasonable care after he became aware of the plaintiffs' negligent purpose of really driving in front of him, that should be treated as a

possible answer to the plaintiffs' negligence. Now the negligence found against him after that time is merely an omission to use the reverse. In this conclusion with much respect I am unable to agree with the learned trial Judge. The evidence is clear and uncontradicted that it is not possible to turn off the power and put on the reverse all at once. If all this is done suddenly the fuse is destroyed and the motive power as a restraining force is removed altogether. I think the motorman did use at least reasonable care when he saw the crisis upon him. Even if he did not do all that was absolutely possible to do, I think he did as much as ought to be demanded of any reasonably careful man.

Finally, when the events occurred within so short a space of time, I cannot avoid the firm conclusion that the gross negligence of the plaintiffs was the real and proximate cause of the accident and that they ought not to be allowed to recover.

I refer to *Jones* v. *Toronto and York Radial Railway*, 20 O.W.R. 460, and *Long* v. *Toronto Railway Co.*, 10 D.L.R. 300.

In my opinion the appeal should be allowed with costs, the judgment below set aside, and the action dismissed with costs.

Simmons, J. (dissenting).

SIMMONS, J. (dissenting):—The plaintiff's action is for damages arising out of collision between the plaintiff's waggon and a street car operated by the defendant city.

The plaintiff's vehicle was a lunch waggon closed in on both sides and ends and windows in the ends and sides and through the front window the driver's reins passed from the inside where he was seated. The point of collision was at the intersection of Ninth avenue and Second street east, in the city of Calgary. The plaintiff was driving east on Ninth avenue and the street car was coming north on Second street east. Between Tenth avenue and Ninth avenue is a subway under the railway tracks and the street cars have to ascend a somewhat sharp grade coming up out of the subway on to Ninth avenue.

The learned trial Judge has found that there was negligence on the part of the defendant in the following respects:—

(*a*) The ringing of the gong was not continued during the whole time the street car was passing through the subway.

(*b*) The motorman did not apply the reverse, and if he had done so the accident might have been avoided.

(*c*) Also that the car was running at a rate of speed which, had it not been checked in instant anticipation of the accident, would have been at a rate of more than ten miles an hour as it crossed Ninth avenue, a rate which, in view of the obstructions to the view of passengers passing along that avenue, is excessive.

(*d*) The motorman should not have assumed that the plaintiff would turn north instead of crossing the track.

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The learned trial Judge found contributory negligence on the plaintiff's part and says:—

> Under the circumstances I think the plaintiffs, if they had looked, could and would have seen the car in sufficient time to avoid the accident, and I think they must be held guilty of negligence in not looking.

And further:—

> On the other hand, notwithstanding the plaintiffs' negligence in this respect, I think as I have already said, that even so, the accident would have been avoided or at least greatly minimized if the defendant's motorman, when he saw the plaintiffs were not, as he supposed, going to turn so as to parallel the car line, but to cross it, had reversed the power on the car, which he probably would have done had he understood it could have been done.

The plaintiffs say they stopped at the corner of Ninth avenue and Second street east and looked for a car, and not seeing one they proceeded and before they got across the tracks their waggon was struck by defendant's car.

The learned trial Judge refused to believe them, for he found contributory negligence on their part in failing to look when they came to the intersection of the streets. In view of this finding as against the plaintiffs, I am of the opinion the conclusion in law arrived at by the learned trial Judge cannot be sustained. At most it was only a mistake in judgment on the part of the motorman in assuming that the plaintiffs would turn parallel to the street car track instead of attempting to cross it.

One of the plaintiffs says: "I always used to run the waggon from Centre street as far as Fourth street east, up and down," and on the night of the accident he was running on Ninth avenue from Centre street going home.

Paley, a witness for the plaintiff, in answer to questions put to him by the trial Judge, says that the plaintiff's waggon had passed him going eastward on Ninth avenue when he caught sight of the street car underneath the subway, and the horse had just cleared the line of Second street east. (Case, p. 37.) And the same witness says the waggon would be pretty near the corner of the street when the car was in the subway. (Case, p. 34.) This witness says he was looking south-west and heard the street car coming and he turned his head in the direction of the street car. He was standing on Ninth avenue about three or four feet west of the drug store. He could not have been less than 10 yards west of Second street east. The plaintiffs' waggon had passed him and had reached Second street east, yet he heard and saw the street car coming under the subway and the plaintiffs continued on their course. The subway walls would partially or wholly obscure the motorman's view of a vehicle coming east on Ninth avenue till the motorman had nearly reached the top of the grade. The street car was lighted

and the lighted windows at the top of the car are higher than the motorman's view, and the plaintiffs could see the street car before the motorman could see the vehicle. The plaintiffs were accustomed to drive along that particular street about the same time each night going from their work and at the same hour. They were thoroughly acquainted with the danger of a collision with a street car at that intersection. The circumstances of the grade make it dangerous for a car to stop while ascending the grade, as the car would slide back the incline and could not be started forward till it reached the bottom of the subway. The trial Judge has found that they did not look for a street car when they came to Second street east. They say they neither saw nor heard the car, and did not know what had struck them.

On the finding of fact by the trial Judge as to the failure of the plaintiffs to look, and on the undisputed evidence referred to by me, I can come to no other conclusion than that the plaintiffs approached what they knew to be a dangerous crossing, quite regardless of the likelihood or not of a street car approaching, and that even if the trial Judge is correct in his conclusions of fact that the motorman did not continue to ring the bell and that the car was going at too great a rate of speed, yet these circumstances did not cause the accident. The plaintiffs must establish that they were misled or induced to continue on their way by some act of neglect or omission of the defendants before they can be relieved of the result of their own contributory negligence. Where there is no reasonable ground for assuming that the plaintiff was taken by surprise or misled by the failure of the defendants to take some precautionary step or give some warning which they might have done, the cause of the accident cannot be laid at the defendant's door where the plaintiff has imputed to him contributory negligence.

Various definitions of contributory negligence have been attempted by the text-writers, but the application of the law must depend upon the facts in each case. In *Dublin, Wicklow & Wexford R. Co.* v. *Slattery*, 3 A.C. 1166, the doctrine of contributory negligence in its relation to negligence of the defendant is very fully discussed. Lord Cairns, L.C., says:—

> My Lords, I should by no means wish to say that a case in which such a course should be taken might arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the appellant's argument. If a railway train which ought to whistle when passing through a station were to pass through it 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 to 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, which caused his death.

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In the same case Lord Penzance says:—

Now what I will ask your Lordship to observe in respect of these cases is this: that in all of them the question which the Court was deciding was not whether the plaintiff was negligent, but whether there was evidence to go to the jury of negligence by the defendants such as caused the injury. In discussing such a matter it is inevitable in many cases that the conduct of the plaintiff should come in question, not for the purpose of establishing contributory negligence on his part (a question which does not arise and is immaterial except upon the assumption that the accident was in some degree caused by defendants' negligence), but for the purpose of tracing the true cause of the accident, and thereby discovering whether the evidence referring the accident to the defendants' negligence, is of such a character that it ought to be submitted to the jury.

One method of proving that a thing is not black is by proving that it is white, and one mode of establishing that an accident was in no degree caused by the negligence of the defendants, is by proof that it was wholly and entirely caused by the negligent conduct of the plaintiff himself. But in such a method of reasoning the negligence of the defendants' conduct is so little in issue that it is really immaterial; for if the accident was wholly caused by the plaintiff's own conduct to the exclusion of any other cause, it could not in any degree have been caused by the defendants' negligence, and so the quality or character of the defendants' conduct, whether negligent or imprudent or wise or careful, is wholly beside the question.

Lindley, L.J., in the *Bernina* case, 12 P.D. 58, 89, says:—

If there has been as much want of reasonable care on A's part as on B's, or in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A cannot sue B. In such a case A cannot in truth say he has been injured by B's negligence; he can only say with truth that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law.

But why in such cases the damages should not be apportioned I do not profess to understand. However, as already stated, the law on this point is settled and not open to judicial discussion.

And on page 88 of the same case he observes:—

Tuff v. *Warman*, 5 C.B. (N.S.) 573, in the Exchequer Chamber, and *Radley* v. *London & North Western Railway*, 1 A.C. 754, in the House of Lords, shew the true grounds on which a person guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A against B for injury directly caused to A by the want of care of A and B will not lie. As Pollock, C.B., in *Greenland* v. *Chaplin*, 5 Ex. 243, pointed out, the jury cannot take the consequences and divide them in proportion to the negligence of the one or the other party. But if the plaintiff can shew that although he himself has been negligent, yet the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action.

Lord Esher, in the *Bernina* case, 12 P.D. 85, observes:—

> The general rule is, that one who receives an injury from the negligence of another may maintain an action for damages. Upon this rule a natural and reasonable exception has been engrafted, that if the injured party by his own negligence has contributed to the injury he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent to a wilful injury.

Great stress is placed by the respondents on *The Halifax Electric Tramway Co.* v. *Inglis*, 30 Can. S.C.R. 256. In that case the jury found that there was contributory negligence on the part of the plaintiff in not looking more sharply for the car, but notwithstanding such negligence on the part of the plaintiff the accident could have been averted by reasonable care on the part of the defendants.

These were findings of fact by the jury and there was evidence (perhaps not evidence of the strongest character) that the car was operated at an excessive speed on a down grade at a dark crossing.

King, J., who delivered the judgment of the majority of the Court, says:—

> Here the defendants were running their car on a dark night, in what their servants say was a dangerous place, and upon a down grade of over eleven hundred feet in length at the point of the accident, and at what the jury have found to be an excessive rate of speed; it was therefore incumbent on them to exercise a very high degree of skill and care to control and stop a car in case of imminent danger to anyone on the track.

The present case upon the facts as found by the trial Judge and upon the uncontradicted evidence, is distinguishable from *Halifax* v. *Inglis*, 30 Can. S.C.R. 256, in the following respects: In the present case the plaintiff drove on to the defendant's line quite reckless and regardless of the consequence of an approaching car. In the latter case the driver did look just before turning the cab to cross the track. In the present case the crossing was well lighted, while in the latter case the crossing was dark; the motorman was under the disadvantage in the present case (well known to the plaintiff) of bringing his car up a somewhat steep grade, necessitating a greater power current and rendering the stoppage of the car on the ascent dangerous, while in the latter case the motorman was taking a car down a somewhat long grade approaching a dark crossing.

In the present case the plaintiff was in a closed lunch waggon, which surely put on him the necessity of keeping a better lookout than if he had been in an open seat. He was accustomed to meet cars coming up the same grade as he went home each evening. The motorman had seen him on other occasions on his way home at night going east from Second avenue along Eighth avenue, and assumed he would go the same route this time and

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this would take the plaintiff north along Second avenue east from Ninth avenue to Eighth avenue.

The plaintiff in the present case would see the lights in the top of the car before the motorman could see plaintiff's horse and rig. The motorman was only 25 or 30 feet from the intersection of the streets when he first saw plaintiff's rig. Paley, a witness for the plaintiff, saw the car in plenty of time to warn the plaintiff of its approach after the plaintiff had passed him on Ninth avenue. There is no conflict between the law laid down in the *Slattery* case, 3 A.C. 1166, and that in *Halifax* v. *Inglis*, 30 Can. S.C.R. 256, where there is negligence on the part of the defendants and also contributory negligence on the part of the plaintiff, it then is a question of fact for the jury as to which party is responsible for the accident. In *Halifax* v. *Inglis, supra*, the jury found that the accident was due to want of reasonable care on the part of the defendants. The case now under consideration was tried without a jury and in so far as the evidence is not conflicting we have the same right and the same duty to find on the facts as the trial Judge, although such would not hold if the facts had been found by a jury and supported by any evidence.

I come to the conclusion that defendants are not liable on the following grounds:—

(*a*) The reckless manner in which the plaintiffs approached and drove on the defendant's tracks.

(*b*) The absence of any ground for assuming that the plaintiffs were induced in any way to continue in their reckless course by any act or omission of the defendants.

(*c*) The finding of the trial Judge to the effect that the plaintiffs at most could only have minimized the results of the accident, but could not altogether have avoided it.

In *Balke* v. *City of Edmonton*, 1 D.L.R. 876, 21 W.L.R. 22, this Court held (Mr. Justice Beck dissenting) that the plaintiff could not recover when he drove on to the defendant's railway without keeping a look out. In that case the plaintiff's contributory negligence was not in any degree of so gross a character as in the present case. Balke was a farmer and a foreigner who drove into the city with his farm produce. He started home after dark and was in a line of teams, some preceding him and some behind him. He was not well acquainted with the crossing in question. The night was dark and the crossing was not lighted by the defendant corporation. The defendants did not have a proper head light on the car and did not ring the gong as soon as they might have done. On account of the darkness and the insufficient head light, the motorman was not able to see the plaintiff approach the crossing. Notwithstanding the negligence of the defendants, this Court held that the plaintiff's failure to look out for the street car was fatal to his claims.

I wish to add that I am not at all convinced of the correctness of the findings of the trial Judge as to the ringing of the bell and the rate of speed of the street car. It is obvious that the evidence of the plaintiffs in this regard is of no value, as they admit they did not see or hear the approaching car. Paley, a witness for the plaintiff, in answer to the question, "How do you account for hearing the noise of the car. Did that prevent you hearing the bell or whistle?" replied, "I could not say, I didn't suppose the bell would do much good if you wouldn't hear it above the noise of the car."

Question: "You heard the noise of the car?" Ans. "Yes, sir."

This witness says he did not hear the gong, but will not say that it did not ring.

Shepherd, a witness for the plaintiffs, says the car was coming at a high rate of speed, but he admits, "I would not know what a high rate of speed is for a street car." He also says he did not hear the gong, but will not swear it was not ringing. As against this negative evidence there is the positive evidence of the motorman and conductor. The motorman says he rang the gong very hard when he saw the waggon. He says he was coming up the incline at a rate less than eight miles an hour. Halpin, the conductor, says the rate was not more than six miles an hour coming out of the subway.

In *Lefeunteum* v. *Beaudoin*, 28 Can. S.C.R. 89, it was held that in estimating the value of evidence in ordinary cases the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. Neither am I convinced that the application of a reverse would have brought the car to a stop sooner than the brake which the motorman applied.

Comba, general foreman of the defendant's railway, says that coming up such a grade he would sooner trust the brakes. In order to apply the reverse the motorman has to shut off power, reverse his crank and then turn the power on gradually and in addition the car wheels may skid, and if the wheels skid the reverse could not exercise any more influence in stopping the car than the brakes.

As to ringing the bell continuously, I am of the opinion that such a course would largely detract from the usefulness of the gong as a warning, for cars are going through the said subway in opposite directions and a continuous ringing of the gong in addition to being a public nuisance would deprive it of the unusual warning character which would otherwise attach to it. If a street car service must be operated under conditions which make them liable for mistakes in judgment or minor acts of negligence of their operatives, without any relation to the gross degree of carelessness of those who get in their way, it seems to me the

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purpose of the street car as a means of conveyance would be so seriously impaired as to practically destroy its usefulness.

I would allow this appeal with costs. In the matter of costs since the result of the appeal on an equal division of this Court is in favour of the respondents, I therefore agree with my brother Walsh as to awarding costs to the appellants down to the trial.

Walsh, J.

WALSH, J.:—I have tried very hard to find some ground upon which this case could be distinguished from *The Halifax Electric Tramway Co.* v. *Inglis*, 30 Can. S.C.R. 256, but I have been quite unable to do so. In that case, as in this, it was found that the defendant was guilty of negligence in running its car at too high a rate of speed; that the plaintiff was guilty of contributory negligence in not looking more sharply for the car, and that the defendant could, notwithstanding the plaintiff's negligence, have averted the accident by the exercise of reasonable care. In each case upon these findings judgment went against the defendant. In the *Halifax* case the ultimate negligence found was the use of the brakes in the first instance and the delay in reversing the power, that being done as the motorman put it, "as the last resort." The ultimate negligence found in this case was that the motorman depended entirely upon the brakes and did not reverse the power at all, the evidence establishing that if he had done so the car would have been stopped in a much shorter distance than it was, and either the accident would have been entirely averted or its effect greatly minimized. The facts of the two cases in all essential details are so alike that I cannot find any point of distinction between them, and as the *Halifax* case is of course binding upon this Court, we must follow it. With the greatest regret and reluctance therefore I think that this appeal must be dismissed with costs.

To me it seems most regrettable that the law should be such as to entitle these plaintiffs to insist upon the defendant paying to them the amount of this judgment. They are, in my reading of the evidence, as much to blame as the defendant for the occurrence of which they complain, if, indeed, a greater measure of responsibility for it does not rest upon them than upon the defendant. They seem to have driven across the street railway tracks near the head of a dangerous incline, up which they must have known that street cars were of necessity propelled at a considerable speed, without taking the slightest trouble to inform themselves as to whether or not there was any car movement in progress along the same. It is by the evidence of their own witnesses that the fact is established that if they had made any effort to do so they would have both seen and heard the coming of the car which eventually ran into them. It almost seems as

if saying to themselves, "Well, if we get across the tracks without being run into by a street car we will be lucky, but if we don't we will sue the city for damages," they had curled themselves up within their covered waggon and shutting their eyes and closing their ears, had let their horse amble through this danger zone at his own sweet will. The finding that the motorman could have stopped the car much more quickly than he did if he had reversed the power, is quite warranted by the evidence, and this being not primary, but secondary or ultimate negligence, is quite sufficient under the authorities to deprive the defendant of the immunity from liability which it would otherwise have been entitled to enjoy by reason of the plaintiff's contributory negligence. This always seems to me to be arguing or adjudicating in a circle, but this principle of ultimate negligence is now too firmly rooted in our jurisprudence to admit of any questioning, and so the defendant must bear all of the loss resultant from the combined negligence of its motorman and the plaintiffs.

This action was commenced without the notice having been given to which the defendant is entitled under its charter. This objection was raised at the opening of the trial, but was subsequently adjusted under an arrangement that the action should proceed as though the notice had been given, the plaintiffs to pay the defendant's costs to the date of the trial. By oversight no doubt the judgment for the plaintiffs is for $1,120 without costs. The appeal book shews the subsequent correspondence between the solicitors under which the judgment is to be varied by giving the defendant its costs to the date of the trial. The judgment will be varied accordingly, and the defendant will be allowed to deduct its costs as taxed from the amount of the judgment.

Appeal dismissed and judgment below varied by an equal division of the Court.

Re NORTHERN ONTARIO FIRE RELIEF FUND TRUSTS.

Ontario Supreme Court, Middleton, J. April 18, 1913.

1. CHARITIES AND CHURCHES (§ II B—45)—CY-PRES — CHARITABLE GIFT—DISPOSITION OF SURPLUS.

If there is a gift for a specific charitable purpose which has taken effect, but the purpose has subsequently failed, the surplus of the fund remaining will be applied *cy-près*; so when there was a fund subscribed for the relief of sufferers in a fire, the surplus remaining after payment of all claims was used, with the consent of the Attorney-General, for the purpose of erecting hospitals in the district where the fire had occurred.

2. COSTS (§ I—16)—PAYMENT OUT OF FUND OR ESTATE.

Upon a proper application for the application or distribution of a charitable gift *cy-près*, the costs may come out of the fund.

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RE NORTHERN ONTARIO FIRE RELIEF FUND TRUSTS.

MOTION by the trustees of the fund for an order determining the disposition of a surplus remaining in their hands after payment of all claims in respect of the purposes for which the fund was primarily contributed.

Order granted.

A. C. McMaster, for the trustees.

H. E. Rose, K.C., for the Corporation of the Township of Tisdale, for the Dome Mines Limited, for the South Porcupine Board of Trade, and for the Corporation of the Township of Whitby.

S. A. Jones, K.C., for the Corporation of the Town of Cochrane, for the Cochrane Board of Trade, and for the Cochrane Hospital Board.

J. B. Holden, for the mine-owners at Porcupine.

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

Middleton, J.

MIDDLETON, J.:—In July, 1911, a disastrous forest fire took place in Northern Ontario, extending over the whole territory known as the Porcupine district and for many miles north, covering the Cochrane district. An appeal was made for contributions to relieve the sufferings thereby occasioned, and, in the result, $56,590 was received by the committee. After all proper claims had been met, there remains in the hands of the committee a balance of about $18,000.

The committee has devoted much time and energy to the consideration of the purpose to which this sum should be applied, and various resolutions have been from time to time passed, and much negotiation has taken place with those concerned, looking to the propounding of some satisfactory scheme. During the course of these negotiations, there has been some fluctuation of opinion on the part of the committee. In the result, no scheme satisfactory to all parties has been evolved, and the matter is placed before the Court, upon notice to those more particularly concerned; the trustees by their counsel desiring to take a position of neutrality.

Mr. Gourlay, one of the trustees, expressed his own view—possibly shared by his colleagues—that the fund ought to be distributed by allotting two-fifths in aid of an institution or institutions in Porcupine; three-fifths in aid of an institution or institutions in Cochrane.

Upon the argument, all seemed agreed that the fund—having regard to the purposes for which it was contributed—could best be used by aiding in the establishment of a hospital or hospitals. This idea commended itself to the Attorney-General; and I think it may be taken for granted that this is the proper destination.

Upon the argument it appeared that at or near Porcupine

different mine-owners had established hospitals in connection with their mines. They desire that the fund, or so much of it as may be diverted in that way, should be used to aid these hospitals. With this idea I do not at all agree. I do not think that the fund was contributed in ease of mine-owners who maintain hospitals in connection with their work.

As an alternative, the mine-owners suggested that the fund should be invested and the income applied in paying for the maintenance of indigent patients who might be cared for in these private hospitals. I do not think that this scheme would be satisfactory.

After reading the material and weighing as best I can the arguments presented, I think that justice would be more nearly done by directing the division of the fund between the two contending territories; the $1,000 as to which Porcupine sets up some particular claim to be regarded as part of its one-half share, and the material now at Cochrane to be turned over to Cochrane on account of its share, at the figure suggested by Mr. Gourlay, namely, $300.

I think that these funds should be used to establish a hospital at or near Cochrane and a hospital at or near Porcupine; the title of the hospitals to be vested either in a board of trustees or the municipality; but the funds should not be paid over until satisfactory provision is made by the respective municipalities for the furnishing of a free site and for adequate maintenance. The municipalities by their counsel offer this. This offer, however, should be implemented in some formal way to the satisfaction of the Attorney-General. These hospitals should be held upon a proper trust, securing the admission of the indigent and unfortunate upon reasonable terms. If counsel for the applicants, for the respective municipalities, and for the Attorney-General, cannot agree, then I may be spoken to upon the subject.

The costs may come out of the fund.

Order granted.

CROWN LUMBER CO. v. SAULSBERRY.

Alberta Supreme Court, Harvey, C.J., Scott, Simmons, and Walsh, JJ. March 31, 1913.

1. PRINCIPAL AND AGENT (§ II—7*a*)—GENERAL OR SPECIAL AGENCY.

An arrangement between the owner of a farm and his brother, whereby the latter was to work the farm on shares, the owner supplying the money needed to carry on farming operations and the profits to be divided between them, does not constitute the brother either the general agent of the owner nor a special agent to purchase lumber for use on the farm, so as to render the owner liable for the purchase price thereof, it appearing that the brother conducted the farm in his own name, made the purchase in question in his own name, and credit was given to him by the seller, the brother having been prohibited from pledging the owner's credit, and the seller believing that the brother was the real owner of the farm.

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2. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—FARMING ON SHARES—PURCHASES.

The fact that the owner of a farm enters into an arrangement with another person whereby the latter is to work the farm on shares, the owner supplying the money needed to carry on the farming operations and the profits to be divided between the two parties, does not constitute the parties thereto partners so as to create a liability on the part of the owner for purchases made by the one working the farm on his own credit, though for the benefit of the joint enterprise.

Statement

APPEAL by defendant from judgment of Stuart, J.

The appeal was allowed.

W. H. McLaws, for defendant.

C. A. Wright, for plaintiff.

The judgment of the Court was delivered by

Walsh, J

WALSH, J.:—My brother Stuart says in his judgment, which is now under appeal:—

> I accept in the main the defendant's statement of facts as to the arrangement that was made between him and his brother, H. M. Saulsberry.

This arrangement was in brief as follows: The defendant, who lives in Seattle, bought land in this country and then agreed with his brother, H. M. Saulsberry, that he (the brother) should come here and farm it, that the defendant should supply him with the money needed to start and carry on his farming operations, which money was to be repaid to the defendant out of the money resulting from the sale of the crops, and that the balance was to be divided evenly between them. My brother Stuart has found upon these facts that "H. M. Saulsberry was in some real sense the defendant's agent at the Fir Grove farm and that as such agent he purchased the goods in question from the plaintiffs." The simple question for our decision is whether or not upon these facts the relationship of principal and agent was constituted between these men.

I think that upon the facts disclosed by the evidence it cannot be said that this brother was the defendant's agent either generally or for the purchase of this lumber. He carried on the farming operations in his own name. He applied to this farm without the defendant's knowledge or consent although he knew of it later, the name "Fir Grove Farm," and in that name carried on some of its transactions. It is true that the defendant gave to the bank a power of attorney appointing his brother attorney of the "Fir Grove Farm Company, George W. Saulsberry, proprietor," which is signed "Fir Grove Farm Co., Geo. W. Saulsberry, Prop." His explanation of this, which I assume the trial Judge believed, is that he signed this in blank simply in his own name, it being upon one of the bank's regular forms, which was afterwards filled up and the signature completed as above by the manager without his knowledge. The lumber in question was purchased by the brother in his own name. Credit

was given for it to him by the plaintiff, the words "Fir Grove Farm Co." being subsequently written into the account by the plaintiff's book-keeper.

The brother had no authority from the defendant to pledge his credit for anything. On the contrary, he was notified by him that he was not to do so. The defendant supplied his brother as agreed with ready money for his requirements. There was no holding out of the defendant as the proprietor of the farm. It is true that he did pay some of the liabilities contracted by his brother, but none of these payments were made under circumstances suggestive of his legal responsibility for them. They were made after his brother's attempt at farming had proved a failure and when the defendant, owing to his brother's departure, took things over. The lumber in question was used in the building of granaries, which were erected and are still standing upon the defendant's farm, a fact which one would have thought the defendant might reasonably have considered sufficient to impose upon him a moral obligation to pay for it, but which in itself does not, in my opinion, involve him in any legal liability therefor.

It is plain upon these facts that as a matter of express agreement the relationship of principal and agent was not constituted between these parties. Nor do I see how it can be held that their conduct was such or the situation created by their arrangement was such as to give rise to that position as an implication of law. The real nature of the agreement must be considered and upon the facts I am of the opinion that the brother was acting not only ostensibly, but really for himself in the carrying on of his operations on this farm, including the purchase of this lumber, although of course the defendant as the owner of the land was to profit by the same.

It was contended on the argument that if these brothers were not principal and agent they were partners, and that the defendant could and should be held liable as such. I think that the arrangement between them was one which under the partnership ordinance the parties were free to enter into without thereby making them partners, and that the defendant cannot therefore be held liable in this way.

With reluctance and regret I come to the conclusion that this appeal must be allowed with costs and the action dismissed with costs. I venture to express the hope that the defendant, having secured the plaintiffs' lumber without making himself liable for its value, may be satisfied with this and not increase the plaintiffs' loss by insisting upon the payment of these costs.

Appeal allowed.

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April 18.

Re SMITH.

Ontario Supreme Court, Middleton, J. April 18, 1913.

1. WILLS (§ I F—60)—CODICIL—REVOCATION OF WILL, WHEN.

The bulk of the effective provisions of a will or other prior testamentary document may be revoked by a codicil, and plain words in the codicil shewing a definite intention to do so cannot be disregarded although other words in the codicil may seem to suggest, though not clearly, an intention that the codicil is to be read with such provisions of the will.

Statement

MOTION for an order determining certain questions arising upon the construction of the will (and a codicil thereto) of Emma Josephine Smith, deceased.

Order granted.

R. J. McLaughlin, K.C., and *S. S. Smith*, for the executors.

E. D. Armour, K.C., *D. C. Ross*, and *A. H. Beaton*, for Elias Smith, Carl Smith, and Vernon Smith.

C. A. Moss, for Dale M. King.

Middleton, J.

MIDDLETON, J.:—The testatrix died on the 9th August, 1896, having made her will on the 19th October, 1889, and added a codicil on the 16th July, 1894. She left surviving her husband, three sons, and one daughter. The daughter was the youngest member of the family. At the time of the making of the will, she was about ten years old, and at the time of the codicil about fifteen.

The will itself presents no difficulty. It is a well-drawn document, prepared by a solicitor. The testatrix, after some minor gifts, divides her estate into two parts: the first covering property recently transferred to her by the trustees of the estate of the late Robert Charles Smith. A deed is produced dated the 6th August, 1889, which was very shortly before the date of the will, shewing that certain Port Hope property is what is so designated. This property is dealt with by clause 7 of the will. It is given to the husband, the executor, in trust, to receive the income for his own use during his life. After his death it is to be equally divided among the children, to be transferred to them after the death of the husband as they respectively attain age. The income—presumably after the husband's death—is to be used for the maintenance of any child under twenty-one. If any child dies before attaining age, leaving a child or children, such issue shall take the parent's share.

By clause 8, furniture, books, etc., are to be divided among the children.

By clause 9 the residue of the property of the testatrix is dealt with. This consisted of some Toronto property, of very considerable value, and the investments of the testatrix. It is

given to the trustee to be held till the youngest surviving child attains the age of twenty-one years. The income is to be a fund to provide for the maintenance of the minor children. If there is a surplus, the husband may retain what is necessary to make up his income, derivable from the first trust devise, to $600; and any residue then remaining is to go for the benefit of the child or children out of whose prospective shares the same may have arisen. When the youngest child attains the age of twenty-five, this second trust fund is to be then realised and the proceeds divided equally among the children and the issue of such of the children as may then be dead; a sufficient fund being set apart to maintain the income of the husband at $600.

The will also contains a provision authorising the husband to spend $150 per annum in continuing his life insurance.

The codicil appears to have been prepared by the testatrix herself, or by some one entirely unskilled in the preparation of legal documents. It is prefaced by the statement: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith, my only daughter, I hereby add this codicil." This would lead one to expect that the codicil would confer an additional benefit upon the daughter. The testatrix proceeds: "I desire the sum of $600 to be paid to her out of my estate . . . until she attains the age of twenty-five years. If at that time she should be married, then for the remainder of her lifetime to pay her $400, unless the income realised through or by my property on division should yield more to each surviving child. Should such be the case, then I authorise such division to be made." The testatrix then proceeds: "Bertha having attained the age of twenty-five years as aforesaid, should Bertha remain unmarried then she is to be paid the sum of $600 a year . . . for the remainder of her life."

These provisions, I think, concern entirely the income derived from the estate, save that Bertha is to receive her $600 either from the income or from the corpus. The division referred to is a division of income and not a division of corpus. The estate of the testatrix, it is said, yielded by way of income about the sum necessary to pay the $600 to the husband, the $150 for life insurance, and the $600 to Bertha; $1,350 in all; so that the effect of this provision, unless the estate greatly increased in value, would be practically to tie up the whole estate during the lifetime of Bertha.

Bertha attained the age of twenty-five in the year 1905, and was then unmarried. She married on the 10th October, 1911, and died on the 13th September, 1912. Her husband, Dale M. King, as her executor, is entitled to receive her share in the estate. No question arises as to arrears of income. The question which presents itself is the right of King, as the executor of Bertha, to a share of the corpus.

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The difficulty is occasioned by the clauses of the codicil following the provisions dealing with Bertha's annuity. These are as follows: "Whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband and executor in my will, is to be equally divided between my surviving sons or their surviving child or children as provided in my will. This bequest to Bertha is to supersede all those made in my will, with the one exception of the provision made for J. D. Smith, my husband."

It appears to me that the result is plain. The whole will is abandoned except in so far as it provides for the husband. The annuity to Bertha is substituted for her quarter interest, and whatever remains after providing for the husband and providing for the daughter is to go to the surviving sons or their children "as provided in the will," which is referred to to explain this substantial gift, but for no other purpose.

The only thing that causes hesitation is the question suggested by the preamble to the codicil; but this cannot override the plain words used; and it may well be that the testatrix thought that she was making a more satisfactory provision for her daughter when she gave her an annuity, and made this a first charge upon her estate.

I cannot surmise why no provision is made for possible issue of the daughter, while careful provision was made for the issue of the sons. All I can say is that no such provision is found in the will; and it may be that the testatrix preferred that her estate should pass to her sons and their issue rather than by any possibility to a son-in-law whom she had never seen.

The costs of all parties may come out of the estate.

Order granted.

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DEMERS v. LAVEILLE.

Quebec Court of Review, Archibald, McDougall, and Chauvin, JJ. May 5, 1913.

1. BILLS AND NOTES (§ I A—4a)—FILLING IN BLANKS.

A person to whom is transferred a blank promissory note with only the signature of the maker thereon, has no authority to fill in and perfect the same, the statutory right to complete and fill in a blank note conferred by sec. 31 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is limited to the person to whom the signed blank is delivered in order that it may be converted into a bill.

[*Ray* v. *Willson*, 45 Can. S.C.R. 401; *Smith* v. *Prosser*, [1907] 2 K.B. 735; *Herdman* v. *Wheeler*, [1902] 1 K.B. 361, and *Aude* v. *Dickson*, 6 Ex. 869, distinguished.]

Statement

APPEAL by way of review on behalf of defendant in an action upon a promissory note signed in blank and which it is alleged by the defendant had been improperly filled in by a transferee of the blank note.

The appeal was allowed and the action dismissed.

G. Lamothe, K.C., for defendant, appellant.

G. Desaulniers, K.C., for plaintiff, respondent.

ARCHIBALD, J.:—This is a review of a judgment maintaining an action for $1,000 upon a promissory note. The facts, so far as they are essential to the judgment of this case, proved, are as follows: The defendant, C. A. Laveille, put his signature at the bottom of a printed form of a promissory note, and handed it in that condition, without date, without amount, without payee, without indication of the time when the note would become mature, to Alex. Duclos. Alex. Duclos had dealings with one Beaulieu, who was then a partner in the firm of Beaulieu and Lalonde. Beaulieu pretended that he was responsible upon endorsements which he had given for Duclos. At any rate, Beaulieu came into possession of this blank note bearing the signature of the defendant. At a certain date, Beaulieu and the plaintiff and the plaintiff's clerk were together at a table, and among them the promissory note in question was filled in, with an indication that the note was to be payable at 24 months from date; with a statement that it was to be payable to the order of Beaulieu and Lalonde at La Banque Nationale (the plaintiff himself put in the words "a vingt-quatre mois de date"); the statement upon the bottom of the time of maturity, viz., 15th and 18th of February, 1907; the clerk put in the place of payment, "La Banque Nationale," and possibly the words $1,000; the figures "$1,000," it is not clear who made them. At any rate, this note was completed in that form by the putting in the delay for payment, the place of payment, while the parties were sitting around a table together, and the plaintiff himself contributed his share. Then Beaulieu endorsed the note with the names "Beaulieu et Lalonde," and left it with the plaintiff. The plaintiff kept it for a long time and finally sued the defendant upon it.

Beaulieu swears that he never gave the note in question to the plaintiff for the purpose of making it his property, either to secure the claim which plaintiff pretends he had against Beaulieu or against Beaulieu and Lalonde, or for any other purpose, but only for safe-keeping. I have my doubts as to this evidence because I find it strange that Beaulieu should have endorsed the note, enabling the plaintiff to use it, if he had not intended to make it the plaintiff's property. Beaulieu, being closely questioned, says that the signature on the bottom of the note is the signature of the defendant; that he knows that signature well and has often seen it; but he will not swear that the defendant Laveille gave that signature in blank to him. Laveille swears positively that he never did give a signature upon a form of

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promissory note to Beaulieu in blank. He said he did give one to one Alex. Duclos, and is perfectly unable to say whether the one filled up in the form of the present note is the signature which he gave to Duclos.

At the date of the hearing in this case Laveille was practically blind and unable to examine the signature in question and consequently unable to speak concerning it. Beaulieu, although he in many places indirectly suggests that he himself got the signature from Laveille, nowhere positively swears so. There is no ground set up by Beaulieu or by any one else which would indicate a reason why Laveille should give to Beaulieu a blank signature on a promissory note form. But it seems that Alex. Duclos was the son-in-law of Laveille, and expected to be his heir; and in one place Beaulieu swears that, when he got that note and, as he says, deposited it for safe-keeping with Demers, he intended to use it for the purpose of indemnifying himself in case he might be held liable upon his endorsement for Duclos. Under these circumstances, with the additional one that Laveille admits to have given one signature in blank to Duclos, I think it is rendered almost certain that Beaulieu got this note with its signature from Duclos. The sections 31 and 32 of the Bills of Exchange Act are important in this case:—

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor or an endorser; and in like manner, when a bill is wanting in any material part, the person in possession of it has *primâ facie* authority to fill up the omission in any way he thinks fit.

32. In order that any such instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given; provided that, if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

The case of *Ray* v. *Willson*, 45 Can. S.C.R. 401, was cited by defendant. That case is not entirely similar to the present one. Ray, residing at Newmarket, in Ontario, owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder Willson swore and the trial Judge found as a fact that the notes were not to be used until he had been notified and authorized their use. Under these circumstances, the Court of Appeal of Ontario dismissed the action. The

Supreme Court confirmed that judgment on the ground that sec. 31 above cited did not apply because the note, although on a promissory note form and bearing the signature of the defendant had not been given to defendant's agent, "in order that it should be converted into a bill," but that it required the future authorisation of the signer to convert into a bill. The trial Judge found as a fact that there was ground to put the holder of the note in question upon inquiry as to the authority of the agent to transfer the note to him, but he had no knowledge that the note had been given in incomplete form to the agent. The case did not go off upon that point. There is no evidence in this case that the note sued upon was not given for the purpose of being converted into a bill.

Another case is referred to by defendant, viz., *Smith* v. *Prosser*, [1907] 2 K.B. 735. That case went off upon the same point as the one just above cited. The notes were given in South Africa by the defendant to the agent, with instructions that they should be retained in custody by his attorney until the defendant should, by telegram or letter from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. They were filled up in fraud by the agent, and again the Court decided that they had not been given for the purpose of being filled up as promissory notes. There is another case of *Herdman* v. *Wheeler*, [1902] 1 K.B. 361. Wheeler, a clergyman, having occasion to borrow fifteen pounds, went to a man named Anderson and asked for a loan, which Anderson agreed to get for him. It was understood that it was to be got from someone else. Anderson got a blank signature from Wheeler upon a stamped promissory note form having a stamp sufficient for 75 pounds. Anderson filled up the note for 30 pounds fraudulently, gave his cheque, afterwards dishonoured, to Wheeler for 15 pounds and sold the note of Wheeler, which he had filled up, making the person to whom he sold it the payee of the note, and got for it 25 pounds. The holder of the note sued Wheeler upon it and was defeated. This case again went off on the ground that it did not come within the proviso of the statute "provided that, if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual." Here it was held that the plaintiff's name being on the note as the payee, it could not be said that the note had been negotiated to him; that the section did not apply to the original parties to the note.

As I have said, none of those authorities apply conclusively to the case in hand, because here, on the face of it, the note was clearly negotiated by Beaulieu and Lalonde, the payees, to Demers. But there is another consideration. This clause which I have cited refers to a holder in due course, which means a

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holder for value without any notice of any defect in the note or in the title of the person transferring the note. Was Demers such a holder? We have above seen that the note was brought to Demers incomplete. Thus, Demers had knowledge that the note was a note which had been delivered in blank and was subject to clause 32 of the Act: "In order that any instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion (as the defendant did) it must be filled up within a reasonable time and strictly in accordance with the authority given." Under that proviso the plaintiff here has no action against the defendant unless he can shew that the note was filled up within a reasonable time, and that it was filled up strictly in accordance with the authority given.

In the case above cited, *Herdman* v. *Wheeler*, [1902] 1 K.B. 361, at 370, Channel, J., in giving the judgment, said:—

> The proviso (that is, the provision of the imperial statute, which is identical with our sec. 32) can never operate in favour of a person who knows the acceptance of the bill to have been in blank. If in the present case Anderson, instead of communicating through telephone with the plaintiff, had brought the stamped paper signed by the defendant with him and had filed it up in the plaintiff's presence the plaintiff would certainly have been put on inquiry as to Anderson's authority; and by reason of the first part of the second sub-section could only have recovered if Anderson was acting strictly within his authority. So in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee, he would, we think, now have to shew that this was within the authority given by the defendant.

Another case is *Awde* v. *Wm. Dickson* (1851), 6 Ex. 869. In this case, the defendant signed a promissory note in blank as security for his brother Richard Dickson, but upon the express condition that one Robinson would also sign as co-surety, and that defendant should not be responsible unless Robinson joined in the note. The note was as follows:—

> December, 1848.
>
> On demand we do hereby jointly and severally promise to pay to ..... or order, one hundred dollars, as witness our hands.
>
> Wm. Dickson.

This was given to R. Dickson. Robinson refused to sign it. R. Dickson took it in its imperfect state to the plaintiff and upon R. Dickson's representation that he had authority to deal with it, the plaintiff advanced him money upon it, and the blanks were filled up by inserting "26" before December and the plaintiff's name as payee. The learned Judge who tried the case directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him. The rule was issued and upon the rule a verdict was entered for the defendant. Baron Parke, in giving judgment, said:—

It is unnecessary to say whether this instrument is forgery or not. But there is certainly ground for contending that the making of it complete contrary to the direction of the defendant, renders it a false instrument as against him. I do not gainsay the position that the person who puts his name to a blank paper impliedly authorises the filling of it up to the amount that the stamp will cover. But this is a different case. Here, the instrument to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument on one condition only, that is, provided Robinson would be joint surety with him. This, therefore, is an instance of a limited authority where, in the case of the refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it unless the person from whom he receives it had a real authority to deal with it. There is no such authority in this case, and unless the circumstances shew that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. It is a fallacy to say that the plaintiff is a bona fide holder for value. He has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority. Consequently the note is void as against the defendant.

Barons Alderson and Platt concur.

This is the position in which the present plaintiff finds himself to-day. Has he proved that Beaulieu had authority to fill up that note as he did? He must prove that without relying on the presumed authority of the person to whom the blank signature is given to fill it up as he chooses. There is no sufficient proof, in my judgment, in this case, that Beaulieu had any authority whatever. As I said before, I believe that there is no proof that the incomplete document was handed to Beaulieu at all. I am convinced that it was not handed to him, but was handed to Duclos, and authority to Duclos to fill it up and make it a complete instrument did not permit Duclos to give that authority to Beaulieu by simply handing the note to him. Moreover, there were many circumstances in all the dealings of the parties which ought to have put Demers upon enquiry. There is some pretence that Demers did make inquiry or did speak to Laveille about the matter. I am convinced that nothing of the kind was done. Laveille swears the contrary. I believe the judgment ought to be reversed and the action dismissed with costs of both Courts.

Action dismissed.

Annotation—Bills and notes (§ I A—4a)—Signature in blank. **Annotation**

Bills and notes signed in blank.

Prior to 1906 secs. 31 and 32 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, constituted one section. The two sections must be read together, for the completed instrument cannot be enforced against any

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Annotation

Bills and notes signed in blank.

Annotation (*continued*)—**Bills and notes (§ I A—4*a*)—Signature in blank.**

person who became a party to it prior to its completion, unless it was filled up within a reasonable time and strictly in accordance with the authority given or unless, after completion, it is negotiated to a holder in due course (sec. 32.)

The English Act provides that where a simple signature on a blank stamped paper is delivered, etc., it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, etc. Sec. 30 provides for the special case where a bill payable after date is issued undated or an acceptance payable at sight or after sight is undated.

Every contract on a bill, whether it is the drawer's, the acceptor's, or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto (sec. 39; cf. secs. 40 and 41). Delivery means transfer of possession, actual or constructive, from one person to another (sec. 2).

The simple signature on a blank paper must be delivered by the signer in order that it may be converted into a bill, and a bill wanting in a material particular must be delivered within the meaning of the Act, before any authority is implied to complete the bill.

B. puts a blank acceptance in his desk. It is stolen, and then filled up as a bill. Even a holder in due course cannot recover from B., for the inchoate instrument was never delivered for the purpose of being converted into a bill: *Baxendale* v. *Bennett*, 3 Q.B.D. 525. Likewise a note written over a signature given merely for the purpose of indicating the signer's address: *Ford* v. *Auger*, 18 L.C.J. 296; or for the purpose of a receipt: *Banque Jacques Cartier* v. *Lescard*, 13 Que. L.R. 39, cannot be recovered on.

The expression "*primâ facie* authority" in the section perhaps hardly expresses the extent of the power of the holder of a blank instrument. The power to complete the bill is not merely that of an agent, but arises from a contract that the person to whom the bill is given, or anyone authorized by him, should be at liberty to fill it up: notes to *Baxendale* v. *Bennett*, 4 R.C. at 645. The nature and effect of the contract made by a person who signs and delivers an instrument other than a bill or note is further considered in 5 R.C. 140, under the title "Blank" and in the ruling cases of *Swan* v. *North British* (1863), 2 H. & C. 175, and *Société Générale* v. *Walker*, 11 A.C. 20.

The payee of a note which is filled in under the authority of sec. 31 may in the same manner as an endorsee be the party to whom it is negotiated, as well as issued, and a holder in due course within the meaning of sec. 32: *Lilly* v. *Farrar*, 17 Que. K.B. 554.

Where a note is signed and endorsed with a blank space for the rate of interest in an existing clause providing for interest, any person in possession of the note has *primâ facie* authority to fill in any rate of interest, but if the note when signed and endorsed had no clause providing for interest, the addition of such a clause is an alteration not contemplated when the note was made and endorsed and avoids the note: *British Columbia* v. *Ellis* (1897), 6 B.C.R. 82; cf. *Burton* v. *Goffin* (1897), 5 B.C.R. 454.

A bill is drawn payable to ——— or order. Any holder for value may write his own name in the blank and sue on the bill: *Crutchly* v. *Mann* (1814), 5 Taunt. 529; *Mutual Safety* v. *Porter* (1851), 2 Allen (N.B.) 230; cf. *Chamberlain* v. *Young*, [1893] 2 Q.B. 206, where it was held that a bill

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Annotation

Bills and notes signed in blank.

Annotation (*continued*)—**Bills and notes (§ I A—4*a*)—Signature in blank.**

made payable to "——— order," and issued by the drawer endorsed by him without filling up the blank, was perfect, "——— order" being construed to mean "my order," *i.e.*, to the order of the drawer.

The plaintiffs were indorsees of an overdue promissory note signed in blank by defendant and given by defendant in payment of certain indebtedness. By error the note was filled up for more than the amount of defendant's indebtedness. Plaintiffs were innocent holders: *Held*, that notwithstanding the provisions of sec. 20, sub-sec. 1, and l. 30, sub-sec. 1 of the Bills of Exchange Act, 1890, this constitutes an equity to which the note was subject, and plaintiffs could not recover anything more than the payee could had he sued on the note, but that, as plaintiffs were innocent holders, and defendant had set up numerous defences that failed, thus driving the plaintiffs to trial, the plaintiffs were entitled to costs of suit: *Fraser* v. *Ekstron*, 6 Terr. L.R. 464.

Sec. 32 is supplementary to sec. 31. "Such instrument" in sec. 32 refers to an instrument which has been delivered in an incomplete state, *i.e.*, a simple signature on a blank paper delivered by the signer in order that it may be converted into a bill, or a bill delivered as a bill but wanting in a material particular (sec. 31).

Although a person who issues a bill leaving a blank in a material part of it, is estopped, as between himself and a *bonâ fide* holder for value to whom it has passed with the blank filled up, from disputing the authority so to fill up, there is no estoppel or presumption of authority in the case of a bill which has not been issued—that is to say, delivered with the intention that it should operate as a bill—by the person charged upon it: *Baxendale* v. *Bennett*, 3 Q.B.D. 525.

Falconbridge (on Banking, p. 399) says: "There seem to be cases which would arise fairly often in practice which would not be within the proviso, and where the first part of the section would take effect. The proviso can never operate in favour of a person who knows the acceptance of the bill to have been in blank. So in all cases where the plaintiff has been allowed to recover on a bill in which he had inserted his own name as payee, he would probably now have to shew that this was done within the authority given by the defendant."

In *Herdman* v. *Wheeler*, [1902] 1 K.B. 361, where the maker intending to borrow £15 from one lender signed a blank stamped paper which the lender subsequently filled in for a larger amount made payable to another party, this other party failed in an action to recover from the maker on the ground that he was not a holder in due course. But in *Lloyd's Bank* v. *Cooke*, [1907] 1 K.B. 794, it was held that the payee may be the holder in due course, and where a note was fraudulently filled in for a larger sum than was authorized by a joint maker, that joint maker was estopped from denying the validity of the note. This later case was distinguished in *Ray* v. *Willson*, 45 Can. S.C.R. 401. See also *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A.C. 173.

B. and A. sign as makers a joint and several note, with blanks for date and payee's name. B. signs on condition that the note shall be issued only if C. also will join as maker. C. refuses to join. A., who is in possession of the note, represents to plaintiff that he has authority to issue it. He fills in plaintiff's name as payee and transfers the note to him for a value. Plaintiff cannot recover from B.: *Awde* v. *Dixon* (1851), 6 Ex. 869; cf. *Hogarth* v. *Latham*, 3 Q.B.D. 643.

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Annotation

Bills and notes signed in blank.

Annotation (*continued*)—**Bills and notes (§ I A—4*a*)—Signature in blank.**

If, however, the signature or incomplete instrument has been delivered within the meaning of sec. 31, and, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands although it had not been filled up within a reasonable time or in accordance with the authority given.

A "holder in due course" is a holder (sec. 2) who has taken a bill, complete and regular on the face of it, under the conditions mentioned in sec. 56. If the bill is not complete and regular on its face, the holder has notice of the imperfection and can be in no better position than the person who took the bill in blank: *Hatch* v. *Searles* (1854), 2 Sm. & G. 147; *France* v. *Clark*, 26 Ch.D. 257, at 262.

"Negotiated" in the proviso to the section means transferred by one holder to another (cf. sec. 60). A delivery of a bill to a payee for value is the issue of the bill (cf. sec. 2) and not its negotiating. B., intending to borrow £15 from A., signs a blank stamped paper, and authorizes A. to fill it up as a note for £15 payable to A. A., instead of so doing, fills up the document as a note for £30 payable to C., and then hands it to C., who takes it in good faith and for value. *Held*, that, even if C. is a holder in due course (which is doubtful), the delivery of the note to him is not a negotiation of the instrument, and therefore he cannot recover, the note not having been filled up by A. in accordance with B.'s authority: *Herdman* v. *Wheeler*, [1902] 1 K.B. 361.

"Completion" in the section refers to completing the form of the bill or supplying the wanting "material particular." It does not include delivery, as in secs. 39 and 178, where a bill or note is said to be inchoate and incomplete until delivery: *Ibid.*

Defendant signed, as maker, a printed form of promissory note, and handed it to A., by whom it was filled up for $55. The plaintiffs became endorsees for value without notice. Defendant held liable, though the note may have been fraudulently or improperly filled up or endorsed: *McInnes* v. *Milton* (1870), 30 U.C.Q.B. 489; cf. *Garrard* v. *Lewis*, 10 Q.B.D. 30.

Where the payee of a note endorsed it in November for the accommodation of the maker, leaving the date and sum blank, and the blanks were filled up in February by the maker, the date inserted being a day in January, it was held that the endorsee could recover against the payee: *Sanford* v. *Ross* (1841), 6 U.C.O.S. 104.

An endorser placed his name upon a note without maker's name or sum or payee's name, and the maker's name was afterwards signed by another person without authority, and the note negotiated. The endorsee must shew that he is a *bonâ fide* holder for value: *Harscombe* v. *Cotton* (1857), 15 U.C.Q.B. 42; cf. *Rossin* v. *McCarty* (1850), 7 U.C.Q.B. 100.

In 1840 B. gives a blank acceptance on a 5s. stamp to A. to accommodate him. In 1852 A. fills up the document as a bill for £200, and signs as drawer. He then negotiates it to a holder in due course. The holder can recover from the acceptor: *Montague* v. *Perkins* (1853), 22 L.J.C.P. 187.

An instrument which is wanting in some one or more of the requisites of a complete bill is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities, *e.g.*, in authority coupled with an interest is not revoked by the death of donor or donee, while an authority not coupled with an interest is revoked by the donor's death. Cahlmers on Bills, 53, cites the four following cases as illustrations:—

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Annotation

Bills and notes signed in blank.

Annotation (*continued*)—**Bills and notes (§ I A—4*a*)—Signature in blank.**

1. B., who is indebted to C., gives him a blank acceptance for £100. C. dies. If C.'s administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer, he can enforce payment thereof against the acceptor: *Scard* v. *Jackson* (1875), 34 L.T.N.S. 65.

2. B., who is indebted to C., gives him a blank acceptance for £100, and then dies. C. may fill in his own name as drawer and payee after B.'s death, and recover the amount from B.'s estate: *Carter* v. *White* (1882), 20 Ch.D. 225, affirmed (1883), 25 Ch.D. 666 (C.A.), where it was held that a surety for the acceptor, not party to the bill, was not discharged. See *Re Duffy*, 5 Ir. L.R. 92.

3. B., having authority to do so, gives a blank acceptance for £100 in the name of the firm. It is filled up after B.'s death. The surviving partners are liable: *Usher* v. *Dauncey* (1814), 4 Camp. 97.

4. B. gives C. a blank acceptance to accommodate him, and without receiving value. After B.'s death it is filled up and discounted with D., who sees it filled up. D. cannot recover the amount from B.'s estate: *Hatch* v. *Searles* (1854), 2 Sm. & G. 147, approved in *France* v. *Clark* (1884), 26 Ch.D. at 262.

A vendor may, after the execution and delivery of a lien note from which his name was omitted, given for personalty purchased at an auction sale, the terms of which required such a note to be given, insert his name in the blank spaces intended therefor: *Bell* v. *Schultz*, 4 D.L.R. 400.

W., residing at Newmarket, owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder, W. swore, and the trial Judge found as a fact, that the notes were not to be used until he had been notified and authorized their use. He also found that the circumstances attending the discount of the note by the agent were such as to put the holder on enquiry as to the latter's authority. The first finding was affirmed by the Court of Appeal:—*Held*, affirming the judgment of the Court of Appeal (24 Ont. L.R. 122), Fitzpatrick, C.J., dubitante, that secs. 31 and 32 of the Bills of Exchange Act did not apply and the holder could not recover. *Held*, per Davies and Anglin, JJ.:—The finding of the trial Judge that the circumstances never arose upon which the agent had authority to use the note, was not so clearly wrong as to justify a second appellate Court in setting it aside. *Held*, per Idington, J.:—The finding of the trial Judge that the holder was put on enquiry as to the agent's authority was justified by the evidence and bars the right to recover. *Held*, per Duff, J.:—The evidence establishes that the agent had no authority to use the note: *Ray* v. *Willson*, 45 Can. S.C.R. 401.

Where a document in the form of a promissory note, but "wanting" in some "material particular," is not "delivered in order that it may be converted into" a promissory note, payment cannot be enforced against the maker, even by a holder in due course, under secs. 31 and 32 of the Bills of Exchange Act: *Smith* v. *Prosser*, [1907] 2 K.B. 735, followed. Judgment of Britton, J., affirmed by a Divisional Court. A subsequent application to the Court of Appeal for leave to appeal to that Court was refused: 1 O.W.N. 701; *Hubbert* v. *Home Bank of Canada*, 20 O.L.R. 651.

ONT.

S. C.
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April 29.

TUCKER v. BANK OF OTTAWA.

Ontario Supreme Court, Middleton, J., in Chambers. April 29, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ III B 3—25)—ASSIGNEE—ACTIONS BY—PURELY PERSONAL RIGHTS OF DEBTOR.

A cause of action for damages for alleged injuries done to the plaintiff's credit, character and business by reason of illegal acts by the defendants, which forced the plaintiff to assign for the benefit of his creditors, is a purely personal right and does not pass to the assignee.

[*Smith* v. *Commercial Union Insurance Co.*, 33 U.C.Q.B. 529, applied; *Hodgson* v. *Sidney*, L.R. 1 Ex. 313, specially referred to.]

Statement

APPEAL by the defendants from the order of the Master in Chambers, 4 O.W.N. 1090, dismissing the defendants' motion to stay the action or for security for costs.

Grayson Smith, for the defendants.

Featherston Aylesworth, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—The plaintiff alleges that the defendants unlawfully charged to his account certain notes not yet due, and misappropriated certain money the proceeds of certain discounts, whereby he was compelled to assign for the benefit of his creditors, and so his credit was damaged, for which he claims $60,000; and his character was damaged, for which he claims $60,000; and his business was damaged, for which he claims $30,000—$150,000.

If the statement of claim discloses no cause of action, it cannot be attacked in this way, and Mr. Smith does not base his appeal upon this ground, but contends that, an assignment having been made, the action ought to be stayed. The action is the plaintiff's action; and, be it well or ill founded, there is no ground for saying that he is a nominal plaintiff put forward by others. The first two claims (if they can be enforced), and probably the third, are claims for purely personal damages, such as would not pass to the assignee: *White* v. *Elliott*, 30 U.C.R. 253; *Dunn* v. *Irwin*, 25 U.C.C.P. 111; *Smith* v. *Commercial Union Insurance Co.*, 33 U.C.R. 529.

Hodgson v. *Sidney*, L.R. 1 Ex. 313, is a case the parties may well study, as indicating that the damages which the plaintiff here seeks to recover are too remote.

The present appeal fails, and must be dismissed, with costs to the plaintiff in the cause. This will not prejudice any properly conceived motion.

Appeal dismissed.

PREVEY et al. v. SECURITY COAL MINES CO. Ltd. et al.

ALTA.

S. C.

1913

May 16.

Alberta Supreme Court. Trial before Scott, J. May 16, 1913.

1. SPECIFIC PERFORMANCE (§ II—40)—JUDGMENT OR DECREE—VENDOR'S ACTION.

In a vendor's action for specific performance where the purchaser has defaulted in his payments, the judgment may direct payment of the arrears with interest and costs to be made by the defendant purchaser to the plaintiff or into court within a limited time with leave to the parties to apply.

Statement

THE plaintiffs claim specific performance of an agreement dated April 3, 1912, entered into by one Charles E. Merwin with them for the purchase of certain coal lands for the sum of $40,000 payable as follows, viz., $3,000 each ninety days from the date of the incorporation of a company then under process of organization by him. The defendant company was organized by him some time prior to April 8, 1912, as he, on that date, conveyed to it his interest in the lands.

Judgment was given in favour of the plaintiff.

G. B. O'Connor, K.C., for plaintiffs.

No one appeared for the defendants.

Scott, J.

SCOTT, J.:—The plaintiff claims that default was made in payment of the instalment of the purchase money falling due on October 17, 1912, which appears to be the second instalment payable under the agreement. The evidence shews that no part of that instalment has been paid.

The plaintiff is entitled to a judgment that the agreement is one which should be specifically performed.

In addition to the instalment due on October 17, 1912, further instalments of $3,000 each became due and payable on the 15th days of January and April last.

The judgment or order will direct the payment to the plaintiffs or into Court to the credit of the action within three months from the date of service of a copy thereof upon the defendants or their solicitors of the three overdue instalments referred to with interest upon each at five per cent. per annum from the times they respectively became due and payable and the costs of the action to be taxed by the clerk, who will make the necessary computation of the amount payable.

The order will reserve leave to the parties to the suit to apply at any time for such further or other order as they may be entitled.

Judgment accordingly.

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S. C.

1913

May 2.

Re ELIOT.

Ontario Supreme Court, Middleton, J. May 2, 1913.

1. PERPETUITIES (§ II—14)—CREATION AND EXERCISE OF POWER OF APPOINTMENT—POWERS—APPOINTMENTS.

An appointment under a power relates back to the instrument creating the power, and if the appointment would offend against the rule against perpetuities if made at the date of the instrument creating the power, it is bad; the test being properly made by treating the appointment as if written in the original instrument creating the power.

[*Re Fane*, 29 Times L.R. 306, specially referred to.]

2. GUARDIAN AND WARD (§ II—11*a*)—INCOME OF FUND—SURPLUS—INVESTMENT—INFANTS.

Where the income of a fund is paid to a guardian for the maintenance, education and support of a child, the guardian should invest the surplus income not required for that purpose, for the benefit of the child.

3. GUARDIAN AND WARD (§ II—11*a*)—APPOINTMENT FOR CHILDREN—INVESTMENT—GUARDIAN—TRUSTEE—DUTIES.

Where the residuary estate of a testatrix is apportioned in equal shares amongst her children, the shares not to vest in the children until they respectively attain the age of 25, the income from the several presumptive shares to be paid by the trustees to the guardian of the children for maintenance, education and support until such shares are vested, the trustees are justified in paying the whole of the income to the guardian both before and after the majority of the children; and upon a child attaining his majority the guardian becomes a trustee for him.

Statement

MOTION by Green and Lewis, executors of the will of Frances Ellen Wood Eliot and trustees under her marriage settlement, upon originating notice, under Con. Rule 938, for an order determining certain questions arising upon the will and marriage settlement.

J. W. Bain, K.C., for the applicants.

F. W. Harcourt, K.C., for the infants other than the eldest, Margery Eliot.

C. A. Moss, for Margery Eliot and her father, Charles A. Eliot.

Middleton, J.

MIDDLETON, J.:—The testatrix was a daughter of the Honourable John Hamilton, who by his will directed his residuary estate to be divided among his children, and that the portions allotted to the daughters should be set apart and invested, the income being paid over to them until they should marry or attain the age of thirty years, when their portions should be settled, if they are then married, in such a way as to be free from the control of any husband and to be inalienable during her life.

Pursuant to this provision, a marriage settlement was executed on the 5th October, 1891; the property coming to the testatrix being vested in trustees for the use of the testatrix during her natural life; and, upon her decease, the trustees are

directed to divide and apportion the same among the issue of the contemplated marriage in such shares and in such manner as she may by her will appoint.

Mrs. Eliot died on the 11th December, 1905, having first made her will. By it she recites her father's will and the marriage settlement and the power of appointment by will thereunder, also that two sons and two daughters, all of tender years, had been born to her. Pursuant to this power, she directs her property to be divided among the children in equal shares; "the share of each of my sons to be vested in and transferred to him upon his attaining the age of twenty-five and the share of each of my daughters to be vested in her on her attaining the age of twenty-five years or on her marriage previously with the consent of her guardian herein named and not otherwise, whichever event shall first happen."

The will then provides that the share of each daughter shall not, upon the vesting, be transferred to her, but that a settlement shall be executed to secure to the daughter the free use and enjoyment of her share, free from the control of her husband, as provided in the fifth paragraph of the marriage contract of the testatrix—i.e., in trust for the daughter for her life, without power of alienation, and with power of appointment by will among the issue of her marriage, and with appropriate provisions in the event of death without issue or without exercising the power of appointment.

The testatrix next provides that, if either of the sons die under the age of twenty-five years, or either of her daughters die under the age of twenty-five years without having been married, the share of the one who died shall vest in the survivor. The income from the presumptive share of each child is, pending the vesting, to be applied by the trustees for the benefit of the child—"and shall be from time to time paid to the guardian herein appointed of each of my children for and toward his or her maintenance education and support in their accustomed manner and style of living until such share of each of my said children shall be vested;" and she nominates and appoints her husband, Charles A. Eliot, guardian of the children.

The questions raised upon this motion are:—

1. Are the trustees justified in paying the whole income to the father, (a) during minority, (b) after majority, pending the vesting of the estate?

2. Is the father entitled to retain so much of the income of the children as may not be necessary for their due maintenance and to invest the same for their benefit?

3. Is the share of each child vested on attaining majority or on attaining the age of twenty-five years?

4. When a daughter attains twenty-five is her share abso-

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lutely vested, or has she merely a life interest and a power of appointment by will among her issue; in other words, does the provision requiring the trustees to settle the share of the daughter offend against the rule with respect to perpetuities?

5. Does the will of the testatrix itself offend against the rule as to perpetuities in postponing the period of vesting until the children respectively attain the age of twenty-five years?

I have set forth the questions in the form in which they were presented by counsel upon the argument rather than in the form indicated by the notice of motion.

Dealing first with the question as to the position of the father. The mother purports to appoint him guardian of the children. It is clear that she had no power so to do. The effect is, however, to create him a trustee, having the powers conferred upon him by the will. He is, therefore, entitled to receive the entire income arising from the estate in question for the maintenance, education, and support of the children. The fact that the testatrix directs the payment to be made to the husband as guardian indicates to me that she contemplated the guardianship to cease on each child attaining age; and, although the father would be entitled to receive the money until the estate vested on the child attaining twenty-five, he would receive it after each child attained majority merely as trustee for the child. Any surplus received by him during the minority of the infants he would hold in trust for the children, and it should be invested for their benefit. This is the course that has been adopted by the executors and by Mr. Eliot, and it is, I think, in accordance with the provisions of the will. This answers the first and second questions.

On the third question, it is clear that the estate of the children does not vest until they respectively attain twenty-five years of age. The language of the will is plain.

The remaining questions turn upon the law relating to perpetuities. I had recently a somewhat similar case before me, *Re Phillips*, 4 O.W.N. 751; and I need not again review the earlier cases. In *Re Thompson*, [1906] 2 Ch. 199, Joyce, J., states the rule to be applied when the validity of the exercise of a power of appointment is called in question; and this rule has recently received the approval of the Court of Appeal in *Re Fane*, 29 Times L.R. 306—"you must wait and see how in fact the power has been executed, and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power."

So treating this case, the power was validly executed by the wife, because the appointment she has made is in favour of her children, who were all then more than four years old, and the estate becomes vested in them at twenty-five, within twenty-one years from the date of her death.

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Applying the same test to the attempt to confer upon the daughters a power to be executed by them by will in favour of their unborn issue, this provision, for the reasons pointed out in *Re Phillips*, offends against the rule with respect to perpetuities, and is bad; and, applying here the decision in *Hancock* v. *Watson*, [1902] A.C. 14, the same result follows as in *Re Phillips*, and the daughters take absolutely.

The costs of all parties may be paid out of the estate; costs of the executors as between solicitor and client.

Order accordingly.

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Mar. 31.

RUDD v. MANAHAN.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. March 31, 1913.

1. LANDLORD AND TENANT (§ II E—36)—ASSIGNMENT OF LEASE—RESTRICTIVE COVENANT AS TO HOTEL—"TIED" HOUSE.

A covenant contained in a document separate from the mortgage given by the owner of the realty upon procuring a loan from a brewing company upon his hotel property whereby such owner and his tenant in occupation of the hotel severally agreed for valuable consideration with the brewing company that neither they nor their assigns would, during a specified period, sell or deal in or allow to be sold or dealt in upon the demised premises any brewing products other than those dealt in by the brewing company, is a covenant running with the land which may be enforced by injunction at the instance of the owner against a purchaser of the lessee's interests in the premises where such purchaser took with notice of such restrictive agreement, although the agreement was subsequent to the making of the lease itself the benefit of which the purchaser had acquired, and although it did not appear that the making of such restrictive agreement was a condition upon which the lease was granted.

[*Rudd* v. *Manahan* (No. 1), 5 D.L.R. 565, affirmed.]

2. COVENANTS AND CONDITIONS (§ II D—22*a*)—RESTRICTIONS ON USE OF PROPERTY—HOTEL SUBJECT TO "TIED HOUSE" CLAUSE IN FAVOUR OF MORTGAGEE.

A covenant given to a mortgagee of an hotel property as collateral security to a mortgage loan, whereby the mortgagor agreed not to sell beer on the mortgaged premises other than that manufactured or sold by the mortgagee for a period of three years will be limited, as regards its enforcement by injunction, so as to terminate with the payment of the mortgage if paid off within the specified term.

[*Noakes* v. *Rice*, [1902] A.C. 24, referred to; and see Annotation to this case.]

Statement

APPEAL by the defendants from judgment of Walsh, J., *Rudd* v. *Manahan* (No. 1), 5 D.L.R. 565, in favour of the plaintiff in an action for the reformation of a hotel lease.

The appeal was dismissed.

J. W. McDonald, and *L. H. Putnam*, for the appellant.

J. C. Brokovski, for the respondent.

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The judgment of the Court was delivered by

SIMMONS, J.:—The plaintiffs are the owners of lots numbered 3, 4 and 5 in block B. of Bellevue plan No. 6177 Y. The plaintiff alleges that on or about the month of September, 1910, the plaintiff and defendant made a verbal agreement whereby the defendant leased from the plaintiff the hotel buildings and stables erected on said lots reserving to the lessors the store premises which formed a part of the same building. Also that on or about September 19, 1910, the said agreement was made in writing under a certain lease, but by a mistake the reservation as to the store premises was not included in the agreement in writing.

The plaintiffs also claim that the part of the lease which gives the lessee the right to assign without the consent of the lessor does not contain the agreement intended by the parties and likewise the clause dealing with the length of the demise and the option of renewal and maintenance of the license.

The learned trial Judge has found as a fact that the reservation as to the store was improperly omitted from the said lease and ordered rectification accordingly. He, however, found against the plaintiffs on the other grounds raised by them and the plaintiffs have accepted the judgment in that regard and do not raise the same by way of cross-appeal so it does not seem necessary to deal with more than the first ground raised by the plaintiffs and on which the defendants appeal.

The defendant Manahan about three months after entering into possession as lessee made a claim for possession of the store which was then leased by the plaintiff to another party. On December 4, 1910, the plaintiff being then in need of capital to pay for certain improvements that had been made on the buildings in question arranged through the defendant Manahan for a loan from the Lethbridge Brewing and Malting Co., Ltd., to pay off this indebtedness. An agreement in writing was entered into between the plaintiffs, the defendant Manahan and the Lethbridge Brewing and Malting Co., Ltd., whereby the plaintiff and the defendant Manahan covenanted with the Lethbridge Brewing and Malting Co., Ltd., as follows:—

> That they will not, nor will either of them, nor their executors administrators or assigns or either of them during the term of three years next ensuing after the date of these presents, sell, dispose of or deal in, or allow to be sold, disposed of, or dealt in, whether by either of the said parties hereto of the first part and second part or by any other person or persons, firm or corporation whatsoever upon the premises at present occupied by the party of the second part in Bellevue aforesaid, known as the "Southern Hotel" and being upon the lots above recited, any beer, lager beer, aerated waters or brewery products except those manufactured or dealt in by the Brewery company, etc.

The agreement further recites that on a breach of this covenant, that the sum of $4,500 and interest shall immediately become due to the company at their option and all securities for the payment of the same shall also at the option of the company become due forthwith.

The plaintiff Barbara Rudd also assigned the rents to the company and executed a mortgage to them on the said lands to secure this indebtedness.

By an assignment dated March 17, 1911, the defendant Manahan assigned his lease to the defendants Grafton & Evans. The evidence of the plaintiff if true is quite sufficient to sustain the findings of fact of the trial Judge. He accepted her statement in preference to that of the defendant Manahan and that of Beebe, the conveyancer, who prepared the lease, and I do not think this can be disturbed by a Court of review, as the learned trial Judge has had the advantage of hearing and observing the witnesses. The same conclusions apply to the findings of the trial Judge as to the fact that the defendants Grafton & Evans had notice of the Lethbridge Brewery Co.'s agreement at the date of the assignment to them of the lease.

In the result then, the appeal is limited to two questions of law: (*a*) Was the trial Judge correct in ordering rectification in accordance with his finding of fact, and (*b*) Was the covenant of the lessors and the lessee Manahan with the Lethbridge Brewing & Malting Co., Ltd., binding on Manahan and upon his assigns Grafton & Evans.

In *Olley* v. *Fisher*, 34 Ch.D. 367, it was held that since the passing of the Judicature Act, 1873, the Court has jurisdiction (in any case in which the Statute of Frauds is not a bar) in one and the same action to rectify a written instrument upon parol evidence of a mistake and to order the agreement as rectified to be specifically performed. In the present it is not suggested that the Statute of Frauds is a bar as part performance has been quite sufficiently established. Nor has delay in asking for relief been urged against the exercise of the jurisdiction to rectify as it indeed hardly could be in the present case, as the plaintiff has ever since the granting of the lease asserted her right to the store premises and successfully maintained her right as far as actual possession was concerned.

As to the questions raised under (*b*) the determining factor is whether the thing covenanted to be done immediately affects the land itself or the mode of occupying it, or not directly affecting the nature, quality or value of the thing demised nor the mode of occupying it is a collateral covenant only which does not bind the assigns: *Mayor of Congleton* v. *Patterson*, 10 East 130.

The covenant in question requires the lessee to conduct his

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hotel business on the premises in a particular way, that is to say, conduct the sales of liquor in such a way that liquors of the Lethbridge Brewing & Malting Company and no other should be offered for sale to customers.

See *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767 and *Courage* v. *Carpenter*, [1910] 1 Ch. 262, as cases which quite bear out the view, that such a covenant runs with the land and binds the lessee and his assigns.

In the result then the appeal should be dismissed with costs. In regard to the injunction, the judgment appealed from provides that the defendants Grafton & Evans be restrained from further breaches of the covenants contained in the agreement with the Lethbridge Brewing and Malting Co. It appears from the authorities that the covenant in regard to selling liquors is binding only during the life of the encumbrance which, if paid at maturity would be three years from the date thereof, whereas in the lease there is a provision for renewal for another two years after the term of three years and the formal judgment should provide that the injunction should no longer remain operative after the payment of the encumbrance to the Brewery Co.

In *Noakes & Co., Ltd.* v. *Rice*, [1902] A.C. 24, where in a mortgage of leasehold of a public house by a licensed victualler to a firm of brewers, the mortgagor covenanted that he and all persons deriving title under him should not during the continuance of the term and whether money should or should not be owing on the mortgage security use or sell in the house any malt liquors except such as should be purchased of the mortgagee, it was held that the covenant was a clog on the equity of redemption and that the mortgagor on payment of all that was due on the mortgage was entitled to a reconveyance of the property or at his option a transfer of the security free in either case from the "tie."

Appeal dismissed.

Annotation

Restrictions as to user of leasehold.

Annotation—Covenants and conditions (§ II D—22a)—Restrictions on use of leased property.

Where a lessor has made an agreement with a tenant, giving him the exclusive privilege of selling refreshments, etc., in a theatre for a fixed period, and such agreement stipulates that in case of sale, lease or transfer of the said theatre, the rights and privileges of the lessee will be protected, and the theatre is transferred by the lessor, and the assigns undertake to respect all the obligations entered into by the lessor, and the assigns transfer their rights, the lessee has a direct action against the assigns first mentioned, to compel the fulfilment of obligations entered into in his favour by the lessor, and need not direct his suit against such lessor: *Authier* v. *Driscoll*, 3 D.L.R. 797.

As to admission of parol evidence to shew that writing does not contain all the conditions, see *Perrin Co.* v. *Peacock*, 19 W.L.R. 910; *Mann* v. *St.*

Annotation (*continued*)—**Covenants and conditions** (§ II D—22a) — **Restrictions on use of leased property.**

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Annotation

Restrictions as to user of leasehold.

Croix Paper Co., 5 D.L.R. 596; *Dubuc* v. *Laroche*, Q.R. 21 K.B. 398. In *Audet* v. *Jolicoeur*, 5 D.L.R. 68, it was held that an action by a lessor for an injunction restraining a lessee from using the land demised in a manner contrary to the lease, may be maintained as an independent action without the admission of prayer for the cancellation of the lease, and it was also held that an action by a lessor for an injunction restraining a lessee from building upon the land demised in breach of the terms of the lease may be maintained without proof of damages to the lessor.

For a discussion of the law of covenants running with the land, see *Pearson* v. *Adams* (No. 2), 7 D.L.R. 139, 27 O.L.R. 87, and *Wood* v. *Saunders*, 3 D.L.R. 342; *Pigeon* v. *Preston* (No. 3), 8 D.L.R. 26, 22 W.L.R. 894. For a full discussion of the law of covenants that run with the land, and of restrictive covenants, see Bell, on Landlord and Tenant, 486.

PALLEN et al. v. THE "IROQUOIS."

(Decision No. 2.)

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Feb. 28.

Exchequer Court of Canada, British Columbia Admiralty District. Martin, L.J.A. February 28, 1913.

1. COLLISION (§ I A—2)—SHIPPING—COLLISION REGULATIONS—SPEED REDUCTION.

In an action against a vessel for damages resulting from a collision with a tug towing a scow in a fog, where it is shewn that the defendant vessel failed to comply with the provisions of article 16, imposing a duty on a vessel in a fog to proceed at a moderate rate of speed, liability is not avoided unless it be shewn that the speed of the vessel was not more than was necessary; the fact that she was running at a speed which would make it safer for herself in determining her position is not the determining factor if such excessive speed made her more dangerous to other vessels.

[*The "Lord Bangor,"* [1896] P. 28; *The "Challenge and Duc d'Aumale,"* [1905] P. 198 (C.A.), referred to.]

2. COLLISION (§ I A—1)—MARITIME CONVENTIONS ACT (IMP.)—DEGREE OF BLAME.

Section 9 of the Maritime Conventions Act, 1911 (Imp.), 1 & 2 Geo. V. ch. 57, as to the degree of blame in collision cases does not apply to Canada.

[*The "Bravo"* (1912), 29 Times L.R. 122; *The "Rosalia,"* [1912] P. 109, referred to.]

Statement

TRIAL of a collision action in admiralty. An interlocutory motion in the case is reported: *Pallen* v. *The "Iroquois"* (No. 1), 6 D.L.R. 527.

On the 22nd of October, 1911, about 4.30 p.m., off the sandheads, Fraser River, the SS. "Iroquois" (a high-powered passenger vessel, Henry C. Carter, master), heading for Vancouver Narrows on a course N.W. by N. ½ N., collided with the steam tug "Noname" (registered tonnage 116, length 86 feet, John Barberie, master), with loaded scow in tow, 60 x 26 feet, bound for Fulford Harbour, via Active Pass, on a course S.E. by S.

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¾ S. The day was calm, with little if any wind; tide flooding probably under one knot an hour. The "Noname" had clear weather till 3.45, when she ran into a thick fog in which objects were not visible beyond half a cable, but proceeded on her course without abating her speed, which was about the best she could make, viz., six knots through the water; I am satisfied that she regularly gave the proper signals, nor do I find any reason for thinking that the "Iroquois" failed to do the same; the fact that some of the witnesses gave apparently truthful yet conflicting evidence regarding the signals heard in fog can readily be explained by a perusal of the report of Trinity House Fog-Signal Committee, 1901, on the Collision Regulations, reprinted in Smith's Leading Cases (1907) 296. The "Iroquois" was, with the slight assistance of the tide, maintaining a speed of probably a little over fourteen knots through the water, which her officers call her "fog speed," as she runs very regularly on that speed and makes distances more accurately on it between fixed points than on her best speed, which, at 143 revolutions, is about 15½ knots. When the vessels actually came in sight of one another they were not more than 250 or 300 feet apart. It was only immediately before sighting the "Noname" that the engineer of the "Iroquois" had been given the signal for half speed, which signal, he says, was followed up without any interval by one for "full speed astern," which was responded to, but it was too late to avoid the collision, though the force of the impact was greatly diminished.

Damages awarded equally against the two vessels.

J. A. Russell and *Moffat*, for plaintiff.

A. D. Taylor, K.C., for defendant.

Martin, L.J.A.

MARTIN, L.J.A.:—It is proved by the evidence of the master and mate of the "Noname" that though they heard a vessel approaching them almost if not quite right ahead through the fog for five or six minutes before they sighted her, they took no other precautions than to continue to sound the fog signal. Article 16 provides that:—

> Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

No valid reason was given for the failure of the "Noname" to "stop her engine and then navigate with caution"; the suggestion of her master that he did not do so because the barge astern would sheer and become more difficult to handle, is inadmissible in the circumstances, because there was nothing in wind,

tide or weather conditions to prevent him from at least reducing his speed to what would be the lowest possible speed consistent with safety of tug and tow in the circumstances, even if it were not practicable to let the way run entirely off the tow and come to a standstill. To escape liability it must be shewn that the movement was not more than was necessary, but no attempt was made to establish this. Cf. *The "Lord Bangor,"* [1896] P.D. 28; *The "Challenge and Duc d'Aumale,"* [1905] P.D. 198 (C. A.). The truth is, according to his own testimony, that he mistook the fog whistle of the "Iroquois" for that of a small boat, and took dangerous chances which contributed to the collision. Indeed, the man at the wheel, Williams, testified that they had heard the "Iroquois" for 20 minutes on their port bow, and she had whistled at least four times from that point. On the other hand, I am unable to accept the excuse offered on behalf of the "Iroquois" for running at such a speed, which cannot be called moderate in the circumstances. While it may be true that she runs more regularly at a certain speed, that may make it safer for herself in determining her position as aforesaid, but at the same time it, if high, makes her more dangerous to other vessels, which is the fact the regulations require her to guard against. She might, on the one hand, run more regularly at 12 knots than at full speed, or, on the other hand, at full speed than 12 knots, at which full speed she would be safer for herself but still more dangerous to others than she was in this instance.

I am unable to say that, after the vessels came in sight of one another, either of them could reasonably be said to have failed to do anything which would have avoided the collision. They are equally at fault in having brought it about by contravening art. 16, which the Privy Council stated in *China Navigation Co.* v. *Lords Commissioners of the Admiralty*, (1908) 24 Times L.R. 460,

> is a most important article and one which ought to be most carefully adhered to in order to avert the danger in thick weather. . . . It was notorious that it was a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it was almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it was heard.

According to the following extract from the judgment of the Admiralty Court in the late case of *The "Sargasso,"* [1912] P. 192 at 199, not only the "Iroquois," but the "Noname," also was guilty of excessive speed:—

> With regard to the "Mary Ada Short," her speed spoken to by her master was three knots; that is probably a smaller speed than she had a good deal, and in this regard, apart from the angle of the blow, I have come to the conclusion, from the nature of the wound, that the speed at which this vessel was going was a good deal more than he says. If vessels could only see each other at a distance of 100 yards, and if they had to

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be under way at all, they ought to proceed as slowly as they possibly can. It is impossible to say what the speed ought to be in figures in every case, but it is obvious, if a vessel is proceeding at a speed which would not allow her to pull up in something like her own length, in the circumstances of this particular afternoon, and if a vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have gone at that speed, and in so far as that speed was exceeded it was excessive.

The situation finally herein was like that described in a case in this Court: *Wineman* v. *The "Hiawatha,"* (1902), 7 Can. Ex. R. 446, wherein it was said, p. 468:—

> The rate was so immoderate and the fog so thick that it prevented either vessel, in the brief space of time which elapsed after sighting the other, from taking any effective steps to avoid the other.

Pursuant to sec. 918 of the Canada Shipping Act, ch. 113, R.S.C., I direct that "the damages shall be borne equally by the two vessels . . . one-half by each," which means in this case that the "Iroquois" must pay one-half of the damage to the "Noname" because no evidence was given of any damage to the "Iroquois," and there will be the usual reference to the registrar, assisted by merchants, if necessary, to assess them. I note that the Maritime Conventions Act, 1911 (Imp.) 1 & 2 Geo. V. ch. 57, sec. 9, does not apply to Canada, so no question of establishing the degree of blame can arise in this Court, but it has been decided that even where that statute can be given effect to, the old rules that each delinquent vessel bears her own costs is still in force: *The "Bravo"* (1912), 29 Times L.R. 122. And compare *The "Rosalia,"* [1912] P. 109, the first decision under said Act.

Judgment for plaintiff.

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April 15.

IRESON v. HOLT TIMBER CO.

Ontario Supreme Court. Trial before Kelly, J. April 15, 1913.

1. WATERS (§ I C 2—22)—RIGHTS OF RIPARIAN OWNER—DRIVING LOGS—RESERVE ALONG BANKS OF STREAM.

A lumber company operating a timber berth under a provincial license cannot conduct its drive in bringing the logs down a stream, so as to deprive a riparian owner of his reasonable and proper means of access to and use of the river, notwithstanding the reserve of one chain along the shore of the river, contained in the original grant from the Crown.

[*Metropolitan Board of Works* v. *McCarthy*, 7 H.L.C. 243, referred to.]

2. WATERS (§ I D—47)—EXTENT OF GRANTEE'S RIGHTS—MEASUREMENT OF RESERVATION IN CROWN GRANT.

The point to which a river is artificially raised by a lumber company in order to facilitate the driving of their logs cannot be considered as the high water mark for the purpose of measuring the reservation along the shore of a river as contained in the original grant from the Crown.

[*County of York* v. *Rolls*, 27 A.R. (Ont.) 72, specially referred to; Angell on Watercourses, 7th ed., sec. 53, p. 50, note 1, referred to.]

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3. LOGS AND LOGGING (§ I—5)—EXCESS OF STATUTORY RIGHTS—UNREASONABLY OBSTRUCTING RIVER.

A lumber company which unreasonably obstructed a river, down which they were driving their logs, so as to render the same dangerous, and at times impassable for those entitled to navigate it, does so in excess of the statutory right conferred on them to float logs and use the water for that purpose, and as a consequence are liable to a riparian owner for damages resulting therefrom.

[The Saw Logs Driving Act, R.S.O. (1897), ch. 43, referred to.]

4. PARTIES (§ I A 1—7)—WHO MAY SUE—INJURY TO RIPARIAN RIGHTS.

A riparian owner who is deprived of his reasonable and proper right of navigating a river and obtaining clear access thereto, by reason of a lumber company unreasonably obstructing the river in the course of their driving operations, has such a special interest and sustains such special damage as entitles him to maintain an action against the lumber company.

[*Hislop* v. *Township of McGillivray*, 17 Can. S.C.R. 479, 489, approved.]

5. DAMAGES (§ I—3)—NOMINAL DAMAGES—ENCROACHMENT AND TRESPASS.

The right of action of a riparian owner for an authorized encroachment on his lands by the increasing of the level of a river for the purpose of facilitating the driving of saw logs and for trespass on his lands in connection with the driving operations, will be maintained against the lumber company although the quantum of damages is merely nominal.

[*Wright* v. *Turner*, 10 Gr. 67, referred to.]

Statement.

ACTION for damages for wrongful entry by the defendants upon the plaintiff's lands in the township of Burton, in the district of Parry Sound, and using the same without the consent or authority of the plaintiff; for an injunction restraining the defendants from further entering upon or in any way making use of the plaintiff's lands, or any part thereof, and from destroying or otherwise injuring trees and timber; for a mandatory order for the removal of a jack-ladder, engines, and hoisting apparatus; to recover possession of the plaintiff's lands occupied by the defendants; and for other relief.

Judgment was given for the plaintiff.

The defendants were the holders of a license from the Province of Ontario for the year ending the 30th April, 1912, to cut timber on certain lands in the township of Mackenzie, upstream from the plaintiff's lands. It was in taking down their logs that they came upon the plaintiff's lands.

W. G. Thurston, K.C., for the plaintiff.

E. B. Ryckman, K.C., for the defendants.

Kelly, J.

KELLY, J. (after stating the facts at length):—The plaintiff's chief causes of complaint are: (1) that the defendants' operations in the river were so conducted as to prevent his using it as he had a right to use it; and (2) that the defendants committed a trespass upon his property by erecting the jack-ladder wholly or in part thereon, and caused him damage by destroying and removing trees and by flooding a portion of his land.

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Dealing with the first of these objections, the defendants have placed much reliance upon their contention that the plaintiff, by reason of the one-chain reserve along the shore of the river, is not a riparian proprietor, and so is not entitled to the privileges of such an owner. This contention is based upon the assumption that the reserve is to be measured from high water mark, and that, therefore, at times of low water, land would intervene between the shore side of the reserve and the edge of the water. Even were it conceded that the measurement of the chain reserve is to be made from high water mark (a position which, on the authorities, is untenable), it cannot be admitted, as contended by the defendants, that the line of these waters in the summer of 1912, when the defendants, for their own purposes, raised the water level several feet above normal, can be considered as the high water line: *County of York* v. *Rolls*, 27 A.R. (Ont.) 72; Angell on Watercourses, 7th ed., sec. 53, p. 50, note 1.

The further contention that the chain reserve itself cuts off the plaintiff's right of access to the water cannot prevail. A case much similar in this respect to the present is *Metropolitan Board of Works* v. *McCarthy*, 7 H.L.C. 243, reference to which will throw some light upon the effect of the conditions existing here.

Another element to be considered in solving the question of the defendants' liability is, whether they were within their rights in using the river as they did use it. They maintain that they have not exceeded the statutory rights of those engaged in a business such as they carry on. The Saw Logs Driving Act, R.S.O. 1897 ch. 43, relates to the duties of persons floating logs and their obligations to break jams and to clear the logs from the banks and shores of the water with reasonable despatch, and to run and drive them so as not unnecessarily to obstruct the flow or navigation of the waters.

It is unquestionable that the defendants did so obstruct the river as to render it extremely dangerous, and at times impossible for it to be used by those having the right to navigate it; and, conceding the rights given by statute to float logs and use the water for that purpose, I am of opinion that the evidence establishes that the defendants exceeded their rights and unreasonably obstructed this river.

In reaching this conclusion, I have not disregarded the statement that permanent settlers and those residing in this region during the summer months are but few, and are located at considerable distances from each other. To these any interference with or improper use of the river, which would obstruct their passage over it, is a serious matter, especially as other means of transport are not readily available.

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In the early stages of the defendants' operations in 1912, and prior to the commencement of this action, discussion took place between the plaintiff and the defendants' representatives about modifying the conditions created by the defendants, so far as was necessary to enable the plaintiff to navigate the river safely and to pass through the booms with his boats. Though promises were given him, nothing was done that resulted in any improvement.

It is also urged that the plaintiff did not suffer any special damage such as entitle him to maintain this action. My view is quite the contrary. He was deprived of the reasonable and proper means of using the river, as well as of reaching places where it was necessary for him to go. His own statement is, that for days at a time he and his family were practically prisoners on his property. He had such special interest and sustained such special damage as gave him an actionable right.

If any direct injury resulted to a private individual from any obstruction placed in a public travelled highway, whether on land or on water, which injury was other and greater than that occasioned to, or suffered by, the general public, the person so injured had his remedy by action at common law for damages, and in equity by injunction to restrain the continuance of the obstruction causing the injury. There is no lack of cases which establish this proposition: *Hislop* v. *Township of McGillivray*, 17 Can. S.C.R. 479, at 480.

Dealing now with the claim that the defendants have trespassed on the plaintiff's lands, removed trees therefrom, and built their jack-ladder thereon, not a little evidence was given tending to shew that the ladder does not encroach on the plaintiff's lands, and that it is situated entirely on the one-chain reserve. When the plaintiff became aware that the defendants were building the ladder, he notified their representatives that it did so encroach.

The raising of the waters by the defendants created an abnormal condition; a fact which to a considerable extent entered into the evidence on the question of the location of the plaintiff's property.

I have with great care gone over the evidence of the various witnesses, and am convinced that the testimony on this point is in favour of the plaintiff.

The exact superficial area of the lands encroached on by the jack-ladder, I do not determine, but it is at least 320 feet, and there is also the triangular piece to the east cut off from the plaintiff's other lands. Trees which had been on the site of the jack-ladder were removed by the defendants. What these were worth was not made clear; but I do not think, on the evidence generally, that their value was great.

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Another result of the rising of the water was the flooding of a small portion of the plaintiff's lands west of the ladder, on which are growing trees.

Effect cannot be given to the defendants' contention that, if there is an encroachment or trespass on the plaintiff's lands, the value of this land is so small as not to be cognizable by the Court in a claim for damages. Authorities are not wanting to shew that, under such circumstances, the owner of the land is entitled to a right of action and to damages, even though nominal: *Wright* v. *Turner*, 10 Gr. 67; *MacGlone* v. *Smith*, 22 L.R. (Ir.) 559.

The plaintiff claims damages for the wrongful entry and trespass on his lands, and an injunction restraining the defendants from further entry, and from destroying and injuring his trees and timber, and from storing logs in the river; and an order compelling them to remove the jack-ladder and its apparatus, an order to remove the booms or so arrange them as not to interfere with his use and enjoyment of the river, and to re-arrange the logs. He is entitled to this relief.

Damages for the trespass and entry and the trees cut and removed, I fix at $15.

Judgment will go accordingly, with costs of the action, including costs of and incidental to the granting of the injunction.

In his argument the plaintiff's counsel applied for leave to amend the claim by adding a claim for damages for the obstruction of the river. I grant this application, and allow the claim, with a reference to the Master in Ordinary to ascertain the amount of damages, if the plaintiff so desires; costs of the reference to be reserved until the Master shall have made his report.

With reference to the defendants' counterclaim for damages for being restrained by the injunction from the 16th August to the 20th August, when, on their application, the injunction was dissolved: in view of the conclusion I have arrived at, that claim must be dismissed with costs. The plaintiff was entitled to the injunction, and the dissolving of it, in the circumstances under which the order for that purpose was made, does not conflict with that view.

I have taken occasion to refer to the learned Judge who made the order dissolving the injunction, and I have learned that he adopted that course, not because he believed that the plaintiff was not entitled to the injunction, but because he considered it convenient and desirable that the logs should be removed by means of the ladder (apparently then the most speedy means of disposing of them), even though it trespassed on the plaintiff's lands, rather than that they should remain untouched, and so continue to interfere with the use of the river and its branches.

During the trial, I became impressed with the belief—and a more deliberate consideration of the evidence confirms this—that, had the defendants been more heedful of the plaintiff's wishes, when in the early part of the summer he requested their representatives so to conduct their operations as not to deprive him of reasonable means of access to the water and of the right to navigate the river, an amicable working arrangement could easily have been arrived at. They acted, however, high-handedly, and without due regard for the inconvenience and hardships which their operations caused him, and thus brought about the dissatisfaction on his part which resulted in the present proceedings.

Judgment for plaintiff.

STORY v. STRATFORD MILL BUILDING CO.

Ontario Supreme Court, Kelly, J. May 3, 1913.

1. CONFLICT OF LAWS (§ I E 1—106)—TORTS—PERSONAL INJURIES—ONTARIO—FOREIGN LAW DISTRICT.

To give the Courts of Ontario jurisdiction to entertain an action for a tort committed abroad, the act must be actionable in Ontario, and not excusable or justifiable in the law district where it was committed.

[*Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, 182; 9 Edw. VII. (Que.) ch. 66, secs. 1, 4 and 5, referred to; *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, distinguished.]

2. MASTER AND SERVANT (§ II E 6—275)—FOR WHAT ACTS OF FELLOW-SERVANT MASTER IS LIABLE.

The doctrine of common employment does not prevail under the law of the Province of Quebec.

[*Asbestos and Asbestic Co.* v. *Durand*, 30 Can. S.C.R. 285, 292; *Filion* v. *The Queen*, 24 Can. S.C.R. 482, applied.]

Statement

ACTION for damages for injury sustained by the plaintiff while working for the defendants, an Ontario company, erecting machinery in a mill in the Province of Quebec, by reason, as the plaintiff alleged, of the negligence of the defendants' superintendent.

The action was tried with a jury.

I. Hilliard, K.C., and *W. B. Lawson*, for the plaintiff.
R. S. Robertson, for the defendants.

Kelly, J.

KELLY, J.:—The defendants are an incorporated company carrying on business as general contractors and mill-builders, and having their head office in the city of Stratford.

The plaintiff is a millwright, whose residence is in the Province of Ontario.

In or about August, 1911, the defendants had a contract for the erection of machinery in a mill in Wakefield, in the Province of Quebec. The plaintiff was employed by them on that con-

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tract, the work on which was carried on under the sole direction and superintendence of Harry Cox, their foreman.

On the 30th August, while engaged with others in installing the machinery on this contract, and while doing such work in obedience to the commands of Cox, the plaintiff was injured by the falling of a machine called a dust-collector, which happened, the jury found, through the negligence of Cox in not having sufficiently nailed to the rafters of the building a board from which the dust-collector was suspended while being put in its place. The board was nailed up by another workman, Muller, by the direction of Cox. The jury assessed the damages at $1,500.

The defendants contend that, under these circumstances, they are not liable.

At the trial, counsel agreed that "by the law of Quebec masters are responsible for damage caused by their servants or workmen in the performance of the work for which they are employed; and that the doctrine of common employment, as stated in the cases of *Asbestos and Asbestic Co.* v. *Durand*, 30 Can. S.C.R. 285, 292; *Filion* v. *The Queen*, 24 Can. S.C.R. 482, Ruegg, 8th (Can.) ed., p. 975, is not a defence in Quebec.

Counsel also agreed that the Quebec statute 9 Edw. VII. ch. 66, "An act respecting Responsibility for Accidents suffered by Workmen in the course of their Work and the Compensation for Injuries Resulting therefrom," applies.

It is essential to consider the conditions under which the plaintiff is entitled to succeed in an action in this Province for a tort committed outside of the jurisdiction. That question was fully gone into in the case of *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, where Lord Macnaghten (at p. 182) states the view, with which the other members of the House unanimously agreed, that "it is well-settled by a series of authorities (of which the latest is the case of *Phillips* v. *Eyre*, in the Exchequer Chamber), that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed."

This is a very plain statement of the conditions under which such an action can be successfully maintained.

Phillips v. *Eyre*, L.R. 6 Q.B. 1, was followed by *The M. Moxham* (1876), 1 P.D. 107, both of which were referred to in the judgments in the *Carr* case.

What is necessary is that the act (committed in a foreign country) be wrongful or "not justifiable," not necessarily that it should be the subject of civil proceedings in the foreign country: *Machado* v. *Fontes*, [1897] 2 Q.B. 231.

The present inquiry is, therefore, to ascertain whether the two conditions mentioned in *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, have been fulfilled.

It was argued for the defence that the first condition is not complied with, inasmuch as the Quebec law cannot be enforced here. This is, I think, a misconception of what is really required. It is not a question of enforcing in this Province the provisions of the Quebec law, but of enforcing the law of this Province in respect of a wrong committed in Quebec which is not justifiable by the law of that Province.

What is first to be considered is, was the wrong or the act complained of of such a character that it would have been actionable if committed in this Province? Of that, I think, there is no doubt, under the state of the law in this Province as it existed at the time of the accident, the provisions of which it is unnecessary to review.

The second condition, also, I take to be complied with. The law of the Province of Quebec, as admitted by counsel as being in force, and the facts as found by the jury, shew that the act complained of is clearly not justifiable in that Province.

The statute 9 Edw. VII. ch. 66, sec. 1 (Quebec), above referred to, provides that "accidents happening by reason of or in the course of their work, to workmen, apprentices, and employees engaged in the work of building, or in factories, manufactories, or workshops . . . shall entitle the person injured or his representatives to compensation ascertained in accordance with" the succeeding provisions of the Act.

By sec. 4, it is declared that a foreign workman or his representatives shall not be entitled to the compensation provided by the Act, unless at the time of the accident he or they reside in Canada, etc.

Section 5 provides that no compensation shall be granted if the accident was brought about intentionally by the person injured.

Taken with the above admissions of counsel, this seems to me to make it clear that the casualty was one for which the plaintiff had a right of action in the Province of Quebec, or, in any event, it was not justifiable there; and, therefore, the second condition as laid down by Lord Macnaghten has been complied with.

I have not left out of consideration the case of *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, cited for the defence. This deals with a state of facts different from those presented here, and does not conflict with the opinion I have expressed, nor limit or modify the law as laid down in the *Carr* case [*Carr* v. *Fracis Times & Co.*, [1902] A.C. 176.]

As to damages: it is stated in Halsbury's Laws of England,

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vol. 6, p. 250, sec. 372, "that the measure of damages in an action in respect of a tort committed abroad is (it would seem) to be governed by the lex loci actus;" and "it may well be that the rules of the lex fori will be allowed to increase the amount of damages in certain classes of torts."

That aspect of the case it is not necessary to consider further here; counsel, when the matter was brought to their attention at the close of the trial, admitted that the amount of the verdict as returned by the jury was within the amount recoverable in the Province of Quebec.

I direct judgment to be entered in favour of the plaintiff for $1,500, the amount assessed by the jury, and costs.

Judgment for plaintiff.

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Re PHILLIPS.

Ontario Supreme Court, Middleton, J. March 4, 1913.

1. WILLS (§ III B—81)—CONSTRUCTION—"HEIRS"—LEGAL AND COLLOQUIAL MEANINGS, CONSIDERED—INTERPRETATION.

In a will in which the testator made bequests to a number of persons, some of whom were his nephews and nieces, and were so designated in the will, while the remaining legatees were strangers, and then a subsequent clause provides for a distribution of certain remaining moneys equally "among the aforesaid heirs," the word "heirs" in this connection must be given its strictly technical and legal interpretation instead of its popular signification, and, in the absence of circumstances preventing the court from adopting such strict meaning, the expression will be construed to mean those persons named in the will who would be entitled to the estate if there were an intestacy.

[*Clarke* v. *Scott*, 67 Pa. St. 446; *Porter's Appeal*, 45 Pa. St. 201, and *Townsend* v. *Townsend*, 25 Ohio St. 477, referred to; *Re Hull*, 63 N.Y. Supp. 725, 30 Misc. 281, distinguished.]

Statement

MOTION for an order determining a question arising upon the will of Lydia Phillips, deceased.

J. H. Spence, for the executors.

G. H. Kilmer, K.C., for the nephews and nieces of the testatrix, legatees under the will.

W. A. Lewis, for other legatees.

Middleton, J.

MIDDLETON, J.:—The question arises with respect to the following clause, "I also give and bequeath to the following persons"—then follows a list of nine persons, to each of whom is given the sum of $50; six of these are described as nephews or nieces; the other three are named without description, and were not related to the testatrix. Immediately after this list of names is the following clause: "All moneys in bank, mortgages, and notes, held by me, after all expenses are paid, to be equally

divided among the aforesaid heirs." There remains an amount of $3,900 to which this clause applies. In addition, there is the proceeds of a parcel of realty, as to which the testatrix died intestate.

The question is, is this sum divisible among the six nephews and nieces or among the nine legatees?

The nephews and nieces contend that the expression "the aforesaid heirs" must be construed narrowly, and that they are alone entitled. The other legatees contend that the word "heirs" is used in a colloquial sense, and is equivalent to "legatees," and that the fund is divisible among the nine.

I have been unable to find any English case in point; but there are several American cases which deal with the precise question.

In *Clarke* v. *Scott*, 67 Pa. St. 446, it is said of the word "heirs" that it "popularly often includes devisees, the persons who are made heirs—'hæredes facti'"—but the outstanding principle to be gathered from all the cases is, that that is not the natural signification of the word; and this meaning is not to be attributed to it unless the will itself renders it imperative.

In *Porter's Appeal*, 45 Pa. St. 201, the facts are singularly like the facts here. The testator had there given legacies to six nephews and nieces, and also to some strangers; and then directed his residuary estate "to be equally divided among the whole of the heirs already named in this my will, proportioned agreeably to the several amounts given to each in the body of this my will." After pointing out that popularly a legatee or devisee may be spoken of as an "heir," but, strictly speaking, an heir is one on whom the law would cast the estate if there were no will, the Court proceeds to inquire in which sense the word in the residuary clause is to be taken, and says: "We have had considerable difficulty with this question, on account of the comprehensiveness of the words 'the whole of the heirs already named;' but we cannot persuade ourselves that the testator intended to make his coachman, to whom he gave a $300 legacy, his heir also, and to admit him to the distribution of the residue along with the right heirs. Yet this absurd consequence would follow from construing the words to embrace all the previously named legatees. We think the better opinion is, that the expression refers to the six nephews and nieces who would have been legal heirs and who are named; in other words, that the word 'heirs' is to have its technical and proper instead of its popular signification. There is nothing in the text of the will to forbid this construction; and, therefore, we feel bound to adopt it."

This case does not stand alone. *Townsend* v. *Townsend*, 25 Ohio St. 477, is very similar. There the testatrix made certain

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provisions—for her husband, for her collateral blood relatives, for blood relatives of a former husband, and for persons not related by blood or marriage, also for certain religious and benevolent institutions; and then provided, "the balance of my estate shall be equally divided among the heirs herein named." The Court held that those entitled to take were confined to the named persons who came within the descriptive word "heirs," and that the technical meaning of that word must not be departed from, unless to carry out the manifest intention of the testatrix; and that, upon the whole will, the Court was not "constrained to substitute 'legatees' for 'heirs'."

In *Graham* v. *De Yampert*, 106 Ala. 279, a similar residuary clause was construed as directing a division among the legatees, when it appeared that no heirs, in the strict sense of that word, were included among the named persons; and in *Re Hull*, 63 N.Y. Supp. 725, 30 Misc. 281, the surrounding circumstances compelled the Court to think that the testator had used the word in some sense other than its strict meaning, and held that in that will it meant all the named beneficiaries.

In the will in hand, there is nothing to prevent me from giving to the word its strict meaning; in fact, there is much to prevent any other meaning being attributed to it. The testatrix has indicated her heirs by following the name of each with the words "my nephew" or "my niece." The amount of the legacies given in the first instance, $50 each, is comparatively small; and it is unlikely that she would have intended the comparatively large benefit to be conferred upon strangers. Another factor is this, that, unless she intended to differentiate between her heirs and the strangers, it would have been much simpler to have directed a division among the nine than to have adopted the more elaborate provision found in the will.

The order will, therefore, declare that the fund in question be divided amongst the nephews and nieces; the costs of all parties to be paid out of the estate.

As the testatrix died intestate with respect to a parcel of land, the proceeds of this land will bear the costs.

Order accordingly.

NOVA SCOTIA CAR WORKS (defendants, appellants) v. **CITY OF HALIFAX** (plaintiff, respondent).

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ. February 18, 1913.

1. TAXES (§ I F 2—81)—EXEMPTIONS—LIABILITY FOR SPECIAL SEWER RATES —AGREEMENT SANCTIONED BY LEGISLATURE.

"A total exemption from taxation" for a certain time upon the "buildings, plant and stock" of a company and upon "the lands on which its buildings used for manufacturing purposes are situated," granted under legislative authority in favour of the company by a city will exempt the company from liability to contribute a share of the cost of sewers constructed in streets upon which its land fronts.

[*Les Ecclesiastiques de St. Sulpice* v. *The City of Montreal*, 16 Can. S.C.R. 399, followed; *Halifax* v. *Nova Scotia Car Works*, 4 D.L.R. 241, 45 N.S.R. 552, reversed.]

Statement

APPEAL from a decision of the Supreme Court of Nova Scotia, *Halifax* v. *N.S. Car Works*, 4 D.L.R. 241, 45 N.S.R. 552, in favour of the respondent (plaintiff) on a stated case.

The appeal was allowed with costs, SIR CHARLES FITZPATRICK, C.J., dissenting.

The judgment of the Supreme Court of Nova Scotia on the case stated was that the assessment for the company's proportion of the cost of the sewer was not "taxation" from which the latter was exempt under the agreement. The company appealed to the Supreme Court of Canada.

Argument

E. P. Allison, for the appellants:—The respondent and the Court below rely on the American decisions, holding that exemption from taxation does not include special assessment. These decisions do not apply to conditions in Canada. They are all based on the constitutional limitation in the 14th amendment and the provision in State constitutions that all taxation must be equal and uniform: see *Davidson* v. *City of New Orleans*, 96 U.S.R. 97; *Illinois Central Railroad Co.* v. *City of Decatur*, 147 U.S.R. 190; *Boston Seamen's Friend Soc.* v. *City of Boston*, 116 Mass. 181. The decisions in *Chicago Great Western Railway Co.* v. *Kansas City North Western Railroad Co.*, 75 Kan. 167, 12 Am. & Eng. Anntd. Cas. 588, shews the interpretation to be given to the word "taxation" in the absence of statutory or constitutional limitations.

Every contribution demanded by the State is a tax. *Per* Strong, J., in *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal*, 16 Can. S.C.R. 399. And the decision of the Court in that case should be decisive of this appeal.

F. H. Bell, K.C., for the respondent, cites *Armstrong* v. *Auger*, 21 O.R. 98; *Illinois Central Railroad Co.* v. *City of Decatur*, 147 U.S.R. 190; *Boston Asylum, etc.* v. *Street Commissioners of the City of Boston*, 180 Mass. 485.

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SIR CHARLES FITZPATRICK, C.J. (dissenting):—Here is the apparently simple question in this case: Is the appellant, the Nova Scotia Car Co., exempt from liability to contribute to the cost of constructing certain sewers built by the respondent, the Corporation of the City of Halifax, under the provisions of the city charter?

For brevity I will refer to the appellant as the company, and to the respondent as the corporation.

By a Memorandum of Agreement made with the corporation and confirmed by the legislature, the Silliker Car Company was promised a total exemption from taxation for ten years on its buildings, plant and stock. The company has since (1911) acquired the property, privileges and franchises including the right to exemption from taxation of the Silliker Car Company and, by Act of the Legislature (ch. 41 of the Acts of 1911), this agreement is also approved of. The sewers were completed in 1908-1910, and except for the agreement, the liability of the company for its share of the cost of their construction is admitted.

The exemption clause reads as follows:—

> The city will grant the company a *total exemption* from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block, but may be divided by a street, and not to exceed twenty acres in all. In addition to these lands the company may hold, for the purposes of its business, and upon the same terms, a lot of land on the water front north of the Intercolonial Round House, Richmond, and not exceeding five acres, provided no tolls or wharfage are charged in connection therewith. At the expiry of the ten years the city agrees that the total yearly value for the assessments on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand ($50,000) dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company, which shall be charged at the minimum rate charged other manufacturing concerns.

After some general provisions authorizing the construction and maintenance of sewers, the city charter prescribes the liability of owners of property adjoining them. The important section is No. 600, which is in these words:—

> (1) Whenever any public sewer is built in any street every owner of any real property on either side of the street, fronting on such sewer in the manner provided in the next succeeding section, *shall be liable to pay to the city towards the construction of such sewer*, the sum of one dollar and twenty-five cents for each lineal foot of his property so fronting.
>
> (2) The remainder of the cost of such construction *shall be borne by the city.*

Section 605 defines what properties shall be considered as fronting on a sewer and liable to contribute to its cost.

Sections 602 and 603 provide for a filing by the city engineer on the completion of the sewer of a plan of the properties liable, which is made conclusive evidence of

> the liability of every person named therein in respect to the property of which he is therein stated to be the owner,

and which amount is constituted a lien. This liability and lien may be

> collected and enforced in the same manner and with the like remedies as by the charter are provided in respect to the rates and taxes of the city.

Finally section 605 enacts that the city collector shall retain from the proceeds of the sale of any property *for rates and taxes* the amount due in respect to such land for the construction of any *public sewer or private drain*.

The language of the sections would appear to differentiate clearly between municipal rates and taxes for which the general body of the ratepayers is liable, and the obligation to contribute to the cost of sewers and private drains imposed by the Legislature on those whose property is specially benefited. And there lies, in my opinion, the crux of this case. Can that distinction be successfully made, and if it exists, what is the effect of it on the claim to exemption?

The sewer in question was no doubt, like all sewers in a city, to some extent a public necessity as well as a private advantage to the owners of property fronting on it, and, therefore, the cost was distributed by section 600 of the charter between the general body of ratepayers and those immediately benefited.

In so far as the cost of construction bears upon the general body of the taxpayers, because the sewers meet a public necessity, one might say that the company would be exempt— it is unnecessary, however, to decide that now—but there is no reason to assume that it was the intention, notwithstanding section 362 referred to later, to impose on the general body of ratepayers that portion of the cost which represents the contribution due by the frontagers on the assumption presumably that their property is increased in value by the construction of the sewer to an amount at least equal to the sum they are required to pay.

I fail to see—and I say it with all deference—how it is possible to hold that the liability imposed by the legislature on the adjoining owner to pay $1.25 for each lineal foot of his property which fronts on the sewer can be called a tax within the meaning of that word in the exemption clause. It is, of course, a burden imposed by the legislative power upon property, to raise money for a purpose public in one aspect, but private in so far as it specially benefits the property of those called upon to contribute, and in so far as it effects that private purpose,

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can it be said to be a tax? The obligation to pay does not arise under a city by-law or ordinance and there is no rating or assessment. To "assess" means to consider and determine the whole amount necessary to be raised by rate (Lord Esher, in *Mogg* v. *Clark*, 16 Q.B.D. 79, at p. 82. There is not even ratability dependent upon the extent of the benefit derived by the property. If it fronts on the sewer under the terms of section 601, the liability is absolute. In that view, and bearing in mind that taxation is the rule, and exemption the exception, can it be fairly said that, when the agreement authorizing the city to give the company total exemption from taxation for ten years was approved of by the Legislature, it was intended that such exemption would include this special contribution to the city towards the construction of the sewer? Such a contention is so inequitable that it must be irresistible to be accepted. Where the Legislature exempts any description of property from contributing to the local requirements, it is simply increasing the taxation on the other ratepayers, and such an intention is not to be lightly assumed. The provision in section 362 (3) of the city charter that nothing contained in the charter itself shall be construed "to exempt any company, firm or individual from liability for paying any street enlarging, any sidewalk, constructing any sewer, or other betterment" cannot be easily conciliated with any such intention.

Further, it must be now considered as established that nothing but an express legislative exemption from rates can authorize that exemption. The exemption must be expressed, none can be implied, and if there be any doubt that interpretation will be adopted which least tends to impose unequal public burthens. (2 M. & G. 134-165; 11 East 675-785.) To repeat myself, I cannot find in the agreement an expressed intention on the part of the corporation to exempt the company from the special contribution imposed by the legislature on all frontagers as well as from the burden of ordinary municipal taxation.

It was argued here that the proviso in relation to the fire protection rate and the rate for water used by the company is in the nature of an exemption and excludes all other exceptions or impositions of a similar nature from the exemption. I think the proviso was inserted probably *ex majori cautela* under the idea that the provisions of the Act might possibly otherwise include the subject-matter of the proviso. As pointed out in respondent's factum there are, in addition, substantial reasons why the proviso was usefully inserted and full effect can be given to it without stretching it in the extraordinary manner contended for. The water rates of the city of Halifax are made up of two distinct parts. There is first a fire protection rate, imposed upon all real property in the city, occupied or unoccu-

pied, and rated upon the assessed values, and, therefore, in form at least analogous to the general rates and taxes, and is dealt with in the part of the charter dealing with taxation, and it was only a reasonable measure of precaution to provide that these should not be included in the exception. There is also the consumption rate, now based, in the case of manufacturing concerns, entirely on the consumption as shewn by meters. These rates vary in amount, and the second part of the saving clause is really an agreement on the part of the city, in addition to the exemption from taxation, to give the company the benefit of its minimum rates. The exception in the agreement of the ordinary water rate for fire protection and of the rate for water used by the company confirms me in the conviction that the exemption was limited to rates imposed for the general purposes of the city and does not include such charges as are incurred for some special service given for the particular benefit of the individual ratepayer.

That exemption from taxation does not include betterment charges, has been definitely decided by the Supreme Court of the United States in two very carefully considered judgments, in both of which it was held that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments: *Illinois Central Railroad Co.* v. *City of Decatur*, 147 U.S.R. 190; *Ford* v. *Delta and Pine Land Co.*, 164 U.S.R. 662, at p. 670.

These cases go much further than it is necessary to go in this case. Here there is neither an ordinary tax nor a special assessment. These decisions are not, it is quite true, authorities in our Courts, but as Lord Herschell said, in *Gas Float Whitton* (No. 2), (1897), 66 L.J. Ad. 102.

> The opinions and reasoning of the learned Judges of Courts in the United States have always been regarded with respectful consideration and have often afforded valuable assistance.

I distinguish this case from *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal*, 16 Can. S.C.R. 399, upon which so much reliance was placed here. The exemption in that case, as Strong, J., said, was made to turn on the single point whether the assessment or charge in respect of a contribution to the drain was or was not "a municipal assessment," and he held that the Seminary was undoubtedly assessed by the city in respect of the contribution and, therefore, came within the terms of the exemption enactment. In that case the by-law provides that the cost of the sewer is to be borne and paid by the owners of real estate on each side of the street by means of a special assessment to be made and levied upon the owners of real estate, and it was to cover that special assessment that the suit was

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brought. No reference is made to the point on which this case was decided below, namely, that the assessment was not imposed for the general purposes of the city, but for one particular purpose only, except possibly by Fournier, J., in *Les Eccléciastiques de St. Sulpice* v. *City of Montreal*, 16 Can. S.C.R. 399, at 406.

That judgment is not an authority on the point raised here. It is worth mention that the Chief Justice, who was with the majority in *Wylie* v. *City of Montreal*, 12 Can. S.C.R. 384, dissented in this case. As to the effect of the remarks of the Privy Council on refusing leave to appeal, I trust I may be permitted to call attention to the following points:—

The Court was evidently speaking only with reference to the Quebec statutes and their Lordships did not even refer to the provisions of the Montreal charter which they expressly state had not been laid before them. Consequently they were apparently under the impression that the sewer charges were rates in the same way as the yearly rates and taxes, and were described as rates or taxes, and that the only distinction between them and the ordinary taxes was that the former were local in application and the latter general. A case such as the present was apparently not in their minds, and the English system of municipal taxation is so different from that which prevails in the United States and Canada that such a case as this would not naturally present itself to them. Further, the reasons given in refusing leave to appeal are not equivalent to a judgment on the main question but only reasons why it was not so abundantly clear that the judgment below was so wrong as to induce the Court to allow a further appeal. This is particularly clear from the last paragraph of the judgment in which their Lordships expressly leave open, and almost invite, a direct appeal on the question involved, which they would hardly have done if they had intended their remarks to indicate a definite opinion. Since the Montreal case this question has been much discussed in the United States. It is most probable that the Privy Council would not to-day wish its observations made on refusing leave to appeal to be viewed as a direct disagreement with the unanimous judgment of the Supreme Court of the United States reaffirmed on further consideration and concurred in by the practically unanimous judgment of the State Courts, especially on a matter with which the American Courts have such ample experience, and the English none.

Idington, J.

IDINGTON, J.:—This appeal turns upon the interpretation of a sentence in a contract between the parties concerned, which reads as follows:—

1. The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which

its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block, but may be divided by a street, and not to exceed twenty acres in all.

This was confirmed by the legislature enacting thus:—

4. The exemption from taxation of the property of the said company set out in the Memorandum of Agreement is hereby confirmed.

A tax is attempted to be imposed notwithstanding this comprehensive language upon appellant and its lands thus exempted to enforce a contribution in aid of the construction of a sewer. It is attempted to be supported by references to a line of American authorities which cannot bind us. These authorities are the result partly of a development of constitutional limitations relative to taxation and partly of other causes unnecessary to dwell upon, and hence possess no weight here. Then, again, it is urged that the contract must be limited by the use of the word "taxation" in the respondent's charter. Even if the charter is to be taken as a guide I see no justification therein for the perversion of such express language as quoted above. Besides it would be slightly inconvenient for the people in the rest of Canada, where similar contracts are very numerous, to have a declaration of this Court that such plain ordinary language in a contract for exemption from taxation is to be read in light of what the respondent's charter contains or any other charter might contain.

If the respondent had desired such or any other limitation it should have expressed it in the contract. Indeed, it has expressly made exception therein relative to water rates for fire protection and rates for water used by the company and shewn thereby what limitations it desired to have inserted. The former like levies for sewer construction is by respondent's charter made a local rate affecting properties within a certain distance from water-pipe lines, and the latter though in truth supposed to be for a service and thus probably distinguishable from the ordinary notion of a tax is yet made collectable as if a tax or rate. So carefully was the contract framed in these regards that one would have supposed anything else having the like semblance to taxation should, if desired, have been provided against. The language used is plain and so clear and comprehensive and given by the statute such effect that it thereby overrides anything in the city charter, which ingenuity might suggest as in conflict with the right appellant asserts. The charter itself has express provision that specific exemptions made therein are not to extend to taxes of this kind. And if the aldermen, when they came to frame a contract with strangers, knew the terms of the charter so well as counsel seeks to persuade us they must have known them, I submit, they would have followed the ex-

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ample in that instrument and put a like provision in this contract; if in truth such was their purpose, which I gravely doubt. It is more probable that sewers were not expected by these staid gentlemen to come into fashion for ten years in the district chosen for the factory site in question.

The appeal should be allowed with costs here and in the Court below and judgment be entered accordingly pursuant to the terms of the stated case.

DUFF, J.

DUFF, J.:—By an agreement entered into between the appellant company and the respondent corporation it was provided that the company should enjoy "a total exemption from taxation" in respect of certain lands, for a specified period, and it was further stipulated that this exemption was "not to apply to the ordinary water rate for fire protection nor to the rate for water used by the company," and this agreement was confirmed by an Act of the Legislature of Nova Scotia. In the year 1908 the corporation constructed a public sewer along Clifton street opposite the lands which were the subject of the agreement. By section 600 of the charter of the corporation it is provided that

> whenever a public sewer is constructed in any street in the city, owners of real property fronting on such sewer are liable to pay to the corporation towards such construction the sum of $1.25 for each foot of such property.

By another provision of the charter the payment of this sum is made a charge upon such property. The Supreme Court of Nova Scotia has held that this impost is not a tax within the contemplation of the agreement and consequently that the "total exemption from taxation" provided for thereby does not relieve the appellant company from liability to pay it, and the corporation appeals. With great respect I am unable to agree with the opinion of the court below. The ground upon which the judgment appears to proceed is this: The payment exacted by section 600 of the corporation's charter is, it is said, in the nature of a contribution for services done by the corporation in constructing a work which constitutes an improvement or betterment in respect of the property charged with the payment; and this sort of contribution, it is said, is not within the purview of the agreement. I do not think there is any principle upon which the plain language of the agreement can be thus restricted. It was not, I think, seriously argued that the contribution required by section 600 is not a "tax" within the ordinary meaning of the word. On that point at all events it appears to me that the judgment of Mr. Justice Strong in *Ecclésiastiques de St. Sulpice* v. *City of Montréal*, 16 Can. S.C.R. 399, and the reasoning of Lord Watson published in the same volume at page

409 are conclusive. As Lord Watson says, powers to execute such works as sewers

> are entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise. *Primâ facie*, their Lordships see no reason to suppose that rates levied for improvement of that kind are not municipal taxes.

The fact that the sum levied upon each proprietor is fixed according to the length of the frontage of his property instead of varying with the assessed value of it can make no possible difference; nor can it matter in the least that the payment is required and the amount of it fixed by a specific provision of the corporation charter instead of being left to the discretion of the governing body of the municipality.

There are, moreover, two circumstances which appear to me to lend very substantial support to the view that the phrase "total exemption from taxation" is not in this agreement used in the restricted sense contended for by the corporation:—

1. The stipulation that the exemption is not to apply to the ordinary water-rate for fire protection nor to the rate for water used by the company clearly indicates, in my opinion, that sums levied as special rates for services which municipalities ordinarily perform were not regarded as necessarily excluded from the exemption the agreement has provided for. This principle of construction has been acted upon frequently in agreements relating to taxes: see *Haslett* v. *Sharman*, [1901] 2 K.B. Ir. 433, at 439.

2. In the charter of the corporation itself, sections 335, 341, 362-3 indicate that a statutory exemption from taxation was regarded by the legislature as *primâ facie* extending to such contributions.

Counsel for the respondent rested largely upon certain decisions of the Supreme Court of the United States. The decisions of that Court are, of course, entitled to the highest respect; but I think we should be going altogether too far if we should accept them as necessarily conclusive upon the meaning of a not uncommon English phrase used in a contract made in this country and especially when they are in conflict with opinions expressed by the Privy Council and by this Court as to the normal effect of such words.

Anglin, J.

ANGLIN, J.:—The matter for determination in this action is the proper interpretation of an exemption clause in an agreement between a municipal corporation and an industrial company. The question is whether a sewer rate of $1.25 per foot frontage imposed on the appellant company, under the authority of section 600 of the charter of the city of Halifax, is taxation, within the meaning of that word as used in the provision

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of the agreement whereby the city assured to the Silliker Company (whose rights and privileges are now vested in and enjoyed by the appellant, 2 Geo. V. (N.S.) ch. 41)—

> a total exemption from taxation for ten years on its buildings, plant and stock and on the land on which its buildings used for manufacturing purposes are situate.

The rate in question is what is generally known as a local improvement or betterment rate. In considering whether such a rate should be included in a "total exemption from taxation," we are not embarrassed by the difficulty which affects many of the American Courts in dealing with similar questions, namely, that, because of a constitutional provision that taxation must be uniform and equal and levied in proportion to the value of the property taxed, local improvement rates, especially when imposed as a fixed charge per foot of frontage on the improvement, are not deemed to be covered by the word "taxation" unless the context makes such a construction of it practically inevitable. For that reason most of the American cases in which it has been held that local improvement rates do not fall within a general exemption from taxation were so decided. The American Courts have, however, recognized a difference between exemptions provided for in what are called general tax Acts and those granted by special agreements, or by private Acts of the Legislature, such as we are now dealing with. The constitutional difficulty is not deemed so formidable in this latter class of cases.

As put by Mr. Justice Brewer, in delivering the judgment of the United States Supreme Court, in *Illinois Central Railroad Co.* v. *City of Decatur*, 147 U.S.R. 190, at 203:—

> It is said that it is within the competency of the legislature, having full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the Courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. . . . This is, undoubtedly, true. So we turn to the language employed in granting this exemption to see what the legislature intended.

I find nothing in the agreement (which was confirmed by 7 Edw. VII. (N.S.) ch. 70, sec. 4), to restrict the application of the word taxation. On the contrary the express exception from the exemption of "the ordinary water rate for fire protection" and of "the rate for water used by the company" rather indicates that the word "taxation" is employed in its most extended meaning—a meaning wide enough to include even a rate imposed as a payment for water actually consumed by the company. The word "total" by which the exemption is qualified implies an intention to relieve from every charge in the nature of a tax, however imposed. There is, in my opinion, no substantial distinction between this case and *Les Ecclésiastiques de*

St. Sulpice de Montréal v. *The City of Montreal*, 16 Can. S.C.R. 399, where it was held that an exemption

> from municipal and school assessments whatever may be the Act in virtue of which such assessments are imposed and notwithstanding all dispositions to the contrary

included exemption from a local improvement rate levied for sewer construction. The same view as to the effect of a general exemption from taxation was taken by the Court of Common Pleas of Upper Canada in *Haynes* v. *Copeland* (1868), 18 U.C. C.P. 150. The reasoning of the learned Judge who decided this case does not, however, impress me as convincing.

The argument of Wells, J., in delivering the judgment of the Supreme Court of Massachusetts in *Harvard College* v. *Aldermen of Boston*, 104 Mass. 470, at pages 482-486, answers the contention that the rate here in question should not be deemed "taxation" within the meaning of that word in the exempting provision of the agreement because it is a special or local rate and is levied according to the frontage of the land abutting on the improvement and not according to its value. In *French* v. *Barber Asphalt Paving Co.*, 181 U.S.R. 324, at 343-4, the following passage from Mr. Dillon's work on Municipal Corporations is quoted by the Court with approval:—

> The Courts are very generally agreed that the authority to require the property specially benefited to bear the expnse of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency.

It is true that local improvement rates are declared by section 603 of the charter of the city of Halifax "to constitute a lien upon the land" benefited and that they are for some purposes to be regarded as incumbrances rather than as taxes. But, as is pointed out in the Ontario case cited by counsel for the respondent, which is one of a series of decisions where local improvement rates were so treated, they are, nevertheless, "charges in the nature of taxes": *Armstrong* v. *Auger*, 21 O.R. 98, at 101.

With great respect for the Supreme Court of Nova Scotia, I am of the opinion that the imposition in question is taxation from which, under the terms of the agreement invoked by the appellants, they are entitled to be exempted.

The appeal should be allowed with costs here and below.

BRODEUR, J.:—I concur with Mr. Justice Anglin.

Brodeur, J.

Appeal allowed with costs; SIR CHARLES FITZPATRICK, C.J., *dissenting.*

(See Annotation on next page.)

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Annotation

Tax exemptions

Annotation—Taxes (§ I F 2—81)—Exemption.

By two Acts of the Ontario Legislature, 62 Vict. ch. 82 and 63 Vict. ch. 98, the council of the city of Stratford were authorized to pass by-laws and enter into agreements with two manufacturing companies, whereby the companies were "to be given exemption from taxation" for the lands and premises whereon their buildings were to be erected, for a period of twenty years. When these special Acts were passed, the Municipal Act in force provided, sec. 411, that a municipal council might by by-law exempt any manufacturing establishment in whole or in part from taxation, except as to school taxes, for any period not exceeding ten years; and sec. 73 of the Public Schools Act then in force provided that no by-law for exempting any portion of the ratable property of a municipality from taxation in whole or in part should be held or construed to exempt such property from school rates of any kind whatsoever. It was held in *Pringle* v. *City of Stratford*, 20 O.L.R. 246, that in the absence of anything to shew that in the special Acts the words "exemption from taxation" were intended to have a larger meaning and to exclude the exception, it should be considered, in accordance with the settled principle of construction, that the legislature did not intend to do more than to alter the general law in so far as it was necessary to permit a longer period of exemption than by that law the council could grant, or to abandon the settled policy in respect of school rates since 1892; and therefore were liable to pay school rates in respect of the property exempted by the special Acts: *Canadian Pacific R. Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 558, and *Regina ex rel. Harding* v. *Bennett* (1896), 27 O.R. 314, were distinguished. The plaintiff, on behalf of himself and the other ratepayers of the city, brought this action against the city corporation and the two companies for a mandamus compelling the city corporation to assess, levy, and collect from the companies school rates, as well for the past as for the future years of the twenty-year period, and for a declaration that the city corporation were in future bound to collect them. It was also held in the same case, that, while the plaintiff had a remedy by appeal to the Court of Revision, that was not his only remedy; and he was entitled to a declaration of the true meaning and construction of the documents under which the exemptions were claimed. In the circumstances, the measure of relief was a declaration applicable to the future only: *Pringle* v. *City of Stratford*, 20 O.L.R. 246.

An agreement between a city and a railway company which also conducted an electric lighting plant exempting from certain taxes "the tracks, right of way, wires, rolling stock, and all super-structures and sub-structures and all the properties of the" railway company does not entitle the company to an exemption from taxes on its buildings, machinery, poles and wires used in connection with its lighting plant: *Re Sandwich, Windsor and Amherstburg R. Co. and City of Windsor*, 3 D.L.R. 43, 3 O.W.N. 575, 21 O.W.R. 44.

As to institutions of learning being exempt from taxation, see *Re Sisters of the Congregation of Notre Dame and City of Ottawa*, 1 D.L.R. 329. As to exemptions from municipal rates, school taxes, etc., see *Re Osler and Town of Indianhead*, 6 W.L.R. 114 (N.W.T.) As to right of municipality to exempt from taxation and *ultra vires* exceptions, see *Carleton*

Annotation (*continued*)—**Taxes (§ I F 2—81)—Exemption.** CAN.

Annotation

Tax exemptions

Woollen Co. Ltd. v. *Town of Woodstock*, 3 N.B. Eq. 138, affirmed 37 N.B.R. 545. For exceptions and conditions and breach thereof, see *Angus* v. *School Trustees of Calgary*, 1 Terr. L.R. 111. As to waiving right to tax, see *City of Montreal* v. *Montreal Street Railway Co.*, Q.R. 35 S.C. 321 (Ct. Rev.).

ROBINSON v. THE GRAND TRUNK PACIFIC R. CO.

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April 18.

Manitoba King's Bench, Curran, J., in Chambers. April 18, 1913.

1. JURY (§ I B 1—10)—STATUTORY RIGHT—JOINDER OF SEVERAL CAUSES OF ACTION.

Where a statement of claim sets up several causes of action properly joined, one of which is akin to or within the general principles of the classes of actions which under sec. 59 of the King's Bench Act, R.S.M. 1902, ch. 40, are to be tried by a jury, the court will direct trial of the whole case to be with a jury.

[*Griffiths* v. *Winnipeg Electric R. Co.*, 16 Man. L.R. 512, applied.]

Statement

APPEAL from order of Referee, directing trial of this action by a jury.

The appeal was dismissed.

B. L. Deacon, for plaintiff.

A. Hutcheon, for defendant.

Curran, J.

CURRAN, J.:—This matter comes before me as a Judge sitting in Chambers, by way of appeal from an order of the Referee, directing the trial of this action by a jury.

The statement of claim contains two separate causes of action, one for conspiracy to cause the plaintiff to be unlawfully dismissed from his employment with the defendant company, and for conspiracy to wrongfully and maliciously lay a charge of theft against the plaintiff, with the defendant company; or, in other words, a conspiracy to defame the plaintiff by accusing him of an indictable offence. The other cause of action is for wrongful dismissal of the plaintiff by the defendant company. Actions for malicious prosecution and slander are *inter alia* by sec. 59 of the King's Bench Act required to be tried by a jury unless the parties in person or by their solicitors or counsel expressly waive such trial. And, subject to the provisions of this section, all other causes, actions, matters and issues shall be tried by a Judge without a jury unless otherwise ordered by a Judge.

The Referee, in making the order appealed from, exercised, and I think, rightly so, a discretion which, undoubtedly, was given him by the statute referred to, and on that ground I ought not to interfere.

Furthermore, I think the order was rightly made upon the principles laid down by the Court of Appeal in *Griffiths* v. *Winnipeg Electric R. Co.*, 16 Man. L.R. 512, because one, at least, of

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the plaintiff's causes of action is akin to, or within the general principles of two of those referred to in section 59, viz.—slander and malicious prosecution. I so interpret the language of the learned Chief Justice, at page 516:—

> If the case was one akin to or within the general principles of those referred to in section 59, it seems to me he (the Judge) would conclude that the policy of the law was that such a case should be tried by a jury;

and of Perdue, J.A., at 526:—

> This case is similar in nature to at least one class of actions which, by section 59, shall be tried by a jury.

I therefore dismiss the appeal with costs to the plaintiff in the cause in any event.

Appeal dismissed.

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May 2.

REX ex rel. SABOURIN v. BERTHIAUME.

Ontario Supreme Court, Latchford, J., in Chambers. May 2, 1913.

1. ELECTIONS (§ IV—93)—CONTESTS—PLEADINGS — QUO WARRANTO — CHARGING BRIBERY.

It is not necessary in a notice of motion in the nature of a *quo warranto*, charging bribery against a member of a municipal council, to state that his disqualification will be sought, where the Act under which proceedings are taken automatically disqualifies the accused if found guilty.

2. ELECTIONS (§ IV—91*a*)—QUO WARRANTO—RELATOR, QUALIFICATION OF.

A person guilty of bribery at a municipal election is not thereby disqualified from acting as a relator upon *quo warranto* proceedings to have a seat in the council declared vacant.

3. ELECTIONS (§ IV—93)—QUO WARRANTO—NAMING WITNESSES IN NOTICE OF MOTION.

The provisions of sec. 222 of the Consolidated Municipal Act (Ont.) requiring a relator to name, in his notice of motion, by way of *quo warranto*, the witnesses whom he proposes to examine are obligatory, and witnesses not so named cannot be examined.

4. BRIBERY (§ I 1—)—WHAT CONSTITUTES—HIRING TEAMS TO CONVEY ELECTORS—MUNICIPAL ELECTIONS.

The hiring of horses, teams, carriages or other vehicles for the purpose of conveying electors to or from the polls, is bribery within the meaning of sec. 245 of the Consolidated Municipal Act (Ont.), no matter what was the motive in so hiring, and disqualifies a member of the council so doing, from holding his seat.

5. ELECTIONS (§ IV—94)—CONTESTED MUNICIPAL ELECTIONS—TRIAL PROCEDURE.

Sec. 220 (4) of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, providing that the proceedings before a judge to declare a seat in the council vacant, shall be entitled and conducted in the same manner as other proceedings in Chambers, does not impose a duty upon the judge to take the evidence down in writing.

Statement

APPEAL by the defendant from the order of Johnston, Jun. J. of the County Court of the United Counties of Prescott and Russell, declaring that the election of the appellant as Mayor of

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the Town of Hawkesbury for the year 1913 was void, and that the appellant was disqualified from being a candidate for any municipal office and from voting at any municipal election or upon any by-law for a term of two years from the date of the order, the 18th March, 1913.

A. Lemieux, K.C., and *E. Proulx*, for the appellant.

N. A. Belcourt, K.C., and *C. G. O'Brian*, K.C., for the relator.

Latchford, J.

LATCHFORD, J.:—The disqualification results from a finding of the learned Judge that Berthiaume had hired a team from a livery stable keeper for the purpose of conveying electors on the day of the poll.

The principal grounds of the appeal are: that there was no admissible evidence upon which the Judge could properly find that Berthiaume had committed bribery, within the meaning of sec. 245 of the Municipal Act, 3 Edw. VII. ch. 19; that evidence, especially the evidence of the livery stable keeper, Larivière, was wrongly admitted; that the relator was himself guilty of bribery, and, therefore, incompetent to question the validity of the election; and that Berthiaume was not given notice that his disqualification would be sought.

It is also urged that, as the evidence taken down by the County Court Judge, when the witnesses were examined viva voce before him, was not read over to the witnesses and signed by them, the proceedings fail. Sub-section 4 of sec. 220 requires that proceedings before the Judge shall be "entitled and conducted" in the County Court in the same manner as other proceeding in Chambers; and, under Con. Rule 494, examinations for the purpose of a motion must, "unless otherwise ordered, be conducted in accordance with the practice upon examinations for discovery, as far as the same is applicable." Upon such examinations, when the evidence is not taken in shorthand under Con. Rules 457 and 458, the depositions are, by Con. Rule 456, to be taken down in writing by the examiner, and when completed "shall be read over to the person examined, and shall be signed by him in the presence of the parties, or such of them as may think fit to attend."

In answer it is stated—and the statement is not disputed—that the manner of proceeding was with the consent of all parties. But, apart from any question of consent, it seems clear to me that the Rules invoked have no application to a case like this. Section 232 of the Municipal Act prescribes the mode of trying cases of this kind. "The Judge shall, in a summary manner, without formal pleadings, hear and determine the validity of the election . . . and may inquire into the facts on affidavit . . . or by oral testimony."

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Latchford, J.

Sub-section 4 of sec. 220 and the Rules mentioned seem to me not to impose any obligation upon the Judge to transcribe the testimony and have it read over to and signed by the witnesses. The Judge might, under sec. 232—without taking down any of the evidence—have declared Berthiaume to have committed an act of bribery. He, however, took very full notes, and the perusal of them and of his reasons for judgment greatly facilitates the disposition of the objections raised on this appeal.

In his reasons for judgment, the learned Judge says: "I find that Mr. Berthiaume has been proved to have hired a team from John Larivière, livery stable keeper, for the purpose of conveying electors to the polls," which, by sec. 245, sub-sec. 7, of the Municipal Act, is defined as bribery; and the consequence of this, by sec. 249, is the loss of his seat, and disqualification for two years. The evidence is, only, that Mr. Berthiaume went to Larivière, and asked him to furnish his rig or team, and he said "all right," and sent it with a driver, and it was used to draw voters. Nothing was said one way or the other about payment. Mr. Berthiaume did not ask the price or whether it was volunteered, and Larivière said nothing as to price. I think that the presumption and legal conclusion must be that the rig was hired. If a man goes to a livery stable keeper, whose business is to let out horses and carriages, and says he wants a horse and driver for such a day, and nothing is said about payment, the presumption is, that he is hiring it, and is liable to pay what it is worth. Mr. Berthiaume, indeed, says that he asked the rig from Larivière, because he thought Larivière was strongly in his favour, and also because he has sometimes got rigs from Larivière for nothing, as he had often hired rigs there for funerals (Mr. Berthiaume being an undertaker), and had been good to him; but this, I think, is all too indefinite to rebut the presumption of hiring. The team came and drew voters, and it came in consequence of Berthiaume's asking for it, and not from any offer of Larivière's. Larivière also furnished a team for the relator (a candidate for the office, not of Mayor, but of Reeve), shewing that it was a matter of business with him. The great mass of corrupt practice set up dwindles down to this; and it seems too bad to unseat and disqualify Mr. Berthiaume for it, especially as Mr. Sabourin appeared to be just as bad, but I do not see any way out of it. The use of the teams probably did not affect a vote—they drew the voters indiscriminately—but the statute, sub-sec. 7 of sec. 245, is positive. It leaves no room for discussion as to motive, as do the other sub-sections of this section. It simply and positively defines the hiring of horses, etc., to be bribery; and then sec. 249 declares that any candidate guilty of bribery shall be unseated and disqualified."

While the consequences of the learned Judge's finding are not disputed, it is argued with much force that an act involving penalties so serious should not be held to have been committed, except upon clear and convincing testimony. As was well observed by Mr. Justice Gwynne, in the *Welland* case, H. E. C. 187, if the matters which constitute the offence charged consist of acts or language which are reasonably susceptible of two interpretations, one innocent and the other culpable, a very grave responsibility is imposed upon the Judge to take care that he shall not adopt the culpable interpretation, unless, after the most careful consideration he is able to give to the matter in hand, his mind is convinced that, in view of all the circumstances, it is the only one which the evidence warrants his adopting as the true one.

I am satisfied that the finding of Judge Johnston was reached only after great consideration; and that, having regard to the circumstances and the ordinary course of business between Berthiaume and Larivière, as related by the former, the finding was the only one that could be properly reached upon the evidence. It seems to me fully warranted by the evidence of Berthiaume himself.

It is objected that the evidence of Larivière, which places the fact of the hiring beyond any reasonable doubt, was inadmissible, because Larivière was not named in the notice of motion, as is required by sec. 222 of the Act when viva voce evidence is to be taken. The proceedings are statutory. The provision of the statute that the relator shall name in his notice the witnesses whom he intends to examine is imperative, and must be as strictly complied with as the prior words of sec. 222, which were considered in *Regina ex rel. Mangan* v. *Fleming*, 14 P.R. 458, where it was held that the relator, before serving his notice of motion, was obliged to file the affidavits and material upon which he intended to move.

As bribery was alleged on the part of Berthiaume, affidavit evidence was prohibited by sec. 248, and evidence had to be taken viva voce. I do not read sec. 248 as unconnected with sec. 222. The two must, in my opinion, be read together, and no witness can be examined whose name has not been mentioned in the notice of motion.

I, therefore, think that the evidence of Larivière was inadmissible. But, rejecting it wholly, there remains the evidence of Berthiaume himself—amply sufficient, as I have stated, to warrant the finding made.

There is no express finding that the relator was guilty of corrupt practices, nor was that matter in issue. It appears, however, that, like Berthiaume, he had hired a team for carrying electors on polling-day. Though guilty, he would not

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thereby be disqualified from acting as relator. There were no recriminatory charges against him; and his status as an elector was not in question: *The Dufferin Case* H.E.C. 529; *Re South Renfrew*, H.E.C. 556; and *Re N. Simcoe*, H.E.C. 617.

Berthiaume was not notified that his disqualification would be sought. But such notice was unnecessary. He received notice of a charge that he had committed various acts of bribery, and in the particulars furnished such acts are stated to include the hiring of teams. Berthiaume, accordingly, had notice of a matter which, if established, results, under sec. 249, in disqualification; and nothing more than the notice given was needed.

The appeal, on all grounds, must be dismissed. A cross-appeal was abandoned upon the argument; and, in any view that presents itself to me, was not material to be considered.

The appeal and cross-appeal failing, I make no order as to costs.

Appeal and cross-appeal dismissed.

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ARNOLD v. DREW.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. BROKERS (§ II B—11)—REAL ESTATE AGENTS—COMPENSATION — COLLUSION—FIDUCIARY RELATIONSHIP.

A real estate agent is not entitled to commission on an alleged sale of his principal's lands to a salesman in the agent's own office, holding, moreover, a close relationship with the agent, where the alleged purchaser's position was not disclosed to the principal and the latter on learning thereof repudiated the agreement.

2. SPECIFIC PERFORMANCE (§ I E—30)—CONTRACTS FOR REAL PROPERTY—AGENT'S RELATIONSHIP WITH PURCHASER.

It is a ground for refusing specific performance to the alleged purchaser that the latter is an employee of the vendor's real estate agent who made the contract, although such employee's compensation may have been upon a commission basis only and not on salary, if the business relationship of the purchaser to the agent was not disclosed to the vendor who lived in a distant city and was not aware of same.

[*McGuire* v. *Graham*, 16 O.L.R. 431, applied.]

Statement

APPEAL by the plaintiff from the judgment of Morrison, J., dismissing action.

The appeal was dismissed.

Bodwell, K.C., for the appellant.

Owen Ritchie, for the respondent.

Irving, J.A.

IRVING, J.A.:—This is an appeal from Morrison, J., who dismissed the plaintiffs' action.

The plaintiffs combined in one action a claim by Arnold for

specific performance of a contract to sell to Arnold some lots in Prince Rupert with a claim by O. M. Helgerson, Limited, for commission on the sale to Arnold.

The defendant, who resides at Vancouver, on February 26, 1912, wrote to the plaintiff Helgerson & Co., who carry on business in Prince Rupert, as follows:—

> Since writing you last, I have been considering the request which you made me in your letter to me dated January 19, 1912, that I put a price on my Prince Rupert property, and I have decided that, if you can, within the next month, sell my property as follows: lot 49, block 34, section 1, lot 38, block 17, section 1, lots 54 and 55, block 27, section 8, for ten thousand five hundred dollars ($10,500) the five hundred dollars ($500) to be your commission.
>
> The terms to be half cash and the balance in three equal instalments at 6, 12, and 18 months. . . .

This offer of employment would, if accepted, constitute Helgerson & Co. the defendant's agents, and would entitle him to their advice and assistance.

On the 1st of March, 1912, the plaintiff Helgerson & Co. wrote:—

> We have your favour of February 26th, in reply to which we have to say that your quotation of the above property has been accepted. We are enclosing herewith our certified cheque for $100 as a deposit on the property, subject to the terms of sale as quoted, and as a guarantee of good faith on the part of the purchaser until the arrival of the proper documents.

To this the defendant replied:—

> I have received your letter of the first inst. In my letter of February 26th, I did not authorize you to accept for me a deposit of $100, or to depart, in any way, from the terms mentioned in my letter. I beg to return herewith your cheque for $100.
>
> If you have found a purchaser, I am willing to complete the sale in accordance with the terms of my letter. If you have not found a purchaser before the receipt of this letter, I withdraw and cancel the price for property mentioned in my letter, and any authority therein contained to you to sell the same.

It appears to me that unless the defendant was bound by what had occurred between Arnold and Helgerson & Co. prior to the receipt by Helgerson & Co. of this letter, he, the defendant, was not bound at all. Now, what had occurred was this: Arnold had paid to Helgerson & Co. $100 and Helgerson & Co. had given him a receipt for that sum and a memo. of the sale, "but, subject to the owner's confirmation." The fact that the sale was subject to confirmation was not disclosed to the defendant.

The plaintiffs rely on this letter as a confirmation of the sale. I agree with the learned Judge that the relationship of Arnold

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to Helgerson & Co. was so close that the defendant was entitled to be told who he (Arnold) was, and what his relationship to Helgerson & Co. was, and that the interim receipt given to Arnold contained the clause that the sale was subject to the owner's confirmation, and I think, having regard to that relationship, and to the fact that the defendant was at Vancouver, Helgerson & Co., at Prince Rupert, where the property is situate, ought to have advised the defendant as to the value of the property.

The subsequent correspondence shews that Helgerson concealed from his client the fact that Arnold was in his employ. Arnold was a clerk, or salesman, in the employ of Helgerson, and it makes no difference that he was paid by commission instead of by salary.

It seems to me that, as the defendant was not informed that Arnold was in Helgerson's employ, specific performance ought not to be decreed.

The case for commission stands on even firmer ground: as to that, I am not satisfied that the agent did his duty. I think that real estate agents should bear in mind that their client has a right to expect assistance and fair play from them and that commissions are not recoverable if that assistance is withheld.

Martin, J.A.

MARTIN, J.A.:—This appeal turns upon a neat question of fact respecting the true relations existing between Arnold and Helgerson.

In a case of this kind where, as was said in *U.C. College* v. *Jackson* (1852), 3 Gr. 171, at 177:—

> All knowledge with respect to such questions is confined, for the most part, within the breasts of the parties immediately concerned . . . the testimony of those who combine for such a purpose must always be regarded with some suspicion.

I have not found the evidence of the plaintiff and Helgerson satisfactory, and I think that the plaintiff's position in the agent's office was more than the mere salesman on commission that has been contended for, assuming that would be sufficient to exonerate him. The learned trial Judge has, in my opinion, reached the right conclusion, wherein he is supported by *McGuire* v. *Graham* (1907), 16 O.L.R. 431, a case no stronger than this.

The appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss this appeal.

Considering the relationship that existed between Arnold and the defendant's agents, Helgerson & Co., and the course of their dealings, in my opinion Drew should have been informed of this so that he might have been able to say whether or not he was willing to deal with him as a principal.

Appeal dismissed.

BLEASDELL v. SPENCER.

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April 1.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin and Galliher, JJ.A. April 1, 1913.

1. APPEAL (§ I B—5)—RIGHT OF APPEAL—FINALITY OF DECISION.

An order which does not finally dispose of the substantial issues in an action is not, for purposes of appeal, a final order, but is to be regarded as interlocutory.

2. APPEAL (§ I B—12)—RIGHT OF APPEAL—RESTRAINING ORDER—FINALITY —CONTINUITY.

An order obtained by an intervening assignee for the benefit of creditors enjoining the receiver appointed at the instance of a judgment creditor by way of equitable execution in respect of the debtor's property generally from collecting rents in respect of which the assignee had the superior claim, is interlocutory and not final as regards the right of appeal, although it may have a continuous effect for an indefinite time.

[*Blakey* v. *Latham* (1889), 43 Ch.D. 23, and *Norton* v. *Norton* (1900), 99 L.T. 709, referred to.]

Statement

APPEAL from injunction order made by Morrison, J., restraining the receiver by way of equitable execution from interfering in the collection of the rents of real property which had been transferred by the judgment debtor to trustees for the benefit of creditors.

The appeal was quashed.

Charles Wilson, K.C., for the appellant.

Ritchie, K.C., for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The preliminary objection was taken that the notice of appeal was out of time. It is conceded by Mr. Wilson, appellant's counsel, that if the order appealed from is an interlocutory one, then the notice is out of time, but he contends that it is a final judgment: if so, the notice was given in time.

The plaintiff recovered in November, 1911, a judgment against the defendant, Rosa Leigh Spencer, for $1,387.50 and costs: but the same remains unpaid. In April, 1912, Miss Spencer agreed to assign all her real property to three trustees, the interveners in this appeal, for the benefit of creditors, and conveyed her real property to them, the arrangement being that the trustees after collecting the rents and keeping down the interest of encumbrances, and paying other necessary expenses, were to distribute the balance among her creditors. The trustees entered into the management of the property and the collection of rents in June, 1912. In October, 1912, plaintiff applied to the Supreme Court for the appointment of a receiver by way of equitable execution, and the order was made. The receiver then notified tenants of the property to pay the rents to him. Thereupon the trustees moved for an order permitting

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them to intervene in the action, and this being granted, they then moved for an order enjoining the receiver from interfering in the collection of said rents, and obtained an order accordingly, which is the one appealed from.

A large number of authorities were cited on both sides which go to shew how difficult it is to draw the line between what ought to be regarded for the purposes of appeal as an interlocutory order, and what a final one. It is apparent that in many cases the line is very difficult to draw. Judges have avoided laying down any precise definition in the matter. I think, however, I am within the authorities in saying that orders which do not dispose finally of the substantial issue in the action are not for the purposes of appeal final, but are to be regarded as interlocutory.

In this case it seems to me that in both form and substance, the order is an interlocutory one. The substantial bone of contention between the judgment creditor and the trustees is the right of the one or the other to exercise dominion over the property which has been conveyed to the trustees by Miss Spencer. The order appointing the receiver did not direct him to receive the property in question specifically, but only the property of the debtor. *Primâ facie*, the trustees have the right to the control of the property and the collection of the rents for the purposes of the declared trusts. If the deeds of assignment and conveyances are illegal, it was open to the receiver with the approval of the Court to bring an action to set aside these deeds, and if he succeeded he could then come back to the Court which granted the restraining order appealed from to have the same vacated. The obstacle in his way then being removed, he could receive the rents in question. It seems to me that the order appealed from was not a final judgment or order in any sense. It did not dispose of the real issue, viz.: the validity of the assignment and conveyances.

The appeal should be quashed.

Irving, J.A.

IRVING, J.A.:—I am of the opinion that this is an interlocutory order, and that the time for appealing has expired.

Martin, J.A.

MARTIN, J.A.:—On the 18th of October, 1912, Walter Ernest Hodges was appointed "receiver and manager of the estate effects and credits of the defendant . . ." without prejudice to the rights of any prior encumbrancers upon the premises and "subject to the approval of this Court . . . (to) generally manage and conduct the same, and all branches thereof, until further ordered." On the 20th of November, following Mr. Justice Morrison made, upon a summons taken out by certain trustees claiming to be prior encumbrancers upon the premises an order in Chambers by which the said receiver was "hereby

restrained from in any way interfering with" certain property which the defendant had conveyed to said trustees. The question arises as to whether this is a final or interlocutory order, and I am of the opinion that apart from other considerations, it is the latter because it manifestly is one for working out the rights of the parties, as settled by *Blakey* v. *Latham* (1889), 43 Ch.D. 23; and *Norton* v. *Norton* (1900), 99 L.T. 709.

The order is, in substance, nothing more than a direction to an officer of the Court to withdraw from the control or possession of a particular asset.

Further, if it is to be considered merely in the light of being one permanently restraining a party from interference that does not make it final, for it was held by the Court of Appeal in *Hind* v. *Marquis of Hartington* (1890), 6 Times L.R. 267, that an order indefinitely staying proceedings against one defendant as being vexatious was not final but interlocutory. And in *Stewart* v. *Royds* (1904), 118 L.T. Jo. 176, the same Court held that where an action had been dismissed because of failure to give security within a certain time limited by an order providing for dismissal in case of default, yet the order was interlocutory only and the appeal ought not to be heard as it was out of time and leave to extend the time was refused, even though the failure to give the security was owing to a mistake.

In my opinion, the objection taken must prevail and the appeal be quashed.

GALLIHER, J.A.:—I am of the opinion that the order appealed from is interlocutory, and the appeal is therefore, out of time. Galliher, J.A.

Appeal quashed.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ. April 10, 1913.

1. MALICIOUS PROSECUTION (§ II A—10)—IN CRIMINAL PROSECUTION—ESSENTIALS OF CAUSE OF ACTION.

In an action for malicious prosecution, the plaintiff's cause of action is established on proof of these essentials: (*a*) that he was prosecuted by the defendant on a criminal charge; (*b*) that the prosecution was determined in his favour; (*c*) that the defendant instituted or carried on the proceedings maliciously; (*d*) that there was an absence of reasonable and probable cause for such proceedings; (*e*) damages express or implied.

2. MISCHIEF (§ I—5)—SETTING FIRE TO THRESHING SEPARATOR—"MACHINES," "STRUCTURE," MEANING OF.

A "threshing separator" is not a "structure" within the meaning of sec. 511 of the Criminal Code 1906, but is covered by the term "agricultural or manufacturing machines" under sec. 510 of the Code.

3. MALICIOUS PROSECUTION (§ I—4)—WHETHER CHARGE WAS FOR CRIMINAL OFFENCE—DEFECTS IN INFORMATION.

A charge of setting fire to a "separator" is equivalent to a charge of attempting to destroy an agricultural machine under sec. 571

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(read with sec. 510) of the Criminal Code 1906; and where such facts have been set out in the information, but the words "contrary to sec. 511 of the Criminal Code" were added, whereas the offence was not in fact under sec. 511 as erroneously supposed, but under sec. 571, the information may none the less be relied upon as a charge of a criminal offence in an action subsequently brought for malicious prosecution.

4. PLEADINGS (§ II L—257)—MALICIOUS PROSECUTION—ALLEGING TERMINATION.

In an action for malicious prosecution, the allegation that the prosecution was determined in the plaintiff's favour is sufficient, where it sets up that "on the case being called the plaintiff was discharged from custody by the presiding judge at the sittings, whereby the said prosecution was determined," the essential allegations being (*a*) that the proceedings were terminated, (*b*) that they were terminated in the plaintiff's favour; and it is not essential, though advisable, to set out in what manner they were terminated.

[*Reday* v. *McAndrew*, L.R. 9 Q.B. 74, referred to.]

5. MALICIOUS PROSECUTION (§ III—20)—TERMINATION OF PROSECUTION—SUFFICIENCY OF ALLEGATIONS.

In an action for malicious prosecution the malicious proceedings complained of were sufficiently terminated in the plaintiff's favour if the magistrate dismissed the charge upon the proceedings being abandoned, unless the abandonment was brought about by some compromise or arrangement with the accused; the principle being that the termination must be such as to furnish *primâ facie* evidence that the action was without foundation.

[*Pearce* v. *Street*, 3 B. & Ad. 397; *Baxter* v. *Gordon, Ironsides, Fares & Co.*, 13 O.L.R. 598; *Fancourt* v. *Heaven*, 18 O.L.R. 492, specially referred to.]

6. MALICIOUS PROSECUTION (§ III—20)—TERMINATION — WHEN WITHDRAWAL BY CROWN EQUIVALENT TO NO BILL.

A prosecution is terminated if the grand jury ignores the bill of indictment; and as in Saskatchewan grand jury functions are performed by the Attorney-General and his agents the withdrawal of the prosecution by any of those officers of the Crown is of the like effect.

[*Fancourt* v. *Heaven*, 18 O.L.R. 492, referred to.]

Statement

APPEAL by the defendant from judgment of Wetmore, C.J., on the trial with a jury of an action for malicious prosecution, awarding judgment for the plaintiff for $600 damges.

The appeal was dismissed.

H. Y. Macdonald, for the appellant.

G. H. Barr, for the respondent.

The judgment of the majority of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an action for malicious prosecution. The plaintiff in his statement of claim alleges:—

1. That on December 14, 1911, the defendant falsely and maliciously and without reasonable and probable cause, appeared before a justice of the peace and charged the plaintiff with having wilfully and without legal justification or excuse, set fire to a certain structure, to wit: a 40-60 "Cock of the North" separator, valued at $1,500, belonging to the complainant, contrary to sec. 511 of the Criminal Code.

2. That upon that charge he was arrested and taken before the said

justice of the peace and was committed for trial at the next criminal Court of competent jurisdiction.

3. That as a result of being so committed for trial, he appeared at the sittings of the said Court on January 23, 1912, and on the case being called a *nolle prosequi* was entered, whereupon he was discharged from custody by the presiding Judge, whereby the said prosecution was determined; and

4. That by reason of said premises he suffered damage.

The action was tried before Wetmore, C.J., with a jury. The jury found the defendant guilty of malicious prosecution, and awarded the plaintiff $600 damages. Judgment for that amount was accordingly entered. From that judgment, the defendant now appeals.

To succeed in this action, the plaintiff must prove:—

(1) That he was prosecuted by the defendant on a criminal charge; (2) that the prosecution was determined in his favour; (3) that the defendant instituted or carried on the proceedings maliciously; (4) that there was an absence of reasonable and probable cause for such proceedings; and (5) that he has suffered damage: unless from the nature of the charge, damage is to be implied: Halsbury, vol 19, p. 677.

As to the findings of the jury on the last three of these essentials, no objection was taken on the argument before us. It was, however, strongly contended that the plaintiff had failed to establish the first two.

As to the first, it was argued that a threshing separator is not a "structure" within the meaning of sec. 511 of the Code, and that, therefore, the information disclosed no offence known to the law. The learned trial Judge expressed the view that a separator was not a "structure" within the meaning of sec. 511, and therefore the information did not set up a valid charge under that section. But he held, following his former decision in *Powell* v. *Hiltgen*, 5 T.L.R. 16, that a legal criminal prosecution was not necessary to found an action for malicious prosecution, but that it was sufficient if the defendant had set in motion the machinery of the criminal law against the plaintiff.

I am of opinion that the learned trial Judge was right in holding that a separator is not a "structure" within the meaning of sec. 511. The question whether the setting in motion of the procedure of the criminal law is a sufficient foundation for an action for malicious prosecution where no valid criminal charge is set out in the information, is one which it is here unnecessary to determine, because I am of opinion that the information does disclose a valid charge. It sets out that the plaintiff wilfully and without legal justification or excuse, set fire to a separator belonging to the defendant. Is the wilfully setting fire by one person to the goods and chattels of another, a criminal offence? I am of opinion, that it is. Sec. 510, provides as follows:—

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Everyone is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property in this section mentioned, and is liable to the punishment in this section specified, that is to say:

To seven years' imprisonment if the object damaged is

(i) Agricultural or manufacturing machines or manufacturing implements damaged with intent to render them useless.

By sec. 72, everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not. And by secs. 570 and 571, an attempt to commit an indictable offence where no express provision is made by law for the punishment of such attempt, is itself an indictable offence. A separator is an agricultural machine; and to say that the plaintiff wilfully set fire to it is, in my opinion, tantamount to saying that he intended to destroy it and render it useless. A charge of setting fire to a separator, therefore, is equivalent to a charge of attempting to destroy an agricultural machine, which, under sec. 571, is an indictable offence. Every necessary ingredient of that offence is set out in the information. The fact that the magistrate, or whoever drew up the information erroneously conceived that it was an offence under sec. 511 and expressly referred to that section, does not prevent it from being a valid criminal charge under another section so long as every essential element of the offence created by that section is set out. I am, therefore, of opinion that the plaintiff established that he was prosecuted by the defendant on a criminal charge.

It was next contended, that the plaintiff had failed to establish that the prosecution terminated in his favour. This argument was based on two grounds. First, because no proof was offered that a *nolle prosequi* had been entered as alleged in the statement of claim; and, secondly, that even if what actually occurred had been alleged, namely, that when the case was called the agent of the Attorney-General stated he would prefer no charge, it was not sufficient to shew a termination of the proceedings in the plaintiff's favour. It was admitted that a *nolle prosequi* had not been entered, but it was submitted that that allegation might be omitted altogether from the statement of claim, and that a sufficient allegation of the termination of the proceedings in the plaintiff's favour still remained. This contention the learned trial Judge upheld, and I am of opinion he was right in so doing. If we omit all reference to a *nolle prosequi* being entered, the allegation that is left is,

that on the case being called, the plaintiff was discharged from custody by the presiding Judge at the sittings, whereby the said prosecution was determined.

This, in my opinion, is sufficient. All that it is necessary to allege is that the proceedings were terminated and that they were terminated in the plaintiff's favour. It is not essential to the sufficiency of the allegation to set out in what manner they were terminated, although it may be advisable to do so: *Redway* v. *McAndrew*, L.R. 9 Q.B. 74. The allegation remaining sets out that the proceedings were determined and that the plaintiff was discharged. The discharge of the plaintiff imports a termination favourable to him.

In *Morgan* v. *Hughes*, 2 T.R. 225, 100 Eng. R. (reprint) 123, the allegation was simply that the plaintiff was released and discharged. This was held not to be sufficient, as it did not state that the proceedings were thereby terminated. Buller, J., in giving judgment, said:—

> It should have been shewn on the face of the record that the prosecution was at an end. Shewing that the plaintiff was discharged, is not sufficient; it is not equal to the word "acquitted," which has a distinct meaning. Where the word "acquitted" is used, it must be understood in the legal sense, namely, by a jury on the trial. There are various ways by which a man may be discharged from his imprisonment without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding a bill, that would have shewn a legal end to the prosecution.

But even if the allegation after eliminating the reference to the entry of a *nolle prosequi* had not been sufficient, the plaintiff was in my mind entitled to have his claim amended so as to set out what actually occurred. Such amendment was asked for, but held to be unnecessary. This objection therefore fails.

We now come to the most important question in this appeal. Is a refusal by the Crown to prefer an indictment against a person committed for trial a sufficient termination of the proceedings in the plaintiff's favour to enable him to maintain an action for malicious prosecution?

The proceedings are sufficiently terminated in the plaintiff's favour if the magistrate dismisses the charge: Halsbury, vol. 19, p. 678. Or if the proceedings are abandoned: *Pearce* v. *Street*, 3 B. and Ad. 397; unless the abandonment is brought about by some compromise or arrangement with the accused: *Baxter* v. *Gordon, Ironsides, Fares & Co.*, 13 O.L.R. 598. In this case, Anglin, J., who gave the judgment of the Divisional Court, said, at p. 601:—

> In *Wilkinson* v. *Howell* (1830), Moo. & M. 495, Lord Tenterden said: "The rule involves this principle, that the termination must be such as to furnish *primâ facie* evidence that the action was without foundation." A spontaneous abandonment or entry of *nolle prosequi* affords such *primâ facie* evidence; an abandonment due to settlement or compromise certainly does not.

It is also sufficient if the Crown-Attorney in open Court with-

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draws the charge: *Fancourt* v. *Heaven*, 18 O.L.R. 492. In this case, the defendant laid an information against the plaintiff before the police magistrate and had him arrested. On appearing before the magistrate, he was allowed out on bail to appear for his preliminary hearing on a certain day. On his appearing on that day the Crown-Attorney in open Court withdrew the charge. The plaintiff brought an action for malicious prosecution. In appeal it was contended that there had been no determination of the proceedings in the plaintiff's favour. Boyd, C., said:—

I agree with the learned trial Judge that the prosecution had terminated in favour of the plaintiff by the withdrawal of the charge in open Court by the Crown Attorney.

It has also been held sufficient if the grand jury, where an accused person has been committed for trial, find no bill. Roscoe's Nisi Prius Evidence, 18th ed., 881. The principle upon which these decisions have been based is that the particular prosecution complained of is at an end. The end, however, need not be a final and conclusive one. If the magistrate refuses to commit, or the grand jury finds no bill, the particular prosecution is concluded, although it may be lawful to institute a fresh prosecution for the same offence: Clerk and Lindsell's "Law of Torts," Can. ed., 647.

Let us now apply this principle to the facts of the case as disclosed by the evidence. The defendant maliciously and without reasonable and probable cause laid an information against the plaintiff before a justice of the peace charging him, as I have found, with a criminal offence. The magistrate committed the plaintiff for trial to the next Court of competent jurisdiction. At that Court the plaintiff appeared. On the case being called, the agent of the Attorney-General announced that he would prefer no indictment. The plaintiff was thereupon discharged. If the abandonment or withdrawal of a prosecution after it has been started, or the refusal of the grand jury to find a true bill, is a sufficient termination of the prosecution in the accused's favour to enable him to maintain an action for malicious prosecution, I am of opinion that it must be held that a refusal on the part of the agent of the Attorney-General to prefer an indictment is also sufficient. Such a refusal is nothing less than an abandonment of that particular prosecution by the Crown. It may be that the Attorney-General can subsequently prefer an indictment against him for the same offence. That, however, does not shew that the proceedings complained of are not at an end. The right of the Attorney-General to prefer a new indictment is not dependent upon the continuation of the original proceedings. In the province of Saskatchewan and Alberta, the functions which in the other provinces are per-

formed by a grand jury are performed by the Attorney-General and his agents. In the other provinces, where an accused person is committed by the magistrate, it is the function of the grand jury to say whether or not he shall be put on his trial. In this province that rests with the Attorney-General or an agent appointed by him. If a grand jury's refusal to put an accused on trial terminates the particular proceedings taken against him. I am of opinion that a like refusal by the Attorney-General or his agent must in this province be held to have a similar effect.

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The appeal therefore, in my opinion, should be dismissed with costs.

NEWLANDS, J. (dissenting in part):—I agree with the judgment of my brother Lamont, excepting as to the effect of the refusal of the agent of the Attorney-General to lay a charge. I do not think that this refusal is a termination of the criminal proceedings favourable to the plaintiff. In *Sparling* v. *Mitchell* (unreported), tried by me at Battleford, I dismissed the plaintiff's action on this ground and the facts of that case as given me by the deputy Attorney-General, convince me that my action was correct. There the defendant laid an information for perjury against the plaintiff on account of some evidence he had given in a civil case on his being examined for discovery. The magistrate committed him for trial, but the Attorney-General refused to lay a charge because the civil case had not been disposed of, and the proceedings therefore dropped. There was, therefore, no final disposition of the case, as there was nothing to prevent the Attorney-General from taking it up again as soon as the civil case was disposed of. I do not, therefore, see how it can be said, that because the agent of the Attorney-General declines to lay a charge, the case has been finally disposed of, if he can do so, as in the case I have referred to, for a reason that may be temporary only.

Newlands, J. (dissenting)

I think there should be a new trial.

Appeal dismissed, NEWLANDS, J., *dissenting in part.*

KLEM v. PUGET SOUND LUMBER CO.

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April 1.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. MASTER AND SERVANT (§ II B 8—180)—SERVANT'S ASSUMPTION OF RISKS —FELLOW-SERVANT'S NEGLIGENCE.

The claims of a man injured in the service of his master depend on the contract of service, and the implied contract of the master does not extend to indemnify the servant against the negligence of any but the master himself, nor to include the workman's assumed risks as to a fellow-servant's negligence.

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2. MASTER AND SERVANT (§ II B 8—180)—FELLOW-SERVANT'S NEGLIGENCE—MASTER'S OWN NEGLIGENCE—DIVIDING LINE.

The liability of a master to a third person or to the general public for injuries resulting through the negligence of his servant is a matter of tort, but the liability of the master for injuries to the servant himself is based on an implied obligation in the contract of hiring whereby the master indemnifies the servant against the negligence of the master himself or someone standing in his place, but not against the negligence of a fellow-servant, and hence the workman is not entitled at common law to obtain indemnity where the injury is occasioned through the negligence of a fellow-workman. (*Per* Irving, J.A.)

[*Lovell* v. *Howell* (1876), L.R. 1 C.P.D. 167, referred to.]

3. MASTER AND SERVANT (§ II A 5—115)—SELECTION AND RETENTION OF EMPLOYEES—MASTER'S LIABILITY.

Where a master does not personally superintend and direct the work of his servants, his duty is performed, at common law, if he selects proper and competent servants to do so, and furnishes the servants with adequate materials and resources for the work. (*Per* Irving, J.A.)

[*Wilson* v. *Merry* (1868), L.R. 1 H.L. Sc. 326, referred to.]

4. MASTER AND SERVANT (§ II E 5—240)—WHO ARE FELLOW-SERVANTS — IMMUNITY OF MASTER.

Under the fellow-servant rule, the immunity of the master is not limited, at common law, to those cases where the injured servant and the one through whose negligence he was injured have been actually engaged at the same work or at work on a common immediate object or near one another or in the employment of the master at the same time. (*Per* Irving, J.A.)

[*Morgan* v. *Vale of Neath Ry. Co.* (1865), L.R. 1 Q.B. 149, and *Farwell* v. *Boston Corp.*, 4 Met. (Mass.) 49, referred to.]

Statement

APPEAL by plaintiff from judgment of Gregory, J., dismissing action brought for damages for personal injuries, on the ground that there was no negligence on the part of the defendants.

The appeal was dismissed.

Higgins, for the appellant.

Harold Robertson, for the respondent.

Irving, J.A.

IRVING, J.A.:—At the hearing we disposed of all points raised before us, except with reference to the swivel, and on that point I am satisfied that the jury was sufficiently instructed, and there was evidence from which they could infer that there was no negligence on the part of the employer.

The claims of a man injured in the service of his master depend on the contract of service. The implied contract of the master does not extend to indemnify the servant against the negligence of any but himself. The liability of the master to a stranger, or the general public, is a matter of tort, but, in the case of a servant, it is a matter of contract. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is about to expose himself; these dangers are usually considered in fixing the rate of payment. By the common law, if the injury is occasioned to him by the negli-

gence of a fellow-workman, he is not entitled to obtain indemnity from the master. Archibald, J., in *Lovell* v. *Howell* (1876), L.R. 1 C.P.D. 167, put it this way:—

> When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and, amongst others, the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen. The question is, whether the injury to the plaintiff in this case did not in some sense arise from one of those ordinary risks of the service he was engaged in which must or ought to have been in his contemplation when he entered into it.

The master's duty, where he does not personally superintend and direct the work, is to select proper and competent servants to do so, and to furnish them with adequate materials and resources for the work. Lord Cairns, in *Wilson* v. *Merry* (1868), L.R. 1 H.L. Sc. 326, said:—

> When he has done this he has done all that he is bound to do.

Lord Wensleydale, in *Weems* v. *Mathieson* (1861), 4 Macqueen 215, at 227, said:—

> All the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner.

And in *Griffiths* v. *London and St. Katharines Dock Co.*, 13 Q.B.D. 259, the Court of Appeal held that, in certain circumstances, it was necessary for the servant to allege and prove distinctly that the master knew of the danger and that he, the servant, was ignorant of it.

The expression, "common employment," is often used in connection with this class of law, and because of that phrase, and because of the difficulty the Courts have experienced in defining the precise principle on which the immunity of the master in these cases rests, there has arisen an idea that the protection given by the common law as to the master is based on the theory that the injured servant had, in fact, some opportunity of observing and guarding against the conduct of the negligent one.

There is no ground for such a theory. The immunity of the master is not limited to those cases where the two servants have been actually engaged at the same work—common immediate object—or near one another, or in the employment of the master at the same time.

In *Morgan* v. *Vale of Neath Ry. Co.* (1865), L.R. 1 Q.B. 149, 155, it was held that a carpenter repairing the roof of an engine shed, and the porters moving an engine of a turntable were fellow-servants.

In *Farwell* v. *Boston Corp.*, 4 Met. 49, an engine-driver and a switch-tender were held by Shaw, C.J., to be fellow-servants.

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The business of the company is managed by John H. Moore, who visits the camp, where the accident occurred, once or twice a week or ten days.

The superintendent of the three camps, of which this was one —No. 2—was a Mr. Jose, who had been in the service of the camp since the spring of 1911—the accident took place on March 9, 1912—and who left the plaintiff's employ because the company were considering the question of getting out their logs by contract, instead of by their own men. He had conducted logging on his own account. He was well recommended by Mr. Frink, of the Washington Iron Works, and by Mr. Earles, for whom he had worked three years. During his employment by the defendant company they were satisfied with his work.

Elmer Young was foreman of No. 2 camp. He was appointed to that position by Mr. Jose. Mr. Moore says he was a competent man—a very good man—during the eighteen months he was with the defendants. He left, after the accident, on getting a position with another company. The only suggestion made as to his incompetency by counsel, in cross-examining Mr. Moore, was that Young, after the accident, was removed from camp No. 2 and put to camp No. 1. Mr. Moore says that if there was such a change it was temporary only, and that Young remained in charge of No. 2 camp until he left, some five months after the accident.

The blacksmith who made the swivel is still in the company's employ on Butte Inlet. The manager of the company says he was a good blacksmith, and there was no suggestion in cross-examination that he was incompetent.

The plaintiff admits they were all competent men except the superintendent, who was on the camp (p. 28), meaning Mr. Elmer Young, but the jury may have very properly thought that all the men were good, and that there was no negligence on the part of the company.

Martin, J.A.

MARTIN, J.A.:—I agree.

Galliher, J.A.

GALLIHER, J.A.:—In this case I do not think we would be justified in setting aside the verdict of the jury. In fact, I inclined to the view that the evidence was quite sufficient to warrant them in coming to the conclusion they did. The Judge's charge seems to me to be unobjectionable.

The appeal should, therefore, be dismissed.

Appeal dismissed

BENNETT v. NEWCOMBE.

B.C.

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1913

April 1.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A.
April 1, 1913.

1. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY — TIME FOR—RESCISSION.

The failure of a purchaser of lands to make the cash payment within a reasonable time after the hour fixed therefor under the agreement of sale, is sufficient ground for rescission by the vendor. (*Per* Irving, J.A.)

[*Bristol, Cardiff, etc., A.B. Co.* v. *Maggs* (1890), 44 Ch.D. 613, applied.]

2. CONTRACTS (§ I D 4—62*b*)—PAYMENT OF PURCHASE PRICE AS ACCEPTANCE —"REASONABLE TIME," ILLUSTRATED.

Under an alleged agreement of sale of lands stipulating for the payment of the purchase price at a fixed hour, and a cheque tendered therefor is dishonoured, what is a "reasonable time," within which to substitute a cash payment for such dishonoured cheque, may be very short, the test being the object for which the time is given. (*Per* Irving, J.A.)

[*Webb* v. *Hughes*, L.R. 10 Eq. 281, applied.]

Statement

APPEAL by the plaintiff from judgment of Gregory, J., dismissing action.

The appeal was dismissed.

D. S. Tait, for appellant.

A. D. Crease, for respondent.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal for many reasons. Both parties agreed that the time for completion was to be 10 o'clock in the morning. The plaintiff knew that another man was waiting to buy the property, and that the defendant was willing to execute an agreement for sale if the plaintiff was in a position to pay. In *Bristol, Cardiff, etc., A.B. Co.* v. *Maggs* (1890), 44 Ch.D. 616, where Maggs withdrew his proposal after some negotiations had been entered into, specific performance was refused against him because all the parties assumed the contract was still under negotiation. In *Martin* v. *Mitchell*, 2 Jac. & Walker 413, the Master of the Rolls, Sir Thomas Plumer, M.R., speaks of the vendor having a *locus poenitentiæ*. In my opinion a confirmation which only remains in the breast of the confirmer, and is never communicated to the other side, would have no binding effect. In the case where the broker acts for both parties it may be different, but even in the case of an auctioneer the bidder has a *locus poenitentiæ*. *Tracey* v. *North Vancouver* (1903), 10 B.C.R. 235, 34 Can. S.C.R. 132; and *Powell* v. *Lee* (1908), 24 Times L.R. 606, are, to some extent, illustrations of this view. In *The National Savings Bank, Hobbs' Case* (1867), L.R. 4 Eq. 9, Romilly, M.R., says:—

If A. writes to B. a letter offering to buy land from B. for a certain

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sum of money, and B. accepts the offer and sends his servant with a letter containing his acceptance, I apprehend until A. receives the letter, A. may withdraw the offer, and B. may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether. He is not bound by communicating the acceptance to his own agent.

Having regard to the circumstances of the case, I think the plaintiff was given a reasonable time. In reading *Webb* v. *Hughes*, L.R. 10 Eq. 281, where what was a reasonable time was considered, we must remember that the reasonableness must be judged with regard to the object for which the time is given. If reasonable time must be given for completing a title, that would certainly require some days, possibly many days, but when it is in making a cash payment in substitution for a cheque which has been given and dishonoured, a very short space of time in my opinion would be "reasonable time."

Martin, J.A.

MARTIN, J.A.:—I concur in dismissing the appeal.

Gallihier, J.A.

GALLIHER, J.A.:—I agree with the learned trial Judge, and would dismiss the appeal.

Appeal dismissed.

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April 19.

UNITED NICKEL COPPER CO. v. DOMINION NICKEL COPPER CO.

Ontario Supreme Court, Kelly, J. April 19, 1913.

1. CONTRACTS (§ I D 1—47)—JOINT OBLIGATION—INCOMPLETE EXECUTION.

Where a promise is intended to be made by several persons jointly, if any of such persons fail to execute the agreement, there is no contract and no liability is incurred by those who have executed the agreement.

[See *Mills* v. *Marriott*, 3 D.L.R. 266.]

2. PLEADING (§ VI—355)—COUNTERCLAIM—DAMAGES THROUGH INTERIM INJUNCTION.

Where plaintiffs claimed as assignees of mining rights under an agreement which (if ever completely made) had been rescinded with the consent of their assignors before the date of the assignment, and obtained an interim injunction restraining the defendants, the grantees of mining rights from the owners of the land, from operating or trespassing on the property, the latter may counterclaim in the action for damages for being prevented from carrying on their mining operations.

Statement

ACTION by the United Nickel Copper Company Limited and S. G. Wightman for an injunction restraining the defendants, the Dominion Nickel Copper Company Limited, from operating or trespassing upon certain lands referred to in a certain agreement, and from allowing their plant, machinery, and chattels to remain on the lands, and for damages for trespass.

J. T. White, for the plaintiffs.

R. McKay, K.C., for the defendants.

KELLY, J.:—The agreement, which bears date the 28th January, 1911, purports to have been made between B. Howard Coffin and his associates, of the one part, and the plaintiff Wightman, of the other part.

Coffin and five associates were the owners of these lands; the agreement was signed by Coffin and three of his associates; the others, Eastbrooke and Hetzel, did not sign it; Eastbrooke at that time was out of the country; Hetzel refused to enter into the agreement.

I do not consider it necessary to set out in detail all the facts, but the evidence establishes the following. The agreement was intended to grant to Wightman a right of entry upon the property, which was known as "the Mount Nickel Mine," in the Sudbury district, "for the purpose of operating the same in such manner and by such methods, together with the right to mine and use the ore therefrom and in such quantities as the party of the second part" (Wightman) "may elect." Wightman was to begin operations within twelve months from the date of the agreement, and was to pay quarterly to Coffin and his associates $2 per ton for the ore mined until payment should be made, thereout and out of the proceeds of the sale of certain stock of the Nickel Alloys Company, of the sum of $80,000. Wightman was also to pay to the other parties to the agreement $5,000 out of each $50,000 of stock of the Nickel Alloys Company sold. Coffin and his associates who made the agreement agreed that the deeds of the property should "remain in escrow to be released" to Wightman as soon as he should have completed the payment of the $80,000. It was also provided that "the party of the second part, as a part of his duties herein, in order to hold the parties of the first part, agrees to have the said Nickel Alloys Company legally bind itself to the party of the first part to have all the duties of the party of the second part herein fully performed."

At the trial it was admitted that the defendants went upon the property prior to the commencement of the action, under a right which they claim to have acquired by written agreement from Coffin and his associates; and, while admitting this to be so, the plaintiffs' counsel did not admit that this latter agreement (which was not produced at the trial) had any effect.

The plaintiffs set up that on the 14th February, 1911, Wightman agreed to transfer to his co-plaintiffs his title and interest to and in these lands, and that on the 14th February, 1912, he executed to them an assignment of his agreement of the 28th January, 1911. They also allege that they thus acquired the exclusive right to the property and to mine upon it.

I have grave doubts as to the agreement being sufficient in form to give Wightman such exclusive right; but, even if it

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Kelly, J.

had such effect, another circumstance in connection with it is fatal to the plaintiffs' claim.

The agreement was clearly intended to be made by all the persons who were owners of the property at that time, namely, Coffin and his five associates; four only entered into the agreement, the other two, for the reasons stated above, not having executed it; and it is not shewn that it was ever brought to Eastbrooke's attention. On this ground, I am of opinion that the owners of the property were not bound. In Halsbury's Laws of England, vol. 7, p. 336, it is laid down that "where a promise is intended to be made by several persons jointly, if any of such persons fail to execute the agreement, there is no contract, and no liability is incurred by those who have executed the agreement." In making this summary of the law, the author refers to a number of leading cases on the subject (some of which on the argument were cited by counsel for the defendants); but, apart from this, I find the further fact that, even if the agreement had been binding, it was put an end to in February, 1912.

Up to that time, Wightman had not paid anything to Coffin or his associates out of the proceeds of the mining operations, nor in respect of the sale of stock in the Nickel Alloys Company, though he had in the meantime sold a considerable amount of that stock; nor had he procured from the Nickel Alloys Company anything to bind that company for the performance of his obligations as contemplated by the agreement.

This was the state of affairs about the end of January and the beginning of February, 1912, when Coffin and his associates, Flint, Parsons, and Riley, who had signed the agreement, complained of Wightman's default and declared their intention of repudiating the agreement and considering it at an end.

Wightman, with one Gilder, who was associated with him, met Coffin and his three associates mentioned above, in Boston; and, on the evidence of what took place at that meeting, I find that they then agreed to the cancellation and rescission of the agreement. Wightman was evidently moved to this course by his failure to carry out several important and essential terms of the agreement.

Following this rescission and on the same day, negotiations were opened up by Wightman or on his behalf with these other parties with the object of making a new agreement, and he then made a proposal which was to be taken into consideration by them.

Wightman and Gilder then returned to New York, but before the other parties had sent a formal reply to the proposition for a new agreement, the Nickel Alloys Company—through its

secretary—forwarded to them a copy of a resolution of that company passed on the 14th February 1912, purporting to ratify the contract of the 28th January, 1911, which it declared had been accepted on the 14th February, 1911, by the stockholders of the plaintiff company. What right that company had to accept at that time is not made clear. In view of the fact that the written assignment by Wightman to his co-plaintiffs, which was produced at the trial, bears date the 14th February, 1912 (not 1911), I cannot see that the plaintiff company had any status in the matter on the 14th February, 1911. One witness, it is true, stated that this was an error for the 14th February, 1911. I have doubts of that being the fact.

On the 15th February, 1912, Coffin wrote Wightman expressing surprise at the action taken, in view of what was understood and agreed upon at the meeting held on the 12th, and repeating the understanding arrived at at that meeting. No reply or communication of any kind came from the plaintiffs afterwards.

This seems to have been the end of the negotiations. On the 14th April, Coffin wrote for himself and his associates to Wightman requesting him to discontinue all operations on the property, as nothing further had been heard from him with reference to any new negotiations, and as no business relations existed between them.

I am satisfied that there was a rescission of the agreement of the 28th January, 1911 (if any such existed) at the meeting of the 12th February, 1912. So far as the evidence shews, no further action was taken by the plaintiffs by way of operating the property down to the commencement of this action. Their conduct indicated that they treated the agreement as at an end. I see no grounds on which they can establish a claim to an injunction or damages, and the action must be dismissed with costs.

The defendants had entered upon the property in November, 1912. On the 22nd of that month, the plaintiffs obtained an interim injunction restraining the defendants from operating or trespassing upon the property, and on the return of the motion to continue the injunction it was dissolved.

The defendants having counterclaimed for damages for being prevented by the interim injunction from carrying on their mining operations, this counterclaim is allowed with costs. Evidence of the amount of damage was not gone into at the trial; and, if the defendants think it of sufficient importance to pursue this claim, there will be a reference to the Master in Ordinary to ascertain the amount. Costs of the reference are reserved until after the Master's report.

Action dismissed.

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Ex. C. 1913

Feb. 28.

PATERSON TIMBER CO., Limited v. SS. "BRITISH COLUMBIA."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, L.J.A. February 28, 1913.

1. COLLISION (§ I A—2)—FIXING LIABILITY—CONTRIBUTORY NEGLIGENCE—VESSEL COLLIDING WITH RAFT—RULES.

A vessel is not liable for a collision with a boom of logs being towed by a steam tug in a locality which is admittedly one that is dangerous for such purposes, and where it appears that the collision was due to the negligence of the tug (*a*) in shewing misleading lights, (*b*) in having too long a tow, (*c*) in having insufficient lights on the boom, and (*d*) losing control of the boom and blocking the channel, the colliding vessel being misled by the lights to such an extent that the boom of logs was not visible until it was too late to avoid the accident, and where it is shewn that the colliding vessel exercised a degree of care commensurate to the circumstances.

[*The "Devonian,"* [1901] P. 221; *Harbour Commrs. of Montreal* v. *The "Universe"* (1906), 10 Can. Ex. R. 352; *N.Y.O. & W. Ry.* v. *Cornell Steamboat Co.*, 193 Fed. 380; *The "Patience,"* 167 Fed. 855, referred to.]

Statement

ACTION against the cargo SS. "British Columbia" (Gustave Foellmer, master; length 170 feet) for having run through and scattered a boom of logs belonging to the plaintiff company while being towed by its steam tug "Erin" (Robert W. McNeill, master), at the northerly entrance to Porlier Pass from the Gulf of Georgia, about one o'clock a.m. on 15th December, 1911.

The weather was clear, occasionally overcast; wind, light S.E.; tide on the last of the flood about ¼ or ½ hour before high water slack, setting out towards the Gulf at about one and a half knots an hour. The boom was of 22 swifters, 1,500 feet in length, with a tow line of 240 feet; total length, exclusive of tug, 1,740 feet, and the tug and boom had been in the neighbourhood and a little to the east of the red bell buoy at the entrance to the channel since about 11.30, holding that position waiting for the strong tide to slacken, the tug being past the buoy, and the boom stretching behind, considerably beyond the buoy on to which the tide sets, both flooding and ebbing. As the tide slackened the tug gradually crept up till at the time of the collision the boom was about half-way past the buoy. The towing lights carried by the tug were two bright white lights in a vertical line, ostensibly under art. 3, and a white light 6 feet high about 40 feet from the end of the boom. This last light was not "a bright white light" within the definition of art. 2 (*a*), but merely an ordinary ship's lantern with a range of visibility not deposed to exceed 1½ miles instead of "at least five," as the article requires a bright white light to have.

The action was dismissed.

C. W. Craig, for plaintiff.

W. B. A. Ritchie, K.C., for defendant.

MARTIN, L.J.A.:—A boom of logs is admittedly not a vessel within the meaning of the regulations, and there is unfortunately no article, strictly speaking, which provides for the lights that should be carried when a steam vessel has such a tow, and, apart from the boom light, the proper inference to be drawn from such lights as were here displayed would be that the tug had in tow a vessel or vessels not exceeding 600 feet in length. The nature of the scene of the accident may best be gathered from the following extract from the Admiralty "British Columbia Pilot," 3rd ed., 1905, p. 130, put in by consent:—

Porlier Pass into Georgia Strait, though short (not exceeding one mile from its southern entrance until fairly in the strait) is narrow, and is rendered still more so by sunken rocks; the tidal streams run from four to nine knots, and overfalls and whirling eddies are always in the northern entrance.

CAUTION:—In consequence of the numerous dangers existing in Porlier Pass, mariners are advised to avoid that passage.

This being admittedly a locality to be avoided, it was incumbent upon those who elected to use it to exercise a degree of caution commensurate to the circumstances, and obviously it was a place where it would be difficult to handle a long boom, and only a few booms a year are taken through it, though used constantly by tugs with barges. The master of the "Erin," who on two prior occasions had fouled the bell buoy with a boom, seems to have realized this, because on approaching the bell buoy he shortened the scope of his tow line from 120 to 40 fathoms, but even at the reduced length I am satisfied that the tug and tow were still far too long for safety; even 1,200 feet would have been unsafe in the circumstances.

When the "British Columbia" opened the pass at its southern end she saw the tug, about 1½ miles off, apparently, heading across the channel behind Race Point on the west side thereof, shewing the two towing lights (in addition to the customary lights which were duly shewn by both vessels), but did not see the boom light, and proceeded at a speed of 7½ knots (her full speed being 9½) on the usual course, keeping a little to the westward of the two fixed "leading lights," bearing S. 5° E. on Galiano Island, set up for the purpose of leading a vessel through the northern entrance into the gulf a little to the east of the bell buoy. Keeping a little to the westward of that range course, so as to be sure to clear the tug, and after exchanging certain signals, which do not affect the matter, she came up to the "Erin" and passed between her and the bell buoy, in the belief, as the master and first officer testify, that the tug was towing a vessel or vessels not longer than 600 feet, and never expecting to encounter a boom, the light on the end of which they did not observe till after they had passed the "Erin," which by this time had advanced a little with the boom, so that about

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PATERSON TIMBER CO. LIMITED v. SS. "BRITISH COLUMBIA."

Martin, L.J.A.

half of it was past the bell buoy. They were keeping a proper look out, and when they saw the boom light it shewed as beyond and to the westward of the bell buoy, and broad on the port bow, about four points, and was taken to be that of a fishing boat, and as they thought they had passed the tow they proceeded and did not notice the boom till they were almost upon it, the logs not being visible for more than 50 feet or so in the water, and had only time to stop the engines before crashing through it.

The evidence was somewhat conflicting as to the position of the boom, the master of the "Erin" contending that no part of it was within 300 feet of the bell buoy, but his evidence is contradicted by one of his own seamen, William Macdonald, who on cross-examination admitted that the tail of the boom had become twisted in towards the bell buoy, and as this important statement corroborates the evidence of the "British Columbia's" officers, I accept their contention that the channel had become blocked by the boom. It was urged that even so, the "British Columbia" was in fault for not having slackened her pace, or stopped, or gone to the westward of the bell buoy, and I was at one time impressed by this submission, and for that reason have given this matter much attention, with the result that having regard to the condition of affairs that really existed, and that which the "Erin" led the "British Columbia" to believe existed, no blame can be attributed to her. If the boom light had been of such a description and so situated, or if the vertical lights had been of such a description that it or they conveyed a reasonable intimation to the "British Columbia" of the true state of affairs, then I should have found that she had negligently contributed to the collision, but as the matter stands I am forced to the conclusion that she was misled as to the nature and length of the tow, and also that the channel was, unknown to her, improperly and dangerously blocked against her. The point is that the officers of the "British Columbia" were never placed in the position of being compelled to consider the taking of any other steps than those they did take on the facts as they were unfortunately made to appear to them. I can only reach the conclusion that this collision was occasioned by the "Erin's" negligence in four particulars, viz.: (1) shewing misleading lights (see *The "Devonian,"* [1901] P. 221); (2) too long a tow; (3) insufficient lights on the boom; and (4) losing control of the boom and blocking the channel, as to which this case is stronger against her than that of *The "Athabasca"* (1890), 45 Fed. 651; wherein that vessel was held justified in breaking through a raft 1,200 feet long, in daylight, in the River Ste. Marie. Some apt cases on this question of the duties and responsibilities attendant upon the towing of booms, rafts and low-lying craft, are: *The "Alicia A.*

Washburn" (1884), 19 Fed. 788; *The "John H. May"* (1892), 52 Fed. 882; *The "Gladiator"* (1897), 79 Fed. 445; *The Consolidation Coal Company, Limited*, v. *The "Admiral Schley"* (1902), 115 Fed. 378; *The "Patience"* (1908), 167 Fed. 855; *N. Y. O. & W. Ry.* v. *Cornell Steamboat Co.* (1911), 193 Fed. 380; and *Harb. Commrs. of Montreal* v. *The "Universe"* (1906), 10 Can. Ex. R. 352.

As to the light that was carried on this boom, I have decided only that it was insufficient and have said nothing as to the number of lights that should have been carried on it, or on booms or rafts of varying lengths in these waters, because that is not a matter for me to decide, but is one to be brought to the attention of the Federal Government by those interested, and this case shews the importance, and indeed urgency of the matter, not only for the benefit of mariners, shipowners and lumbermen, but for the protection of the travelling public.

Action dismissed.

Annotation—Collision (§ I A—2)—Shipping.

Annotation

Collision—Shipping

In *Montreal Harbour Comrs.* v. *SS. "Universe,"* 10 Can. Exch. R. 352, it was held under the circumstances of the case that the "Bay State" and tow were in fault upon the following grounds: (1) Because the barge "Bath" had no pilot, and no proper look-out was kept on the "Bay State" or her tow; (2) those in charge of the "Bay State" and her tow neglected to take the precautions required under the special circumstances of the case, the tow ropes being too long, and no attempt having been made to shorten them. The "Bay State" had no lookout, and she made no signals to the tow or to the SS. "Universe," which she appears to have sighted before the "Universe" saw her; (3) there was no additional tug to control the tow, more particularly the last barge, the "Bath;" (4) neither the steam barge "Bay State" nor the barges in tow exhibited proper regulation lights, though they had got under way, and the collision occurred before sunrise; (5) the steam barge "Bay State" and tow should not have taken the St. Mary's current, as they did, with the tow in such condition as it was proved to be, more particularly in view of the position of the dredges of the Harbour Commissioners, and the place where they were moored, of which the pilots on board the "Bay State" and "Berkshire" were well aware; (6) after the collision occurred the steam barge "Bay State" and her tow continued down to Quebec without stopping to enquire what damage had been done. It was also held, that the screw steamer "Universe" and the dredges of the Harbour Commissioners were not at fault, and that the Boutell Steel Barge Company, the owners of the steam barge "Bay State," and of the barges "Berkshire" and "Bath," and the said steam barges "Bay State and "Bath" are liable for all the damages resulting from the collision: *Montreal Harbour Commissioners* v. *SS. "Universe" and SS. "Bay State,"* 10 Can. Exch. R. 352, 31 Que. S.C. 10 (Dunlop, L.J.).

Where a barge while being towed by a steam tug in the waters of Lake Huron was stranded by the careless navigation of the tug, such carelessness subsisting in the faulty steering of the tug and failure to give proper

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Annotation

Collision—Shipping

Annotation (*continued*)—Collision (§ I A—2)—Shipping.

directions as to the steering of the tow, coupled with the absence of a proper lookout on the tug, the tug was liable in damages to the owners of the barge. Under the circumstances of the case the appellants were entitled to the benefit of the limitation of liability mentioned in R.S.C. 1886, ch. 79, sec. 12, namely $38.92 for each ton of the tug's tonnage, without deduction on account of engine room: *Waldie* v. *Fullum*, 12 Can. Exch. R. 325; *Sewell* v. *The British Columbia Towing and Transportation Company*, 9 Can. S.C.R. 527, was explained and distinguished.

In order to bring himself within the remedy provided by sec. 20 (c) of R.S.C. 1906, ch. 140, a party must prove affirmatively that there was negligence on the part of some officer or servant of the Crown; to shew merely that an accident had occurred is not sufficient to establish a *prima facie case* of negligence: *Western Assurance Co.* v. *The King*, 12 Can. Exch. R. 289; *Dubé* v. *The King*, 3 Ex. C.R. 147, followed. *McKay's Sons* v. *The Queen*, 6 Ex. C.R. 1, referred to and explained.

Where the captain of a ship neglects, in the "special circumstances" of the peril then imminent, to observe the dictates of the highest prudence, and especially the just and peremptory measures of precaution which the rules of navigation enforce, the ship is liable for damages arising from a collision:—*Held*, that the profits that would have been made if the collision had not taken place are recoverable as part of the damages, and are not too remote: *Lake Ontario and Bay of Quinte Steamboat Co.* v. *Fulford*, 12 Can. Ex. R. 483.

When the master of a ship, in danger of collision with another ship, instead of porting his helm puts it to starboard and so makes the collision inevitable, the absence of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the collision from full liability if the omission to give such signal did not contribute in any way to the accident: *Tucker* v. *The "Tecumseh,"* 10 Can. Exch. R. 149. See also *Tucker* v. *The "Tecumseh,"* 10 Can. Exch. R. 44.

For other cases on collisions due to negligence, see *Butt* v. *"Dorothy,"* 1 E.L.R. 139 (N.S.); *"Ocland"* v. *"Regulus,"* 6 E.L.R. 587; *"Kelvin Austin"* v. *"Lovett,"* 35 Can. S.C.R. 616; *"Tarter"* v. *"The Charmer,"* 7 W.L.R. 417; *"Brigitte"* v. *"Forward,"* 9 Can. Exch. R. 339; *"Cadwell"* v. *"C. P. Bielman,"* 10 Can. Exch. R. 155; *"Kennedy"* v. *"The Surrey,"* 11 B.C.R. 499; *"Canadian Lake and Ocean Navigation Co.* v. *"Dorothy,"* 10 Can. Exch. R. 163; *"Wandrian"* v. *"Hatfield,"* 38 Can. S.C.R. 43; *Bryce* v. *C.P.R.*, 13 B.C.R. 446; *Montreal Transportation Co.* v. *New Ontario Co.*, 40 Can. S.C.R. 160; *"Rosalind"* v. *"Senlac,"* 40 Can. S.C.R. 54; *"Harbour Commissioners of Montreal* v. *"Albert M. Marshall,"* 34 Que. S.C. 299, 12 Can. Exch. R. 178.

BROWN v. GRAND TRUNK R. CO.

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Mar. 14.

Ontario Supreme Court. Trial before Meredith, C.J.C.P. March 14, 1913.

1. DEATH (§ II—5)—RIGHT OF ACTION—WORKMEN'S COMPENSATION.

Under the Ontario Workmen's Compensation for Injuries enactments giving any person entitled in case of death "the same right of compensation as if the workman had not been a workman," the "same right of compensation" means that which is conferred by the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33.

2. DEATH (§ II B—10) — WHO MAY MAINTAIN ACTION — APPORTIONING CLAIMANTS' LOSS.

In apportioning money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, and under the Ontario Workmen's Compensation for Injuries enactments, the true guide must be the actual pecuniary loss of each of the claimants, and the statute as to distribution of decedents' estates furnishes no satisfactory guide.

3. DEATH (§ II B—10)—WHO MAY MAINTAIN ACTION—APPORTIONMENT OF CLAIMANT'S LOSS.

Money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, or the Ontario Workmen's Compensation for Injuries enactments, may properly be apportioned by the Court in one of two ways: (1) by finding the amount of pecuniary damages which each of the claimants has really sustained, and if the whole be more or less than the fixed sums, awarding to each his proper proportion; or (2) by finding the proportion which the right of each bears to the others, and dividing the amount available accordingly.

4. DEATH (§ II B—14)—RIGHT OF ACTION — STEP-CHILDREN — APPORTIONMENT.

Infant step-children of the deceased who were dependent upon him for support have a right to share in the distribution of the proceeds of money collected under the Ontario Workmen's Compensation for Injuries enactments or the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, as damages for his death through the negligence of another, though in the apportionment of the fund they would not be entitled to as large a sum as would be children of deceased's own.

Statement

ACTION brought by the plaintiff as administratrix of her deceased husband, and as his widow, for damages caused by his death through the negligence of the defendants.

Judgment was given for the plaintiff.

R. U. McPherson, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

F. W. Harcourt, K.C., for the infants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This action came on for trial at the Hastings assizes; and, after a jury had been called but before they were sworn, a compromise was effected between the parties out of Court, and judgment was afterwards directed to be entered, in accordance with its terms, for the plaintiff, for $1,500 damages.

The action was brought by the plaintiff as administratrix of her deceased husband, and as his widow, for damages caused by his death, through, it was alleged, the negligence of the defendants; and in the pleadings it was stated that there were no chil-

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dren, the claim being made altogether in the widow's interests. But, after judgment had been directed to be entered in accordance with consent minutes filed, it was stated that there really were four step-children—children of the plaintiff by a former husband—whose right to damages should be taken into consideration.

The plaintiff was thereupon called and heard at length on the subject of the disposition of the damages; and it was thereafter directed that all such questions should stand over for further consideration before me at Chambers, together with an application to be made for an allowance to the mother, out of any part of the damages that might be awarded to the children, for their maintenance, after notice to the Official Guardian, who should represent them; and that has now been done.

The widow is 32 years of age, and the children, 6, 8, 9, and 11, and they all reside with and are supported by her at Belleville. Neither she nor any of them has any other means or any property.

There is nothing to indicate whether the liability of the defendants was a liability directly under the Fatal Accidents Act, 1 Geo. V. ch. 33, or only under the Workmen's Compensation for Injuries enactments; and so there would not be sufficient ground for restricting the rights of the parties to those conferred by the latter enactments, if they be more restricted than the other as to the persons who may recover damages; but I cannot think they are. Under the Workmen's Compensation for Injuries enactments, "any person entitled in case of death shall have the same right of compensation as if the workman had not been a workman . . . ." The same right of compensation must mean that which the Fatal Accidents Act alone confers; and, therefore, the provision that the amount recovered "may . . . be divided between the wife, husband, parent, and child" must mean the wife, husband, parent, and child provided for in that enactment; and "child" there includes step-son and step-daughter.

There is no doubt of my power to apportion the damages; that is expressly provided for in the Fatal Accidents Act, sec. 9; but the difficulty of so doing is increased by the fact that the amount recovered is an arbitrary sum.

Different methods have been adopted in dividing money thus recovered: in some cases statutes of distributions of deceased's estates have been taken as the guide, and indeed in some States seem to have been made, by legislation, to govern; but, except where they are made by legislation to rule, they cannot be the best guide; and they would be helpless in this case. That which the law says ought to be done with the property of an intestate is obviously no very strong evidence of that which he

would have done with his means if he had not been killed. The true guide must be the actual pecuniary loss of each of the claimants.

The only damages which can be recovered, in such an action as this, are reasonable damages, for pecuniary loss only, sustained by persons coming within the provisions of the Acts giving such a right of action—limited, in some cases, to a maximum fixed amount.

Accordingly, there seem to me to be but two ways in which an apportionment can rightly be made in cases such as this: first, by finding the amount of pecuniary damages which each of the claimants has really sustained, and, if the whole be more or less than the fixed sums, awarding to each his proper proportion; or, second, by finding the proportion which the right of each bears to the others, and dividing the amount available accordingly; and the latter method is better applicable than the former to the circumstances of this case.

The case would be quite different, in the apportionment of the damages, if the children were the deceased's own. It is improbable that, had he lived, they would have fared, in a pecuniary sense, from his bounty, as they would, by reason of his duty as well as his bounty, had they been his own; and it is quite probable that any of such benefits as they might have received through his earnings would largely have been only indirectly through his wife, their mother.

There is, I think, enough evidence now before me to warrant a finding that the pecuniary losses of the children altogether are equal to no more than one-half of that of the widow.

The children's shares of the damages I apportion among them as follows: the youngest six, the next eight, the next, nine, and the oldest eleven, all thirty-third parts of the fund. The method I adopt in such apportionment, in the circumstances of this case, is: a fixed age applicable to the four when forisfamiliation is probable, and when, at all events, each should be able, and, if the step-father had lived, would probably be obliged, to fare for himself and herself; then allow to each an equal share each year, from the death of the step-father until the fixed age is reached. Taking $500 as the amount available, the shares in money would be about $162, $140, $106, and $92.

Then, in regard to the application for payments to the mother out of the children's shares: the best plan that I can suggest, in the interests of mother and children, is, that the whole amount recovered in the action be paid into Court to their credit, and that half-yearly sums of say $75 be paid out to the widow for their joint support, benefit, and welfare until the fund is exhausted, or until other order shall be made; the mother to

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satisfy the Official Guardian that all money so received has been so applied before each half-yearly payment shall be made; with liberty to any one interested to apply to vary the order, at any time, should circumstances change in any material way.

If the widow be unwilling to accept this plan, her two-thirds of the net proceeds must, of course, be paid to her when demanded; but the infants' shares must be paid into Court to their credit, in the proportions I have mentioned; and no order will be made at present for payment out of any part of it; it will be better to wait for six months or so to test such method as the mother may see fit to adopt for their and her maintenance and welfare.

Judgment for plaintiff.

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NEY v. NEY.

Ontario Supreme Court, Britton, J. March 10, 1913.

1. INFANTS (§ I C—11)—CUSTODY—PATERNAL RIGHT AS AGAINST MOTHER—CONDUCT OF PARENTS.

Where a wife has voluntarily left her husband and two children, aged one and three years, respectively, "merely to scare the husband," and the husband takes her at her word and both husband and children live for about three years with the husband's parents and separate and apart from the wife, and where the wife then applies to the Court for the custody of the elder child, the custody of both children will be awarded to the husband if it appears that the interests of the children will be better conserved in that way.

2. DIVORCE AND SEPARATION (§ V A—46)—ACTION FOR ALIMONY—SEPARATION—UNPROVED INFIDELITY CHARGES.

An offer on the part of the wife to return to her husband whom she had left voluntarily is dispensed with for the purposes of her action for alimony by the fact of the husband making and persisting in allegations of infidelity against her unsupported by any testimony at the trial.

[*Ferris* v. *Ferris*, 7 O.R. 496, specially referred to.]

Statement

ACTION for alimony.

Order made granting alimony to wife and custody of children to husband.

L. F. Heyd, K.C., for the plaintiff.

T. C. Robinette, K.C., for the defendant.

Britton, J.

BRITTON, J.:—The plaintiff and defendant were married at Toronto on the 5th May, 1906, lived together as man and wife, and two children—a boy and girl—were born. Almost from the first, the married life of these parties was not a happy one. The plaintiff in her evidence charges the defendant with cruelty and abusive language; but in her statement of claim the charge is that of abandoning the plaintiff and, without just cause, refusing to live with and maintain her.

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The defendant alleges that the plaintiff was of a peculiar disposition, and given to ungovernable fits of temper; that at times she was kind, and at other times abusive, to the children. The plaintiff admitted striking the defendant at least on one occasion, but said that she was provoked to do so by the defendant. There was a great deal of quarrelling between the two, and not wholly the fault of either one.

On the 10th August, 1909, the defendant was due to return home from his work between five and six o'clock in the afternoon. Just before that time, the plaintiff, having given the children their supper, prepared to leave the house. According to her own story, she left the children in a back room, she going to a front room; and, when her husband entered by the back door, she went out of the house by the front door. The plaintiff told a neighbour that she intended to leave her husband. She went to a friend's house and remained away all night. The defendant, not finding the plaintiff, inquired of the neighbour, and got the information that the plaintiff had gone. He did not appear to be at all agitated or concerned, but simply remained all night with his children, and the next morning went with them to his father's home—both father and mother living not far away.

About 9 o'clock or a little later the following morning, the plaintiff returned to the house, saw neither husband nor children, and she, in turn, did not seem to care about their absence. The plaintiff remained in the house, making her home there, and making no request to or claim upon the defendant. After a little, the plaintiff moved out, stored the furniture, and, later on, sold it, not accounting to the defendant for the proceeds. The defendant did not ask her to account.

Ever since, the plaintiff has maintained herself by her work as a dressmaker, and has, apparently, been very comfortable and financially successful. While the plaintiff was living alone, the defendant made no offer to assist her, and did nothing for her support. For a considerable time after the plaintiff left the house, she had no communication with her husband, and made no effort to see him or speak to him.

In 1910, it is said, the plaintiff preferred a charge against the defendant for non-support; but nothing came of it.

In 1911 on more than one occasion, the plaintiff desired to see the children, but made no request to the defendant to take her back or for support.

This action was commenced on the 23rd January, 1912, but was not brought to trial until the 6th February last.

In the action the plaintiff complains that the defendant has improperly kept the children from her, and avers that she has done nothing to disentitle her to the custody of the children.

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On the 30th October, 1912, the defendant filed his statement of defence. In it he claims the custody and control of the children. After the filing of the statement of defence, and on or about the 31st October, 1912, the plaintiff captured her son Marshall, who has remained in her custody ever since.

The defendant thereupon obtained a writ of habeas corpus, addressed to his wife, to bring up the body of the child Marshall. On the 22nd November, 1912, the application of the defendant came before Mr. Justice Middleton in Chambers, and it was ordered that the application be referred to the Judge at the trial of the present action.

If the matter had rested as it was on and after the 10th August, 1909, until the commencement of this action, the question of the plaintiff's right to alimony would have been somewhat difficult, in view of the many decisions in actions for alimony.

The plaintiff voluntarily left her husband's house, in the circumstances mentioned, evidently intending that the defendant should believe that she did not intend to return. She says she only intended to scare the defendant; but the defendant took her at her word. Then the plaintiff has not been in need of assistance from her husband, and has not asked for it. It would be difficult, in these circumstances, to say that the defendant was living apart from the plaintiff without her consent or against her wish.

The case, however, does not rest there. The plaintiff—whether she is to any extent penitent or not, or whether for the sake of her children—now avows that she was always willing to live with the defendant: and, when giving her evidence at the trial, she said that she was willing to return to her husband. It did appear a somewhat reluctant consent, but it was consent, all the same.

The defendant, in his statement of defence, charges the plaintiff with want of chastity, and names a man with whom the plaintiff "had formed an improper intimacy." No evidence was offered to sustain this allegation. The plaintiff denied it.

In these circumstances, with such a charge not withdrawn and not proved, the plaintiff would be entitled to alimony without a willingness to return to her husband. Even if the defendant offered to take the plaintiff back, still persisting in the unproved charges, the plaintiff would be entitled to alimony, and any offer on her part to return would be dispensed with. *Ferris* v. *Ferris*, 7 O.R. 496, although reported mainly on the question of costs, bears out my view.

But here the defendant is not willing to take the plaintiff back. He absolutely refuses to do so. He heard his wife's evidence as to her innocence. He was not able to produce any evi-

dence as to her guilt; and yet he refuses. There is here the plaintiff's unqualified consent to return to her husband, and the defendant's unqualified refusal to receive her.

In these circumstances, the plaintiff is entitled to judgment for alimony, with costs.

As to the amount, the plaintiff is not in need; upon her own statement she has earned money and saved it, and can continue to do so. The amount should not be large; and I fix it, until otherwise ordered, at $4 a week.

As to the custody of the children, I am of opinion that in this case the paternal right must prevail. The boy, Marshall, was born on the 6th December, 1906, and so is over six years of age. The girl, Dorothy, was born on the 1st July, 1908, and is four and a half years old. It is important that these children should, if possible, be kept together and in the house and home where the defendant has his residence. The defendant must so arrange that the children shall be so kept by him. He is able to do it; I believe him quite sincere in his desire to have the children and to maintain and educate them for their good.

I do not doubt the love of the plaintiff for her children; but she is not, at present, in such a home of her own as is necessary for the welfare of these children. To secure such a home and maintain it—as would be necessary—would trench upon the plaintiff's resources to such an extent as greatly to embarrass her. Even with the sacrifices the plaintiff would be willing to make, the children could not be as well cared for with her, working as she must to maintain them, as in a properly organised household, where the defendant would be with them during reasonable hours, apart from his working-time.

Then it must not be forgotten that the plaintiff took the choice of abandoning these children, when much younger than at present, to the defendant. Whether to "scare" her husband or not, the act of the 10th August, 1909, was not a kind or motherly one.

On the other hand, I have considered the argument that the defendant admittedly was convicted at Whitby of an offence which was greatly to his discredit. The defendant says that he was improperly convicted. However that is, I have considered the case as if the offence was committed. This is a painful case; both parties are to some extent under a cloud. Apart from this offence, the defendant's reputation and character are good.

I do not think that the husband, by anything he has done, "has abandoned his right" to the custody of his children.

I have endeavoured to consider the rights and feelings of the mother, as well as of the father, the welfare of the children, their surroundings, the chances for education and improvement —in short, I have looked at this case having in mind the cases

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cited and other reported cases; and my conclusion is, that the mother must restore the boy to the father; and the order will be that the father will have the custody of the children.

The order will make provision for the access of the mother to the children, so that she may see them at reasonable intervals, and at convenient times.

The children will be maintained by their father in a home where, together, they and their father will reside.

Subject to what may be said in settling the terms of the order, I think the plaintiff's visits to the children should not be more frequent than once every three weeks, upon twenty-four hours' previous notice, and that the visits should be in the afternoon between 2 and 5.

Full provision will be made in the order and care will be taken to prevent anything being done that will not be for the good of the children.

There will be no costs to either party of the proceedings apart from the alimony action.

Order for alimony to wife and custody of children to husband.

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SIMMERSON v. GRAND TRUNK R. CO.

Ontario Supreme Court. Trial before Middleton, J. April 9, 1913.

1. MASTER AND SERVANT (§ II E 5—266)—LIABILITY—PERSON IN CHARGE—BRAKEMAN GIVING SIGNALS.

A brakeman standing on the ground and giving signals to the engineer of a locomotive engaged in transferring cars from one track to another, is a person in charge or control of the engine, within the meaning of sec. 3, sub-sec. 5 of the Workman's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

[*Allan* v. *Grand Trunk R. Co.*, 8 D.L.R. 697; *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, applied; and see Annotation to this case.]

Statement

ACTION for damages for injuries sustained by the plaintiff while in the defendants' service as a brakesman upon a train, owing, as the plaintiff alleged, to the negligence of another brakesman, who at the time was in charge of the engine.

Judgment was given for the plaintiff for $1,500.

W. S. McBrayne, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff was employed as a brakesman upon the Grand Trunk Railway. A car situated upon a transfer siding had to be removed for the purpose of placing it upon an industrial siding. This car was the second car upon the transfer siding; and, in order that it might be removed, it was neces-

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sary that the two cars should be drawn from the transfer on to the main line, and that they should then be backed so that the second car would be free of the switch leading to the transfer. The first car would then be pulled forward and backed into the transfer, and the engine could pick up the car desired and take it to its destination.

The train crew consisted of an engine-driver, fireman, and two brakesmen—the plaintiff and one Bryant. When the cars were drawn from the transfer on to the main line, the brakes were not entirely free, and the plaintiff, who was upon the cars, went to the forward end for the purpose of releasing the brakes. When the car was backed upon the main line, it was necessary for the brake to be applied, so that the car would not be carried too far after it was freed from the train.

As soon as the engine started to back, the coupling was released. The plaintiff, having released the brakes on the forward car, was passing to the rear; and, just as the signal to the engine-driver to reverse and go forward was given by Bryant, the brakesman standing upon the ground—whose duty it was to signal—the plaintiff was about to step from the forward car to the rear car. At this instant Bryant spoke to him, saying "Jump on the end car." Not clearly distinguishing what was said, the plaintiff, instead of immediately stepping across the space between the cars, hesitated for a moment, and then stepped. It was too late, as the momentary delay was sufficient to cause the end car to separate from the engine and the front car; and the plaintiff fell to the ground; fortunately being able to throw himself clear of the rails. Both feet were seriously injured, and this action is brought.

In giving his evidence, the plaintiff did not state his case clearly, although he told the facts accurately. He stated that there was no fault in anything done by the engine-driver or fireman; there was no jolt which threw him off the car. The accident would not have happened had it not been for his momentary hesitation by reason of his failure to grasp what was said by Bryant.

The jury found that there was "negligence on the part of the defendants through the defendants' employee not seeing plaintiff was on the other car before the cars parted;" which means that, in the view of the jury, it was incumbent upon Bryant, the brakesman upon the ground—whose duty it was to give the signals for the motion of the engine—to have seen that the plaintiff reached the rear car before the signal was given which caused the engine to stop and permitted the cars to part.

Allan v. *Grand Trunk R. Co.*, 8 D.L.R. 697, 4 O.W.N. 325, and *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 4 O.W.N. 51, 27 O.L.R. 165, justify the finding that Bryant was in charge or

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control of the engine, within the meaning of sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act; and I think that the jury might well come to the conclusion at which they have arrived, that Bryant, who knew that it was the plaintiff's duty to go upon the rear car, ought to have seen that the plaintiff was safely there before giving the signal in question.

At the trial, counsel for the defendants did not desire the question of contributory negligence to be submitted to the jury; so that, in this view, the plaintiff is entitled to recover $1,500, the amount awarded by the jury.

Judgment for plaintiff.

Annotation

Servant's assumption of risks.

Annotation—Master and servant (§ II E 5—260)—Assumption of risks—Superintendence.

Sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. In an Ontario case the plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—*Held* (Lennox, J., dissenting), that there was reasonable evidence that M. was, on the occasion in question a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon the findings of the jury in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M.: *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 27 O.L.R. 165.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway": *Allan* v. *Grand Trunk R. Co.*, 8 D.L.R. 697, 4 O.W.N. 325.

In the case of *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335, an overhead crane in the defendants' factory, operated by electric power, was used to raise and move heavy castings from place to place. M., the man who operated the crane, sat in a cage which ran upon rails, and from it he regulated the movement of the crane; when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved. The crane had been in use where the plaintiff, a foreman moulder, was working, and he had told M. that he did not require it any more, and, while M. was moving it away,

Annotation (*continued*)—**Master and servant (§ II E 5—260)—Assumption of risks—Superintendence.**

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Annotation

Servant's assumption of risks.

it was raised above the plaintiff's head, the cable parted, and a heavy hook attached to the cable fell and injured the plaintiff. In an action to recover damages for the injuries sustained, the jury found that the injuries were caused by the negligence of M. in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable:—*Held*, that M. was a person having the charge or control of an engine or machine upon a railway or tramway within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160; and the defendants were answerable for his negligence. Clause 5 was held to be much wider in its scope than as it stood in the first Ontario Act, 49 Vict. ch. 28, which dealt with this subject.

For a general discussion of the law relating to negligence of a fellow servant, where an action is brought to recover under this section of the Workmen's Compensation for Injuries Act, where there is a person in a position of superintendence whose orders resulted in injury to the plaintiff, see *Brulott* v. *Grand Trunk Pacific R. Co.*, 24 O.L.R. 154.

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May 15.

Ontario Supreme Court, Middleton, J. May 15, 1913.

1. CORPORATIONS AND COMPANIES (§ V E—221)—EFFECT OF PURCHASE OF STOCK—RIGHT OF ACTION.

An assignment of a share of stock in a company, made more than one month after a winding-up order was entered, although not proceeded with, is inoperative as a transfer of stock to qualify the transferee to sue to set aside a sale of the assets of the company by the assignee of the company for the benefit of creditors, on the ground that one of the inspectors of the estate was interested in the purchase.

2. ASSIGNMENTS FOR CREDITORS (§ III B—20)—SALE OF ASSETS—SUIT TO VACATE—RIGHT OF STOCKHOLDER TO MAINTAIN.

Under an assignment by a company of its assets upon trust to apply the proceeds in payment of its debts and to pay any balance to the company, any right to sue to set aside a sale of the assets made by the assignee, upon the ground that one of the inspectors of the estate was interested in the purchase, is vested in the liquidator and not in a creditor or shareholder.

3. ASSIGNMENTS FOR CREDITORS (§ III B—20)—SALE OF ASSETS TO INTERESTED PARTY—VALIDITY.

A sale by a company's assignee for the benefit of its creditors was not vitiated on the ground that an inspector of the estate was interested in the purchase, though he had not formally resigned his position, where he did not participate in the negotiations leading up to the sale, and his act in signing a memorandum on the margin of the conveyance was purely formal and at the suggestion of the purchaser.

4. PARTIES (§ II A 6—95)—ASSIGNMENT FOR BENEFIT OF CREDITORS—SALE TO INSPECTOR—SUIT TO AVOID.

In an action to set aside a sale of the assets of a company made by its assignee for the benefit of creditors because one of the inspectors of the estate was interested in the purchase, any question as to his right to retain profits derived by him cannot be considered, if neither the company nor the inspector is a party to the action.

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Statement

ACTION by Dilman B. Shantz, on behalf of himself and other creditors and shareholders of Jacob Y. Shantz & Son Company Limited, to set aside a sale of the assets of the company by the defendant Clarkson, the assignee of the company for the benefit of creditors, to the defendant Gross; upon the ground that one Jacob B. Shantz, an inspector of the estate, was interested in the purchase.

The action was tried before MIDDLETON, J., without a jury, at Berlin, on the 13th May, 1913.

M. A. Secord, K.C., for the plaintiff.

W. N. Tilley and *R. H. Parmenter*, for the defendant Clarkson.

W. C. Chisholm, K.C., for the defendant Gross.

Middleton, J.

MIDDLETON, J.:—On the 28th February, 1912, the company made an assignment to the defendant Clarkson of all its assets, upon trust to sell and convert the same into money, and to apply the proceeds in payment of the debts, and to pay the balance, if any, to the company.

[The learned Judge then referred to a proceeding for the winding-up of the company and the making of a winding-up order, which did not become effective.]

On the 19th March, a meeting of the creditors was held. Mr. Jacob Shantz, Mr. Butler, and Mr. Whitehouse were appointed inspectors. The inspectors met immediately after the shareholders' meeting, and instructed the assignee to draw up an advertisement for the sale of the business as a going concern.

An advertisement was accordingly published, but the sale was not proceeded with pursuant to it, as the plaintiff desired a postponement, hoping that he would be able to make financial arrangements which would enable him to purchase the property, and organise a new company in such a way that the creditors would receive payment in full, and that he and other members of the old company, who had become personally responsible to creditors, would in this way be relieved from liability.

The sale was accordingly adjourned until the 2nd May. In the meantime, and before the date first fixed for the sale, an arrangement had been entered into between the plaintiff and his brother, the inspector, Jacob Shantz, by which Jacob was to assist in the purchase and to take stock in the proposed new company.

Upon this coming to the knowledge of the assignee, he informed Jacob that he ought at once to resign, as it would be improper for him to be interested in the purchase while still inspector. Mr. Shantz did not formally retire, but accepted the view of the assignee, and withdrew from the meeting of inspectors; and thereafter, save as to the formal execution of the con-

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veyance, took no part as inspector. He did not learn anything, in his capacity as inspector, not otherwise fully known to him; and he took absolutely no part in the subsequent sale.

Quite unknown to the assignee, Jacob Shantz had been negotiating with the defendant Gross. Gross was interested in the company, and was contemplating purchasing if D. B. Shantz (the plaintiff) did not himself purchase: so as to protect the creditors and to minimise his own loss as a creditor and as surety. Jacob Shantz, in all that he did, acted with perfect openness and propriety. His position was known both to the plaintiff and to Gross. If his brother could purchase, as he expresses it, he "was with him;" if his brother failed to purchase, then he "was with Gross" to aid him.

When the property was offered for sale, a reserved bid of $75,000 had been fixed by the assignee and the other two inspectors. The best bid was made by Gross, who offered $70,000. The $75,000 was a sum estimated as being required to pay the creditors in full.

The offer made by Gross was rejected, and the negotiations were continued; the plaintiff hoping for and seeking delay, believing that he might yet be able to obtain financial assistance; but it was plain to all concerned that this hope would never be realised. Finally—after notice to the plaintiff—the assignee and the inspectors other than Shantz agreed to accept $70,000 from Gross; Gross assuming all liabilities incurred by the assignee after the date of the assignment, so that the $70,000 should be available for the creditors. It now appears that this sum will be sufficient to pay the creditors in full, or almost in full.

The sale was a good sale, and, in the interest of all concerned, it should not be interfered with unless there is no other alternative.

The plaintiff, prior to the liquidation of the company, had held some 459 shares of the capital stock; but before that date he had, with the assent of the company, transferred this stock.

On the same day that the company assigned—the 28th February, 1912—Shantz himself executed an assignment for the benefit of his creditors.

In these two ways he had at this time divested himself of all title as stock-holder. He is not shewn to be a creditor of the company.

Apparently for the purpose of giving trouble, the plaintiff obtained an assignment from his wife of one share of stock, which she held. This assignment is put in at the trial, and bears date the 2nd April, 1912. I have suspicion as to that being the actual date of the assignment. This assignment is not shewn to have been in any way approved; and, being made more than a month after the date of the winding-up order, is inoperative as a trans-

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fer of stock; but it may operate as an assignment of any dividend which might be payable to the shareholders as the result of the liquidation.

It is by virtue of the supposed ownership of this share that the plaintiff claims a locus standi to maintain this action. He issued his writ on the 18th May, 1912, after the contract with Gross, but before a conveyance had been made in pursuance of that contract—the conveyance being dated the 20th May, and registered on the 27th May, after the registration of the lis pendens in this action. In the meantime a new company had been incorporated; and Gross, on the 21st May, conveyed to it. This company has been in possession and operating the plant for the year during which this action has been pending; and the $70,000 paid by Gross has been held by the assignee.

I think the plaintiff fails, for various reasons.

First, he has not been shewn to be either a creditor or shareholder. On the evidence, there is no suggestion that he was a creditor; and I think the transfer to him of the one share of stock after the date of the winding-up order did not make him a snareholder.

Secondly, I do not think that the right of action, if any, is vested in the shareholder. Under the trust deed, the creditors are first to be paid, and the money is then to be held for the company. Even if a shareholder or creditor, the plaintiff does not represent the company. The rights of the company are vested in the liquidator.

In the next place, although Jacob Shantz had not formally resigned his position as inspector, he was given to understand that he could not take any part in the deliberations of the inspectors, by reason of his contemplated interest in the plaintiff's proposed purchase; and from that time on he took no part whatever in the negotiations leading up to the sale. It cannot be said that he in any way abused a fiduciary relationship.

It is true that Jacob Shantz signed a memorandum in the margin of the conveyance to Gross. This, it was said, was done at the request of the purchaser, who deemed it essential to perfect the conveyance. But his act in joining in the conveyance was purely formal.

The case is entirely different from any of the cases cited, because there was no knowledge on the part of Clarkson that Shantz had any interest in the purchase made by Gross. There was no collusion in any sense of that term. Clarkson, voicing the views of the creditors, desires to affirm the sale. In no other way can these creditors expect to receive payment in full of their claims. They have no interest in setting aside the transaction.

If the sale was at an undervalue—which is not alleged—the creditors are not concerned; the company alone is interested.

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Gross was not disqualified from being the purchaser. It was open to him to bid. If Shantz, the inspector, by reason of his sub-contract, is disqualified from keeping for himself any profits he may make out of the transaction, that is a matter that cannot now be dealt with; for the company, who alone could claim it, and Shantz, who alone could be liable, are not before the Court.

I would be the first to deprecate any attempt to narrow the beneficial equitable doctrine which precludes a person occupying a fiduciary position from himself purchasing without the concurrence of all concerned; but this case illustrates what has often been pointed out, that equitable doctrines must not be pushed to such an extent as to produce a palpable absurdity. When it is realised that in this case an insolvent man, who has assigned for the benefit of his creditors, takes a transfer of one share in a company in liquidation and seeks to set aside a sale of property made by the assignee of the company, which has secured to the creditors payment in full—a result which the plaintiff hoped for, but proved unable to bring about—and that this action is brought just at the critical moment of the closing of the transaction, and has resulted in withholding $70,000 from the body of creditors for a year, and when it is not suggested that any other shareholder of the company has any sympathy with the contention put forward by the plaintiff, it is seen how utterly devoid of any semblance of equity this action is.

The action is dismissed with costs.

Action dismissed.

LARCHER v. TOWN OF SUDBURY.

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May 13.

Ontario Supreme Court, Lennox, J. May 13, 1913.

1. DEDICATION (§ I A—3)—PUBLIC HIGHWAYS—ACTS CONSTITUTING DEDICATION.

That a patentee of land, in subdividing it, agreed to open a public road along a given line, that a road was opened and its limits defined by a fence, and that the patentee and his grantee performed statute labour on the road for several years, shews an intention to dedicate the road as a public highway.

2. DEDICATION (§ I A—3)—HIGHWAYS—ACTS OF PATENTEE.

An owner of land is bound by his acts, both before and after issuance of a patent, shewing an intent to dedicate it as a public highway. [*Beveridge* v. *Creelman*, 42 U.C.R. 29, and *Rae* v. *Trim*, 27 Gr. 374, referred to.]

3. HIGHWAYS (§ I A—4)—MUNICIPAL SUCCESSION TO TOWNSHIP'S RIGHTS.

When certain territory which formerly constituted part of a township became part of a town, the town succeeded to the rights and obligations of the township concerning land in that territory dedicated as a highway.

4. DEDICATION (§ I A—3)—HIGHWAYS—MAINTENANCE OF GATES—EFFECT.

Proof of maintenance of gates across a road is not controlling on the question as to whether it was dedicated as a public highway, where

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the evidence of intent to dedicate is clear, and it does not appear that the dedicating owner or his grantee maintained or sanctioned the gates, while it is shewn that there was never any interruption of user of the road, since time does not run and obstructions do not count against the Crown.

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5. PLANS AND PLATS (§ I—3)—MUNICIPAL POWERS—APPROVAL OF PLAN.

Inadvertent action of a town council in approving a plan for a subdivision of land not shewing a public road previously dedicated by a land owner, does not affect the town's right to subsequently assert the existence of such highway, as against a purchaser of land adjoining the road who knew of its existence, and of the town's claim thereto, especially in view of the Land Titles Act, R.S.O. 1897, ch. 138, sec. 26, in force at the time of the filing of the plan, providing that all registered lands are to be taken to be subject to any public highway, etc., subsisting; and in view of the provisions of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) ch. 19, secs. 629, 632, for proceedings to close or dispose of public highways.

Statement

ACTION for trespass to land claimed by the plaintiff as his, but asserted by the defendants to be part of a highway.

A. Lemieux, K.C., for the plaintiff.

G. E. Buchanan, for the defendants.

Lennox, J.

LENNOX, J.:—The land in dispute in this action is part of the west half of lot 4 in the 4th concession of the township of McKim, in the district of Nipissing. This half lot, 160 acres, was patented to Samuel Robillard on the 19th May, 1893, and is now within the limits of the town of Sudbury. Robillard was in rightful possession as locatee from 1887 or 1888, and made his final payment to the Crown on the 15th April, 1893.

Before the patent, Robillard determined to subdivide; and, in selling to Edward Dubreuel and Edward Dubreuel junior, he agreed to open a public road, where the road in dispute is now, connecting what is now Murray street with the portion of the said half lot lying north and east of the Junction creek. Thereupon the Dubreuels entered into possession of their respective parcels, the road was opened, a bridge built by Robillard and Edward Dubreuel the younger; and the elder Dubreuel, as owner of the land now owned by the plaintiff, defined the limit of the roadway and of his own land, as the same is now contended for by the defendants, by erecting a brush fence between his property and the roadway as it was then recognised by all parties interested, from near the south-easterly corner of the bridge, curving south-westerly until it intersected the easterly boundary of Murray street as it now is. It has been satisfactorily established that this brush fence was replaced by a better one, and this again by a post and wire fence; all built by Dubreuel the elder. These posts are there yet, and they marked an undisputed easterly boundary of the defendants' alleged highway until the plaintiff attempted to extend his boundary westward by building a fence along the eastern side of Murray street and cutting off access to the road and

bridge in question. This road and the road beyond the bridge were laid out and formed, and a connecting bridge built, just where the present bridge stands, fully a quarter of a century ago.

The plot of land owned by Dubreuel the elder became the property of Mr. J. H. Clary. He subdivided and filed a plan. That portion of it affecting the issues in this action are lots 6, 8, 7, and 9, now owned by the plaintiff. This plan shewed no road except Murray street touching upon or crossing these lots. It bears this certificate: "Sudbury, July 20th, 1906. The Council of the Town of Sudbury, three-quarters of the members thereof being present, hereby resolve that we hereby approve of this plan." This bears the corporate seal and is signed by the Mayor and clerk. Murray street, the only street shewn, is less than 66 feet wide. Upon this endorsement the plaintiff practically rests his case; and the effect of it has to be determined in this action. Before dealing with this point, however, it will be necessary to consider and determine whether or not, prior to the endorsement of this certificate, the roadway in question had become "a common and public highway."

I have come to the conclusion, upon the evidence, that both Robillard and his grantee clearly intended to dedicate the road in question as a public highway, and recognised and treated it as a highway, by doing statute labour upon it and otherwise, for a number of years. It is true that the bridge and the first fence may have been built before the patent issued, as in *Beveridge* v. *Creelman*, 42 U.C.R. 29, and *Rae* v. *Trim*, 27 Gr. 374; but here there was a continuous offer until it was accepted and acted upon by the Township of McKim, as I shall shew. Although not a complete dedication at the time, perhaps, the owner was bound by his acts, both before and after the issue of the patent, as held in the two cases above quoted. As a matter of fact, however, neither the patentee nor the adjoining owner did anything at any time except in recognition and furtherance of the dedication.

Distinguishing between the road and the bridge, Robillard says that the township took over the road definitely in 1891; and the minutes of council bear this out. On the 6th May, 1891, they appointed a special committee to report as to rebuilding the road near the bridge. There was a special meeting for consideration of the report on the 13th May, and it was then resolved to do the work by "statute labour tax," and that it be done "under the supervision of Robillard as pathmaster for that section where the road is used." The minutes of the 27th August, 1891, contain a resolution to call for tenders for a bridge—said to be another bridge upon the road in question. The minutes of the 8th October, 1891, record the appointment

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of Xavier Pilton to oversee the expenditure of the poll-tax of the township where he resides, and give acknowledgments, etc.

The Town of Sudbury succeeded to the rights and obligations of the township when this territory became a part of the town. When that happened has not been shewn—but it was evidently before the 6th August, 1896. From that date, the town records shew occasional expenditures on road and bridge, amounting to about $380.

I am clearly of opinion, then, that on the 20th July, 1906, when the certificate approving of plan M. 59 was endorsed, the disputed land—the road in question—had become and was a common and public highway of and within the town of Sudbury.

I dealt with the question of gates at the trial. The only reliable evidence was as to gates north of the bridge, and so north of the land in question. If the evidence was pointed to the question of dedication, it fails, as the evidence of intent and dedication is clear, and it is not suggested that Robillard or his grantees maintained or sanctioned a gate, and Robillard's evidence is clearly the other way. There never was any interruption of user, and time does not run and obstructions do not count as against the Crown.

Now as to the question of the effect of the alleged approval by the council. Does this act effect a conveyance or surrender of the highway or estop the municipality? Clearly not. As to estoppel, I am of the opinion that there may be cases in which this doctrine will grip and hold an individual clothed with absolute power, and yet not bind a municipal corporation to the act or neglect of its statutory agent. In the latter, the question "What were the powers conferred upon the council?" must be met. But, aside from this, there are no equities in support of it. The evidence shews that the council, if it was the act of the council, simply blundered. It is shewn too that Mr. Clary, for whom the plan was made and filed, never intended that it should touch or interfere with the highway, and did not know in fact that the subdivision embraced land covered by the highway. These are not, perhaps, determining points in themselves. But they are secondary considerations when inquiring as to the vital points connected with a plaintiff invoking estoppel.

The action is without merits. The roadway was an open, travelled, and conspicuous highway—visible to everybody. The plaintiff knew of it, saw it, inquired about it, and knew that the defendants claimed it, before he bought. He saw the boundary-fence, and must be taken to have known that what he bought outside that line of posts was not land, but a lawsuit with its precarious results. I cannot give judgment for the

plaintiff upon the ground of estoppel. It was not shewn that the plaintiff as a matter of fact knew about this plan at all; but, as it is filed, he has perhaps a right to say that he had legal notice of it. Take it in this way, and what had he the right to conclude? That the street, not being shewn upon the plan, was surrendered or closed? I don't think so. Sudbury registrations are under the Land Titles Act. Under sec. 26 of the Act in force at the filing of this plan, R.S.O. 1897 ch. 138, and under sec. 24 of the present Act, all registered lands, without any notice thereof upon the registry, are to be taken to be subject to "any public highway, any right of way, watercourse, and right of water and other easements," subsisting in reference thereto. And in 1906, under R.S.O. 1897 ch. 138, sec. 109, it was not necessary, as it is now under the Land Titles Act of 1911, sec. 105, that the plan should shew "all roads, streets . . . or other marked topographical features within the limits of the land so subdivided." In fact, as a matter of law, at that time and under that Act, subject to one exception only, the land-owner, without consulting the council, could file any plan he liked. The exception is to be found in sec. 110 of R.S.O. 1897 ch. 138, and sec. 630 of the Municipal Act, which prevent the establishment of a street or highway of less than 66 feet in width without the consent of the council "by a three-fourths vote of the members thereof." The council, therefore, only spoke as to the width of Murray street, and consented to its being only 50 feet. They had jurisdiction to sign for that purpose, and only for that purpose; and that is what they did approve of in fact, as shewn by the reference to "three-fourths" of the members in the certificate itself. Anything beyond this would be ultra vires. The result is obvious. The plaintiff had a right to infer the council's approval of the narrow street; and, buying upon the faith of this, he has the right to rely upon this road as a highway and outlet. Estoppel should aid him to this extent, and no further.

Is there any other way of putting it for the plaintiff? I think not, but there is a stronger way of putting it for the defendants, and this because there are statutory methods provided by which alone highways can cease to be highways. This highway remains the property of the town until closed or disposed of under the provisions of the Municipal Act. The rights of persons interested to be heard and the requirements as to notice by posters and publication in a newspaper and provision for a substituted road and compensation, in some cases, must all be accorded and strictly complied with before a highway can be legally stopped up, altered, diverted, sold, or disposed of by the municipal council: Consolidated Municipal Act, 3 Edw. VII. ch. 19, secs. 629, 632; cases collected in Biggar's Muni-

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cipal Manual, pp. 352.3. The counsel could not, therefore, by the casual and equivocal act referred to, deprive the corporation and the public of this valuable and necessary highway for the benefit of a man buying with his eyes open. The council, however, have not been blameless, and the defendants are, therefore, not entitled to costs.

There will be judgment dismissing the action without costs.

Action dismissed.

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May 14.

BOARD OF GOVERNORS OF KING'S COLLEGE, WINDSOR v. POOLE.

Ontario Supreme Court, Kelly, J. May 14, 1913.

1. WILLS (§ III D—100)—PROVISION AS FOR DEBT OR LEGACY—CONDITIONS OF CODICIL.

A will reciting that "as soon as the obligations on my personal and real estate have been discharged, including the payment of $5,000 to the University at Windsor, N.S., for which I gave my 'note of hand,'" certain disposition should be made of testator's property; and letters acknowledging delivery of such note payable at his death, shews an intention to make the payee a creditor of his estate, and not a mere legatee; thus rendering invalid the terms of a codicil whereby he subsequently attempted to impose a condition on the manner and terms of payment.

2. BILLS AND NOTES (§ I B—14)—PAYMENT OF NOTES NOT PRODUCED—RIGHT TO INDEMNITY BOND.

In paying a note which was given by testator and which has been lost or is not produced, his executors are entitled to a bond of indemnity against it from the payee.

3. COSTS (§ I—9)—RIGHT TO ALLOWANCE—ACTION AGAINST EXECUTORS.

On judgment against executors on a note given by their testator, but not produced, costs should not be awarded where it is not their fault that the note has not been produced, and they had no knowledge, until after the close of the pleadings, of the existence of letters upon which the liability rests; but the executors are entitled to be paid their costs, as between solicitor and client, out of the estate.

Statement

ACTION against the executors of the will of the Reverend Jacob Jehosophat Salter Mountain, deceased, to recover $5,000, and interest from the date of his death, the 1st May, 1910, as a debt due, or, in the alternative, for payment of that sum as a legacy, with interest from the 10th May, 1911.

The Alumni of King's College Windsor, a corporate body, were added as defendants at the trial.

J. G. Harkness, for the plaintiffs and added defendants.

R. C. Smith, K.C., for the original defendants, the executors.

Kelly, J.

KELLY, J.:—By paragraph 19 of his will, dated the 25th June, 1902, the testator made the following declaration: "It is my desire further that as soon as the obligations on my personal and real estate have been discharged, including the payment of

$5,000 (five thousand dollars) to the University at Windsor, N.S., for which I gave 'my note of hand,' then all my real estate in Cornwall, Ont., in the Isle of Wight . . . shall be" disposed of as the testator then directed. In a codicil dated the 6th April, 1903, he directed that "the $5,000 (five thousand dollars) referred to in my last will and testament as set apart for the benefit of the University at Windsor, Nova Scotia, be paid by my executors to the Alumni Association of King's College, to be held by them in trust for said University, on condition of its remaining as heretofore in the town of Windsor, Nova Scotia, and its being conducted according to the intention of its original founders, as it now is:" and he further directed that the interest only on the sum was to be handed over from time to time to the treasurer of the Board of Governors of the University.

The "note of hand" referred to has not been produced, though it is clear, from evidence to which I shall presently refer, that the testator delivered it to the plaintiffs or their representative prior to the making of the will.

In December, 1912, after the pleadings herein had been closed, there were discovered in the basement of the Church of England Institute in Halifax, letters written by the deceased to the Bishop of Nova Scotia (Dr. Courtney), in some of which reference was made to this $5,000. In one, dated the 27th November, 1897, where the testator speaks of the necessity of making a new will owing to his marriage, he says: "Nevertheless, I don't think that my bequest to my dear old Alma Mater would otherwise have been vitiated by my subsequent marriage, because of the formal note of hand by which, at your suggestion, I further obliged myself in the same behalf, and then enclosed it to the secretary of the Alumni. Still it is just as well to make assurance doubly sure, lest possibly the question might be raised and cause trouble. As it now is, this claim would count among my debts, and be the first on my property, even before my funeral expenses."

In another, dated the 6th January, 1903, he says: "I also take the liberty of asking you to send me a copy of the 'note of hand' I sent you some years ago for $5,000 (five thousand dollars) payable after my death to the University of King's College, Windsor, Nova Scotia. I have not been able to find the copy I must have of it somewhere."

The statements made both in the will itself and in these letters indicate that a note for $5,000 was made by the testator, payable at his death. There is also the evidence, in his own written acknowledgments, that the note was delivered over From this I find a clear intention to make the payees creditors of his estate.

It is evident that he adopted this course deliberately, so as

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Kelly, J.

to place the holders of the note in the position of creditor rather than of legatee. That being so, the attempt by the codicil to put a condition on the manner and terms of payment could not have any effect as against what I find to be a debt of the testator then existing. While we have the clear evidence of the making and delivery over of the note, there is no evidence that it, or the obligation it represented, was satisfied by payment or otherwise in the lifetime of the deceased; and I think that the estate should now pay to the plaintiffs the $5,000 and interest thereon from the 1st May, 1910, the date of the testator's death, such payment to be in full satisfaction of the note and obligation of the testator and of the $5,000 mentioned in the will and codicil.

The note having been lost, or in any event not being forthcoming, the executors will, at the time of payment, be entitled to a bond of indemnity against it from the plaintiffs.

It is not the fault of the executors that the note has not been produced; and until after the close of the pleadings they had no knowledge of the existence of the letters which are a material part of the evidence. This is not, therefore, a case where costs should be awarded. The executors will, however, be entitled to be paid their costs, as between solicitor and client, out of the estate.

Judgment for plaintiffs.

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May 15.

CLEVELAND v. GRAND TRUNK R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. May 15, 1913.

1. MASTER AND SERVANT (§ I C—10)—CONTRACT OF EMPLOYMENT—AUTHORITY OF FOREMAN.

A railway company is not liable to an employee as for breach of an agreement by its foreman to allow such employee, as pay for his services and in addition to per diem wages, to cut hay growing on the company's premises, where the wages proper agreed upon were at the maximum rate which the foreman, who employed him, was authorized to allow, and where there was no shewing that the foreman was authorized to bind the company by the agreement respecting the hay, though it was his duty to see that the hay was removed.

Statement

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, withdrawing the case from the jury and dismissing the action, which was brought to recover damages for breach of a contract alleged by the plain-

E. G. Porter, K.C., for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Mulock, C.J.

MULOCK, C.J.:—The evidence shews that the plaintiff was, on the 3rd October, 1911, employed as section-man on the de-

fendant company's railway, by their foreman William Murphy; and shortly thereafter was appointed by Murphy as lamplighter for the company at Belleville, at the wage of $1.50 per day, the maximum rate paid by the company to lamplighters; and Murphy had no authority to exceed that rate.

After working for a week or two as lamplighter, the plaintiff, according to his evidence, told Murphy: "I will keep this job steady if you will give me the hay that grows there at the east end of the yard. Mr. Murphy said: 'If you keep this job steady, the hay is yours; until such time as that hay is fit to cut, the hay is yours.' . . . I said, 'All right, sir, I will.'"

The plaintiff continued as such lamplighter until some of the hay was ready to cut; and, upon going to cut it, he found a portion of it already cut, and removed, by a man named Palmateer, apparently with the consent of the company; and the action is for damages caused by the breach of the alleged contract to give the hay to the plaintiff.

The plaintiff, during his period of service as lamplighter, was paid in money at the rate of $1.50 per day.

Murphy, who was called by the plaintiff, testified that he had authority to hire the plaintiff as a lamplighter at a rate not exceeding $1.50 per day, and that it was part of his (Murphy's) duty each year to see that the hay in question was cut and removed; and that, in order to effect such purpose, he was authorised to give it away to any one, in consideration of such removal; and he swore that the giving of the hay by him to the plaintiff was a pure gift for the purpose of securing its removal, and not by way of an addition to the plaintiff's wages.

The plaintiff's contention, in substance, is, that he was to receive an addition to his rate of wages, not in money, but in kind, viz., in hay; but there was no evidence to submit to a jury of any authority in Murphy to bind the company to a contract for an increase of wages—such increase to be paid to the plaintiff, not in money but in kind, viz., by giving him any property (for example, hay) of the defendant company in behalf of such service.

I, therefore, think that the learned trial Judge was right in withdrawing the case from the jury and dismissing the plaintiff's action; and this appeal should be dismissed, and with costs, if the defendants require them.

CLUTE, and LEITCH, JJ., concurred.

Clute, J.
Leitch, J.

SUTHERLAND, J., dissented. After setting out the facts and quoting portions of the testimony given at the trial, he said:—

Sutherland, J. (dissenting)

I think that there was evidence of a contract set up and testified to by the plaintiff that should have been submitted to the

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Sutherland, J. (dissenting)

jury. The question of the agency of Murphy and its scope were also matters which, upon the evidence, the plaintiff was entitled to have go to the jury.

The plaintiff, on his motion by way of appeal, asks for a new trial, and I think this should be granted. The defendants on the appeal contended that the hay, under the circumstances, was an interest in land; and, as there was no contract in writing, as required by the statute, the plaintiff could not succeed. The contract set up by the plaintiff, however, was, that, if he continued to work at his employment until the hay was ready to cut, it would thereupon become his, provided he cut and cleared clean.

I do not think that, under these circumstances, the hay could be considered an interest in land.

I would allow a new trial, with costs of the appeal to the plaintiff.

Appeal dismissed, SUTHERLAND, J., *dissenting*.

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May 15.

FIELD v. RICHARDS.

Ontario Supreme Court, Middleton, J. May 15, 1913.

1. TRESPASS (§ I C—18)—CUTTING TIMBER—MEASURE OF DAMAGES.

In an action for trespass upon plaintiff's land and for wrongfully cutting timber therefrom, defendants, having been allowed by order of Court to remove the timber cut, subject to plaintiff's right to damages, must answer for its then value—not as standing timber, but as it then was in the log.

[*Faulkner* v. *Greer*, 16 O.L.R. 123; *Greer* v. *Faulkner*, 40 Can. S.C.R. 399, referred to.]

2. COSTS (§ I—4)—RIGHT TO ALLOWANCE—INJUNCTION.

On judgment for plaintiff in an action for injunction against, and damages for, trespass upon lands and for cutting timber therefrom, he is entitled to costs, though defendants acted innocently in the trespass, especially where they could have avoided prosecution of the action beyond an injunction motion by admitting their wrong and by submitting to an injunction.

[*Cooper* v. *Whittingham*, 15 Ch.D. 501, referred to.]

3. PLEADING (§ I M—95)—ADMISSIONS—SCOPE OF ISSUES.

Damages for wrongfully cutting timber on plaintiff's land is properly awarded against two co-defendants, where no issue as to the sole liability of one of the defendants was raised at the trial and where the statement of defence admitted the responsibility of both for the cutting.

Statement

ACTION for an injunction and damages in respect of trespass and cutting timber on the plaintiff's lands.

The action was tried before MIDDLETON, J., without a jury, at Bracebridge, on the 8th May, 1913.

R. C. Levesconte, for the plaintiff.

J. E. Jones, for the defendant.

MIDDLETON, J.:—The plaintiff owns lot 15 in the 12th concession of the township of McLean, intersected by a bay of Lake Menominee (often called Rat Lake). The lands are wooded, and were purchased for use as a summer residence. The patent reserves "an allowance of one chain in perpendicular width for a road on the shore." Warne, the patentee, purchased the timber on the road allowance from the Townships of McLean and Ridout; but, when he sold the land, he did not sell the timber on the road allowance. On the 12th July, 1909, Warne, for $25, sold to Richards the timber on this allowance, with the proviso that all timber not removed by the 19th April, 1911, should revert to him. Richards also acquired title to the adjoining lands.

In the winter of 1909-1910, Richards and his co-defendant Zimmerman, acting for him, cut timber and trespassed on the plaintiff's lands. It is admitted that 21 trees were cut on the portion of the lot north of the bay, and it is shewn that 23 trees were cut on the lands south of the lake.

A discharged employee of one of the defendants gave an exaggerated account of the trespass, and a motion for an injunction was the result. The plaintiff was also ignorant of the rights of the defendant Richards upon the road allowance, and much incensed at the destruction of the trees along the shore. On the return of this motion, the defendants were, by order, allowed to remove the timber cut, subject to the plaintiff's right to damages. The timber then cut was the plaintiff's, and the defendants must answer for its then value—not as standing timber, but as it then was in the log. *Faulkner* v. *Greer*, 16 O.L.R. 123, and *Greer* v. *Faulkner*, 40 Can. S.C.R. 399, are conclusive upon this question.

The 44 trees would cut on the average 3 logs each; and, allowing 18 logs to the M., would give about 7,000 feet—probably an under-estimate, as some of the trees were very large. This at $6.50 per thousand would make $45. To this must be added two cords of tan bark, $10; and, I think, an allowance should be made for the trespass and injury to the lands; this I fix at $50; making a total of $105.

Then as to costs. In *Cooper* v. *Whittingham*, 15 Ch.D. 501, Sir George Jessel says: "When a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs. The rule is plain and well settled.

It is, for instance, no answer, when a plaintiff asserts a legal right, for a defendant to assert his ignorance of such right, and to say, 'If I had known of your right, I would

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not have infringed it.' There is an idea prevalent that a defendant can escape paying costs by saying, 'I never intended to do wrong.' That is no answer; for, as I have often said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them."

Here the defendants did not admit the wrong and submit to an injunction, as they well might have at an early stage, and so have avoided the prosecution of the action beyond the injunction motion.

Something is said, in a memorandum handed in by Mr. Jones, as to the defendant Zimmerman being a contractor, and so being alone liable. This is based on an answer made to a question asked late in the trial, and upon which there was no cross-examination. The defence admits the responsibility of both defendants for the cutting, and no such issue was suggested at the hearing.

Judgment will be for the plaintiff for the injunction sought and $105 damages and the costs of the suit on the High Court scale, including the costs of the injunction motion.

Judgment for plaintiff.

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April 25.

Re PATERSON AND CANADIAN EXPLOSIVES, Limited.

Ontario Supreme Court, Falconbridge, C.J.K.B. April 25, 1913.

1. VENDOR AND PURCHASER (§ I B—7)—DEDUCTION FOR DEFICIENCY IN QUANTITY—INNOCENT MISREPRESENTATION.

Where an intending purchaser of land under an agreement containing an innocent misrepresentation as to the area of the land, assigns his interest in the agreement without knowledge of the misrepresentation, merely turning over what he had acquired the right to purchase, and using *ipsissima verba* of his own contract, he is not liable to make an abatement of purchase money for the deficiency.

[*Wilson Lumber Co.* v. *Simpson*, 23 O.L.R. 253, referred to.]

2. VENDOR AND PURCHASER (§ I B—7)—DEDUCTION FOR DEFICIENCY IN QUANTITY—SURVEY.

A printed stipulation in a contract for the sale of land for a lump sum, that the vendor shall not be obliged to produce any abstract of title or any title deeds or evidence of title or survey except such as he may have in his own possession, does not raise a presumption that the parties intended a survey to be made before closing, and, in the event of deficiency in acreage, to abate the purchase price.

Statement

APPLICATION by the Canadian Explosives Limited, the purchasers, under the Vendors and Purchasers Act, for an order authorising them to retain out of their purchase-money the sum of $2,005.50 for compensation by reason of the alleged deficiency in the area of the lands described in the contract for sale between the parties.

The application was dismissed.

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RE PATERSON AND CANADIAN EXPLOSIVES, LIMITED.

Falconbridge, C.J.

Shirley Denison, K.C., for the purchasers.
R. J. McLaughlin, K.C., for the vendor.

FALCONBRIDGE, C.J.:—In the contract the land is described as being "the north half of lot 31, concession 1, township of Scarborough, county of York, together with all improvements thereon, being 100 acres more or less."

The area of the land, as shewn by actual survey, is 90 $\frac{45}{100}$ acres. The purchase-money is $21,000; and the purchasers claim that only the sum of $18,994.50 should be paid.

Mr. McLaughlin contended that I had no jurisdiction, on this application, to decide in effect that the purchasers are entitled to specific performance with abatement of purchase-money, and that the compensation mentioned in 10 Edw. VII. ch. 58, sec. 4, is only compensation arising out of the contract itself. I do not pass upon this objection, because I think the case is not one in which, in any view of the case, I can give relief to the purchasers.

The facts of the case are as follows. The said north half was patented on the 23rd September, 1836, to one Robert Galbraith; and in the patent the land is described thus: "All that parcel or tract of land situate in the township of Scarborough, in the county of York, in the Home district of our said Province, containing by admeasurement one hundred acres, be the same more or less, and being the north half of our Clergy Reserve, lot number thirty-one in the said township of Scarborough."

The said half lot has always been described in the same manner, and always remained in the family of the original patentee until the transactions now in consideration.

By writing bearing date the 28th June, 1912, F. D. Galbraith, a descendant of the original patentee, entered into an agreement for the sale to Paterson, the present vendor, of the said half lot, describing it in the same way, for the sum of $18,000. Within a very few days the present agreement of purchase was made. The agreement between Galbraith and Paterson has never yet been consummated by the making and delivery of a deed. In other words, Paterson simply sold his option or agreement, at a profit of $3,000. There is no allegation whatever of any want of good faith on the part of any of the persons interested.

Mr. Denison based an argument on the following sentence in the purchasers' offer: "You shall not be bound to produce any abstract of title, or any title deeds, or evidence of title *or survey*" (the italics are my own) "except such as you may have in your possession." The contention is, that the use of the words "or survey" contemplates the making of a survey before closing the matter; and that, therefore, this constitutes a contract made with a view to a possible abatement.

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RE PATERSON AND CANADIAN EXPLOSIVES, LIMITED.

Falconbridge, C.J.

The words in question appear as part of a real estate broker's printed form, and I do not think that they are open to the construction which the purchaser seeks to give to them.

The cases on this subject are reviewed and discussed in *Wilson Lumber Co.* v. *Simpson* (1910), 22 O.L.R. 452; in the Divisional Court (1911), 23 O.L.R. 253.

As I said before, there is no fraud or suggestion of fraud on the part of the vendor. He simply turned over what he had acquired the right to purchase, using the ipsissima verba of his own contract; and I do not think that there is anything in the contract itself to raise a presumption that there should be an abatement or even a survey of the property.

The purchasers' application is, therefore, dismissed. Under all the circumstances, I shall not make any order as to costs.

Application dismissed.

B.C.

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Mar. 10.

BOOTH v. CALLOW.

British Columbia Supreme Court. Trial before Gregory, J. March 10, 1913.

1. LANDLORD AND TENANT (§ II B 1—14*a*)—COVENANTS FOR TAXES—SPECIAL EXCEPTION.

Where a lease contained a printed covenant that the lessee was "to pay taxes" and also a later covenant that the lessee was to pay the taxes "on any building that he may hereafter see fit to erect," the former covenant may be struck out on a claim for rectification of the lease in accordance with the proved intention of the parties at the time the instrument was made.

Statement

ACTION by the plaintiff to recover possession of premises for breach of covenant to pay taxes or, in the alternative, damages.

The action was dismissed.

Mayers, for plaintiff.

Tait and *Hall*, for defendant.

Gregory, J.

GREGORY, J.:—It appears to me that, in the circumstances of the case, it is hardly susceptible of argument that she is entitled to possession, for in addition to other circumstances she acknowledged the tenancy by accepting rent up to within a few days of issuing her writ.

The lease in question is in the short form, and contains in the printed form a covenant "to pay taxes," and also a later covenant in writing to pay the taxes "on any building that he (the lessee) may hereafter see fit to erect." The later covenant would appear to restrict the generality of the earlier one, but even if it does not the defendant counterclaims to rectify the lease by striking out the first covenant on the ground that it was included by the draughtsman's mistake, he not having struck it out, as it had been mutually agreed that the only

taxes the defendant should pay would be any additional taxes caused by any new buildings he might see fit to erect. This the plaintiff denies, and if the matter stood on their evidence alone I could not, in the state of the law, give effect to the defendants' contention. But that is not the case. I regret to say that I am unable to place any reliance whatever on the plaintiff's testimony, not because I think she deliberately stated what is untrue, but because of her advanced age, her general frailty, the position she finds herself in; her own admissions as to her defective memory, etc., etc. I am convinced she has now no clear recollection of what took place.

Nor can I accept the testimony of her son. He was called after recess, the plaintiff's case having been closed before adjournment. From whatever cause, nervousness, forgetfulness, or whatever it may have been, I was not favourably impressed. There is hopeless contradiction between him and his mother in several instances.

The defendant testifies positively that he refused to agree to pay the general taxes, and that the plaintiff agreed to this and to renew his lease for ten years if he would pay an additional rent, and pay the taxes on any new buildings he put up. This is incidentally supported by the evidence of Messrs. Johnston, Gower and Cashmore, and seems to be strongly supported by the undisputed fact that the plaintiff herself paid the taxes up to the beginning of the year 1913 without ever asking the defendant to refund them or even mentioning the subject to him, or, I must hold, anyone on his behalf. When the matter was first mentioned to him by plaintiff's son in February, 1913, he stoutly maintained that there was no clause in the lease requiring him to do so, and he gave a detailed account of his interview with the son, which the son did not deny in a single particular when he gave his evidence. Neither the plaintiff nor her son appears to have had the slightest idea that defendant was to pay taxes generally until after a friend, who had seen the lease, told them of it. Their conduct throughout is consistent with the defendant's story and not with their own, and leaves no doubt in my mind that it was mutually agreed as contended for by the defendant.

I have examined all the cases referred to by plaintiff's counsel, but they do not appear to me to meet the circumstances of this case, and the plaintiff's argument is based on the false assumption that I have nothing before me but the assertion of defendant contradicted by the plaintiff, and upon the like assumption that the defendant has in some way taken advantage of the plaintiff.

When the lease was entered into the terms of it as contended for by either plaintiff or defendant were quite reason-

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Gregory, J.

able, and neither of them could then foresee that three years later the property would become so valuable that the taxes would be increased tenfold.

To require the plaintiff to pay the taxes is to ask her to pay in taxes double the amount she receives in rent, and in the early part of the trial I expressed the opinion that that was unfair or dishonest on the part of the defendant; but I must say that it seems equally unfair for the plaintiff to ask defendant to pay ten times (and more) taxes than it was ever in the contemplation of either party he should pay, particularly when all the increased value in the property goes to the plaintiff. I unsuccessfully tried to induce the parties to come to a settlement. I have no jurisdiction to make a new contract for them to meet the new conditions which have arisen, and must therefore leave them where they stand at law. The action will be dismissed and defendant will succeed on the counterclaim; the lease must be rectified by striking out the printed words "and to pay taxes" in the first covenant thereof.

As the action was caused by the defendant's own neglect in not having the first covenant as to taxes struck out of the printed form, and as he did not counterclaim until the morning of the trial he is only entitled to the costs of and subsequent to the trial.

Action dismissed.

B.C.
C. A.
1913
April 1.

MACLEOD v. HARBOTTLE.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. LANDLORD AND TENANT (§ II B 2—15)—LEASES—IMPLIED COVENANTS—ELEVATOR SERVICE.

Where at the time of leasing of an apartment in an apartment house there is an elevator service therein which is reasonably necessary as a means of access to the apartment, a condition will be implied, in the absence of an express provision in the lease to the contrary, that the elevator service shall be maintained in an efficient way by the landlord; and damages are recoverable by the tenant for the breach which damages may be set off against the rent.

Statement

APPEAL by the plaintiff from judgment of McInnes, County Court Judge, allowing the defendant's counterclaim in an action for rent.

The appeal was dismissed.

R. M. Macdonald, for the appellant.

Garrett, for the respondent.

Macdonald, C.J.O.

MACDONALD, C.J.O.:—The plaintiff sued for one month's rent of rooms on the fourth storey of his apartment house occupied by the defendant, under lease for a year at $60 per

month. There was an elevator in the house for the use of the tenants of the apartments. It is not denied that she was entitled to the use of the elevator. Some months after her occupancy began the elevator service became intermittent and inefficient. Frequent complaints were made by the defendant and her son respecting the service. The defendant was an old lady troubled with weakness of heart, and the service of the elevator was, as the plaintiff knew, practically necessary for her ingress, egress and regress to her apartments.

I am bound to draw from the learned trial Judge's conclusion, the inference that the inefficiency of said service is chargeable to the fault of the plaintiff. In these circumstances the defendant left the apartments, the rent then being paid up to the day of her leaving. This action is for the following month's rent in advance. The inefficiency of the elevator service was set up as a defence, and defendant also counterclaimed for damages in respect thereof. The learned Judge gave judgment for the plaintiff for the month's rent, and for the defendant on her counterclaim for damages to an equal amount. The plaintiff appealed against the judgment on the counterclaim.

The learned Judge found that there was an express condition, contemporaneous with the making of the lease, that the elevator service should be efficient. I am unable to find any legal evidence of this, possibly because the stenographer was brought into the case after some evidence had been taken which was not fully noted. But, if I am right in thinking, that, when apartments are let in houses in which there is an elevator service provided as a means of access to the apartments, there is an implied condition, in the lease, that that means of access shall be reasonably maintained by the landlord, it is not necessary that there should be evidence of such verbal contemporaneous promise.

The main question involved in this appeal is an important one, and one upon which there appears to be no direct authority. Modern apartment houses are equipped with elevators for the convenience of tenants. The intending tenant sees the equipment of the house. To him an efficient elevator service is all-important, especially if he is taking apartments several storeys above the ground floor. When he takes the apartments in such circumstances, I think it must be assumed that an efficient elevator service, to be maintained by the landlord, is in contemplation of both parties, and if the lease is silent respecting such service, the Court may imply a condition or warranty that the service shall be maintained by the landlord, and should he fail to do so, the tenant has a legal remedy for the breach of the implied contract. The rights of a lessee of apartments in such a house are not to be measured by those of the lessee of an ordinary house or building, nor even of a furnished house. The implied condition in

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Macdonald, C.J.O.

a lease of a furnished house, that it shall be fit for habitation is limited to fitness at the beginning of the tenancy, and does not extend to continuing fitness during the term. But the reason for so limiting the condition does not apply to the promise to maintain an efficient elevator service, requiring, as it does, continuing performance by the landlord of his obligation, and hence, I think, a tenant who has been denied such service unreasonably, by which I mean by default other than that incidental to the service, such as delays necessitated by making repairs, or by reason of accidents or matters over which the landlord has no control, is entitled to some species of redress. Whether he can abandon the lease and refuse to pay rent may depend on the facts of the particular case, but that he may recover damages I think must be conceded. While not strictly in point, the observations made by the Judges in *Wilson* v. *Finch-Hatton* (1877), 46 L.J. Ex. 489, and *Sarson* v. *Roberts*, [1895] 2 Q.B. 395, may be referred to as throwing light upon the principles which ought to be applied to cases of this kind.

In this case the right to recover damages only arises, the defendant not having appealed against the judgment for the rent. In awarding her damages the learned Judge has found in her favour the facts necessary to support her counterclaim. I think it was open to him, on the evidence, to conclude that the failure of the defendant to provide an efficient service was a negligent failure, and that this entailed upon her the loss of the use of the apartments for at least the period of one month after she left, and that therefore the damages are not unreasonable.

I would dismiss the appeal.

Irving, J.A.
Martin, J.A.
Galliher, J.A.

IRVING, MARTIN, and GALLIHER, JJ.A., concurred with the Chief Justice.

Appeal dismissed.

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S. C.
1913
April 30.

PLAYFAIR v. CORMACK.

Ontario Supreme Court, Middleton, J. April 30, 1913.

1. BROKERS (§ I—4)—STOCK BROKERS—FIDUCIARY RELATIONSHIP—BROKER'S OWN STOCK—PROFITS.

An agent cannot make a profit at the expense of his principal; and a broker employed to purchase stock who transfers his own stock to the purchaser, cannot escape from the operation of the rule unless he makes full disclosure to his principal.

[*Bentley* v. *Marshall*, 46 Can. S.C.R. 477, followed.]

Statement

ACTION to recover $4,263.57 alleged to be a balance due to the plaintiffs, as brokers and agents for the defendants, in respect of the purchase of 10,000 shares of the capital stock of the Swastika Mining Company Limited.

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PLAYFAIR v. CORMACK.

Middleton, J.

W. N. Tilley, and *Harcourt Ferguson*, for the plaintiffs.

R. McKay, K.C., and *W. C. MacKay*, for the defendant Steele.

G. H. Gray, for the defendant Cormack.

MIDDLETON, J.:—The facts are not complicated. At the time of the occurrences in question, the defendant Steel was treasurer of the Swastika Mining Company. He was also the largest individual stockholder. On the 18th May, an agreement was arrived at between the company, Steele, and the plaintiffs, by which the plaintiffs agreed to buy a large block of stock at 45 cents. This stock they contemplated placing upon the market in such a way that the price would be speedily raised and might possibly reach a dollar. Steele agreed not to market any of his stock except through the plaintiffs.

Steele practised as a physician at Tavistock, in partnership with the defendant Cormack, also a physician. Cormack had only recently come to that village, and was a man of very small means. He had not theretofore had any stock transactions. He found himself surrounded in Dr. Steele's office by an atmosphere of speculation and optimism. He knew something of Steele's relations to the company, partly from Steele himself, and partly from outside gossip. Yielding to his environment, Cormack determined to augment the $60 per month which he was entitled to draw under his partnership arrangement, by some of the unearned increment which it was thought the public was all too anxious to contribute to the fortunate owners of the stock in question.

On the evening of the 21st May or the morning of the 22nd, he had some conversation about this with Steele, resulting in a determination to "plunge" either alone, as is said by Steele, or along with Steele, as he says; and Steele telephoned to Martens, the partner of the plaintiff firm having the matter in charge, inquiring whether stock could be purchased, and informing Martens that a medical friend of his was desirous of buying some stock if he could purchase on time. Martens consented, and Cormack sent a telegram on the 22nd May, "Buy for me sixty days five thousand Swastika." It is important to note that no price is named. The brokers, having received this telegram, did not purchase the stock from any outsider, but "put through" a transaction upon the Toronto Stock Exchange. As explained by Martens, this means that, desiring to sell stock which he holds and at the same time having a customer who desires to buy, the broker makes an offer upon the floor of the Exchange to buy or sell at a price named by the broker. No one desiring to sell or buy at that price, the broker himself sells to the secretary of the Stock Exchange, and then buys from the

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secretary; the transaction thus being regarded as an actual transaction, intended to fix the market-price. This course, it is said, was justified by by-law 26, sec. 7, of the Stock Exchange.

I should have mentioned that when Playfair, Martens, & Co. (the plaintiffs) made the arrangement with the mining company, although the transaction was carried through in their name, they were acting on behalf of themselves and Warren, Gzowski, & Co., and that, as between these two brokerage firms, they were to share equally in the profits and losses of the transaction. This partnership was called in the evidence the "syndicate."

The transaction thus "put through" upon the floor of the Exchange was treated as a sale by the syndicate, and Playfair, Martens, & Co. credited the syndicate with the proceeds; thus treating themselves as purchasers. They then sold to Cormack at this price, plus two and a half cents, to represent their brokerage and carrying charges. In pursuance of this, they sent to Cormack a bought note stating: "We have this day bought for your account and risk 5,000 Swastika at 62, sixty days buyer's option; commission $50; amount $3,150." Playfair, Martens, & Co. in this way profited as members of the syndicate by half the difference between 45 and the price at which the transaction was put through, 59½, in addition to their charges for carrying and brokerage.

No discharge of the fact that they were the vendors was at any time made by them. They justify this course of procedure by the view that the fact that they offered to buy or sell at this price on the open market can be taken as fixing the market-price.

In a similar way a second purchase of like amount was made by Cormack on the 8th June.

Contrary to expectations, the stock did not go up but steadily went down. Cormack renewed from time to time; and finally, in January, 5,000 shares were sold at 24½, and in February the remaining 5,000 at 23¼ and 23½. The proceeds were credited, leaving the balance now claimed.

These sales are not in any way impeached, and were carried through by a transfer of the stock from the mining company to the purchaser. No stock was issued on the former transaction.

It is conceded that the rule which prohibits an agent employed to purchase from transferring his own property, and from being himself the vendor, would prevent the plaintiffs from recovering if the transaction is to be regarded—as it has been regarded by the plaintiffs—as a brokerage transaction. The plaintiffs seek to take the case out of the operation of this rule, because the defendant Cormack, in his pleading and in

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an affidavit filed in answer to a motion for judgment, speaks of the transaction as "a purchase of stock from the plaintiffs."

I do not think that this is sufficient. The facts are absolutely plain and free from any uncertainty or controversy; and the pleading ought to be amended so as to conform to the facts. The first telegram constituted the brokers agents to purchase. Throughout they acted as though they were agents, and they cannot divest themselves of that fiduciary relationship without making that full disclosure pointed out as being necessary in *Bentley* v. *Marshall*, 46 Can. S.C.R. 477. I do not think that this wholesome rule can be frittered away by any suggestion that the purchaser must have known from the circumstances that it was extremely likely that the agent was transferring to him his own stock. Nothing short of the fullest and most ample disclosure on the part of the agent will suffice to free him from disability. For this reason, I think the action fails.

The plaintiff's claim against Steele is based upon the allegation that when Cormack purchased he purchased in truth as agent for himself and Steele. This claim is not made out. Cormack so states, but is contradicted by Steele; and the circumstances surrounding the transaction, with the inconsistencies in Cormack's evidence, compel me to find that the allegation is not proved. The plaintiff, therefore, fails against Steele on this ground as well.

Cormack claimed indemnity against Steele upon the theory that when the agreement to share the profit was made Steele agreed to bear all the loss. This theory is not supported by the evidence at all. The action will, therefore, be dismissed, with costs to be paid by the plaintiff to both defendants; and Steele will be entitled against Cormack to the costs of the third party proceedings.

Action dismissed.

MACDONALD v. HELGERSON.

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British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. CONTRACTS (§ II D—145) — CONSTRUCTION — PARTICULAR WORDS—"TO DO THE SQUARE THING"—COMPENSATION—QUESTION FOR JURY.

Where the plaintiff agreed to perform, and did perform, certain services for the defendant, relying upon his promise "to do the square thing" as compensation for such services, the question as to what compensation under the circumstances a promise "to do the square things" imports, should be submitted to the jury.

[*Croasdaile* v. *Hall*, 3 B.C.R. 384, distinguished.]

2. CONTRACTS (§ II D—145)—CONSTRUCTION — PARTICULAR WORDS—"TO DO THE SQUARE THING"—COMPENSATION.

Where the defendant employed the plaintiff to perform certain services for him, promising as compensation therefor "to do the square thing," this is a promise to pay what is an adequate and reasonable

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price for the services rendered, in other words a *quantum meruit*. (*Per* Martin, J.A.)

[*Croasdaile* v. *Hall*, 3 B.C.R. 384, distinguished; *Bryant* v. *Flight*, 5 M. & W. 114, applied.]

MACDONALD v. HELGERSON.

APPEAL by the plaintiff from the judgment of Young, County Court Judge, refusing to allow the case to go to the jury.

Statement

The appeal was allowed and a new trial ordered.

M. A. Macdonald, for the appellant.

Bodwell, K.C., for the respondent.

Irving, J.A.

IRVING, J.A.:—I would allow the appeal. The case ought to have been allowed to go to the jury in order that it might decide upon the meaning of the words and actions of the defendant when the plaintiff asked him if he would allow him a commission.

Martin, J.A.

MARTIN, J.A.:—After reading the evidence of the plaintiff as a whole, as it should be read (and particularly pp. 10, 22, and 27, of the appeal book), it comes down to this, that it was open to the jury, as should have been left to them, to find if they believed the plaintiff that the agreement between the parties was that the plaintiff was to receive some commission for his services, but the amount of it was not specified, it being agreed to that the defendant was, "to do the square thing" with the plaintiff in that respect. Now, if one man agrees to employ another to perform certain services for reward, and the other says to him, "how much am I going to get for this?" and he replied, "I will do the square thing by you," in my opinion that is a promise to pay what is an adequate and reasonable price for the services rendered—in other words a *quantum meruit*. There is no intention in such circumstances of appointing any one an arbiter to fix the compensation as, in effect, was the case in *Croasdaile* v. *Hall* (1895), 3 B.C.R. 384. If I employ a man to put a shingle roof on my house on the understanding that I will do the "square thing" by him after he has finished the job, that means that he is to do a fair (or "square) job as regards material and labour and get a fair (or "square") price for it. Each of us is in one sense "relying on (the other's) honour" (as the plaintiff puts it, p. 22) to act properly in the premises, but there is no intention of excluding the ordinary tribunals of the land from determining, in case of the default of either party, what their reciprocal obligations are. The defendant's idea herein of doing the "square thing" by the man whose services he was glad to avail himself of was to pay him $50. It may be too little or it may be too much. The evidence is not very definite in one way, but, at least, the jury knew exactly what the plaintiff did for the defendant, and should have been allowed to pass upon the matter and say if the defendant did or did not do

the adequate and reasonable, *i.e.*, the "square" thing in the circumstances. While I have reached this conclusion on the facts of this case, at the same time it is clear that it would not require much change in the language to bring the question within the principle laid down in *Croasdaile* v. *Hall*, 3 B.C.R. 384, but, as it presents itself here, it is a stronger case than *Bryant* v. *Flight* (1839), 5 M. & W. 114, wherein a contract to "pay something" was inferred.

The appeal should be allowed, with costs, and a new trial ordered, the costs of the first to be paid by defendant.

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GALLIHER, J.A.:—In this case I think there should be a new trial. I distinguish it from *Croasdaile* v. *Hall* (1895), 3 B.C.R. 384, upon which the learned trial Judge relied. Taking the evidence of the plaintiff, which is not contradicted, where he says, at p. 10, of the appeal book, that the question of commission was discussed, but no amount was fixed, the defendant Helgerson remarking that he would do the square thing with Macdonald anyhow, it seems to me that the square thing there must mean what is reasonably declared, and it is a question for the jury to decide whether the amount of $50 offered was the doing of the square thing. The agreement was not what Helgerson should consider the square thing, but what would be the square thing.

Galliher, J.A.

Appeal allowed.

GALBRAITH v. McDOUGALL.
(Decision No. 2.)

McDOUGALL v. GALBRAITH.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, Leitch, JJ. March 13, 1913.

1. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—SHARING PROFITS—JOINT INTEREST.

The sharing of gross returns does not, in itself, create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

[*Galbraith* v. *McDougall*, 6 D.L.R. 232, varied; *Heap* v. *Dobson*, 15 C.B.N.S. 460; *Andrews* v. *Pugh*, 24 L.J. Ch. 58, specially referred to.]

Statement

AN appeal by McDougall from the judgment of Britton, J., 6 D.L.R. 232, in favour of plaintiff Galbraith in the consolidated action. Galbraith sued in an action for a declaration that plaintiff was entitled to one-quarter of the profits arising from the sales of certain mining lands, and to an undivided quarter interest in the part not sold, and for an account under a certain partnership agreement between plaintiff and defendant. The

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cross-action by McDougall was for payment by Galbraith of one-half the cost of surveying, developing, marketing and selling the said lands.

The appeal was allowed and the judgment below, *Galbraith v. McDougall*, 6 D.L.R. 232, varied.

McDougall owned a lot in the Whitney district of Algoma, which he expected to become the site of a town, and he made an agreement with Galbraith, dated at Montreal, the 11th February, 1911, and signed by both parties, as follows: "In consideration of the sum of $1, receipt of which is hereby acknowledged, and for other good and valuable consideration, the said . . . McDougall transfers and makes over to . . . Galbraith one-fourth interest in a certain lot of land containing 160 acres . . . It is understood that this transfer covers all surface, mineral, and other rights on said property. This agreement is conditional on the Temiskaming and Northern Ontario Railway Commission locating their station on said lot. Galbraith is to provide the funds for surveying and laying out the property in town lots and other incidental expenses preparatory to offering said property for sale. Said expenses are to be equally shared by each when the property is disposed of or when a sufficient sum is realised."

A more formal document was afterwards drawn up in Ontario, dated the 29th March, 1911, and signed by the parties, as follows:—

"Whereas the party of the first part (McDougall) is the owner of lot 12 . . . and . . . intends laying out the whole or a portion of the said lot as a town-site and to dispose of lots therein by private sale or otherwise; and whereas it is necessary to secure a survey of and register a plan of the said town-site and to open streets upon the same and in other respects improve the land for the purpose of a town-site; and whereas the party of the second part (Galbraith) has agreed to advance and pay one-half of the total cost of all necessary expenses in connection with the laying out, improvement, and development of the said town-site, together with the survey, plan, and advertisement of the same, in consideration of an undivided one-quarter interest or share in the proceeds of the sale or disposition of the said lot, mining rights, or otherwise:—

"Now . . . in consideration of the premises and the terms, provisions, and conditions herein contained, the parties hereto mutually agree each with the other as follows:—

"(1) The party of the second part (Galbraith) agrees to advance from time to time as may be necessary, or become liable for, one-half of all expenses incurred through the expedient laying out of the said lot . . . into a town-site . . .

"(2) The party of the second part further agrees to devote

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a reasonable amount of his time and attention to the affairs of the said town-site and to assist in the laying out and improvement of the same and the sale thereof.

(3) In consideration thereof, the party of the first part agrees to and does hereby grant, assign, and give to the party of the second part an undivided one-quarter share or interest in the proceeds arising from the sale of the said town-site, in lots or otherwise, the timber, and mining rights thereon, and in all profits or benefits arising therefrom in any respects whatsoever.

"(4) Proper books of account shall be kept . . .

"(5) A division of the profits, if any, shall be made every six months, until the whole of the interests of the parties hereto are disposed of.

"(6) The party of the first part shall devote his time and attention to the requirements of the said town-site and act in conjunction with the party of the second part."

The land was divided into town lots, and these were rapidly sold, and such part of the proceeds as was thought necessary was used for expenses. The receipts were approximately $30,000, and the expenses $12,000.

Each party brought an action against the other. Of the $18,000 surplus, McDougall claimed $16,500, leaving Galbraith only $1,500. Galbraith claimed $4,500; and the trial Judge gave effect to Galbraith's claim.

McDougall appealed.

A. G. Slaght, for McDougall.

E. D. Armour, K.C., for Galbraith.

Clute, J.

CLUTE, J. (after setting out the facts at length):—It was a joint venture in which one party owned the property, and the other agreed to pay half the expenses of clearing the land, laying out the site, etc., in consideration of one-quarter of the proceeds of the sale. He took a certain risk for a possible gain.

The chief argument addressed to the Court by Mr. Armour on behalf of the respondent was that this undertaking was a partnership and that under the rule applicable to the taking of accounts in such a case, the advance should be deducted from the gross receipts and the difference divided as profits. It is open to doubt whether the agreement entered into between the parties constituted a partnership.

Stroud, Judicial Dictionary, 2nd ed., 1415, under the heading "Partnership" (II. (2)) points out that "the sharing of gross returns does not, in itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived." This question is more fully

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discussed in Lindley, 7th ed., 38, 39, 55 and 56; *Heap* v. *Dobson*, 15 C.B.N.S. 460; *Andrews* v. *Pugh*, 24 L.J. Ch. 58.

But, whether the agreement amounts to a partnership or not, the terms are too clear to leave doubt as to the intention.

If the construction claimed for the respondent be the true one, the result will be that instead of the plaintiff advancing and paying one-half of the expenses incident to placing the property upon the market, he would in fact be paying only one-fourth of the expenses. This arises from the fact that if the expenses are paid out of the proceeds of the sales, the defendant is paying three-fourths of the expenses, because, under the terms of the agreement he is entitled to three-fourths of the fund out of which such payment is made.

From this fact has arisen, I think, a misapprehension of the plaintiff's case.

Thus: Sales, $30,000, quarter of which is $7,500, is plaintiff's share; deduct plaintiff's share of expenses $6,000, which was paid out of sales, leaves a balance of $1,500, plaintiff's share of profits.

On the other hand, if from quarter of the sales $7,500, there is deducted quarter of the expenses, viz., $3,000, this leaves $4,500 as plaintiff's share, having paid $3,000 instead of $6,000 towards the expenses.

The effect is the same if, as the plaintiff contends, $12,000 expenses should be deducted from sales, $30,000, leaving $18,000 and then one-quarter interest allotted to plaintiff, he would receive $4,500; thus contributing to the expense one-quarter instead of one-half, his one-half having been paid out of a fund of which he is entitled to one-quarter share.

The transaction must be treated as if the advance which Galbraith was bound to make had actually been made. Having made the advance, he is entitled to receive one-fourth of the whole of the proceeds, which is $7,500; but, as this would be the total amount which he would have received had he advanced the $6,000, the $6,000 must be deducted from this amount, making his profits in the transaction $1,500.

It ought not to be forgotten that, under the peculiar terms of the agreement, the defendant puts in his land without receiving any special advantage therefrom except his three-fourths of the proceeds of the sales. In a word, the plaintiff ought not to be permitted, not having made his advances, to have them paid out of a fund of which he is entitled to only one-fourth and the defendant to three-fourths.

With deference, I think the judgment of the trial Judge should be varied to conform to the construction put upon the agreement as contended for by McDougall. He is entitled to costs in the Court below and of this appeal.

As under the amendment, full relief can be given in the first action, the second action is dismissed without costs.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J. (after setting out the facts):—Much argument was advanced to us upon the question whether the two documents should be read together, or whether the latter entirely superseded the former. It does not seem to me that, for the purposes of this case, it makes any difference which view is taken; and I do not enter into the inquiry; but I am not to be taken as assenting to the conclusion in that regard of my brother Britton.

Much, too, was said as to whether a partnership was formed or not. That, it seems to me, is also immaterial—a mere matter of terminology. Whether in this case one calls the relations between the two a partnership or a joint enterprise or a common venture, their rights and duties inter se are governed by the document they have signed—and these are the only rights and duties we here consider.

The main reliance of the respondent was upon the use of the words "advance" and "profits"—and, if "advance" always meant "to pay out money which is to be later repaid," and "profits" always meant "gain made on any business when both receipts and disbursements are taken into consideration," there would be foundation for his contention. But "advance" often means "pay" (Words and Phrases Judicially Defined, *sub voce*); and that this is its meaning here is, I think, shewn in the recital No. 4.

Nor is "profit" or "profits" wholly unambiguous. The primary meaning is "benefit or advantage," and that meaning is found very frequently indeed. See Words and Phrases Judicially Defined, sub voce, p. 5661. "There is no single definition of the word 'profits' which will fit all cases:" per Farwell, J., in *Bond* v. *Borrow*, [1902] 1 Ch. 353, at p. 366.

From the whole document it is, to my mind, clear that what was intended was this: McDougall, owning the land, agreed that, if Galbraith would pay one-half of the "expenses," he should receive one-fourth of the proceeds of the sales. No doubt, by a minute analysis of the agreement, arguments may be found against this interpretation; but, while we are to examine such a business document with care, we are not to scrutinise it microscopically or dissect it as with a scalpel. Taking the document as a whole and in connection with the circumstances of its formation, I cannot agree with the learned trial Judge.

A confusion of thought sometimes seems to arise by the use of language somewhat metaphorical. Here the land is said to pay

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the expenses. Strictly the payment is out of money which has been obtained by the sale of land. If I am right in my view, whenever any money was received for the sale of any land, as between the parties one-fourth of that belonged to Galbraith and three-fourths to McDougall—and should have been so credited; whenever any money was paid out for "expenses," one-half should have been debited to Galbraith and one-half to McDougall. Then it became a simple matter of bookkeeping. The whole effect was, that, instead of either procuring money from some other source, money on the spot to which they were entitled was used.

The method followed by the learned trial Judge makes McDougall pay not one-half but three-fourths of the expenses.

I think the appeal should be allowed with costs here and below. If the parties cannot agree, the reference may proceed; but it seems more convenient to order this to proceed before the Master in Ordinary, in Toronto.

Appeal allowed.

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Re COLEMAN and McCALLUM.

Ontario Supreme Court, Lennox, J., in Chambers. April 19, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 3—60)—BY-LAWS—EXTENT OF POWER—DISCRETION WITHIN STATUTORY LIMITATIONS.

Where an enabling statute empowers a municipality to impose building restrictions within certain fixed limitations, but the statute is not intended of itself to prohibit anything, the municipality may in its by-laws, stop short of the limit in the exercise of its discretion, and impose only a portion of the authorized restrictions.

2. MUNICIPAL CORPORATIONS (§ II C 3—63)—BY-LAW—DEFINITENESS—QUASI-EXPROPRIATION—BUILDING RESTRICTIONS.

Statutes, and *a fortiori* municipal by-laws, purporting to control or take away, by quasi-expropriation without payment, rights ordinarily incident to ownership, must be construed strictly, and should be definite and certain to all intents.

3. MANDAMUS (§ II A—76)—TO MUNICIPALITY—CONDITIONS PRECEDENT—BUILDING PERMIT—TERMS.

Where a municipality under separate by-laws restricts the building of apartment-houses and lodging-houses respectively, in a certain restricted district, having special reference as to the former to the fire risk incident to the multitude of kitchens in apartment-houses; a mandamus granted on the application of an owner to require a municipality to approve his plans and specifications for the erection of a proposed lodging-house in such district may be granted upon terms requiring the owner and his assigns not to use the building as an apartment-house while the prohibition of the latter continues, where the method of construction adopted seems applicable both to a lodging-house and to an apartment-house; and such terms may include a condition that the applicant, on selling, shall give notice of the court's order to the purchaser and require from him a restrictive covenant to be included in the conveyance whereby the purchaser shall bind himself and his assigns to observe the limitation upon which the mandamus was granted and such other order as the court may thereafter make in the matter.

MOTION by Alfred B. Coleman for a mandamus requiring Robert McCallum, the City Architect, and the Corporation of the City of Toronto, respondents, to approve the plans and specifications submitted by the applicant for the erection of a building at the south-west corner of Sherbourne and Rachael streets, in the city of Toronto.

W. N. Ferguson, K.C., for the applicant.

Irving S. Fairty, for the respondents.

LENNOX, J.:—I think the applicant is entitled to a mandatory order, but not unconditionally.

Lennox, J

On the 11th March, 1907, the respondents the Corporation of the City of Toronto passed by-law No. 4861, "A By-law for regulating the erection and to provide for the safety of buildings;" and, subject to certain amendments not material to this application, this by-law continued in full force until the 1st April instant. Under the head of "Definition of Terms," it was enacted by sec. 14: "The following terms of this by-law shall have the meaning assigned to them respectively. . . . "*Apartment or tenement house* (32), a building which, or any portion of which, is or is intended to be occupied as a dwelling by three or more families living independent of one another and doing their cooking upon the premises." . . . "*Lodging House* (34), a building in which persons are accommodated with sleeping apartments, including hotels and apartment houses, where cooking is not done in the several apartments." The punctuation perhaps obscures the meaning a little, but at all events it is plain that, for the purpose of "regulating the erection . . . of buildings" in the city of Toronto, suites or groups of apartments are divided into two classes, namely: (a) suites in which the occupants do their own cooking—the building containing these is an apartment or tenement house; and (b) suites in which the occupants do not do their own cooking—the building containing these is a lodging house.

Having thus eliminated from "apartment house" a class of building which might otherwise have been called—which, I think, would otherwise have been called—an apartment house, sec. 42 proceeds to provide for a special method of construction to prevent the spread of fire in all apartment houses which are not fire-proof, and to offset the additional risk incident to the multitude of kitchens permitted in this class of building—precautions which are not enacted and which are obviously not so necessary in the case of a lodging house. This was the building law in Toronto when the Legislature in 1912 amended sec. 541A of the Consolidated Municipal Act of 1903, as enacted by sec. 19 of the Municipal Amendment Act of 1904, by adding after clause (b) the following clauses:—

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"(c) In cities having a population of not less than 100,000, to prohibit, regulate, and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

"(d) For the purposes of this section, an apartment house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons:" 2 Geo. V. ch. 40, sec. 10.

Subsequently, on the 13th May, 1912, and without repealing or amending the definitions of "apartment or tenement house" and "lodging house" above set out, and with by-law 4861 still in force "for regulating the erection of buildings" in this city, the respondents the Corporation of the City of Toronto passed No. 6061, "A by-law to prohibit the erection of apartment or tenement houses, and of garages to be used for hire or gain, on certain streets," and, by clause 1, prohibited, as the council had power to do, the erection of any apartment or tenement house upon property fronting upon Rachael, Sherbourne, and other streets.

With this provincial law and the by-laws referred to in force, the applicant, in the month of March last, filed plans and specifications and applied to the city council for permission to erect what he calls a "Temperance Hotel" upon the property fronting upon Rachael and Sherbourne streets. There have been several alterations in the plans. Coleman originally intended and the application was launched for permission to erect a building in which cooking would be done in the several suites—clearly an apartment or tenement house as defined by by-law 4861; a class of building prohibited upon these streets by by-law No. 6061. The plans as now on file shew only provision for one kitchen and dining-room in the building, and the applicant swears that, finding that his first application was contrary to by-law 6061, "I decided to erect and conduct on the said premises an hotel conducted as an ordinary licensed hotel is conducted, excepting that I have no license for the sale of liquor and do not intend to apply for the same. 3. Following out my changed scheme, I had the plans altered so as to cut out all the separate kitchens, sinks, etc., and provided on one floor reading-rooms, dining-rooms, lavatories, baths, wash-house, catering department, and servants' quarters and lavatories, similar to that provided for in the ordinary licensed hotel, and it is my intention, and the plan of my building is drawn for use in this manner only, that none of the guests at my hotel shall be allowed to wash in my rooms or to cook in my rooms, and that the work of their rooms shall be done by my servants, and the light shall be furnished by me, and heat shall be furnished by

me, and the meals shall be furnished by me in the general dining-room, and in general the whole building shall be under my control and supervision."

As shewn by affidavit, in the end, as at the beginning, the permit was refused, upon the ground that the erection of the proposed building "would constitute a contravention of by-law No. 6061." Upon the argument it was mentioned, but only as affecting the size of the bed-rooms, that a new by-law was passed on the 1st April instant. I have obtained a copy of this by-law, 6401. It, too, is "a by-law for regulating the erection and to provide for the safety of buildings," and it repeals No. 4861. Passed at a time when this motion was standing for argument, it may be that the respondents are not entitled to rely upon it; but, as there were several stages in the applicant's proceedings, I have decided to take this by-law into consideration in arriving at a conclusion.

The only points to be noted are: (1) for "apartment or tenement house" this by-law adopts the definition contained in 2 Geo. V. ch. 40, sec. 10, above quoted. Under this definition, if the council had chosen to leave the matter there, the narrowing effect of the definitions in the old by-law would have been avoided; and, by a re-enactment of prohibitory by-law 6061, the probable object of the council might have been accomplished. (2) But, instead of this, this repealing by-law re-enacts, word for word, the definition of the former by-law as to what constitutes a lodging house, and thus again excludes from "apartment or tenement house" any building of the apartment house class in which cooking is not done or provided for in the several apartments. (3) Under the new by-law, bed-rooms shall have a floor area of at least one hundred square feet, in hotels, apartment, tenement, and lodging houses. And (4) section 42, for special safeguards against fire in apartment houses, is re-enacted.

After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a "Temperance Hotel." Hotels, of course, are not prohibited. I prefer, however, not to rest my decision wholly or mainly upon this view of the question.

Take it, however, that it is not an hotel, is the applicant entitled to be permitted to erect the proposed building upon the proposed site? I am of opinion that he is. The refusal, as I have stated, was based upon by-law No. 6061, but the question cannot be determined by this by-law alone. It prohibits the erection of an "apartment or tenement house" upon the site in question. When it was passed, building by-law No. 4861 was in force, and this latter defined and constituted an apartment house where separate cooking is not done, as I have already

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quoted, "a lodging house." The proposed building, as now shewn by the plans and specifications and described in the affidavits, is a lodging house within the meaning of this definition. That it is called an hotel is immaterial, as an hotel, by the same definition, is also a lodging house. It is manifest, then, that by-law 6061 prohibited apartment and tenement houses as defined under this caption in the building by-law, only, and not those designated lodging houses in the same building by-law.

It was argued that you must adopt the unlimited description of the statute of 1912, but this contention is based on a misconception of the function of the statute. The statute is not intended to prohibit anything. It gives the power to prohibit, and limits its extent. Within that limit the council can act, short of that limit they may stop—as they did here. Beyond that limit they cannot go. To adopt the full measure of the statutory definition, or rather limitation, the council had only to repeal the definitions quoted; and, failing to do this, these definitions govern.

Is the situation altered by the new by-law? I cannot see that it is, and I have already indicated the reason, namely, that it re-enacts the former definition of a lodging house. A lodging house, as defined under the former by-law, was not prohibited by No. 6061. A lodging house under the new by-law is just what it was under the old, and is nowhere prohibited.

The wisdom or unwisdom, or the fairness or unfairness, of the powers conferred by the Legislature, or the exercise of these powers by the council, are not matters for me to deal with, but statutes, and a fortiori by-laws, purporting to control or take away rights ordinarily incident to ownership, quasi-expropriation without payment, confiscation as it is often called, must be construed strictly, and the meaning must not be left in doubt—they must be definite and certain to all intents.

On the other hand, having regard to the easy stages by which the applicant has developed his present proposals, there should be some guarantee of the good faith of the applicant, and that not only will a building be erected of the character now indicated but that afterwards it will be used for the purposes and in the manner declared.

Therefore, upon the applicant amending the plans on file so as to provide that each of the bed-rooms shall have a clear floor area of 100 square feet at least, and upon his undertaking by his counsel that the building in question shall not at any time, without the consent of the municipality or the Court, be diverted from the uses and purposes or be occupied or used in a manner inconsistent with the uses and purposes now declared by the applicant, and that, in the event of the sale of the property, due notice of this undertaking and of the order now to be made shall

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be given to the purchaser, and he will be required, in and by the conveyance to him, to bind himself and his heirs and assigns to observe and abide by the conditions above set out and such order as the Court may make, and the applicant, for himself and his heirs and representatives in estate, undertaking to abide by such order or judgment as the Court may make or pronounce touching the matters hereby provided for, an order of peremptory mandamus, reciting or embodying the foregoing conditions and undertaking, will issue to the purport and effect in the notice of motion claimed.

There will be no costs.

Mandamus granted on terms.

MERRITT v. CORBOULD.

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Apr. 1.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. BROKERS (§ II B—10) — STOCK BROKERS — COMPENSATION — SALE ON UNAUTHORIZED TERMS.

Where an agent, authorized to sell shares of stock, negotiates an alleged sale upon terms not authorized by his agency contract and not acquiesced in by his principals, the agent is not entitled to recover commission for the alleged sale.

Statement

APPEAL by the defendant from judgment of Gregory, J., in favour of the plaintiff in an action for commission alleged to be due in respect to the sale of certain stock.

The appeal was allowed and the action dismissed.

Davis, K.C., for the appellants.

Bodwell, K.C., *A. H. MacNeill*, K.C., and *Mayers*, for the several respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff and defendants were the holders of all the issued shares in the capital stock of the Canadian Pacific Lumber Company, Ltd. The company being in financial difficulties, the said shareholders were desirous of selling their shares and agreed that the plaintiff might sell them on specified terms, which, if he succeeded in doing, would, it is admitted, entitle him to remuneration.

Considerable evidence and argument were directed to the question of whether or not the plaintiff went to London at defendants' request, or undertook the said agency only as incidental to a proposed visit which he intended to make to London. As, however, it was conceded by his counsel that the plaintiff could only maintain his right to a commission, or a *quantum meruit*, by shewing that he actually made a sale or obtained a purchaser ready and willing and able to buy on the terms upon

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which he was then authorized to sell, the circumstances of his going to London are, in the result, immaterial. The real question is, did the plaintiff make such a sale or procure such a purchaser?

It is not necessary in my view of the case that I should concern myself with the terms of the plaintiff's original authority, since it is admitted that, after he had made fruitless endeavours to sell the shares, he and the defendants, other than Meredith and Irwin, agreed to sell their shares to the said Meredith and Irwin, an agreement which is in no way impugned in this action. This was early in January, 1910. The plaintiff's original authority, thereupon came to an end; and had the matter stopped there, it is conceded that the plaintiff could have no claim such as he is asserting in this action. But something else occurred. Immediately after the said sale to Meredith and Irwin, the plaintiff sent a cablegram to the defendant, Sir Charles Hibbert Tupper, intimating that one Johnston, with whom he had previously been in treaty, wanted the refusal of the shares on terms therein specified. This was communicated to the other defendants, and as a result, Meredith and Irwin agreed to suspend for fourteen days their said agreement to permit the plaintiff to make a sale on the terms set forth in a cablegram addressed to him, dated 11th January, 1910, as follows:—

> Will sell all shares, two hundred and forty thousand, and market price for lumber, shareholders assume law suit, retaining book debts, Tees agreement and limits, Meredith finally consents if closed fourteen days, you may sell limits not less than one hundred thirty if mill sold.

I understood Mr. Davis, appellants' counsel, to admit that that authority was assented to by all the defendants. At the same time Sir Charles Hibbert Tupper cabled the plaintiff:—

> Commission five per cent.

On the 18th of the same month the plaintiff claims that he concluded a sale to the said Johnston and his associates. If that sale, as set out in the memorandum then prepared, is the one authorized by the cablegram of the 11th of January, then the plaintiff's claim is well founded. If it substantially differs from the one so authorized, then I think the appeal must be allowed, because I cannot find, on the evidence, including the correspondence by wire, that the defendants—all of the defendants—modified the terms of that authority.

The Johnston agreement was not, in my opinion, authorized. The cablegram of the 11th of January read in connection with the one to which it was an answer calls for cash. The sale was not for cash. I do not mean cash on the signing of the agreement, but on completion.

But, in addition to this there is the following article in the agreement of sale:—

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If the purchaser fail to comply with the agreement their deposit or any other sum they may have paid shall be absolutely forfeited, but the vendors shall have no further claim against them for damages.

If this does not reduce the transaction to a mere option to purchase, as I think it does, it at least curtails the ordinary legal remedies of a vendor against the purchaser for default.

The learned trial Judge appears to have thought that because the defendants or one or more of them recommended the plaintiff in case he required legal assistance to procure the services of Mr. Russell, a London solicitor, and that inasmuch as he prepared the written agreement of sale in question, any departure from the terms authorized by the cablegram must be deemed to have been made by the solicitor of the defendants, and that such departure would therefore bind the defendants as if made by their agent duly authorized in that behalf. With every respect, I find myself unable, in the circumstances of this case, to concur in that view.

Macdonald, C.J.A.

I would, therefore, allow the appeal and dismiss the action.

IRVING, J.A.:—I would allow this appeal. The agreement obtained by Merritt does not fall, in my opinion, within the terms prescribed by the cablegram of the 11th of January, nor was the agreement obtained by him an agreement of option. It was an agreement for purchase. Corbould's objection that, in the event of the English option not going through the Meredith agreement might miscarry, seems to me to point the distinction between the two agreements. Mr. Russell was not the arbiter to settle the meaning of the cablegram of the 11th of January: he did not represent Meredith in any way.

Irving, J.A.

MARTIN, and GALLIHER, JJ.A., concurred in the result.

Martin, J.A. Galliher, J.A.

Appeal allowed.

SIMPSON v. PROESTLER.

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Apr. 18.

British Columbia Supreme Court, Hunter, C.J.B.C. April 18, 1913.

1. PUBLIC LANDS (§ II—21)—PROVINCES—AGREEMENT TO SELL LAND — PRE-EMPTION.

An agreement to sell land comprised in a pre-emption record is not void as being an infraction of the British Columbia Crown Land Act, R.S.B.C. ch. 129, sec. 159.

[*Turner* v. *Curran*, 2 B.C.R. 51, disapproved.]

Statement

SPECIAL case stated for the opinion of the Court as to whether an agreement to sell land comprised in a pre-emption record is an infringement of the Crown Land Act.

Argument

Mayers, for the plaintiffs, contended that *Turner* v. *Curran* (1891), 2 B.C.R. 51, had been overruled by *Hjorth* v. *Smith* (1896), 5 B.C.R. 369, and that the interpretation of the word

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"transfer" was to be found in the Crown Lands Ordinance, ch. 144 of R.S.B.C. 1871; by sec. 13, a transfer was permitted after the grant of the certificate of improvements, and by sec. 14 a form of transfer was prescribed, which shewed that the transfer intended was one of all the right, title, and interest in the land. There was a broad distinction between an act and an agreement to do an act; and the effect of the Land Registry Act was that an unregistered instrument passed no estate, legal or equitable in the land: an agreement for sale could not be registered until after the registration of the Crown grant. He also referred to Pollock on Contracts, 8th ed., 416, and the cases there cited.

F. C. Elliott, for the defendant, contended that the intention of the Act was to prohibit all dealings with land until the issue of the Crown grant.

Hunter, C.J.B.C.

HUNTER, C.J.B.C.:—There is nothing illegal in an agreement to sell land comprised in a pre-emption record; the section of the Crown Land Act spoke only of a transfer. In asking me to declare an agreement to transfer illegal and void, the defendant was asking to have read into the Act words which were not there.

In my opinion *Turner* v. *Curran*, 2 B.C.R. 51, went too far: in my view, even in the case of a transfer, the effect of the Act was merely to suspend its validity.

Judgment accordingly.

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Apr. 7.

ROSS BROTHERS, Ltd. (defendants, appellants) v. BRAND (plaintiff, respondent).
BRAND v. ROSS.
(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. MASTER AND SERVANT (§ III B 8—180)—NEGLIGENCE—FELLOW SERVANT'S NEGLIGENCE.

It is actionable negligence when defendant's servants placed a plank in a weak and insecure position for the workmen to walk up so that it tilted while the plaintiff was turning over a box of bolts and over end upon it in loading a dray, alongside his employer's warehouse, with the result that the plaintiff, who did not know that it was insecure, fell and was injured, particularly where by statute the employer is held liable for the negligence of a fellow workman of the injured party (N.W. Ord. (Alta.) 1911, ch. 98.)

[*Brand* v. *Ross*, 8 D.L.R. 256, affirmed on appeal.]

Statement

APPEAL by defendants from the judgment of the Supreme Court of Alberta, *Brand* v. *Ross Brothers*, 8 D.L.R. 256, affirming the judgment at the trial in favour of the plaintiff for damages for personal injuries.

The appeal was dismissed.

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ROSS BROS. LTD. v. BRAND.

S. B. Woods, K.C., and *O. M. Biggar*, for defendants, appellants.

J. S. Ewart, K.C., for plaintiff, respondent, was not called upon.

Sir Charles Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Here the admitted facts are that the plaintiff was in the service of the defendants and that the injury occurred in the course of the employment.

The obligation to deliver the goods on the dray was on the appellants, and there can be no doubt that, in law, they were under a duty to provide reasonably safe appliances, having regard to the nature of the work in which the respondent was engaged. Assuming that a ten-inch plank was sufficient to enable him to pass with his load from the platform to the dray, it is evident that the safety of the respondent depended upon the way the plank was secured at both ends. That it was not safely secured on the truck-end and that he used it in ignorance of the fact must be admitted if we accept the respondent's version of the accident as the trial Judge did. If securely fastened the plank would not tilt. The tilting must have been the consequence of the insecure fastening. The position of the plank on the dray was changed to the knowledge of Dawson who was directing the work, in the absence of the plaintiff, and in the change then made I find the determining cause of the accident. The appeal is dismissed with costs.

Idington, J.

IDINGTON, J.:—I think this appeal ought to be dismissed with costs for the reasons assigned by Mr. Justice Walsh in the Court below in support of its judgment.

Duff, J.
Anglin, J.
Brodeur, J.

DUFF, ANGLIN, and BRODEUR, JJ., agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Re WINNIPEG NORTHEASTERN R. CO.

(Decision No. 2.)

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Apr. 25.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron, and Haggart, JJ.A. April 25, 1913.

1. EMINENT DOMAIN (§ I B—8)—RAILWAY COMPANY—PLANS AND PROFILE —VACATING FOR DELAY.

Where the plan of the line of a proposed railway has been approved by the Railway Commissioner of Manitoba, and filed in the land titles office of the district, but nothing has been done towards actually establishing the railway, except the obtaining of a charter which incorporated the provisions of the Manitoba Railway Act, and the payment in of a specified deposit in respect of such charter, the Public Utilities Commission of Manitoba has jurisdiction, upon the application of an owner through whose property the proposed line runs, to set aside the plans on the company's default in proceeding within a reasonable time.

[*Re Winnipeg North-Eastern R. Co.*, 10 D.L.R. 469, affirmed as to jurisdiction.]

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RE WINNIPEG NORTH-EASTERN R. CO.

APPLICATION by the railway company for leave to appeal from the judgment of Commissioner Robson of the Manitoba Public Utilities Commission, *Re Winnipeg North-Eastern R. Co.* (Decision No. 1), 10 D.L.R. 469. The application was referred to the full Court.

H. P. Blackwood, for the railway company.

W. F. Hull, for the respondent, Kern.

The Court of Appeal held that the Commissioner had jurisdiction to make the order from which it was sought to appeal, and leave must be refused, as no question of jurisdiction was involved.

Leave to appeal refused.

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1913

Apr. 30.

SHORE v. WEBER.

Supreme Court of Saskatchewan. Trial before Newlands, J. April 30, 1913.

1. MORTGAGE (§ VI C—84)—RIGHT OF FORECLOSURE—INFORMALITIES AFFECTING REGISTRATION—TORRENS SYSTEM.

An informal charge given in respect of lands which are subject to the Land Titles Act (Sask.) for a debt, will not be enforced by foreclosure or sale if not in conformity with the statutory requirements for mortgages, but a personal judgment may be recovered in respect of the debt which it represents.

2. LAND TITLES (TORRENS SYSTEM) (§ III—30)—MORTGAGES AND CHARGES—IRREGULARITY AFFECTING REGISTRATION.

The fact that an informal charge, which should not have been received for registration under the Land Titles Act (Sask.) because not in the form prescribed, was in fact received by the registrar and entered of record, does not give it the effect of a mortgage under the Act.

Statement

ACTION to enforce a charge upon lands.

J. F. Bryant, for the plaintiff.

No one for the defendant.

Newlands, J.

NEWLANDS, J.:—This is an action upon an incumbrance given by the defendant to the plaintiff for the sum of $267.43, with interest at twelve per cent. The plaintiff asks, amongst other things, for judgment against the defendant for the amount claimed and foreclosure or sale of the land. The defendant did not appear at the trial, and the plaintiff gave evidence to prove his claim as far as the burden of proof was on him. Having proved that the defendant owes him the amount claimed, he is entitled to judgment for that amount with interest and costs; but he is not entitled to either foreclosure or sale of the land.

The incumbrance, on the face of it, shews that it was given for a debt due by the defendant to the plaintiff. Being given to secure payment of a debt, it is in effect a mortgage, and is, therefore, bad, and should not have been registered: *Re M. Rumely*

Co. and Registrar of Saskatoon, 4 Sask. L.R. 466, 17 W.L.R. 160. The fact that it was improperly registered does not give it an effect that it would have had if it had been a mortgage: *Re Gaar Scott Co. and Giguere*, 2 Sask. L.R. 374, 12 W.L.R. 245, where the Court *en banc* held that a mortgage which could not be registered as a mortgage, but which had been filed by way of caveat, was properly removed by a Judge.

Judgment accordingly.

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THE KING v. RACICOT.

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EX. C.
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Feb. 12.

Exchequer Court of Canada, Audette, J. February 12, 1913.

1. DUTIES (§ I—16)—CUSTOMS—CROWN INFORMATION TO RECOVER DUTIES.

Section 264 of the Customs Act, R.S.O. 1906, ch. 48, does not apply to shift to the defendant the onus of proving compliance with the customs law when sued for customs duties claimed on the trial of an information laid by the Crown charging a smuggling scheme, if no goods were found upon which to make seizure nor was proof made by the Crown of their actual introduction into Canada; evidence of suspicious circumstances accompanying the shipment of the goods in question in the foreign country to a frontier point therein, and payment made therefor by the defendant, a merchant carrying on business in Canada, is insufficient, in a customs prosecution, to raise a presumption of their further transportation into Canada.

[*Foss Lumber Co.* v. *The King*, 8 D.L.R. 437, 47 Can. S.C.R. 130, referred to.]

Statement

TRIAL of an information exhibited by the Attorney-General of Canada, whereby it is alleged the defendant, who is a merchant carrying on business in the town of St. Johns, in the district of Iberville, P.Q., had during the years 1907, 1908 and 1909 smuggled into Canada, at a point near Rouses Point, goods and merchandise subject to duty. It is further alleged by the information the goods have not been seized and forfeited, and the Crown, under sec. 206 of the Customs Act, asks for judgment against the defendant in the sum of $8,845.35.

The defendant denied by his plea all the plaintiff's allegations.

F. W. Hibbert, K.C., for the Crown.
F. J. Bisaillon, K.C., for defendant.

Audette, J.

AUDETTE, J.:—The Crown has adduced evidence shewing that the goods in question have been purchased by the defendant from different jewellery manufacturers in the United States of America, with instruction to ship or express them to one Couture, at Rouses Point, in the State of New York, U.S. It is also proved, in most cases, that the goods have been paid for by Racicot.

On behalf of the defendant it was proved that the greater

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part of the goods in question had been bought in the name of the defendant, at the request of and for one Larivière, and the reason assigned for so doing is that where the goods are purchased by a merchant, they can be had at better prices, with, it is assumed, better trade discount. Larivière, who styled himself as "a jobber" during the period in question, testified the goods were bought for him, and that he peddled them through that part of the country, and he swears that in all such cases the goods were exclusively sold in the United States.

Couture, Larivière and Racicot had all, at one time, lived at St. Johns and knew one another.

The Crown having established and proved the purchase of these goods in the United States, the payment for the same by the defendant, and traced them to Couture at Rouses Point, N.Y., claims that under sec. 264 of the Customs Act, that having done so, the burden of proof is upon the defendant to prove the goods were not brought into Canada.

Before assenting to the correctness of this contention, it is necessary to consider the provisions of sec. 264 with reference to the provisions of the interpretation clause of the Customs Act, as embodied in sub-sec. 2 of sec. 2, and certain decisions illustrative of the proper interpretation which should be placed upon sec. 264 by this Court. Sub-sec. 2 of sec. 2 (R.S. 1886, ch. 32, sec. 2, and R.S. 1906, ch. 48) reads as follows:—

> All the expressions and provisions of this Act, or of any law relating to the customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment for the purpose for which this Act or such law was made, according to the true intent, meaning and spirit.

A similar enactment in the Customs Act, 1883, was considered by Sir William Ritchie, C.J., in *The Queen* v. *J. C. Ayer Company*, 1 Can. Ex. R. 232, and he there came to the conclusion that notwithstanding the language of this interpretation clause, the intention of the legislature in the imposition of duties must be clearly expressed, and in case of doubtful interpretation the construction shall be in favour of the person charged with an infringement of the Act.

In the recent case of *Foss Lumber Co.* v. *The King*, 47 Can. S.C.R. 130, 8 D.L.R. 437, Sir Charles Fitzpatrick, C.J., adopts Sir William Ritchie's views as above expressed with the following observation:—

> To this I would add what Lord Taunton said, when speaking of the stamp duty: The stamp law is *positivi juris*. It imports nothing of principle or reason, but depends entirely upon the language of the legislature.

It was also held in the case of *Algoma Central R.* v. *The King*, 32 Can. S.C.R. 277, [1903] A.C. 478, that a taxing Act is not to be construed differently from any other statute.

Approaching sec. 264 of the Customs Act in the light of the interpretation clause and the above decisions, one must necessarily come to the conclusion that the section applies only to a case where the Crown has proved the defendant "has smuggled or clandestinely introduced into Canada any goods subject to duty."

There is no proof whatsoever that the goods in question have been entered into Canada at any frontier port, or after crossing the frontier. Moreover, the charge against the defendant, by paragraph 77, and even by all previous paragraphs, is that the goods under sec. 206 of that Act have been smuggled or clandestinely introduced into Canada. The plaintiff has utterly failed to prove such goods have been introduced into Canada.

The defendant has, by the evidence of Larivière, disproved part of the plaintiff's case by adducing evidence that some such goods have been bought and sold in the United States, although paid for by Racicot.

However, in the view this Court takes of the case, this last mentioned evidence makes no difference, as in both cases the Crown has failed to prove any smuggling or introduction of the goods into Canada.

The solution of the facts involved in this case would have been ever so much more satisfactorily arrived at, had Racicot and Couture been heard. Racicot could have corroborated Larivière, and both Racicot and Larivière could, if they had cared, have induced Couture to give evidence, and thereby enabled us to know the part he took in the transaction. Furthermore, if there was nothing wrong, Couture could have had no objection to help Racicot dissipate the accusation against him.

Upon the facts viewed as a whole, it must be conceded that the conduct of the defendant might very well have given rise to suspicion in the mind of the customs authorities; but in the absence of proof that the goods were brought into Canada, mere suspicion will not justify the Court to give effect to sec. 264, thus shifting the burden of the proof and presume that the defendant has evaded the payment of duties and so infringed the provisions of the Act.

Under all the circumstances this Court finds that the plaintiff has failed to prove the allegations of the information and the action is dismissed with costs.

Action dismissed.

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Feb. 21.

CROSS (respondent, appellant) v. CARSTAIRS (petitioner, respondent); Re EDMONTON ELECTION.

(Decision No. 4.)

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 21, 1913.

1. APPEAL (§ II A—35)—JURISDICTION OF SUPREME COURT OF CANADA—ELECTION CONTESTS—ALBERTA—LEGISLATIVE POWER AND INTENT.

The inherent power of the legislature of Alberta to determine questions relating to the election of its members has been, in part, delegated by that legislature to the judges of the Alberta Supreme Court; and such delegation of power under the Alberta Controverted Elections Act to the Alberta Supreme Court was intended by the Alberta Legislature to be final, so far as courts of law are concerned, and the decision of the Alberta Supreme Court is *not* subject to appeal to the Supreme Court of Canada.

[See *Carstairs* v. *Cross* (No. 2), 7 D.L.R. 192.]

2. APPEAL (§ II A—35)—JURISDICTION OF SUPREME COURT OF CANADA—ELECTION CONTESTS—ALBERTA.

The judgment of the Alberta Supreme Court, on appeal from the decision of a judge on preliminary objections filed under the Alberta Controverted Elections Act, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

[See *Carstairs* v. *Cross* (No. 2), 7 D.L.R. 192.]

Statement

APPEAL from a decision of the Supreme Court of Alberta, *Carstairs* v. *Cross* (No. 3), 8 D.L.R. 369, affirming, by an equal division of opinion, the judgment of Mr. Justice Scott, *Carstairs* v. *Cross* (No. 2), 7 D.L.R. 192, dismissing preliminary objections to the petition against the return of the appellant as a member of the provincial legislature of the Province of Alberta for the district of Edmonton.

Motion on behalf of the respondent to quash the appeal for want of jurisdiction.

The appeal was quashed.

Argument

Ewart, K.C., for the motion:—The authority in respect of the trial of controverted elections resides absolutely in the Legislature of Alberta, and, in this regard, that legislature has delegated only partial powers to the Courts and Judges of the province for inquiry and report. By the Supreme Court Act, R.S.C. 1906, ch. 139, there is no jurisdiction conferred on the Supreme Court of Canada to hear such appeals, and the local statute makes such proceedings and the report thereon final within the province. The controversy on this appeal does not concern a cause, matter or proceeding, either at law or in equity, which could fall within the statutory jurisdiction of the Supreme Court of Canada. Moreover, the decision sought to be appealed from was merely in respect of preliminary objections, whereby those preliminary objections were dismissed; these proceedings were interlocutory only and did not put an end to the election

petition; consequently, it cannot be deemed a final judgment within the meaning of the Supreme Court Act: *Charlevoix Election Case*, 2 Can. S.C.R. 319; *Glengarry Election Case; Kennedy* v. *Purcell*, 59 L.T. 279.

Lafleur, K.C., and *O. M. Biggar, contra*:—The proceedings in question arose in a Court of superior jurisdiction and the judgment appealed from was rendered by the final Court of appeal within the province. There is no restriction placed upon the powers of Parliament in respect to such proceedings by sec. 101 of the British North America Act, 1867. The Alberta statute in respect to controverted elections (secs. 4, 7, 10, 13) provides for the filing of the petition in the Court; the proceedings are had in open Court (secs. 15, 18, 19, 20, 21, 28). The whole matter involves a dispute in respect of civil rights submitted to the decision of a Court of superior jurisdiction within the province, and the decision is a final judgment within the provisions of the Supreme Court Act. Reference is made to *McDonald* v. *Belcher*, [1904] A.C. 429; *Baptist* v. *Baptist*, 21 Can. S.C.R. 425; *Chevalier* v. *Cuvillier*, 4 Can. S.C.R. 605; *Shields* v. *Peak*, 8 Can. S.C.R. 579; *Ville de St. Jean* v. *Molleur*, 40 Can. S.C.R. 139.

DAVIES, J.:—This is an appeal from a judgment of the Supreme Court of Alberta confirming, on an equal division of opinion, the decision of Mr. Justice Scott, dismissing certain preliminary objections taken to a provincial election petition under the Alberta Controverted Elections Act. Davies, J.

At the hearing objections were taken that this Court had no jurisdiction to hear this appeal because, first, it is taken from the findings of the Supreme Court of Alberta under the Alberta Controverted Elections Act, and, secondly, because the decision dismissing the preliminary objections was not a "final judgment" within the interpretation placed by this Court upon that term as used in section 37 of the Supreme Court Act.

We were all of the opinion, at the conclusion of the argument, that the objections were fatal. In order to give us jurisdiction to hear appeals from decisions of provincial Courts under provincial controverted elections Acts, it seems to me that such Acts must either expressly or by necessary implication contemplate and provide for such appeals and that, in addition, Parliament must have clearly conferred upon us jurisdiction to hear them. Mr. Lafleur contended that, under the 18th and 21st sections of the Controverted Elections Act of the Province of Alberta, the decision of the trial Judge was a judgment of the Court; that sec. 28 provided for an appeal to "the Supreme Court sitting *in banco* from any order or determination of the Judge," and that the determination of such Supreme Court on

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such appeal was a "final judgment" within the 37th section of chapter 139 of the Revised Statutes of Canada, 1906, respecting the Supreme Court of Canada. I am not able to accept this contention.

The inherent power of the legislature to determine questions relating to the election of its members has been, in part, delegated by the Legislature of Alberta to the Judges of the Supreme Court of the province. The Judge who tries the election petition is empowered to find whether the candidate petitioned against was "unduly returned or elected a member of the Legislative Assembly," and he is directed within a specified time, "unless his judgment is appealed," to "report his finding to the clerk of the Executive Council." The Judge is empowered expressly not only to find that the candidate petitioned against was not duly elected, but that another candidate was entitled to the seat and so to certify, in which case it is provided "that such other candidate is entitled to the seat in the place and stead of the respondent" to the petition.

Then section 28 provides for an appeal to "the Supreme Court *en banc* from any order or determination of the Judge," and section 31 provides "that the adjudication and finding of such Court on such appeal shall be duly certified by the registrar or such other officer to the Judge appealed from," and "if the appeal is from any finding or determination of the Judge under section 21," he shall, in turn, forward it to the clerk of the Executive Council.

It is perfectly clear to me that the delegation of power to the Court was one intended by the legislature to be final and not to be subject to further appeal to this Court. The conclusions the judge in the first instance and the Court in appeal afterwards may reach are variously spoken of as a "judgment" and as "findings" or "determinations" or "adjudication and finding." Provision is expressly made for giving effect to them. No provision whatever is made for any further appeal, and, in my opinion, the appeal to the provincial Supreme Court was and was intended to be a final disposition of the subject-matter delegated by the legislature, so far as the Courts of law were concerned.

I do not think that the finding or disposition made by the Supreme Court on an appeal to it from the trial Judge on these election petitions can be said to be "a final judgment of the highest Court of final resort in the province" within the meaning of sec. 37 of the Act respecting this Court. In any event, the disposition made in this case of the preliminary objections cannot be said to be such a final judgment. It simply dismissed these objections, leaving the petition to be proceeded with and heard in the ordinary way. The appeal to this Court must be

quashed because of want of jurisdiction. Costs of a motion to quash allowed.

IDINGTON, J.:—The provincial legislatures are each entitled to declare how the members of its legislative assembly are to be elected, the validity of their elections are to be tested and determined, in the case of dispute thereabout, and how the proceedings adopted to apply such test and procure such determination are to be had and the consequences of such determination. Parliament has not the slightest right of its own mere will to interfere.

It never was intended by sec. 101 of the British North America Act that the appellate Court therein contemplated should be given, as against the will of the legislature, any jurisdiction over the subject of elections to the legislative assembly. Such a mode of determining the right to sit in any parliament or legislature (of higher order than a municipal council), as trial by the Judges of the ordinary Courts of the country had not, when the British North America Act was passed, either in England or here, ripened into a practical legal conception. Such bodies had always guarded as one of their most precious privileges the right to determine all such questions.

When the time came for provincial legislatures to confer the power of doing so, in whole or in part, on the Courts and Judges, the cry was rather that no such power could be constitutionally exercised, and it was somewhat grudgingly conceded as an improvement on old methods though a great step in modern civilization as developed under constitutional government to effectively help purify public life. It has long been conceded to be part of the inherent power of each legislature to so enact by way of delegating the execution of that power inherent in the legislature, or to speak more accurately, the legislative assembly, to such authority as it might see fit to entrust with the duty of deciding and determining what should be done in the premises. Until the legislature has determined otherwise than it has, the delegation of power cannot be held to have gone so far as an appeal here would involve.

The Controverted Elections Act of Alberta has certainly intended that the Supreme Court of the province should be the ultimate appellate Court and its decision end all disputes arising under said Act. Everything indicates that when proceedings were taken they should be so conducted as to enable an appeal there before constituting a final result and when once decided there that the proceedings should be ended and that the result reached there is to be treated as final. Parliament can in no way add to this delegation of power by the legislature or meddle with it or with its results in any way.

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The legislature might, for example, to put an extreme case, have constituted Parliament itself the sole Judge of all such questions or given it power to help in the determination thereof, but it has not. Until it does some such like thing or otherwise permitted the intervention of Parliament, the latter cannot nor can we, its creation, interfere. The appeal must be quashed with costs as of a motion to quash.

Duff, J.

DUFF, J.:—In my opinion a proceeding under the Controverted Elections Act of Alberta for questioning the validity of an election is not a "judicial proceeding" within the contemplation of sec. 2, sub-sec. (*e*) of the Supreme Court Act, R.S.C. 1906, ch. 139; and the appeal is, consequently, incompetent. There are, I think, other objections equally fatal, but it is unnecessary to refer to them specifically.

Anglin, J.

ANGLIN, J., agreed with DAVIES, J.

Brodeur, J.

BRODEUR, J.:—A motion to quash has been made in this case on two grounds: (1) That the judgment appealed from has been rendered in the matter of a provincial controverted election; and (2) that it is not a final judgment. The appellant whose election has been contested has filed preliminary objections that the deposit had not been validly made and that the petitioner was not a qualified elector. The judgment *a quo* is on these preliminary objections.

It is not necessary in order to dispose of this motion, to decide whether there is an appeal to this Court in controverted elections of Alberta. The law states, however, that the judgment from that province has to be final in order to be brought before this Court.

According to the well settled jurisprudence of this Court, a judgment dismissing preliminary objections is not considered final. For that reason I would quash the appeal.

Appeal quashed with costs.

McGREGOR v. CHALMERS.

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March 31.

Manitoba King's Bench. Trial before Prendergast, J. March 31, 1913.

1. CONTRACTS (§ V C 3—408)—OPTION—RESCISSION—FAILURE OF CONSIDERATION.

Defendant's right to avoid an option given plaintiffs to purchase land, because a cheque given by one of them for one-half the consideration of the option was dishonoured, is not affected because the other plaintiff, on receiving notice of cancellation of the option, offered defendant the amount of the cheque.

2. SPECIFIC PERFORMANCE (§ I E 1—32)—OPTION TO PURCHASE REAL PROPERTY—FAILURE OF CONSIDERATION.

An option given by defendant to plaintiffs to purchase land was *nudum pactum* and unenforceable where the consideration therefor was not paid.

3. ESTOPPEL (§ III G 1—87*a*)—OPTION TO PURCHASE LANDS—MODIFICATION—FORFEITURE—WAIVER.

Defendant did not waive the right to avoid an option given plaintiffs to purchase land, because of dishonour of a cheque given by one of them for one-half the price, by allowing the latter time in which to pay the cheque.

4. CONTRACTS (§ V C 3—408)—OPTION—RESCISSION—FAILURE OF CONSIDERATION—ONUS.

In an action to specifically perform an agreement to convey, wherein defendant vendor asserted forfeiture of plaintiffs' option to purchase because a cheque given by one of them for one-half the consideration was dishonoured, the onus was on plaintiffs to shew that the other plaintiff offered to pay the amount of the cheque before defendant declared the option cancelled because of the default.

5. ESTOPPEL (§ III B—54)—TO DENY VALIDITY OF INSTRUMENT—PINNING TOGETHER INCOMPLETE MEMORANDA—STATUTE OF FRAUDS—SUFFICIENCY.

Defendant's request that a memorandum extending an option given by him to plaintiffs to purchase land be pinned to the original option, estops him to assert insufficiency of the memorandum in itself within the Statute of Frauds.

Statement

ACTION for specific performance of an option for the purchase of land owned by the defendant.

The action was dismissed.

J. E. O'Connor, K.C., for the plaintiffs.

J. F. Kilgour, for the defendants.

Prendergast, J.

PRENDERGAST, J.:—On May 15, 1912, the two plaintiffs, after one of them had had negotiations with the defendant about the land in question, proceeded to the latter's place, which is on the outskirts of the city of Brandon, and obtained from him a written option in which the stated consideration is $50, and which reads in part as follows: "I agree to give you, your heirs and assigns, the exclusive option to June 4, 1912, to purchase the following lands on the following terms, namely, the north-east . . . all of said lands at the price or sum of one hundred and fifty dollars per acre. The sum of ten thousand dollars in cash on acceptance of option, balance . . ."

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The said consideration was paid by plaintiff McKay giving his cheque for $50, which was eventually cashed.

The defendant, when giving evidence, seemed to complain at first that he had no opportunity to consult his solicitor, while the option was drafted by Mr. McKay, who is a member of the profession; but he made it plain later that the document fully represents his intentions.

On June 4th following, which was the day when the option was to expire, the defendant went to McGregor's office in Brandon at the request of both plaintiffs, and the latter then asked him for an extension, which he gave them in writing, the document which was also drafted by Mr. McKay, reading as follows:—

> Brandon, Man., June 4, 1912.—S. H. McKay and Duncan McGregor. I, William Chalmers, in consideration of the sum of one hundred dollars now paid to me by you do hereby extend option annexed until July 10, 1912. (Sgd.) William Chalmers.

It appears that the defendant on that occasion, referring to the document about to be drawn, told Mr. McKay to "make it short and pin it to the other paper," meaning the original option, which was done. After the extension was drawn up each of the plaintiffs handed the defendant his individual cheque for $50.

Two days later the defendant turned the two cheques over to the Western Milling Company, with which he had a running account, and a few days after received a letter from them saying that the Merchants' Bank, where McGregor's cheque was payable, had refused to honour it.

The defendant then telephoned to McGregor, who said he would attend to it, and after that to the company, telling them to present the cheque again; but two days later he was informed by the latter that the cheque had again been refused. In fact, at intervals of two or three days the defendant renewed three times those communications with McGregor and the company, urging the former, and making enquiries from the latter, always with the same result. McGregor admits that although repeatedly urged as stated, he did not attend to the matter at all; he says that he was busy, that he neglected it, that he had reason to believe his cheque would be honoured, which was denied by the bank officials.

The defendant then went to Mr. McKay's office to tell him what had happened. This was on June 19th. I may say at once that the issue will depend largely on the view to be taken of what happened on that occasion. I shall, however, pass that over for the moment, and dilate only later on the two versions given of this meeting.

From Mr. McKay's office the defendant went over to McGregor's, and told him he had repeatedly promised over the

'phone to meet that cheque, and had not. The defendant says McGregor then promised later "to meet the cheque the next day, sure." McGregor says:—

> I told him I was hard up—not that I was, but to play on his sympathies. I told him that I expected that I was overdrawn; that I expected money and if I got it the next day I would pay the cheque, and at any rate I'd pay it as soon as I could.

After the interview the defendant 'phoned over to the Milling Company for the fourth time, to present the cheque by him the following day.

On the 24th, upon being advised by the Milling Company that the cheque had been again refused by the bank and was charged back to his account, the defendant settled with the company, took back McGregor's cheque, went to his solicitors and had cancellation notices served the same day on both plaintiffs. I do not think it matters that Mr. McKay, upon receiving the notice, promptly offered the defendant the amount of McGregor's cheque. Nor is it necessary, in view of the ground on which I will eventually base my decision, to examine whether—assuming everything was in order up to that date—the plaintiffs properly accepted (in the sense of *exercising*) their option, by leaving on July 9th with Mrs. Chalmers, in the absence of the defendant, their declaration of acceptance (ex. 24) with a $10,000 cheque.

It does not seem to me—always subject to whatever effect should be given to the interview above referred to between Mr. McKay and the defendant, and which will be presently considered—that the plaintiffs were in a position to exercise the option on July 9th. My opinion is, 1st. that the plaintiffs really never had an enforceable option, as they never paid the consideration of $100 agreed upon; and 2nd. that if the proper view be rather that the option was in a sense conditional as depending on payment of McGregor's cheque, and required as such some notice to be determined, then such termination was effected by the cancellation notices.

The principle that time is, by the very nature of the transaction, of the essence of an option, does not seem to me to play any part here, because that applies to the exercising or enforcing of an option; and with respect to the giving and taking of an option, time is not an element in any way, for until an option is validly given and taken, which implies a consideration from the purchaser to the vendor, the transaction is *nudum pactum*. The present transaction seems to me, then, to be of that nature, the consideration for which it was meant to be given not having materialized.

As to the plaintiffs' contention that there was waiver on defendant's part by his allowing McGregor some time to pay his

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cheque, I would say that his conduct only shews a disposition on the one hand not to take any unfair advantage and yet on the other to press firmly for his rights.

I now come to that interview which the defendant, after being advised that McGregor's cheque had been refused the third time, had with Mr. McKay; that was in the latter's office.

The defendant says he went to Mr. McKay because he thought the latter should know. He says he stayed outside the counter, as he found Mr. McKay near it on the other side; that the conversation did not last a minute, and that while it lasted Mr. McKay was busy himself with papers that were in a drawer. His evidence suggested that Mr. McKay did not seem to consider the matter very important, and gave him indifferent attention. He sums up the conversation by saying that he told Mr. McKay that McGregor had not paid his cheque and that he was going to see him—McGregor—about it, and that McKay replied, "That's right; see McGregor; it'll take the responsibility off my shoulders." He says that Mr. McKay said this as he was stooping to take some papers, and that he then left.

Mr. McKay, on the other hand, says that when the defendant told him that McGregor's cheque had not been paid, he replied, "I'll give you my own cheque for it," and went towards his office to make it, but that the defendant said, "I'll see McGregor first," to which he, McKay, replied, "If he doesn't fix it you come back and I'll give it to you," and that the defendant promised to do so. All this is denied by the defendant, while Mr. McKay denies, on the other hand, having said, "Yes, see McGregor; it'll take the responsibility off my shoulders."

We then have these two conflicting versions of the interview. Finding it impossible to harmonize them on any reasonable assumption, having no reason to discredit either, and considering especially that the onus is on the plaintiffs, I will hold it not proven that Mr. McKay offered the defendant his cheque and that the latter promised to come back if McGregor did not settle.

I may say, moreover, that it does not look from his conduct, either before or after this interview, as if the defendant was just preparing to spring cancellation notice on the plaintiffs. I have detailed the many steps he took before the interview to have the cheque cashed. And after the interview he went at once to see McGregor, 'phoned a fourth time to the Milling Company to present the cheque again, then allowed several days to pass, during which he would naturally suppose (although there is no evidence that this happened) that McGregor would speak about it to Mr. McKay, and it was only on the 24th, when advised that the cheque had been refused a fourth time and was charged back to his account, that he cancelled.

I cannot but believe also that by that time (June 19th) the

plaintiffs had become dubious whether the prospective purchasers in Montreal with whom Mr. McKay was in communication, would come to terms, and that they were beginning to believe that the option might possibly not be of much value. This would account for McGregor's absolute inactivity for his having "neglected it," as he says himself, as also for M. McKay's general attitude at the interview referred to, if the defendant's evidence on that point is correct.

It is true that Mr. McKay received from those parties in Montreal $500 on the 24th. But he says that up to that time he had no undertaking from them, and I understand that the plaintiffs never contemplated for a moment taking the land without having first secured a purchaser.

I am then of opinion, as above stated, that on July 10th, the time provided in the extension agreement, there was no option that the plaintiffs could act upon, whether the proper view be that the so-called option was *nudum pactum* as being without consideration from the beginning; or that it required as being conditioned on payment of the cheque that there should be some notice of the defendant's intention to terminate it, which was duly given.

With respect to the defence under the Statute of Frauds, I think that the defendant's request that the extension agreement be pinned to the original option (which he does not deny), estops him from setting up that the two plaintiffs are not sufficiently connected.

On the question of uncertainty in the description of the land and terms of payment, I believe the agreement is such that the Court could enforce it.

The action will be dismissed with costs.

Action dismissed.

SMITH v. KILPATRICK.

New Brunswick Supreme Court, McLeod, J. March 18, 1913.

1. SPECIFIC PERFORMANCE (§ I A—11)—PERSONS ENTITLED TO ENFORCE — PLAINTIFF DISQUALIFYING HIMSELF.

One who has disqualified himself from performing a contract to give $1,500 and a particular lot for a certain farm property by conveying the lot to a third person, cannot compel specific performance by the other party.

Statement

ACTION for declaration of rights and title, and recovery of possession.

Judgment was given for plaintiff.

M. G. Teed, K.C., for the plaintiff.

G. W. Fowler, K.C., for the defendant.

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McLEOD, J.:—The land which is the subject of this suit is situated in Upham, Kings county. It formerly belonged to Joseph F. Merritt of the firm of Merritt Brothers. In the fall of 1901 Merritt Bros.' firm suspended payment and this land together with other property there then belonging to Mr. Merritt was sold by the sheriff of Kings county under an execution issued against Joseph F. Merritt and was bid in by Mr. George McKean for Mrs. Merritt, wife of Joseph F. Merritt.

For some reason the deed was not given to Mr. McKean until December, 1910, and in January, 1911, the land that is the subject of this suit was sold to the plaintiff and Mr. McKean, Mr. Joseph F. Merritt and Mrs. Joseph F. Merritt joined in a conveyance to him. The defendant is now in possession of the land and has been in possession of it since the spring of 1900 and claims to own it or to be entitled to a deed of it.

The plaintiff asks for a declaration that he is entitled to it in fee, free and clear of any right or claim in the defendant under any agreement of purchase and for possession of the lands and premises.

Unfortunately the evidence given on the part of the plaintiff and that given on the part of the defendant is absolutely contradictory and by no course of reasoning can it be said that one of the parties may be mistaken. I shall be obliged to conclude that either one or other of the parties has not told the truth. I shall first state the facts claimed by the plaintiff.

This land in dispute is a part of what I shall call the Upham farm. The whole farm contained about 400 acres. This, together with some other land was, as I have already said, formerly owned by Joseph F. Merritt. In 1899 his brother W. Hawksley Merritt carried on a lumbering operation on it, Merritt Brothers making the necessary advances for the operation. Mr. Theodore Titus who lived at Upham and at that time had a saw mill there, acted as agent for W. Hawksley Merritt and also, I gather from the evidence, as agent for Joseph F. Merritt. He, Titus, says that in the fall of that year the defendant came to him, and to use his own words, wanted the job of getting the lumber off. He, says that the defendant said he would buy the farm part of the property, that is the front of the property which had been partly cleared. The part he proposed to buy contained about 200 acres, and Mr. Titus says they agreed as to cutting the lumber he, the defendant, was to receive $2.50 a thousand for it afloat at Titus's mill pond and he, Titus, afterwards gave him 20 cents per thousand more to put it clear of Titus's dam. That made the amount $2.70 per thousand. Titus, in making the agreement for the land and logs was acting for both the Merritts.

As to the property Mr. Titus says he told the defendant he could have the front of the farm for $2,500 and the line was run

out some couple of years after that. Merritt Brothers were to supply him for the lumbering operations and anything that remained owing him after paying for the supplies was to go on account of the purchase of the farm. The arrangement was entirely verbal. Joseph F. Merritt agreed to these terms for the sale of the farm. The defendant went on lumbering that winter and in the following May took possession of the farm and house and moved in.

In the winter of 1900-01 he also lumbered on the place. It does not appear that there was any new agreement made as to the price that he was to cut for. Mr. Merritt had some cattle on another place and they were sent down to the defendant's place and he took care of them. In the fall of 1901 Merritt Brothers suspended payment and went into liquidation and this property, as I have said, together with other properties that Mr. Joseph F. Merritt had, was sold under an execution and bid in by Mr. George McKean for Mrs. Merritt. There was no lumbering operation carried on there in the winter of 1901-02. In the fall of 1902 Mr. Joseph F. Merritt says that he went to the defendant's home and made another agreement with him. This was made in the name of Mrs. Merrritt as Mr. McKean simply held the property for her. The agreement was a verbal one, but Mr. Merritt says that he made a memorandum of what their agreement was in the presence of the defendant on some paper furnished him by the defendant for that purpose. He says that the defendant complained he had lost the winter's work of the then last season and it was some loss to him and they made a new agreement about the property.

He says the defendant told him that he, the defendant, owned a piece of woodland that stood in his father's name. It was known as the Ryder lot. He, Mr. Merritt, had got Mr. Titus to cruise this lot for him and the arrangement then made, he says, was that the defendant was to pay $1,500 in money for the farm part of the Upham farm and deed Mrs. Merritt this piece of woodland and also Mrs. Merritt was to allow the defendant's father to cut firewood on about 20 or 25 acres of land at the rear of the Upham farm, on what was called the Darling property and he says that this $1,500 was to be as cash on May 1, 1903; that is, he, the defendant, was to pay no interest until that time in consequence of the defendant keeping his, Merritt's, cattle there. Mr. Merritt says that squared everything up to May 1, 1903, and then the $1,500 was to be paid and the lot of land conveyed to Mrs. Merritt, if not paid interest was to be charged on the amount owing.

The woodland, as I have said, stood in the name of the defendant's father. The defendant said he would get a deed of it for Mrs. Merritt and that together with the $1,500 was to be the consideration for the farm part of the Upham property.

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He says it was further agreed that the defendant was to cut lumber on the property that year for which he was to receive $2.75 a thousand for spruce and for hardwood $3.25 a thousand and 20 cents a thousand for loading it on the cars, either soft or hard wood and if there was anything over in the spring, that is if defendant made anything on the operation, it was to go on account of the purchase money of the farm.

The defendant was to cut the lumber on the lot he was purchasing. There were some small pieces that had lumber on them and he was to cut that lumber down to a nine inch stump, but Mrs. Merritt was to have the lumber, paying him for cutting it.

The defendant went on and lumbered that winter and Mr. Merritt supplied him. In the spring Mr. Merritt says he was a little behind hand, but the defendant complained that he, Merritt, took out deck plank and that made it more troublesome and Mr. Merritt agreed to give him enough to pay him what he wanted and call it square. There was nothing left to go on account of the purchase money of the farm.

In the fall of 1903 defendant agreed with Mr. Merritt to lumber again that winter for him. That agreement is in writing and is as follows:—

Memo. of Agreement.

St. John, N.B., October 6, 1903.

It is this day agreed between Walter L. Kilpatrick and Mrs. J. F. Merritt, that Walter L. Kilpatrick is to chop and haul what logs he can get off the Upham place and the Kilpatrick properties, cut up in lengths suitable for the mill and delivered on the skids, providing the mill is there, at $3 per thousand. Should the mill not be there he is to receive twenty-five cents per thousand extra for putting on the mill skids from yards, also what stock is now on the place he is to keep until spring without charge for hay, but for what short feed he gives them Mrs. J. F. Merritt is to pay for same.

Either Mrs. J. F. Merritt or the millman is to find the man to roll the logs on the skids.

MRS. J. F. MERRITT,
Per J. F. M.
Walter L. Kilpatrick.

After this contract was signed Mr. Merritt says defendant came back before commencing his operations and said he couldn't do the work for $3 a thousand, he wanted $4, and it was intended a large portion of what he made should go on the house and farm account and Mr. Merritt agreed to make it $4 instead of $3, but no other change was made in the written contract.

In the spring of 1904 Mr. Merritt says defendant was some six or seven hundred dollars behind. He asked Mr. Merritt for a deed of the farm, but Mr. Merritt told him a deed would not be given until he paid for it and deeded Mrs. Merritt the Ryder lot.

The matter appears to have been in dispute between them ever

since. They attempted an arbitration, but for some reason or another they did not succeed in carrying it out, and, as I have said, in 1911 the plaintiff purchased the property and it was conveyed to him. The defendant at some time after the fall of 1902 got the title of the Ryder lot and sold and conveyed it to some one else.

The defendant's statement differs entirely from this. He says that in or about the year 1900—it would be in fact the fall of 1899—he entered into a verbal agreement with Mr. Titus. He says that Mr. Titus came to his house and that Mr. Titus told him if he would take the lumber off his property he would give him four years in which to do it and supply him and would then give him a deed of this two hundred acres, that there was no price whatever mentioned for taking the lumber off, he was simply to act as foreman and get the lumber off and when he had taken it off he was to have a deed of the place, and he says in consequence of that he lumbered in 1899 and 1900 and went into possession in May, 1900, and that all his subsequent lumbering operations were carried on under that agreement, and Mr. Titus was to pay him whatever the men's wages were and was to furnish him with supplies, and he claims to have lumbered the four years and to be entitled to the place.

Now it is between these two conflicting statements that I must decide. Men may sometimes forget what has taken place, but men do not remember what has never taken place. If the defendant's statement is true Mr. Titus simply has made a statement that is absolutely untrue and Mr. Joseph F. Merritt has done the same thing. On the other hand, if Mr. Merritt and Mr. Titus are correct then the defendant has simply made a statement that is untrue.

Under those circumstances it is necessary to look at outside circumstances as far as they bear upon it and see which is the most reasonable statement. Mr. Titus was there simply acting as agent for Mr. Merritt. He had no interest other than that and it seems extraordinary that he would make a bargain such as it is claimed by the defendant he did make, that is, to tell the defendant to go in and hire what men he wanted, pay what wages he wanted and pay for supplies and get the lumber out and he would give him this farm.

Then there is another small matter. The defendant says he had three or four horses that he worked there, but made no charge for them. It is difficult to conceive why he should not charge for his horses if he was simply a foreman there. I not only heard all the evidence given, but I have gone over it carefully and I am obliged to say I cannot accept the defendant's statement as to what the contract was.

Coming down to the agreement made in the fall of 1902. He

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at first states that he did not make any agreement with Mr. Merritt, but he afterwards admits that there was some agreement with him, and he admits that there was a talk between him and Mr. Merritt about $1,500. On the other hand, Mr. Merritt produces the paper with the memorandum that he there made. Whilst the paper itself is not in evidence as its admission was objected to by defendant's counsel, Mr. Merritt referred to it to refresh his memory and said he made it there in the defendant's house and in his presence.

As to the memorandum this is what the defendant says on cross-examination:—

Q. When he was up there didn't you produce that sheet of note paper to him (indicating the paper on which the memorandum was made by Mr. Merritt)? A. It is pretty hard to tell whether I produced that piece of paper.

Q. You don't remember anything about it A. No, sir, I don't remember anything about that piece of paper.

Q. Do you remember Mr. Merritt ever at any time making any memorandum at your house when he and you were talking? A. No, I don't.

Q. Will you swear he never did? A. I don't think he did. He might have done something in the house and I didn't know of.

Q. But in your presence? A. No, not that I remember.

Q. Will you swear he did not? A. Not that I remember. It doesn't look much as if it was done in anybody's presence.

And so through a large part of his evidence when pressed down as to those things he answers by he does not remember.

Coming to the agreement of 1903, which was in writing and specified the amount that he was to get for lumbering during the winter which amount was subsequently increased, if the bargain was such as he claims, that is, that he was simply to have four years in which to take the lumber off and then get the deed of the place, it is difficult to see any reason for making an agreement or fixing any price for getting the lumber out. There was no reason for it because Mrs. Merritt would have to pay all the costs whether large or small.

Therefore, after having given the case careful consideration I have concluded that the agreement made in 1899 was the one stated by Mr. Titus and that the agreement as stated by Mr. Merrit was the agreement that was made in the fall of 1902.

Mr. Fowler on behalf of the defendant contended and very strongly that if I did come to that conclusion I must order an accounting between the parties, because he said anything defendant made on these contracts was to go towards the payment of the house and farm, and that is true if the contract is to be carried out; but the defendant has placed himself in such a position that he cannot carry out the contract. He has sold the Ryder lot which was to be part of the consideration paid and he cannot convey that to Mrs. Merritt or to the plaintiff either.

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Mrs. Merritt did not agree to sell this land for $1,500, but agreed to sell it for $1,500 and the Ryder lot. The defendant has sold and conveyed the Ryder lot away and he cannot now convey it either to Mrs. Merritt or the plaintiff. Having placed himself in such a position that he cannot carry out his part of the contract, he cannot compel Mrs. Merritt to carry out her part. Mrs. Merritt has sold this property to the present plaintiff. It is not open to the defendant now to say to the plaintiff: I must have an account as to whether there is anything coming to me under these contracts or not, so that it may go on account of the purchase of the farm. As he did not carry out his part of the contract, as I have said, he cannot compel Mrs. Merritt to carry out her part.

If there is anything owing to him by Mrs. Merritt he has his claim still against her which he can enforce either at law or in equity, as he may be advised; but I have concluded that as between himself and the plaintiff he is not in a position to demand an accounting.

The order, therefore, will be that the plaintiff is entitled to the land in fee free and clear of any right or claim of the defendant under any agreement of purchase and also that he is entitled to the possession of the lands and premises. The defendant must pay the costs of this action.

Judgment for the plaintiff.

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April 9.

Alberta Supreme Court. Trial before Stuart, J. April 9, 1913.

1. MASTER AND SERVANT (§ III—285)—MASTER'S LIABILITY TO STRANGER FOR SERVANT'S TORT.

A *primâ facie* case of negligence is made out against the owner of a vehicle where it is shewn that the vehicle while being driven by one of his servants ran into the plaintiff, who was standing on the sidewalk, and who was injured as the result thereof.

[*Crawford* v. *Upper*, 16 A.R. (Ont.) 440, applied, and *Manzoni* v. *Douglas*, 50 L.J.Q.B. 289, distinguished; see also *Baillargeon* v. *St. George's*, 4 D.L.R. 894.]

2. EVIDENCE (§ II E 1—135)—STATUS—MASTER AND SERVANT—PRESUMPTION OF RELATIONSHIP—STRANGER'S CLAIM.

In an action against the owner of a vehicle for damages for injuries alleged to have been sustained by the negligence of his servant resulting in a collision with the plaintiff, evidence that the vehicle in question was owned by the defendant, who was engaged in the transfer business, and that he employed men to drive vehicles at the time of the accident in question, is sufficient, in the absence of evidence to the contrary, to raise the inference that the person who was driving the vehicle, though his name was unknown, was the servant of the defendant.

[*Joyce* v. *Cappell*, 8 Car. & P. 370, referred to.]

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5. EVIDENCE (§ II E 1—145)—PRESUMPTIONS—STATUS—MASTER AND SERVANT—SCOPE.

In an action against the owner of a vehicle for damages alleged to have been sustained by the plaintiff through a collision with the defendant's vehicle; evidence that the vehicle in question was driven through the streets at a time when draymen were usually at work, that the defendant was engaged in the transfer business and the driver of the vehicle was in the employ of the defendant, is sufficient, in the absence of any evidence to the contrary, to raise the inference that the person driving the waggon was acting in the scope of his employment and that he was about his master's business at the time of the accident in question.

Statement

ACTION for damages for personal injuries.

Judgment was given for the plaintiff.

D. S. Moffatt, for plaintiff.

R. Stewart and *J. H. Charman*, for the defendant.

Stuart, J.

STUART, J. (oral):—In this case, which I tried the other day, I have decided that there must be judgment for the plaintiff for damages. I confess that it is a very hard case either way you look at it. It is hard on the plaintiff if he cannot recover against someone. It is very hard on the defendant to have to pay damages.

The facts simply were these. The plaintiff came from North Dakota on June 3, 1911, and on the 4th of June he was standing on the sidewalk near the Imperial Hotel, on the corner of Second street east and Ninth avenue, about one and a half feet from the curb, and about the same distance from a steel electric light pole. He was talking to a friend. He was facing north-east. His friend was facing him and facing south-west. While they were standing talking something struck the plaintiff on the left side of the head and knocked him down senseless, and the next thing he knew he woke up in the Holy Cross Hospital, three days afterwards. That is all he knows about the accident. The friend who was speaking to him knows but little more. He said that while he was talking something shot by his face and struck his friend and knocked him down on the sidewalk, and he said he thought he was killed. The next thing he saw was a dray with a horse breaking away from it, the dray catching on the steel post.

I infer from that that it was some part of the dray that struck the man, although what part we do not know. The dray was not loaded, but I think it is the reasonable inference from the facts that it was that dray that struck the man on the side of the head. A very severe wound was given him and the doctor said that the outer bone in his head was fractured, although the inner bone was not. He stayed in the hospital seven or eight days and got out and around and went back to North Dakota, and didn't make any claim on anybody or make any inquiries

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about what caused it, apparently thinking, I suppose, that he would recover soon, but it turned out that he found his right arm was practically useless, paralyzed, which according to common medical knowledge would probably result from an injury on the left side of the brain, and he eventually wrote up to some solicitor here, but did not come back to Calgary until the following May, that is May, 1912, and a writ was issued on May 30, against the defendant Thomas Ward.

I should say that there is this additional fact about the accident, that the policeman who was on point duty on the corner of Eighth avenue and Second street east, saw a man, a driver of a dray crossing Eighth avenue going southward about the time the accident is shewn to have occurred, and after he had got across Eighth avenue he saw him whip up his horse, not in any unreasonable way, but as a driver would naturally do when he was past the crowd. The next thing he saw was a crowd of people gathering about the Imperial Hotel, and he went down to see what was wrong and he found the dray against the post with the horse attached and the shaft broken and some pieces of harness there, and the driver, or a man who said he was the driver, there, who then gave to the policeman, according to the policeman's story, some such name as Taylor. He asked the driver who he was working for and he said for the Alberta Transfer Company. He asked what his employer's name was and he said he gave him some such name as Wall or Waugh. The defendant's name is Ward.

Aside from the defendant's examination for discovery that is all the plaintiff could prove. However, he examined the defendant for discovery and the defendant said that at that time he was engaged in the transfer business and that he and two other men occupied an office together, had a common office and common telephone, of which they shared the expenses and had over their office door, and I think he said on their drays, the words "The Alberta Transfer Company," but they were not working together any more than that. Each employed his own men and owned his own dray. The defendant said that he had a man working at that time; he didn't know his name; he never did know his name, but he knew that he had an accident about that time, because he came home one day with his harness all smashed and he said that he discharged him because he didn't like the explanation that he gave, and paid him in cash what was coming to him. He had only worked a few days. He said he had never seen him since, except once three or four months afterward at the C. P. R. station, when he was apparently taking the train for the east, and the defendant thought he was going to the old country, so that defendant had no means of tracing him, no means of getting his evidence as to what had happened. The plaintiff did not sue until, as I have said, long after the accident happened, that is, about a year afterwards.

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Now, the defendant offered no evidence at the trial. It was contended by Mr. Charman that a *primâ facie* case had not been made out on either of three counts:—

1st. That there was no evidence that the man driving the dray was the defendant's servant.

2nd. That there was no evidence that he was acting at the time within the scope of his employment.

3rd. That there was no evidence of negligence.

With considerable reluctance I have come to the conclusion adverse to the defendant on all those points.

I think the evidence that I have stated is sufficient to justify me in the absence of any other evidence in making the inference that this defendant's unknown servant was really the man that was driving that dray that struck the plaintiff, and I think we ought to infer, in the absence of any evidence to the contrary, that when a driver of a dray is driving it through the streets at one o'clock in the afternoon where draymen usually work, that he was acting in the scope of his employment, that he was about his master's business at the time.

Upon the first point, as to the servant being actually his servant, I refer to *Joyce* v. *Cappell*, 8 Car. & P. 370, which I think is of some assistance and points to the conclusion I have made.

And then on the point of negligence I cannot distinguish the case from the case of *Crawford* v. *Upper*, 16 A.R. (Ont.) 440. In that case a person was on a sidewalk and was knocked down by a runaway horse. The case was heard by Hagarty, Burton, Osler and Maclennan, and the judgment of the Court was delivered by Hagarty, Chief Justice of Ontario. He said this:—

We have to say here whether the fact of a horse in the street of a city being seen running away, upsetting the cutter and throwing out the driver and then running into the sidewalk and injuring a passenger thereon, does not shew a *primâ facie* case. I am inclined to think that it does.

It would be hardly fair on persons injured in this way if the additional burden of proof of the cause or reason of the runaway should be cast upon them. It might in many cases be next to impossible to prove what took place in some other street, etc.

I think the reasonable view of the law, and of the ordinary transactions of human life, is, that if a man's horses galloping through a street run on and injure a passenger on the sidewalk, a case of *primâ facie* wrong is shewn. It may be fully explicable, but I think it calls for explanation.

There are some accidents from which by their mere occurrence negligence may be inferred, *res ipsa loquitur*.

There are some other passages in the judgment which are worth looking at.

Mr. Charman quoted a case of *Manzoni* v. *Douglas*, 50 L.J. Q.B. 289, which at first blush is very much against the plaintiff, but on examination is not. In that case from the plaintiff's own

evidence it was shewn that the driver of the conveyance was doing all he possibly could to control his horse, and it was evidently from the plaintiff's evidence a case of the horse having got the better of the driver. Now here there is nothing to shew what the driver was doing one way or the other. It is, as I say, very unfortunate and very hard on the defendant, because he is unable to get his driver, to trace him, to find out where he is, and he cannot get the evidence to shew what happened; but it is worthy of remark that the driver never mentioned to his employer when he was telling about the accident that he had hurt anybody. And I think I must gather from the defendant's examination on discovery that he was very much inclined to believe that his driver had been acting wrongfully, had been doing something that he should not have done, because he discharged him on the spot, practically. It is just a case for the application of the real principle that underlies the law as regards a master being responsible for the misdoings of his servant. He is supposed to employ careful servants, make a careful choice of his servants, and he is shewn here to have employed a man whose name he did not know and never inquired to find out.

So I think, in the absence of any other evidence, I am bound, following this case of *Crawford* v. *Upper*, 16 A.R. (Ont.) 440, to assume that what happened was due to the negligence of that unnamed servant, and therefore that the defendant is liable for damages.

As I said, it is rather hard on the defendant, but I don't see how, in my present opinion at least, he can escape liability as to the amount of the damages. The man was knocked senseless and received a very severe injury on his head and was in the hospital unconscious for two or three days. He did get well enough, of course, to go around, but he was quite evidently seriously injured, and his arm was made useless for a number of months at any rate, and is not quite well yet. There was some evidence as to his failing to get employment which he hoped to get. It is not a case, however, in which I am going to attempt to give absolute compensation. In fact, one cannot try to do that. I think one thousand dollars is not unreasonable, although I would not wonder if it is not enough; but I don't think it is too much, and I have to be on the safe side. Owing to the fact that he didn't make any claim immediately and to the length of time that he allowed to elapse before bringing his action—a year—which has apparently, or possibly at any rate, prejudiced the defence in securing evidence to defend himself by tracing the whereabouts of his servant, I am inclined to think that he should not be given any costs.

Judgment for $1,000 without costs.

Judgment for plaintiff.

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April 10.

ROGERS LUMBER CO. v. SMITH.

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. April 10, 1913.

1. EXECUTION (§ I—3)—PROPERTY SUBJECT TO.

An execution attaches to land only to the extent of the debtor's interest therein, existing when the execution was filed in the land titles office, as against a mortgage upon the land.

[*Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, referred to.]

2. EXECUTION (§ I—8)—PROPERTY SUBJECT TO—SUBSEQUENTLY ACQUIRED INTEREST.

An execution will bind not only the interest of the debtor at the time the execution is filed, but any further interest which the debtor may acquire during the continuance in force of the execution.

3. MORTGAGE (§ II A—40*b*)—PRIORITY AS TO JUDGMENTS — EQUITABLE MORTGAGE—MERGER IN LEGAL MORTGAGE.

Even if as a general rule the taking of an ineffectual legal mortgage by an equitable mortgagee does not merge the equitable mortgage, as affecting his right of priority, the rule will be displaced by clear proof of intention to the contrary; and, hence, taking of a mortgage to replace a prior mortgage which was not registerable because of an incorrect description of a plan, and because the mortgagors were not then the registered owners of the land, gives priority to a creditor of the mortgagors who obtained judgment against them and filed an execution thereon after the first mortgage, but before the second was given, intention to abandon the prior mortgage clearly appearing, though the mortgagees erroneously regarded the second mortgage as affording as valuable security as the first.

[*Manks* v. *Whiteley*, [1911] 2 Ch. 448, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of Newlands, J., *Rogers Lumber Co.* v. *Smith* (No. 1), 8 D.L.R. 871, on a case stated for the opinion of the Court.

The appeal was dismissed with costs.

H. J. Schull, for appellants.

J. A. Allan, for respondents, the Ideal Fence Co.

P. H. Gordon, for respondent, W. T. Smith.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an appeal from the judgment of my brother Newlands on a case stated for the opinion of the Court. The facts as admitted are as follows:—

On September 27, 1910, the defendants Niklason and Cleugh, being indebted to the plaintiffs in the sum of $1,141.45, executed a mortgage on lot 80 according to a plan No. 3720 of the townsite of Lang. It was intended by both parties to this mortgage that it should cover lot 80 according to plan No. K3720. The plaintiffs, being unable to register the mortgage by reason of the incorrect description of the plan and also by reason of the fact that Niklason and Cleugh were not at the time the regis-

tered owners of the lot, having only an agreement of sale thereof, filed on October 4, 1910, a caveat against lot 80, plan K3720. On December 1, 1910, the respondents the Ideal Fence Co. recovered judgment against Niklason and Cleugh for $1,388.84 and issued execution thereon which was duly filed in the land titles office. On February 1, 1911, the plaintiffs, thinking that the easiest way to correct the errors in the above mentioned mortgage and thereby obtain a registerable security was by way of a new instrument, had Niklason and Cleugh execute a new mortgage on lot 80 according to plan K3720. This mortgage, as set out in the stated case, was given to replace the mortgage of September 27. On the same day as this mortgage was given one Larson, the registered owner of lot 80, executed a transfer thereof to Niklason and Cleugh, and on February 27 this transfer and the mortgage of February 1 were, it is stated, registered simultaneously. The certificate of title was issued having endorsed thereon the plaintiffs' mortgage, but subject to the respondents' execution. On March 9, 1911, the plaintiffs, without making any search to ascertain how the title stood, executed under their corporate seal the following document and registered the same:—

To the registrar of the Assiniboia land registration district:—

Rogers Lumber Company, the incumbrancee, doth acknowledge to have received all moneys due under a certain encumbrance bearing date of the first of October, 1910, and made by C. J. Niklason and W. T. Cleugh, of township No. Lang, in range No. west of the second meridian, to Rogers Lumber Co., to secure the sum of $1,141.45, and in respect of which the said Rogers Lumber Co. on October 4, 1910, caused a caveat to be filed in the land titles office for the Assiniboia land registration district against lot 80, plan K-3730, Lang, in the Province of Saskatchewan, as No. A.C. 1155, and that such encumbrance is therefore discharged and such caveat registered thereunder is hereby withdrawn.

It was admitted that the statement contained in this document that the plaintiff company had received all the moneys due under the mortgage of October 1 was incorrect, but no attempt was made to controvert the statement therein contained that such incumbrance was thereby discharged. The land was seized by the sheriff under the respondents' execution and was advertised for sale when the plaintiffs brought this action. The question for the opinion of the Court was, Are the plaintiffs entitled to rank upon the lands and premises mentioned in these mortgages in priority to the execution of the Ideal Fence Co.? My brother Newlands answered the question in the negative. From his judgment this appeal is taken.

For the plaintiffs two arguments were put forward, under both of which it was contended that the plaintiffs were entitled to succeed. First, it was argued that under *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, an execution against lands affects only the debtor's interest in the property, and by that

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interest is meant the interest over which the debtor had at law or in equity a right to consider himself the beneficial owner, and over which he had disposing power for his own benefit without committing a breach of duty; that as the debtors Niklason and Cleugh, by executing the mortgage of October 1, had in equity parted with that portion of their interest in the lot in question represented by the mortgage, the respondents' execution only attached to such interest as the debtors had over and above the mortgage.

Wilkie v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282, decided that an execution bound only the interest which the execution debtors had in the land at the time the execution was filed in the land titles office. The respondents' execution, therefore, only attached to whatever interest Niklason and Cleugh had in the lot on December 1, 1910. What was that interest? It was the entire property in the lot save and except such interest as passed to the plaintiffs under their mortgage of October 1. What that interest was, it is, in my opinion, unnecessary to determine, because whatever it was it was subsequently abandoned and extinguished by the discharge of the mortgage, unless indeed it was kept alive by the application of the equitable doctrines urged upon us as the second branch of the argument on behalf of the plaintiff and hereinafter referred to. The document above set out shews beyond question that the mortgage of October 1 was discharged. Whatever rights against the land, if any, that mortgage gave the plaintiffs thereby became extinguished; and as that was the only lien upon the execution debtors' interest in the land in priority to the respondents' execution, the entire property in the lot would, in my opinion, become bound by the execution; for I take it to be established law that an execution will bind not only the interest of the debtor at the time the execution is filed but any further interest which the debtor may acquire during the continuance in force of the execution. When the plaintiffs took their second mortgage it could attach only to such interest as remained in Niklason and Cleugh after the giving of the first mortgage and the attaching of the execution. This was realized by counsel for the plaintiff, and he rested his claim to succeed on the plaintiff's unregistered mortgage, in support of which he submitted as his second contention the proposition that where the equitable mortgagee takes a legal mortgage which is ineffectual, no merger results, and the mortgagee has the right to stand on the security of the equitable mortgage and thus preserve his priority. In support of this proposition he also cited Pomeroy's Equity, 3rd ed., vol. 2, p. 1266; *Grice* v. *Shaw*, 10 Hare, 76; Fisher on Mortgages, Can. ed., 1910, sec. 1559.

Whatever may be the general rule in this regard flowing from the application of equitable doctrines, that rule, as was said by

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Parker, J., in *Manks* v. *Whiteley*, [1911] 2 Ch. 448, will be displaced by clear proof of intention to the contrary. In the present case we have, in the discharge of the first mortgage and its replacement by the second, the clearest proof that the plaintiffs abandoned whatever rights they had under the first, and no longer relied upon it as a security. That being so, whatever charge (if any) upon the interest of Niklason and Cleugh in the said lot was created by the unregistered mortgage was entirely extinguished, and in my opinion it makes no difference that the releasing by the plaintiffs of their first security and their taking the second was done under the erroneous belief that the second was just as valuable a security to them, so long as their intention to abandon the first and rely upon the second is beyond question. The plaintiffs having released whatever rights they had under their unregistered mortgage, and having chosen to rely upon the second, are entitled only to such rights as that security gives them.

I am therefore of opinion that the judgment of my brother Newlands should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

PEARSON v. O'BRIEN.

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Nov. 12.

(Decision No. 2.)

Judicial Committee of the Privy Council. Present: Earl Loreburn, L.C., Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline. November 12, 1912.

1. CONTRACTS (§ I D—2)—LACK OF MUTUALITY—MATERIAL ALTERATION—PLACE OF PAYMENT.

In a land contract the place of payment of the purchase-money is a material term, and where, on its execution by the intending purchaser, he alters, without the consent of the vendor, the formal contract of sale already executed and forwarded by the vendor, by changing the place of the payment of the purchase-money, or inserting a stipulation that payments shall be "at par" at the city where the purchaser lives (the vendor being in another jurisdiction and executing the document therein), such amounts to a material alteration, and the contract may be avoided by the vendor.

[*Pearson* v. *O'Brien*, 4 D.L.R. 413, affirmed.]

2. ALTERATION OF INSTRUMENTS (§ II B—19)—CHANGING PLACE OF PAYMENT—MATERIALITY.

An acceptance of an offer to sell, which varies the amount of the cash payment, and increases the amounts of the deferred payments, is merely a counter offer to purchase and no contract is made by it although the total price is not thereby changed.

[*Pearson* v. *O'Brien*, 4 D.L.R. 413, affirmed.]

3. CONTRACTS (§ I D 4—62)—OFFER AND ACCEPTANCE—ACCEPTANCE CHANGING PLACE OF PAYMENT.

The place of payment is a material term of a contract, and where the alleged acceptance changes the place of payment, it is merely a new offer and not an acceptance which concludes a contract.

[*Pearson* v. *O'Brien*, 4 D.L.R. 413, affirmed.]

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4. PAYMENT (§ III—25)—PLACE OF PAYMENT.

Where a contract for sale of lands made by offer and acceptance is silent as to the place of payment of the purchase-money, the presumption is that the price is payable at the place where the party made the offer and was domiciled.

[*Pearson* v. *O'Brien*, 4 D.L.R. 413, affirmed.]

5. CONTRACTS (§ I D—62)—OFFER AND ACCEPTANCE — ACCEPTANCE WITH TERMS OF INTERPRETATION—VARIANCE.

Where a person holding an option to purchase land forwards a remittance of the deposit money required on acceptance with a letter enclosing for signature by the vendor formal agreements of sale already signed by the sender who wrote that the documents were "in accordance with" the option, the vendor may properly treat the letter as a proposal to accept the offer only in the sense of the formal documents and to pay the money on the like terms; consequently the vendor is not bound if there is a material variance and a further definite acceptance in conformity with the option is not made within the option period.

6. ESTOPPEL (§ III G 1—87*a*)—ACQUIESCENCE — MODIFICATION OF TERMS.

The vendor under an option of purchase who, on receiving a letter of purported acceptance accompanied by a cheque for the deposit, cashes the cheque pending negotiations between the parties as to discrepancies between the option itself and the formal agreement sent to him for signature, is not thereby estopped from insisting upon the terms in the option with which the cheque was consistent and from objecting to a variation made therefrom in the formal agreement; and if the agreement falls through because the parties are not *ad idem*, whereupon the vendor offers to return the money, his objection to the terms sought to be introduced by the prospective purchaser is not waived by his having cashed the cheque.

Statement

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba, *Pearson* v. *O'Brien*, and *O'Brien* v. *Pearson*, 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510.

The appeal was dismissed.

Wallace Nesbitt, K.C., *W. H. Trueman* and *Ira MacKay*, for the appellant.

J. S. Ewart, K.C., and *A. G. Kemp*, for respondent O'Brien.

Hon. M. M. Macnaghten, for respondent Douglas.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—In the month of May, 1910, the respondent Thomas Douglas was or purported to be, owner of a house and premises in Colony street in the city of Winnipeg, described on a certain plan as lot 26, and S. ½'s of lots 23 and 25 in 85 St. James.

The primary, and in one event, the only question for decision in this case is whether the respondent Douglas, in the latter end of this month of May, entered into with the appellant a concluded and binding agreement to sell this house. This is a question not of law, but of fact, and in the present instance resolves itself into the question whether the appellant accepted definitely a certain option of purchase, which may conveniently

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be called an offer, to sell this house, contained in a letter, bearing date the 24th of May, 1910, sent to him by the respondent Douglas. The letter runs thus:—

Moose Jaw, 24th May, 1910.

I hereby agree to accept $9,750 for my house on Colony street, 287, on the following terms: $2,000 cash by 26th May.

The difference in existing mortgage and what can be raised in excess of it, to be paid to me as soon as new mortgage can be completed.

The balance of my equity to be paid in three equal annual instalments, with interest at six per cent. per annum.

This agreement to last until 26th May, 1910, and is given to Mr. Geo. A. Pearson.

It is understood that there is no commission or brokerage fee.

T. DOUGLAS, M.D.

No place having been named in this letter at which the purchase-money was to be paid, the law implies that the residence of the vendor is the place of payment, and the offer is, therefore, to be read as if the words "to be paid at Moose Jaw," were written into it after the figures $9,750. This is the construction the respondent insists the offer bears. It by no means follows, however, that an unskilled person, a person not a lawyer, would understand the letter in this sense. It is plain that by the words "the balance of my equity to be paid," it is meant that the balance of the purchase-money, *i.e.*, $7,750, was to be paid. Otherwise these words would be meaningless, since an equitable interest in either land or money cannot be paid, in whatever other manner it may be dealt with. On this necessary assumption the offer meant that this sum of $7,750 should be paid in three equal annual instalments, so that until May, 1913, the appellant's debt to the respondent would not be entirely discharged. This, however, was subject to one contingency, namely this, that the whole, or a portion, of this balance of $7,750, might be raised by mortgage of the property sold, and on the mortgage being effected, whenever that event should take place, paid to the vendor. Any acceptance of the offer which ignored this latter contingency, and treated the balance as payable in three annual instalments and in no other way, would not be an acceptance of the offer actually made, but a variation of it, differing from it in a material particular. Again, the offer leaves it entirely vague as to terms upon which the mortgage was to be effected, the rate of interest to be paid, the time during which the loan was to remain outstanding, the person by whom the mortgage was to be effected, and the precise nature of the interest to be pledged. The stipulation, which is, however, express and clear, is that as large a sum, in excess of the existing incumbrances, as could be raised should be raised, and when raised be paid to the vendor, Douglas. That being the ambiguous nature of this offer, an unskilled person is not, except upon strong proof, to be dis-

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believed when he states that he put upon it a construction differing from that which to the mind of a lawyer would be its true construction. The appellant, by his letter, dated the 25th of May, 1910, purported to accept, and no doubt intended to accept, this offer in the sense in which he understood it.

The letter runs as follows:—

Dr. T. Douglas, Esq.,
Moose Jaw, Sask.

Dear Sir, 25th May, 1910.

(Re lot 26 and S.½'s of 23 and 25, 85 St. James. Plan 127.)

Enclosed you will find cheque payable to your order at par in Moose Jaw for the $2,000, being the first payment on the above property and agreements of sale on same already signed and witnessed by me in accordance with my option which you gave me yesterday.

Now, I trust you will kindly sign the agreements and return one to me at your earliest convenience, also forward me the keys of the house and stable, or if they are here in Winnipeg kindly give me an order to get them. I suppose you should also send me an order to collect the rent on the stable, too, as the tenant will probably demand this before he will pay me.

Trusting you will be well pleased with my business with you, I remain,

Yours very truly,
GEO. A. PEARSON.

In this letter he states that the agreement of sale already signed and enclosed was "in accordance with the option," which the respondent had given him the day before. That statement may be untrue, and the proof of its untruth may be furnished by the cheque also enclosed in the letter, but if it be true, then it appears to their Lordships that it must be taken as establishing that the meaning which the option or offer bore to the mind of the writer, was one which authorized and justified the framing of the agreement as he had framed it. Now, the first important provision introduced by him into this agreement is in direct conflict with the construction which according to the law the option, or offer, bears as to the place of payment. It runs thus:—

At and for the price and sum of nine thousand seven hundred and fifty dollars in gold or its equivalent to be paid to the vendor at Winnipeg as follows: Two thousand dollars upon the execution of this agreement, and the balance of seven thousand seven hundred and fifty dollars in three equal annual payments to become due 26th May, 1911, 1912, and 1913, with interest thereon at the rate of 6 per cent. per annum.

This provision cannot be treated as a mere formal mode of carrying out the common understanding of two parties. The only indication given by the vendor of his intention as to the place where the money was to be paid was furnished by his

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silence on the point, coupled with the address his letter bears as his place of residence. If the statement in the appellant's letter be true, then the executed agreement shews he never thought that he was required to pay any portion of the purchase at Moose Jaw, and never consented or agreed to do so. Thus the vendor, speaking through his letter, would appear to say to the purchaser, in effect, "You must pay at Moose Jaw," and the purchaser, speaking through his letter in reply, and through the agreement enclosed in it, would appear to say to the vendor, "I'll pay at Winnipeg." On these documents, if they stood alone, it would, therefore, be obvious that there was no consensus of the minds of the two contracting parties on this point. But these documents cannot be allowed to stand alone. They must be taken together with the cheque and considered in combination, effect being given, so far as possible, to the contents of each of the four.

Whatever might be the proper construction of the offer in the appellant's mind as to the place of payment, he was not, and could not be, under any misapprehension as to the date fixed for the payment of the instalment of $2,000, or as to the time within which he should accept the offer, if he accepted it at all.

The letter of the 24th of May expressly provides that this sum of $2,000 cash is to be paid by the 26th May, and also provides that the offer or option was only to last till the 26th of May, 1910. It was, therefore, absolutely necessary for him to pay $2,000 on 26th of May if he meant to avail himself of the option at all.

The payment of this sum, however, merely proves that the purchaser desired and intended to accept the offer. It proves nothing as to the sense in which he understood it. The cheque he sent is peculiar in form. It runs as follows:—

No. 1068. Winnipeg, Man., 25th May, 1910.

Geo. A. Pearson & Co.

Realty Brokers, Loans and Leases.

Pay to the order of Thomas Douglas, M.D., $2,000 (two thousand dollars).

Being first payment in full on lot 26 and S. ½'s of lots 23, 25, in 85 St. James, plan 127.

Price, $9,750. Terms, $2,000 cash, balance of equity in 1, 2, and 3 years at 6 per cent. annually.

To the Union Bank of Canada.

G. A. PEARSON.

Endorsements on face:—

Accepted 25th May, 1910, Union Bank of Canada, Winnipeg.

Moose Jaw Branch, please pay at par W.W.S. p. Acct.

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Endorsements on back:—

T. Douglas.

Union Bank of Canada, Winnipeg, 2nd June, 1910, R. to Z.

Receiving teller.

Bank of Montreal, 30th May, 1910, Moose Jaw, Sask.

Pay to the order of any Bank or Banker, Union Bank of Canada, Moose Jaw, Sask., Jno. G. Vico, manager.

It evidently purports to set out the terms of the offer. It omits, however, all reference to the mortgage, and represents on its face that the balance of the purchase-money, $7,750, was to be paid in three annual payments, and in no other way. It has been urged that this omission is of no importance since the mortgage could only be effected by the consent of both parties, and that by consent they might make any supplementary provision they pleased for the payment of the balance of the purchase-money. Even assuming, however, that this is the true meaning of the provision as to raising a further sum by mortgage, the omission of all reference to the mortgage in the cheque is, in their Lordships' view, significant, and of some importance, when one has to consider whether the contents of the cheque are sufficient to shew that the appellant could not have thought or believed that the signed agreement which he transmitted was in conformity with the option. The cheque, though drawn upon the Winnipeg branch of the Union Bank of Canada, is, by an endorsement on its face, signed with the initials of the accountant, W. W. S., made payable at Moose Jaw, through the Moose Jaw branch of that bank, and to that extent it is in conflict with the provisions of the signed agreement. The cheque accompanied the draft agreement. It was given in payment of the first instalment only. It was not paid apparently at Moose Jaw until the 30th of May, and on the 27th, Messrs. Knowles & Hare returned to the appellant the agreement signed by him together with another agreement, a new agreement, containing a new clause by which the appellant was made to undertake to pay off the existing mortgage, and indemnify the vendor against all claims in respect of it, and providing that the whole price, $9,750, should be paid at Moose Jaw, $2,000 on the execution of the agreement, and $7,750 in three equal annual payments to become due on the 26th May, 1911, 1912, and 1913, respectively. In this letter of these gentlemen there is a statement that the new agreement forwarded was, save as to this indemnity clause, exactly the same as the agreement the appellant had prepared and forwarded. This was, of course, inaccurate. They were not the same. One clause was struck out from the appellant's agreement, and the place of payment changed; but nothing turns upon this representation. The appellant was not misled by it. He detected the alterations, and on the 30th of May, 1910, wrote

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to Messrs. Knowles & Hare a letter containing the passage following:—

> Knowles and Hare,
> Barristers, etc.,
> Moose Jaw, Sask. 30th May, 1910.
>
> Dear Sirs,—Enclosed you will find the agreement of sale which you executed, signed and witnessed by me. It is quite satisfactory to me to have the extra clause inserted, but you changed the place of payment from Winnipeg to Moose Jaw, and, as the property is here, it is only proper to have the payments payable at par in Winnipeg, which you will see that I have changed.

The appellant here states what he meant to do rather than what he actually did. He did not strike out or alter the clause making the purchase-money payable at Moose Jaw, but after the words "to be paid to the vendor at Moose Jaw, Saskatchewan, as follows," contained in the agreement, he interpolated the words, "but at par in Winnipeg," thus making the agreement, as he thought, conformable to what was, in his view, the proper meaning of the offer. To this letter of the 30th of May, he received a reply dated the 2nd of June, 1910, containing the following passage: "We have your letter of the 30th ultimo, returning one copy of the contract in this matter executed by yourself. We notice that you have changed it so that, as it now stands, it is not the contract executed by our client, Dr. Douglas. We refer to the change of the place of payment from Moose Jaw to Winnipeg. This is not satisfactory to our client, and instructions are given us to say that he withdraws from the agreement and will not now conclude it upon the present basis. He is not averse, however, to entering into a new contract. As to this he will see you in Winnipeg some time during the next week and will confer with you upon the matter."

This latter paragraph may, when read in connection with the respondent's negotiation with his co-respondent O'Brien, explain why the vendor, while repudiating the contract of sale, retained the portion of the purchase-money he had received. It is, therefore, clear from the correspondence that, if the respondent's offer of the 24th of May, 1910, was not by the appellant's letter of the following day accepted definitely, and without any misunderstanding of its meaning and effect, there was no final and conclusive acceptance of it at all. As has been already pointed out the appellant states in this letter in effect that the option was of such a nature as to accord with the agreement he had signed, and he accepted it in that sense. It now appears this is not the sense in which the respondent understood the offer. If the appellant's statement be true, the parties were never *ad idem*. The question is: What is the correct inference of fact to be drawn from the contents of the cheque taken in conjunction with the letter which covered it, and with the agree-

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ment which accompanied it? Is the true inference that the appellant did not think that the meaning of the offer was that the purchase-money should be paid at Winnipeg, or is that he wrote the truth when he, in effect, stated that he thought it provided that the money should be paid there?

Different minds may differ as to the weight and significance to be attributed to this cheque as a piece of evidence, and may, therefore, draw different conclusions from the consideration of its terms in connection with those of the other documents referred to; but, on the whole, their Lordships are unable to come to the conclusion that the appellant's statement in his letter of the 25th of May, was untrue, or that there was any definite and conclusive acceptance by him of the respondent's offer in the sense in which he, the appellant, understood it. This disposes of the case. All that occurred after that date is immaterial. It could not estop the respondent from relying on his solicitors' letter of the 2nd of June, 1910, or amount to a waiver of the objection they made to the appellant's alteration of the draft agreement.

Their Lordships are, therefore, of opinion that the appeal must be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay to the respondents their separate costs of the appeal.

It is right to point out that the appellant introduced into the agreement prepared by or for him a clause giving definite shape to the provision touching the future mortgage contained in the offer. It was to the effect that the vendor was to raise a mortgage of $5,000, or whatever amount a loan company would advance on said property. In this he appears to have correctly interpreted the meaning and intention of the vendor, as the clause was copied into the agreement prepared by the vendor's solicitors.

Appeal dismissed.

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HENNINGSEN PRODUCE CO. v. POGGIOLLI.

Alberta Supreme Court, Harvey, C.J., Simmons, and Walsh, JJ.
April 1, 1913.

1. SALE (§ II C—39)—IMPLIED WARRANTY—MERCHANTABLE ARTICLE—BUYER'S KNOWLEDGE, EFFECT.

The implied warranty of merchantableness provided in clause 2 of sec. 16 of the Sales of Goods Ordinance, ch. 39, C.O. 1898, is negatived where the buyer makes an examination of the goods on its delivery and though found to be defective, fails to reject the same. (*Per* Harvey, C.J., and Simmons, J.)

2. SALE (§ II C—35)—IMPLIED WARRANTY—FITNESS FOR SPECIFIC PURPOSE—SELLER'S SKILL NOT RELIED ON, EFFECT.

The provisions of clause 1 of sec. 16 of the Sales of Goods Ordinance, ch. 39, C.O. 1898, to the effect that there is an implied warranty

that goods sold for a particular purpose shall be reasonably fit for such purpose, does not apply where the defects complained of were discovered by the buyer at the time of the delivery and the goods were retained by him without objection, the defects complained of being entirely within his own knowledge, since the provisions of clause 1 apply only where the buyer relies upon the seller's skill and judgment. (*Per* Harvey, C.J., and Simmons, J.)

[*Wallis* v. *Russell* (1902), 2 Ir. R. 585, referred to.]

APPEAL by defendant from judgment of Crawford, District Court Judge, in favour of the plaintiffs for goods sold and delivered. Statement

The appeal was dismissed, WALSH, J., dissenting in part.

J. W. McDonald, for appellant.

Colin McLeod, for respondents.

HARVEY, C.J.:—The defendant, who is a merchant at Blairmore, purchased from the plaintiffs, who carried on business in Montana, some cheese for the purpose of sale in his business, and this action is for the price of it. The defence is that the defendant relied on the plaintiffs to supply goods reasonably fit for the purposes for which they were sold, that the plaintiffs warranted that the goods would be of a merchantable quality, but that they were not of a merchantable quality, but were in fact worthless, and he claims as damages the price of the cheese. At the trial before His Honour Judge Crawford judgment was given for the plaintiffs for the price of the cheese without any deduction for damages. The defendant did not give evidence as to the condition of the cheese when received, but his wife did, and she states as follows:— Harvey, C.J.

Q. Do you know anything about this cheese? A. Yes, sir, I know as quick as he got the cheese, he (i.e., the defendant) said, "Come and look at this cheese, it is all cracked and mouldy; shall I ship it back?" I said, "No, you can write." He said it was too much trouble to write. . . . As soon as the cheese came we opened it up and took it out and we saw it was all mouldy; it was all the same. We sold some of it, but some was brought back. We sold some the same week, and we have the pieces at home.

Q. How much of the cheese did you examine? A. Every bit; after it came in we examined it and it was all the same.

There is no doubt that after what was done the defendant could not reject the cheese, and he does not by his defence attempt to do so.

There is no evidence of any express warranty, but he relies on the provisions of the first clause of sec. 16 of the Sales of Goods Ordinance, ch. 39, C.O. 1898. The first and second clauses of that section are as follows:—

Sec. 16, Cl. 1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required,

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so as to shew that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose;

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

2. Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality;

Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

The evidence indicates that the cheese in question was ordered from the plaintiffs either by letter or through a traveller and therefore being bought by description, the provisions of the second clause would apply.

In view of the examination of the cheese when it was received and the fact that its condition as to the defects now complained of was then discovered, there would seem to be no room for doubt that under the provisions of the second clause the implied condition or warranty of merchantable quality is negatived. The question then arises whether, that being the case, any advantage can be derived from the prior portion of the section.

For two reasons it appears to me that it carries the case no further. In the first place, that provision applies only to cases where the buyer relies on the skill and judgment of the seller. In this case it is clear that at the time of the acceptance the buyer could not have been relying on the skill and judgment of the seller to protect him from the defects complained of, because they were then entirely within his own knowledge.

Secondly, the purpose for which the goods were required was to be sold in the course of business, and the condition or warranty of the first provision would in the present case be merely one of merchantable quality, which under the circumstances is negatived by the second provision. An instructive case on this section is *Wallis* v. *Russell*, [1902] 2 Ir. R. 585, in which it was held that the vendor of crabs was liable for poisonous qualities which were not discoverable by the examination which was made. At 597 Pallas, C.B., says:—

> In cases within sub-sec. 2 if he has examined the goods, he is to be held to have relied on his own judgment, so far, but so far only, as regards defects observable on examination.

I think, therefore, the defendant cannot now support his claim for damages.

Sec. 13 appears at first to be in some respect inconsistent with the view expressed, but a careful consideration I think

shews that there is no real inconsistency. Sec. 13 provides that

When a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

It also provides that after acceptance a breach of condition can only be treated as a breach of warranty in the absence of a contract to the contrary. This section seems clearly to recognize the right of a buyer in cases coming within it to accept goods which he knows before acceptance do not fulfill the conditions and claim damages in respect of their failure in this respect, and sec. 51 provides that he may set up this breach of warranty in diminution or extinction of the price or may maintain an action against the seller for the damages. It is, however, equally clear that it applies only when there is a condition which is not fulfilled.

There may be express conditions or there may be implied conditions under sec. 16, and to all such cases sec. 13 would apply. In the present case, if there had been no examination, or if the defects had not been discoverable on examination, as in *Wallis* v. *Russell*, [1902] 2 Ir. R. 585, the condition would have continued to exist, but immediately on the examination which disclosed the defects complained of, the implied condition ceased and sec. 13 thereafter had no application to the case.

It appears that the proper corporate name of the plaintiffs is The Henningsen Creamery Co., but it is agreed by the terms of the Appeal Book that the appeal is to be argued as though the action were in the name of the Henningsen Creamery Co., and the necessary amendments made. The proceedings may therefore be deemed amended accordingly. It was also agreed on the argument that the appellants might object that the plaintiffs were not registered under the Foreign Companies Ordinance, though this objection was not raised by the pleadings. I think, however, this objection was properly rejected by the trial Judge for the reasons given by him.

I would, therefore, dismiss the appeal with costs.

SIMMONS, J.:—I concur. Simmons, J

WALSH, J. (dissenting in part):—The defendant undoubtedly accepted the cheese and is therefore liable for the price of it. He took it from the railway station and with knowledge of its condition cut up some of the wheels and sold to customers as much of it as he could. After that it is too late for him to say that he did not accept it. Walsh, J.

I think, however, that he is entitled to an allowance from the contract price for the loss sustained by him by reason of the fact that the cheese was not reasonably fit for the purpose

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for which he bought it, namely, for re-sale to his customers. The cheese was sold for delivery at Blairmore. It was shipped from Great Falls, Montana, on the 1st of March, 1910, and reached Blairmore on the 23rd of March. The plaintiffs' agent who sold the goods says that the cheese was in good condition when it left Great Falls, but that is the only evidence of its condition at any time which is offered by the plaintiffs. The evidence of the defendant and his wife is that on its arrival at Blairmore it was in a condition which rendered it practically unsaleable. In this they are corroborated by the evidence of two other witnesses and unless we are to say that the evidence of these four witnesses, who are the only people who speak as to its condition upon its arrival at Blairmore or at any subsequent time, is untrue, we must hold, I think, that it was not then reasonably fit for such purpose.

I have read the judgment of the Chief Justice and with great respect I am unable to agree in his conclusion that because the defendant knew the condition of the cheese by his examination of it before he accepted it, he is not entitled to recover from the plaintiff his damages resulting from such condition.

I am of the opinion that there was upon this sale an implied condition that the cheese should be reasonably fit for the particular purpose for which it was required. The plaintiffs well knew what that particular purpose was. The defendant at the time of the sale carried on business as a merchant, and the plaintiff had for some time sold him cheese for re-sale to his customers, and the plaintiffs' agent who made this sale knew that this lot was ordered for that purpose. The plaintiffs knew that the defendant was relying upon its skill or judgment to furnish him with goods fit for that purpose, the same being of a description which it was in the course of the plaintiffs' business to supply. There are present, therefore, all the elements required to create an implied condition of fitness under sub-sec. 1 of sec. 16 of the Sale of Goods Ordinance. When his examination of the cheese before his acceptance of it revealed its condition, I think that his right was either to repudiate the contract because of the breach of this condition, or to waive the breach of the condition and treat it as a breach of warranty. This is a right expressly reserved to him by sec. 13. The whole section is framed upon the supposition that there has been a breach of a condition. How could the buyer elect to waive a breach of a condition without knowing of the breach, and how could he know of the breach of such a condition as this without examining the goods? If sec. 13 means anything it means that if the buyer discovers a breach of a condition, as in such a case as this he could only do by an examination of the goods, he can elect either to repudiate the contract entirely or to take the goods and look

to the seller for the resulting damages. To say that because he examines them and takes them he must pay their full contract price without deduction, simply means that the right of election given to him by sec. 13 is valueless.

The proviso to sub-sec. 2 of sec. 16 has, of course, nothing to do with the case. It in terms applies only to goods which are the subject-matter of such a sale as is covered by sub-sec. 2, whilst the contract of sale which we are discussing is one which is within sub-sec. 1. I cannot agree that because the defendant inspected this cheese upon its arrival and before its acceptance, he must be deemed not to have relied upon the skill and judgment of the plaintiff. Surely he had the right to examine the goods before accepting them, even though they were sold under a condition of implied fitness. He had a perfect right to examine them to see whether or not they answered this condition, even though he relied in the first place on the skill and judgment of the plaintiffs in selecting them for him. And this brings us back to sec. 13 with the right of election given to him under it.

The defendant says that all of this cheese which he sold was returned to him and that he was paid for none of it, and in this he is corroborated by his wife. I take it, however, from the evidence of his witness, Steve Novario, that he bought one wheel of this cheese from the defendant and that he paid for it. There is nothing to shew the weight of this wheel nor the price which Novario paid for it, and the proof of both of these facts is on the defendant. The plaintiffs' invoice shews that the heaviest wheel weighed 123 pounds, and I think that it should be assumed that this is the wheel which was sold to Novario and that he paid for it at least the plaintiffs' invoice price, so that the defendant lost nothing in respect of it. I think that the rest of the cheese was worthless because of its condition and that the defendant realized nothing from it and that he should be entitled to its full invoice price of $120.72 as damages for breach of warranty.

I think that the learned District Court Judge was right in holding that registration of the plaintiffs under the Foreign Companies Ordinance was not necessary in the facts of this case to entitle it to maintain this action.

I would allow the judgment for the plaintiffs to stand and direct judgment to be entered for the defendant for $120.72 and costs of the counterclaim.

The plaintiffs should pay the costs of this appeal.

Appeal dismissed, WALSH, J., *dissenting in part.*

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April 2.

British Columbia Supreme Court. Trial before Morrison, J. April 2, 1913.

1. MISTAKE (§ III D 3—50)—QUANTITY OF SUBJECT MATTER—LANDS—RECTIFICATION BETWEEN VENDOR AND PURCHASER.

Where by mutual mistake of both vendor and purchaser land sold at an acreage price was dealt with on the sale as being of a much larger area as erroneously described in one of the documents of title (*ex. gr.* 87 acres, instead of 25 acres), rectification may be ordered on the purchaser discovering the mistake although subsequent to conveyance.

[*Cole* v. *Pope*, 29 Can. S.C.R. 291, applied.]

2. VENDOR AND PURCHASER (§ I D—20)—DEFICIENCY IN QUANTITY—ABATEMENT.

An abatement in price may be decreed even after conveyance of unimproved lands where the parties have proceeded upon a mutual mistake as to the quantity of land which was the subject of the contract, and have dealt with the same at an acreage price as though it were of three times the extent which it actually was, if the parties cannot be replaced in their original position because of subsequent dealings with the property by the purchaser before discovering the mistake and of alterations made thereto.

3. DAMAGES (§ III A 3—62)—BREACH OF CONTRACT TO CONVEY—MUTUAL MISTAKE—LARGE DEFICIENCY IN QUANTITY.

Where a purchaser sells off a part of uncleared land purchased by him and proceeds with the erection of improvements on the remainder suitable to the area which both parties had assumed the tract to contain, and the purchaser takes no steps to verify the area which both parties had by common mistake assumed to exist, until after erecting a barn with a capacity adapted to the supposed area, but much too large for the actual quantity of land, his right to damages does not extend beyond the refund of a proper proportion of the purchase money and cannot include his loss in respect of the unsuitable improvements.

Statement

ACTION for damages by a purchaser of land against his vendors for damages by reason of a large deficiency in quantity alleged to have been ascertained only after conveyance. The plaintiff had, in ignorance of the mistake as to quantity, dealt with the land by taking off timber, selling a small portion of the land and erecting farm buildings on the remainder, and he claimed special damage for loss by reason of the construction of the buildings and the sale of the small portion having been made on the basis of the total area on which the price per acre was computed. The purchaser had built a barn much too large and expensive for the quantity of land for which it was to serve.

The defendants by their pleading offered to repay the purchase money if the lands were reconveyed to them. The purchaser declined to reconvey because of his own agreement to convey the portion resold by him. The error had not been known to the vendors at the time of sale.

Judgment was given for the plaintiff for a refund of a pro rata share of the price, but his claim for the special damage was denied.

J. McDonald Mowat, for plaintiff.

J. L. C. Abbott, for defendant.

Morrison, J.

MORRISON, J.:—I find there was a mutual mistake as to the

quantity of land in the area agreed to be sold. I find that a bargain of sale was concluded between the parties on the basis of 87 acres at the price of $19 per acre. Immediately upon the conclusion of the purchase by conveyance, the plaintiff proceeded to clear the land and to erect a barn with a capacity commensurate with the extent of land acquired and he also purchased machinery to work that area of land. He also sold five acres to one Anderson, and, thereupon, for the purpose of the sale he had the land surveyed for the first time, when it was found that the parcel bought from the defendants contained only 25 acres, and that the five acres sold to Anderson were not within this 25 acre area. The defendants were quite unaware of these circumstances at the time. The plaintiff now claims damages for breach of covenant to convey 87 acres or alternatively a return of the price of 60 odd acres at $19 per acre, with interest from the date of the conveyance. The defendants are willing to make a reconveyance of the property and bring into Court the necessary sum for repayment thereupon to the plaintiff. This the plaintiff refuses, alleging as a ground that he has agreed to convey a portion of the land. It seems to me that the plaintiff is alone responsible for the consequences of his precipitancy in subdividing his purchase. For aught I know he can reconvey as desired by the defendants. I do not think he is entitled to the damages he claims in consequence of his own acts. He knew, or must be held to have known, the defendants' connection with the property. I do not think he in any way relied upon anything they may have said as to the acreage, if they said anything or did anything other than exhibit the sketch attached to the Crown grant, which does shew 87 acres to be the quantity of land in the parcel.

He should have taken ordinary precautions to check up the boundaries, if not before the purchase, at any rate before he started to sell a portion and before he began erecting buildings and expending money in alleged improvements by denuding the property of timber.

If I understand Mr. Abbott aright, he contends that inasmuch as the contract was completed by conveyance, there can be no relief.

The competent relief in a case such as this, of a common mistake, is a rectification: *Cole* v. *Pope*, 29 Can. S.C.R. 291; *Paget* v. *Marshall*, 28 Ch.D. 255 at 263, 54 L.J.Ch. 575. The defendants must return to the plaintiff the price of so much of the land as falls short of the quantity proved to be there. As to the costs of the action, the plaintiff is not entitled to costs because he has failed on the main ground of his action and has refused to accept the defendants' reasonable offer of repayment owing to his own alleged inability to accept it. The defendants are not entitled to costs owing to their mistake.

Judgment for plaintiff.

ALTA.

S. C.

1913

May 27.

Re LAND TITLES ACT.

Alberta Supreme Court, Beck, J. May 27, 1913.

1. MORTGAGE (§ VI F—97)—ENFORCEMENT—FORECLOSURE ORDERS—JURISDICTION.

A local Judge or Master of the Alberta Supreme Court has jurisdiction to make foreclosure orders and vesting orders without restriction of his jurisdiction with regard to the amount of the claim or the value of the property.

2. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—AUTHORITY OF DISTRICT JUDGE.

A District Court Judge as such has jurisdiction under the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, to make any order which the statute authorizes a "Judge" to make where there is no limitation in the particular section to indicate that only a Judge of the Supreme Court shall have the power.

3. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—PROCEDURE—ORDERS OF MASTERS OF SUPREME COURT.

A Master of the Supreme Court of Alberta has no jurisdiction as such to make orders under the Lands Titles Act, 6 Edw. VII. (Alta.) ch. 24, which by the terms of the statute are to be made by "a Judge."

4. LAND TITLES (TORRENS SYSTEM) (§ III—30)—MORTGAGES—FORECLOSURE ORDERS MADE BY MASTER OF COURT.

A foreclosure order or a vesting order made by a Master of the Alberta Supreme Court is an "order of a Court" within the exception of sec. 102 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, as to attestation by a witness for the purpose of recording against lands.

5. LAND TITLES (TORRENS SYSTEM) (§ VII—70)—PROCEDURE—ATTESTATION FOR REGISTRATION—ORDERS OF DISTRICT JUDGE.

Orders made by a Judge as persona designata under the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, including orders made under that heading by a District Court Judge, are within the exception of sec. 102 of that statute as to attestation of instruments by a subscribing witness.

Beck, J.

BECK, J.:—I have had several questions raised before me by way of reference from the registrar. I have consulted three of my brother Judges, with the result that we all agree in the following propositions:—

1. A District Court Judge in his capacity as a Local Judge of the Supreme Court, and consequently a Master, has jurisdiction to make orders for "foreclosure" or sale and vesting orders, whether in mortgage cases or not, in actions in the Supreme Court irrespective of the value of the property or the amounts of the claims in question. He also has power under sec. 116 to add any directions for the doing of any act by the registrar necessary to give effect to any such order.

2. A District Court Judge as such—but not a Master—has jurisdiction to make any order which the Act authorizes "a Judge" to make, i.e., where the Judge is *persona designata* except where, as, for instance, in secs. 112 and 113 as amended, a Judge of the Supreme Court is specially designated; and this independently of any question of the amount involved or that may perhaps be involved.

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I think, too, and one of my brother Judges agrees with me, and I have not had an opportunity of consulting the others upon this point, that the words "orders of a Court or Judge" in sec. 102 "Attestation of Instruments," must in this Act be interpreted so as to comprise under the words "Orders of a Court" a Master's Order, and under the words "Orders of a Judge," orders made by a Judge as *persona designata*.

P. L. McNamara, registrar, in person.

J. R. F. Stewart, contra.

Re A TAXATION.

SASK.

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May 3.

Saskatchewan Supreme Court, Brown, J. May 3, 1913.

1. COSTS (§ II—29)—REVIEW OF TAXATION—SASK. RULE 732.

The direction of Rule 732 (Sask. Judicature Rules, 1911), that the dissatisfied party may "within ten days and on two days' notice" apply for a review of a taxation, implies that the return date of the notice must be within the ten days; and it is not sufficient that the notice should be served within the ten days if returnable after that period.

2. APPEAL (§ III F—98)—EXTENSION OF TIME—REVIEW OF TAXATION.

A motion under Rule 732 (Sask. Judicature Rules, 1911) for a review of a taxation between party and party, being in the nature of an appeal, the Court will, in like manner as upon appeals, require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time for giving the notice by which the review proceedings are commenced.

[*Craig* v. *Phillips*, 7 Ch.D. 249; *Re Helsby*, [1894] 1 Q.B. 742, applied.]

Statement

APPLICATION on the part of the plaintiff to review the taxation of the defendant's bill of costs. The costs were taxed by the local registrar at Yorkton on 16th of April. The notice of review was served on 26th of April and made returnable in Chambers for May 1st. The application was made under Sask. Rule 732, and it was objected to on the part of the defendant as being too late.

H. V. Bigelow, for the plaintiff.

W. H. McEwen, for the defendant.

Brown, J.

BROWN, J.:—In the case of *Hudson* v. *Long*, decided by me on October 10, 1910, I held that under rule 622 (as it then read), in the case of an appeal from a Local Master, the return date of the notice must be within eight days after the decision complained of, that it was not sufficient that the notice should be served within that time. I so decided under the authority of *Fox* v. *Wallis*, 2 C.P.D. 45; *Bell* v. *North Staffordshire R. Co.*, 4 Q.B.D. 205; *Gibbons* v. *London Financial Association*, 4 C.P.D. 263. That rule seems to be, as far as the point involved is concerned, on all fours with rule 732; and I am of opinion, therefore, that the return date of the notice under rule 732 must be within the ten days there specified, and that it is not sufficient

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BROWN, J.

that the notice should be served within the ten days. In that view the plaintiff was too late in giving his notice. The plaintiff, however, asks that the time be enlarged, and I of course have power to so order under rule 704. The question arises as to whether or not the circumstances of this case are such as to justify me in so exercising that power. This review is in the nature of an appeal from the decision of the taxing officer: *Clark* v. *Fox*, 23 W.L.R. 61. The following authorities shew clearly that the Court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time: *Craig* v. *Phillips*, 7 Ch.D. 249; *Re Helsby*, [1894] 1 Q.B. 742; *International Financial Society* v. *City of Moscow Gas Company*, 7 Ch.D. 241; *Re Arbitration between Coles and Ravenshead*, 23 T.L.R. 32. The only reasons given in this case for an extension of time are those set out in the affidavit of Mr. Bigelow. In this affidavit he states that on the 18th April the plaintiff's solicitors at Yorkton wrote a letter to him at Regina instructing him in said letter to appeal from the taxation and to prepare a notice of review; that this letter also informed him that the local registrar at Yorkton had been requested to transmit the file from Yorkton to Regina in order that Mr. Bigelow might be able to prepare the notice; that this letter reached Regina on April 21st, and on that date Mr. Bigelow attended at the Court House, but was informed that the file had not arrived; he again attended on the 22nd April, but the file had not yet arrived; he then immediately wrote to the plaintiff's solicitors at Yorkton, calling their attention to this fact; and on the 25th April he found the file in the office at Regina.

Even assuming that the plaintiff's solicitors did request the local registrar at Yorkton to forward the file, I am inclined to the opinion that under the authorities above referred to the grounds set up would not be sufficient to justify me in making the order asked for, but I do not find it necessary to fully consider that point, because there is no evidence before me of a satisfactory character that such request was ever made to the Local Registrar. It is true that the plaintiff's solicitors at Yorkton so stated in their letter, but they make no affidavit with reference to the matter, nor does Mr. Bigelow in his affidavit state that he believes they made such request. He simply states that he was informed by their letter that the request had been made; and we find that immediately upon Mr. Bigelow's letter of April 22nd being written, that the papers are forwarded.

The plaintiff, in my opinion, has not shewn sufficient grounds on which to get the relief asked for, and the application will therefore be dismissed with costs.

Application dismissed.

PEPPERAS v. LeDUC.

ONT.

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May 2.

Ontario Supreme Court, Britton, J. May 2, 1913.

1. CONTRACTS (§ III G 2—300)—PUBLIC POLICY—IMMORAL MOTIVES—WANT OF CONSIDERATION—PROMISE EX TURPI CAUSA.

A promise made in consideration of the cessation of illicit cohabitation is void simply for want of any consideration, so that if made in the form of an instrument under seal, there may be *primâ facie* a valid contract; yet if the transaction is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void *ex turpi causa* and no claim or defence can be maintained which requires to be supported by allegation or proof of such an agreement; hence each of the parties thereto is powerless to enforce or to set aside an agreement of this character by judicial process.

[See Annotation to this case.]

2. BREACH OF PROMISE (§ II—5)—DEFENCES—PLAINTIFF'S MARRIAGE TO ANOTHER.

Damages for a breach of promise of marriage cannot be recovered when the plaintiff has subsequently married a person other than the defendant.

Statement

ACTION for cancellation of an agreement, for damages for the defendant's breach of an alleged promise to marry the plaintiff, and to recover money expended for and advanced to the defendant.

Counterclaim for a declaration that a lot of land at North Cobalt standing in the name of the plaintiff in reality belonged to the defendant, and for possession.

J. H. McCurry, for the plaintiff.

G. A. McGaughey, for the defendant.

Britton, J.

BRITTON, J.:—The defendant and plaintiff, without being married, lived together for three or more years as man and wife. While so living, the plaintiff, who is a hard-working woman, purchased lot 40 according to plan M. 67 filed in the office of Land Titles at North Bay, which land is situate at North Cobalt.

Upon this lot the plaintiff, out of her earnings, built a house, and she in the main supported the defendant. The defendant did to some extent contribute by his labour to his own support.

The plaintiff, as she states, was anxious that the defendant should marry her, and he repeatedly promised to do so; but, for some reason, he would never fulfil his promise. On the 9th August, 1909, an agreement, under seal, was entered into by the parties. By this instrument the plaintiff agreed, after the sale of the property, to pay over to the defendant one-half of the proceeds of sale, and that she would not dispose of the property for less than the sum of $1,800 without the written consent of the defendant. The defendant agreed that he would accept one-half of the proceeds of the sale in full of all his claim

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and interest in the property, and he agreed that he would withdraw any caution filed by him in the office of Land Titles at North Bay. Apparently a caution had been filed, but no proof of such was given at the trial.

After the agreement was entered into, the plaintiff was married to a man named Pepperas, and is now living with him as his wife. The plaintiff brought this action charging that the defendant falsely and fraudulently represented to the plaintiff that he intended forthwith to marry the plaintiff, and by reason of these representations induced the plaintiff to enter into the agreement mentioned. She asks for cancellation of the agreement, for damages for breach of promise to marry, and for money advanced for the support of the defendant, and for money advanced to him for other purposes. The defendant sets up by way of defence that he bought the lot and erected the house at his own expense, and he counterclaims for a declaration that the property belongs to him, and for possession.

I find that the plaintiff purchased the lot, and paid for the erection of the house, and that the defendant has no right whatever to the property—other than what he may have, if any, under the agreement mentioned. There was no consideration in fact for that agreement other than what is implied in the evidence given by the plaintiff. The promise and covenant given by the plaintiff were in consideration of the cessation of illicit cohabitation, and void. In such a case, if the agreement is in the form of a bond or covenant under seal, so that there may be prima facie a valid contract, "if the security is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void." There is presumption of illegal consideration from the mere fact of continued cohabitation after security is given. See Leake on Contracts, 5th ed., p. 541, [6th ed., 554].

This action to set aside the agreement cannot be successfully prosecuted by the plaintiff. "No claim or defence can be maintained which requires to be supported by allegation or proof of illegal agreement:" Leake, 5th ed., 550; 6th ed., 564, 565.

In my view of the law, the defendant cannot enforce this agreement.

The plaintiff's claim for breach of promise of marriage is absurd, as she has married a person other than the defendant—so that, presumably, she has benefited by the defendant's breach of that part of his contract.

The plaintiff's action must be dismissed, but without costs, and without prejudice to her right of action for any money claim, if any not vitiated by illegality.

The defendant's counterclaim will also be dismissed without costs.

Action dismissed.

[See Annotation on following page.]

Annotation—Contracts (§ III G 2—300)—Illegality as affecting remedies.

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Annotation

Illegality of contract

The ground on which the Court refuses to enforce immoral contracts is that they are against public policy as encouraging and aiding immorality. Where the plaintiff knew that the additions which he made to a house were for the purpose of increasing the defendant's immoral trade, the Court refused to aid in enforcing a mechanics' lien for the work done: *Pearce* v. *Brooks*, L.R. 1 Ex. 213; *Clark* v. *Hagar*, 22 Can. S.C.R. 570; *Miller* v. *Moore*, 17 W.L.R. 548 (Alta.).

In *Perkins* v. *Jones*, 7 Terr. L.R. 103, the plaintiff said to the defendant, referring to a certain named lot: "If you can get me that lot I will build." Accordingly the defendant, a builder by trade, did purchase the lot for the purpose of building a house thereon for the plaintiff; and a few days later the plaintiff entered into a written agreement respecting such lot and house, with the defendant, and paid $500 cash down. The house was intended for purposes of prostitution, as the defendant knew, and before the defendant had done anything toward building other than "brushing" the lot, the plaintiff gave notice to the defendant that she had decided not to build and demanded an immediate return of the $500 paid by her: *Held*, *per curiam*, that there had been part performance of the contract and that subsequently the plaintiff could not recover the money paid by her thereunder. *Quære*, *per* Newlands and Harvey, JJ., whether money paid under an immoral contract can be recovered back under any circumstances: *Perkins* v. *Jones* (1905), 7 Terr. L.R. 103.

The effect of illegality in the matter or purpose of an agreement is to render it wholly void of legal effect; no claim or defence can be maintained, which requires to be supported by allegation or proof of an illegal agreement: *Taylor* v. *Chester* (1869), 38 L.J.Q.B. 227, L.R. 4 Q.B. 314; *Odessa Tramways Co.* v. *Mendel* (1878), 47 L.J.C. 505, 8 Ch.D. 235. See *Hyams* v. *King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696; Leake on Contracts, 6th ed., 564. Either party may repudiate the agreement, with or without alleging a reason, and may afterwards justify on the ground of the illegality: *Cowan* v. *Milbourn* (1867), 36 L.J. Ex. 124, L.R. 2 Ex. 230.

The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law, there the Court says he has no right to be assisted: Mansfield, C.J., *Holman* v. *Johnson*, 1 Cowp. 343.

Illegality which will avoid a contract as against a party will avoid it also as against his representative: *Phillpotts* v. *Phillpotts* (1850), 20 L.J. C.P. 11, 10 C.B. 85. And the effect of illegality is the same in equity as at law. A contract or instrument which fails in a court of law by reason of its illegality cannot be enforced in equity; although money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of equity as it is in a Court of law: *Thomson* v. *Thomson*

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Annotation

Illegality of contract

Annotation (*continued*)—Contracts (§ III G 2—300)—Illegality as affecting remedies.

(1802), 7 Ves. 470; *Re Cork and Youghal Railway* (1869), 39 L.J.C. 277, L.R. 4 Ch. 748. See *Chapman* v. *Michaelson* (1908), 78 L.J.C. 272, [1909] 1 Ch. 238. A bond or covenant or other security subsequently given for a debt originating in an illegal consideration or transaction, or for a prior security for such debt, is vitiated by the same illegality: *Fisher* v. *Bridges* (1854), 23 L.J.Q.B. 276, 3 E. & B. 642; as a bill given to a broker for his charges in effecting an illegal insurance: *Ex p. Mather* (1797), 3 Ves. 373; a bill in renewal of a bill given for a gaming debt: *Wynne* v. *Callander* (1826), 1 Russ. 293; a security given to a compounding creditor by way of illegal performance: *Geere* v. *Mare* (1863), 33 L.J. Ex. 50, 2 H. & C. 339; a bond given to the holder of a note which had been given for an illegal purpose and indorsed to the holder when overdue: *Amory* v. *Meryweather* (1824), 2 L.J.O.S.K.B. 111, 2 B. & C. 573.

A guarantee of an illegal debt is illegal and void; but a guarantee of a debt which is merely void and not illegal, as the loan of a company in excess of their borrowing powers, is valid: *Yorkshire Waggon Co.* v. *Maclure* (1881), 51 L.J.C. 253, 19 Ch.D. 478. See *Re Coltman* (1881), 51 L.J.C. 3, 19 Ch.D. 64.

The effect of illegality is the same, in whatever form the contract is framed, whether in the form of a simple contract or of a contract under seal, or of a bond with an illegal condition: Co. Lit. 206*b*; *Duvergier* v. *Fellows* (1828), 7 L.J.O.S. C.P. 15, 5 Bing. 248, (1830), 8 L.J.O.S. K.B. 270, 10 B. & C. 826, (1832), 1 Cl. & F. 45, and though the contract is apparently valid in form and matter, extrinsic evidence is always admissible in variance of or in addition to the contract in order to shew that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal: *Collins* v. *Blantern* (1767), 2 Wils. 341, 1 Sm. L.C. 355. The facts shewing illegality, either by statute or common law, must be pleaded; they cannot be proved under a bare denial of the contract: Ord. XIX. rr. 15, 20. See *Willis* v. *Lovick* (1901), 70 L.J.K.B. 656, [1901] 2 K.B. 195; but where the illegality appears from the plaintiff's own evidence (as in the case of a criminal conspiracy to create a market by fictitious dealings in shares) it is the duty of the Court to take judicial notice of the fact, and to give judgment for the defendant, although the illegality is not raised by the pleadings: *Scott* v. *Brown*, [1892] 2 Q.B. 724, 61 L.J.Q.B. 738. The Courts will grant discovery in aid of the defence of illegality unless there are special circumstances of exemption: *Benyon* v. *Nettlefold* (1850), 20 L.J.C. 186, 3 Mac. & G. 94.

Money paid in consideration of an executory contract or purpose which is illegal, upon repudiation of the transaction may be recovered back, as upon a total failure of consideration; but it cannot be reclaimed after the happening of the event: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548, 50 L.J.M.C. 145; *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 620, [1905] 2 K.B. 123. Money deposited with a stakeholder upon a wagering contract may be reclaimed and recovered back after the event, at any time before the money has been actually paid over; but not if the stakeholder has paid it over

Annotation (*continued*)—Contracts (§ III G 2—300)—Illegality as affecting remedies.

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Annotation

Illegality of contract

according to the event before his authority is revoked: *Howson* v. *Hancock* (1800), 8 T.R. 575.

The party seeking to recover money paid upon an illegal contract or purpose must give notice that he repudiates the transaction before it is executed, and reclaim the money, in order to entitle him to maintain an action; and merely bringing the action is not sufficient notice: *Busk* v. *Walsh* (1812), 4 Taunt. 290; *Palyart* v. *Leckie* (1817), 6 M. & S. 290.

After the execution of the illegal contract or purpose, money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies that "*in pari delicto melior est conditio possidentis*": *Taylor* v. *Chester* (1869), 38 L.J.Q.B. 227, L.R. 4 Q.B. 313. The rule applies where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part: *Kearley* v. *Thomson* (1890), 59 L.J.Q.B. 288, 24 Q.B.D. 742; and where it has been executed as far as possible, and further execution has become impossible: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616.

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Hyams* v. *Stuart King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696. But in the case of purely equitable remedies, the Court may refuse its assistance to a *particeps criminis*, who does not rely upon any part of the illegal transaction, as a person invoking the jurisdiction of the Court of Chancery must come into Court with clean hands: *Ayerst* v. *Jenkins* (1873), 42 L.J.C. 690, L.R. 16 Eq. 27. Accordingly money lost fairly at illegal gaming or wagering, and paid, cannot be recovered back: *Howson* v. *Hancock* (1800), 8 T.R. 575; *Thistlewood* v. *Cracroft* (1813), 1 M. & S. 500; *Dufour* v. *Ackland* (1830), 9 L.J.O.S. K.B. 3. So with money paid or accounted for as the price of goods sold and delivered under an illegal contract of sale: *Owens* v. *Denton* (1835), 4 L.J. Ex. 68, 1 Cr. M. & R. 711. And money paid to induce a person to become bail for another cannot be recovered back, after the purpose is completed by acceptance of the bail, whether the principal makes default or not: *Herman* v. *Jeuchner* (1885), 54 L.J.Q.B. 340, 15 Q.B.D. 561. See *Consolidated Exploration Co.* v. *Musgrave* (1899), 69 L.J.C. 11, [1900] 1 Ch. 37, which is perhaps to be supported upon the ground that the transfer of shares was *ultra vires*, and the transferee a trustee for the company.

Where money was deposited with a company's banker for the purpose of giving the company a fictitious credit, it was held that after an order was made for winding up the company the money could not be recovered back: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616. Upon this principle a premium paid upon an illegal insurance, after the risk has determined, is not recoverable, though the underwriter cannot be compelled to pay the loss: Marine Insce. Act, 1906, sec. 84; *Vandyck* v. *Hewett* (1800), 1 East 97; *Allkins* v. *Jupe* (1877), 46 L.J.C.P 824, 2 C.P.D. 375; *Harse* v. *Pearl Life Assce.* (1904), 73 L.J.K.B. 373, [1904]

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Annotation

Illegality of contract

Annotation (*continued*)—Contracts (§ III G 2—300)—Illegality as affecting remedies.

1 K.B. 558. But if the premium in such case has been paid or secured by a bill only, there is no remedy on the bill, being the security for an illegal debt: *Ex p. Mather* (1797), 3 Ves. 373. So an underwriter having paid the loss under an illegal insurance cannot recover it back; and though he has only paid it to the broker of the insured, who has not paid it over: *Tenant* v. *Elliott* (1797), 1 B. & P. 3.

Upon the same principle goods or other property delivered under an illegal agreement or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. Where goods were delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounded with his creditors, it was held that he might repudiate the transaction before the composition had been carried out, and recover the goods from the pretended buyer, or from a subvendee to whom they had been delivered with notice of the illegal transaction: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291.

But if the contract is executed and a property either general or special has passed thereby, the property must remain; and upon this ground a lien for work done upon a chattel, though under an illegal contract, is valid; *Scarfe* v. *Morgan* (1838), 7 L.J. Ex. 324, 4 M. & W. 270. Upon the same principle a conveyance of property executed upon trust for the absolute use of a woman, cannot be set aside upon the ground that it was executed in consideration of illicit cohabitation: *Ayerst* v. *Jenkins* (1873), 40 L.J.C. 690, L.R. 16 Eq. 275. See *Phillpotts* v. *Phillpotts* (1850), 20 L.J.C.P. 11, 10 C.B. 85.

No claim can be allowed for compensation or contribution between persons engaged in an illegal transaction: Jessel, M.R., *Sykes* v. *Beadon*, 48 L.J.C. 522, 11 Ch.D. 197. Where two persons had joined in an illegal wager which they won, and one of them advanced to the other his share of the winnings, which the loser failed to pay, it was held that he could not recover back the sum so advanced, because he could not maintain such claim except through the illegal contract: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; Leake on Contracts, 6th ed., 569.

An exception to the rule, that money paid in execution of an illegal contract cannot be recovered back, is made where the party who paid the money acted under undue pressure or influence on the part of the receiver, and therefore was not *in pari delicto* with the latter: *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468; *Williams* v. *Bayley* (1866), 35 L.J.C. 717, L.R. 1 H.L. 200; *Jones* v. *Merionethshire Perm. Bg. Soc.* (1891), 61 L.J.C. 138, (1892), 1 Ch. 173. And this rule has been applied to money extorted by an abuse of legal proceedings; as where a party paid a sum of money to obtain his release from an arrest under a colourable legal process: *De Cadaval (Duke)* v. *Collins* (1836), 5 L.J.K.B. 171, 4 A. & E. 858. Another exception is, where a statute has been passed with the object of protecting a particular class of persons, the members of that class may recover payments made by them. Thus the fees of a sheriff are fixed by statute, and an overpayment may be recovered: *Woodgate* v. *Knatchbull* (1787), 2 T.R. 148, *Dew* v. *Parsons* (1819), 2 B. & A. 562. So money paid in excess of the legal interest allowed by the statutes against usury could be recovered back: *Ashley* v. *Reynolds* (1731), 2 Stra. 915; *Bromley* v. *Holland*

Annotation (*continued*)—Contracts (§ III G 2—300)—Illegality as affecting remedies.

ONT.

Annotation

Illegality of contract

(1802), 7 Ves. 3; as now is the case where a moneylender charges a higher rate of interest than the Court sanctions in an application under the Moneylenders Act, 1900 (Imp.): *Saunders* v. *Newbold* (1904), 74 L.J.C. 120, (1905), 1 Ch. 260, affirmed *sub nom. Samuel* v. *Newbold* (1906), 75 L.J.C. 705, [1906] A.C. 461.

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(Decision No. 2.)

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May 5.

Alberta Supreme Court. Trial before Stuart, J. May 5, 1913.

1. EVIDENCE (§ XII J—965)—CONTRACTS—DOCUMENTS—PROOF BY ATTESTING WITNESS—NECESSITY.

A document to the validity of which an attesting witness is necessary must be proved by his evidence unless his absence is satisfactorily accounted for.

2. MORTGAGES (§ XII J—965)—EXECUTION—PROOF—SUFFICIENCY.

In an action in effect to secure an order directing registration of a mortgage without production of a certificate of title, proof of the execution of the document by the attesting witness will be treated as having been given, if necessary, though he did not testify, where it appears that he could say no more than that he drew the document, signed defendant's name thereto and held the pen while defendant made his mark, which facts were undisputed, especially in the absence of specific objection to the proof of the execution of the mortgage.

3. RECORDS AND REGISTRY LAWS (§ III A—10)—WHAT MAY BE RECORDED—MORTGAGES—EFFECT OF FALSE AFFIDAVIT.

Registration of a mortgage without production of a certificate of title will not be directed at least without destruction of a false affidavit of execution on the back of the document, stating that the mortgage was read to defendant mortgagor, an ignorant foreigner, and that he seemed to understand it.

4. SALE (§ III A—56*a*)—CHATTELS—RESTRICTIONS AGAINST TACKING LAND MORTGAGES THERETO—STATUTORY PROHIBITION.

A clause in an agreement to purchase agricultural machinery reciting that the buyer agreed to give a mortgage on specified lands to secure payment of the price, is a "charge or encumbrance" upon the land within Stat. Alta. No. 5 of 1910 (2nd sess.), making void any mortgage, charge or encumbrance on land contained in or annexed to an agreement to purchase chattels, etc.

[*Fell* v. *Official Trustee of Charity Lands*, [1898] 2 Ch.D. 44, referred to.]

5. SALE (§ III A—56*a*)—CHATTELS—RESTRICTIONS AGAINST TACKING LAND MORTGAGES THERETO—STATUTORY PROHIBITION—SINKING MEMORANDA.

Several documents signed at the same time by an ignorant foreigner, whereby he agreed to buy agricultural machinery and gave a mortgage to secure the purchase price, will be treated as a single contract within Stat. Alta. No. 5 of 1910 (2nd sess.), making void any mortgage, charge or encumbrance on land contained in or annexed to an agreement to purchase chattels, etc.

Statement

ACTION for a declaration confirming the plaintiffs' title in respect to a mortgage on lands, the defendant refusing to deliver

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up his certificate of title for the purpose of registering the said mortgage. A preliminary motion in the case upon a question of discovery is reported, *Nichols* v. *Skedanuk* (No. 1), 4 D.L.R. 450.

The action was dismissed with costs.

Frank Ford, K.C., and *Bolton*, for the plaintiffs.

A. C. Grant, for the defendant.

STUART, J.:—The plaintiffs in their statement of claim allege that the defendant on May 30, 1911, being indebted to the plaintiffs in the sum of $5,025, and having when incurring the said indebtedness agreed to give a mortgage as security therefor, mortgaged certain lands to the plaintiffs by instrument of mortgage made in accordance with the Land Titles Act and duly executed by the defendant to secure payment of the said indebtedness. They allege further that at the time the said mortgage was executed they omitted to obtain the certificate of title for the lands mortgaged, that the defendant afterwards refused to deliver the same for purposes of registration, that in order to protect their interest under the said mortgage the plaintiffs registered a caveat against the said lands, that the defendant thereafter served a notice under sec. 89 of the Land Titles Act requiring the plaintiffs to take proceedings under their caveat and that therefore the plaintiffs entered this action. Then follows the prayer for relief in which the plaintiffs ask (a) judgment or order substantiating the title, estate, interest or lien claimed by the said caveat, (b) costs, (c) such further or other relief, etc.

In his statement of defence, after general denials the defendant alleges that the execution of the mortgage was obtained by false and fraudulent representations, that the defendant did not know that he was giving or executing a mortgage or other security on his lands, that one Shandro representing himself to be the agent of the plaintiffs canvassed the defendant and three other persons for the purpose of selling them jointly a threshing separator and traction engine and that the said Shandro well knowing that the defendant was unable to speak or read or write the English language falsely and knowingly represented that a certain document presented to the defendant for signature was an order for machinery only and that the defendant not knowing that it was a charge on his lands executed the said document.

At the trial the agent Shandro swore that he had canvassed the defendant, his son John, one McCormack and one Pentala Nicholoschuk for the purchase of some machinery and had got an order from them for a type of machine which it turned out that the plaintiffs could not supply. Then, he said, afterwards he went out with the company's traveller and one Higginson who was in the company's employ and obtained from the men an order for the machinery now in question which they all signed. Shandro

could speak the language of the defendant. He swore that he had some conversation not only with the other men but with the defendant as to the question of security on their lands. Neither McCormack nor the son John had land which could be mortgaged. Nicholoschuk had land upon which he could give a second mortgage. He said that with the defendant there was not so much discussion because he, the defendant, told him his land was clear and that his certificate was in the land titles office. He also said that the defendant had asked him if he could borrow money on his land after he signed the order, that he said he would ask Higginson about it and that in consequence of what Higginson told him he told the defendant that he could do so until the machinery was delivered.

The defendant swore that he did not tell Shandro that his certificate was in the land titles office but that he had shewed it to Shandro in his (defendant's) house on one occasion and that his reason for doing this was because they wanted a mortgage and that he had told them he would not sign a mortgage. He admitted that Shandro had told him that before he took the machine he could borrow money but that after he took it he could not borrow money on the land. He said, however, that he did not pay any attention to this because he did not intend to give a mortgage anyway and he knew that he could always borrow money on his land.

Some time afterwards the machinery was shipped to Vegreville for delivery and the purchasers came there to receive it. Shandro and Higginson were there representing the plaintiffs. While Shandro and the purchasers were attending the unloading of the machinery Higginson remained in the hotel writing out the documents which the purchasers were to be asked to sign. These consisted first of other duplicate copies of the order already signed but dated on the day of delivery. These were required as was explained so as to secure the full benefit of the 30-day time limit for registration under the Conditional Sales Ordinance. Then there were six promissory notes for the six instalments of the purchase price and also a mortgage in duplicate for the defendant and a mortgage in duplicate for Nicholoschuk.

Shandro swore that after the machinery was unloaded he told the purchasers, the defendant included, to come into the hotel and make settlement and that he told the purchasers generally just before they came to sign that they were giving notes and a mortgage on their lands as security to the company. He also swore that the defendant again said that his certificate was in the land titles office. He stated that neither he nor Higginson read or interpreted the mortgage to the defendant but that the purchasers signed all the papers in order, the defendant doing so by touching the pen while Higginson made a mark with

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it after having written the defendant's name. There was nothing in Shandro's evidence to suggest that any statement was made to the defendant just before executing the mortgage to the effect that the particular document then to be signed was the mortgage. I gathered from the evidence that the notes and the order were signed first, although this is not quite clear.

The defendant swore that no reference was made to the certificate of title at Vegreville at all and he denied that he was told by Shandro or knew that he was going to sign, was signing, or had signed a mortgage on his lands.

It is also not very clear to me upon Shandro's evidence whether it was only before they went into the hotel that he stated to the defendant that they were going to sign the security on the land or in the hotel just before the signing. I may as well say at this point that where the evidence of Shandro and that of the defendant's conflict I think that of Shandro must be adopted. Even if I were to accept the defendant's statement that he had shewn the certificate to Shandro as true it would be difficult for me to understand why the defendant would shew to Shandro his certificate of title unless there had been some intimation to him that he would be expected to pledge his land as security for the price of the machinery. The only other possible explanation is that he may have shewn it as proof of what he owned. The one difficulty which I have about Shandro's evidence is that what he said in Court was necessarily a translation into English by himself of words which he used in Ruthenian to the defendant and there was some suggestion by the interpreter who interpreted the defendant's evidence as to a word having been used in Ruthenian which had an ambiguous meaning and which might mean merely a documentary evidence of indebtedness as well as a pledge of real estate to secure it. Shandro was of course unable to tell me the exact words he used and it is regrettable that owing to the circumstances these were not available. He did swear definitely that he mentioned a mortgage "*on the land.*"

My hesitation really arises not so much from any doubt as to Shandro's honesty in giving his evidence as from a consideration of the possibility that in using the words "on the land" he may not have been translating some exactly corresponding words of Ruthenian but giving only his interpretation of some *one* word only which in his view meant a mortgage on land. He was not asked definitely as to this. However, he must have known how much depended on the words he used in Court and unless he was knowingly misleading me, which I do not think he was, it seems to me that I ought to accept his account of what he said to the defendant as correct. I do not think it is very material whether it was said before going to the hotel or in the hotel just before the signing. I think the proper inference to draw from

my acceptance of Shandro's evidence as accurate is that the defendant was aware that some one of the numerous documents contained a pledge of his land although he never knew which particular one it was. This inference would be much strengthened if I could accept his story that he had shewn the certificate to Shandro but inasmuch as Shandro denies this I think the defendant's statement on this point must be rejected. Possibly his purpose in so stating was to strengthen his denial that he had said that the certificate was in the land titles office.

The defendant admits that he was told at the time of taking the order for the machinery that he could not mortgage his land to borrow money after he got the machinery delivered to him. This supports the view that he must have known when it was delivered and when he signed the documents that the plaintiffs at least thought they were getting some hold upon his land. His conduct appears to me to be capable of this interpretation, that he felt himself secure as long as he did not give up his certificate of title and that in signing the documents presented to him he was simply willing to do what they asked in order to get the machinery delivered feeling that his certificate at home would turn out to be an absolute shield.

Now although I have decided to accept Shandro's evidence in preference to that of the defendant there is still the question of law whether upon the foregoing facts I should find the document to have been properly executed and this quite aside from the circumstance that the attesting witness Higginson was not called by the plaintiffs. But the fact that he was not called and the absence of any reason for it except the poor one that he was no longer in the employ of the plaintiffs as well as the still more serious circumstance that in making his affidavit of execution Higginson inserted therein apparently in his own handwriting, a clause saying, "This mortgage has been read over and explained to him and he seems to understand it," which according to Shandro's evidence was absolutely false and which circumstance was, I think, the real reason for not calling him, have suggested to me the necessity of very carefully scrutinizing the transaction. If the false affidavit had had anything to do with a misleading of the defendant it would operate very strongly against the plaintiffs. But it was evidently only intended to mislead the registrar of land titles and though this may have considerable to do, as I shall shew presently with the particular form of relief asked for, I think it cannot have so much to do with the question whether the defendant should be held to have properly executed the mortgage.

Now I wish to say that it is difficult for me to understand the ideas or point of view which could have been in the minds of Higginson and Shandro, two educated and intelligent men, who were completing a very grave business transaction with a poor

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ignorant foreigner and expecting him to sign a mortgage on his homestead which he had secured as a home, not, I imagine, without toil and pain, when they omit to deal plainly and carefully with him and omit to explain fully and completely the nature of the particular document presented to him just immediately before he signed it, when they omit even to say, "Now, Mr. Skedanuk, this document which you are now to sign is a mortgage on your land. By this document you agree to this, and to this, and to this. Do you understand that fully?" and if he said "yes" then to say, "Then we want you now to sign it, if you please; but remember this gives us a right to take your land in case you do not pay." If they had done so he might never have signed at all, or if they had spoken thus plainly at the time of canvassing him in the first place he might never have signed the order. That, of course, would not be good modern "business" but it would have been something else and something a good deal better. Possibly the fact that the statute had recently been passed to which I shall presently refer may have embarrassed the plaintiffs' agents in deciding just how they should proceed. It is just owing to such grave omissions as these I have suggested that the Legislature no doubt was led to pass the Act in regard to mortgages, etc., contained in orders for machinery as well as the more recent Act in regard to the reasonableness of machinery contracts.

My finding of fact then is that the defendant knew when he went into the hotel that he was going to sign some document pledging his lands but this inference I must repeat rests on no very strong foundation. It rests solely upon the previous conversations about the possibility of his borrowing money on the security of his land after he had bought the machinery and upon Shandro's statement that he told him to come and sign the notes and the mortgage "on his land" and I must confess that I should have felt more satisfied than I am with the propriety of this inference if I had understood the Ruthenian language and could have had Shandro tell me the exact words he used. But Skedanuk did not know when he signed which document was which nor the particular one or ones which did in fact bind his land. And this, as I think can be shewn, is very material in so far as the application of the statute, ch. 5, of 1910, is concerned.

But before dealing with that I think it right to refer to another matter. It is a rule of evidence that a document to the validity of which an attesting witness is necessary must be proved by the evidence of such attesting witness unless his absence is satisfactorily accounted for. See Halsbury, vol. 13, p. 511. Higginson was the attesting witness and he was not called. Whether sufficient objection was taken to the proof of execution by Shandro or not to justify me in applying the rule is a question. Certainly the exact point did not arise in my mind until

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after the trial was over. I thereupon sent for the counsel for the parties and they came into Court and after hearing them I thought it right that an opportunity for calling Higginson should be given the plaintiffs in case I concluded that his evidence was necessary. Now inasmuch as this action is in effect an action to secure an order directing the registration of the mortgage without the production of the certificate of title I think the point is one which deserves serious consideration. Certainly in view of secs. 60 and 102 of the Land Titles Act attestation is necessary before the document can be treated as a valid mortgage under the Act, that is, as a mortgage capable of registration and I doubt whether the concluding proviso of sec. 103 is intended to apply to such a case as this although it possibly may so apply. However, even if Higginson's evidence were necessary it seems to me the proper course to pursue is to treat his evidence as having been given and for this reason. Obviously he could say no more than that he drew up the documents, signed the defendant's name to them and held the pen while the defendant made his mark. He could not speak Ruthenian and Shandro gave no evidence of any conversation interpreted by himself which passed between Higginson and the defendant. As there is no contest about these things having been done I think the best plan, which cannot prejudice the defendant, is to assume in the plaintiff's favour, if they need the assumption, that Higginson's evidence was given particularly in view of the absence of the specific objection on the point I raised.

Having thus disposed of this point, then even if I were to find that the execution of the mortgage was proper and properly proven I confess I should have much hesitation in ordering its registration as of the date of the caveat, or at all, in view of the fact that the affidavit of execution on the back of it is a false affidavit. The insertion of the clause saying that the mortgage had been read over and explained to the defendant and that he appeared to understand the same, while false in itself, looks also somewhat like a subsequent correction made to comply with the new form of affidavit of execution, namely, form DD which was provided by order-in-council of July 29, 1911, to be made in case of signature by a marksman. Even if there were nothing more in the case than I have so far referred to I think the Court would not order the registration of such a document at least without the destruction of the false affidavit of execution.

The case, however, turns in my opinion on other considerations altogether and it is not after all necessary to decide upon the sufficiency of the execution of the mortgage. I think this is just such a case as the statute No. 5 of 1910 (2nd sess.) was intended to deal with and that that statute applies. The evil, and it was a grave evil, which the statute was intended to remedy was just such improper methods of getting an ignorant farmer's

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land pledged for the price of machinery as were here adopted. The impropriety was not in what was done but in what was omitted—the omission, namely, to treat the purchaser not as legitimate game in the great field of hard business and law—but as a man whose ignorance of our language and of law and business made a full detailed, deliberate, slow and complete explanation of what he was asked to do a necessary part of the proceedings of any just and honourable business man who was dealing with him. It is the absence of this and the presence of the false affidavit of Higginson which, notwithstanding what I think was some lack of truthfulness in the defendant in giving his evidence, especially in regard to the certificate of title, makes me feel no regret in coming to the conclusion for the reasons I proceed to give that the statute of 1910 is fatal to the plaintiff's action. The first section of that statute reads as follows:—

> From and after the coming into force of this Act, every mortgage, charge or encumbrance upon land or upon any estate or interest therein contained in, endorsed upon or annexed to a writing, or instrument written or printed, or partly written and partly printed, or any part thereof, which said writing or instrument is required to be registered in order to preserve the rights of the seller or bailor of goods as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration, or against judgments under the Ordinance respecting Hire Receipts and Conditional Sales of Goods, or contained in, endorsed upon or annexed to a written order, contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever, notwithstanding anything contained in the Land Titles Act or in any other Act or Ordinance.

Now the defendant signed an order for machinery of which the purchase price was to be $5,026 and the agreement or order contained the following clause:—

> The purchaser agrees to fully settle for the above described machinery before it is delivered to him by paying said freight and charges by giving said notes on the blank forms of the vendor and signing a receipt for the goods received and for the further securing payment of the price of the said machinery and the said notes and all other obligations given therefor and the costs of drawing and registering the mortgage the purchaser agrees to deliver to the vendor at the time of the delivery of the said machinery as herein provided, or at the option of the vendor at any time thereafter upon demand a mortgage on the lands hereinafter referred to and set over the signature of the purchaser at the foot hereof in the statutory form containing also the special covenants and provisions in the mortgages usually taken by the vendor.

In the first place I think it is perfectly obvious that that clause in the agreement comes within the wording of the statute and is null and void. I think the clause is a "charge or encumbrance" upon the land mentioned within the meaning of those words.

In *Fell* v. *Official Trustee of Charity Lands*, [1898] 2 Ch.D. 44 at 54, Lindley, M.R., said:—

To draw a distinction between making a charge and doing that which necessarily involves a charge, is too subtle. Whether I sign a piece of paper and so create a charge, or whether I do an act which creates a charge, appears to me to be immaterial as regards this prohibition.

In Wharton's Law Lexicon encumbrance is defined as "a claim lien or liability attached to property," and this is quoted with approval by Romer, J., in *Jones* v. *Barnett*, [1899] 1 Ch.D. 611 at 620. An agreement to give a mortgage certainly comes within the meaning of these terms. It is, in effect, an equitable mortgage; see Coote on Mortgages, 8th ed., p. 53. The clause, therefore, is one plainly struck at and rendered null and void by the statute. Yet the plaintiffs allege that it was in pursuance of that agreement that the separate piece of paper the real mortgage relied upon was given. Even if there were nothing more in the case I think it would be very much open to doubt whether when an equitable mortgage given in one document is made null and void by statute a concurrent legal mortgage given at the same instant and in pursuance of the other equitable mortgage and to secure the same debt and for the same purpose should not be treated as also null and void.

But in my opinion it is not necessary to rest the case there. It will be observed that the section of the statute quoted, if we leave out the reference to writings or instruments which require to be registered under the Conditional Sales Ordinance, enacts that "every mortgage charge or encumbrance upon land, etc., contained in, endorsed upon or annexed to a written order contract or agreement for the purchase or delivery of any chattel or chattels shall be null and void to all intents and purposes whatsoever." Now, in my opinion the mortgage in question is contained in the agreement for the purchase of the machinery because upon the facts at least of this case it was clearly part of that agreement. The mortgage recites the indebtedness of the defendant upon certain notes (signed possibly only immediately after the execution of the mortgage or at any rate concurrently therewith) and says, "Which said notes were given for the price of machinery furnished by the plaintiffs to me (the mortgagor)." The mortgage contains a long number of clauses to which the defendant is supposed to have agreed before he got the machinery. In my view everything set forth in the mortgage was in this case part of the agreement for the purchase of the machinery. I guard myself by saying "in this case" for this reason. It is not necessary here to go so far as to say that in every case, no matter what the circumstances, a mortgage for the purchase price of machinery given in a separate document but contemporaneously with the special order or contract falls within the line of prohibited transactions. In the present case there are special circumstances, however, which I think make it necessary to so hold. It is here that the method of execution be-

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comes very material. The signing or execution was a general one of all the documents at once. The defendant did not know one from the other. He merely signed in all ten separate documents, two being duplicates, containing all that the plaintiffs wanted him to agree to do. I think that those eight documents must all be read together as the agreement of purchase of the chattels in question that the mortgage in question was part of that agreement and must be treated as "contained in" the agreement within the meaning of the statute. I am confident that there is ample authority for holding that a number of documents signed simultaneously or at least practically so and all evidencing something that the signer has agreed to must be treated as one agreement. A deed of conveyance with a bond to reconvey, one executed by one man and the other by another, may be taken as an example. They are often treated as one document and as a mortgage. In the words of Lindley, M.R., the distinction between what was done here and what is made null and void by the statute is "too subtle." What would have been the result if the defendant had been of equal intelligence with Higginson and Shandro or had been fully advised by them so as to clearly understand that one particular document which he signed was a mortgage on his land it is not necessary I think for me to consider. For all practical purposes and essentially he made one signing and one agreement. This being so I think I must hold the mortgage null and void and dismiss the action with costs. There will be an order vacating the caveat also, but this will not issue if the plaintiffs serve notice of appeal within the prescribed time.

Action dismissed.

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March 31.

CAREY v. ROOTS.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Scott, Simmons and Walsh, JJ. March 31, 1913.

1. CONTRACTS (§ IV F—370)—OPTION TO PURCHASE—MANNER OF ACCEPTANCE.

A contract of option for the purchase of land which does not specify a time or manner for the acceptance of the option, but which fixes a date, about two months later, when the first payment of the purchase price was to be made, may be accepted within a reasonable time, and an acceptance before the time for such first payment is not an unreasonable delay.

[*Paterson* v. *Houghton* (1909), 19 Man. L.R. 168, referred to; *Carey* v. *Roots* (No. 1), 5 D.L.R. 670, affirmed.]

2. CONTRACTS (§ I D 4—62*a*)—ACCEPTANCE OF OPTION—DEFERRED PAYMENTS.

In a contract of option for the sale of land which does not specify a time for acceptance, but which provides that the first of three annual payments should be made on a specified date about two months after

the date of the option, such annual payment is not a condition precedent for the acceptance of the option in the absence of circumstances connected with the giving of the option which would justify the conclusion that the vendee could not have until the time of the first payment to decide whether he would accept. (*Per* Harvey, C.J., Scott and Walsh, JJ.)

[*Mills* v. *Haywood*, 6 Ch.D. 196; Dart's Vendors and Purchasers, 7th ed., 272, referred to; *Carey* v. *Roots* (No. 1), 5 D.L.R. 670, affirmed.]

3. CONTRACTS (§ I D 4—62)—OFFER—ACCEPTANCE OF OPTION—SUGGESTION OF ALTERNATIVE PLAN OF COMPLETION.

Where a vendee, holding an option for the purchase of land, which option merely recites that the vendor agrees to give to the vendee an option for the purchase of his land at a certain price, payments to be made at certain specified times, replies within a reasonable time by letter that he is prepared to carry out the terms of the option, but in the same letter suggests that the vendor instead of executing an agreement for the sale of the land, make a transfer of the land and take a mortgage back for the unpaid balance, such a suggestion does not impose a condition or qualify the acceptance, but the letter constitutes an unconditional acceptance, the vendor being at liberty to accept or reject the suggestion. (*Per* Harvey, C.J., Scott, and Walsh, JJ.)

[*Pearson* v. *O'Brien* (No. 2), 11 D.L.R. 175, referred to; *Carey* v. *Roots* (No. 1), 5 D.L.R. 670, affirmed.]

4. TENDER (§ I—7)—WHEN DISPENSED WITH—WRONGFUL SALE IN BREACH OF CONTRACT.

A purchaser of land who has accepted an option given to him by the vendor, which option specified a time for the payment of the first instalment of the purchase price, is entitled to specific performance without making a tender of the first payment on the purchase price where his acceptance of the option was made in time, but the vendor in the meantime, without the purchaser's consent, sold the land to another who took with knowledge of the existing option. (*Per* Harvey, C.J., Scott, and Walsh, JJ.)

[*Gamble* v. *Gummerson*, 9 Gr. 193; *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, referred to; *Carey* v. *Roots* (No. 1), 5 D.L.R. 670, affirmed.]

Statement

APPEAL by the defendant from judgment of Stuart, J., *Carey* v. *Roots* (No. 1), 5 D.L.R. 670, in favour of the plaintiff, in an action for specific performance of an agreement for the sale of lands.

The appeal was dismissed, SIMMONS, J., dissenting.

James Muir, K.C., for defendant.

A. H. Clarke, for plaintiff.

Harvey, C.J.

HARVEY, C.J.:—On 25th November, 1911, the defendant Roots, who lived in Medicine Hat, gave to the plaintiff, who lived in Winnipeg, an option to purchase his quarter section in the following words:—

In consideration of a payment of $10 I agree to give to Major A. B. Carey the option of my ¼ section N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre.

Balance to be paid 1-3 on the last day of January each year till paid.

(Sgd.) E. H. ROOTS.

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A day or two later the plaintiff gave instructions to his solicitor in Calgary, who caused a caveat to be registered in the land titles office, which is at Calgary.

The time for payment was fixed at the date specified to enable the plaintiff to obtain the money which he had to arrange for from England. He made his arrangements and on the 11th January, 1912, he wrote to his solicitor, instructing him to complete the purchase on the terms of the option and stating that he was prepared to make the first payment before the end of the month if it would help to get the bargain closed. This letter appears to have been received at the solicitor's office on the 16th January, and on 20th January the solicitor wrote the defendant Roots the following letter:—

Calgary, Canada, Jan. 20, 1912.

E. Roots, Esq.,
Medicine Hat, Alta.

Dear Sir:—

Re Major A. B. Carey and yourself, Our File 9588.

We are acting for Major A. B. Carey, who secured an option from you on the north-east quarter of Section Twenty (20), Township Twelve (12), Range Five (5) West of the 4th Meridian.

According to the terms of option Major Carey has to pay one-third of the purchase price on the last day of January in each year till the purchase price is paid in full, the purchase price for land being at the rate of $25 per acre.

Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.

Yours faithfully,

H. A. ALLISON.

When this letter reached the defendant is not clear, but the envelope bore the Medicine Hat postmark of January 24th, there apparently being some delay in posting or transmission. The defendant in the meantime had transferred the land on the 3rd day of December, 1911, to his co-defendant, who is described in the transfer as a real estate agent, the consideration named being $5,000. This transfer was registered on the 17th December, 1911. When the defendant Roots received the above letter, instead of replying to it, he states in his examination for discovery that he gave it to his co-defendant at the latter's office, who in his turn gave it to his solicitor, Mr. Mahaffy.

On the 26th January, or two days after the receipt of the letter in the Medicine Hat Post Office, Mr. Mahaffy gave a notice under the provisions of sec. 89 of the Land Titles Act, to

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the caveator, calling upon him to take proceedings under his caveat within 60 days, in default of which the caveat would lapse. This notice is signed, "J. J. Mahaffy, solicitor for David Henry Brown, the registered owner," and is addressed to the plaintiff in care of his Calgary solicitors.

It would appear from a later letter of plaintiff's solicitor that this notice was sent by mail and in due course would have reached the solicitor's office within a day or two. In the meantime in answer to his solicitor's request the plaintiff had forwarded him the $1,330 required for the payment due on 31st January. This appears to have been received by the solicitor on 28th January, and as it was sent from Winnipeg on January 25th, the day before the date of Mr. Mahaffy's notice, the latter would very probably arrive on the same or the preceding day. The situation then was that on 28th January, three days before the day of payment, the plaintiff by his solicitor had received notice that the defendant Brown had acquired the interests of the defendant Roots and contested the plaintiff's rights under the option. What took place from then till the 20th of March does not appear from the evidence. No evidence is given for the defence and the then plaintiff's solicitor does not give evidence nor is there any explanation in evidence why he is not called. This, however, may be due to the fact that Bench and Bar alike were well aware that owing to very serious illness the solicitor could not be called. In the view I take of the case, however, any explanation is unnecessary, and the subsequent tender on the 21st March is likewise of no importance.

The only defence set up by the defendant Brown is that he is an innocent purchaser for value without notice. This defence necessarily fails on the evidence and no attempt is made to support it by argument. The defendant Roots, however, sets up various defences, most of which are without evidence in support. It is contended on his behalf that the offer contained in the option was never unconditionally accepted and that time was of the essence and the payment of January 31st, 1911, not having been paid or tendered on time, the plaintiff's rights ceased. In *Paterson* v. *Houghton* (1909), 19 Man. L.R. 168, at 175, Cameron, J.A., says:—

> An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or it may be, a reasonable, time in the future.

In Dart's Vendors and Purchasers, 7th ed., 272, it is stated that:—

> The conditions imposed on the exercise of an option are always strictly construed. All precedent conditions must be fulfilled by the purchaser before the contract for sale binds the vendor. Moreover, time is of the essence of such contracts, hence if the conditions are not complied with by the day fixed, the option is lost.

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As far as the payment of the money on the day named is concerned, the whole question appears to be whether the offer could be accepted or, as it is commonly expressed, the option could be taken up without the payment of the money. If it could not the payment of the money was a condition precedent and the offer was binding only till the date fixed for the payment and could not be accepted after. If, however, the offer could be effectively accepted without the payment of the money, then upon such acceptance a new contract of purchase and sale would be complete and the rules applicable to such contracts would apply and in the absence of some stipulation or special circumstance time would not be essential. See *Weston* v. *Collins* (1865), 34 L.J. Ch. 353, 354.

It is very common for options to be put in the form providing for acceptance by the payment of a specified sum by a named date, but this option is not in that form and I can see no reason why one of the annual payments should be any more a condition for the acceptance of the option than another or all three, and it would appear to me to be absurd to say that though the purchaser had paid two of such payments, yet there was not a binding contract of sale and purchase because he had not paid the third. In *Mills* v. *Haywood* (1877), 6 Ch.D. 196, the plaintiff leased certain premises from one Austen, the holder of a leasehold interest for 10 years, at £1,000 a year. The lease contained an option to plaintiff at any time during the term to purchase the premises for £3,500 and the expenses of the purchase and sale. During the term plaintiff's solicitors wrote the following letter to Austen:—

> Mr. Mills is desirous of exercising his right to purchase the lease of the Radnor, and has instructed us to call upon you, as far as you are concerned, to complete the sale, which he is ready and willing to do. We have informed Mr. Gibbon and the National Bank of this, and if there be any other parties now representing you, be kind enough to hand them this letter.

It was contended that the relation of vendor and purchaser was not created till the money was paid, but it was held by the Vice-Chancellor and confirmed by the Court of Appeal that the letter was a good acceptance of the offer without payment of the money, and created a binding agreement for sale and purchase. In my opinion the offer in that case furnished a much stronger case for argument that the payment was a condition precedent than the present offer does and I have no hesitation in coming to the conclusion that the payment of any part of the purchase money was not a condition precedent to the acceptance of the offer.

I am also of opinion that no valid objection can be taken to the time of the acceptance. No time is specified and there were no circumstances connected with the giving of the option which

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would justify the conclusion that the plaintiff could not have until the time of the first payment to decide whether he would accept. In any event there was no unreasonable delay, having in view the fact which was made known to the vendor that the plaintiff had to obtain the money from England.

It is urged, however, that the solicitor's letter is not an unconditional acceptance.

It is true that the last paragraph suggests the view that either an agreement or a transfer and mortgage would follow, but the earlier part of the letter is an acceptance in much the same terms as the acceptance in *Mills* v. *Haywood*, 6 Ch.D. 196, and I am unable to see that the last paragraph does in fact impose any condition or in any way qualify the acceptance. It is well known that it is not an uncommon practice to enter into a formal agreement when an informal one is created by the exercise of an option, and in the very recent case from Manitoba decided by the Privy Council, *Pearson* v. *O'Brien* (No. 2), 11 D.L.R. 175, 22 W.L.R. 703, this was proposed and the judgment contains no suggestion that the tendering of a formal agreement for execution by the vendor would in any way qualify the acceptance if it were in the terms of the offer.

The letter does not insist as a condition or otherwise on anything that he is not entitled to, but suggests something which the vendor might accept or reject. Whether the solicitor means to suggest that he considered an agreement for sale was necessary or merely that he took it for granted that the owner who was being bound by an agreement to sell which would cover a period of two years, of which he had no memorandum in writing in his possession, would desire a formal agreement signed by the purchaser, which the purchaser was prepared to give unless he should prefer to give a transfer and take back a mortgage, is not to be gathered clearly from the terms of the letter.

In either case, however, it appears to me that it is not either in terms or in effect the imposing of any condition or the acceptance, and the offer was therefore, I think, unconditionally accepted and a binding agreement for sale and purchase was created.

Such being the case, is there any reason why the plaintiff should not now be decreed specific performance? On the day fixed for payment he had the money ready to pay the instalment then due and he was then and apparently ever after ready, willing and eager to carry out his part of the purchase, but he had learned then that his vendor had put it out of his power to make a good title and it was stated in *Gamble* v. *Gummerson*, 9 Gr. 193 at 198, by Esten, Vice-Chancellor of Upper Canada, that

> A purchaser, in the absence of a special agreement, is not bound to

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pay, except as a deposit, a particle of the purchase money, until a good title is shewn, and the estate is discharged from incumbrance.

See also *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114.

Moreover, the plaintiff had received a notice from the defendant Brown, who held the title subject to a mortgage to his co-defendant, which could be construed in no other way than a repudiation of the plaintiff's rights under the agreement, which in itself would excuse any offer of payment. I think, therefore, there was no obligation on the plaintiff at any time or to any one to make a tender, though he did so as a matter of precaution before bringing the action, but that all he was called upon to do was to bring the action, which he was invited to do by the defendant Brown's notice.

I think the learned trial Judge was right in granting the relief of specific performance asked for, and no objection is made to the form of the judgment, and I would therefore dismiss the appeal with costs.

Scott, J.

SCOTT, J.:—I concur.

Simmons, J. (dissenting)

SIMMONS, J. (dissenting):—On November 25th, 1911, the defendant gave to the plaintiff a writing signed by the defendant, which is as follows:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my quarter section—N.E. ¼ of 20 Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid 1-3 on the last day of January of each year till paid.
>
> (Signed) E. H. ROOTS.

The plaintiff said he was expecting money from England and suggested January 31st as the date of payment of one-third of the purchase price, and the balance in one and two years. The defendant signed the memorandum on a leaf of plaintiff's note book and did not get from the plaintiff a duplicate or a copy. The plaintiff filed a caveat in the land titles office on November 30th, 1911, and the defendant sold and conveyed to one Brown the said land on December 3rd, 1911, and Brown registered his transfer subject to plaintiff's caveat and admits he purchased with notice of plaintiff's claim under the option.

On January 20th, 1912, the plaintiff's solicitor wrote the defendant, advising him that Carey wished to make payment of one-third of the purchase price and that he was anxious to close out at once. Carey had not yet placed funds in the hands of his solicitor to make this payment, and in fact did not do so until January 25th, 1912. The learned trial Judge has found as a fact that the defendant received Mr. Allison's letter by post before the end of January and there is apparently no fault to find with this conclusion. Subsequently on March 20th Mr. Begg, representing the plaintiff, tendered to the defendant the

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payment alleged to have become due on January 31st with interest and also tendered an agreement of sale for execution by the defendant, and the defendant refused the money and refused to execute the agreement. The learned trial Judge has found that the defendant's dealing with Brown was merely an attempt to defeat the plaintiff's rights if possible.

Aside from the question of fraud, I do not think the defendant's dealings with Brown can in any way affect the legal or equitable rights of the plaintiff. There is no suggestion of fraud and the claim made on behalf of the plaintiff that the defendant could not in any way deal with the lands after giving the plaintiff the option, is quite untenable. It is true that the rights acquired by a subsequent purchaser will be subject to the interest of the plaintiff, whatever that may be, under the option, assuming, as in this case is the fact, that the subsequent purchaser has full notice of the claim of the plaintiff.

It will then be necessary to determine what interest, if any, the plaintiff had in the defendant's lands when his solicitor, Mr. Allison, wrote the letter of January 20th to the defendant. I think this letter may be interpreted as intended to be a notice to the defendant of the plaintiff's acceptance of the option. If the plaintiff at this date, namely, January 20th, 1912, has still the right of exercising the option, then he is on firm ground, but if this was too late a date for him to signify his intention of taking up the option, then he must fail and the rights of Brown are quite immaterial to the decision of this question. Brown took title with notice and also subject to plaintiff's caveat and he therefore acquired the interest (if any) the defendant had in the lands at that date, and no more.

The determination of the question before us does not at all depend upon the fact as to whether defendant had any interest in the land on December 3rd when he purported to sell to Brown. The plaintiff's claim must necessarily stand or fall on his notification of acceptance on January 20th, 1912. If he had the right then to do so, his notification had the effect of constituting the plaintiff purchaser and the defendant vendor upon a valid contract of sale between them.

There are authorities who hold that an option to purchase does not even vest in the option holder any interest, legal or equitable, in the land: Cyc. vol. 39, p. 1237. Williams on Vendor and Purchaser, vol. 1, p. 468, adopts the view that an option does, however, create an interest in the land in favour of the person who holds it, and must therefore conform with the fourth section of the Statute of Frauds. In *London and South Western Railway Co.* v. *Gomm*, L.R. 20 Ch.D. 562, the railway company sold lands to Gomm and the latter covenanted that he, his heirs or assigns would at any time thereafter whereon the lands might be required for the works of the railway com-

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pany, on request of the railway company on six calendar months' notice, re-convey to the railway company for the sum of £100. There it was held by the Court of Appeal, reversing Kay, J., that the option or right to obtain a reconveyance on giving the required notice created an estate interest in the land. Our registrars have all along accepted this view and register caveats for the option holder.

A long line of eminent authorities have, however, upheld the distinction between an option, which is a unilateral contract and enforceable by one only of the parties, and an agreement for sale, which is enforceable by either of the parties. In the former, time is essentially of the essence of the contract; in the latter, time is not necessarily of the essence of the contract.

> Where the contract fixes no date for the exercise of the option the Court will try to discover from the terms of the agreement and the circumstances of the case, the intention of the parties.
>
> Dart on Vendor and Purchaser, 7th ed., page 273.

It is quite clear from the wording of the option that no time is specified in which acceptance must be made. The naming of the date of the first deferred instalment of purchase money can not be interpreted to be more than it purports to be, and to read into it that it also includes not only the date of the first deferred instalment of purchase money, but also the time and manner of acceptance of the option would be going quite beyond the ordinary construction and meaning of the words used. The circumstances surrounding the transaction strongly bear out this view. The owner was anxious to obtain a purchaser, but was not anxious to have the first deferred instalment before the spring of 1912, and at the suggestion of the option holder the date of payment was made on January 31st, as he expected money from England about that time.

In *Woods* v. *Hyde* (1862), 31 L.J. Ch. 295, a lease for 21 years contained a proviso that the lessees should be entitled to purchase the fee on giving notice to the lessor, his heirs or assigns of their intention to do so, and that the lessor, his appointees, heirs or assigns would on payment of the purchase money do all acts for effectually conveying the premises to the lessees.

It was held by Wood, V.-C., that the serving of the notice constituted a valid contract of sale. The Vice-Chancellor says:—

> If it is the true and sound construction of the original clause, as I think it is, that the contract is created at once by the notice, then the question as to the payment within the three months does not arise, because the contract having been once made, unless it is pointed out that time is of the essence of the contract, which there is nothing on the face of it to shew, all the results of a contract would follow.

Ranelagh v. *Melton* (1864), 10 Jur. N.S. 1141, follows the

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same line. Where lessees had an option of purchasing the fee upon giving within seven years, three months' notice of their desire to do so, and paying a fixed sum at the expiration of such notice, it was held that time was of the essence of the contract and a bill for specific performance was refused because the lessees, after giving the notice, failed to make the payment on the stipulated time. Sir R. T. Kindersley says:—

There is no doubt that if the owner of lands and a person disposed to purchase from him, enter into a contract, constituting between themselves the relation of vendor and purchaser, and there is a stipulation in such contract that the purchase money shall be paid on a certain day, the Court in the ordinary case, has long established the principle that time is not of the essence of the contract; in other words, that the fixing of a precise day for paying the money and completion does not put the parties into such a position that the vendor may say: "If payment is not made on that date I will not complete." On the other hand, it is well settled that where there is a contract between the owner of lands and another person, whether he be lessee or not, that if such other person shall do a specified act he shall buy the property; then time is of the essence of the contract. For the parties cannot be regarded as vendor and purchaser until the act to constitute that relation has been performed; the agreement being this: "If you will do a certain act, I will convey to you the land," this Court looks upon it as a condition, on the performance of which the party who claims the benefit of the performance of the condition is to be entitled to certain privileges and benefits; but in order to entitle him to them he must perform the condition strictly.

In *Woods* v. *Hyde*, 31 L.J. Ch. 295, the condition was the giving of the notice, but in *Ranelagh* v. *Melton*, quoting the words of the Vice-Chancellor:—

Two things are specified—first, they must within the seven years give three months' notice of their desire to become purchasers, and secondly, at the expiration of such notice pay £210 in respect of each lot.

In *Weston* v. *Collins*, 34 L.J. Ch. 353, the same principle of law is enunciated by the Lord Chancellor.

In the present case the learned trial Judge has not found (as indeed he could hardly do) that the letter of January 20th was in itself a notice of acceptance within a reasonable time, but that having in view defendant's dealings with Brown and defendant's statement, "I thought it was simply to hold the property for him till he made his payment," that the letter of January 20th was acceptance within reasonable time as contemplated by the parties.

The statement is contained in the examination for discovery of the defendant, which was made a part of plaintiff's case.

Now when the defendant was asked why he did not reply to the letter of Mr. Allison of January 20th he repeated: "Well, I don't know, I don't know as I had to." I do not think that the statement of either party made subsequent to the transaction

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as to what they thought was in the contemplation of the parties is admissible evidence, but even if it were, then the defendant's evidence, so far as it was made a part of the record, is quite as favourable to the view that he considered he was lawfully entitled to treat the option no longer effective in favour of any interest of the plaintiff.

In *Hicks* v. *Raymond & Reid*, [1893] A.C. 22, Lord Herschel says:—

> I would observe in the first place that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances.

In the same case Lord Watson states the law thus:—

> The rule (that is, as to performance within a reasonable time) is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted and has invariably been held to mean 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.

Hicks v. *Raymond*, [1893] A.C. 22, is commented upon and approved by the House of Lords in *Carlton Steamship Co.* v. *Castle Mail Packet Co.*, [1898] A.C. 486. It does not seem reasonably clear that the plaintiff thought the option gave him until the 31st of January in which to signify his acceptance. The plaintiff says: "He thought he should get some document when he made the first payment." Notwithstanding that he went to a solicitor shortly after obtaining the option and filed a caveat in the land titles office and then waited for his purchase money for the first payment to come to hand.

To say that a man can by paying the owner a sum of $10 on an option to purchase land at the price of $4,000, wait from November 25th to January 20th before signifying acceptance, is to construe an option holder's duties in a way quite irreconcilable to the onus placed upon him by the authorities I have quoted, in which time is plainly of the essence. The delay of the plaintiff in signifying acceptance seems to me fatal to his right to a decree of specific performance.

I would therefore allow the appeal and order that plaintiff's caveat be removed from the register.

Walsh, J.

WALSH, J.:—I concur with judgment of Harvey, C.J.

Appeal dismissed, SIMMONS, J., *dissenting.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 1, 1913.

1. COLLISION (§ I A—3)—FIXING LIABILITY—INDEPENDENT CONTRACTORS—TOWAGE CONTRACTS.

One who contracted to tow scows using a tug-boat owned or controlled by himself, was an independent contractor, for whose negligence in permitting one of the scows to come in contact with and injure the scow of a third party the employer is not liable, the contractor not being interfered with by his employer in the performance of the contract.

[*Quarman* v. *Burnett*, 6 M. & W. 499, and *Jones* v. *Corporation of Liverpool*, 14 Q.B.D. 890, referred to.]

2. BAILMENT (§ II—10)—RIGHTS OF BAILEE—INJURY TO PROPERTY BY THIRD PERSON.

A bailee may recover against one who wrongfully injures the bailed property, regardless of whether the bailee is bound to make good to the bailor any damage to the property; and, hence, the bailee of a scow injured by another's act in negligently permitting another scow to come in contact with it, is entitled to recover the whole damage as if he was the actual owner, subject to his accounting to his bailor.

["*The Winkfield*," [1902] P.D. 42; *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422; and *Irving* v. *Hagerman* (1863), 22 U.C.R. 545, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of Grant, County Court Judge, dismissing part of the plaintiffs' claim in an action to recover for repairs to a scow and demurrage, and cross-appeal by the defendants.

The appeal was allowed against defendant Patterson, and the cross-appeal of the defendants Coast Quarries, Limited, was also allowed.

S. S. Taylor, K.C., for the appellant.

R. M. Macdonald, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiffs were bailees of a scow which was either owned or hired from the undisclosed owner, by the Granite Quarries, Ltd., which was delivering building material at the plaintiff's wharf. By the terms of the contract under which the Granite Quarries, Ltd., delivered the scow with its load at the said wharf, the plaintiffs were to be responsible for any damage done to it while tied up there. The defendant, the Coast Quarries, Ltd., was also delivering material on scows to the plaintiffs at the same wharf under a contract which required delivery there by the said Coast Quarries, Ltd. The Coast Quarries, Ltd., contracted with the defendant Patterson, who either owned or was in control of a tug-boat, to tow their scows from their own wharf at their quarries to the plaintiff's said wharf, and to securely tie them up there, at a certain specified rate per scow. While a scow which had been tied up at

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the plaintiff's said wharf by the Granite Quarries, Ltd., was in the custody of the plaintiffs, the defendant Patterson, during the night, and in the absence of the plaintiffs and their servants, brought in and tied up at said wharf one of the defendant company's scows under the arrangement aforesaid, but so negligently that before morning it had come in contact with said scow of the Granite Quarries, Ltd., and injured the same.

The plaintiffs procured temporary repairs to be made to the injured scow, and afterwards brought this action to recover the cost of said repairs and consequent demurrage, and also the cost that will be incurred in making permanent repairs to the said scow. The learned County Court Judge gave judgment against both defendants for the amount of the said temporary repairs and demurrage, but dismissed the plaintiff's claim on the other branch of the case. It appears that the chief damage done to the scow was the breaking of the keelson. The evidence shews that the broken keelson will have to be replaced by a new one in order to properly repair the damage. The learned Judge appears to have had some doubts as to the sufficiency of the evidence that such new keelson is required to put the scow in proper repair, but in my opinion the evidence is sufficient to support the plaintiff's claim in that behalf. The plaintiff might have proven more strictly the cost of such new keelson, but that phase of the case was not the subject of much contest.

Both parties have appealed. The plaintiffs against the dismissal of their claim in respect of the permanent repairs; the defendants against the judgment awarding the plaintiff the amount of the temporary repairs and demurrage. Two questions of law are involved in these appeals. First, the right of the plaintiff to recover for the whole damage done to the scow as if they were the actual owners thereof, or had already reimbursed the owner; and secondly, their right to recover against the defendants, the Coast Quarries, Ltd., by reason of the negligence of the defendant Patterson.

In my opinion the defendant Patterson was an independent contractor competent to do the work entrusted to him in towing and delivering the scow. He was in no way interfered with by the defendant company in the performance of his contract, and hence I think the defendant company are not liable for his negligence, and that therefore the action should be dismissed as against them: *Quarman* v. *Burnett*, 6 M. & W. 499; *Jones* v. *Corporation of Liverpool*, 14 Q.B.D. 890.

As to the second question, any doubt or confusion which may formerly have existed as to the right of a bailee to sue a wrongdoer either in a possessory action or on the case for injury done to the chattel, has been set at rest by the judgment of the Court of Appeal in "*The Winkfield*," [1902] P.D. 42, a report in which the history of the law of bailments in so far as it relates

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to circumstances like the present is traced, and the conclusion arrived at that it does not matter whether the bailee is under obligation to make good to the bailor any damage to the chattel entrusted to him or not, he may sue the wrong-doer for the full damages as if he were himself the actual owner. Collins, M.R., with whom the other Judges of the Court concurred, said:—

Therefore, as I said at the outset, and as I think I have now shewn by authority, the root principle of the whole discussion is that as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped.

The Court in that case expressly overruled *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422, holding that the bailee could not recover any damages that he was not under obligation to make good to the bailor. While *Claridge's* case, *supra*, has been overruled, the inferential finding in that case that where the bailee is under obligation to make good to the bailor he can recover the whole damages, has been affirmed, and also supports the conclusion at which I have arrived, because in the case at bar by agreement between the plaintiff and the Granite Quarries, Ltd., the plaintiffs were under such obligation.

"*The Winkfield*," [1902] P.D. 42, is also authority for the proposition that the plaintiffs may recover notwithstanding that the money has not yet been expended in making the repairs. On this point also I refer to *Irving* v. *Hagerman* (1863), 22 U.C.R. 545, which was approved of and followed in *Mason* v. *Morgan* (1865), 24 U.C.R. 328.

The result is that the appeal of the Coast Quarries, Ltd., is allowed and the action as against it is dismissed with costs. The appeal of the plaintiff is allowed as regards defendant Patterson, and judgment should be entered against him for the additional sum of $350—the sum which has been proven will be required to make the permanent repairs, and also for $48 demurrage, with costs here and below as if the action had been brought against him alone.

Irving, J.A.

IRVING, J.A.:—I would dismiss this action so far as the Coast Quarries Co. is concerned. Patterson was an independent contractor, and the Coast Company is not in any way responsible for his negligence.

As to Patterson, I think the cross-appeal should be allowed: see "*The Winkfield*," [1902] P.D. 42; *Irwin* v. *Corporation of Bradford* (1871), 22 U.C.R. 18.

Martin, J.A.

MARTIN, J.A.:—It is clear that there is no liability on the part of the defendant company the Coast Quarries, Ltd., which appears from the case of *Milligan* v. *Wedge* (1840), 12 Ad. & E.

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737 (which I select as illustrating exactly the point in principle), wherein a butcher who had employed a drover to drive (i.e., "deliver" as the defendant company herein contracted to deliver sand and gravel) a bullock from Smithfield market to his own slaughter house, outside London, was held not to be liable for damage done to goods in the plaintiff's show room (in a shop in a public street) by the bullock owing to the careless driving of the same by the drover's servant while on the way. I refer also to *Dalyell* v. *Tyrer* (1858), El. Bl. & El. 899, the case of a steam tug hired by a ferryman to carry passengers, and particularly to the judgment of Willes, J., in *Murray* v. *Currie* (1870), L.R. 6 C.P. 24 (a case of stevedores unloading a vessel), which is commended by the Court of Appeal in *Hall* v. *Lees*, [1904] 2 K.B. 602, at 614, wherein the fact is emphasized that independent contractors in one sense indeed may be said

> to be the agents of the owner, but they are not in any sense his servants. . . . They are not put in his place to do an act which he intended to do for himself.

That language precisely disposes of the contention of the appellants of this point.

I agree that the "*Winkfield*" case, [1902] P.D. 42, answers the other objections to the rights of the bailee herein.

After an examination of certain decisions in Admiralty Courts I confess I should have thought that in the circumstances of the mooring of both these scows and the failure to watch them when subject to tides, the contention would have been advanced by the defendant, here and below, that both parties were in default and that the Admiralty rule should be invoked and the damages equally borne, without costs to either party, but as this course was not adopted I do not feel called upon to pass upon the point, though I note it so that it may not be assumed that this aspect of the matter did not present itself to me, as it doubtless will to others on a close perusal of the facts.

Galliher, J.A.

GALLIHER, J.A.:—The case of "*The Winkfield*" decided by the Court of Appeal in England in 1901, and reported in 71 L.J. Adm. at p. 21, [1902] P.D. 42, wherein the cases are discussed, decides beyond question the right of a bailee of goods to recover full damages for injury done to goods of his bailor while in possession of the bailee.

The cross-appeal of the plaintiff should be allowed, and judgment entered against Captain Patterson for the full amount claimed. I would also allow the appeal of the Coast Quarries with costs. There was no doubt in my mind at the hearing, and cases which I have since read have strengthened that view, that Patterson cannot be considered the servant or agent of the Coast Quarries, but was an independent contractor.

Appeal and cross-appeal allowed.

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April 4.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. April 4, 1913.

1. VENDOR AND PURCHASER (§ I A—4)—TENDER OF DEED—CONTRACT TO CONVEY—RIGHT TO SPECIFIC PERFORMANCE.

Contract purchasers of land are not ordinarily entitled to specific performance of the agreement in the absence of tender on their behalf of a conveyance for execution.

Statement

APPEAL by plaintiffs from the judgment of Gregory, J., in an action for specific performance of an agreement entered into by the defendant Cooper to sell them two lots under an agreement dated December 6, 1911. The consideration was $1,600, of which $800 was to be paid in cash and $400 on June 6, 1911, and the balance, $400, on December 6, 1911. On February 24, 1911, the plaintiff sold the property to Lim Bang, who paid them $1,700 in cash and agreed to pay the other two instalments on the dates above mentioned, namely, $400 on June 6, and $400 on December 6, 1911, but no notice of this sale or assignment was given by the plaintiffs to the defendant. Under this arrangement the plaintiffs were no longer interested as soon as they obtained their property. The agreement between the plaintiffs and the defendant contained this clause:—

> It is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are . . . made at the times and in the manner above mentioned, and as often as no default shall happen in making such payments, the vendor, his heirs or assigns may give to the purchasers, their heirs, executors, administrators and assigns 30 days' notice in writing demanding payment thereof; and in case any such default shall continue, these presents shall at the expiration of any such notice be null and void and of no effect, and the vendor shall be at liberty to re-possess or re-sell and convey the said lands to any purchaser as if these presents had not been made, and all the monies paid hereunder shall be absolutely forfeited to the vendor, his heirs, executors, administrators or assigns. The said notice shall be well and sufficiently given if delivered to the purchasers, their heirs, executors, administrators or assigns or mailed at Victoria, B.C., post office under registered cover addressed as follows.

Lim Bang made default, nor did the plaintiffs pay after they had been requested to do so. Notice to cancel was given and the power to cancel was exercisable 30 days after the 6th of June. On March 6, 1912, the defendant addressed a notice to the plaintiffs at Victoria, B.C., demanding payment of the sum of $800 and all interest due to date, and giving notice that if default should continue after the expiration of 30 days from that date the agreement should be null and void and of no effect, and that all moneys paid thereunder should be forfeited. Two of the plaintiffs, Wing On and Chuck Sing, received their no-

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tices, and the third, Bark Fong, was away in China from November, 1911, to June, 1912. The two who received the notice communicated with him, and upon his return to British Columbia on May 15, 1912, when $842 was owing, the plaintiffs made a tender to the defendant of all money then due and owing, but the defendant declined to accept it.

Statement

The appeal was dismissed.

Maclean, K.C., and *H. C. Hall*, for the appellants.

Langley, for the respondents.

Irving, J.A.

IRVING, J.A.:—I agree with my brother Galliher and think the appeal should be dismissed.

Martin, J.A.

MARTIN, J.A.:—My opinion is that while the contention advanced by Mr. McLean as to personal service of the notice in the circumstances is correct, yet the judgment can be supported on the other branch adopted by the learned Judge below, viz., that the case is not one for specific performance. Admittedly and in express terms, the purchase was one of speculation, and the principle of the case comes within that in *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171.

Galliher, J.A.

GALLIHER, J.A.:—In this case there seems to me to have been no proper legal tender, no conveyance having been submitted for execution on behalf of the plaintiffs, and I am unable to say that defendant's conduct in the matter constituted a waiver. In this view it becomes unnecessary to pass upon the validity of the notice given by Cooper to the plaintiffs. The appeal will, therefore, be dismissed.

Appeal dismissed.

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March 3.

BENJAMIN v. McLEAN.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Drysdale, J. March 3, 1913.

1. APPEAL (§ III F—96)—TIME FOR CROSS-APPEAL—MODIFICATION OF JUDGMENT—NECESSITY FOR CROSS NOTICE.

Where on defendant's appeal from a judgment against him, it appears that the trial Judge erroneously denied recovery on a note for $95 and that on another note for $150 a credit of $50 was disregarded, the judgment may be varied, though there was no notice of cross-appeal, so as to remedy the error, by virtue of Order 57 of the Nova Scotia practice.

Statement

APPEAL by the defendants from judgment of Russell, J., in an action to recover the amount of four promissory notes made by defendant in favour of plaintiff payable at the Royal Bank of Canada, Amherst, and the Bank of Nova Scotia, Oxford, N.S., which said notes were alleged to have been duly presented for payment, and dishonoured and returned to plaintiff; the de-

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fence was that the notes in question were made for the accommodation of the plaintiff, or were given in renewal of previous notes so made. Judgment was given on the four original notes in favour of plaintiff with costs.

The appeal was dismissed, judgment below being varied.

F. L. Milner, for appellant.

H. Mellish, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I can see no reason for differing from the conclusion reached by the learned trial Judge in this case. It all turned on a question of fact and he has given his reasons for believing the plaintiff's version of the transaction with the defendant.

Those reasons, in my view, are sound ones, and it would require very much more than was urged by counsel for defendant to justify us in reversing his decision. I particularly notice one ground, that is to say, the conduct of defendant in securing a meeting at which he got a resolution passed allowing him a commission of ten per cent. on the sale of stock, including not only his own, but also on $12,000, being plaintiff's shares in the company, the result of which was to declare his own shares fully paid up, when, as a matter of fact, he had only paid a very small sum on account of them. Such a transaction on its face indicates wrongdoing, and was illegal, and it was, further, carried out in the absence of the plaintiff, the largest shareholder in the concern. His conduct in this matter characterizes his actions throughout and well justifies the learned Judge's remarks in reference thereto.

Defendant's counsel further contended that the trial Judge, having found in defendant's favour on the $95 note, had awarded plaintiff $50 more than he claimed or was entitled to. Apparently the learned Judge has overlooked the fact that the plaintiff does not claim the full amount of the note for $150, December 11, 1909, on which $50 had been paid, and in this way has awarded too much, but, as pointed out in the judgment of Graham, J., the plaintiff is also entitled to recover on the $95 note and to have the judgment varied in that respect.

The amount of the verdict should be varied accordingly. The appeal, with this modification, should be dismissed with costs.

Graham, E.J.

GRAHAM, E.J.:—This is an action upon, among other things, two promissory notes for $80 each, dated respectively June 16, 1910, and June 17, 1910, made by the defendant; also for items of cash paid by the plaintiff to the bank when renewals of the original notes and renewals of the renewals were taken up. The original notes were for $175 and $150 respectively.

The defence as to the first note is that the original was made by the defendant for the accommodation of the plaintiff. To

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the second, that the original was made by the defendant and endorsed by the plaintiff for the accommodation of the Pugwash Milling Co., and while the defendant may be liable for his share, it cannot be recovered in this form of action, namely, on the note itself.

The Pugwash Milling Co. was organized by the plaintiff, who was the president, and by the defendant, who was the secretary. The plaintiff had owned the plant and it was put in at $12,000—shares $10,000, and cash $2,000. The defendant took shares to the amount of $1,500. The other shareholders were three for $100 each and one for $50, an inconsiderable proportion. The plaintiff's version is that the two notes of $175 and $150 were given by the defendant in payment on account of his shares, and the plaintiff used them at the bank and had to take them up from time to time. All the probabilities are in favour of that version.

The plaintiff says that the defendant first gave him a note for $550 and he sent it to be discounted at the branch at Oxford of the Nova Scotia Bank. They wrote back enquiring whether the note was for shares, and he replied that it was. And then they refused to take it and it was returned and destroyed. Then the expedient of the two notes for $175 and $150 was resorted to and they were discounted at the branch of the Royal Bank and Bank of Nova Scotia, respectively.

The existence of the $550 note is not contradicted; it is in fact admitted; and it is at variance with the defendant's version that one note was for the plaintiff's accommodation and one for the accommodation of the milling company. Then it would be exceedingly improbable from the circumstances of these two people that the plaintiff was asking the defendant for accommodation for $550 when he had money on deposit, presumably, at a lower rate of interest.

The defendant is met with the question of how he was to pay for his shares and he says they were to be paid out of the commissions for selling shares. And on the eve of the action, the plaintiff being absent from the place, he had a meeting of the directors, at which a resolution was passed to pay him ten per cent. on the shares sold, including ten per cent. on the $12,000 worth of shares represented by the plant which the plaintiff had put into the company. This transaction is out of the question.

Then the Judge at the trial has found in favour of the plaintiff, namely, that these notes were given on account of the defendant's shares, and that the plaintiff was really accommodating the defendant by endorsing them. The notes being thus disposed of, the sums of money paid by the plaintiff on renewing must also be allowed for in favour of the plaintiff. There are also notes for $80 and $70, respectively, to which the same de-

fence was raised, and the trial Judge has found in the same way in respect to these notes, namely, that they were not given by the defendant for the accommodation of the Pugwash Milling Co.

In making up the amount for which judgment is given, the learned trial Judge, instead of following the particulars, and charging the defendant with the notes in the series, together with the payments in cash to take up the previous notes, when renewing, took place, took a shorter method of charging the defendant with the original notes and the subsequent interest. But in this there was included a payment of $51.80 which was not claimed for in the particulars and which the plaintiff failed to shew was actually made by him, and his attention was specifically called to it.

Apparently the amount was paid out of funds of the Pugwash Milling Co. This would have to be deducted from the balance found to be due by the Judge in this judgment. But there is another item which the learned Judge did not allow to the plaintiff which I think he should have allowed. It is a claim for $96.75 cash paid by the plaintiff to take up another note, namely, a note for $95 which was also given by the defendant to the plaintiff, and to which the same defence as in the case of the other notes was pleaded, and here the learned Judge found it was given as accommodation for the milling company. Even assuming that this was so, the plaintiff under the statement of claim was entitled to recover by way of contribution half of the amount, having paid the whole. But I think the trial Judge should have allowed the whole. He had taken the oath of the plaintiff as against that of the defendant in the other cases, namely, that the notes were given in payment of the shares which the defendant had subscribed for, and only found that this was not so in this case because the proceeds of the $95 note went to the credit of the milling company in the books of the bank. But the reason for that is that before that in the case of the other notes the bank had not opened an account with the milling company, but had done so just before the discounting of the $95 note. It was paid out as some of the proceeds of the other notes were paid out, to liquidate indebtedness of the milling company. But none the less the defendant gave the note (endorsed by the plaintiff for his accommodation) to raise money to pay for the shares taken by the defendant. He was taking original shares, not part of the plaintiff's shares, and he owed the company for the shares.

In the defendant's account with the company of July 30th, 1910, he credits himself with this $95 note as well as with one of the other notes now in question, and another afterwards renewed by one of the other notes now in question. There can be no reasonable doubt that this $95 note was given on account of

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the defendant's shares, and probably is part of the $520 note which the bank refused. The plaintiff having been obliged to take it up, was entitled to look to the defendant for it, and the defendant will thus have that much more of his shares paid for.

There is no cross notice of appeal as to this item, but none is necessary, at any rate in a case in which the amount of the judgment is upheld on the appeal, although upon other grounds than those given in the judgment. And as to the excess the Court has the power under Order 57 of the judicature rules to vary the judgment upon the appeal which the defendant has taken, although there is no cross notice of appeal.

The appeal should be dismissed with costs and the plaintiff should have judgment for the amount of his particulars, namely, $552.49, as made up to the date of the issue of the writ with costs.

Drysdale, J.

DRYSDALE, J., concurred.

Appeal dismissed, judgment below modified.

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April 1.

De SALIS v. JONES.

British Columbia Court of Appeal, Macdonald, C.J.A., and Irving, Martin and Galliher, JJ.A. April 1, 1913.

1. EQUITY (§ III A—56)—EQUITY PRINCIPLES—MUTUALITY—REAL ESTATE AGENT'S COMMISSION—DEFAULT IN PURCHASE PRICE.

Where an agent, having become entitled to his commission for the sale of land, after receiving half of it, agrees with his principal that he waives all claim to the balance, if the purchaser does not pay the second instalment of the purchase price on the due date, and the purchaser fails to pay on that date, but pays the instalment with interest on a subsequent date, the court in the exercise of its equitable powers will not allow the agreement to stand, where it appears that it was not the intention of the parties that there should be such absolute forfeiture, but that the agent understood that the agreement in question, which was drawn up by his principal's solicitor, was intended only to provide for a forfeiture in the event of the purchaser failing to carry out the agreement of purchase. (*Per* Macdonald, C.J.A., and Martin, J.A.)

2. BROKERS (§ II B—12)—REAL ESTATE — RELINQUISHMENT OF RIGHTS —COMMISSION—PAYMENT OF PURCHASE PRICE.

An agreement by an agent, who has become entitled to commission for the sale of land and who has been paid part of it, that he waives all claim for the balance of his commission in the event the second instalment is not paid by the purchaser on the due date, does not amount to a waiver of the agent's contractual rights unless there is a consideration to support such an agreement. (*Per* Irving and Galliher, JJ.A.)

3. ACCORD AND SATISFACTION (§ I—8)—PROMISE ALONE AS SATISFACTION—ABSENCE OF CONSIDERATION.

An accord and satisfaction is a contract and requires consideration to support it. (*Per* Irving and Galliher, JJ.A.)

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DESALIS v. JONES.

APPEAL by the plaintiff from judgment dismissing his action brought to recover the balance of commission due on the sale of certain lands.

The appeal was allowed.

D. S. Tait, for appellant.

Maclean, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal. The facts are simple and, in the main, not in dispute. The plaintiff, a real estate agent, secured a purchaser for defendant's land acceptable to him. It is not disputed that in so doing he become entitled under the agreement between them to a commission of $2,000. When it came to the execution of the agreement of sale to the purchaser, the defendant desired to have an understanding with the plaintiff as to how the commission should be paid. He induced the plaintiff to accept half of the sum down and to agree to accept the other half when the next instalment of the purchase money should be paid by the purchaser. It is here that the only question of fact in dispute arises. The defendant, according to Mr. Shandley, his solicitor in the transaction, and who gave evidence on his behalf, wanted the commission to be payable half down and the remainder "only in the event of the next instalment being paid on the due date (June 12, 1912)." A letter was drawn up by Mr. Shandley and signed by the plaintiff in which it was declared that,

> if the said instalment and interest is not paid on the said 12th day of June, 1912, I hereby waive all claim for said balance of $1,000.

The plaintiff was without legal advice and was unused to legal documents, and says he did not understand the letter in any other sense than this, that if the said instalment were never paid he should lose the other half of his commission.

I can well understand that the plaintiff, unsuspicious as he was, and obsessed with the one idea that the balance of his commission was dependent only upon payment by the purchaser of the next instalment, did not appreciate the significance of the phrasing of the letter. He swears, positively, that he did not, and I believe him. Had it not been that the defendant now insists that he intended the document to operate according to its strict meaning, I should have given him credit for the same belief, and thus account for his failure to directly challenge the plaintiff's attention to the intended meaning, which was to my mind, entirely inconsistent with what a person with his absolute right to the whole commission, unconditionally, would be likely to consent to if he did comprehend the true legal effect of what he was asked to sign. It is apparent from defendant's own statements that he did not regard payment on the due day as of vital importance to him. He thought the

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Macdonald, C.J.A.

commission excessive, and took this means of attempting to deprive the plaintiff of part of it.

That the plaintiff signed under a mistake, I have no doubt, but that the defendant was also under the same mistake the evidence disproves. The document therefore cannot be rectified on the ground of mutual mistake.

Relief, however, is also claimed on equitable grounds against penalty or forfeiture. Reduced to plain language, the plaintiff agreed that he would forfeit $1,000 of his own money if the purchaser did not pay the second instalment on the due date. This instalment was accepted by defendant on a subsequent day, together with interest for the overdue period, so that defendant as he admits has not been in any way damnified by the delay. The only question therefore left, is as to whether in the circumstances of this case, the Court ought to grant such relief. Having regard to the evidence in this case, I have no hesitation in saying that he ought to be so relieved.

Having come to this conclusion, I do not find it necessary to deal with the question raised as to the consideration for the promise contained in the letter.

The plaintiff should have judgment for the balance of his commission, with costs here and below.

Irving, J.A.

IRVING, J.A.:—On the date on which the interview took place when De Salis was foolish enough to sign the document put before us, he had performed all he had undertaken to do, to entitle him to his commission; he had found a purchaser, and had satisfied the terms of the agreement between him and Jones; he had performed the act in consideration of which Jones made his promise to pay him $2,000. There would be no waiver of his contractual rights except for consideration. I can find no consideration for the contract alleged to be set up, or alleged to be entered into, by written consent signed by De Salis.

Mr. Maclean argued that this document was an accord and satisfaction. That too, is a contract and requires consideration. Mistake comes into play only where there is a contract. This document is not a contract: it is a *primâ facie* evidence of a contract—but there was no contract, there was no intention on the part of De Salis of making any contract. There was no *animus contrahendi*. Jones thought he had given too much and was trying to save himself. If this receipt had made a contract it would be voidable for fraud, not mistake. I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—I concur with judgment of Macdonald, C.J.A.

Galliher, J.A.

GALLIHER, J.A.:—I concur with judgment of Irving, J.A.

Appeal allowed.

THOMAS v. WARD.

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April 14.

Alberta Supreme Court. Trial before Stuart, J. April 14, 1913.

1. AUTOMOBILES (§ III B—205)—INDIVIDUAL RIGHTS AND LIABILITIES—STATUTORY DUTY—"TURN TO RIGHT," WHEN.

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 automobile should always be 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.

[See also *Campbell* v. *Pugsley*, 7 D.L.R. 177.]

2. AUTOMOBILES (§ III B—180)—DUTY AND NEGLIGENCE OF OPERATOR—RULE AS TO "TURNING TO RIGHT."

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.

[See also *Campbell* v. *Pugsley*, 7 D.L.R. 177.]

3. AUTOMOBILES (§ III B—200)—NEGLIGENCE OF OPERATOR—CONTRIBUTORY—REAL CAUSE, TEST.

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.

[See also *Campbell* v. *Pugsley*, 7 D.L.R. 177.]

4. AUTOMOBILES (§ III D—350)—DUTY AND LIABILITY TO ANOTHER OPERATOR—EMBARRASSMENT CAUSED BY ANOTHER OPERATOR.

The driver of an automobile is not guilty of contributory negligence as a matter of law where on approaching 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.

[*Adams* v. *Lancashire & Yorkshire R. Co.*, L.R. 4 C.P. 739, 38 L.J. C.P. 277, distinguished; see also *Campbell* v. *Pugsley*, 7 D.L.R. 177.]

Statement

ACTION by an automobile driver against the driver of another automobile for damages resulting from a collision.

Judgment was given for the plaintiff.

E. F. Ryan, for the plaintiff.

A. A. McGillivray and *E. V. Robertson*, for the defendant.

Stuart, J.

STUART, J. (oral):—This is an action by a driver of an automobile, against another driver of an automobile for damages resulting from a collision. The plaintiff Thomas was going down what is called Eighth street west, on what is known as the Mount Royal Hill in Calgary, and the defendant Ward was going up

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Eighth street west going south. The defendant had gone past what is known as Twentieth avenue or Royal avenue, and was going at six or seven miles an hour, I think, from the evidence, but he was on the left hand side of the centre of the street. His excuse for that, is that there was a street running out from the west which cut through a deep bank, on account of which he could not see whether or not any person was coming from the west and he thought, he said, that it was advisable to keep further to the east side of the street in order to avoid a possible collision with somebody who might suddenly dart out from that street. With the consent of the parties, I took a view last evening of the *locus in quo* and while there might be some reason for his doing so up to a certain point, there is no reason in the world why, when he arrived at the northern boundary of this side street, which is called Twenty-first avenue or Durham street, he should not have turned to the right side of the street because he could then see that there was no person coming. This, I think from the evidence he did not do, but he continued on the left hand side of the centre of a narrow street only thirty feet wide for a little space longer. The plaintiff was coming down the hill and going he says at ten or twelve miles an hour, but people in the other automobile say that he was going much faster than that, and I would gather from some of the evidence as to the tracks and the way the automobiles came together, that he must have been going somewhat faster than that. The probability is that he was going faster than ten or twelve miles an hour and I think he was coming down at an excessive rate of speed and in coming down at that rate of speed he was guilty of some negligence, but that is the only negligence that I can find attributable to the plaintiff. He was coming down and he saw the other automobile coming up on the wrong side of the street. Now it is suggested and there is evidence that the nearest the defendant's automobile came to the left hand side of the street, that is the east side, was nine feet, and the defendant suggests that there was ample room for the plaintiff to have gone in there between his left hand wheel and the curb (at least there is no real curb, but earth at the edge of the pavement) and it is suggested by the defendant that the plaintiff himself was to blame for not going on and keeping on his side of the street and going in there in that narrow space and passing him. Now there may be something in that argument and it is rather a difficult question for me to decide, but on considering the matter very carefully, I have come to the conclusion that, although it was discovered afterward that there was nine feet, it would not be so obvious to the plaintiff that there was nine feet and it would appear rather a narrow space for him to

go between. I think that he was not to blame when he had some doubt as to whether he had room enough to get through, and when he saw that the other man was not going over to the other side of the street, I hardly think he was to blame for turning to the left to keep out of that man's way who was on the wrong side of the street. Of course, the defendant coming up, may have intended all the time to turn, as he thought, in time, but the trouble about that is, that the two men may not have the same ideas as to how long you should wait and I do not see why you should blame the plaintiff for not waiting a little longer and for turning a little sooner than the defendant thought he should have done.

Now, as to the rule of the road, I do not know that there is any law about it particularly except in the recent statute of 1911-12 which says, that when people meet they must turn to the right. Now that does not mean that you should always be on the right hand side of the road. That is not what the law says. It says, that when two people meet they shall turn to the right. I observe in one of the authorities which was quoted to me that in some of the American States the words are used: "Shall seasonably turn to the right," that is, he shall turn to the right in seasonable time. Now these words are not used in our statute, but I think, that is what our statute means. It must mean that a person must in a reasonable and seasonable time before actual meeting, turn to the right. In my opinion the defendant did not do that. He did not turn in a reasonable time to the right. Returning again to the question of the room that was left, I notice that the judgment in the case of *Wordsworth* v. *Willan et al.*, 5 Esp. (N.P.) 273, says:—

> The driver must not make experiments. He should leave ample room and if an accident happened from want of that sufficient room, he was no doubt liable.

and there is an expression in the case of *Pluckwell* v. *Wilson*, 5 Car. & P. 375, in which Mr. Justice Anderson said a person was not bound to keep on the ordinary side of the road, but if he did not do so he was bound to use more care and diligence, and keep a better look out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road." And there is another case I have found of *Chaplin* v. *Hawes*, in 3 Car. & P. 544, in which the same question of turning out and keeping on the right side of the road arose, and Mr. Chief Justice Best said:—

> But on the sudden a man may not be sufficiently self-possessed to know in what way to decide. The wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently.

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Now these cases are all referred to in Beven on Negligence, vol. 1, p. 543, Canadian edition. My view of the case is that the real cause of the accident was the defendant's negligence in being on the wrong side of the road. I think that constitutes negligence, not that there is an absolute law that you must always be on the right hand side of the road, but when an automobile driver is going along the road and knows, as this man must have known, that he was going to meet another man, although there is no penalty for not being at all times on the right-hand side of the road, yet it is negligent, it seems to me, for him to be on the left-hand side, which is not the usual side according to the common practice in this country. It is then negligent for him, without any excuse, not to be on the right hand side of the road. More than that in this case the defendant broke the statute in not turning to the right in seasonable time, which, I think, is what the statute means. Therefore, although I think the plaintiff was himself guilty of some negligence in going at an excessive rate of speed down that hill, yet I think the defendant might have avoided the accident if he had not been himself negligent, and that the real cause of the accident was the defendant's being on the wrong side of the road where he did not need to be at all and his not turning out as soon as he should have done and his embarrassing the plaintiff by staying there too long and putting the plaintiff to the difficulty of making a decision on a sudden whether he should run in between an apparently very narrow space or whether he should turn to the left, which was his wrong side of the road. Now, I do not think the defendant can blame the plaintiff for being embarrassed and taking what ultimately turned out to be a wrong course. His doing so is due to the defendant's action in being on the wrong side of the road. As to the case of *Adams* v. *Lancashire & Yorkshire R. Co.*, L.R. 4 C.P. 739, 38 L.J.C.P. 277, and quoted by the defendant, all I have to say in that case is this, that in that case what the plaintiff did in order to avoid the defendant's negligence was itself a negligent thing. Here I do not think it was a negligent thing on the part of the plaintiff to turn out to the left when he saw the other man adhering to the wrong side of the road. As to the suggestion that the plaintiff might have stopped altogether, I do not think that comes in very good grace from the mouth of the defendant when the whole trouble was caused by his doing something which he should not have done. I think, therefore, there will have to be judgment for the plaintiff for a certain amount. The automobile was a very old one; in fact, there is some evidence that the smash destroyed its value altogether as it would cost as much to repair it as it was worth, in the beginning. The claim is for one thousand dollars, which is rather a peculiar thing when the

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plaintiff comes into Court and swears that it was worth only eight hundred dollars before it got hurt or smashed. Some of the witnesses think that it would only have sold for two hundred dollars before it was smashed, while one of the witnesses for the plaintiff says it would cost between five and six hundred dollars to put it back in its original condition. Another witness for the defendant thinks it could be put in a reasonable state of repair for two hundred and sixty-five dollars. On the whole, I think that considering the fact that it was a second hand automobile and had been used a great deal, being pretty well worn, I do not feel inclined to put the damages at more than three hundred and fifty dollars and that will be without costs. I say without costs, because when an automobile driver sues another automobile driver for damages resulting from a collision, it is as far as I am concerned going to be rather an unusual case for the plaintiff to make out that he was so absolutely innocent of wrong doing himself, that he should be entitled to costs against the other man, from my observation of these gentlemen, as they go around the streets. Three hundred and fifty dollars without costs will be the judgment for the plaintiff. I may add that the real reason for not giving costs is because I think that man was going too fast down that hill.

Judgment for the plaintiff.

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Alberta Supreme Court. Trial before Stuart, J. April 17, 1913.

1. CONTRACTS (§ III F—290)—VALIDITY AND EFFECT—RATIFICATION WITHOUT SEAL OF AGREEMENT UNDER SEAL.

An agreement under seal for the sale of land made by one purporting to be the agent of the owner, may be ratified by the owner by a writing not under seal, since the seal on the agreement of sale is mere surplusage, if the agreement is otherwise a sufficient memorandum to satisfy the Statute of Frauds.

[*Hunter* v. *Parker*, 7 M. & W. 322, applied; see also *French Gas Savings Co.* v. *Desbarats Advertising Agency, Limited*, and Annotation thereto, 1 D.L.R. 136.]

Statement

ACTION for specific performance of an agreement for the sale of land.

Judgment was given for the plaintiff.

A. A. McGillivray, for the plaintiff.

James Muir, for the defendant.

Stuart, J.

STUART, J.:—This was an action for specific performance of an agreement of sale for certain lots in the city of Calgary. The plaintiff put in an agreement in writing, dated December 28, 1910, which is signed by the plaintiff and signed on behalf of the defendant by one William H. Wilson. The whole question

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involved in the case is the question of the authority of Wilson to execute that agreement. It is contended by the defendant that no sufficient authority was shewn, and it was also contended that, even if the letters which were put in should constitute authority, they were not under seal, and inasmuch as the agreement itself was under seal any authority to exercise it must, itself, have been under seal before it became valid. In my opinion, the letters that passed before the execution of the agreement were not sufficient to shew an authority at the time. I think the inference is, from the letters, that a right of approval was still reserved by the defendant so that it is unnecessary for me to say anything about the question of authority being under seal or not. However, after the agreement was signed, the plaintiff's solicitors sent a letter, dated January 14, 1911, to the defendant in California, in which they specified the numbers of the lots, describing the property, and in which they state they are sending a transfer of the property from the defendant to the plaintiff; in which they refer to the question of the defendant's name having been changed apparently by her marriage; they refer to the question of the registration being apparently in her maiden name, and asking for her marriage certificate. They also asked about the certificate of title, and they told her the amount of the sale, the amount of the purchase price, $2,100, and they told her all about what she was to do in order to put the transaction through and complete it. They told her to go to the bank and draw on them for the amount due, and attach the transfer, after having it executed according to instructions, and the defendant thereupon replied, referring to the receipt of the letter, and instead of repudiating the transaction, she just said that, on account of the ill-health of her family, she could not go to the bank for a few days, but that she hoped to do business in a few days, and would send the papers that were desired. She also said something about where the certificate of title could be found, and also made reference to her marriage certificate. Now, that letter is clearly a ratification of the agreement. I cannot see how it can possibly be construed otherwise. The inference is that she ratified what was done, and knew all about it, apparently confirming it and did confirm it. What came up afterwards did not appear in the evidence, as to what made her change her mind; as she gave no evidence, in fact, no evidence was given for the defence. The only doubt I have about the matter is due to a passage from Halsbury, vol. 1, page 71, which says, "the execution of a deed can only be ratified by a deed or a matter of record." Now, if we treat that agreement of sale as a deed—of course, it does contain a covenant—there might be some application of that principle to this case, but, on looking at the authorities mentioned there in Halsbury, I, with a great

deal of hesitation, venture to entertain some little doubt as to the exact accuracy of that statement. I think, possibly, it is correct on the face of it, but I do not think the authorities quoted for it are particularly apt. In fact, my judgment in this case, which is against the defendant, is based on one of them, and that is *Hunter* v. *Parker*, 7 M. & W. 322. In that case, a ship was wrecked on the shore of New Brunswick, and the master could not get into communication with the owner in England, and he put it up at auction, and it was sold and the master signed a bill of sale under seal. The owner got the money, took the proceeds of the sale, and, as the jury found, ratified the whole transaction. He afterwards brought an action for conversion against Mr. Cunard—not against Mr. Cunard, but the person to whom Mr. Cunard sold the ship. Mr. Cunard was the purchaser in the first place. The case went to appeal, and the judgment of Parke, B., is very apt. I do not need to quote it, but it will be found on pages 342 to 344 of the case, the principle being, that the bill of sale did not need to be under seal, and that the ratification was sufficient. The mere fact that they put it under seal did not prevent the ratification from being sufficient. The bill of sale could serve as a transfer under the Ship Registry Act, it was held, which transfer did not need to be under seal. Perhaps I might quote the last sentence:—

> It is the deed of the auctioneer, but it also may operate by the consent of the principal as a written transfer from him, as it certainly would have done if there had been no seal to it; and in order to prevent the instrument from failing in its effect, and *ut res magis valeat quam pereat*, we do not feel ourselves precluded from holding that it operates to transfer an interest. If the authority had been by deed to convey by deed, the instrument would have been clearly inoperative for that purpose; but, the authority is by parol, and must be assumed to have been to convey in the form in which it was conveyed; and this, we think, may be supported.

However, on the whole case, I doubt very much if I should have listened, in any case, to the argument about the agreement of sale being under seal. That might have been an argument which could be raised in an action at law on the covenant, for damages, but this is a suit in equity, to enforce an agreement of sale of land, and the whole matter is a matter of evidence. There was an agreement made, and it is just a question whether it was properly evidenced by writing or not to satisfy the Statute of Frauds. I think it was, and I think that the defendant ratified what her agent, Wilson, had done by the letters to which I have referred, so there will be the ordinary judgment for specific performance of the agreement. The plaintiff is entitled to his costs.

Judgment for the plaintiff.

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LEACH v. HAULTAIN (registrar) and NATIONAL TRUST CO.

Saskatchewan Supreme Court. Trial before Newlands, J. April 14, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ VII A—56)—PREFERENCES BY INSOLVENT—EXEMPTIONS—FAILURE TO CLAIM—REGISTRATION OF TITLE.

If a debtor who has assigned his property for the benefit of his creditors does not file his claim of exemptions within thirty days of the registration of the assignment as required by Land Titles Act, sec. 117 (R.S.S. 1909, ch. 41), the registrar of title has the right to recognize the assignee as the absolute owner, both legal and equitable, of the land assigned, but the title of the debtor is not affected by such failure where the assignee has not applied for registration as owner and admits the debtor's right to the exemptions claimed, and in such a case and on the registrar's refusal to register a transfer of the debtor's homestead, an order will be entered, directing registration of the transfer; it being only against the transferee of the assignee that the debtor cannot claim his exemptions if he fails to claim them within the thirty days' period.

Statement

IN January, 1912, one Pemble executed an assignment for the benefit of his creditors in favour of the defendant the National Trust Co., the official assignees of the judicial district of Regina, which assignment excepted two lots, on which he and his family resided as their home, and the value of which did not exceed $1,500, and said assignment was duly registered by the said company in the Assiniboia land registration district. By transfer dated the following April, Pemble transferred all his right, title and interest in the said land to the plaintiff, who paid to him the full amount of the specified purchase price; and the transferor's claim to the land as exempt from seizure and sale under execution was admitted in writing by the defendant the National Trust Co. Pemble, however, having neglected to file his claim of exemption within thirty days of the registration of the assignment as required by sec. 117 of the Land Titles Act (ch. 41, R.S.S. 1909), when the plaintiff tendered to the defendant Haultain the said transfer, Haultain refused to register it on the ground that Pemble had no right to deal with the land on account of his failure to claim it as exempt within thirty days after the registration of the assignment above referred to. The plaintiff claimed specifically an order of the Court directing the defendant Haultain to register said transfer in favour of (the plaintiff) Edith Leach and to issue title in her name free from the said assignment, or a vesting order.

For the defendant Haultain it was contended *inter alia* that the assignment was within the operation and meaning of sec. 7 of the Assignments Act (ch. 142, R.S.S.), and lands exempt were within the provisions of sec. 117 of the Land Titles Act, and that the defendant Haultain by reason thereof and of Pemble's omission to file the claim of exemption within the time directed by the last mentioned section, was bound or authorized to refuse to register the transfer.

J. A. Allan, for the plaintiff.
J. M. Carthew, for the defendant the registrar.

NEWLANDS, J. (oral):—I have very little doubt as to the meaning of these sections. Sec. 7 of the Assignments Act, which provides the form in which the insolvent can convey all his property to the assignee, gives the description which has always been considered a proper description for a general assignment for the benefit of creditors; it is a description which has always conveyed all the property of the debtor, with the exception of his exemptions, to the assignee. Our legislature has followed that form of description, recognizing that although it conveyed all his property to the assignee with the exception of the exemptions, it did not fit in with the Land Titles Act, and therefore they had to make another provision for the registration of the title. What they have done is this: they have simply provided that the assignment shall be filed in the land titles office, and then the assignee shall come in and make application to the registrar to be registered as owner of the land of the debtor. In that application he will, of course, have to state of what lands he would desire to be registered as owner, and he would have to shew to the registrar that the title to the lands was in the debtor before he could be registered. As the registrar knows nothing about the exemptions of the debtor, the Act gives the debtor thirty days in which to claim his exemptions, and of course, as Mr. Allan says, during that thirty days the assignee must be stayed in dealing with the land. If the debtor does not put in his claim within thirty days, the registrar has the right to recognize the assignee as the absolute owner, both legal and equitable, of the land, and he can only recognize his transfer of the land. That, I think, is the meaning of the provision. But in this case several things have not been done. The land, of course, has been assigned under the assignment subject to the exemptions, but, I understand from Mr. Allan, the assignee has not made any application to be registered as owner, and the title is in the same position as it was before, it has never been transmitted to the assignee, and the assignee admits that this land is part of the exempt land. I do not think that it was ever the intention of any of these Acts to do an injustice to any party. The intention in making the provision was that all parties should get their rights. The debtor had the thirty days in which to claim his exemptions, to protect himself in case the assignee wished to deal with the exemptions as well. Of course, in the case of a *bonâ fide* purchaser for value, or in fact as between anybody and the assignee, the debtor would lose his exemptions if he did not make his claim, if those exemptions were transferred; but on the other hand, if they were not transferred, and the title was registered in the assignee, I do not see that the Courts would refuse to

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recognize the rights of the debtor if the assignee was willing to recognize them. It is only as against the transferee of the assignee that the debtor cannot claim them if he omits to claim them within thirty days; and therefore I think, as Mr. Allan says, that in this case the title to the property has not been changed at all. It has not been vested in the assignee. The assignee has no intention of claiming this property. He admits it to be an exemption. Under these circumstances I do not see that the title of the debtor has been affected at all. Of course the registrar can not allow the debtor to deal with the property.

Allan:—I think that the power has been conferred upon your Lordship by sec. 150 of the Land Titles Act, which reads:—

> In any proceeding respecting land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorandum or entry affecting land, the Judge by decree or order may direct the registrar to cancel, correct, substitute or issue any duplicate certificate or make any memorandum or entry thereon or on the certificate of title, and otherwise to do every act necessary to give effect to the decree or order.

NEWLANDS, J.:—The order will be, then, that the registrar be directed to register these transfers as if the assignment for the benefit of creditors had not been on file, and there will be a declaration that this property was the homestead of Edward Ernest Pemble, and that he conveyed his rights to the plaintiff. I will add that my intention was to make it clear that if a party did not claim his exemptions within the thirty days, and the assignee was registered as the owner, the assignee could deal legally with the exemptions. That is not a part of this case; I simply want to make it quite clear that, according to my reading of the Act, the debtor, in order to protect himself, must make his claim within thirty days. If he does not, and the assignee is registered as owner, the assignee can then transfer and give good title, and the debtor has lost his right to the exemptions.

Allan:—I did not understand your Lordship to express the opinion that the debtor would forfeit his exemptions if, after thirty days, the title to the property claimed remained in the assignee, and the assignee declined to recognize such exemptions.

NEWLANDS, J.:—I would express that, if the assignee had gone ahead and done what he would ordinarily do. If, for instance, he had a list of the debtor's property, both exempt and unexempt, and he had put in his application to be registered as owner, as he should properly do as soon as he can, and the property was transferred to him, and he became the owner, I do not think he could deal with the property within thirty days after the filing of the assignment; but if the debtor does not make his claim for the exemptions within those thirty days, I think the

assignee can legally deal with both the exempt and unexempt property, and the debtor by his own fault would have lost his right to his exemptions. I think, however, that as long as the title is in the assignee, the Court can act as I am doing in this case. I do not make any vesting order, because there are two transfers and there is no reason why the plaintiff should not make title in the ordinary way.

Judgment accordingly.

ARMSTRONG v. BASTEDO and GALLAGHER.

Saskatchewan Supreme Court. Trial before Johnstone, J. April 18, 1913.

1. TRUSTS (§ I—1)—CREATION — REQUISITES—ABSENCE OF FIDUCIARY OR CONTRACTUAL RELATIONSHIP.

Where a prospective purchaser of real estate procures an agent to endeavour to effect the purchase of certain land for him, and the agent, without disclosing the name of his principal, negotiates with the defendants who are real estate agents with whom the land had been listed for sale by the owner, but subsequently the defendants without informing the proposed purchaser become the purchasers themselves and obtain an agreement of sale from the owner and refuse to make the sale to the proposed purchaser's agent, returning to him his cheque which had been given by way of deposit with plaintiff's verbal offer, the conduct of the defendants, though reprehensible, does not entitle the prospective purchaser, on discovering the facts, to a declaration that the defendants are trustees of the land for him, or that they should convey to him, since there was no fiduciary or contractual relationship between him and the defendants.

[*Tate* v. *Williamson*, L.R. 1 Eq. 528; *Lees* v. *Nuttall*, 39 E.R. 21, and *McDonnell* v. *Smith*, 26 N.S.R. 259, distinguished.]

Statement

ACTION for a declaration that the defendants are trustees of certain lots verbally agreed to be purchased by the plaintiff through his agent, but which were purchased by the agents for the vendor, without disclosing to their principal that they were the purchasers.

The action was dismissed.

W. F. Dunn, for the plaintiff.

W. B. Willoughby, for the defendants.

Johnstone, J.

JOHNSTONE, J.:—The defendants were carrying on business at the time hereinafter mentioned at the city of Moose Jaw in co-partnership.

In the month of February, 1912, one Gross, then residing in the city of Toronto, owned lots 9, 16 and 17 in block 22 in High Park addition to the said city of Moose Jaw, and had the same listed for sale with the defendants.

The plaintiff, wishing to purchase such lots from Gross, procured his agent, one Wrenshall, also a real estate agent of Moose Jaw, to go to defendants and endeavour to effect a purchase, if possible, through the defendants, instructing Wrenshall to offer

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$4,500 for the lots, payable as follows: $1,500 in cash on completion of sale, and the balance in two equal payments of fifteen hundred dollars each, with interest at eight per cent. per annum, in six and twelve months respectively.

Wrenshall, acting on these instructions and as agent for the plaintiff, but without disclosing the name of his principal, made the offer to the defendants as instructed, and at the time of making the offer, paid to the defendants $100 by cheque as a deposit, who retained such offer until returned to Wrenshall in the manner hereinafter mentioned. The offer, which was a verbal one, and the deposit were accepted by the agents subject to the approval or confirmation of the owner, Gross. The offer was forthwith submitted by the agents to the principal, who, after some preliminary inquiries, accepted the same.

The defendants then, without informing the proposed purchaser, became the purchasers and obtained an agreement of sale from Gross, who was paid by his agents a portion of the purchase money. The defendants thereupon refused to make the sale to Wrenshall, and returned to him his said cheque given by way of deposit, which Wrenshall destroyed. The plaintiff, learning the facts, subsequently requested the defendants to transfer to him, but this they declined to do. There was no offer or acceptance in writing, and all negotiations were between Wrenshall and the defendants, and these were conducted verbally. These are briefly the facts. The plaintiff now seeks in this action to have the defendants declared trustees of the said lots for him or that they, the defendants, may be ordered to make a transfer or conveyance thereof to the plaintiff, or that he may be granted such further or other relief as to the Court shall seem meet.

There was no contractual, fiduciary or other relationship established between the plaintiff and the defendants, and in the absence of this I fail to see how the plaintiff can have in this action in any event any recourse against the defendants. True they in a manner not consistent with honest dealing got into the plaintiff's shoes as to the proposed purchase by him, and in doing so they were unquestionably guilty of some not very savoury real estate juggling, of which they were not very proud, judging from the actions of Bastedo under cross-examination. Morally, the defendants may be bound to convey to the plaintiff, but not legally, for which perhaps the plaintiff himself or his agent is to blame. In all the cases referred to me by the plaintiff's counsel as supporting his right to recover there was either a contractual or fiduciary relationship established. In *Tate* v. *Williamson*, L.R. 1 Eq. 528, there was a fiduciary relationship, that of an uncle and nephew, where the latter was an inexperienced youth who consulted and was advised by his uncle

as to financial matters from time to time. In *Lees* v. *Nuttall*, 39 E.R. 21, there was the relationship of principal and agent; and in *McDonnell* v. *Smith*, 26 N.S.R. 259, and every case and text-book authority cited, the same rule was appealed, that is, that there must be a contractual or fiduciary relationship to succeed.

The plaintiff's action will therefore be dismissed, but without costs.

Action dismissed.

SCANDINAVIAN AMERICAN NATIONAL BANK v. KNEELAND.

Manitoba King's Bench. Trial before Curran, J. April 29, 1913.

1. PLEADING (§ I N—118)—AMENDMENT—AFTER TRIAL—ALLOWABLE ON WHAT TERMS.

Under the Manitoba practice, a plaintiff will be allowed to amend his statement of claim at the close of the case where it appears that no injury or prejudice can be occasioned to the defendant thereby and where the imposition of costs will properly compensate the defendant therefor, but the defendant will be given time to file his defence to the amended statement of claim and the case will be reopened, if required, to admit further evidence in regard to any new matter raised by the amendment and the defence thereto.

[*Lee* v. *Gallagher*, 15 Man. L.R. 677, followed.]

Statement

AT the opening of this case the defendant made an application for an order for additional security for costs against the plaintiff and filed an affidavit shewing the amount of disbursements so far incurred, and also the amount of the costs in the action up to this point exclusive of certain counsel fees. I reserved the matter for consideration and proceeded with the trial, which lasted some days. At the close of the case the plaintiff asked leave to amend clause 9 of the statement of claim by alleging that the plaintiffs had in consideration of the payments therein referred to by H. H. Berge, discharged him from his liability under the contract of guaranty in question.

The order for additional security for costs was granted and leave to amend allowed.

O. H. Clark, K.C., and *P. A. Macdonald*, for plaintiff.
H. Phillipps, and *C. S. A. Rogers*, for defendant.

CURRAN, J.

CURRAN, J.:—This amendment would seem to be necessary in view of the provisions of a statute of the State of Minnesota, known as art. 4283 of the revised laws of Minnesota, 1905, relating to discharge of joint debtors. The amendment was strongly opposed by the defendant, and I reserved this matter also and intimated to counsel that I would announce my decision upon both applications before giving judgment in the action. I have now given both matters careful consideration, and I have come to the conclusion that I ought to make an order

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requiring the plaintiff to give additional security for costs. A *praecipe* order for security for costs was obtained by the defendant, and in compliance therewith the plaintiffs paid into Court $200. This amount is not now by any means adequate in view of the amount of costs and disbursements already incurred, as shewn by the affidavit of Mr. Phillipps, and I think it would not be unreasonable, under the circumstances, and considering the length of time occupied in the trial of the action, to require the plaintiffs to give additional security to the amount of four hundred dollars, if the money is paid into Court, or by bond, if that method is adopted, in the sum of $800.

I also allow the plaintiffs' application for leave to amend. Were I to refuse this, I think I would be acting contrary to the intent and spirit of our rules of Court relating to amendments, and the well established practice of our Courts in that respect. The amendment is in my opinion necessary to determine the real questions or issues raised by the proceedings. No injury or prejudice can be occasioned to the defendant by allowing the amendment that costs will not compensate him for, and I take it this is the test as to whether or not an amendment should be granted: *Lee* v. *Gallagher*, 15 Man. L.R. 677. The defendant will have the usual time to file his defence to the amended statement of claim, or longer if necessary. The case will be reopened, if required, to admit further evidence if the parties desire to produce any such, restricted, of course, to the new matter raised by the amendment and defence thereto. All costs occasioned to the defendant by reason of the amendment will be costs in the cause to the defendant in any event of the cause, and costs of the application for additional security for costs will be costs in the cause.

When the amendment hereby allowed has been made and defence thereto, if any, filed, the plaintiffs will amend the record accordingly. I will, on application of the parties, or upon two days' notice by one party to the other, fix a date to hear any further evidence and argument occasioned or rendered necessary by the amendment.

There will be a stay of proceedings in the action until the order for additional security for costs has been complied with, and such security must be given within one month from the date of my formal order in that behalf, which order the defendant will take out forthwith.

Judgment accordingly.

HOOPER v. BEAIRSTO PLUMBING CO., Limited.

MAN.

K. B.

1913

May 3.

Manitoba King's Bench. Trial before Macdonald, J. May 3, 1913.

1. MASTER AND SERVANT (§ II A 4—67)—INJURY TO INEXPERIENCED EMPLOYEE—DEFECTIVE APPLIANCE—LIABILITY OF EMPLOYER.

An inexperienced boy sixteen years old employed, in the cutting of a concrete floor, to hold a chisel while another employee struck it with a sledge hammer, can recover from the employer for loss of an eye caused by a splinter of steel flying from the chisel; it appearing that the chisel and the use to which it was put rendered scattering of splinters likely, and constituted a special danger to the injured boy, who was directed to so hold the chisel that his head was on or near a level with the top of it.

2. MASTER AND SERVANT (§ II A 4—62)—EMPLOYER'S DUTY RESPECTING APPLIANCES—PRIMA FACIE LIABILITY FOR INJURY.

If through breach of an employer's duty to use reasonable care to provide proper appliances, to maintain them in proper condition, and to so carry on his operations as not to subject his employees to unnecessary risk, an employee suffers injury, the employer is *primâ facie* liable.

[*Smith* v. *Baker*, [1891] A.C. 325, 362; and *Williams* v. *Birmingham*, [1899] 2 Q.B. 338, referred to.]

Statement

ACTION for damages for the loss of an eye.

Judgment was given for the plaintiff.

H. J. Symington, for the plaintiff.

R. D. Guy and *E. Frith*, for the defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiff Hooper, Jr., to whom I shall hereafter refer as the plaintiff, claims damages for injuries resulting in the loss of an eye while working in the employ of the defendant company.

At the conclusion of the plaintiff's case I was inclined to grant a motion for a nonsuit, thinking the accident one of those for which no one is responsible, and one of the risks reasonably incidental to the plaintiff's calling, a mischance which no care could have foreseen, and for which no one is to blame.

The plaintiff is a boy of the age of 17, at the time of the accident, a little over 16 years. In October, 1912, his father secured employment for him with the defendant company to learn the plumbing trade.

On January 8, 1912, the plaintiff was working at the St. Regis Hotel, under James Arkell, an experienced plumber, known as a master plumber, in the employ of the defendant company, on a contract made by the proprietors of the hotel with the company. The work engaged in at the time of the accident was cutting a concrete floor to enable them to lay pipes. The plaintiff was directed by Arkell to hold a chisel (ex. 1) while he, with a sledge hammer swinging over his shoulder, came down with all possible force, struck the top of the chisel, thus cutting into the concrete and breaking it up. It was while thus engaged that the plaintiff sustained the injury.

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From the evidence it would appear that this is the only way known to the trade for breaking up concrete flooring, and if the rights of the plaintiff were dependent only upon the dangerous manner of performing the work, I would find some difficulty in holding the defendant company liable, although I think it is time that tradesmen engaged in this class of work should devise some method by which accidents of this kind could be averted; the danger in case of the sledge hammer not being correctly directed, the danger from splints, both from the concrete and from the chisel and hammer, surely these are dangers that could very easily be guarded against.

The work progressed for some time under the direction of Arkell, he wielding the hammer. After a time he handed the hammer to a labourer employed around the hotel, and after a blow on the chisel the boy was struck in the eye by a steel splinter and embedded so deep that competent and skilled eye specialists could not extract it, and it became necessary to remove the eye.

An examination of the chisel used in the work (ex. 1) removes all my doubts as to the plaintiff's right to succeed; a highly dangerous implement in the use to which it was put and not such an appliance as it is the duty of an employer to provide. A sledge hammer striking on the edge of this chisel in the manner shewn here would, in all likelihood, scatter steel splinters to the danger of everyone at close range, and especially dangerous to the plaintiff, who was holding it with his head on or near a level with the top of it.

An experienced mechanic, I am satisfied, would not incur the risk to which this boy was put with a chisel in the condition in which this one is and was, but a boy of the age of the plaintiff, without any previous experience whatever, would not hesitate to carry out the directions of the experienced mechanic over him and through whom he was learning his trade.

The employer's liability at common law is stated by Lord Herschell in *Smith* v. *Baker*, [1891] A.C. 325, at 362:—

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

If by reason of a breach of the duty thus defined a servant suffers injury, the employer is *primâ facie* liable: *Williams* v. *Birmingham*, [1899] 2 Q.B. 338.

Appliances in a proper condition were not provided here, and in my opinion the plaintiff is entitled to damages which I fix at two thousand dollars, and there will be judgment for the plaintiff for that amount with costs.

Judgment for plaintiff.

Re THOMPSON LOCAL OPTION BY-LAW.

(Decison No. 2.)

MAN.

C. A.

1913

May 6.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Cameron, JJ.A. May 6, 1913.

1. INTOXICATING LIQUORS (§ II C—33)—BY-LAWS—LOCAL OPTION—REGULARITY.

A local option by-law was not vitiated by omission of the clerk of the municipality to comply with Municipal Electors Act, sec. 9, in failing to distribute copies of the alphabetical list prepared by him, preparatory to a revision of the same, amongst the school teachers of the municipality, where the list was duly revised by the County Court Judge in accordance with the Act.

2. INTOXICATING LIQUORS (§ II C—33)—BY-LAWS—LOCAL OPTION—ADOPTION—NOTICE TO ELECTORS—STATUTORY REQUIREMENTS.

Where the Liquor License Act, sec. 66 (R.S.M. ch. 101) requires that after the first and second readings of a local option by-law a municipal council shall publish notice stating the object of the by-law and that a vote will be taken thereon at the time and places fixed under the Act, and sec. 68 requires that at such time and places a poll shall be taken and all proceedings thereat shall be conducted in the same manner as voting upon any by-law required by the Municipal Act to be voted upon, etc.; these sections do not make applicable to the adoption of local option by-laws all the provisions of Municipal Act, sec. 376, as to giving of notice, sec. 66 being complete in itself on that subject.

3. INTOXICATING LIQUORS (§ II C—33)—BY-LAWS—LOCAL OPTION—ADOPTION—LEGALITY OF VOTES.

In passing upon the validity of a local option by-law, votes of electors who procured certificates from the clerk of the municipality and voted thereon in a subdivision in which they were not rated, are not to be deemed illegal or void, where the clerk gave out the certificates without discrimination as between the parties interested, both of whom obtained and used them, and where the electors' names were on the last revised voters' lists for the municipality, and they were entitled to vote on the by-law, though the deputy returning officers should not have given the ballot papers out to voters producing certificates unless they were acting in an official capacity in the election; and such election proceeding will be upheld if such non-compliance or irregularity did not affect the result of the voting and the proceedings were conducted substantially in accordance with the requirements of the Act.

[*Brown* v. *East Flamborough*, 23 O.L.R. 533; *Re Cleary* v. *Nepean*, 14 O.L.R. 394; and *Regina* v. *Tewkesbury*, L.R. 3 Q.B. 629, 636, distinguished.]

Statement

APPEAL by the municipality from decision of Macdonald, J., *Re Thompson Local Option By-law* (No. 1), 10 D.L.R. 493, quashing a local option by-law.

The appeal was allowed.

F. M. Burbidge, for the municipality.

The judgment of the Court was delivered by

Cameron, J.A.

CAMERON, J.A.:—By-law No. 36 of the rural municipality of Thompson repealed a local option by-law previously in force

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in part of the municipality. The by-law in question was voted on by the electors on the day of the election of municipal officers, as fixed by statute. There was a total possible vote of 670 electors, of whom 241 voted for, and 229 against, the by-law, which was accordingly declared carried by a majority of 12 out of a total vote polled of 470.

A motion to quash the by-law came before Mr. Justice Macdonald, who in a written judgment granted the motion with costs. This appeal is taken from his order.

One of the objections to the by-law is that the clerk of the municipality had not complied with sec. 9 of the Municipal Electors Act in failing to distribute copies of the alphabetical list prepared by him, preparatory to a revision of the same, amongst the school teachers of the municipality. As this alphabetical list was duly revised by the County Court Judge in accordance with the Act, and thereupon became final, this omission of the clerk cannot be regarded as material.

By sec. 66 of the Liquor License Act (ch. 101, R.S.M.) and the amendments thereto, it is provided that, in case of a by-law such as this, the council, after the first and second readings of the same, shall publish in a newspaper in the municipality and in the *Gazette* a notice stating the object of the by-law and that a vote will be taken thereon on the day and at the hour and places fixed under the Act. Such notice is to be published for at least a month and not more than once a week.

By sec. 68 of the Act it is further provided that:—

At such day, hour and places a poll shall be taken, and all proceedings thereat and for the purpose thereof shall be conducted in the same manner as voting upon any by-law required by the Municipal Act to be voted upon, except that all municipal electors shall be entitled to vote thereon.

By sec. 376 of the Municipal Act, in case a by-law requires the assent of the electors, the council shall, by publication in a newspaper in the municipality and "once in the *Manitoba Gazette* at least two weeks in advance of the day of voting" (4-5 Edw. VII. ch. 25, sec. 1), and by posting up in four or more public places, give notice of the object of the by-law and of the time and place of voting thereon.

It is contended that, by sec. 68, all of the provisions of sec. 376 of the Municipal Act as to giving notice apply in the case of a by-law under the Liquor License Act in addition to those required by sec. 66. But this cannot be said to be the intention of the Legislature. If we read the two secs. 66 and 68 together, it would appear that it was intended that the first should provide a complete list of specifications as to what should be done by the council in giving notice to the electors of what the object of the by-law was and where it should be voted upon, and the second section provides for the manner of taking the vote by incorporating the appropriate provisions of the Municipal Act.

Had the two sections been consolidated there could hardly be any question raised that this was not the proper construction. "Proceedings thereat and for the purpose thereof" must, therefore, be read to mean "proceedings at and for the purpose of taking the poll." The subject of notice or of any other preliminary proceeding is not covered by sec. 68. The obvious differences in the requirements of notice provided for by sec. 66 and sec. 376 indicate that those set forth in 66 are complete in themselves. The history of these enactments goes to shew that this is to be inferred. I refer to the Municipal Act of 1884, 47 Viet. ch. 11, sec. 130, sub-sec. (3), and the Liquor License Act of 1889, 52 Viet. ch. 15, sec. 11, sub-sec. (*c*). These enactments have been substantially continued, through subsequent amending and consolidating enactments, to the present day, it being plainly the intention that each should form a separate code.

I would therefore hold the provisions of sub-sec. (*b*) of sec. 376 of the Municipal Act are excluded by the specific provisions set forth with particularity in sec. 66 of the Liquor License Act.

It appears that certain of the electors, some 16 in number, procured certificates from the clerk of the municipality and voted thereon in a subdivision in which they were not rated. It is contended that these 16 votes must be taken as illegally cast and that they must be deducted from the number of those recorded as voting in favour of the by-law. On the facts this would be a violent presumption to make, as the evidence is that the clerk gave out these certificates without discrimination as between the two parties interested, both of whom obtained and used them.

Under the provisions of the Municipal Act, sec. 98, each elector may vote in each ward in which he has been rated, but, in case of voting for mayor or reeve, he is limited to one vote only.

By sec. 99 of the Municipal Act, where an elector is entitled to vote in more than one ward or subdivision, he "shall vote" for reeve in a rural municipality in the ward or subdivision in which he is resident. If he is a non-resident or is not entitled to vote in the ward or subdivision in which he resides, then he is to vote where he first votes and there only. A penalty is affixed by sec. 100 for anyone who votes more than once, but there is no penalty in the case of an elector who, being entitled to vote in one ward or subdivision, votes in another, but only once, at the same election. Under sec. 102 the clerk may give a certificate to an elector acting as deputy returning officer or as agent, entitling him to vote at a poll other than the one where he is entitled to vote. Under sec. 105 a non-resident elector may procure a certificate from the clerk, upon which he can vote at any poll. There is no other provision than the above providing

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for certificates, nor is any penalty imposed on the clerk for issuing unauthorized certificates, or on any elector procuring a certificate to which he is not entitled.

Under sec. 95 it is the duty of the clerk to furnish each deputy returning officer with a certified copy of the last revised list of electors for the "municipality, ward or subdivision" "for the purpose of enabling the persons named in such lists to vote at the election" (sec. 97).

Any person offering to vote at an election under the Liquor License Act may be challenged and must, if requested, take the oath prescribed by sec. 69 of the Liquor License Act. He must, amongst other things, swear that he is the person named on the list shewn to him, that he has not voted before, and is entitled to vote at the election.

By sec. 390 of the Municipal Act (incorporated in the Liquor License Act by sec. 68), the proceedings at the poll where a by-law requiring assent is voted on shall be the same as nearly as may be as at municipal elections and secs. 81 and 90 to 105 and 109 to 201 of that Act are made applicable.

What is the effect of a ballot cast by a voter on a by-law in a poll other than that where his name appears, but votes in a subdivision where he is not rated? We may set aside the certificates issued in this case as being altogether unwarranted by the statute. The effect of sec. 98 is enabling and permissive, it is not imperative in the sense that sec. 99 is. If an elector on a by-law under the Liquor License Act presented himself at a poll in a subdivision where he was not rated, shewed that he was on the certified copy of the voters' list for the municipality, supplied by the clerk (as they appear to have been in this case), expressed his willingness to take the oath prescribed, and took it, and the deputy returning officer gave him a ballot which he cast, then it seems to me difficult to say that this vote is wholly void. He is a "voter" entitled to vote on any by-law as that term is defined in the interpretation clause of the Municipal Electors Act. The act of the deputy returning officer in handing out a ballot in these circumstances would not be justified by the language of sec. 113, sub-sec. (*a*). Nevertheless an elector entitled to vote in the municipality and to vote once only has voted, and the failure of the deputy returning officer to observe the provisions of the above sub-section, could hardly be allowed to have the effect of depriving the voter of his vote. It surely cannot be said that the vote so cast was an unlawful vote or that it is to be regarded "the same as if the vote had never been cast," as remarked by Chancellor Boyd, in *Brown* v. *East Flamborough*, 23 O.L.R. 533, citing *Regina* v. *Tewkesbury*, L.R. 3 Q.B. 629, 636.

I think it is impossible to say that these 16 votes were void or illegal votes. They certainly are not of such a class as were

the five votes of married women (who had no right whatever to vote) that were excluded in *Re Cleary* v. *Nepean*, 14 O.L.R. 394, or the 26 spoiled ballots that were excluded from the total in *Re Brown* v. *East Flamborough*, 23 O.L.R. 533. In both these cases the votes attacked came within the class of those referred to in *Regina* v. *Tewkesbury*, *supra*, viz., those which "are to be considered as thrown away, i.e., as if the voters had not given any vote at all" at 636. But in this case the votes were those of voters unquestionably entitled to vote at the election here in question. The deputy returning officers were in error in acceding to the request for ballot papers; but they did give them out and the ballots were cast by electors whose names were on the last revised voters' lists for the municipality and entitled to vote on the by-law.

According to the returns, therefore, the result announced properly expresses the intention of the electors of the whole municipality who voted, and it seems to me that we cannot give weight to this objection and that this is a case where, on the evidence, the proceedings were conducted substantially in accordance with the requirements of the Act, and whatever non-compliance or irregularity as to the taking of the poll there may have been did not affect the result of the voting, and it is impossible to give effect to this objection.

I would submit with deference that the order appealed from must be reversed and the application to quash dismissed. The municipality must have the costs of this appeal and of the motion to quash.

Appeal allowed.

Re CANADIAN DIAMOND CO., Ltd., Broad's Case.

Alberta Supreme Court, Walsh, J. May 6, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 4—125)—FIDUCIARY RELATION—MISFEASANCE BY DIRECTOR—ACT NOT CONSTITUTING—ACCEPTANCE OF STOCK FOR SERVICES.

A director's acceptance of stock issued to him for services rendered prior to the incorporation of the corporation, did not constitute misfeasance in the nature of a breach of trust where the memorandum of association authorized the issue, though the company's prospectus states that "no amount has been or will be paid to any director beyond the purchase price paid to the syndicate as above mentioned"; no claim of fraud as to the rendition or value of the services being made.

[*Coventry & Dixon's Case*, 14 Ch.D. 660, referred to.]

2. CORPORATIONS AND COMPANIES (§ IV G 5—130)—OFFICERS—LIABILITIES—WINDING-UP—DETERMINATION OF DIRECTOR'S LIABILITY—PREREQUISITES.

On application by the liquidator of a company to compel a director to account, his liability respecting stock issued to him for services under Companies Ordinance (N.W. Terr. 1911, ch. 61), sec. 110, for want of the contract in writing referred to in clause (*b*), will not

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be determined; if he is so liable his name should be placed upon the list of contributories, in order not only that his liability as such may be determined in the proper manner, but also that the rights and liabilities of the contributories as amongst themselves may be decided.

3. CORPORATIONS AND COMPANIES (§ IV G 1—106)—OFFICERS—ELECTION—OFFICE OF ASSISTANT MANAGING DIRECTOR—AUTHORITY FOR CREATION.

An article of association authorizing the directors of a company to appoint one or more of their number to be managing director or managing directors, warrants creation of the office of assistant managing director in addition to the office of general manager.

4. CORPORATIONS AND COMPANIES (§ IV G 3—120)—OFFICERS—COMPENSATION—MANAGING DIRECTORS—SALARIES—VOTE REQUIRED.

Under an article of incorporation providing that the directors may pay to any managing directors such salary as they may think fit, provided that a majority of all the directors (exclusive of any managing director) vote in favour of such salary, the salary may be paid on the vote of a majority of the directors exclusive of the managing director to whom it is voted.

5. CORPORATIONS AND COMPANIES (§ IV G 3—120)—OFFICERS—COMPENSATION—IMPROPER PAYMENTS TO DIRECTOR—LIQUIDATOR'S RIGHT TO RECOVER.

The liquidator of a company is entitled to recover from a director, under a misfeasance summons, money paid the director by the company as commission on shares subscribed for by him at the time he signed the memorandum of association; such payments not being authorized by the articles of association or the prospectus, and being in violation of Companies Ordinance (N.W. Terr. 1911, ch. 61), sec. 111.

[*Re Newman (George) & Co.*, [1895] 1 Ch. 674; *Re Bodega Company, Ltd.*, [1904] 1 Ch. 276; *Re Oxford Benefit Building & Investment Society*, 35 Ch.D. 502, referred to.]

Statement

APPLICATION by the liquidator of the Canadian Diamond Co., Limited, for an order compelling one Broad, a director of the company, to pay over certain sums alleged to be due in respect of various acts of misfeasance as a director.

Judgment was given for the plaintiff.

Judge, for the liquidator.

Petrie, for Broad.

Walsh, J.

WALSH, J.:—This provincial company is being wound up under the Companies' Winding-up Ordinance, 1903. The liquidator applies under sub-sec. 17 of sec. 22 of this Ordinance for an order compelling one Broad, a director of the company, to pay to him three sums of $1,000, $200 and $100 and interest, for which Broad is alleged to have made himself liable by various acts of misfeasance as such director.

Immediately after the incorporation of the company its directors allotted to Broad 1,000 shares of its capital stock of a par value of $1 each, as his remuneration for services rendered previous to the incorporation of the company, and this allotment was afterwards ratified by the company in general meeting. The sum of $1,000 claimed represents the par value of these shares.

One of the objects of the company, as set out in its memorandum of association, is to remunerate any person for services rendered in the formation of the company, either in cash or shares. The company's prospectus states that "no amount has been or will be paid to any director beyond the purchase price paid to the syndicate as above mentioned." The contention for the liquidator is that in the face of this statement in the prospectus it was not competent for the directors to allot these shares to Broad, and it was misfeasance on his part to accept them. No suggestion of fraud is made, neither was it contended before me that the services rendered by Broad were mythical or that they were extravagantly paid for by the allotment to him of these shares. The whole argument was that in the face of this statement in the prospectus the company had no power to issue these shares to Broad and he had no right to accept them.

If the company otherwise had the right to allot these shares to Broad for the consideration named, I do not see how the validity of the allotment could be affected by the representation in the prospectus which I have quoted. The representation is that no amount has been or will be paid to a director. The complaint is that shares have been allotted to a promoter. In strictness this is not within the representation. Even if it is, I think that the statement amounts to nothing more than a representation that the power given to the company to allot shares upon such a consideration had not been and would not be exercised. A purchaser of shares upon the faith of this statement might very well complain of its violation, and perhaps be entitled to rescission of his contract to purchase, for a prospectus is a document on the faith of which persons are intended and entitled to and do rely in applying for shares in the company issuing it. But that is a vastly different thing from treating as a misfeasant an officer of the company who accepts such shares under the circumstances here present.

If there is any liability on Broad for this sum of $1,000 it is certainly not as a misfeasant. James, L.J., in *Coventry & Dixon's* case, 14 Ch.D. 660, defined the word "misfeasance" in the corresponding section of the English Companies Act as meaning

> misfeasance in the nature of a breach of trust; that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any money of the company or by which the company's property has been wasted or the company's credit pledged. It must be something resulting in actual loss to the company.

The act here complained of is not a misfeasance within this definition, for it is not even alleged that any loss has resulted to the company by this transaction and I cannot imagine how any loss can result.

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It was suggested on the argument that Broad, if not liable upon this ground, is liable under sec. 110 of the Companies Ordinance for want of the contract in writing referred to in clause (*b*). I understood Mr. Petrie to consent that I should dispose of the question of his client's liability under this head, but I am neither able nor willing to do so. I am not in possession of all of the facts which are necessary to enable me to dispose of it, and even if I was, I do not think I should do so on this application. If Broad is so liable his name should be placed upon the list of contributories, in order not only that his liability as such may be determined in the proper manner, but also that the rights and liabilities of the contributories as amongst themselves may be decided.

The motion is dismissed as to the sum of $1,000. If the liquidator has already filed his list of contributories and he feels disposed to test the question of Broad's liability as such, he may amend his list without further order by placing his name upon it with respect to these shares, and in that way the question of his liability will be properly and effectually dealt with.

The sum of $200 is claimed as being the amount improperly paid to Broad as assistant managing director of the company. A good many statements of fact were made during the argument, for which I can find no warrant in the material filed. I can, of course, only consider those which are proved in the usual way. These simply are that Broad was appointed by the directors as assistant managing director at a salary of $100 per month, and that he was paid two months' salary at such amounting to $200. It is then alleged that this appointment was made in contravention of the articles of association and that there was therefore no legal warrant for the payment of this salary. Art. 69 provides that "the directors may appoint one or more of their number to be managing director or managing directors of the company." One Maberley was appointed general manager of the company and it was argued that this exhausted the director's powers under art. 69. In view of the fact that this article expressly authorizes the appointment of one or more directors as a managing director or managing directors, I cannot understand this argument. Then it is said that there is no authority in the articles for the appointment of an assistant managing director. He is none the less a managing director simply because the word assistant is applied to his office. That means nothing more than that he is a managing director who ranks in authority below some other managing director. I am of the opinion, therefore, that art. 69 fully warrants the creation of this office. Art. 71 provides that:—

> The directors may pay to any managing directors such salary as they may think fit, provided that a majority of all the directors (exclusive of any managing director) vote in favour of such salary.

The liquidator's affidavit shews that at the same meeting one of the other two directors was appointed general manager and the remaining one assistant general manager, and the argument is made that as the vote of a majority of all the directors (exclusive of any managing director) is necessary to validate such a salary, such a vote was impossible, for all of the directors were at this date managing directors, and were therefore under the terms of this article excluded from voting. Even if this was a sound argument, which I do not think it is, I could not give effect to it on the material before me, for it may be the case that Broad's salary was fixed before his fellow directors were made managing directors, in which event, of course, their votes would justify the payment of his salary. The article in question is carelessly drawn, but what, I think, it means is that the salary may be paid on the vote of a majority of the directors exclusive of the managing director to whom it is being voted. This claim is dismissed.

The remaining claim of $100 is for commission paid to Broad on the 2,000 shares subscribed for by him at the time of his signing the memorandum of association. There is nothing in the articles of association justifying this payment and there is no reference to it in the prospectus. It was therefore made in direct violation of sec. 111 of the Companies Ordinance and must be repaid. This is a sum which I think can be recovered under a misfeasance summons. See *Re Newman (George) & Co.*, [1895] 1 Ch. 674; *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; *Re Oxford Benefit Building & Investment Society*, 35 Ch.D. 502.

The order will be for Broad to pay to the liquidator $100 with interest at 5 per cent. from February 16, 1911. There will be no order as to costs as between the parties. The liquidator will have his costs of the application out of the estate and I fix them at $25.

Application granted.

Re BRITISH COLUMBIA FISHERIES.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 18, 1913.

1. FISHERIES (§ I—2)—FEDERAL AND PROVINCIAL POWERS—SEA FISHERIES.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise, the exclusive right of taking fish (*ferœ naturæ*) either in tidal waters or in non-tidal navigable waters within the "railway belt" of British Columbia.

2. FISHERIES (§ I—2)—FEDERAL AND PROVINCIAL POWERS—TIDAL WATERS.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, as to the open sea within a marine league of the coast of that province, by way of lease,

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license or otherwise, the exclusive right of taking fish which as *res naturæ* are the property of nobody until caught; and the same restriction applies as to tidal waters in the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States of America.

3. PUBLIC LANDS (§ I—1)—RIVER BEDS—"RAILWAY BELT" LANDS IN BRITISH COLUMBIA.

The beneficial ownership of the beds of navigable non-tidal waters within the "railway belt" in British Columbia, which were vested in the Crown in the right of that province at the time of the transfer of the "railway belt" lands to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

Statement

REFERENCE by the Governor-General-in-council of questions for hearing and consideration as to the powers of the Legislature of British Columbia to authorize the Government of that province to grant exclusive rights to fish as therein mentioned.

The questions referred to the Supreme Court of Canada for hearing and consideration pursuant to the authority of sec. 60 of the Supreme Court Act, are as follows:—

1. Is it competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right to fish in any or what part or parts of the waters within the "railway belt,"

(*a*) as to such waters as are tidal, and

(*b*) as to such waters as although not tidal are in fact navigable?

2. Is it competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low-water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province?

3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province, or lying between the province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low-water mark in the said waters or any of them?

At the hearing of the arguments presented in respect of the issued raised upon the reference:—

Argument

Hon. A. W. Atwater, K.C., and *Newcombe*, K.C. (Deputy Minister of Justice), appeared for the Attorney-General for Canada.

Lafleur, K.C., and *H. A. Maclean*, K.C., for the Attorney-General for British Columbia.

Wallace Nesbitt, K.C., *Aimé Geoffrion*, K.C., *E. Bayly*, K.C., and *C. C. Robinson*, for the Attorneys-General for Ontario, New Brunswick and Manitoba.

S. B. Woods, K.C., for the Attorneys-General for Saskatchewan and Alberta.

Sir Charles Fitzpatrick, C.J.
Davies, J.

SIR CHARLES FITZPATRICK, C.J., and DAVIES, J., agreed with DUFF, J.

IDINGTON, J.:—The respective jurisdictions of the Dominion and the province relative to the questions of fisheries and fishing rights were determined by the decision of the Judicial Committee of the Privy Council in the case of the *Attorney-General for the Dominion of Canada* v. *The Attorney-General for Ontario et al.*, [1898] A.C. 700. The result of that decision was to leave the property therein as such (save possibly in the merest technical sense) in the province subject to and entirely dependent upon the legislative regulations and restrictions of the Dominion Parliament. There can be no doubt that the right to fish in the sea and all its arms on the coast of British Columbia has been a public right enjoyable by everybody, and must so remain until the Dominion Parliament signifies otherwise, as, for example, by declaring that it will be for the good of the whole of Canada that a several or exclusive right of fishing may be granted. There may be a question whether or not the province could grant an exclusive license anticipating and conditional upon and subject to the legislative regulations to be provided by Parliament. This would be practically of little use, even if technically it could fall within the terms of the judgment referred to. After having given that possibly arguable right of the province the best consideration I can, it seems to me that it must be taken to be the will of Parliament that, until it has otherwise declared, the common law giving such rights as the public now possess is the regulation to be observed, and that is inconsistent with the grant of an exclusive license.

If the province should try to revoke this right of the people, it must do so through its legislature. Such legislation would be *ultra vires* and in any event if need be the veto power of the Dominion could prevent it. What has been urged relative to the province having exclusive jurisdiction over "property and civil rights" as a ground for interference by the local legislature independently of Parliament, seems to me misplaced. There is *primâ facie* no more of property or civil right involved in the question than in the right to navigate these same waters. There may be civil rights arise out of the operation of navigating, but the right to navigate is held subject to regulation by Parliament. When there has been well and truly granted a license to fish in said waters, within and conformable with the legislative regulations adopted by Parliament, then there will arise a civil right in the licensee which will fall in all its incidents of assignments and succession within the power of the province over property and civil rights. This exercise of power granting such a civil right is the foundation of such incidental rights and is itself an exercise of the power the province has over property and civil rights. It may be also made so long as consistent with the

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Parliamentary regulations, subject to terms and conditions giving rise to other incidental civil rights. The recognition of the power of the province over all these properties and civil rights so developed, furnishes no argument for limiting the exclusive legislative authority of Parliament given by sec. 91, sub-sec. 12, of the British North America Act, over "Sea Coast and Inland Fisheries."

If the contention of the province were to prevail it might result in one man or corporation acquiring the monopoly for all time over a food supply of fish which the rest of the people of Canada, as well as of British Columbia, have a right to enjoy. Such a result is properly admitted as a possible logical consequence of the contention set up, but is plausibly met by the argument that there is no power but may be abused. But I cannot overlook the comprehensive language of the exclusive power given Parliament over "sea coast and inland fisheries" and coupled therewith the predominant feature of our whole scheme of confederation, which is that to those who are to be directly affected by the exercise of any power is entrusted the power of due and proper rectification of any misuse of such power.

This power of granting exclusive licenses to fish in the waters of British Columbia so touches the welfare of the whole people of Canada, not only in relation to their food, but also in the widest areas of national life, in so many and diverse ways, that a book might be written thereon. I think the people who may be affected by its operation must be declared virtual masters, through their Parliament, of the situation.

The illustration given by Lord Herschell as to Parliament having the right to prescribe the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose, has been pressed, not exactly as the limit, but as if expressive of the entire nature of its power. I do not think it is more than an illustration. I by no means read it as indicating the whole nature of the power. For I think the exclusive nature of the legislative power over the subject-matter named, is as wide as it possibly can be and relates to everything that Parliament may deem fit to deal with in regard thereto. The incidental property or civil rights in the province which may be found therein, of course, cannot be touched by Parliament. And I have no doubt once these limits of their respective powers are accurately apprehended, the trust, so timely expressed by Lord Herschell, that the good sense of the legislatures concerned will overcome any apparent inconvenience, will be realized.

Even if the right to fish in non-tidal but navigable waters may differ from those other rights, all seem so classed together by the British North America Act that I think the right of the province in either case must be treated for all practical purposes

as resting on the one common basis of the regulations of Parliament. The nature of the property which the Dominion may have relative to the granting of licenses to fish in the waters within the "railway belt" is not directly raised by these questions submitted for determination herein. It can only be incidentally considered here relative to the questions put by way of an answer to the claim of the province. In the view just expressed it seems hardly necessary to consider it. There is, however, not the same clear common law right of the public to fish in these non-tidal navigable waters as in the others in question herein. Hence, notwithstanding the opinion I have just expressed, I see there may be another point of view worthy of notice. The Settlement Act, ch. 14, of the British Columbia Statutes of 1884, seems to transfer such a title in the soil as to preclude the province from granting any license to fish in non-tidal navigable waters existent on lands covered by said grant. There is, in my opinion, no foundation in law for the claim that fish therein ever were *jura regalia* such as the precious metals I would, therefore, answer each of the questions in the negative.

I understand from counsel that though taking the form of "Reference under the Supreme Court Act," this submission is in fact pursuant to the consent of the Province of British Columbia and the Dominion as a means of determining their respective rights in the premises. It is conceivable that British Columbia before the Union, or after that event, and before the later Settlement Act I have referred to, may have made grants inconsistent with the operative effect to be given the respective results of the legislation dealt with in accordance with what I have said. In either such case the Act of Union or later Act cannot interfere.

Duff, J.

DUFF, J.:—It will be convenient first to consider question 2. The colony of British Columbia was established in 1858. By an ordinance promulgated by Governor Douglas, on the 19th of November of that year, the laws of England, criminal and civil, as they existed on that date, were declared to be in force in the colony "so far as the same are not from local circumstances inapplicable," and by an ordinance, promulgated in 1867, after the union of the old colony of British Columbia with Vancouver Island, the ordinance of 1858 was made applicable to the whole of the new colony of British Columbia thereby constituted.

It is not suggested that from the first establishment of the colony of British Columbia down to the time when the United Colony entered the Canadian Union, any enactment was passed by any law-making authority affecting the public rights of fishing in tidal waters in any way material to the present question. At the date of the Union the law governing these rights

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may be taken for our present purpose to have been the law of England "so far as the same was not from local circumstances inapplicable."

> The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *primâ facie* right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.

This statement of the law, contained in the opinion of the Judges given by Mr. Justice Willes, in 1863, in response to a question put by the House of Lords in *Malcolmson* v. *O'Dea*, 10 H.L. Cas. 593, at page 618, was expressly approved by the House, and is, of course, a final pronouncement as to the state of the law in England respecting public rights of fishing in tidal waters on November 19, 1858. I can think of no good reason why the rule enunciated in this passage should be supposed to be inapplicable to the circumstances of British Columbia, and I think it must be held to have been in force throughout British Columbia in 1871, when the provisions of the British North America Act became applicable to the province. That statute vested in the Dominion Parliament the exclusive authority to make laws relating to the "sea coast and inland fisheries," and in *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario*, [1898] A.C. 700, at 716, one consequence of this was held by the Privy Council to be that

> all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only.

It follows that question 2, in so far as it refers to a supposed exclusive right to be created by the province in tidal waters, ought to be answered in the negative. The question as framed goes further; but no suggestion was made in the argument as to the character of any possible non-exclusive rights of fishing grantable by the province in tidal waters, and, as I do not understand what point is intended to be raised by the reference to such possible rights, I must ask to be permitted to treat the question as confined to exclusive rights.

I may further add that I have treated the question as relating only to rights of fishing as commonly understood, that is to say, rights to take fish (not being royal fish, as to which our opinion is not desired) that as *feræ naturæ* are, where the fishery is public, the property of nobody until caught.

Treating question 3 as also confined to exclusive rights of fishing in the sense already indicated, that question must for the

same reasons be answered in the negative. It is not necessary to consider the very important question whether the bed of the open sea within the three-mile limit is or is not vested in the Crown in right of the province. For the same reason also the first branch of the first question must be answered in the negative. The public right being subject to the exclusive control of the Dominion Parliament, it is immaterial whether the beds of tidal waters passed or did not pass to the Dominion under the transfer of the "railway belt."

The second branch of the first question raises a different point. I think it should be answered in the negative for these reasons.

1st. The beds of non-tidal, navigable waters within the railway belt, in my opinion, passed to the Dominion by the transfer effected by the Settlement Act. In that Act, 47 Vict. ch. 14, sec. 2, the lands transferred are thus described:—

> The public lands along the line of railway . . . to a width of 20 miles on each side of the line.

It is argued that the beds of non-tidal navigable waters within the boundaries indicated by this language did not pass to the Dominion for two reasons:—

(*a*) It is said that the rights of the Crown to such beds, at the date of the Union with Canada as well as the date of the Settlement Act, rested upon prerogative title; and that according to the judgment of the Privy Council delivered by Lord Watson in the *Precious Metals* case, 14 App. Cas. 295, the term "public lands" in the description above quoted must be taken not to comprise any land held under such title. It cannot be doubted that expressions can be quoted from the judgment of Lord Watson, which taken by themselves might appear to lend some support to this view of that decision. At page 303, for example, he says:—

> It, therefore, appears to their Lordships that a conveyance by the province of public lands which is in substance an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

It is unnecessary to decide whether passages such as this justify the construction the province seeks to place upon the judgment as a whole; for it is clear, I think, that the beds of non-tidal waters, whether navigable or not, do not, according to the law of British Columbia, belong to the Crown *jure prerogativæ*. That such is the law of England is indisputable: *Bristow* v. *Cormican*, 3 App. Cas. 641, and *Johnston* v. *O'Neill*, [1911] A.C. 552, at p. 557. Mr. Lafleur referred to certain expressions in books of authority which designate non-tidal rivers subject to a common right of passage as "royal rivers"

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and sought to draw the inference that the beds of such rivers are held under prerogative title. The significance of such expressions is fully explained by Lord Hale in the second chapter of "De Jure Maris" (Moore, Foreshore, p. 374.) They signify nothing more than the expression "King's highway" as applied to a highway on land. See also the judgment of Bowen, L.J., in *Blount* v. *Layard*, [1891] 2 Ch. 681n, at p. 688.

It seems to be argued, however, that in this matter of the nature of the title by which the beds of such waters are held, the law of England is from local circumstances inapplicable to British Columbia and that in that province the beds of navigable non-tidal waters are (like the beds of tidal waters) the property of the Crown in right of prerogative.

I cannot understand why it should be supposed to be more in consonance with the circumstances of British Columbia that the beds of non-tidal navigable waters vested in the Crown should be deemed to be held under prerogative title than that such beds should be held under the same title as the Crown lands in the province generally. In the argument counsel dwelt upon the great size of the lakes and rivers. The rivers of Vancouver Island are diminutive when compared with the Shannon, and there is certainly no lake as large as Lough Neagh. On the mainland there are lakes perhaps twice as large as Lough Neagh and rivers much longer than the Shannon; but what conceivable inconvenience could the community suffer by reason of the beds of those waters being held by the Crown under the same title as other Crown lands? From the very beginning full authority to deal with Crown lands of every description was vested in the local legislative authority. The first local law-making authority was that conferred upon Governor Douglas, who was appointed on September 2, 1858, and, under the authority of an order-in-council passed pursuant to 22 Vict. ch. 49, was invested with power to make laws for the "peace, order and good government" of the colony; and it was in exercise of this power that the ordinance of November 19, 1858, already referred to, providing for the introduction of the law of England was passed. All Crown lands and mines in the colony, whether held under prerogative title or not, came under the legislative jurisdiction of the Governor, and from that time forward they became the subject of legislative provision as occasion arose.

One is at a loss to surmise what possible practical importance could attach to the point whether beds of non-tidal waters which were the property of the Crown and were subject to the local legislative authority, were to be regarded in the eye of the law as held according to one description of title or according to another. I do not think there is any ground for holding that in this matter the rule of the common law did not come into force *simpliciter*.

(*b*) The other ground upon which the province contends that these beds did not pass to the Dominion is this. It is said that in British Columbia the Crown's title to the beds of non-tidal waters which are capable of navigation in fact are, like its title to the beds of tidal waters, burdened with a public easement of navigation; and it is said to be a rule of construction applicable to grants by the Crown to a subject that lands held by a title burdened with such a public servitude do not pass except by express words or by necessary implication. This rule of construction, it is argued, ought to be applied to the Settlement Act. The object of the transfer being, it is contended, to enable the Dominion to recoup the cost of construction of the railway, by selling the land to settlers, a presumption arises, it is said, that only such rights were intended to pass to the Dominion as in the ordinary course would be granted to settlers. It does not appear to me to be necessary for the purpose of dealing with this argument to express any opinion upon the very important question of how far and upon what principle public rights of navigation are recognized by the law of British Columbia as existing in non-tidal waters capable of being navigated. Certain rivers and lakes in that province, which from the first settlement of it have been used as public highways, are, one cannot doubt, subject to a public easement of passage. Such rights can in the case of such waters be maintained upon grounds which involve no straining of the principles of English law.

There are, on the other hand, lakes and streams capable, no doubt, of navigation whose economic value for the community is primarily due to their availability or potential availability for purposes of irrigation, of mining and of industry generally. From the first settlement of the country the necessity of making provision for the application of the waters of lakes and streams to these purposes was recognized; and a system of "water records" which, while not entirely displacing riparian rights, recognizes the paramount right of the province to control the use of such waters, and under which riparian owners and others may, upon application to the public authorities, acquire the right to divert such waters from their natural beds for such purposes has for years been a settled feature of the law of the province and has always been regarded as essential in the interests of provincial industry. On the other hand, these waters are often so situated that while they are capable of navigation, in fact, the practical interest of the community in them as possible ways for public travel or transport could only be infinitesimal.

It is not necessary, I repeat, in my view of the question before us, to say whether the law of England was so modified on its introduction into British Columbia as to give rise to a public right of navigation over every such inland navigable water. Nor do I think it necessary to decide how far the rules of English

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law relating to the rights of riparian proprietors in respect of the beds of such waters are applicable to British Columbia, nor whether by the law of that province there is any rule of construction applicable to grants from the Crown according to which the beds of non-tidal navigable waters only pass by express words or by necessary implication. Assuming such rights of navigation to exist in all such waters, and assuming the rule of construction in the case of a grant to a subject to be that which is contended for, still it seems to me that the conclusion which the province asks us to draw cannot be supported.

The area transferred by the Settlement Act is an area about 500 miles long and 40 miles wide. It stretches from the eastern boundary of the province to the Gulf of Georgia, and is very varied in its physical character. At the time of the Settlement Act it included a good deal of timber land and a good deal of land known to be fit for agriculture. The waters navigable and non-navigable within the area must have been regarded by everybody who thought about the matter as likely to prove a most important factor in connection with the settlement and development of it. Why should anybody be supposed to have contemplated that as between the Dominion and the province the control of the water system should be divorced from the ownership of the "belt" as a whole? As regards non-navigable waters nobody suggests such a thing. As regards waters navigable in fact, assuming they were subject, as is argued, to public rights of navigation and fishing, then it must be remembered that this area was to be dealt with by public officials under the control of the Dominion Parliament and that the Dominion Parliament is the supreme conservancy authority in respect of navigation and fishing. Whatever considerations might be urged in the case of a grant by the Crown to a subject in support of a presumed intention to exclude the beds of navigable waters because of the existence of such public rights, I can think of no reason why such a presumption should be applied to this transfer. Moreover, it could hardly have escaped the notice of both parties that the retention by the province of the beds of non-tidal navigable as distinguished from non-navigable waters, was bound to lead in numberless cases to much uncertainty of title, and for that reason alone I think we may assume that such retention was not contemplated.

2nd. The beds of the waters in question having passed to the Dominion, the right of fishing would pass also as a profit of the soil, unless according to the law of British Columbia the right of fishing in non-tidal, navigable waters is not a profit of the soil; and having passed to the Dominion that right could not be granted away again by the province.

I am not sure that I have grasped the argument of the province at this point, but whether the right of fishing in these

waters is or is not vested in the Dominion as a profit of the soil, it seems to me to be impossible to answer this question in the affirmative.

It cannot be argued, and I do not suppose counsel intended to argue, that (the beds at the time of the transfer being vested in the Crown in proprietary right) the right of fishing was held by the Crown in right of prerogative. The argument addressed to us was that in these waters there is a public right or privilege of fishing over which in some way the province is entitled to exercise control. I do not think it is necessary to decide whether the law of British Columbia at the date of the Union recognized any public right of fishing in these waters. There can be no doubt that the law of England recognizes no necessary connection between the public right of navigation and the public right of fishing; and, indeed, the great weight of authority is in favour of the view that a right of the character last mentioned cannot exist in non-tidal waters under the common law. Whether on its introduction into British Columbia the law of England underwent such a modification as to require us to hold that in every body of water in that province which is capable of navigation (the bed of which is vested in the Crown) a right or privilege of fishing belongs to the public and if there be such a right or privilege in non-tidal waters, what is the nature of it, are questions involving points of far-reaching importance which ought only to be passed upon after hearing argument in the interests of those private owners who might be affected by the decision and who were not represented on the hearing of this reference. It is unnecessary, as I have said, to pass upon those questions. Such a public right or privilege if it exist in non-tidal waters, may be either (*a*) an absolute right, only capable of limitation or restriction by legislative authority, such as the public right of fishing in tidal waters, or (*b*) a privilege in the nature of a mere tacit license revocable at the will of the Crown or the Crown's grantee as owner. Strong, C.J., in his opinion in the *Fisheries* case, 26 Can. S.C.R. 444, at 526, 527, 528, and 531, expresses the view that there is a public privilege in such waters and appears to think it is of the last-mentioned character. Such a privilege would, of course, leave untouched the Crown's proprietorship of the fishery as incidental to the ownership of the *solum*. As regards the waters in question this proprietorship would pass to the Dominion by the transfer and with it the power of revocation theretofore vested in the province as owner. If, on the other hand, there is a public right of fishing of the first mentioned character, it is, as we have seen, subject to the exclusive control of the Dominion Parliament.

This question, then, should be answered in the negative because the beneficial ownership of the beds of navigable non-tidal

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waters within the "railway belt" that were vested in the Crown at the date of the transfer passed to the Dominion; and with the ownership of the beds the fisheries passed also as ordinary profits of the soil unless at the date of the union the title of the Crown was burdened with a public right of fishing that was only capable of being restricted or limited through the exercise of legislative authority. If such a public right did exist in respect of the fishings in the waters in question, then by the operation of the British North America Act as construed in the *Fisheries* case, [1898] A.C. 700, the Dominion Parliament became solely invested with legislative authority to limit or restrict that right.

Anglin, J.

ANGLIN, J.:—I concur in the reasons assigned by my brother Duff for answering in the negative the second and third questions, restricted as indicated by him, and that part of the first question which relates to tidal waters. But I prefer to state in my own way the grounds on which I base a negative answer to the second branch of the first question, which concerns waters navigable in fact but not tidal.

It was much debated at bar whether under the provincial statutory grant the Dominion Government did or did not acquire proprietary rights in the beds of these waters. While I adhere to the view which I expressed in *Keewatin Power Co.* v. *Town of Kenora*, 13 O.L.R. 237, as to the inapplicability to the great stretches of fresh water in this country, which are navigable in fact, of the rule of the English common law, which treats as navigable only such waters as are tidal, in the view that I take it is not necessary here to determine that important point.

If the English common law test of navigability applies in British Columbia without any modification, all non-tidal waters must be deemed non-navigable in law, and a grant similar in its terms to that before us, if made by letters patent to a private person, would carry the subjacent soil of such waters, whether in fact navigable or non-navigable. The statutory grant to the Dominion will not receive a narrower construction. In this view the province has by its grant parted with the proprietary interest upon which its right to grant fishing leases or licenses must be rested. It has transferred that proprietary interest to the Dominion; and whatever jurisdiction the Legislature of British Columbia may possess enabling it to derogate from provincial Crown grants to private persons, it has no legislative power to derogate from the effect of its statutory grant to the Dominion of the "railway belt" lands, which, as public lands, are under the exclusive legislative authority of the Dominion Parliament until disposed of to settlers: *Burrard Power Co., Ltd.* v. *The King*, [1911] A.C. 81.

On the other hand, if, in British Columbia, waters in fact navigable though non-tidal should be deemed navigable in law, and *publici juris* in the same sense as tidal waters, there would, in my opinion, exist in them the same public right of piscary which exists in tidal waters; and the provincial legislature is not competent to authorize any grant which would interfere with the fullest exercise of that public right. It follows that in either view the Legislature of British Columbia cannot authorize grants of exclusive rights to fish in these waters.

I cannot accept the contention pressed on behalf of British Columbia that the interest of a province in the ordinary fisheries in provincial waters which should be deemed navigable in law is a *jus regale* of the same nature as its right to the precious metals which were held not to be *partes soli*, and were on that account excluded from the operation of the grant of the "railway belt lands": *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295.

A public fishery will not pass by a Crown grant of the *solum* of the water in which it exists, or indeed of the fishery itself in express terms, not because such a fishery is not *pars soli*, but because the *solum* itself, vested by law in the Crown, is subject to a trust to preserve the public rights of navigation and of fishing, which the competent legislature alone can extinguish. But the precious metals do pass under a Crown grant which contains language apt to convey them. Legislative action is not requisite.

On the other hand, any fishery vested in the Crown in waters of which it owns the *solum*, other than a public common of piscary existing by law, with which a province is not competent to interfere, is held not by prerogative, but by proprietary title: *Mayor of Carlisle* v. *Graham*, L.R. 4 Ex. 361 at 367-8; *Duke of Devonshire* v. *Pattinson*, 20 Q.B.D. 263, *per* Fry, L.J., at 271.

BRODEUR, J., agreed with DUFF, J.

Brodeur, J.

Report accordingly.

Re QUEBEC CENTRAL R. CO.

(File No. 21042.)

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Board of Railway Commissioners, March 31, 1913.

1. CARRIERS (§ IV A—519)—RAILWAY BOARD—STATUTORY PROVISIONS—AMALGAMATION OF RAILWAY COMPANIES—LEASE DISTINGUISHED.

Amalgamation of railways is essential to the operation of Railway Act, R.S.C. 1906, ch. 37, sec. 362, which gives an amalgamated company all powers possessed by the consolidated railways; and, hence, the section does not apply to make one company of both where a lease has been made of a provincial railway to a Dominion company for 999 years, though the only occasion for the continued corporate existence of the lessor company appears to be the issuance of stock, bonds and debentures, and the receipt of rent.

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2. CARRIERS (§ IV A—519)—LEASES—JURISDICTION OF BOARD OF RAILWAY COMMISSIONERS.

Sec. 361 of the Railway Act, R.S.C. 1906, ch. 37, which provides for sale or lease of one railway company's line to another, and which requires the agreement therefor to be submitted to the Board of Railway Commissioners, with application for recommendation to the Governor-in-council for sanction, does not give the Board jurisdiction of a lease of a provincial line to the Canadian Pacific Railway Company, though the statute 2 Geo. V. (Can.) ch. 78, sec. 14, provides that, subject to secs. 361-363 of the Railway Act, that company may, for any of the purposes specified in sec. 361, enter into an agreement with the provincial company, and may lease its railway and undertaking.

[*Preston and Berlin Street R. Co.* v. *Grand Trunk R. Co.*, 6 Can. Ry. Cas. 142, referred to.]

The Chief Commissioner

THE CHIEF COMMISSIONER:—Complaints have been made to the board as to the operation and practices of the Quebec Central R. Co., and the question as to whether or not that railway is subject to the jurisdiction of the board was heard at Ottawa on the 18th of March.

The Quebec Central is a provincial company incorporated under the statutes of the Province of Quebec. The railway has, however, been acquired by the Canadian Pacific R. Co. under a lease dated October 2, 1912.

This lease seems to give absolute control of the railway and its operations to the Canadian Pacific R. Co. Under it, not only the railway now constructed, but also all extensions, branches, and additions that the lessor—that is, the Quebec Central R. Co.—may hereafter be authorized to construct by the Parliament of Canada, by the Legislature of the Province of Quebec, or by the Board of Railway Commissioners for Canada under the provisions of the Railway Act and amendments, with all appurtenances, are leased to the lessee—the Canadian Pacific R. Co.—for a term of nine hundred and ninety-nine years.

The lessor's corporate acts are subject to contract with the lessee, the lessor agreeing not to issue any additional capital stock, bonds, or other financial obligations, without the lessee's consent; and at the same time, agreeing to sell all or any part of the existing capital stock within its control, and use its best endeavours to obtain power to create, and thereafter create and issue, additional capital stock, if the lessee so desires. On the same request the lessor must issue bonds or debenture stock to such amount or amounts and at such rate of interest, not exceeding 4%, as the lessee fixes. The lessor is to apply the proceeds of such bonds or debenture stock in such proportions and in such manner towards the construction or permanent improvement of the railway as the lessee may direct; or, at the option of the lessee, the lessor is to pay over the whole or any part of such proceeds to the lessee, in order that the lessee may itself, according to its own discretion, apply the same as aforesaid.

The lessee also has the right to exercise all the franchises and

powers of the lessor in operating the railway, in building branches under the railway Act or under any Act of the Legislature of the Province of Quebec, and has the right to use the name of the lessor.

The officers of the lessor are required on the demand of the lessee, to append their signatures and affix the seal of the lessor to any document useful in the exercise of the lessor's rights and franchises. The lessee, of course, can do what it likes in connection with the running of the trains, may make such rules, regulations, and by-laws touching the railway as it deems advisable, and is to make the tariff or tolls.

The only matters left to the lessor, to warrant its continued corporate existence, seem to be the issue of further stock, bonds, and debentures, and the receipt of rent.

The rent takes the form of the payment of interest on the company's bonded or debenture stock indebtedness, and a dividend upon the capital stock of the lessor for the time being issued and outstanding at the rate of 4% for the first four years of the term and afterwards at the rate of 5%. It would appear that this collection is in its turn probably a matter of form in so far as the lessor is concerned, and that the lessee probably, through some official of its own, who may have the added dignity of an official name in the lessor company, will make these payments direct to the shareholders of record and to the bond and debenture stock holders.

On the other hand, it should be pointed out that the lessee covenants to do everything, during the term of the lease, necessary for the preservation of the property and franchises of the lessor, and for keeping alive its incorporation for all purposes mentioned in its acts of incorporation; and that the lease contains provisions for surrender at the end of the term, and for re-entry for non-payment of rent.

The probable reasons for the continuance of the corporate functions of the lessor would seem to be—first, the maintenance of the defined interests of the shareholders in the company, as represented by their stock certificates, unchanged, thus obviating difficulty in determining their interests, and making their compensation easy of adjustment in the form of the dividend secured; secondly, the issue of securities by the lessor for the purposes of the road, enabling the Canadian Pacific to construct new lines under Provincial Acts, if they are found favourable, and to operate said lines without interference from the Board of Railway Commissioners.

The lease was submitted to the Board for its approval under sec. 361 of the Act; and a consideration of the provisions of that section and of sec. 362, as well as of sub-sec. 21 of sec. 2, is now necessary. Sec. 361 deals with the sale or lease of the com-

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pany's railway and undertaking by one company to another, either in whole or in part, or for amalgamation. Under the terms of the section, the agreement has to be submitted to the Board, with the application for its recommendation to the Governor-in-council for sanction, the duty of the Board being, in the proper case, to recommend to the Governor-in-council the sanctioning of the agreement.

Under sec. 362, companies agreeing to amalgamation are deemed to be amalgamated and to form one company in the name and upon the terms and conditions which the agreement provides, and the amalgamated company is to possess and be vested with . . . all the powers, rights, and franchises . . . belonging to, possessed by, or vested in the companies parties to the agreement. The interpretation of "railway" (sec. 2, sub-sec. 21), shews that the word includes any railway which the company has the authority to construct or operate.

Sec. 362, however, has no application. Absolute as is the acquisition by the Canadian Pacific R. Co. of the railway in question, there is nothing in the agreement providing one way or the other for amalgamation, a matter necessary to the operation of this section.

Ordinarily speaking, sec. 361 of the Act would have no application under the decision of the late Chief Commissioner, Mr. Justice Mabee, on the application of the Montreal Street Railway for approval of amalgamation agreements with the Montreal Terminal Railway and the Montreal Park and Island R. Co. In that instance, the local company, the Montreal Street Railway Company, absorbed two Dominion incorporations,—the Montreal Terminal and the Montreal Park and Island R. Co. Mr. Justice Mabee held that section 361 deals only with the federal companies and not with two provincial companies, nor with a federal and a provincial company; and that, therefore, the section had no application to the sale of a federal railway and its assets and facilities to a provincially incorporated company. This judgment would apply in the present case, if it were not for the Act obtained by the Canadian Pacific R. Co. (2 Geo. V. ch. 78, sec. 14), which provides that, subject to the provisions of secs. 361, 362, and 363 of the Railway Act, the company may, for any of the purposes specified in sec. 361, enter into an agreement with the Quebec Central R. Co., and may lease the railway and undertaking of the latter company.

The Board recommended the agreement in question for the sanction of the Governor-in-council on November 28, 1912, and that sanction was granted. The Quebec Central Railway is now a railway operated by the Canadian Pacific R. Co. Is it "a railway" within the definition of the Railway Act? Mr. Beatty claims, firstly, that its operation by the Canadian Paci-

fic R. Co. is not under the provisions of the Railway Act, but under the special Act of 1912, claiming that before the Canadian Pacific R. Co. could operate a provincial line under a provincial charter, special authority had to be obtained from the Dominion Parliament; and, secondly, that the railway operated under the section of the interpretation clause already referred to, means a railway subject to the provisions of the Railway Act,—in other words, a railway either incorporated by the Dominion Parliament, or specially declared by that Parliament to be a work for the general advantage of Canada.

In the case of *The Preston and Berlin Street R. Co.* v. *Grand Trunk R. Co.*, 6 Can. Ry. Cas. 142, an application was made by the street railway for an order of the Board permitting it to use a small portion of the Grand Trunk R. Co.'s land for the purpose of its street railway,—a provincial road. The application was refused, the late Mr. Justice Killam holding that the provision in the Railway Act giving the Board power to authorize the use by any company of the railway tracks or the land of another company applies only to a railway authorized by an Act of the Dominion Parliament, or declared to be a work for the general advantage of Canada.

Everything considered, I am of the view that this Board has no jurisdiction. The line is still a provincial line. The judgments both of Killam, J., and Mabee, J., affirm the proposition that the railways subject to the provisions of the Railway Act are only those subject to the jurisdiction of the Dominion Parliament, with certain exceptions of no importance here. This must be necessarily so. I think it also apparent, that the mere act of the Dominion company, such as the purchase of a provincial line cannot of itself oust provincial jurisdiction.

This is not a case of a Dominion company operating a provincial line under the Railway Act, which may or may not be possible, and the Board is not to be understood as determining that under no circumstances can it have jurisdiction over a company as such enabling it to regulate operation apart from any authority to compel the building of industrial branch lines or the enlargement of the track facilities of the railway itself. Here the right of operation has been granted to the Dominion company by a special Act of the Parliament of Canada.

The case appears to require legislation to deal properly with it. It seems contrary to public policy and the proper administration of the railway system, that a Dominion company, in so far as its major operations are concerned, should be subject to the jurisdiction of the Board, and be exempt from such jurisdiction.—be, so far as this Board is concerned, entirely free from control of any kind—on a small part of the line operated because of certain legal distinctions which cannot appeal

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to the shipper or passenger, or in any way effect the exigencies of traffic.

An undivided control in operation is probably more important than construction. Uniformity of railway practice, a most important essential, would seem to demand that railway companies, however incorporated, should, if operated by any of the large Dominion systems, be subject to Dominion control.

The ASSISTANT CHIEF COMMISSIONER concurred.

Jurisdiction denied.

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April 25.

PRINNEVEAU v. MORDEN and JONES and ROBIN HOOD FLOUR MILLS, Limited.

Alberta Supreme Court. Trial before Stuart, J. April 25, 1913.

1. LIENS (§ II—9)—THRESHER'S LIENS—MODE OF SEIZING AND SELLING THEREUNDER.

The Thresher's Lien Ordinance (Alta.) giving a lien "for the purpose of securing payment" for threshing grain, does not confer upon the lienor the right to seize such grain by breaking open the granary of the owner, where the same is stored, and sell the same without resorting to legal process.

[*Brown* v. *Glenn*, 16 Q.B. 254, and *Mulliner* v. *Florence*, 3 Q.B.D. 484, applied.]

2. LIENS (§ II—9)—THRESHER'S—RIGHT OF SALE, UPON RETENTION, HOW EXERCISED—CONVERSION.

Under the Thresher's Lien Ordinance (Alta.) giving a lien "for the purpose of securing payment" for threshing grain, the lienor's right is only one of retention, and he is guilty of conversion if he sells the subject-matter of the lien without resorting to his legal remedy.

3. LIENS (§ II—9)—THRESHER'S—HOW FORECLOSED AND SOLD—SEIZURE UNDER FI. FA.

The proper procedure of the enforcement of a lien conferred by the Thresher's Lien Ordinance (Alta.) is to sue in a court of equity for a foreclosure of the lien and have a sale made by an order of the court.

[*Jacobs* v. *Latour*, 5 Bing. 130; and 25 Cyc. 681, specially referred to.]

4. ESTOPPEL (§ III G—85)—BY LACHES OR ACQUIESCENCE.

Where a quantity of grain stored in a granary of the owner has been improperly seized by one claiming a lien thereon under the Thresher's Lien Ordinance (Alta.) and sold to a third person, thus rendering the person seizing the same liable in conversion to the owner, the latter cannot complain if the Court assesses the value of the grain at the price sold to the third person rather than the market price at the time of the conversion, where the owner, knowing that the illegal seizure was being made and being in a position to prevent the same and to notify the buyer not to take it, remained passive and allowed the seizure and sale to be made, and the Court is satisfied that the rights of the parties could have been adjusted if the owner had taken advantage of his opportunities to interfere.

5. SALE (§ III—45)—RIGHTS AND REMEDIES OF PARTIES—CAVEAT EMPTOR—KNOWLEDGE OF ADVERSE VIEW, EFFECT.

An elevator operator, though he is required to receive all grain offered and to give either storage receipts or cash purchase tickets

therefor, under the provisions of sub-secs. (1) and (2) of sec. 157 of the Grain Act (Alta.), is not protected by the provisions of that Act in buying grain, where he knew that such grain was under seizure by one claiming a lien under the Thresher's Lien Ordinance (Alta.) and where he failed to make proper inquiries as to the right of the vendor to sell the same; the Grain Act, under the circumstances, merely protecting the elevator operator from liability for receiving the same.

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ACTION for damages for illegal seizure made by the defendants Morden and Jones, in exercise of an alleged thresher lien.

Statement

Judgment was given for the plaintiff and the counterclaim of defendants Morden and Jones was allowed.

James Short, K.C., and *Lafferty*, for the plaintiff.

J. S. Mavor, for the defendants Morden and Jones.

A. L. Smith, for the defendant Robin Hood Flour Mills, Limited.

STUART, J. (oral):—In this case, I gave judgment at the close of the hearing upon most of the facts that were in dispute, although not all, but I reserved my judgment on some very important questions of law under the Thresher's Lien Ordinance. The facts are that the defendants Morden & Jones threshed some flax and wheat for the plaintiff and a dispute arose as to what the bargain was about, what should be paid and in consequence of that dispute, payment was not made. These defendants thereupon seized a large quantity of flax which they had threshed and which the plaintiff had had stored in a granary of his, which he had built for that purpose near the station, I think, at Bassano. They made their seizure through a bailiff and in order to do so, they broke open the granary, that is they broke down a large two by four scantling, I suppose it was, which had been nailed across the door, not merely to secure the door, but to strengthen the building, which appeared to need strengthening. They not only seized the flax there, but they forthwith drew it to an elevator, the elevator belonging to the other defendants, the Robin Hood Flour Mills Company, and after it was all drawn they sold it to these defendants. The question arises whether they were justified in doing that or not. It was contended that the Threshers' Lien Ordinance gives the thresher a right not only to seize but to forthwith realize by sale. As I intimated at the argument, I do not think they have that right under the Thresher's Lien Ordinance. It is quite plain to me that all it gives is a security or what is called in some of the text books a "passive" lien. There are several grounds upon which the seizure could be called illegal. The case of *Brown* v. *Glenn*, 16 Q.B. 254, shews that they had no right to break open the barn or the granary for the purpose of making the seizure. Lord Campbell, C.J., says there, referring to some

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statute which Mr. Justice Patteson had spoken of in his judgment, as follows:—

> The statute referred to by my brother Patteson is also very important: It affords a clear inference that, irrespectively of the matters therein provided for, the outer door of a barn or stable could not be broken open for the purpose of executing an ordinary distress. The doctrine is at least not novel; it was acted upon by Lord Hardwicke; and his decision is cited by Mr. Sargent Williams in his note to Poole v. Longueville, 2 Wms. Saund. 284 C., note (2), 6th edition. In *Penton* v. *Browne*, 1 Sid. 186, it was decided, on demurrer, that the outer door of an out-house might be broken open for the purpose of executing a *fieri facias*. This, however, is not inconsistent with our decision; for a distinction may reasonably be made between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes.

I do not think, therefore, that they had the right to break open the granary in the way they did and for that reason the seizure itself was illegal. I do not think either that they had any right to sell. I refer on that point to the case of *Mulliner* v. *Florence*, 3 Q.B.D. 484, where Bramwell, L.J., said:—

> The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give someone else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person.

Then there is an exposition of the law in Halsbury's Laws of England, vol. 19, p. 25, where he says:—

> Legal or possessory liens merely confer on the holder of the goods or chattels in respect of which they are claimed a passive right to detain such goods or chattels until the debt is paid, and cannot be enforced by sale of the property held, although there may be expense incurred in its retention; a person who chooses to insist on his rights of retainer may do so, but he has no further right, and must put up with any inconvenience which the retention may entail.

He speaks of certain exceptions arising from the custom of certain trades and also, in a note on page 26, of exceptions where there is an express right given by statute to enforce the lien by a sale, subject to certain notices, and so on, but there is nothing of that kind contained in our Thresher's Lien Ordinance at all. Sec. 1, of the ordinance says that the thresher shall have a right to a certain quantity of grain "for the purpose of securing payment," i.e., as a security. Sec. 2 does nothing more

than provide a means of ascertaining the quantity to be retained. Sec. 3, I think, is intended only to protect the lienholder against other creditors and to give him priority. I think, therefore, that the defendants Morden and Jones were guilty of conversion in selling. It is perhaps not necessary for me to go on, but I think I ought to. I do not find any reported case dealing with this so perhaps I had better go on and say something about how it might be enforced. It was suggested by Mr. Short, on behalf of the plaintiff, that they ought to sue and then seize under execution, but I think as far as seizing under execution is concerned perhaps that is not the right thing to do. I refer to the case of *Jacobs* v. *Latour*, in 5 Bing. 130, 15 E.C.L.R. 506, where Best, C.J., said:—

> A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution the defendant might have insisted on his lien. But Masser himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Masser and with his assent Masser's subsequent possession must have been acquired under the sale and not by virtue of the lien.

That, of course, was an action at law for a recovery of the debt and a writ of execution was issued and the property was sold under that, and that is all that applies to; but it is clear from p. 681 of vol. 25 Cyc. that he can sue in a Court of equity for a foreclosure of the lien and have a sale made by an order of the Court, but not by the sheriff under *fi. fa.* That seems to me the proper course to adopt if it becomes necessary to enforce the lien. It is not necessary to quote that passage, but it may be found in the volume I have quoted. Now, that is sufficient, it seems to me, to entitle the plaintiff to judgment for a conversion of the property and it is a question of what the judgment should be. The one fact that I did not decide at the close of the hearing was the value of the flax. Counsel for the plaintiff tried to impress upon the Court that I ought to give a greater value than what the grain was sold for to the Elevator Company, but in this case, I have decided to accept that as the value; and just here I want to make some comments upon the plaintiff himself, which I hope he will see. I was not very much more impressed with his evidence than I was with Jones' in some respects. He gave me the impression of being a man that thought he was awfully acute and shrewd. After his solicitor, on his instructions of course, had drawn up a statement of claim saying that he, the plaintiff, had instructed one MacDonald as his agent to engage the threshers, he comes into Court and says:—

> I did not instruct him to engage the threshers; I let a contract to him, to MacDonald, to thresh the grain and told him to go and make a contract with somebody else.

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Now I do not think that that was a right way for him to endeavour to present his case to the Court, nor do I think it was the right way for him to attempt to act. He must have known perfectly well, when he sent MacDonald off on that sort of an errand, that MacDonald and Morden and Jones would not perceive the very, very fine legal distinction that he was trying to draw in his own mind. Then, when he met the men and had his dispute, I do not think that he acted right any more than the defendant. It passes my comprehension how men can stand off at arms' length from each other in this way and not act like ordinary decent human beings with some generosity in their hearts. The moment they do not agree they fly apart and each becomes determined to stand by the law, whereas a word suggesting compromise or settlement might have led to an avoidance of a great many of the difficulties. He might have said, "Well, if we cannot agree about this, we will have to have it settled; you have a right to a lien on some of my grain for whatever I owe you;" they ought to have recognized that and said, "Yes, we have a lien; well let us put aside enough to cover it and wait until this is settled." Instead of that, he goes away and leaves them and they, on their part, without his being around, seized the grain after breaking open the granary and went and sold it. I think if he had been a little more willing to approach them and talk to them like a reasonable man he could have prevented a lot of trouble. Then when he found out that they were delivering it to the elevator company he never went near the elevator company to tell them not to take it, although it was only down the street; he let it go and as a consequence, we have a a long dispute as to how much grain there was. He might easily have prevented the elevator company from getting into any difficulty if he had gone and told them that he did not think these people had a right to deliver it to them. In that case, the elevator company would have stopped at once. Instead of that, he walks away and makes up his mind that he is going to have his legal rights out of that crowd. For the reason that if he had gone and notified them they would never have sold it, but would have kept it in storage and the amount might have been ascertained and the grade could have been ascertained and if he was entitled subsequently to a higher price he could have got it, by keeping the grain as his own, and because owing to his omission to go to the elevator company as he could have done the sale followed, I think he cannot complain if he is held to the elevator price. The evidence is that it was, at the current market price which they gave for it, worth 92 cents per bushel and the value of the grain at that price was $724.05 and that is the amount for which there should be judgment for damages against the defendants, Morden and Jones, and also, I think

necessarily, although it is not going to hurt them much, against the milling company; I have also something more to say in regard to costs and about the milling company's actions but that will be the amount of the judgment in favour of the plaintiff against both defendants.

Now with regard to the defendants Morden and Jones, they are entitled to a judgment for their threshing account against the plaintiff. If I adhered to what I said at the trial according to the pleadings it would be $892.52 on the calculation that I then made, taking into consideration the credit of $100; but I intend to modify what I said then to a slight degree and to allow the defendants the $26.90 which they claimed and which they proved they paid for feeding their horses. I have changed my mind upon that small point, and I think the plaintiff ought to pay that. He sent MacDonald out to make a bargain of some kind about threshing and MacDonald was clearly his agent and it seems to me that when he let MacDonald run the affair for him, he must stand by the result of it. I think I ought to allow them that $26.90, which makes their claim against him, for which they will have judgment, $919.42.

Now as to the costs, I do not think the defendants Morden and Jones can expect to recover costs against the plaintiff owing to their illegal seizure and the illegal sale. On the contrary, I think the plaintiff must have his costs against them; but he will not have judgment for his costs against the milling company owing to the way he acted in not notifying them. They will have to pay their own costs; and I do not regret that, because though they knew the grain was under seizure they took the advice, not of their own solicitor, but of the solicitor of the man from whom they were buying and the advice of the town policeman and somebody else, I forget who it was . . . They did not say that they consulted the custodian of the town pump or anything of that kind . . . but they made very little inquiry. They will have to pay their own costs. With regard to the payment for the grain, the payment of that out of the judgment for the defendants Morden and Jones against the plaintiff will be treated as satisfaction of the judgment against the milling company, so that really the defendants Morden and Jones will be entitled to a judgment for their balance which will be $195.37 against the plaintiff. Of course, the plaintiff will have his costs against them and there will be judgment for the ultimate balance according to how it falls, which of course, depends upon the taxation. I say nothing about MacDonald's claim because that does not enter into the case. He is not a party and he will have to get that as best he may.

Further note:—Since delivering the foregoing oral judgment, counsel for the Robin Hood Flour Mills Co. have asked me

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to express a more specific opinion as to their position under section 157 of the Grain Act. Sub-sections (1) and (2) of that section require the elevator operator to receive all grain offered and to give either storage receipts or a cash purchase ticket. It was suggested that these clauses forced the company to do what they did. In my opinion the company is not protected. They knew the grain was under seizure and made no proper enquiries. They went further also than they needed to do in buying the grain. In the circumstances, while I think the Grain Act would protect them from liability for receiving merely, I do not think it protects them when they undertook to become the purchasers. The Act does not force them to buy; nor, in my opinion does it authorize them to buy something which the assumed vendor did not own and had no right to sell.

Judgment for plaintiff.

MAN.

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May 3.

MASSEY v. WALKER.

Manitoba King's Bench. Trial before Macdonald, J. May 3, 1913.

1. VENDOR AND PURCHASER (§ I E—25)—AGREEMENT TO CONVEY—BREACH BY PURCHASER—NOTICE OF CANCELLATION—REQUISITES.

Notice by the contract vendor, of cancellation of agreement to convey, is construed strictly and subjected to the closest compliance with the power enabling it.

[*LeNeveu* v. *McQuarrie*, 5 W.L.R. (Man.) 348; and *Mills* v. *Marriott*, 3 D.L.R. 266, referred to.]

2. VENDOR AND PURCHASER (§ I E—28)—AGREEMENT TO CONVEY—BREACH BY PURCHASER—NOTICE OF CANCELLATION—SUFFICIENCY.

Written notice by the contract vendor to the purchaser, of intention to terminate the agreement and to exercise power of cancellation and re-entry, provided in such agreement, sufficiently shewed an immediate intention to cancel, within provision in the agreement that in default of payment by the purchaser, the vendor may put an end to the agreement, by mailing notice intimating an intention to determine the agreement.

[*Canadian Fairbanks* v. *Johnston*, 10 W.L.R. (Man.) 571, referred to.]

3. VENDOR AND PURCHASER (§ I E—28)—AGREEMENT TO CONVEY—BREACH BY PURCHASER—NOTICE OF CANCELLATION—SUFFICIENCY.

Notice by the contract vendor, of intention to cancel the agreement for the purchasers' default in making payment, addressed to the purchasers by name, was not insufficient as not being addressed to the purchasers, nor because one of the purchasers was served two days later than the other, since that would not affect the right of the one first served to redeem up to the expiration of the redemption period, dating from the service upon the purchaser last served.

4. VENDOR AND PURCHASER (§ I E—28)—CONTRACT TO CONVEY—CANCELLATION FOR PURCHASER'S DEFAULT—TIME AS ESSENCE OF CONTRACT.

Time being of the essence of a contract to convey, the contract is at law determined by the vendor giving the notice of intention to cancel provided for in the agreement in case of default by the purchaser in making payments, and by the purchaser's failure to remedy the default within the time allowed under the notice and agreement, though,

in equity, the Court would relieve against or enforce specific performance, notwithstanding default, if it could do justice between the parties and if there is nothing in the express stipulations between the parties, the nature of the property or the circumstances which would make it inequitable to interfere with or modify the legal right.

[*Roberts* v. *Berry*, 3 DeG. M. & G. 284, 22 L.J. Ch. 398, referred to.]

5. PENALTIES (§ I—5)—FORFEITURES—BREACH OF CONTRACT TO CONVEY—REMISSION.

Provision in an agreement to convey, for automatic forfeiture of the contract on mere default by the purchaser, will be relieved against as being in the nature of a penalty.

[*B. C. Orchards* v. *Kilmer*, 10 D.L.R. 172, referred to.]

6. ESTOPPEL (§ III K—143)—BY RECEIVING PAYMENTS—CONTRACT TO CONVEY—DEFAULT BY PURCHASER—CONDONATION.

A contract vendor did not condone default in payment by the purchaser by receiving a partial payment after serving notice of intention to cancel the contract, but before expiration of the redemption period under the notice, since the vendor could assume that the balance due would be paid in that time.

Statement

ACTION for the cancellation of an agreement for the sale of land and forfeiture of the moneys paid thereunder, and for the vacation of a caveat.

Judgment was given for the plaintiff in part.

A. G. Kemp, and *W. P. Fillmore*, for the plaintiffs.
H. F. Tench, and *R. H. L. Henry*, for the defendant.

Macdonald, J.

MACDONALD, J.:—On December 18, 1911, the plaintiffs purchased from the defendant under an agreement of sale (ex. 3) the lands and premises therein described for the sum of $2,700, and made a payment of $100, being the first cash payment referred to in the said agreement, and entered into possession of the lands.

The plaintiffs made default in payment of the principal and interest falling due under said agreement and by reason of the non-observance of the covenants, provisoes, stipulations and agreements of the said agreement, the whole of the moneys secured by the said agreement became due and payable.

The agreement contains the following proviso:—

Provided that in default of payment of the said moneys and interest, or any part or parts thereof on the days and times aforesaid, or of performance of fulfilment of any of the stipulations, covenants, provisoes, and agreements on the part of the purchasers herein contained, the vendor shall be at liberty to determine and put an end to this agreement and to retain any sum or sums paid thereunder as and by way of liquidated damages in the following method, that is to say—by mailing in a registered package, a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchasers at Winnipeg post-office, or by delivering the said notice to the purchaser personally, and if at the end of thirty days from the time of mailing or delivery thereof the amount so due be not paid, then the said purchasers shall deliver up quiet and peaceable possession of the said lands and premises or any part

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thereof, to the vendor or agent, immediately at the expiration of the said thirty days, and if the said notice be one of intention to determine this agreement, this agreement shall, at the expiration of the said thirty days, become void and be at an end, and all rights and interests hereby created or then existing in favour of the purchasers or derived under this agreement shall thereupon cease and determine and the lands hereby agreed to be sold shall revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed, and without any suit or legal proceedings to be brought or taken and without any right on the part of the purchasers for any compensation for moneys paid under this agreement.

The defendant did, on September 17, 1912, cause notice of cancellation to be given and served by registered post upon the plaintiff Norman Massey, and on the plaintiff Stuart on September 19, 1912.

Following the expiration of thirty days from date of service of the notice of cancellation, the defendant notified the plaintiffs' tenant occupying the premises that he (the defendant) had become the absolute owner of the said premises and that the plaintiffs had no estate or interest therein and thenceforward the rents were paid to the defendant. The notices of cancellation were mailed as provided for in the agreement of sale on the dates stated, but were not received by the plaintiff Stuart until October, 1912, and by the plaintiff Massey until November, 1912; in the meantime payments had been made by the plaintiffs and accepted by the defendant on account of the purchase.

In December, 1912, the plaintiff Stuart had a conversation with the defendant, when he told him that he had a prospective purchaser for the property, and stated the price and terms. The defendant replied that he also had a purchaser who would make a larger deposit, and when the sale was completed the plaintiffs would get their money back. The plaintiff Massey was not a party to this understanding, and in December, 1912, he called upon the defendant, when the latter stated that he had been put to expense in connection with the sale to the plaintiffs and that there would be nothing coming to them, and this stand he has taken throughout.

I find that the only expense he was put to was the sum of $27.45, cost of a loan which he had raised upon the property for his own benefit, and which he says were to be paid by the plaintiffs, and he received from the plaintiffs the sum of three hundred and one dollars. He now, however, claims a forfeiture of this money as well as a cancellation of the agreement of sale and a revesting in him of the property.

Now, let us see if the notice of cancellation is in accordance with the provisions of the agreement and sufficiently effective to cut out all further interests of the plaintiffs in the said lands.

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Notices of cancellation are construed strictly and subjected to the closest compliance with the power enabling them: *LeNeveu* v. *McQuarrie*, 5 W.L.R. (Man.) 348; *Mills* v. *Marriott*, 3 D.L.R. 266, affirmed in the Supreme Court of Canada.

The agreement provides that on default being made, the vendor may determine the agreement and retain the moneys in the following method; that is to say, "by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchasers, at Winnipeg post-office, or by delivering the said notice to the purchasers personally, and if at the end of thirty days from the time of mailing or delivery, the amount so due be not paid," then the agreement shall, at the end of said thirty days, become void and be at an end, and the moneys paid forfeited.

The sufficiency of the notice of cancellation is the subject of much debate pro and con. It is contended by counsel for plaintiff that it does not conform to the terms of the agreement.

(*a*) That it does not express an immediate intention to cancel. The agreement provides that if at the end of thirty days from the time of mailing . . . the amount so due be not paid, then the purchasers shall give up quiet and peaceable possession at the expiration of the said thirty days and if the said notice be one of intention to determine the agreement, the agreement shall, at the end of the said thirty days, become void, and at an end, and all rights and interests thereby created or then existing in favour of the purchasers or derived under the agreement shall thereupon cease and determine, and the lands shall revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed and without any right on the part of the purchasers for any compensation for moneys paid under the agreement.

This agreement so far as cancellation rights are concerned is similar to that in *Canadian Fairbanks* v. *Johnston*, 10 W.L.R. (Man.) 571. In that case the notice which was intended as a cancellation stated "that as you have made default, etc., the said agreement is hereby determined and put an end to, etc.," the notice did not follow the wording of the proviso which says the vendor shall be at liberty to determine this agreement by mailing a notice intimating an intention to determine this agreement, and if the notice be one of intention to determine the agreement the agreement shall become void. The notice was held bad in not intimating an intention to determine as provided for in the agreement.

In the case under consideration the notice seems to me well within the provisions of the agreement. It reads

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it is the intention of the vendor to determine the said agreement and to exercise the power of cancellation and re-entry provided in the said agreement, etc.,

and the agreement declares that immediately after the expiration of the said thirty days and if the said notice be one of intention to determine this agreement this agreement shall at the expiration of the said thirty days become void and at an end.

(*b*) Objection is taken that the notice of cancellation was not addressed to the purchasers, and further that one of the purchasers was served two days later than the other. I see no force in these objections. The notice was addressed to the purchasers by name, and although one was served two days later than the other that would not affect the right of the first served to redeem up to the expiration of the thirty days from the date of service upon the last served.

Several other objections are taken which, to my mind, are trivial, and do not call for discussion.

The notice of cancellation then, I find, was effective, and in compliance with the requirements of the agreement and the default not having been remedied the agreement is in law at an end, as at law the rule always was that the time fixed for completion was of the essence of the contract. The rule in equity, however, is different, and although unreasonable delay would, of itself, conclude either party, the Court would relieve against or enforce specific performance, notwithstanding default in any step towards completion, if it could do justice between the parties and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract: *Roberts* v. *Berry*, 3 DeG. M. & G. 284, 22 L.J. Ch. 398.

If there was no express stipulation between the parties other than a provision as to a forfeiture on a mere default by the purchaser, it is plain the Court would relieve, holding such a forfeiture to be in the nature of a penalty: *B. C. Orchards* v. *Kilmer*, 10 D.L.R. 172, but here is an express stipulation between the parties providing and agreeing to a means by which the agreement may be put an end to. It is not an automatic conclusion resulting from default, but the result of a deliberate agreement, by which the mode of cancellation is arrived at. The notice of cancellation served upon the purchasers repeats the provisions of the agreement under which it may be cancelled and ends by an effective cancellation. The purchasers had thirty days within which to make good their default. Notices of cancellation were served by mailing on the 17th and 19th

September, 1912, although not received until after the thirty days had expired, had the plaintiffs, after the receipt of such notices, made some move towards making good their default and satisfactorily explained the reason of their delay, there might be some equity in their favour, but they did nothing until March, 1913, to assert their right to redeem, and their only explanation is that they thought the property lost to them by reason of the notice.

It is also urged by counsel for the plaintiffs that, owing to the receipt by the defendant from the plaintiffs of moneys on account of the purchase after the service of the notice, but before the expiration of the thirty days, he had condoned the default. These moneys were remitted by the plaintiffs before the notices of cancellation had been served, but received by the defendant after. It could not therefore have been expected by them as a condonation of their default, and I do not think it would have that effect on the vendor. They had the thirty days within which to make their payment. The vendor might very well accept any portion during the running of the thirty days in expectation of the balance being paid before the expiration of that time: see *Keene* v. *Biscoe*, 8 Ch.D. 201.

In my opinion the plaintiffs have not made out a case for relief, but as the defendant has offered to reimburse them, the moneys received on the purchase price, less any expense he has been put to by reason of the default, there will be a reference to the Master to ascertain the amount and the same shall be applied on the defendant's costs, and if any amount in excess of such costs, the same to be paid to the plaintiffs.

The defendant is entitled to a declaration that the agreement has been cancelled and is null and void and that the lands have reverted and revested in him free from the claim of the plaintiffs and the caveat 66869 be vacated and set aside and discharged.

Costs to the defendant.

Judgment accordingly.

BUREAU v. LAURENCELLE.

Alberta Supreme Court. Trial before Scott, J. May 16, 1913.

1. PRINCIPAL AND AGENT (§ III—36)—AGENT'S COMPENSATION—ACCOUNTING—CLAIM FOR TRAVELLING EXPENSES.

On an accounting for services of a financial agent, he should not be allowed the full amount of travelling expenses incurred upon a trip upon which he bought property for his principal, where it appears that he purchased much more property on his own account at the same time.

2. SET-OFF AND COUNTERCLAIM (§ II—41)—OF AND AGAINST JUDGMENTS—APPORTIONMENT AGAINST VARIOUS CLAIMS.

In directing a set-off of the amount recovered upon defendant's counterclaim against a much larger total allowed to the plaintiff in

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respect of the latter's several claims secured and unsecured, the court may direct the application of the set-off first upon the unsecured claim and of the surplus, if any, proportionately in reduction of the secured claims.

3. PARTNERSHIP (§ IV—15)—JOINT OWNERSHIP—RIGHTS OF PARTIES—REFUSAL TO SELL INTEREST.

Where plaintiff and defendant owned property jointly, the former was under no duty to the latter to sell in order that the latter might realize upon his interest.

4. POWERS (§ I—3)—REVOCATION—GENERAL POWER OF ATTORNEY—RIGHT TO WITHDRAW.

A general power of attorney from plaintiff to defendant to purchase lands for plaintiff on an understanding that defendant should be paid a commission thereon and should be interested in the purchases, was subject to withdrawal at plaintiff's will.

5. CORPORATIONS AND COMPANIES (§ V C—185)—STOCK—AGREEMENT TO TRANSFER—EFFECT.

Plaintiff's agreement to transfer stock to defendant in consideration of services rendered by the latter should be construed as an admission that defendant was entitled to receive an amount at least equal to the value of the stock at that time.

6. CORPORATIONS AND COMPANIES (§ V C—185)—STOCK—AGREEMENT TO TRANSFER—RIGHT TO DECLARE TRUST.

Breach of plaintiff's agreement to transfer stock to defendant does not entitle defendant to have plaintiff declared a trustee respecting the stock, and defendant is entitled to damages only, based upon the value of the stock at the time it should have been delivered; it not appearing that defendant might not have bought other shares at their value at that time.

Statement

THE plaintiff's claim is for $12,404.06 and interest thereon, being amount due upon a mortgage made by defendant to him, moneys paid by plaintiff for him and balance due by him on purchase money of lands sold by plaintiff to him. The plaintiff's claim was admitted by defendant at the trial. The defendant claims to be entitled to set off against plaintiff's claim various sums amounting in all to $6,099 for services rendered to him as plaintiff's financial agent in procuring investments upon mortgage, purchasing real estate, construction and management of a hotel and superintending such construction, management of such investments, collection of moneys and interest thereon, commissions on sales of land and travelling expenses connected with such services.

Judgment was given for the plaintiff for $17,254.03, and for the defendant on his counterclaim for $500.

O. M. Biggar, K.C., for plaintiff.

J. Cormack, for defendant.

Scott, J.

SCOTT, J.:—The plaintiff, who resides in France and who appears to have had at his disposal a large sum of money for investment, first met the defendant during a visit to Edmonton in 1899. He then gave the defendant, who was then manager of Le Banque Jacques Cartier there, a general power of attorney

to act for him. The plaintiff had already made some investments there and appears to have made further investments after giving the power of attorney and while defendant continued as manager of the bank, but the latter makes no claim for any services he may have rendered at that time. The bank closed its Edmonton branch early in the year of 1900 and the defendant was removed to another branch in the Province of Quebec and later to the head office in Montreal. When leaving Edmonton he placed the plaintiff's affairs in the hands of Mr. Cowan a solicitor there, upon certain stated terms as to remuneration, and he acted as plaintiff's agent until about March 7, 1902, when defendant took them over, he having then returned to Edmonton.

While in the Province of Quebec, the defendant, appearing to have become dissatisfied with his position in the bank, opened a correspondence with the plaintiff with the object of inducing him to make further investments. One scheme he suggested was a ranching business in conjunction with his (defendant's) brother. Another was the investment of $10,000 to open a private bank in Edmonton with him as manager. Neither of these proposals was adopted by plaintiff and defendant then applied to him for a loan of $2,000 to enable him to open the bank there on his own account, and the plaintiff appears to have advanced him moneys for that purpose. As to this advance he wrote plaintiff on September 23, 1901, as follows:—

> I am glad for both of us that you have consented to my proposition. As a matter of fact, I believe it is the sure way of both of us to become rich. . . . The money that you will lend me will be for one year because otherwise I would not have time to make it grow sufficiently. There is nothing to prevent us carrying on the loan business together, for I desire to do for you what you have done for me.

Shortly after writing this letter defendant returned to Edmonton and opened an office there. On January 23, 1902, he wrote plaintiff stating that he was lending money at the rate of sixty per cent per annum. On March 2, 1902, he wrote stating that he had taken over plaintiff's mortgages from Mr. Cowan, and that he did so "in order to save you the costs of collection." On March 15, 1902, he wrote acknowledging receipt of a power of attorney from plaintiff and stating, "I could not hope for anything more, I have now the key to the fortune of our millionaire, what happiness."

The defendant states that the plaintiff promised to pay him for his services. This the plaintiff denies and states that the defendant offered to look after his investments for nothing.

It is apparent from the letters of the defendant given in evidence that, at the time of the opening of the correspondence, he was not only dissatisfied with his position in the Banque Jacques Cartier, but also that, being desirous of taking up some

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other business, he was without the necessary capital to do so, and that his only object in approaching the plaintiff to make investments through him was to obtain the advantage which plaintiff's wealth and financial standing would afford him. In none of his letters, some 26 in all, did he make any suggestion or claim that he was entitled to any remuneration for his services in looking after the plaintiff's investments. On the contrary, I think the only reasonable conclusion to be drawn from them is that these services were rendered gratuitously in return for the valuable assistance plaintiff had afforded him in enabling him to make investments on his own account which appear to have later become extremely profitable. Take for instance his letter which I have already quoted to the effect that he had taken over plaintiff's mortgages from Mr. Cowan in order to save the cost of collection and his statement in his letter of October 28, 1906, giving as his reason for abandoning a proposed trip to Paris, "I must do so in order to look after the making of a fortune for yourself and myself," and further, in the same letter, "I have made it my business to watch the events and everything that might occur which might be advantageous to us. In two years both of us will be rich and then we shall celebrate in a manner worthy of our great personalities. I have already interested you in many things without asking your permission." Again in his letter of October 19, 1903, he acknowledges his indebtedness to the amount of $500, and claims no deduction for services rendered, and in September, 1909, he gave plaintiff a mortgage for the amount due by him for advances and interest, and did not then make any such claim, and in September, 1908, he applied to plaintiff for a further loan and then made no such claim.

Certain items of defendant's set-off, amounting in all to $4,874, are charges for commission on the purchase of lots on which the Windsor Hotel in Edmonton is situated, on the expenditure of $23,333.34 in building the hotel thereon, for superintending the work of construction and the subsequent sale of the hotel property.

The plaintiff states, and it is not contradicted, that the defendant applied to him to purchase the property and erect the hotel thereon and lease it to him. It was agreed between them that the hotel should be leased to defendant and one Corriveau at a rental which would yield plaintiff a certain rate of interest upon his investment. It was therefore a venture which defendant had a special interest not only in seeing that the amount invested should not be excessive, but also in seeing that the hotel was completed as soon as possible, and in my view the services rendered by him were rendered with only these objects in view. No demand for payment for these services was made by him at

that time, and it is therefore apparent they were not considered as part of plaintiff's outlay on the property when fixing the amount of the rental. The defendant is not entitled to charge a commission upon the sale of the property as it was not sold by him, but by one Stephen, to whom plaintiff paid a commission of $5,000 upon the sale. Defendant states that he did not charge a commission at that time as he thought he ought to receive one-third of the profit made by the plaintiff on the sale, but he does not now make such claim, nor is there any ground for it.

Defendant also claims to be entitled by way of set-off to a commission of five per cent. upon the investment of $25,500 for plaintiff upon mortgages. The evidence shews that he invested only $11,456 in that manner, being the amount so invested subsequent to January 1, 1902. There is no evidence as to what would be a proper charge for such services, beyond defendant's statement in his letter of March 8, 1909, that the company of which he was then manager was charging a commission of one per cent. for like services. At that rate he would, at most, be entitled to only $114.56, but for the reasons I have already stated, he is not entitled to any remuneration.

The defendant also claims a commission upon the purchase by him for the plaintiff of certain properties in Edmonton, Calgary, Saskatoon, and Vancouver, and for travelling expenses to Vancouver and Saskatoon for that purpose. I have already stated that at the time these purchases were made, the defendant did not intend to make any charge for his services. As to the travelling expenses it appears that during his visit to Vancouver he purchased property for himself to the amount of $21,000 while that bought by him for the plaintiff amounted to only $1,800, and that during his visit to Saskatoon he bought eleven lots for himself and only one for the plaintiff. His claim of $450 for his travelling expenses appears to me to be excessive and, so far as my notes shew, there is no evidence as to the amount he expended. In any event the proportion which plaintiff should pay would be very small.

The defendant counterclaims in respect of various matters which I will now deal with. He claims that at the time of the sale of the Windsor Hotel property he and Corriveau had a lease thereof which had then about three years to run, that the purchasers threatened to sue the plaintiff, who, thereupon, procured them to surrender their lease and agreed to pay them severally a reasonable consideration for such surrender and that defendant's interest therein was worth at least $30,000.

The defendant admits that the purchasers paid him and Corriveau $41,000 for their leasehold interest together with the furniture and stock on hand. It is not shewn that the plaintiff was under any obligation to the purchasers to obtain a surrender

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of the lease, and such being the case I cannot understand upon what ground the defendant seeks to recover from the plaintiff for such surrender, and I therefore disallow the claim.

The defendant also claims that he held a general power of attorney from the plaintiff and was authorized to invest in the purchase of lands for him on the understanding that he should have the sale thereof and be paid a commission thereon, and should be interested in such purchases, that the defendant invested a certain sum as his share of a property in Vancouver which he had opportunities of selling, but the plaintiff refused to permit him to do so, and has since cancelled the power of attorney. Defendant claims a commission of five per cent. upon $6,000 which he claims is the present value of the property.

This claim is not clearly stated, but I gather from it that the plaintiff and defendant were jointly interested in the property and that when defendant wanted to realize upon his interest the plaintiff refused to sell his. The evidence does not shew that any such understanding existed. In any event the plaintiff was in my view entitled to refuse to sell his interest and also to withdraw the power conferred upon the defendant. There was nothing to prevent the latter disposing of his interest.

The same may be said of a like claim of the defendant respecting a property in Edmonton in which the defendant had purchased an interest from the plaintiff which defendant claims he was unable to sell owing to the cancellation of the power of attorney.

A further claim of the defendant is that in 1907 plaintiff became a shareholder in a certain joint-stock company known as "Jasper's Limited," which was reorganized in 1908, under the name of "The Franco-Canadian Mortgage Company, Limited," the plaintiff becoming a large shareholder therein, that the defendant, at his request, and on his promise to remunerate him independently of his salary or other remuneration that he might receive from the company, undertook to continue the management of the company from its inception until August, 1909, that during that month all matters in difference between them in connection with the company were adjusted, and plaintiff agreed that if the company would grant him for certain services $10,000 in paid up stock he would transfer $5,000 of such stock to the defendant in settlement of his claim against him in regard to the company.

The defendant states that such was their agreement. The plaintiff denies that he ever agreed to give the plaintiff $5,000 in stock, but he admits that in 1909 he offered to make him a present of stock to the amount of $2,000, and states that he refused to accept it on the ground that he was then the manager of the company, and that, by reason thereof, he did not think

that he was entitled to anything while manager. The plaintiff does not in express terms deny that there was an agreement between them respecting the transfer of stock, and his offer to transfer stock to the amount of $2,000 should, I think, be construed as an admission that the defendant was entitled to receive from him remuneration to an amount at least equal to the value of that amount of stock at that time. The weight of evidence is not in favour of defendant's contention that the amount was to be $5,000, and I therefore hold that he was not entitled to receive more than $2,000. It is shewn that its value at that time was $25 per share, or a total value of $500, and it has not been shewn to have increased in value. The defendant claims that plaintiff should be declared a trustee of the stock to which the defendant is found to have been entitled to receive. In my opinion he is not entitled to this relief or any relief, except damages for its non-delivery, and that they should be based upon its value at the time it should have been delivered. For anything that appears to the contrary, the defendant might have bought other shares at their value at that time.

I give judgment for the defendant upon his counterclaim for $500 with costs of the counterclaim. I give judgment for the plaintiff for $17,284.03 with costs, the amount being made up as follows:—

Balance due on mortgage dated 3rd September, 1909	$ 7,788.78
Balance due upon agreement for sale of land	9,001.25
Amount of promissory note for $400 paid by plaintiff for defendant and interest thereon from 23rd July, 1909..	464.00
	$17,254.03

As to the amount due under the mortgage and agreement for sale the plaintiff will be entitled to the usual order in such cases, with an order for sale of the properties comprised in case of default of payment within three months from service of the order, the plaintiff's costs to be apportioned between these claims in proportion to the amount due in respect of each.

The amount of defendant's judgment on his counterclaim and costs must, of course, be applied in reduction of plaintiff's judgment. I know of no rule relating to its appropriation in respect of the plaintiff's different claims, and I see no reason why it should not be applied, first, in satisfaction of the claim of $464, and remainder proportionately in reduction of the other claims, and I so direct.

Judgment for plaintiff.

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VAUGHAN v. SCHNEIDER.

Alberta Supreme Court. Trial before Scott, J. May 12, 1913.

1. BILLS AND NOTES (§ V B 2—135)—FACTS PUTTING ON INQUIRY—ACTION BY INDORSEE—HOLDING IN DUE COURSE—SUFFICIENCY OF EVIDENCE.

In an action on a note brought by an indorsee and defended on the ground that the note was obtained through fraud, it appearing, among other things, that the indorsee knew that liability on similar notes taken by the same payee had been defended on the same ground, and that in taking the note he knew that interest payments were in arrears and made no inquiry as to the circumstances under which it was given; the indorsee is not *primâ facie* a holder in due course.

[*Jones* v. *Gordon*, 2 A.C. 616, referred to.]

Statement

ACTION by indorsee and holder of promissory note made by the defendant.

The action was dismissed.

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

Frank Ford, K.C., for defendant.

Scott, J.

SCOTT, J.:—The plaintiff's claim is upon a promissory note for $625, dated April 16, 1907, made by the defendant payable on July 1, 1910, to McLaughlin Bros. or order with interest at six per cent. per annum and indorsed by them to the plaintiff.

By an amendment to the statement of claim made by me at the trial the plaintiff alleged that since the issue of the writ of summons the note sued upon has been lost, and he offered indemnity to the satisfaction of the Court against the claims of any other person thereon. Sufficient proof of the loss of the note was given by him at the trial. The evidence, however, shews that the interest upon it was payable yearly, and in that respect it differs from the terms of payment set out in the statement of claim.

The defence relied upon at the trial were (1) that the plaintiff was not the holder in due course; (2) that he gave no consideration for the note, and (3) that McLaughlin Bros. through their agent obtained the note by false representations and fraud.

The plaintiff in his reply admitted that by reason of the facts set out in the statement of defence, McLaughlin Bros. could not recover upon the note, but he claimed to be entitled to recover by reason of his being the holder thereof in due course. By reason of this admission the burthen of proving that he was such holder was cast upon him by sec. 58 (2) of the Bills of Exchange Act.

The only evidence that he was a holder in due course was his own testimony at the trial, in which he states that he bought the note from the payees on April 14, 1911, for $724.79, and he produced his cheque of that date for that amount payable to their order and indorsed by them.

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McLaughlin Bros. are dealers in Percheron horses at or near Columbus, Ohio, and they appear to have dealt extensively in the sale of stallions, both in the United States and Canada. The note in question was given by the defendant on account of the purchase of one of their stallions. It appears from the evidence that notes taken by them upon the sales of other stallions to other parties have been a fruitful source of litigation. It was one of these notes which was in question in *Peters* v. *Perras*, reported in 7 W.L.R. 193, 8 W.L.R. 162 and 42 Can. S.C.R. 244.

The plaintiff is now State Bank Examiner for Ohio, and has been such since January, 1912. He has had a long experience in banking, having been cashier of various banks in and in the vicinity of Columbus for over twenty-five years, and a National Bank Examiner for five years. For the five years prior to January, 1912, he was cashier of the Union National Bank of Columbus, and for the year before that cashier of the Merchants and Manufacturers National Bank of Columbus. He also appears to have had considerable experience in dealing with McLaughlin Bros. notes, as the evidence shews that not only had he acquired a number of their notes before the time he claims to have purchased the one in question, but during the time he was cashier of the two banks referred to they also had purchased a number of them before that time. He admits that a number of actions were brought by those banks upon the notes, that in all or nearly all of them defences similar to those in this action were raised, and that in at least one of them the bank suing as, and claiming to be, holders in due course, failed to recover judgment, also that he had brought several actions upon the notes acquired by him and that the same defences were raised to them, but it does not clearly appear that his actions were brought before the time he claims to have bought the note in question. He states that he at that time bought several other notes of the firm, some twelve or fifteen in all, and his actions may have been brought upon some of them. It is clear, however, that the actions of the banks were commenced long before that time.

The plaintiff states that, at the time he bought the note in question, he inquired from the member of the firm who negotiated the sale as to the financial standing of the defendant and was informed that he was thought to be good for the amount of it. He admits that he made no inquiry about the note or as to the consideration for it or as to the circumstances under which it was given, and gives as his excuse for not doing so that he did not regard it as any particular business of his. He also admits that he knew at that time that the interest upon the note was then over two years in arrear and yet he made no inquiry as to why the interest had not been paid.

It appears that before the plaintiff began dealing with the

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firm's notes, the Union National Bank, of which he was then cashier, had refused to further deal with them, although it continued to act as his bankers and to give them a line of credit. The only reason the plaintiff gives for the bank ceasing to deal with the firm's notes is that they borrowed on direct loans to the extent of their line of credit, and says that he knows of no other reason. He also admits that the bank may have refused to discount paper for them. The reason he gives for the bank ceasing to deal in the firm's notes does not appeal to me as sufficient, as, if they were considered by the bank to be proper securities, I see no reason why they should not have been taken as security for the advances.

The plaintiff states that he obtained possession of the note at the time he purchased it and retained it until shortly before its maturity, when he placed it in the hands of another bank in Columbus for collection, with instructions to protest it if not paid, and that it was returned by the bank to him unpaid, but he is unable to state whether or not it had been protested for non-payment. He states that he did not obtain a waiver of protest by the payees or any security or undertaking from them for its payment and that his remedy against them is dependent upon its protest for non-payment. If that is the fact it is difficult for me to believe that he did not take sufficient interest in the matter to ascertain by an examination of it after its return to him whether it had been protested.

The plaintiff further states that, after the note was returned to him unpaid, he placed it in the hands of his attorneys with instructions to proceed to collect the amount from the defendant. Upon being asked why he did not attempt to collect it from the indorsers, he replied that he could not very well ask them to relations between them was the buying of their notes from time pay it without seriously interfering with the business relations then existing between them. He admits that the only business to time. He states that he had bought several of their notes before buying the note in question, some of them in 1908 and 1909 and some at a later date, all of his actions upon them being against the makers, and that he never called upon the payees for payment except in one case where he had failed to realize upon a judgment against the maker. He states that he usually bought the firm's notes four or five months before maturity at a discount which, if they were paid at maturity, would yield him interest at the rate of from twelve to fifteen per cent. upon the amount paid by him. He admits that he may have bought one note two weeks before its maturity. He acquired the note in question less than three months before maturity, and yet this action was not commenced until fourteen months after its maturity. The delay in bringing it has been shewn to be partially, but not entirely, due to the neglect of his attorneys, but he does

not appear to have complained of it, although it materially affected the amount of his return from the amount he claims to have invested.

The plaintiff states that if the note in question was not protested for non-payment, he has no remedy against the indorsers, and that if protested he can recover from them only the amount of the note and the accrued interest. If that is his position it is difficult for me to believe that he would incur the risk and expense of an action against the maker and materially lessen by the delay the amount of his return from the investment rather than apply to the indorsers for payment upon the maturity of the note. That is not the course usually pursued by bankers.

I can understand that a person without any business or banking experience and without the knowledge the plaintiff must have had of the suspicious circumstances connected with the McLaughlin Bros. notes, in respect of which he had dealings, might have been induced to purchase the note in question upon the terms the plaintiff says he purchased, but I cannot believe that he, with the long and varied experience in banking and with that knowledge should have bought upon those terms and under the circumstances he states. It appears to me to be unreasonable that he should have done so. It is to me incredible that with his experience of that firm's notes he should have purchased one made by a resident in a foreign country, the interest upon which was long in arrear, without making any inquiry other than that which I have referred to, unless, in omitting to make further inquiry, he feared that, if he did so, he might learn something which would tend to throw suspicion on the transaction. (See judgment of Lord Blackburn in *Jones* v. *Gordon*, 2 A.C. 616.)

The cheque produced by the plaintiff for the amount of the purchase money, he says he paid for the note is upon the Union National Bank, of which he was then cashier. It is stamped "paid," and under ordinary circumstances would afford strong corroborative evidence of the payment having been made by him, but, assuming that his statement as to the purchase of the note is untrue, the fact that he was then the cashier of that bank would render it easy for him to manufacture such evidence to support his statement.

The position of the plaintiff as to his being a holder of the notes appears to me to be analogous to that of the defendant in *Olstadt* v. *Lineham*, 8 W.L.R. 152, in which it was held by the Court *en banc* that the fact that the defendant in that suit had heard rumors that other notes given by the same payees upon similar transactions were obtained by false representations and had made no inquiry about the notes sued upon, was sufficient to support a verdict that he was not a holder in due course.

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I have referred at some length to the conduct of the plaintiff subsequent to the time he claims to have purchased the note in question, but in so doing I do not intend to imply that it would affect any interest he acquired in the notes at that time. I refer to it merely because it tends to throw some light upon the nature of the transactions.

I am forced to the conclusion that the plaintiff has not truly stated the nature of the dealings between him and McLaughlin Bros. with respect to the note in question. I reach this conclusion not only on the grounds I have stated, but also on the ground that I was not satisfied with the manner in which he gave his evidence. There was a want of candour in many of his statements in answer to questions put to him on cross-examination and a suspicious forgetfulness as to certain matters which may have tended to cast doubt upon his version of the transaction between him and McLaughlin Bros., although those matters related to transactions of a much more recent date.

I, therefore, hold that the plaintiff has failed to shew that he is a holder in due course and I give judgment for the defendant with costs.

Action dismissed.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. November 22, 1912.

1. JUDGMENT (§ I F 1—46)—MOTION FOR SUMMARY JUDGMENT—LEAVE TO DEFEND.

Under C.S.N.B. 1903, ch. 116, sec. 50, which authorizes, on return of summons, an order for leave to sign judgment on a liquidated demand, unless defendant satisfies the Judge that he has a good defence, or that he is entitled to defend, the right of defence is absolute on defendant shewing that he has a good defence; but if he merely shews such facts as in the opinion of Court are sufficient to base an order giving leave to defend, as distinguished from facts basing an absolute right of defence, the Court may then impose conditions in granting the leave, such as payment of the amount into Court.

[*Wallingford* v. *Mutual Society*, 5 A.C. 685, 704, and *Girvin* v. *Grepe*, 13 Ch.D. 174, 177, referred to.]

2. JUDGMENT (§ I F 1—46)—MOTION FOR SUMMARY JUDGMENT—REPLY AFFIDAVITS—RIGHT TO RECEIVE.

On application under C.S.N.B. 1903, ch. 116, as amended by Acts N.B. 1911, ch. 37, for liberty to sign final judgment, it is largely discretionary with the Judge to permit plaintiff to read affidavits in reply to defendant's affidavits of defence.

[*Davis* v. *Spence*, 1 C.P.D. 719, and *Girvin* v. *Grepe*, 13 Ch.D. 174, referred to.]

3. JUDGMENT (§ I F 1—46)—MOTION FOR SUMMARY JUDGMENT—CONFLICTING AFFIDAVITS.

On application under C.S.N.B. 1903, ch. 116, as amended by Acts 1911, ch. 37, for liberty to sign final judgment, any conflict between the affidavits of the parties as to the merits of the defence should be resolved in defendant's favour.

4. SET-OFF AND COUNTERCLAIM (§ I A—2)—BREACH OF WARRANTY—DIMINUTION OF PRICE.

Where there is a breach of warranty on the sale of goods the buyer may set up the breach in diminution of the price without a cross-action or plea of set-off in respect thereof.

[*Mondel* v. *Steel*, 8 M. & W. 858; *Church* v. *Abell*, 1 Can. S.C.R. 442, referred to.]

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Statement

APPEAL by defendant from the County Court of Carleton.

The action was brought to recover the sum of sixty dollars, the price of a hay-loader alleged to have been sold and delivered by the plaintiffs to the defendant. An appearance was entered and the plaintiffs then made an application under sec. 49 of the County Court Act (ch. 116, C.S. 1903) as amended by ch. 37 of the Acts of 1911, for liberty to sign final judgment. The usual affidavit was made by one of the plaintiffs verifying their claim and stating his belief that the defendant had no defence. On the return of the summons the defendant's affidavit was read, in which he stated that he had a good defence on the merits, and then narrated at some length the various negotiations which led up to the so-called purchase, and which, according to him, resulted in a purchase subject to certain conditions which were never performed by the plaintiffs and in consequence of which the whole purchase was repudiated and notice given to the plaintiffs that the machine was held subject to their order.

W. P. Jones, K.C., for the appeal.

A. B. Connell, K.C., for plaintiffs, *contra*.

Barker, C.J.

BARKER, C.J.:—The defence, to which the statements in the defendant's affidavit seem to have been directed, is twofold. In the first place, that there never had been any delivery or acceptance of the machine, in which case the plaintiffs' action would fail; and in the second place, if it could be made to appear that the defendant had retained the machine, his liability would not be the contract price of $60, but only the actual value of the machine in its inefficient state by reason of certain changes or additions which the plaintiffs as part of the original agreement had agreed to supply, but which they never had supplied. In answer to the defendant's affidavit the plaintiffs were allowed to read further affidavits—one of the plaintiffs who had made the first affidavit, and one of Jackson, a salesman of the plaintiffs—and on hearing these affidavits the Judge made the order appealed from. The whole transaction arose out of conversations between these three people—the plaintiff who made the affidavit; Jackson, the salesman, and the defendant. There were no writings of any kind; and that the statements of those interested are conflicting and contradictory will not surprise any one who has had much experience in dealing with disputes of this kind.

Before going into the principal question in dispute, there are

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two objections which I shall dispose of. The plaintiffs' counsel objected that there is no appeal in this case, as it involves merely a question of fact. He referred us to *Canadian Fairbanks Co.* v. *Edgett* (1911), 40 N.B.R. 411. That case is altogether different from this. This application does not depend upon any finding of facts by the Judge. Sec. 50 of ch. 116 authorizes the Judge upon the return of the summons to make the order for leave to sign judgment, either conditionally or unconditionally, unless the defendant by affidavit or otherwise satisfies him of one of two things, either that he has a good defence—in which case, under the authorities to which I shall refer, he has an absolute right to defend—or else that the facts disclosed are sufficient to entitle him to defend; in which case the right to defend may be preserved subject to conditions such as payment of the money into Court.

Odgers in his work on Pleading and Practice, 7th ed., 55, says:—

> On the hearing of the application the Master has three courses open to him. He may give leave to defend unconditionally. And he ought to do so, whenever there is an issue to be tried, even though he may think the defendant will fail (citing *Jacobs* v. *Booth's Distillery Co.* (1901), 50 W.R. 49, 85 L.T. 262; *Wells* v. *Allott*, [1904] 2 K.B. 842, and other cases). If, however, no real defence is shewn by the defendant, the Master may give him only conditional leave to defend, that is, subject to such terms as to paying money into Court, giving security, or time or mode of trial, or otherwise, as he may think fit. But if the facts alleged by the defendant do not amount to a defence to the action either in fact or law, then as a rule the order giving leave to sign judgment will be made.

In *Wallingford* v. *Mutual Society*, 5 A.C. 685, at 704, Lord Blackburn, in speaking of similar provisions in the Judicature Rules, says:—

> Now, I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment? If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right unless there be something very extraordinary (which I can hardly conceive) that the defendant should be able to raise that defence upon the merits either to a whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend. And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfies him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits.

In *Girvin* v. *Grepe*, 13 Ch.D. 174, Jessel, M.R., at 177, speaking of the same rule, says:—

> Therefore, the real question is, not the immediate trial of the case, but

whether there is such a *primâ facie* case that the defendant ought to be allowed to have it tried, which is a totally different issue.

It will be seen, therefore, that there are no facts to be found by the Judge below upon which this appeal turns. The question is whether the facts submitted by the defendant, and which he alleges he can prove, would raise a defence which he ought to have an opportunity of submitting to a jury in the ordinary way. That is a question of law, and the objection raised by the plaintiff cannot be sustained.

The defendant's counsel in support of the appeal contended that the Judge erred in allowing the plaintiffs to read affidavits in reply. I do not think this objection can be sustained. That is the usual course, and it must be largely, if not altogether, in the Judge's discretion: *Davis* v. *Spence*, 1 C.P.D. 719, and *Girvin* v. *Grepe*, 13 Ch.D. 174.

Coming now to the substantial question involved here, ought this defendant to be deprived of an opportunity of raising the defence which by his affidavit he alleges he has? When this appeal first came before us we directed the return to be sent back to the County Court Judge, that he might inform us of his reasons for making the order. In answer to that he has sent us the following:—

> From the reading, I might almost say the spelling out of the affidavits in this cause, as well as the presentation of it by counsel for the defence, I became convinced, rightly or wrongly, that the defendant had no good defence to the action on its merits; that any claim he had against the plaintiffs was by way of set-off for breach of contract on their part in not delivering the promised parts of the hay-loader, and of such a defence he could not take advantage in this action as he had not pleaded it, even if such a plea would avail him in the County Court: see *Finn* v. *Brown* (1901), 35 N.B.R. 335. I found as a fact that the plaintiffs had sold and delivered to the defendant, and the defendant had accepted, the hay-loader, to recover the price of which this action is brought. It will be noted that paragraph 7 of the second affidavit of Geo. E. Balmain, one of the plaintiffs, is not specifically denied, and that practically no denial, and in some instances no denial at all, is made of the facts and conversation set out in paragraphs 2 and 10 of the affidavit of George W. Jackson. The learned counsel for the defendant urged that his client was a man of substantial means, well able to pay if he lost the case, consequently I felt that I was neither doing an injustice nor imposing a hardship by ordering summary judgment, and leaving the defendant to his remedy (if any) by cross-action.

I cannot but think that the Judge of the County Court has fallen into the error of disposing of the case on its merits, as he viewed them, instead of confining himself to the preliminary issue for his determination, with which his opinion as to the real merits of the case had little, if anything, to do. The Judge seems to attach great importance to the fact that sec. 7 of the second affidavit of the plaintiff Geo. E. Balmain, and secs. 2 and 10 of Jackson's affidavit, have not been denied or

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contradicted. The defendant has never had a chance of making any specific denial. Those affidavits were made in answer to the defendant's affidavit. So far as the two are inconsistent or contradictory as to material statements—and there can be no doubt that they are so—to that extent they furnish the strongest reasons for not shutting the defendant off from having his version of the transaction submitted to the usual tribunal. I am unable to agree with the Judge's reasons for making the order as set out in the closing sentence of his return. No man can be deprived of a legal right without having an injustice done him.

I have already pointed out that the defendant's statements in his affidavit go to shew, or are intended to shew, two lines of defence: (1) that the machine never was accepted by him at all, and (2) that if he has retained it, it was not according to the contract, and he is therefore not liable to pay the full contract price.

I do not agree with the Judge that this defence requires a plea of or is a set-off in the legal acceptation of that word. It merely goes to the amount of damages, that is, in reduction of the contract price. Two cases may arise on a sale of chattels—one where there is a warranty, and the other where there is a contract without warranty. The rule was made expressly to avoid the circuity of action which the order in this case renders necessary. It is laid down in *Mondel* v. *Steel* (1841), 8 M. & W. 858, and recognized in *Church* v. *Abell*, 1 Can. S.C.R. 442.

In the former case, Parke, B., states the old rule and the new rule, which was promulgated in *Basten* v. *Butter* (1806), 7 East 479. At p. 871 of the report Parke, B., says:—

> It must, however, be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.

Why should the defendant be precluded from giving evidence before a jury as to the reduction in the contract price, even if he were held liable for the value of the machine? All parties agree that the hay-loader was not complete when sold and that there were certain fittings required to make it so. The plaintiffs say these were furnished; the defendant denies this, or at all events that those furnished were sufficient to make the

machine efficient as it should be. I cannot agree that in such a case the rule which allows a summary judgment to be signed for the plaintiff has or was intended to have any application.

I think this appeal should be allowed with costs; that the order for summary judgment be set aside; and that the defendant be allowed to defend unconditionally.

LANDRY, MCLEOD, WHITE, and MCKEOWN, JJ., concurred with BARKER, C.J.

BARRY, J.:—The respondents (plaintiffs below) brought an action in the Carleton County Court against the appellant (defendant below) for goods sold and delivered, the particulars indorsed on the writ claiming for one hay-loader $60. The defendant appeared in the action by an attorney, and pleaded the general issue of *non assumpsit*, but no other plea; neither did he give notice of any other matter of defence. The plaintiffs, upon the usual affidavit, took out a summons before the Judge of the County Court for summary judgment under the provisions of ch. 116, Con. Stat. 1903, and the learned Judge, upon consideration of the affidavit of the plaintiffs upon which the summons was granted, the affidavit of the defendant in answer and the affidavits of one of the plaintiffs and one Jackson, a salesman of the plaintiffs, in reply, and being satisfied as he states, "that the said defendant has not disclosed such facts as are sufficient to entitle him to defend the action," made an order authorizing and empowering the plaintiffs to sign final judgment for the sum of sixty dollars, being the amount claimed by the particulars on the writ to be due, together with costs, including the costs of the application, thus really determining the merits of the case upon affidavits, and putting an end to the action. From this order the present appeal is taken.

The affidavit of one of the plaintiffs upon which the summons for summary judgment was granted, after identifying the writ of summons and appearance and plea attached, states that "the defendant is justly and truly indebted to the plaintiff in the sum of sixty dollars for the price of one hay-loader sold and delivered by the plaintiffs to the defendant and at his request," and "in my belief there is no defence to this action."

The defendant, in answer, swears that he has a good defence to the action on the merits; that the plaintiffs did not sell and deliver to him the hay-loader mentioned in the affidavit of the plaintiff. The affidavit of the defendant then goes on to state that the hay-loader was brought to the defendant's farm by the plaintiffs' agent, Jackson, in July, 1910, for the purpose of making a sale of the same to the defendant; Jackson and a travelling agent of the manufacturers endeavoured to put the implement together, and a trial was made of it; it did not work

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satisfactorily, and at the conclusion of the trial defendant was asked by Jackson if he would purchase the machine. The defendant says he declined to purchase at that time, stating that he was not satisfied with it and pointing out to Jackson and the manufacturer's agent certain defects in the material and working of the machine which deterred him from purchasing. Jackson urged the acceptance of the machine, stating that later he would remedy the defects; the defendant told him that if the defects were supplied he would consider the question of purchase. At the urging of Jackson, the defendant, in the haying season of 1910, made a further trial of the machine and found that it did not work to his satisfaction. Jackson, a few days afterwards, returned with some fittings which he left at defendant's and requested another trial; another trial did not turn out satisfactorily. Twice in November, 1910, Jackson went with further repairs to defendant's, without, however, putting them on the machine. The defendant told him that it was no use leaving the repairs, that he should put them on the machine if he wished a trial made of it. In the summer of 1911 the defendant told Jackson if he wished him to make any further trial of the machine, he had better place it in proper condition, as the haying season was approaching. Jackson stated that he could not get a particular piece that was to be used in repairing, but was going to get it made. About ten days after the commencement of the haying season, Jackson brought the piece of repairs spoken of and put it on the machine, and asked the defendant if he would buy the machine and give a settlement for it; this the defendant declined to do until the thing was put in proper shape. He says:—

I told Jackson, "When I buy a machine, I want it put in thorough repair, and you know where to get the pieces and you know what is needed, and then make a finish of it before I buy the machine." The said Jackson did not then place the machine in what I considered to be proper shape in certain other respects, and seemed unwilling to do so, and at length I told him that as he did not seem disposed to fix the machine up properly, I was tired of having it around, and that he must take it away, and that if he did not take it away I would charge him storage for it.

The defendant offered Jackson $40 for the machine, which was refused; still another trial of it was made, with the same result as before; it did not work satisfactorily.

In reply to the defendant's affidavit, two affidavits were produced and read, one by George E. Balmain, one of the plaintiffs, in which he purports to give a circumstantial account of the negotiations that preceded and accompanied what he concludes was a sale of the machine to the defendant, and stating that Jackson and the manufacturers' agent had reported that the defendant was well pleased with the machine. Mr. Balmain also recounts a conversation had between him and the defendant

in which, he says, the latter expressed himself as being well satisfied with the machine and its working, and that he agreed to give a settlement for the machine as soon as some comparatively trifling parts were supplied to him. These parts, Mr. Balmain says, he sent out later, and requested Jackson to get a settlement. The other affidavit—that of Mr. Jackson—like Mr. Balmain's, contains what purports to be a circumstantial account between the defendant and the plaintiffs' agent for the purchase and sale of the machine; besides this, the affidavit in the main consists of a contradiction of the statements in the defendant's affidavit, so far as those statements relate to the negotiations and conversations between the defendant and Mr. Jackson.

The authority for a Judge of a County Court to direct summary judgment in an application of this kind, is to be found in secs. 49 and 50 of ch. 116, Con. Stat. 1903, the latter of which sections is as follows:—

> 50. The Judge may, upon return of the summons, unless the defendant by affidavit or otherwise, satisfies him that he has a good defence to the action, or discloses such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

The object of this legislation is, obviously, to prevent frivolous or vexatious defences being set up and persisted in against a just claim, merely for the sake of delay, but it was never intended to deprive a defendant of his right to a trial by jury, if, in answer to the application, he can shew the existence of such facts as ought to satisfy the Judge that there is at least a triable issue between the parties.

O. 14, r. 1 (*a*) of the Judicature Act, 1909 (taken from the English Judicature Rules of 1883) contains provisions almost exactly similar to sec. 49 (as amended by ch. 37, 1 Geo. V.) and sec. 50 of ch. 116, Con. Stat. 1903. The latter part of that rule provides that, "The Judge may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence, or otherwise, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."

This rule, having the effect of a statute, and secs. 49 and 50 of ch. 116, Con. Stat. 1903, being *in pari materia*, ought to receive a uniform construction, notwithstanding the slight variation in the language, the object and the intention being the same: *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, at 215; whatever has been determined in the construction of one of them is a sound rule of construction for the other: *Rex* v. *Mason* (1788), 2 T.R. 581, at 586.

It has been determined in the House of Lords that Order

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14 was never intended to shut out a defendant who could shew that there was a triable issue applicable to the claim as a whole, from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court, as a condition of leave to defend: *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262.

The summary jurisdiction conferred by this order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion: *Sheppards* v. *Wilkinson* (1889), 6 T.L.R. 13. Summary judgment under this rule should not be granted where any serious conflict as to matter of fact, or any real difficulties as to matter of law arises: Ann. Prac. 1912, p. 145. The power to give summary judgment under this Order is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purpose of delay: *Jones* v. *Stone*, [1894] A.C. 122. As a general principle where a defendant shews that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bonâ fide* defence, he ought to have leave to defend, and a mere contradiction on oath by the plaintiff in his affidavit in reply, unsupported by some undoubted documentary evidence, as an account shewing the balance due, or a letter promising to pay, has been held insufficient to deprive a defendant who has shewn a reasonable or probable ground of a *bonâ fide* defence, of his right to leave to defend: Ann. Prac. 1912, pp. 166 *et seq.*

Upon the argument before us, Mr. Jones took the objection that the Judge of the County Court should not have received the affidavits of Mr. Balmain and Mr. Jackson in reply to the affidavit of the defendant made for the purpose of shewing cause, and he cited the case of *North Central Waggon Co.* v. *North Wales Waggon Co.* (1879), 39 L.T. 628, where it was held by Cockburn, C.J., and Pollock, B., that where a defendant has filed an affidavit for leave to defend under Order 14, the plaintiff has no right to file a counter-affidavit, as that would amount to trying the case upon affidavit.

But the rule there laid down has not always been adhered to. Thus, in *Davis* v. *Spence* (1876), 1 C.P.D. 719, it was held by Brett, L.J., (721) that the obligation on defendant to "shew cause" by necessary implication allows the plaintiff to answer the defendant's case; and in *Girvin* v. *Grepe* (1879), 13 Ch.D. 174, Jessel, M.R., considered affidavits in reply admissible on the language of the rule, and according to the common law practice under Keating's Act and the Chancery practice on interlocutory injunctions.

This Court has never, by any considered judgment, decided

whether or not affidavits in reply are permissible, but so far as I have been able to ascertain, the practice of the Judges at Chambers has been to hear everything there is to be said upon the subject in order to assist them in coming to a true conclusion in regard to the defendant's right to defend.

Objection to the hearing of the appeal was taken by counsel for the respondents upon the ground that it was an appeal from the decision of the County Court Judge upon a question of fact, and under recent decisions of this Court, amongst them *Canadian Fairbanks Co.* v. *Edgett*, 10 E.L.R. 42, 40 N.B.R. 411, an appeal in such cases does not lie. I am not at all sure that the order appealed from can be said to be a decision upon a question of fact; I should rather be disposed to think that the question whether or not the defendant has disclosed such facts as are sufficient to entitle him to defend the action, is one of law and not of fact; but if I am wrong in this, there must obviously be always a great difference between cases where a Judge has jurisdiction to finally decide questions of fact—where he is sitting as a trial Judge, without a jury, for instance—and cases where he has merely the right to enquire whether there is a triable issue to go before a jury or a Court, without proceeding to finally determine that issue.

Adapting the language of Lord James of Hereford in *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T. 262, to the varying conditions of the present case, it is not for a Judge of a County Court to enter into the merits of the case at all. He ought to make the order for judgment only when he can say to the person who opposes the order, "You have no defence; you could not by general demurrer, if it were a point of law, raise a defence here. I think it impossible for you to go before any tribunal to determine the question of fact." I am not expressing any opinion whatever upon the merits of the case. It appears to me that under the affidavits there is a fair issue to be tried. On which side the chances of success are, it is not for me to say; but, thinking as I do that there is a fair issue to be tried, either by the Judge with a jury, or by the Judge alone, I would allow this appeal and send directions to the Court below to allow the defendant to defend unconditionally.

Appeal allowed.

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PORTER v. ROGERS.

New Brunswick Supreme Court. Trial before Barker, C.J. January 21, 1913.

1. VENDOR AND PURCHASER (§ I E—27)—CONTRACT TO PURCHASE—RIGHT TO RESCIND—MISDESCRIPTION OF PROPERTY.

A contract purchaser at auction of leasehold property described in an advertisement of sale as located at "No. 171 Chesley street," was entitled to rescind his agreement on discovering that the property fronted on an alley and was located 100 feet away from the named street; it appearing that the premises were not known by that description, except so far as a tenant's address was improperly given at that address.

[*Swaisland* v. *Dearsley*, 29 Beav. 430; and *Stanton* v. *Tattersall*, 17 Jur. 967, referred to.]

2. EVIDENCE (§ VI-E—535)—CONTRACT TO PURCHASE LAND—DESCRIPTION OF PROPERTY—EXPLANATION AS TO PROPERTY INTENDED.

In an action to compel defendant to carry out a written agreement to purchase leasehold property described as located at "No. 171 Chesley street," on his refusing to proceed on discovering that the property was located on an alley and not on the named street, oral evidence offered by plaintiff to shew that the sale was intended to cover property not located on Chesley street, was not only inadmissible, but such agreement would be void under the Statute of Frauds; no part performance of the contract appearing.

[*Higginson* v. *Clowes*, 15 Ves. 516; and *Shelton* v. *Livius*, 2 C. & J. 411, referred to.]

3. COSTS (§ I—10)—DISCRETION—GIVING COSTS.

On dismissal of an action to compel defendant to carry out a purchase at an auction sale of land misdescribed in the advertisement of sale as being located at "No. 171 Chesley street," whereas the property was situated on an alley, defendant is entitled to costs, where the misleading character of the description resulted from the fault of plaintiff or his agent, for reliance upon which the defendant was not to blame.

Statement

ACTION to compel the defendant to carry out an agreement for the purchase of land, which he repudiated on the ground that he had been misled by the description in the advertisement of sale.

The action was dismissed.

Argument

M. G. Teed, K.C., for the defendant:—There are two points: first, the defendant never assented; his mind never went with the purchase of the property in the statement of claim. The parties were not *ad idem*, therefore there was no contract to be enforced: second, the agreement upon which the action is brought, is brought under the Statute of Frauds. It lacks the disclosure or designation of the vendor. The name of the vendor or any description of him is not given to satisfy the statute, even in the case of purchase by auction: *Cundy* v. *Lindsay*, L.J.Q.B. 481, 3 App. Cas. 459; *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638; *Webster* v. *Cecil*, 30 Beav. 62; *Calverly* v. *Williams*, 1 Ves. Jr. 210; *Higginson* v. *Clowes*, 15 Ves. 516; *Manser* v. *Back*, 6 Hare 443; *Hickman* v. *Berens* (1895), 2 Chan. 638;

Miles v. *Saunderson* (1897), 2 Chan. 534; *Murray* v. *Jenkins*, 28 Can. S.C.R. 565. Second proposition, Statute of Frauds. The memorandum is defective: *Williams* v. *Lake*, 2 El. & El. 349; *Skelton* v. *Cole*, 1 DeG. & J. 587; *Potter* v. *Duffield*, L.R. 18 Eq. 4; *Williams* v. *Jordan*, 6 Ch.D. 517; *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Jarrett* v. *Hunter*, 34 Ch.D. 182; *Donnison* v. *Peoples' Cafe Co.*, 45 L.T.R. 187.

Argument

J. B. M. Baxter, K.C., for the plaintiff:—The Statute of Frauds, under the pleadings, cannot be raised. *Williams* v. *Lake*, 2 El. & El. 349, and *Skelton* v. *Cole*, 1 DeG. & J. 587, are not cases of auction. In *Potter* v. *Duffield*, L.R. 18 Eq. 4, you do not find the name of either plaintiff or defendant in the memorandum. Duffield was not the vendor. *Chinnock* v. *Marchioness of Ely*, 3 App. Cas. 459, not applicable. Not a case by auction. *Jarrett* v. *Hunter*, 34 Ch.D. 182, in the present memorandum, there is not the indefiniteness that there is in any of the others. *Donnison* case not a case of auction. After he has deposited the cheque he is too late: *Webster* v. *Cecil*, 30 Beav. 62.

Barker, C.J.

BARKER, C.J.:—The plaintiff is the assignee of certain leasehold premises situated in that part of the city of St. John which formerly was a part of the town of Portland. The lease which was made in 1906 contains the following as the description of the premises:—

> All that lot, piece and parcel of land lying and being in the town of Portland aforesaid situate on the southerly side of the alley way running westerly from the Short Ferry road and known and distinguished in series of plans of division of land belonging to the estate of the late Susanna Peters, deceased, among the heirs on file in the office of the registrar of deeds and wills in and for the city and county of St. John by the letter I and the number three (3), the same being 75 feet front on said alley way and running back forty feet.

The lot thus demised is a lot having a frontage of 75 feet on a certain alley and extending back 40 feet, and this is the description of it in a lease made only six years previous to the events which have given rise to this action. Under the plaintiff's direction, F. L. Potts, an auctioneer doing business in St. John, advertised the sale of these premises at auction in the newspapers as follows:—

> 2 tenement house and small house, No. 171 Chesley street, cheap leasehold at 20 per year. By auction the above property will be sold at Chubbs Corner Saturday morning at 12 o'clock.

At the time named the property was offered for sale, and it was knocked down to the defendant for the sum of $975. He then signed a bidding paper which contained the advertisement I have just given and the following:—

> Terms of sale of above advertised leasehold property is sold on the fol-

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lowing terms and conditions: The purchaser to pay 25% of the purchase price at the time of the property being knocked down, to the auctioneer, F. L. Potts, and signing this bidding paper; the balance on surrender of deed at the office of F. L. Potts, 96 Germain street, on Wednesday morning, the 8th day of May, at 11 o'clock. Should the purchaser fail to comply with the above terms the property may again be put up and sold, and any loss made thereby will be deducted from the deposit made by the purchaser. The property sold free of all taxes, and water rates up to December 31, 1911. Ground rent from May 1st, 1912; the purchaser to receive all rents from May 1st, 1912.

I bid for the above property $975.

(Signed) BART. ROGERS.

This sale was made on Saturday, the 4th of May. The defendant signed the bidding paper and gave a cheque for the 25% required by the conditions of the sale. The defendant made the purchase without making any inspection of the premises, and although he had in a general way a knowledge of property on Chesley street, he did not know precisely where No. 171 was. He accordingly went down to ascertain what he had bought, and on enquiry he found that the lot on which the house was numbered 171, fronted on an alley and was some 100 feet from Chesley street. In other words, the lot sold and described as lot "No. 171 Chesley street" was a lot from which there was no access to Chesley street, which did not front on that street, which was 100 feet or so distant from that street and fronted on an alley which has no name, unless the local one of "slab alley" can be so considered. The defendant then went to the auctioneer, said that he had been misled by the description, stopped payment of the cheque and repudiated the transaction. This action is brought to compel him to carry out his contract, and in order to succeed there must, among other things, be a written contract signed by the defendant specifying what the property is which the defendant agreed to purchase. The contract which carries out the description of the property as advertised and offered for sale is for the sale and purchase of a "2 tenement house, and small house, No. 171 Chesley street." The defendant swears, and I have no hesitation in accepting his statement, because I should have done the same as he, that he supposed the houses opened on or fronted on, or, to use a usual phrase, were on Chesley, one of the well known public streets of the city, with the city water pipes laid through it for the convenience of residents. Was he justified in purchasing on that basis? And if so, upon what principle can this Court compel him to pay his money for a two tenement house situated down a nameless alley and not within a hundred feet of Chesley street, where there is no water supply. In *Swaisland* v. *Dearsley*, 29 Beav. 430, the Master of the Rolls, speaking of a case of mistake, says:—

But the principle upon which this Court proceeds in cases of mistake

is this: If it appears upon the evidence that there was in the description of the property a matter in which a person might *bonâ fide* make a mistake, and he swears positively that he did make such a mistake and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appear in the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake or that he did not understand what he was about.

This is not exactly a case of mistake. There is none, so far as the defendant is concerned, for he was quite right, I think, in treating a property described for purposes of sale as being No. 171 Chesley street as a property on Chesley street. The plaintiff knew that the property was not on Chesley street, for her own lease described it as having a frontage of 75 feet on this alleyway, and makes no mention either of Chesley street or any number on it.

In *Stanton* v. *Tattersall*, 17 Jur. 967, the purchaser filed a bill to set aside the contract and for a return of his deposit. It was also a sale by auction and the property was described as a freehold estate, "being Nos. 58 on the north side of Pall Mall, opposite Marlborough House," etc. The house sold was not on Pall Mall at all, and on this, with other grounds, the plaintiff sought to get rid of the contract. Sir J. Stuart, V.-C., held that he was entitled to a decree. He says:—

> If the plaintiff in this case had at once taken the objection as to the misdescription of the house as being on the north side of Pall Mall, he would have been entitled to avoid the contract on that ground. I am bound to hold that the contract must be rescinded on the plain principle that what was presented to the purchaser as coming within the terms of the contract in the particulars, is something entirely different from what the ordinary construction of such a contract would be. I think, therefore, that the plaintiff must be relieved on the principle that a man, when he purchases, must have property which answers the description by which he contracted to buy.

Another view was put forward, upon which it is sought to sustain this action. In section two of the statement of claim it states that the property in question "is known as No. 171 Chesley street in the city of St. John." And the argument is, that as the property is known by that name and was advertised and sold by that name, a conveyance by that name would carry the title, and the contract must therefore be carried out, the words "Chesley street" being of no importance under the maxim *falsa demonstratio non nocet*. I do not think the evidence at all sustains any such contention. There were only three witnesses sworn; of these two, that is, Potts and the defendant, knew nothing whatever about the property, and the third, Porter, the plaintiff's agent, does not seem to have known much more, though he said it was on Chesley street. When Porter went to Potts to give instructions for advertising the pro-

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perty he was naturally asked where it was. To this Porter said, "On Chesley street"; but in order to get the street number they took the name of one of the tenants and found on reference to the directory for 1911 that his address was "171 Chesley street." Putting the two together, the property was advertised as "171 Chesley street." No tenant of the premises, no resident in the alley, for there were other houses there, no one at all, was produced in order to shew that this property was ever known as "171 Chesley street." That it was on Chesley street was a misrepresentation of the plaintiff's agent, to the auctioneer, and that it was "No. 171 Chesley street" was simply an invention of the man who got up the directory. It is also claimed that at the sale and before the bidding had commenced, the auctioneer in reply to a question by the defendant as to what he was selling, told him that it was a property on Chesley street, and referred him to the city directory. The defendant denies that any such reference was made, at all events in his hearing. In my view it is unimportant whether any such reference was made or not. The sale was made and the contract now sought to be enforced was signed after the enquiry was made and answered by the auctioneer. That contract describes the property as "No. 171 Chesley street." There is neither doubt nor ambiguity about these words, either as to the street or the number. It is a plain contract for the sale and purchase of a property on Chesley street. And if it is sought by way of reference to a directory or otherwise to alter or qualify the language of the contract so as to convert it into a contract for the sale of property not on Chesley street at all, evidence for that purpose would not only be inadmissible, but the plaintiff would be relying on a new contract of which there is no record in writing signed by the parties as required by the Statute of Frauds and of which, therefore, no oral proof could be given except in cases of part performance: *Higginson* v. *Clowes*, 15 Ves. 516; *Shelton* v. *Livius*, 2 C. & J. 411. It was also contended by the defendant's counsel that this contract does not comply with the Statute of Frauds, as it does not contain the names of the contracting parties or sufficiently identify them. In the view I have expressed on the first point it is not necessary to consider the other.

As to the costs, this is not a case of mutual mistake where each party may well pay his own. The plaintiff and those who were acting for her seemed to have caused all the trouble. The plaintiff's agent described the property as on Chesley street. Her lease shews this to be incorrect, and there is no one, it seems to me, whose attention could be directed to the property and its situation without his knowing that to describe it as was done in this advertisement must necessarily be misleading. No doubt there was no such intention, but the result is the same.

The plaintiff's bill must be dismissed and I think with costs.

Action dismissed.

TUCKER v. MASSEY.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 4, 1913.

1. BROKERS (§ II B—12)—RIGHT TO COMMISSION—HALF INTEREST IN REAL ESTATE.

A contract by defendants to pay plaintiff a broker's commission on all such sales respecting a townsite owned by defendants as should be effected through his introductions, does not limit the right to commission to sales of lots made to a company in contemplation as prospective purchasers when the contract was made, and entitles plaintiff to a commission on an accepted sale of an undivided half interest in the townsite made through his introduction, especially where all the initial transactions negotiated were merged into the final sale.

[*Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A.C. 614, and *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, distinguished; see also Annotation on real estate brokers' commissions, 4 D.L.R. 531.]

Statement

APPEAL by the defendants from the judgment of Morrison, J., and a jury in an action for commission alleged to be due in respect to a sale of an undivided half of a townsite brought about by the plaintiff.

The appeal was dismissed, GALLIHER, J.A., dissenting.

S. S. Taylor, for the appellants.

Craig, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff recovered judgment against the defendants other than the defendant Garvey, who was dismissed from the action during the trial, for an amount represented by 10 per cent. of the price for which the defendants sold an undivided half interest in the Haysport townsite through, as the plaintiff claims, his instrumentality. The defendants had purchased the said townsite for speculation. The plaintiff and the defendant Massey met, and as the result of a conversation they then had with respect to the Haysport townsite, Massey, according to the plaintiff's evidence, agreed to pay him 10 per cent. commission "on all such sales as should be effected through his (the plaintiff's) introductions." The jury found that the agreement between the parties was "that the plaintiff was to receive 10 per cent. commission on sales effected through parties introduced to the defendants by the plaintiff. Plaintiff having introduced one Somerset Finch, the jury found that the sale in question was "the result of the introduction of Finch by the plaintiff to the defendants."

I think the fair inference from the evidence is that all parties understood that Finch was simply a promoter, and that if any business were done by reason of Finch's introduction, it would be done with persons in England through the efforts and connections of Finch. After the introduction Finch agreed to purchase four lots on the representation of the defendants that

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it would be advisable to secure at once some portion of the water frontage in the townsite. I think it cannot be doubted that the purchase of these lots was regarded by all parties as merely an initial one, because shortly afterwards Finch obtained an option to purchase eight other lots; then sixteen others, and on the day upon which he obtained the last mentioned option, he obtained a further option to purchase a considerable portion of the townsite at a price of $100,000. Finch then early in 1910 went to England, and busied himself in promoting a fishing company to take over his options and carry on its business at Haysport. He kept in touch with the defendants, as the correspondence shews. Ultimately on July 3, 1911, he cabled to the defendants to the effect that negotiations were under way with the Alberta Land Company, Ltd. Thereupon the defendants replied that defendant Freer would leave at once for London, which he did. On his arrival he interviewed officers of the Alberta Land Company, Ltd., the result being a sale to that company with the concurrence of Finch of an undivided half interest in the Haysport townsite. Some other rights or options of no apparent value controlled by Finch were included in the sale, but if they affected the purchase price, and therefore the amount of commission, the point is not raised in the notice of appeal as I read it.

It was argued on behalf of the appellants that the agreement to pay the plaintiff a commission ought to be held to be limited to sales of lots to a fishing company for the purposes of their industry, whereas, as was contended, the sale to the Alberta Land Company, Ltd., was of an entirely different character, and was not in contemplation of the parties when the commission agreement was entered into. No doubt it was to a fishing company that plaintiff expected sales would be made as a result of his introduction of Finch, but the agreement was not expressly limited to such. The defendants were content to promise a commission on all sales which might result from plaintiff's introductions, without restriction as to the character of the interest sold. But assuming that in the circumstances the narrow construction contended for by the appellants ought to be placed upon the agreement, yet I think it cannot be said that the jury was not at liberty to conclude from all the evidence and circumstances of this case that the sale finally effected was one falling within the purview of such an agreement. It was not seriously suggested that the initial purchase of four lots was all that could come within the commission agreement. Had the other eight lots or the sixteen lots been purchased, I do not think the defendants would have ventured to argue that the plaintiff ought not to have his commission on their purchase price. I think this is also true of the large block agreed to be sold for $100,000. Now, all these initial transactions were merged in the final agreement with the Land Company. The agreements

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executed at the time of that sale, first by the defendants and Finch, in which the defendants undertook to allot to Finch certain shares in a projected company to operate at Haysport in consideration of Finch agreeing to "transfer to the Alberta Land Company, Ltd., and Messrs. Massey and Freer jointly, with a view to the establishment of a fishing industry at Haysport, all the rights and concessions he possessed," including the lots and options above mentioned, and the references in the agreement of sale with the Land Company, of the intention of that company "to promote and form a company with limited liability in England or in Canada, with the object amongst others of acquiring and taking over from the proprietors the whole or some part or parts of the properties and rights hereafter to be acquired by the proprietors as aforesaid, with a view to the development thereof," are indicative of the purpose to which the purchaser proposed to devote either the whole townsite or a substantial part thereof.

The main distinction between this case and such cases as *Burchell* v. *Gowrie & Blockhouse Collieries, Ltd.*, [1910] A.C. 614, and *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, is that here the subject-matter to be sold was not definitely ascertained at the time the commission agreement was made in this sense, that no limit was placed upon the number of lots or the quantum of interest which might be sold as the result of the plaintiff's introduction. Had the agreement been that the plaintiff should be paid a commission on the sale of a half interest in the townsite effected by a person introduced by him, there could, I apprehend, be no doubt about his right to recover; the defendants, however, left the matter at large. There was no break in the continuity of the efforts of Finch and of the defendant's assent thereto from the beginning until the final sale. It cannot, therefore, I think, be said that the latter was a new and independent transaction.

I am unable to say that the verdict is wrong, and therefore the appeal must be dismissed.

IRVING, J.A.:—I would dismiss this appeal. I am satisfied that the question in issue was as to the 10 per cent. on $26,000, and that the jury had that in view, and that their answers are to be read in that connection. The answers on pp. 45 and 12 support the fourth finding of the verdict. Finch's 5 per cent. was in consideration of his giving up his interest.

Irving, J.A.

MARTIN, J.A.:—I concur in the opinion that there was evidence to go to the jury. I hesitated for some time, in deference to the view taken by my brother Galliher, for whose opinion in these matters I have great respect, but I find that on re-perusing the evidence for the third time I cannot escape from the con-

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clusion that the case was properly left to the jury. It must be borne in mind that the agreement, as set up, was a general one, for the sale of all the lots in the townsite. The plaintiff was authorized to dispose of them all, and while it is perfectly true that he introduced Finch, who was admittedly a promoter, not a purchaser on his own account, to the owners as a person who would buy only at the time, as they thought, lots for the establishment of a fishing industry, yet even though the introduction was on that basis, it would not, of the language employed, prevent the plaintiff recovering if, by any chance, Finch were to expand his ideas and purchase entirely apart from his original intention as to the fishing industry, another block of lots in the same way, say for the purpose of establishing a lumber industry. And e.g., if the plaintiff at the same time had introduced another man representing a lumber industry who had come to buy and had bought lots for that sole purpose, and also bought more lots on his own account because of what he heard Finch say respecting his fishing project, the plaintiff would be entitled to his commission. It is all a question of degree of remoteness, and it was for the jury to say what meaning was to be attached to the intention of the parties in the special circumstances. Subsequent events, I think, shew that even though the ideas of Finch were expanded, they were not very far from what was originally contemplated. The statements of Tucker at pp. 6, 7 and 8, and of Garvey at pp. 44 and 45, largely support this view.

Galliher, J.A. (dissenting)

GALLIHER, J.A. (dissenting):—The question narrows itself down to the consideration of whether the plaintiff was the *causa causans*, or merely the *causa sine qua non* of the sale which took place.

The authorities to which we have been referred after all go to emphasize the fact that the determination of this question depends largely upon the particular facts and circumstances of each case.

The jury have made two important findings of fact:—

1. That the plaintiff was to receive 10 per cent. commission on sales effected through parties introduced to the defendants by the plaintiff.

2. That the sale to the Alberta Land Company was the result of the introduction of Finch by the plaintiff to the defendants.

These findings, if I may use the expression, seem to me to be half truths, or to put it in another way, they may be construed in a limited sense or in the fullest and broadest sense that the words can be used.

If construed in their limited sense, viz., that had it not been for the introduction of Finch to the defendants, the sale might never have come about, and in that sense is due to the introduction, it may very well be that the evidence warrants such a

finding, but that in itself is not sufficient to entitle the plaintiff to succeed.

On the other hand, if it is intended to be and is to be construed in its broadest sense, that to my mind cannot be done without giving full effect to the facts and circumstances surrounding the initiation of the dealings and the introduction of Finch, and having regard to what was in the contemplation of all parties when the agreement for commission was made.

As I regard that part of the evidence, if these facts and circumstances entered into the consideration of the jury, and they should, they would not be warranted in coming to the conclusion they did if their findings are to be interpreted in their broader sense.

Taking the evidence of the plaintiff himself. At the time when Finch was introduced to the defendants, and when the agreement for commission was made, there was nothing in the contemplation of any of the parties other than that Finch, who was in touch with capital in England, was introduced to the defendants for the purpose of inducing that capital to establish a fishing industry on the Haysport townsite, owned by the defendants, and for the purchase of such lands as might be necessary in connection therewith. This is evidenced by the nature of their first transaction, and purchase of four lots. Moreover, the plaintiff says he never regarded it as a real estate proposition at all, but only as in connection with the establishment of fishing industries.

Nor do I think the subsequent options or agreements between Finch and the defendants, and which he unsuccessfully endeavoured for two years to carry through, alters the position for the deal that eventually went through was one of a different character entirely to that contemplated when any agreement for commission was made, being one not only for the establishing of a fishing industry, but for the exploitation of the townsite as a real estate proposition by the expenditure of large sums of money, and was for a half interest in the townsite, and not for the acquiring of any particular portion of the townsite for a fishing industry.

It may be, though I express no opinion thereon, that the plaintiff is entitled to commission on such portion of the purchase moneys as are applicable to purchases in connection with its fishing industry, but there is not sufficient evidence before us upon which we could intelligently deal with that.

In my view there is, under these circumstances, no appreciable difference between the right to commission on the whole transaction here and in a case of, say, this kind: Supposing after Finch had been introduced for the purpose before set out, and a commission agreed upon as before stated, valuable oil springs or minerals had been discovered on the property, and the Alberta

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Land Company, who had been introduced to the defendants by Finch, decided that in addition to purchasing such lands as they might require for the purpose of their fishing industry, they would go in with the defendants for developing these oil springs or minerals, and paying perhaps large sums of money for an interest in these, could it be said in view of the nature of the transaction between the plaintiff and the defendants when Finch was introduced, and of what was then in the contemplation of the parties when the promise for commission was made, that the plaintiff would be entitled to commission on the sales of the oil and mineral interests?

If it can, it is carrying it farther than I am prepared to go, and it would be difficult to prescribe a limit beyond which the plaintiff might not go in claiming commission, through the various ramifications that might ensue in dealing with the property.

For these reasons I am, with great respect, unable to reach the same conclusions as my learned brothers.

The appeal should be allowed, and the action dismissed with costs, but under the circumstances without prejudice to the plaintiff if he may be so advised to bring an action for the recovery of commission in respect of so much of the transaction as is connected with the establishment of the fishing industry.

Appeal dismissed, GALLIHER, J.A., *dissenting*.

MAN.
K. B.
1913
May 3.

HUGHES v. EXCHANGE TAXICAB AND AUTO LIVERY, Limited.

Manitoba King's Bench. Trial before Macdonald, J. May 3, 1913.

1. AUTOMOBILES (§ III B—262)—DUTY TO SLOW UP—TAXICAB COMPANIES—INJURY TO PASSENGER—PRIMA FACIE NEGLIGENCE.

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.

2. CARRIERS (§ II G—70)—MEASURE OF CARE REQUIRED—LIABILITY FOR INJURY TO PASSENGERS.

A carrier of passengers is liable only for negligence and not as an insurer of their safety.

3. DAMAGES (§ III I—165) — MEASURE — TORTS — PERSONAL INJURY — AMOUNT RECOVERABLE.

$300 is reasonable compensation for negligent injury to a taxicab passenger, sustained by being thrown against the glass separating the driver from the passenger's compartment, where his pecuniary loss aggregated $173, though he was permanently scarred to a slight extent, measuring on the basis of the substantial injury suffered.

Statement

ACTION for damages resulting from injuries sustained by being thrown against the glass separating the driver of a taxicab from the part in which passengers are carried, when the taxicab ran into an upright post.

Judgment was given for the plaintiff.

J. K. Sparling and *F. Sparling*, for the plaintiff.
F. J. G. McArthur, for the defendants.

MACDONALD, J.:—The plaintiff on the early morning of January 1, 1913, engaged a taxicab from the defendants to drive him with two companions from 337 McDermott avenue to his home, 325 Lipton street, in the city of Winnipeg.

The driver (an employee of the defendants), evidently thinking he had arrived at Lipton street, turned into Burnell street, and almost immediately upon turning and discovering his mistake, turned quickly to correct his error and in doing so ran into an upright post, and in consequence of the impact the plaintiff was thrown against the glass partition which separates the passengers from the driver and sustained injuries for which he claims damages.

The driver was driving at considerable speed and it seems to me he did not use proper judgment in handling his car just before the accident. The post was plainly visible and his running into it was clearly *primâ facie* negligent. He has attempted to lay the blame upon the plaintiff and his companions, but his version of it I do not accept. That he was the sole cause of the accident I am absolutely convinced. It is true that a carrier of passengers is liable only for negligence and not as an insurer of their safety, but in this case there was negligence for which the defendants are responsible.

The damage to the plaintiff, however, is not serious. True he is permanently scarred to a slight extent, but the damages must be measured on the basis of the substantial injury he has suffered. He lost two weeks of his time, incurred medical expenses, and had some clothing damaged, amounting in all to the sum of $173.

Three hundred dollars would seem to me a fair and reasonable compensation for the damage sustained, for which amount there will be judgment for the plaintiff, with County Court costs and without a right of set-off.

Judgment for plaintiff.

MAN.

C. A.

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May 6.

PETTIT v. CANADIAN NORTHERN R. CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Cameron, JJ.A. May 6, 1913.

1. DAMAGES (§ III I 3—186)—DEATH—PAIN AND SUFFERING—ACCIDENTAL DEATH—RECOVERY BY DECEDENT'S FAMILY—ELEMENTS.

In an action by the widow and administratrix of the deceased for damages under the Manitoba Act, for compensation to families of persons killed by accident (R.S.M. 1902, ch. 31), the measure should be for the widow's pecuniary loss sustained because of the death, in a sum that will give her the physical comfort which she had at the time of her husband's death out of his labour and earnings to be continued during the expectancy of life, subject to the accidents of health and employment; but not covering the physical and mental suffering of the deceased nor the mental sufferings of the plaintiff for the loss of her husband.

[*Blake* v. *Midland*, 18 Q.B. 93, and *C. P. R. Co.* v. *Robinson*, 14 Can. S.C.R. 105, referred to; *Pettit* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.]

2. STATUTES (§ II C—120)—STATUTES ADOPTED FROM ENGLAND—EFFECT OF ENGLISH DECISIONS.

A statute practically copied from an English Act is taken subject to judicial decisions upon it given in England.

[*Trimble* v. *Hill*, 5 A.C. 342, referred to; *Pettit* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.]

3. DAMAGES (§ III I 3—187)—DEATH — LOSS OF SERVICES — ACCIDENTAL DEATH—RECOVERY BY DECEDENT'S FAMILY—EXCESSIVENESS.

$5,000 is an excessive recovery by a surviving wife under the Manitoba Act (R.S.M. ch. 31) for accidental death of her husband, and the recovery should be reduced to $3,000, where he was 65 years old and earned only $45 monthly, and she was 57 years old, though he was apparently a strong, healthy man.

[*Rowley* v. *London*, L.R. 8 Ex. 221, and *Lamonde* v. *G. T. R. Co.*, 16 O.L.R. 365, referred to; *Pettit* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.]

Statement

APPEAL by the defendants from judgment of Prendergast, J., *Pettit* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, awarding the plaintiff $5,000 damages.

The appeal was allowed in part, the damages being reduced to $3,000.

O. H. Clark, K.C., for the defendants.

W. H. Trueman, for the plaintiff.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The judgment of the learned trial Judge should not be disturbed except as to the amount of the damages, and the matter was reserved solely upon this branch of the case.

The action is for damages under the Manitoba Act for compensation to families of persons killed by accident, R.S.M. ch. 31. This Act is practically a copy of the English Act known as Lord Campbell's Act.

The action being only for the purpose of making good to the survivors the financial loss sustained by them because of the death of the bread winner, the physical and mental suffering of the deceased is not a factor to be considered. It might well be urged that the suffering or sorrow of a dependent wife should be considered and a *solatium* allowed her in estimating her loss; but under the English Act this question has been disposed of adversely to the plaintiff in the case of *Blake* v. *Midland*, 18 Q.B. 93. It is there held that the damages must be limited to the pecuniary loss sustained because of the death, and at page 112 the following language is used: "They (the jury) could not take into their consideration the mental sufferings of the plaintiff for the loss of her husband." Beven on Negligence at 185 refers to this case as the English law at the present day. Our province has practically copied this Act, and we therefore take it, subject to the judicial decisions upon it given in England: *Trimble* v. *Hill*, 5 A.C. 342.

The English Act in practically the same language was enacted in the Province of Quebec, and in an action under it the Supreme Court in *C. P. R. Co.* v. *Robinson*, 14 Can. S.C.R. 105, applied the rule as to assessment of damages laid down in *Blake* v. *Midland*, 18 Q.B. 93.

It seems to me clear that in this action the plaintiff's damages must be limited to her actual financial loss from the death of her husband. She was at the death 54 years old, and he was about 65; was earning $45 per month, and was apparently a strong, healthy man, practically never ill. There was no evidence as to the probable duration of the life of this strong, healthy man of 65, as there was in *Rowley* v. *London*, L.R. 8 Ex. 221, and as I assume there was in *Lamonde* v. *G. T. R. Co.*, 16 O.L.R. 365. In this last case the following language is used:—

> I have only to assess the damages to which the plaintiff is entitled. The deceased was sixty-five years old and his wife sixty-three; his wages were $1.10 a day, Sundays and holidays included, and his expectation of life was eleven years. Nine hundred dollars seems to me a reasonable sum at which to assess the damages.

With the very greatest respect for this distinguished Judge, I would have been more liberal. The amount he granted was a sum equal to the whole wages for two and a quarter years.

The plaintiff is entitled to her pecuniary loss, that is, a sum that will give her the physical comfort which she had at the time of her husband's death out of his labour and earnings to be continued during the expectancy of life, subject to the accidents of health and of employment. I will venture to say that without the assistance, protection and society of her husband, she could not purchase the same comforts for less than it cost the two to live together. If the husband had been in life merely her watch dog, and if that was a pecuniary advantage to her, then why not damages for this loss?

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PETTIT v. CANADIAN NORTHERN R. CO.

Howell, C.J.M.

I fully realize all the difficulties referred to by many eminent Judges in the past as to the assessment of damages in such cases as this; but the difficulties must be faced. These two people lived together in holy partnership for more than 20 years, and I shall assume that each comforted, assisted and protected the other, and incidentally the money which he brought into the partnership still further assisted in the battle of life. In my view of the matter something beyond mere mortality tables and actual earnings may be considered.

Putting myself in the position of a jury in this case, and without giving further reasons, I would assess the damages at $3,000, and in this respect I differ from the learned trial Judge. I cannot find evidence that would justify the assessment of $5,000. It is not a question of demeanour of witnesses, but conclusions to be drawn from undisputed facts. Perhaps the sorrow and sufferings of the plaintiff was an element considered in finding that amount.

The judgment against the defendants will be reduced to $3,000, and there will be no costs of this appeal.

Judgment below reduced.

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May 29.

SHEARDOWN v. GOOD.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. May 29, 1913.

1. SPECIFIC PERFORMANCE (§ I E—30)—CONTRACT FOR SALE OF LAND—OMISSION OF MATERIAL TERM—CONCEALMENT OF.

Specific performance of a contract for the sale of land will be refused where the vendor was led to believe by her agent and by the vendee on signing the contract that a clause had been inserted therein in accordance with the agreement between the vendor and the vendee, that the former might recede from the bargain within ten days if she desired to do so.

2. FRAUD AND DECEIT (§ II—5)—CONTRACT—OMISSION OF MATERIAL TERMS—CONCEALMENT OF.

It is a fraud for the agent of a vendor and the vendee in a contract for the sale of land to conceal from the vendor the omission from the contract of a clause permitting the latter to recede from the bargain within ten days, which was to be embodied in the contract.

Statement

APPEAL by the plaintiff from the judgment of Latchford, J., dismissing the action with costs.

C. W. Plaxton, for the plaintiff.

L. V. McBrady, K.C., for the defendant.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—The action is by the assignee of a purchaser against the vendor for specific performance of a written agreement for the

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sale of land. The unwilling vendor asserts as a defence that a term was to be included in the writing permitting her to recede from the bargain within ten days.

The learned trial Judge has found that the vendor understood from the real estate agents who acted for her and for the purchaser respectively that such a clause was to be embodied in the contract which she signed. He credited her testimony where it conflicted with theirs, and came to the conclusion "that there was not that fairness and equality" between them and her "which should exist to warrant the Court in decreeing specific performance." The omission of the term referred to was, in effect, a fraud perpetrated upon the vendor. The document should be read and construed as though it contained it.

The exercise of jurisdiction in such cases is a matter of judicial discretion, and "much regard is shewn to the conduct of the parties": *Lamare* v. *Dixon*, L.R. 6 H.L. 414, 423; *Coventry* v. *McLean*, 22 O.R. 1, at p. 9.

In view of the findings of the trial Judge, I think that the judgment cannot be disturbed, and that the appeal should be dismissed with costs.

Appeal dismissed.

LAROSE, BELL & PARR v. WEBSTER.

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May 14.

Alberta Supreme Court. Trial before Simmons, J. May 14, 1913.

1. CONTRACTS (§ II D 4—185)—CONSTRUCTION CONTRACTS—MEDICAL AND HOSPITAL EXPENSES—RIGHT OF SUBCONTRACTORS TO REIMBURSEMENT.

Where a subcontract for railway construction work did not bind the principal contractor for the subcontractors' expense for medical and hospital services furnished to their employees, a letter from the former to the subcontractors, stating that a physician had been appointed to look after medical work in the district, and requesting the subcontractors to collect a stated sum monthly from each employee and remit the same to the contractor to be turned over to the medical department; and the physician advised the contractor and the subcontractors that after a fixed date he would not continue the services at the old rate; and no further arrangement for medical or hospital service was made, the contractor is not bound to reimburse the subcontractors for subsequent outlay for such services, the contractor having paid over all moneys collected from the subcontractors' men.

Statement

ACTION to recover expenses incurred by the plaintiffs in connection with medical and hospital services furnished to the men working for them, as sub-contractors in the construction of a railway line.

The action was dismissed.

McCaul and *Valens*, for the plaintiffs.

L. W. Brown, for the defendant.

Simmons, J.

SIMMONS, J.:—The plaintiffs were sub-contractors in 1910 from the defendant on the G.T.P. branch line from Tofield to

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Calgary. Plaintiffs' sub-contract covered about 12 miles of grade construction in the vicinity of Trochu. The contract contained no stipulation and no agreement upon the part of either the plaintiffs or defendant in regard to the subject-matter of this action which arises out of a claim made by the plaintiffs against the defendant for expenses incurred by the plaintiffs in connection with medical and hospital services furnished to the men.

On May 14, 1910, the defendant wrote the plaintiffs as follows:—

Alix, Alta., May 14, 1910.

Jno. Parr, Esq.,
Trochu, Alta.

Dear Sir,—Dr. J. D. Milne has been appointed to look after the medical work in the Trochu district, and is supposed to visit the camps and can be called on at any time. He has a hospital at Trochu for use of any patients requiring treatment in a hospital. Please collect seventy-five cents per month from each man. The full amount of medical fees are chargeable to a man who works three days or more in any month. Kindly report the amount collected each month to me and I will remit to the medical department.

Yours truly,

(Sgd.) GEO. H. WEBSTER.

Dr. J. D. Milne, a doctor at Trochu undertook and performed the work of supplying medical and hospital attendance for the men during the months of May and June, 1910, under the arrangement referred to in defendant's letter of May 14, 1910, to John Parr, one of the plaintiffs. On June 23, 1910, he advised the defendant and also the plaintiffs that he would not continue these services after June 30, 1910, at the remuneration of 75 cents per man per month.

No further or other arrangement was entered into by the defendant in regard to medical services or hospital accommodation for the men after June 30th. The plaintiffs, however, continued to employ Dr. Milne during the remainder of 1910, and a part of 1911, and also sent men to Edmonton to be looked after by Dr. Hyslop who was in charge of medical work at Edmonton for the G.T.P. The plaintiffs also sent men to the Sisters of Charity Hospital at Trochu for treatment.

The plaintiff claims:—

For fees paid to Dr. Milne	$ 17.75
For fees paid Sisters of Charity at Trochu	370.00
For fees paid Dr. Hyslop	114.00
Medical attendance on Morgan	10.00
Railway fare conveying patients to Edmonton	26.00
Costs in suit of Dr. Milne	201.62
Costs in suit of Sisters of Charity	93.86
Total	$834.03

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The Sisters of Charity sued the plaintiffs and the defendant in this Court and recovered judgment against the plaintiffs in this action for $370 and costs, which were taxed at $93.86, but that action against Webster (the defendant in the present action) was dismissed with costs.

In the action of Dr. Milne against the plaintiffs and the defendant in the present action, the defendant Webster paid into Court $391.50, this sum representing money in his hands which had been deducted from the wages of the men in the employ of Larose, Bell & Parr, and by Webster deducted from the moneys due Larose, Bell & Parr on their estimates.

Judgment in this action went against Larose, Bell & Parr for $409.25, which was reduced by the moneys paid into Court by Webster to $17.75 and costs of the action and judgment for Webster for costs subsequent to payment into Court of $391.50 by him.

There was at no time either prior to June 30, 1910, or subsequent thereto, any undertaking by Webster to do more than pay over to whomsoever might be in charge of the medical work, the sum of 75 cents per man per month as and when collected by the plaintiffs or deducted by the plaintiffs from the men's wages, which he did in 1910, and paid the same into Court in the action of Dr. Milne above referred to. He has not refused to carry out the same arrangement in regard to the 75 cents per man per month for the season of 1911, although under no obligation to do so as I find that he was not a party to any contract or arrangement in regard to medical or hospital expenses subsequent to July 1st, 1910.

The plaintiffs' action is therefore dismissed with costs.

Action dismissed.

Re EMMONS v. DYMOND.

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May 28.

Ontario Supreme Court, Britton, J., in Chambers. May 28, 1913.

1. COURTS (§ II C—185)—ONT. ACT, 10 EDW. VII. CH. 30—TRANSFER OF CAUSE FROM COUNTY COURT TO SUPREME COURT—SUFFICIENCY OF APPLICATION FOR.

In order to justify the removal of an action from a County Court to the Supreme Court, under sec. 29 of the Ontario Act, 10 Edw. VII. ch. 30, it must appear that the action is one that ought to be tried in the High Court rather than in the County Court.

[*Re Aaron Erb* (No. 2), 16 O.L.R. 597, specially referred to.]

Statement

APPLICATION by the defendant for removal of this action from the County Court of the County of Middlesex to the Supreme Court of Ontario.

E. C. Cattanach, for the defendant.

R. U. McPherson, for the plaintiff.

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RE EMMONS v. DYMOND.
Britton, J.

BRITTON, J.:—The County Courts Act, 10 Edw. VII. ch. 30, is the Act now in force. Section 22, sub-secs. 3, 5, and 6, and sec. 23, make provision for the transfer of cases from a County Court to the Supreme Court of Ontario, where the facts are as stated in these sections and sub-sections.

Section 29 governs as to what cases and on what conditions causes may be removed, where sec. 22 and its sub-sections and sec. 23 do not apply.

This application must be considered as made under sec. 29. The words "fit to be tried in the High Court" mean, I think, "that ought to be tried in the High Court rather than in the County Court;" and I cannot say that a reason for transfer, or for certiorari, has been shewn. See *Re Aaron Erb* (No. 2), 16 O.L.R. 597; *Re Hill* v. *Telford*, 12 O.W.R. 1056.

The motion will be dismissed; costs in the cause. This will be without prejudice to any order the County Court Judge may make as to any amendment, or as to the trial, or any matter in the disposition of the case by him.

Motion dismissed.

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May 22.

COLE v. RACINE.

Ontario Supreme Court, Kelly, J. May 22, 1913.

1. FRAUDULENT CONVEYANCES (§ III—10)—CHATTEL MORTGAGE—UNLAWFUL PREFERENCE—KNOWLEDGE OF MORTGAGOR'S INSOLVENCY.

A chattel mortgage upon the property of an insolvent trader is void as to his subsequent assignee for creditors, because an unlawful preference in contravention of the Assignments and Preferences Act (Ont.), where the mortgagee at the time of taking the security had knowledge of the mortgagor's insolvency.

2. CHATTEL MORTGAGE (§ III—32)—FILING—SUFFICIENCY—AFFIDAVIT OF ATTESTING WITNESSES—FAILURE TO STATE DATE OF EXECUTION.

Failure to state in the affidavit of the attesting witnesses the year of execution of a chattel mortgage given to a creditor of the mortgagor, will, under clause (*a*), sec. 5, of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, render the conveyance void as to the mortgagor's subsequent assignee for the benefit of his creditors.

3. CHATTEL MORTGAGE (§ III—30)—BILLS OF SALE AND CHATTEL MORTGAGE ACT (ONT.)—ATTESTING WITNESS—AFFIDAVIT OF—STRICT CONSTRUCTION OF REQUIREMENT OF ACT.

The requirement of clause (*a*), sec. 5, of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, as to stating the date of the execution of a chattel mortgage in the affidavit of the attesting witnesses, is imperative and must be strictly construed.

Statement

TRIAL of action was begun by plaintiff, as assignee of the estate of Alfred St. Laurent, an insolvent, to set aside, as fraudulent against creditors, a chattel mortgage made by Arthur St. Laurent to the defendant, on the 2nd January, 1912.

Judgment was given for the plaintiff.

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When the chattel mortgage was made, Arthur St. Laurent carried on business as a retail merchant in Ottawa.

On the 12th March, 1912, he, by bill of sale, transferred his business to his brother Alfred St. Laurent, who on the 26th June, 1912, made an assignment to the plaintiff for the general benefit of his creditors.

After the evidence had been taken at the trial, before KELLY, J., without a jury, Arthur St. Laurent also executed to the plaintiff an assignment for the general benefit of his creditors; and the plaintiff, as such asignee, on the 7th December, 1912, commenced another action against Arthur St. Laurent, similar to this action. The two actions were then consolidated, and the defendant was given time and opportunity to adduce further evidence; and on the 8th February, 1913, the matter again came before KELLY, J., but no further evidence was submitted.

A. E. Fripp, K.C., for the plaintiff.

J. U. Vincent, K.C., for the defendant.

Kelly, J.

KELLY, J.:—On its face, the chattel mortgage was made to secure a debt of the mortgagor already incurred, and the mortgage does not purport to be made on any other consideration, or even to have given an extension of time for payment.

As far back as the beginning of February, 1911, the mortgagor was indebted to the defendant to an amount considerably in excess of $5,000; and, on the evidence adduced for the defendant, at no time afterwards was that indebtedness less than it was in February, 1911. At the end of 1911, it was considerably more. In December, 1911, the defendant's representative at Ottawa interviewed the debtor and his brother Alfred, who acted as manager of the business, and asked for payment or security, and was told that the debtor had no money and could make no payment, and that the debtor was then insolvent.

It is true that the defendant's representative denies that it was stated to him that the debtor was insolvent; but I feel bound to accept the testimony of the debtor and his brother on that point, especially in view of the somewhat peculiar circumstances surrounding the making of the chattel mortgage, and the occurrences leading up to it.

The defendant's representative, Bissonette, in denying knowledge or notice of the debtor's insolvent condition in December, 1911, says that the debtor or his brother then told him that the debtor's stock-in-trade or assets amounted to $12,000; and, though he was pressing for payment and knew of the debtor's inability to make any payment, and knew too that the indebtedness to the defendant, which was, in February, 1911, about $5,400, had considerably increased in the meantime, it is not easy to give much weight to his statement that he did not ascer-

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tain the amount of the liabilities, from which, taken in conjunction with the stated value of the assets, he would have learned the true financial condition of the debtor. If we are to believe him, he did not even make inquiries about the liabilities; and I am not, under these circumstances, apart from anything else, prepared to accept his evidence that he did not know that the mortgagor was insolvent. I have no doubt that he did know, and that the mortgagor and his brother also knew, and that the mortgage was made with that knowledge and for the very purpose of securing the defendant for the debt due him, and thus defeating or prejudicing the rights of other creditors.

In that view of the case, I do not think it necessary to discuss what was said by the mortgagor and his brother about the alleged bargain that the defendant was to advance such cash as would be necessary from time to time to satisfy other creditors, and assist in keeping the business running for a year. The two cash advances, amounting altogether to $950, made by the defendant soon after the making of the chattel mortgage, might indicate some such bargain, but I do not need to pass upon that. If, however, such a bargain were made and did exist, the defendant did not live up to it. It is denied, however, on the defendant's behalf, that any such agreement was entered into.

Something was said, too, that would indicate a desire or intention to keep the other creditors quiet for a time after the making of the mortgage. The evidence on that point was not denied. That, in itself, helps to shew an intent to give defendant a preference. To my mind, therefore, the chattel mortgage is void as against the other creditors of the mortgagor.

On another ground also the mortgage is void. Clause (a) of sec. 5 of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, requires that the affidavit of the attesting witness, which is to be registered with the chattel mortgage, shall, amongst other things, state the date of the execution of the mortgage. Section 7 provides that, if the mortgage and affidavits (that is, the affidavit of the attesting witness and the affidavit of bona fides by the mortgagee) are not registered as by the Act required, the mortgage shall be absolutely null and void as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for valuable consideration. The affidavit of the attesting witness filed with this mortgage sets forth that it was executed "on Tuesday the 9th day of January, one thousand nine hundred and ."

This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal omission, and such a non-compliance with the requirements of the Act as renders the mortgage void.

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For the above reasons, apart from any others that were urged, the mortgage should be set aside, and the mortgaged assets held by the assignee freed therefrom. If any of the goods and chattels covered by the mortgage or the proceeds thereof have been received and not accounted for by the defendant, they must be accounted for and the proceeds thereof paid to the plaintiff; and there will be a reference to the Local Master at Ottawa to ascertain the amount, if the parties cannot agree.

The proceeds of the sale of the mortgaged assets, which have been paid into Court, pending action, will be paid out to the plaintiff.

In view of the circumstances, particularly of the insolvency of the mortgagor at the time the mortgage was made, and of the bill of sale later on made by Arthur to Alfred, who was and had been manager of Arthur's business, and had full knowledge of its financial condition, the net proceeds of the mortgaged assets will be applied, first, towards payment of the claims of Arthur's creditors, and then towards the payment of those of Alfred's creditors.

Owing to the form in which the first action was brought, I think that, instead of costs being awarded against him, the defendant should be paid out of the estate his costs down to the consolidation of the two actions; the plaintiff also to be entitled to costs of the action out of the estate. Costs of the reference are reserved until after the Master's report.

Judgment for plaintiff.

WESTERN PLANING MILLS COMPANY, Ltd. v. EATON.

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May 14.

Alberta Supreme Court. Trial before Scott, J. May 14, 1913.

1. SALE (§ I B—11)—TIME FOR DELIVERY.

A contract to sell a building contractor materials for railway stations, delivery to be made at the places where the materials were to be used, implies an obligation on the seller's part to deliver within a reasonable time, regardless of any car shortage on the carrying railroads.

2. SALE (§ III C—70)—RESCISSION BY BUYER FOR DELAY—ACQUIESCENCE BY SELLER—ACTS CONSTITUTING.

On notice by a buyer of building materials of rescission of his contract as to undelivered materials, for the seller's failure to deliver within a reasonable time, the seller's conduct in asking withdrawal of the cancellation, in stopping further preparation of the materials, and in afterwards negotiating for a new contract, constituted acceptance of the cancellation and acknowledgment of the right to cancel.

3. SALE (§ I B—9)—DELIVERY—SUFFICIENCY.

Under a contract to sell building materials with freight prepaid to the place of delivery, there was no delivery of materials, where the buyer refused to receive them, because the railway company held the shipments for freight charges and duty, and he was not furnished with any invoice of the shipments.

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4. SALE (§ III A—54)—DEDUCTION FROM PRICE—FREIGHT CHARGES.

On settlement for building materials bought under a contract requiring payment of the freight charges by the seller to the place of delivery, the buyer is entitled to a deduction for such charges and for customs duty paid by him at the point of destination.

ACTION for goods sold and delivered and for damages for refusal to take delivery of other goods bought.

Judgment was given plaintiffs for the amount brought into Court.

Savary, for the plaintiffs.

J. K. Lavell, for the defendant.

Scott, J.

SCOTT, J.:—Plaintiff company claims $3,215.80 for goods sold and delivered to the defendant and $1,917.98 for goods bargained and sold which he refused to accept. Defendant admits his indebtedness to the amount of $1,582.05 upon the claim for goods sold and delivered and has paid that sum into Court. He disputes the remainder of the claim.

The defendant contracted with the Canadian Pacific Railway Co. to erect ten railway stations at various points in Alberta and Saskatchewan and subsequently about March 18, 1912, plaintiff company contracted with him to supply the lumber and mill work required for the erection of these stations for $1,850 for each station. This included the payment of freight to the several station sites.

The defendant states that it was a condition of the contract with plaintiff company that the materials required for the stations at Aldersyde and Webb were to be delivered at once, and it appears that McKinnon, the manager of the company, who negotiated the contract, at once ordered from a mill at Bonner's Ferry, Washington, U.S., two carloads of the material for each of these stations for delivery to the defendant there. The first carload for Aldersyde reached there on 13th April and the second a few days later. These were held by the railway company for payment of freight charges and duty amounting in all to $331.93 and defendant was obliged to pay that sum in order to obtain delivery. Both McKinnon and the defendant had computed that three carloads of materials would be required for each station. The third carload which was to contain the bulk of the mill work from plaintiff company's mills at Calgary was never delivered at Aldersyde and the defendant, in addition to the loss he sustained by reason of his workmen being idle for want of the materials, was obliged to procure them elsewhere.

The defendant sent his men to Webb early in April to work on the station there. They remained idle there for want of the materials which plaintiff company was to supply. Some of it they procured from local dealers. Up to 7th May no materials

had been delivered there by the company. On that day the defendant saw one Edwards, who (in the absence of McKinnon, who was then at the Coast), was acting manager of plaintiff company, and told him that his men were being held up and that he must have the lumber at once. Edwards told him that he would look the matter up and wire him later. Later on same day he telephoned defendant that no shipments had been made to Webb and that he could not make any before 13th May. Thereupon the defendant cancelled the order by telegraph. Still later, on the same day, Edwards telegraphed him stating that two cars had been shipped on 27th April and asking him to withdraw the cancellation which the defendant refused to do.

On receiving notice of the cancellation of the contract Edwards at once stopped work on the mill work which was then in course of preparation and shortly afterwards he approached defendant to get him to purchase the mill work already prepared at a valuation but as they could not agree upon the price, the sale was not made.

Defendant went to Webb on 17th May and found that two carloads of lumber consigned to him by plaintiff company had reached there but were held by the railway company for the payment of freight and duty amounting to about $400. He was not furnished with any invoice of their contents. He refused to pay the charges or take over the contents. There is no evidence as to when these charges were paid, but plaintiff company's counsel admitted that the duty on one car was not paid before 16th May, or upon the other before 25th June. Neither is there any evidence as to what became of the contents of the two cars, but the same counsel stated that he was informed that they were sold by the railway company to satisfy their charges.

McKinnon states that it was a term of the contract that plaintiff company was to supply the materials when ordered subject to delay by car shortage. The defendant denies that delay by car shortage was ever mentioned during the negotiations, and states that the first he ever heard of car shortage was on 24th April.

It is shewn that the delay in delivery was partially, though not entirely, due to car shortage. The delay in respect of the delivery of the third carload for Aldersyde was due entirely to the fact that plaintiff company had not the mill work prepared and ready for delivery. The non-delivery of the mill work at Webb was probably due to the same cause. At all events it was not shewn to be due to car shortage. I hold, however, that upon the evidence that it was not a term of the contract that plaintiff company was not to be liable for delay in delivery by reason of car shortage, and that it was a contract upon its part to deliver within a reasonable time.

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I also hold that, in view of the knowledge plaintiff company had at the time of entering into the contract, of the work for which the materials were required and of the time at which they would be required, it did not deliver the materials for the Aldersyde and Webb stations within a reasonable time after they were ordered and that, by reason of the non-delivery at the last-mentioned station, the defendant was entitled to cancel the contract. I am further of opinion that the conduct of Edwards, the plaintiff company's manager, after receiving the notice of cancellation was an acceptance thereof and an acknowledgment of defendant's right to cancel.

The defendant admits the delivery and receipt of materials to the amount of $1,913.97, and it was not shewn that any further deliveries were made. The materials in the two carloads delivered at Webb are charged as goods sold and delivered to the defendant, but I have already shewn that they were not delivered to him. From this sum the defendant is entitled to deduct $331.93, the amount paid by him for freight and duty on the Aldersyde cars. I hold that the plaintiff company is not entitled to claim the freight charges referred to in the statement of claim nor to recover any portion of the $1,975.98 claimed for mill work prepared by them under the contract of which defendant did not take delivery.

I give judgment for the plaintiff for the $1,582.05 paid into Court together with costs of suit up to the time of payment into Court. Defendant to be entitled to the costs of the action subsequent thereto.

Judgment accordingly.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, E. M. Meredith, and Magee, JJ. January 15, 1913.

1. JUDGMENT (§ II D—100)—EFFECT AND CONCLUSIVENESS—WHAT MATTERS CONCLUDED.

The plaintiff is not estopped by judgments in former actions, where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

[*Kennedy* v. *Kennedy* (1911), 24 O.L.R. 183; *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189, referred to. See also *Kennedy* v. *Kennedy*, 3 D.L.R. 536.]

2. PERPETUITIES (§ I—1)—IN GENERAL.

Any gift not of a charitable nature, the purpose of which is to tie up property for an indefinite term, is void as creating a perpetuity.

[*Kennedy* v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.]

3. WILLS (§ III G 4—139*a*)—RESTRAINTS UPON ALIENATION—PERPETUITIES.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used and

employed by them in their discretion in maintaining and keeping up, until sold and disposed of, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise.

[*Kennedy* v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.]

4. PERPETUITIES (§ I—1)—IN GENERAL—DETERMINING POINT OF TIME IN A WILL.

In considering a case in which the rule that a gift which creates or tends to create a perpetuity is void is invoked, it is not after-events that should be looked at, but the situation at the death of the testator; it must then be seen that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it is not, the gift is void; and the fact that subsequently the event did actually happen within the time, is of no consequence.

[*Kennedy* v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.]

5. WILLS (§ III B—80)—DEVISE AND LEGACY—DESCRIPTION OF BENEFICIARIES—WHEN ANNUITANT IS A "PECUNIARY LEGATEE."

A mere annuitant under a will may be a "pecuniary legatee," within the meaning of that term in the residuary clause, where no contrary intention appears in the will, and where in aid of such construction it appears that the will contains other bequests to which the term "pecuniary" could not apply.

6. WILLS (§ III E—105)—DEVISE AND LEGACY—WHAT PROPERTY PASSES—"TO MAINTAIN AND KEEP UP" A FAMILY RESIDENCE, EFFECT.

The discretion in a will "to maintain and keep up" a family residence will not ordinarily be construed to cover the support of any of the inmates of the residence.

7. WILLS (§ III—70)—DEVISE AND LEGACY—"DISCRETION" OF NAMED TRUSTEE—EXERCISE BY OTHERS.

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustee only, yet where the exercise of the discretion has not been clearly limited by the terms of the will, the broader construction may be given.

[*Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139; *Crawford* v. *Fenshaw*, [1891] 2 Ch. 261; Trustee Act, 1 Geo. V. (Ont.) ch. 26, sec. 4, subsec. 6, referred to.]

Statement

APPEAL by the defendant James H. Kennedy from the judgment of Teetzel, J., *Kennedy* v. *Kennedy*, 3 D.L.R. 536, 26 O. L.R. 105.

The judgment below was varied.

Argument

E. D. Armour, K.C., for the appellant. The judgment appealed from, in so far as it determined that the disposition of the residue of the estate for the maintenance and up-keep of the house devised to the appellant was void, and that the testator died intestate as to the whole of the residue, and in so far as it reserved the right to the next of kin to bring an action respecting the deed poll in the proceedings mentioned, in case the judgment should not be affirmed, was erroneous and ought to be reversed. In *Kennedy* v. *Kennedy* (1909), 13 O.W.R. 984, an action brought by the defendant Joseph H. Kennedy against the appellant and the other parties to this action, except the Suydam Realty Company Limited and Henri Suydam, in which Joseph H. Kennedy claimed, amongst other things, as heir-at-law of the testator,

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that the residuary disposition was void, and that the testator died intestate as to the residue, it was adjudged that the plaintiff in that action was not entitled as heir-at-law or next of kin, and that the testator did not die intestate, and the action was dismissed, and the question of the validity of the residuary disposition was and is by that judgment *res judicata*: *Lemm* v. *Mitchell*, [1912] A.C. 400; *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615; Halsbury's Laws of England, vol. 13, p. 333, sec. 466. In any event, the residuary disposition for the maintenance and up-keep of the house is valid, because it provides for a spending of the capital from time to time, and does not prohibit alienation of the property or render it inalienable in any sense, and does not create or tend to create a perpetuity: Marsden's Law of Perpetuities, p. 83, and cases there cited. The authorities upon which Teetzel, J., decided the case, were cases in which income alone was to be spent, and the capital was taken out of commerce and rendered inalienable, or alienation was prohibited; whereas, in this case, no provision or direction is made for retaining the capital indefinitely or spending only the income. The testator intended to and did create a trust of the residue in favour of the appellant, the object mentioned being only the motive which actuated him; and such trust is not within the rule against perpetuities, even if it otherwise applied; and the executor held the residue for discharge of the trust immediately upon the death of the testator. If the true interpretation of the will is, that capital and income undisposed of from time to time are to be accumulated, then such direction to accumulate is valid for twenty-one years from the testator's death. The learned Judge was wrong in reserving a right to bring an action to challenge the good faith of the executor in making the deed poll, because it had been pleaded in a prior action of *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189, in which all the parties to this original action, except Henri Suydam, were parties, and all parties were then informed of it, and because it was again pleaded in this action, and no attack was made upon it, and no pleading or suggestion of bad faith was made respecting it; and the plaintiff should have raised all his claims and had them tried in this action. The amount of the expenditure, in any event, is within the discretion of the executor, and is not subject to control by the Court unless fraud is proved, and none was suggested.

James Bicknell, K.C., for the respondents David Kennedy, Robert Kennedy, and Joseph H. Kennedy. The judgment of Teetzel, J., is right, except in so far as he dismissed the action against the Suydam Realty Company Limited, and ought to be affirmed. The disposition of the residue infringes the rule as to perpetuities, and is, therefore, void. It involves the tying up

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of the residue or its proceeds for an indefinite period for the maintenance and keeping-up of the house and premises by the will devised to the appellant, and, therefore, tends to a perpetuity. The disposition of the residue is not a gift, devise, or bequest to the appellant personally, but is a perpetual gift for the benefit of other real property; and, not being a gift for a charity, is void: *Thomson* v. *Shakespear* (1860), 1 DeG. F. & J. 399; *Carne* v. *Long* (1860), 2 DeG. F. & J. 75; *Yeap Chea Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, at p. 394; *In re Dutton* (1878), 4 Ex. D. 54, at p. 58; *Goodman* v. *Mayor, etc., of Saltash* (1882), 7 App. Cas. 633, 651; *Re Holburne, Coates* v. *Mackillop* (1885), 53 L.T.R. 212, at p. 215; *Hoare* v. *Hoare* (1887), 56 L.T.R. 147, at p. 149; *In re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110; *In re Christchurch Inclosure Act* (1888), 38 Ch. D. 520; *In re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649. Even if the disposition of the residue was not void, the appellant has no right to appropriate the whole of it, but must account to the estate for such part of it as is not required for the maintenance and keeping-up of the house and premises. The appellant, being a trustee, acted improperly in assuming to appoint to himself the whole of the residue. The deed poll executed by the appellant was and is void and a fraud upon the rights of the other parties interested in the estate. The appellant proved no judgment entitling him to rely as against the respondents upon the defence of *res judicata*. By way of cross-appeal, it is submitted that the learned Judge should have declared the deed poll void and should have directed administration of the estate. The learned Judge was wrong in refusing to admit evidence of the improvidence of the sale to the Suydam Realty Company Limited. The disposition of the residue being void, the power of sale for such purpose was and is also void. The sale to the Suydam Realty Company Limited should have been set aside, and the appellant should have been restrained from carrying out that sale.

A. J. Russell Snow, K.C., for the respondent Madeline Kennedy. In a former action brought by the respondent Madeline Kennedy against this appellant for the construction of the will in question, it was contended by the learned counsel for the appellant that Madeline Kennedy could not maintain that action because the residence had not been and might never be sold, and that, therefore, the bequest of the residue to her was void as a breach of the rule against perpetuities, and with that contention the learned Judge agreed, and dismissed Madeline Kennedy's action: *Kennedy* v. *Kennedy* (1911), 24 O.L.R. 183. Assuming that this decision is correct, I submit that the devise and bequest, to the executors and trustees mentioned in the will, of the residue, to be used by them in

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their discretion in so far as it might go for the maintenance of the testator's house and premises bequeathed to his son James H. Kennedy in the manner in which it had been kept by the testator, is also void for the same reason, and also for these reasons: (a) because there is no trust in favour of James H. Kennedy by this clause; (b) because there is no *cestui que trust* and no person to enforce the trust; (c) because there is no fixed sum to be used for the maintenance and keeping-up of the residence; (d) because the appellant has no interest in the residue that can be alienated; (e) because of uncertainty as to time and general indefiniteness. In every trust there is an implied obligation on the part of the trustee to invest the capital moneys belonging to the estate, and no express provision is required in any trust for this purpose; and, therefore, the income is tied up and taken out of commerce indefinitely, as well as the capital. I further submit that the learned Judge was right in reserving the right to bring an action to challenge the good faith of the executor in making the deed poll referred to, for the reason that the respondents were taken by surprise at the trial when this deed poll was first produced as an exhibit, no mention of it having been made in the pleadings.

T. P. Galt, K.C., for the respondent Georgia Peake. The judgment of Teetzel, J., holding that the disposition of the residue of the estate for the maintenance and up-keep of the house devised to the appellant was void, and that the testator died intestate as to the whole of the residue, is correct and should be upheld, for the reasons given by the learned Judge. The question involved in this action was not raised or dealt with in the action brought by Joseph H. Kennedy against the appellant and others, as alleged by the appellant, and a perusal of the judgment of Riddell, J., clearly shews that no such question was in contemplation by the learned Judge or in the minds of the parties, and the dismissal of the action was on entirely different grounds, and in no way interferes with the right of the plaintiff and his brothers and sisters to maintain that the bequest in the last paragraph of the testator's will is void. The bequest of the residue of the testator's estate to be used and employed in the maintenance and up-keep of the house was void as contravening the rule relating to perpetuities: Jarman on Wills, 6th ed., p. 278; Theobald's Law of Wills, 6th ed., p. 577; *Lloyd* v. *Lloyd* (1852), 2 Sim. N.S. 255, at p. 265. The entire residue of the estate, except so much as, in the honest discretion of the trustees, it is necessary to expend for the up-keep and maintenance of the residue, is tied up and taken from commerce within the meaning of the cases. The whole of the fund must be held for such purpose until the residence be sold; and, under the terms of the will, the residence may not be sold for an indefinite

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period. The execution by the trustee of the deed poll, whereby he sought to appropriate the entire fund to his own use and benefit, was entirely inoperative, and could not affect the rights of the parties. He was bound to administer the fund properly, expending only such sums as might be necessary for the maintenance and upkeep of the house, and it is open to the Court to direct an inquiry as to such expenditures: *Juler* v. *Juler* (1860), 29 Beav. 34; *Mordaunt* v. *Hussey* (1798), 4 Ves. 117.

W. A. Proudfoot, for the respondent E. W. J. Owens, adopted the argument of *Bicknell*, K.C.

Armour, in reply, referred to *In re Macklem and Commissioners of Niagara Falls Park* (1897), 14 A.R. 20.

GARROW, J.A.

January 15, 1913. GARROW, J.A.:—The action was brought to obtain the construction of the last will of the late David Kennedy, who died at the city of Toronto on the 17th February, 1906; to set aside a sale of part of the residuary estate to the defendants Henri Suydam and the Suydam Realty Company Limited; and for the administration by the Court of the estate.

At the trial, the action as to the defendants Henri Suydam and the Suydam Realty Company was dismissed with costs.

The estate, at the death of the testator, apparently consisted of his residence, worth about $55,000, the lands sold to the Suydam Realty Company for $97,000, other lands worth about $20,000, and personal property to the value of about $30,000. No evidence was given of any charges or incumbrances. The testator was apparently of the impression that he also owned the property at Lambton Mills known as "the Foxwell estate." This turned out to be a mistake. He had only been a mortgagee, and the foreclosure was opened up, with the result that the estate lost the property, and the son Joseph Hilton Kennedy, to whom the Foxwell estate was devised, lost the gift intended for him by his father.

The testator devised the residence to his son James, the appellant, in fee simple, subject to certain charges, as to maintenance and residence therein, in favour of his two granddaughters Gertrude Maude Foxwell and Annie Maude Hamilton. He bequeathed to these granddaughters and to his daughter Margaret M. Down and his granddaughter Madeline Kennedy each the sum of $5,000. He also gave to his son David, the plaintiff, an annuity of $400 charged upon the estate generally. The other legacies and bequests, except those contained in the residuary clause, were of specific articles of trifling value, and need not be further mentioned.

The residuary clause, the construction of which is now in question here, is as follows:—

"The rest residue and remainder of my estate both real and

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personal I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them in so far as it may go to the maintenance and keeping up my house and premises herein bequeathed to my son James Harold Kennedy with full power and authority to them to make sales of any real estate upon such terms and conditions and otherwise as may be expedient and to execute all deeds documents and other papers necessary for the sale of same and to make title thereto to any purchaser thereof and the proceeds of such sales to devote as in their discretion or in the discretion of a majority of them may seem meet and necessary to keep up and maintain my said residence in the manner in which it has been heretofore kept and maintained and if for any reason it should be necessary that the said residence should be sold and disposed of I direct upon any such sale being completed that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

The "executor executrices and trustees aforesaid," therein referred to, are the two granddaughters, Gertrude Maude Foxwell and Annie Maude Hamilton, legatees, and the appellant, James Harold Kennedy, to whom the residence was devised.

The two grandchildren disclaimed. Probate of the will was granted to the appellant, and he is now, in consequence, sole executor and trustee. And, claiming that the whole of the residue was appropriated by the will for the maintenance of the residence devised to him, he, by an instrument called a deed poll, dated the 20th January, 1911, in professed exercise of the power and discretion given to him by the will, limited and appointed to himself the whole residuary estate, subject only to the payment of the annuity of $400 to the plaintiff, and to any other charges upon the estate, if any, which should thereafter be found to exist.

The residuary clause before set out has already given rise to more than one action, with the result that one of the defences now raised is estoppel by *res judicata*.

In *Kennedy* v. *Kennedy*, 13 O.W.R. 984, the first of these actions, the plaintiff was a son of the testator, and was the devisee of the Foxwell estate before-mentioned. He claimed to be a pecuniary legatee, within the meaning of the residuary clause, owing to his failure to obtain the Foxwell estate devised to him. He also asked that the will might be interpreted and the rights of all parties declared. But all that was adjudged and determined by Riddell, J., was, that the then plaintiff had no right at that time to interfere with the estate, and the action was dismissed without construing the will. Under these circumstances, it is clear that no estoppel arises by reason of the judgment in that action.

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In *Kennedy* v. *Kennedy*, 24 O.L.R. 183, the plaintiff was a pecuniary legatee, but not one of the next of kin. And what was determined by Latchford, J., was, that the bequest in the residuary clause to pecuniary legatees was void under the rule against perpetuities, and that the plaintiff could not, for that reason, maintain the action. The plaintiff also sought to set up a claim apparently obtained after action brought, as the assignee of one of the next of kin, under which she would have been entitled to attack the whole clause. This was refused, but the judgment was also stated to be without prejudice to any subsequent action. That judgment was simply affirmed by a Divisional Court.

In *Foxwell* v. *Kennedy*, 24 O.L.R. 189, the status of the plaintiff was precisely that of the plaintiff in the *Kennedy* v. *Kennedy* case next before-mentioned; and Teetzel, J., simply followed *pro formâ* the judgment of Latchford, J., which the Divisional Court affirmed.

In one of the cases referred to by the learned counsel for the appellant, *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615, Lord Macnaghten, at p. 622, says: "The result is that it appears that the point raised by this appeal has already been adjudicated upon. There is here, as there was in the case of *Peareth* v. *Marriott* (1882), 22 Ch. D. 182, to which Mr. Levett referred, a decree *inter partes* on the very same subject."

That could not truthfully be said here. The "very same subject" might have been determined in the first, and only in the first, of the three actions to which I have referred, but was deliberately and intentionally not dealt with. See also *Moss* v. *Anglo-Egyptian Navigation Co.* (1865), L.R. 1 Ch. 108, at p. 115; *Barrs* v. *Jackson* (1842), 1 Y. & C. Ch. 585, and the remarks upon it of Lord Selborne in *The Queen* v. *Hutchings* (1881), 6 Q.B.D. 300, 304.

Mr. Justice Teetzel's construction of the residuary clause is as follows: "I think it is plain from all the provisions of the will with reference to his residence that the testator's scheme was to have the same maintained as a family residence for these two young ladies as long as they lived and for his son James Harold Kennedy and his family and descendants or whomsoever James Harold Kennedy might will or otherwise give the said residence to, and that as to such residence it should until sold or disposed of be kept up and maintained by the trustees and those succeeding them in the trust in the manner in which it had been kept up and maintained by him." And he reached the conclusion, after evidently very careful consideration and a reference to a number of cases upon the subject, that the gift in question is void as creating or tending to create a perpetuity.

The appellant complains of this construction, and contends

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that by virtue of the clause and of the deed poll he is entitled to the whole of the residuary estate, subject only to the plaintiff's annuity, and to any other charges upon the estate, if any should exist.

The rule of construction in cases arising under this well-known rule of law, as well as of statutory provision, is well-established, that in considering a case in which the rule is invoked it is not after-events which should be looked at, but the situation at the beginning, that is, at the death of the testator. In other words, one must be able then to see that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it does not, the gift is void; and the fact that subsequently the event did actually happen within the time is of no consequence.

But, before further considering the legal aspect, it is proper, I think, to try first to find, if possible, what the testator really meant; for it must, after all, be to the true meaning that the law is to be applied, either to save or to destroy. And this meaning is to be derived from the words of the will itself in the light of the surrounding circumstances. The Court is at liberty to put itself as nearly as possible in the position of the testator at the time he made the will, and to consider all the material facts and circumstances known to him. And all the facts and circumstances respecting persons or property to which the will relates are legitimate, and may even be necessary evidence to enable the meaning and application of the testator's words to be understood, *though not for the purpose of altering or adding to them.* See the cases collected in Beale's Rules of Legal Interpretation, 3rd ed., pp. 526 *et seq.* These latter words are highly important, for the question is not what the testator meant as distinguished from what his words express—but, simply, what is the meaning of his words in the light of the surrounding circumstances?

The mere language of the clause does not seem to be very obscure. The testator gives the whole of his residuary estate, amounting, it is said, to something over $100,000, to the three named executors and trustees in trust: (1) to sell and get in; (2) to apply the proceeds, including the principal as well as the interest, if any, in their discretion or in the discretion of a majority of them, so far as it will go, in maintaining and keeping up the residence; and (3), in case a sale should from any cause become necessary and should take place, to divide what then remained, in equal proportions, among the pecuniary legatees named in the will.

One apparent obscurity may be, whether the plaintiff, as an annuitant only, would be a "pecuniary legatee," within the meaning of that term in the clause, which should, I think, be resolved in the affirmative, there being no contrary in-

tention indicated in the will, which contains more than one other bequest to which the term "pecuniary" could not apply. See *Gaskin* v. *Rogers* (1866), L.R. 2 Eq. 284, at p. 291, where the general rule is stated.

A minor obscurity is perhaps involved in the nature and extent of the "maintenance and keeping-up" which the testator intended. But, even as to this, the testator has supplied a guide by the use of the words "in the manner in which it has been heretofore kept up and maintained."

But, by no reasonable interpretation that I can conceive of, could the direction to maintain and keep up be stretched so as to include, not merely the house and premises, but also the inmates, which is the contention of the appellant; in other words, he contends that he and his family are entitled to their living expenses, as well as to the maintenance and up-keeping of the premises, at the expense of the residuary estate. When the testator intended to give personal maintenance, as in the case of the two granddaughters, he was careful to say so.

What is one of the really mysterious things in this very extraordinary clause is, that so large a sum should have been devoted to such a comparatively trifling purpose—a purpose for which the interest alone, upon any reasonable investment of the principal, one would think, would have been ample. And this expenditure was to continue without any limit as to time being stated, except such as is contained in the words "if for any reason it should be necessary that the said residence should be sold and disposed of," upon the happening of which event, if it ever happened, the balance then remaining was directed to go to the pecuniary legatees. That event, a sale, was, therefore, clearly made the point for the determination, not only of the prior interest, whatever it is, but for the commencement of the subsequent interests upon the final distribution. If, when it arrived, the whole fund had been expended, the pecuniary legatees would, of course, get nothing; for the whole might, under the terms of the bequest, be expended for the single purpose of maintaining and keeping up the residence. What was to happen if it should not become necessary to sell is in no way mentioned nor in the slightest degree throughout the will indicated. The testator appears to have had but the one event or possibility in mind, and that evidently not one which he anticipated was certain ever to happen; for he says, "if it should became necessary to sell." Necessary for whom? Primarily, in a will, these words would imply, necessary for the executors to sell in order properly to administer the estate. But it is not shewn that there were debts or prior charges of any kind which could reasonably have induced the testator to believe that such a necessity would ever arise. The words, however, are perhaps capable of the

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construction that the necessity might come from James's circumstances also, after the decease of the testator. If he sold, as of course he might, the two granddaughters would still be entitled in respect of their charges upon the property for board, maintenance, and residence, but, in case of a sale, are given no other special consideration over the other pecuniary legatees. This then is the language of the will; and, whatever doubt there may be in applying it to the circumstances, it is not caused by any difficulty in understanding the words, for they are perfectly plain.

Primâ facie, the words mean a provision, indefinite as to time, for the maintenance and up-keeping of the property devised to James, determinable only upon an event which may occur at any time, however remote, or may never occur, and in the meantime the large fund in question is to be tied up, except for the paltry sum which, in the reasonable exercise of their discretion, the trustees are empowered to expend from time to time for that purpose.

Two other periods may be, and are, suggested for the determination of the period of maintenance so as to bring it within the rule: one, the lifetime of the trustees and the survivor of them; the other, the life of James, the devisee for whose benefit the provision in question primarily enures. It is undoubtedly the rule that a trustee cannot delegate to another a discretion vested in him alone. The same would, of course, be true of a body of trustees consisting of two or more. A testator or settlor could certainly so express a discretion with respect to the trust property as to make it exercisable only by the named trustee or trustees and by no one else. But that, in my opinion, has not been done in this case.

The words of the bequest are: "I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them . . . with full power and authority to them to make sales," etc. In *In re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139, Farwell, J., held that words not unlike these were not sufficient to confine the trust to the named trustees, who were also the executors there, as here, but that the trust was annexed to the office, and, including the discretion, could be exercised by the trustee for the time being. A somewhat similar decision by the Court of Appeal, followed by Farwell, J., is *Crawford* v. *Fenshaw*, [1891] 2 Ch. 261, in which Bowen, L.J. (pp. 267-8), uses this language: "As a testator is free to do what he pleases, it seems to me that even if you find in a will a power given to executors in their official capacity there may be such an indication of reliance on the just judgment of the individuals as would make it impossible, if one or more renounced, for the others to

act; but I think such reliance must be expressed in clear and apt language."

See, also, the Trustee Act, 1 Geo. V. ch. 26, sec. 4, sub-sec. (6), by virtue of which a new trustee is vested upon his appointment with all the powers, authorities *and discretions* as if he had been originally appointed a trustee, subject, of course, to any express provision to the contrary in the instrument creating the trust.

Nor am I able to derive from the language any evidence of an intention to confine the benefit to the life of the devisee, James, or of him and the two granddaughters, or of any of the three. The great fault, as it seems to me, of both the suggested constructions is, that they ignore the circumstance, clearly defined by the testator himself, that the final distribution should take place only upon a sale by some one.

In the Divisional Court, in the cases before referred to, in 24 O.L.R. 183 and 189, the conclusion was arrived at that the bequests to the pecuniary legatees were void because of the remoteness and uncertainty of the event upon which they were to become entitled. If that was a correct conclusion in those cases, it is also the proper conclusion here; and, after much consideration, I am not prepared to say that it is not, much as I would prefer to uphold the clause if consistently with legal principles it could be done.

A testator must express himself in language which is capable of being understood and applied to the subject-matter, and he must keep within the rules of law which regulate the power of disposition. If he fails in either particular—and in this case he, in my opinion, does, in one or the other, and probably in both—the bequest is void.

Under these circumstances, the deed poll executed in his own favour by the appellant is of no effect, and should have been so declared as a necessary corollary from the judgment.

Whether, in any event, it could have been upheld need not be considered, for it certainly falls with the construction applied by Teetzel, J., with which I now concur.

Administration of the estate by the Court is asked; and, considering all the circumstances, and especially the large amount of litigation which has already taken place over this will, which it is very desirable should not be longer continued, I think the request should have been and should now be granted. And the appellant should be ordered to bring into Court the proceeds of the recent sale to the Suydam Realty Company Limited, to abide the further order of the Court. Subsequent dispositions of the residuary estate will, of course, take place only under the direction of the Court.

The plaintiff is, of course, entitled under the terms of the

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will to a charge in respect of his annuity upon the residuary estate, which, I understand, is ample for that purpose.

I do not disturb the order as to costs made by Teetzel, J.; and the costs of the appeal of all parties may also, under the circumstances, be paid out of the residuary estate.

Further directions and the subsequent costs should, I think, be reserved.

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

MACLAREN and MAGEE, JJ.A., concurred.

Meredith, J.A. (dissenting)

MEREDITH, J.A. (dissenting):—If the clause of the will in question be ambiguous, if it be equally open to an interpretation under which it would be valid, and one under which it would be void, in law, that interpretation which would give it validity should be applied to it; of course, testators have no intention to make invalid wills, but such wills may be made in ignorance of the law.

However, in this case, if no such question of validity or invalidity arose, I would have no difficulty in applying, and would apply, to it that interpretation which is not offensive to the rule against perpetuities.

The whole will must be looked at, and it may be illumined by material circumstances existing at the time the will was made: and, so considering the question, I can find no good reason for holding that there was any intention to tie up the residuary estate in perpetuity in any event, or to tie it up in any event for longer than three lives, at the most, then in being.

The sole purpose, to be found within the will and the circumstances, for the gift of this residue of the man's estate was the maintenance and keeping up of his residence for the benefit of the legatees and trustees of his will—Foxwell, Hamilton, and his son James—who were to reside there together; such maintenance and keeping up of such residence to be "in the manner in which it has been heretofore kept and maintained." By the will the "dwelling-house and premises" are devised to the son James, and the other two are each given a right to reside and be maintained there, a right which by the will is made a charge upon this property; and it is quite plain that the continuance of a home there during their lives, after his death, as it had been in his life, but with his son James as head of the household, was a dominant factor in the testator's mind in providing for the maintenance and upkeeping of the home. Why then carry the period of such maintenance beyond the life of the longer liver of the two women, or at the utmost the longest liver of the three beneficiaries?

The learned trial Judge seems to me to have fallen into the plain and fatal error of assuming that the maintenance was to

continue until the homestead should be sold, and that the sale provided for in the will might be at any period, no matter how remote, or never. To the contrary, it seems to me that this sale was to be, if at all, during the lives of those who were given the right of residence there, or the life of the survivor of them. What reason can be advanced for any other than the latter conclusion? The words of the will do not require, as the learned Judge seemed to have thought, that the trust should continue until there should be a sale; that which it really does provide for is a possible sale whilst the rights of residence and maintenance are in force; the trust shall continue during the lives of these beneficiaries, unless in the meantime it may become necessary to sell the property, in which case they are to have a share of the residue absolutely, instead of maintenance out of it. Why maintain and keep up the residence for the benefit of those the testator knew not, and for whom, if he had known them, it might be that a provision for their benefit would be the last thing he would wish to make—even the devisees of his devisee might be intolerably objectionable; and yet the holding is, that the gift is in perpetuity, because there might never be a sale; a thing which, upon this will, it would never have occurred to me to be possible. Surely what the man meant was this: "Keep the house going, as in my lifetime, for the benefit of you three, and use the residue of my estate, 'as far as it will go,' for that purpose; but, if you cannot do that, if it become 'necessary' to sell, then give to the women a share of the residue, in lieu of the maintenance they were to have had." The interpretation which has been given to the will means that the testator's intention was, that, in case of a sale, say, an hundred years hence, then the residue of the residue was to be divided, which seems to me to be obviously inconceivable. What the testator surely meant was a division of what was left of the residue, so that their share of it would go to the women in their lifetime. Unless I attribute to the testator something very like insanity, how can I consider that he directed the corpus of, as well as income from, this large residuary estate, to be devoted to the repair merely of the homestead, "in so far as it may go?"

It is true that, thus looked at, no provision is made for the passing of any part of the residue to any one after the death of the two women without a sale; but why should there be? Is there any possibility that any of it would be left then? The corpus of the residuary estate, not merely the income from it, was to be expended, and expended in the discretion of these three beneficiaries or a majority of them; an expenditure which, the testator foresaw, might not last their lives, as his words "in so far as it may go" shew.

There is, of course, no difficulty in suggesting reasons why

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sale might become necessary in the lifetime of the three; and it may be that, whatever may be said as to that, there is no restraint upon any alienation of this property intended in anything said in the will.

Finding, therefore, nothing in the will to indicate an intention that the trust should, or might be, one in perpetuity, but, on the contrary, finding everything pointing to its continuance at longest during the lives of the beneficiaries, with a provision for its sooner ending, I can come to no other conclusion than that the ruling of the trial Judge, that this provision of the will is void because offensive to the rule against perpetuities, ought to be reversed.

I also think that the discretion to be exercised regarding maintenance was to be that of the persons for whose benefit the residence was to be maintained, individually, or a majority of them, and not that of any executor of the will or administrator of the estate through the ages which it has been held that this trust may continue. These women's rights of residence and maintenance were specially well-guarded by the testator; and one very important way of so guarding them was in giving to each a share of this discretion. But, in any case, it is a trust to be exercised in good faith, from time to time, of which the impeached deed is, in my opinion, a flagrant breach; a deed which should accordingly be set aside.

But it is said that estoppel prevents any interpretation of the will now; for the appellant, that the respondents are estopped from questioning the validity of the gift; and for the respondents, that the appellant is estopped from denying its invalidity. If both are estopped, in the sense that each has a judgment against the other sustaining his point, there seems to be nothing for it but to begin interpretation over again.

However, I find no estoppel in either of the former actions; the judgment in the one was on a motion for judgment, on the ground that the plaintiff had no right to maintain the action because until the homestead was sold she had no such right as she claimed; and, as I understand the case, the motion was successful on that ground, whatever may have been said regarding her case in other respects. Whilst in the other action these questions were not raised, and need not have been, and were not dealt with in any way.

I would allow the appeal, and direct that judgment be entered in accordance with the views I have expressed; and would make no order as to costs of this further litigation over an already too much litigated subject; in which success and want of success are pretty much divided.

Judgment below varied as stated by GARROW, J.A.

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May 9

Ontario Supreme Court. Trial before Kelly, J., and a jury. May 9, 1913.

1. PRINCIPAL AND AGENT (§ II C—20)—MALICIOUS PROSECUTION—CRIMINAL ACTION—INSTITUTION BY AGENT—SCOPE OF AUTHORITY.

A person is not the agent of a company so as to render it liable for causing the arrest of a salesman employed by him on a charge of converting property of the company to his own use, where the only authorization of such person was the agent's contract of employment, which provided that he should employ a reasonable number of salesmen, who were to enter into contracts directly with the company and with whom all their dealings were to be directly conducted, notwithstanding the agent by the terms of his contract with the company was required to instruct them as to their duties and to assist them in their work, and notwithstanding a stipulation therein that the agent should be answerable to the company for the acts of the salesmen employed by him, and to bear any charge-backs or advances that the company might make in the salesmen's accounts, or which the company should be unable to collect from them, as well as for all goods belonging to the company that might be in the possession of such salesmen.

2. PRINCIPAL AND AGENT (§ II A—10)—CRIMINAL ACTIONS—AGENT'S IMPLIED POWER TO INSTITUTE ON BEHALF OF PRINCIPAL.

Authority of an agent to cause the arrest of a person on behalf of his principal may be implied in cases of emergency where the facts shew that the exigencies of the occasion require prompt action in behalf of the principal.

[*Bank of New South Wales* v. *Owston*, L.R. 4 A.C. 270, referred to.]

3. PRINCIPAL AND AGENT (§ II A—10)—CRIMINAL ACTION—INSTITUTION BY AGENT—EMERGENCY JUSTIFYING.

The existence of such an emergency or exigency as will justify an agent in causing the arrest and prosecution of a person on behalf of the agent's principal, cannot be implied where the arrest was caused many months after the commission of an offence against the principal.

4. EVIDENCE (§ II E 4—162) — MALICIOUS PROSECUTION — AUTHORITY OF AGENT TO INSTITUTE CRIMINAL ACTION ON BEHALF OF PRINCIPAL—ONUS TO SHEW.

In order that the plaintiff may recover against a company in an action for malicious prosecution for an arrest caused by its agent, the onus rests upon the plaintiff to give some evidence to justify a finding that from the nature of the agent's duties or the terms of his employment he had authority to institute the prosecution.

[*Thomas* v. *Can. Pac. R. Co.*, and *Bush* v. *Can. Pac. R. Co.*, 14 O.L.R. 55, followed.]

Statement

AN action for malicious prosecution.

Judgment for plaintiff as against the individual defendant, and action dismissed against the defendant company.

I. Hilliard, K.C., and *W. B. Lawson*, K.C., for the plaintiff.

G. F. Shepley, K.C., and *G. W. Mason*, for the defendant company.

No one appeared for the defendant Dent.

Kelly, J.

KELLY, J.:—The plaintiff, in 1910 and the early part of 1911, was in the employment of the defendant company as an agent for the sale of scales. The defendant company's chief

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place of business is in the city of Detroit. The defendant Dent was also at that time in the employment of defendant company as a salesman.

About the end of April, 1912, the plaintiff, on the information of Dent (who therein professed to act as agent and representative of the defendant company) was arrested at Ottawa on a charge of having converted to his own use a scales which he had taken in exchange and as part payment for a scales of the defendant company which he had sold to Stone & Fisher, of Iroquois.

The arrest took place about 9 o'clock in the forenoon, and he remained in custody until about 4 o'clock in the afternoon of the next day. He was taken to Iroquois, where, on an investigation before magistrates, he was acquitted. Dent was then, at his own request, bound over to prosecute the plaintiff at the Sessions, and such prosecution took place later on at Cornwall. There also the plaintiff was acquitted.

The sale of the scales by the plaintiff—for conversion of which the charge was laid—was made a year or thereabouts prior to the arrest.

The written contract of employment between the plaintiff and the defendant company bears date the 12th January, 1910. In October and November of that year, dissatisfaction having arisen about the mode of dealing by the plaintiff and other agents, owing to scales taken in exchange not having been satisfactorily accounted for or returned, the company, in correspondence with the plaintiff, made it a condition that all scales taken in exchange for scales sold by the plaintiff should be immediately returned to them, and in the same correspondence a new scale of payment to the plaintiff was fixed. The plaintiff evidently adopted this as a term of his agreement with the company, and lived up to it, and returned all scales taken in exchange by him till the sale to Stone & Fisher about April, 1911, when he retained the scales taken in exchange from them; and though, in reporting to the company the making of this sale, he informed them that he was forwarding the old scales taken in exchange, he failed to do so; and, later on, he sold it and retained the money received therefor. He left the company's employment in or about September, 1911.

Some question or accounts between the plaintiff and the company arose, and interviews took place between the plaintiff and Dent, following which Dent consulted Mr. Honeywell, a solicitor in Ottawa, who had previously had some knowledge of the matter. Though he (Honeywell) says that he had general information as to the effect of the agreements between the plaintiff and the company and the correspondence which took place in relation to the terms of employment, these documents

were not submitted to him at the time he was consulted by Dent. He also says that, being of the opinion from what was laid before him that the plaintiff was guilty of a criminal offence, he referred Dent to Mr. Ritchie, the Crown Attorney, whom Dent then consulted. No papers or documents were laid before Mr. Ritchie; but, on Dent's statement that the old scales was the property of the company, and that the plaintiff had sold it and pocketed the money, he advised that he was subject to prosecution. The arrest then followed.

At the close of the plaintiff's case, counsel for the company asked for a nonsuit. I was of opinion that there was sufficient evidence to go to the jury as to the action taken by Dent, but I reserved the question of the liability of the company for the acts of their co-defendant, if the jury should find in favour of the plaintiff. The verdict as returned by the jury (which of their own motion they put in writing) was as follows: "We as jury consider that Mr. Dent did not disclose the facts properly to Mr. Ritchie. A. No. We as jury agree that the plaintiff is entitled to $1,200."

On this finding, I think that the plaintiff is entitled to judgment as against Dent.

Dealing with the question of the liabiilty of the defendant company, I am unable to see that there was any evidence that Dent had authority, express or implied, from the company to prosecute or arrest. His powers and duties as agent for the company are set forth in the printed agreement of employment between them dated the 15th January, 1910, and which is in the same form as the original agreement between the plaintiff and the company, except that the agreement with Dent contains a provision that he should employ a reasonable number of salesmen, whose contracts would be made with the company; that he (Dent) was to instruct these salesmen and give them assistance in doing their work, and be held responsible by the company for their acts and for any charge-backs or advances which might be made in their accounts, or which the company would be unable to collect from the salesmen, as well as for scales and other goods which might be in their hands. The company were also to keep the accounts with the salesmen, and payments to them were to be made direct by the company.

In the *Bank of New South Wales* v. *Owston*, L.R. 4 A.C. 270, where a number of cases touching upon the liability of an employer for prosecution by an employee or officer were considered, it is said (at 288):—

> The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge would not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly

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on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man whom he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

Authority may be implied in cases of emergency, when the exigency of the occasion requires it; but authority in such a case is a limited one; and, before it can arise, a state of facts must exist shewing that such exigency is present, or from which it may reasonably be supposed to be present.

In the present case there is no evidence whatever of the existence of any such emergency or exigency. Many months had elapsed between the commission of the act for which the plaintiff was prosecuted and the time of the arrest; and, for nearly all that period, Dent had knowledge of what had taken place. For a considerable time prior to the arrest, the plaintiff was employed in and around Ottawa, and there were no circumstances or conditions to necessitate immediate action in order to preserve or protect the company's property or interests, or from which it might be inferred that the opportunity to arrest the accused might be lost if the necessary time were taken to refer the matter to the company. There is nothing from which an inference of special authority could be drawn.

We are then to consider whether Dent had authority, either expressly or within the general scope of his employment. There is an absence of evidence of any express authority from the company to prosecute the plaintiff, or to prosecute any other person, in respect of any dealings or transactions with the company, or indicating that the company had knowledge that a prosecution was about to take place or was being carried on, or that Dent contemplated a prosecution; nor is there any evidence that the company approved, ratified, or condoned Dent's action.

This part of the case is, therefore, narrowed down to a consideration of the question whether, in the scope of his duties, Dent had general authority from the company to arrest and prosecute, where no emergency or exigency, such as above-mentioned, existed.

It is of some importance to bear in mind that the course of dealing, as set forth in the written agreements, required the plaintiff to make returns of money and of scales taken in exchange, not to Dent, but to the company; and that payments of moneys coming to the plaintiff were to be made direct by the company to the plaintiff, and not through Dent; and, according to the plaintiff's own uncontradicted evidence, the company shipped scales to him direct, and not through Dent. These

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circumstances indicate the limited character of Dent's authority.

I fail to see any evidence of a general authority to cause the plaintiff's arrest or to prosecute, or that Dent's duties involved in their performance the putting of the criminal law in motion. This is not a case of the agent doing an authorised act in an unauthorised manner, but of doing an act not authorised, either expressly or impliedly, by his employers.

The master's liability for the unauthorised torts of his servant is limited to unauthorised modes of doing authorised acts: Clerk & Lindsell's Law of Torts, Can. ed. (1909), p. 75.

The question of such authority has been dealt with over and over again in such cases as *Bank of New South Wales* v. *Owston*, cited above: *Abrahams* v. *Deakin*, [1891] 1 Q.B. 516; *Hanson* v. *Waller*, [1901] 1 K.B. 390; *Stedman* v. *Baker*, 12 Times L.R. 451; and also in two cases—comparatively recent—in our own Courts: *Thomas* v. *Canadian Pacific R. Co.* and *Bush* v. *Canadian Pacific R. Co.*, 14 O.L.R. 55, in which a number of the English cases are reviewed.

The onus was on the plaintiff to give some evidence which would justify the jury in finding that, from the nature of his duties or the terms of his employment, Dent had authority to institute these criminal proceedings.

In my view, he has not satisfied the obligation to give such evidence; and, following the reasoning and the conclusions arrived at in *Thomas* v. *Canadian Pacific R. Co.* and *Bush* v. *Canadian Pacific R. Co.*, 14 O.L.R. 55, and the authorities on which the judgment in these cases is based, I can only conclude that as against the defendant company the plaintiff has no right to succeed.

Judgment will, therefore, be in favour of the plaintiff as against the defendant Dent for $1,200 and costs, and dismissing the action as against the defendant company with costs.

Judgment accordingly.

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April 1.

Alberta Supreme Court, Stuart, J. April 1, 1913.

1. SOLICITORS (§ II B—26)—UNSUED CLAIM—AUTHORITY TO CONSENT THAT TEST CASE SHALL CONTROL.

An agreement entered into between plaintiffs' solicitor and defendant's solicitor, although made with a view to avoid multiplicity of action, whereby plaintiffs' solicitor agreed before action brought that the result of a pending action against the same defendant, in which he represented another plaintiff, should control the outcome of the unsued claim against the same defendant, will not be given effect to by the court where it appears (1) that the agreement in question was made under the mistaken belief that the material facts in the claim of the other plaintiffs and upon which the question of liability hinged, were identical with those in the pending case, and (2) where it appears that the plaintiffs' solicitor had no authority to bind his clients to such an agreement.

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2. PRINCIPAL AND AGENT (§ II D—25)—AGENT'S AUTHORITY—RATIFICATION —STATUTE OF FRAUDS.

While the requirement of sec. 4 of the Statute of Frauds is that writing and signature by the party to be charged or his agent are necessary to make an enforceable contract for the sale of land, the authority of the agent need not be in writing; and where two or three joint owners gave a power of attorney authorizing the third to make sales and to fix the terms of sale of the lots; and where a real estate agent was verbally authorized by such joint owner to proceed to advertise and sell the lots, and did so, and the joint owner ratified the sales so made, the agreements are enforceable under the statute against the three joint owners.

[*Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288, specially referred to.]

3. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY—SALE OF LAND.

Where one of the owners of the lots of a city subdivision holds a power of attorney from his co-owners authorizing him to make agreements for sale and do all things necessary for carrying out such sales, and where such owner, acting for himself and his co-owners, holds himself out as having authority to carry out such sales, and makes contracts to effect same through a real estate agent, such owner's acts in that regard are binding upon his associates.

[*Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288, specially referred to.]

4. CONTRACTS (§ I E 5—95)—SUFFICIENCY OF WRITING—STATUTE OF FRAUDS —LAND SALE BY AGENT AS SUCH.

Where the sufficiency of the memorandum, on a sale of land, is in question under the Statute of Frauds, such memorandum may meet the requirements if, when read when the purchase cheques (*a*) the parties can be identified, (*b*) the property is described, (*c*) the price and terms are stated; and this although the actual owner is not named in the memorandum of the contract which was signed by the agent in his own name, where the form of the contract shewed on its face that it was made on behalf of the "owner."

[*Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288, specially referred to.]

Statement

THIS is an application by way of originating summons by the plaintiffs Powell, Mottershaw and Godlonton for a declaration that they each have a beneficial interest in three distinct pieces of land, which, as they allege, were sold to them respectively under three distinct agreements of sale made with them by the Eureka Real Estate Company, as they allege as the authorized agents of the defendants.

Judgment was given declaring the plaintiffs entitled to specific performance of their agreements.

C. F. Jones, for plaintiffs.

Aitken, and *Wright*, for defendant.

Stuart, J.

STUART, J.:—The matter has come up in this way. A number of persons, the plaintiffs among them, dealt with the Eureka Real Estate Company, of which one Brockbank was a partner and the manager, and bought from that company a number of properties by separate agreements. Among the number was one Henry H. Rogers. Some difficulty arose as to the authority of the Eureka Real Estate Company to act for the owners. The purchasers all apparently consulted the same firm of solicitors, Messrs. Jones, Pescod & Adams. The Eureka Real Estate Company had given to each purchaser a receipt for a certain cash

payment. It seems to have been thought that these receipts were all of the same nature as to form, and some arrangement, the character of which is an essential point in the present case, was arrived at between Jones, Pescod and Adams and Messrs. Aitken and Wright, who were solicitors for the defendants, by which it was agreed that only one action should be commenced, and it was thought at least, and, so far as the solicitors were concerned, agreed upon, that this should be treated as a test action and that the claims of the other purchasers should abide the result of this one action. Rogers was chosen as the plaintiff, and he brought an action against the present defendants for specific performance of his agreement of sale. This action was tried on November 8, 1911, by Mr. Justice Scott. In that action several defences were raised. The first one was as to the sufficiency of the receipt given to Rogers as a memorandum under the Statute of Frauds. The second defence was with respect to the question of a power of attorney given to the defendant Hewer by the other defendants. It was contended that this was not sufficient to authorize Hewer to delegate his authority to the Eureka Real Estate Company. A third defence was that the sale made by the Eureka Real Estate Company was made subject to the owners' approval and that such approval had never been given. A fourth defence was *laches*.

Mr. Justice Scott decided against the defendants on every ground raised by them, and granted Rogers a decree for specific performance: *Rogers* v. *Hewer* (No. 1), 1 D.L.R. 747, 19 W.L.R. 868. The defendants appealed to the Court *en banc* and the appeal was heard by the Chief Justice, Mr. Justice Simmons, and myself: *Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288, 22 W.L.R. 807. On that appeal I was of opinion that the Rogers memorandum was not sufficient to satisfy the statute, and with this view the Chief Justice agreed. Mr. Justice Simmons dissented. As the majority of the Court were against the plaintiff Rogers on this point, it did not become necessary for us to consider the remaining defences. Mr. Justice Simmons, however, did find it necessary owing to his agreement with the trial Judge upon the question of the memorandum to consider the other defences, and he delivered a judgment in which he concurred throughout with the opinion of the trial Judge. The appeal, therefore, was allowed and Rogers' action was dismissed.

The various purchasers had filed caveats against the properties bought by them respectively and by some omission the formal judgment of the Court did not provide for the removal of the Rogers caveat. An application was made to me in Chambers to set aside all the caveats. Mr. Jones consented that the Rogers caveat and the caveats of all those purchasers whose receipts were open to the same objection as the Court *en banc* found to be fatal in the Rogers case, should be vacated, but he contended

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that the receipts received by Powell, Mottershaw and Godlonton were essentially different from the Rogers receipt and not open to the same objection. Thereupon Mr. Wright raised the question of the alleged agreement to let the rights of all the other purchasers stand or fall according to the result of the Rogers action. I was of opinion that a grave question had arisen as to the exact nature of that alleged agreement, and I entertained some doubt as to the extent to which the present plaintiffs might be bound by any such agreement. I therefore refused to set their caveats aside and it was agreed that the rights of the present plaintiff should be brought up for determination by an originating summons. I granted this summons to Mr. Jones, acting for the three plaintiffs, and it was heard by me sitting in Court on February 14th last. No objection was taken to the joinder of the three cases in one action.

Mr. Wright appeared for the defendants and consented to a declaratory judgment being made and agreed subject to his right of appeal to abide the result as if formal actions for specific performance had been begun by writ of summons.

First, then, as to Powell's case. He received two receipts, the first reading as follows:—

Calgary, 26th July, 1910.

Received of F. B. Powell ten dollars deposit on lots 19 and 20, block 27, South Calgary. Price $85 each cash, subject to confirmation by owner. $10.00. EUREKA REAL ESTATE CO.

Geo. L. Brockbank.

The second receipt was given next day and was for the balance, viz., $160, and otherwise in its wording followed the first receipt.

As to Mottershaw, he also received two receipts in the same terms, except that the word "cash" did not appear in the first, which was dated August 29, 1910, and was for $5. The second receipt was not given until March 27, 1911, and was for $172.90. It was stated in evidence by Mottershaw that the $7.90 additional was for registration fees.

As to Godlonton, he got a receipt for $100 in terms which are not distinguishable from the first receipt of Powell's.

Now, the receipt given to Rogers shewed, not a cash sale, but a sale on terms with deferred payments, and it appeared in evidence in the Rogers action that there had been an agreement to pay interest on the deferred payments at a certain rate. This term of the agreement was not set forth in his receipt, and it was on this ground, and on this ground only, that the Chief Justice and myself held the Rogers receipt to be insufficient as a memorandum under the statute. Both Mr. Justice Scott and Mr. Justice Simmons thought even the Rogers receipt sufficient. It is clear, therefore, that I ought to hold the receipts obtained by the three present plaintiffs to be sufficient.

With respect to the other objections, although there are no pleadings in this case, it was agreed that all the objections raised by the defendants in the Rogers action should be open to the defendants in the present one, and that the evidence in the Rogers action as it appears in the Appeal Book and so far as it is relevant and material to the present case should be treated as part of the evidence in the present case. Of course I can therefore have little difficulty. As a trial Judge I think I should follow the view taken by Mr. Justice Scott on the trial of the Rogers action, concurred in as it was by Mr. Justice Simmons in a considered judgment in the Court *en banc*. I hold, therefore, that none of the defences raised to the Rogers action can now be successfully urged against the present plaintiffs.

There remains, therefore, only the question of the alleged agreement that the rights of the present plaintiff purchasers should abide the result of the Rogers case. There are two reasons why I think the defendants cannot succeed upon this point. In the first case, it is clear that whatever agreement was made was made under the mistaken belief that all the receipts were identical, which turns out not to be the case. In the next place, there was no evidence adduced sufficient to shew that Mr. Pescod, who conducted the negotiations, was ever expressly authorized to make the agreement. He did not say definitely that he had been so authorized when the question was put to him by me directly. All that the plaintiffs said was that they "understood" that their cases were to depend on the result of the Rogers action. The authorities cited to me in regard to the compromise of actions do not appear to me to be applicable here, even if the solicitor, Mr. Pescod, had had a *primâ facie* authority to bind his clients, which, in this case, where no action had been begun at all, seems to me very doubtful. I think the existence of a mistake of fact would be sufficient to prevent the agreement being binding. It was not a mistake of law, but a mistake as to the question of the identity of the various receipts. At any rate, the plaintiffs are not shewn to have been aware that their receipts were essentially different in the wording from that of Rogers.

I think all the plaintiffs are entitled to specific performance of their agreements, and there will be a declaration accordingly. They are also entitled to their costs.

Judgment for plaintiffs.

MAN.

K. B.

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June 2.

ABRAMOVITCH v. VRONDESSI.

Manitoba King's Bench. Trial before the Referee. June 2, 1913.

1. MECHANICS' LIENS (§ VIII—60) — PARTIES TO ACTION — REGISTERED WHEN ACTION BROUGHT A NECESSARY PARTY.

Under sec. 22 of the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, ch. 110, a claim of lien under the Act cannot be "realized" unless the person who is the registered owner of the land at the time of the commencement of the action is made a party to it, or unless there is some other action pending, to which such owner is a party, in which the claim may be "realized," and, in such case, although the lien has been duly registered within the time required by the Act, it absolutely ceases to exist unless some action to which the registered owner is a party has been commenced under the provisions of the Act, within the period of 90 days prescribed by the Act.

[See Wallace on Mechanics' Liens, 2nd ed., 390, 402.]

2. PARTIES (§ II B—119)—ADDING PARTIES DEFENDANT—MECHANICS' LIEN.

It is too late after the expiration of the statutory period for the commencement of an action to enforce a mechanics' lien to amend by adding as a party defendant a purchaser of the lands who became the registered owner after the registration of the lien, but before action thereon.

Statement

TRIAL of an action brought under the Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, ch. 110, to enforce a mechanics' lien for work done in building houses for the defendant Vrondessi upon land belonging to him at the time of the doing of the work.

After the registration of the plaintiff's lien, but prior to the commencement of the action, the title to the property had been transferred to and had become vested in one Anthony Calis, by certificate of title under the Real Property Act. The plaintiff's lien was the only one that had been registered under the Act. Anthony Calis had not been made a party to the action which came on for trial nearly a year after it was begun.

The action was referred to the Referee for trial pursuant to 7 and 8 Edw. VII. (Man.) ch. 28, sec. 12.

W. J. Donovan, for plaintiff.

W. B. Towers, for Vrondessi.

R. D. Guy, for Vlassis.

Official Referee.

THE REFEREE:—By sec. 22 of the Act:—

Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action be commenced to realize the claim under the provisions of this Act, or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* in respect thereof according to Form No. 6 in the schedule hereto be registered in the proper registry office, or land titles office.

This section requires that an action to realize "the claim" or an action in which "the claim" may be realized, must be commenced within the period named, otherwise the lien "shall absolutely cease to exist," and I am satisfied that, in an action to realize the claim of lien on the land, the person who is the owner of the land at the time of the commencement of the action is a necessary party to it.

There has, therefore, in this case been no action in which this claim can be realized, commenced within the prescribed time, and I hold that the plaintiff's lien has absolutely ceased to exist, as the owner cannot be made a party defendant by amendment after the lapse of the ninety days.

There will, however, be judgment against the defendant Vrondessi personally for the balance of the contract price, $1,800.

Personal judgment only.

Re CLEARWATER ELECTION.

Alberta Supreme Court, Beck, J. May 10, 1913.

1. ELECTIONS (§ II C—69)—DISPUTED BALLOTS—POWER OF COURT OF ENQUIRY.

Under the Alberta Election Act, 9 Edw. VII. ch. 3, the individual envelopes containing "disputed ballots" are not to be opened at the Court of enquiry; that Court is to decide only the question of the qualification of the several voters, and the duty of the deputy returning officer is to return these individual envelopes unopened to the returning officer with the decisions of the Court as to the qualification and its automatic decisions of allowance or disallowance or a statement of disagreement as the case may be.

2. ELECTIONS (§ II C—68)—DISPUTED VOTES—DUTY OF RETURNING OFFICER.

The Alberta Election Act, 9 Edw. VII. ch. 3, sec. 210, which requires the returning officer to add up votes from the statement of the polls and the returns of the Court of enquiry and any votes allowed by him as to which any Court of enquiry has failed to agree, etc., implies that while neither the deputy returning officer nor the Court of enquiry is at liberty to open the envelopes containing the disputed ballots, it is the duty of the returning officer to do so notwithstanding any apparent inconsistency of the returning officer's return (form 52), which must be deemed to have been drawn in contemplation of a return in cases where there were no disputed ballots.

3. ELECTIONS (§ II C—71)—ALBERTA MUNICIPAL ACT—FORMS—MODIFICATION.

The Alberta Elections Act, 9 Edw. VII. ch. 3, which empowers the Lieutenant-Governor-in-council to vary the forms provided in the Act, etc., does not affect the right of any officer to modify any provided form to meet the facts of the particular case.

4. MANDAMUS (§ I F—56)—SUBJECTS OF RELIEF—ELECTIONS—PERFORMANCE OF DUTY BY RETURNING OFFICER.

On a returning officer wilfully neglecting to add disputed votes allowed by a Court of enquiry under the Alberta Elections Act, 9 Edw. VII. ch. 3, though under a *bonâ fide* misapprehension of his duty, mandamus lies under sec. 235 to compel him to do so; an appeal to a

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District Court Judge or a recount by him not affording such other remedy as precludes relief by mandamus.

5. ELECTIONS (§ II C—67)—ALBERTA MUNICIPAL ACT—DISPUTED VOTES—DUTY OF RETURNING OFFICER.

In counting disputed ballots under Alberta Election Act, 9 Edw. VII. ch. 2, sec. 210, a returning officer should preserve their identity by restoring them to their respective individual envelopes.

6. COSTS (§ I—10)—DISCRETION—MANDAMUS AGAINST ELECTION OFFICER.

On issuance of mandamus to compel a returning officer to add disputed votes allowed by the Court of enquiry under the Alberta Elections Act, 9 Edw. VII. ch. 3, he was left to pay his own costs, but applicant's costs were awarded against a candidate who unsuccessfully opposed the application.

Statement

APPLICATION for a mandamus to compel the returning officer to add the disputed votes allowed by the Court of enquiry, under the Alberta Election Act, 9 Edw. VII. ch. 3.

The application was granted.

F. Ford, K.C., and *M. W. Edgar*, for H. W. McKenney.

H. A. Mackie, *C. C. McCaul*, K.C., with him, for A. W. Taylor.

W. Gariepy, K.C., for John McKerracher.

Beck, J.

BECK, J.:—To solve in a satisfactory way the questions discussed before me on the hearing of this application, I find it best to consider the procedure laid down by the Act with regard especially to disputed ballots in the order of time.

Sec. 100 provides for the addition by the deputy returning officer at the time of the poll of the names of persons whose names do not appear upon the lists. A prerequisite is the making of an oath by the intending voter in a form provided.

Sec. 177 provides that at the request of an agent or person representing any candidate such an intending voter shall be served by the deputy returning officer with a notice to appear to answer to a charge of having voted contrary to the provisions of the Act. The same section goes on to provide:—

> After serving the notice . . . the deputy returning officer shall
>
> (*a*) Receive the ballot of the person desiring to vote;
>
> (*b*) Place it in an envelope marked "Disputed Ballot";
>
> (*c*) Securely seal the envelope;
>
> (*d*) Write upon it the name and place of residence of the person and his number as it appears in the poll book, the name and number of the polling place and his own name; and then
>
> (*e*) Deposit it (i.e., the sealed envelope enclosing the voter's ballot) in the ballot box.

Sec. 180 provides for the marking of certain unused ballots as "declined," and sec. 182 of certain others as "cancelled." Sec. 186 provides that immediately after the close of the poll the deputy returning officer shall first place all the cancelled and declined ballot papers in separate envelopes and seal them up and then count the number of voters whose names appear by the

poll book to have voted and make an entry thereof on the line immediately below the name of the voter who voted last, and then open the ballot box and count the number of votes for each candidate, but that he shall not count the "disputed ballots."

The "cancelled," "declined" and "disputed" ballots are thus set aside in the counting by the deputy returning officer. In counting the remaining ballots it may become the duty of the deputy returning officer to reject some of them. Such as he does reject are called "rejected ballot papers" (sec. 187.)

In respect of all except disputed ballots he is to note in the poll book every objection taken, decide the objection, subject to review in recount, number the objection and place a corresponding number on the back of the ballot paper objected to, with his initials (sec. 188.)

Sec. 189 provides in effect that the deputy returning officer shall count all the disputed ballots except those which he decides should be rejected and shall keep an account of the number of ballots cast for each candidate and of the number of rejected ballot papers; that all the ballot papers indicating the votes given for each candidate respectively shall be put into separate envelopes or parcels; and that all disputed, rejected and unused ballot papers shall be put into separate envelopes, sealed and signed, which shall be endorsed so as to indicate the contents.

So we have at the close of the deputy returning officer's count separate envelopes containing:—

(1) Ballots counted, i.e., those which are not "disputed ballots" and those which have not been "rejected"; these in separate envelopes or parcels indicating the votes given for each candidate respectively.

(2) Disputed ballots, i.e., those of persons added to the list and served with a notice under sec. 177.

(3) Rejected ballots, i.e., those rejected by the deputy returning officer.

(4) Unused ballots.

Then secs. 190, 191 and 193, in conjunction with form (46) make it quite clear that it is a duty of the deputy returning officer to put into the ballot box (which is then to be locked and sealed)

(1) A statement provided for by sec. 190.

(2) The polling list.

(3) The poll book.

(4) The envelopes containing ballot papers.

(5) The other documents required by law to be returned by the deputy returning officer to the returning officer.

Sec. 193 provides that in the event of there being disputed ballots, the deputy returning officer is to retain the box during the enquiry as to disputed ballots and sec. 195, that he shall, when sitting with a justice of the peace in a Court of enquiry as to disputed ballots, unlock the box and take therefrom the

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envelope containing the disputed ballots and the poll book and then relock the box. The Court then proceeds to enquire and enquire only (sec. 203) whether any statement sworn to under the provisions of the Act by the voter whose vote is the subject of the enquiry is false in whole or in part, and if false in part, in what respect it is so false.

Sub-sec. 2 of this section says that

If it is proved to the satisfaction of the said Court that any voter whose vote is the subject of enquiry has sworn to any such statement which is false in whole or in part, the vote of such voter shall be disallowed; but if it is proved to the satisfaction of such Court that every such statement so sworn to by such voter is altogether true, such vote shall be allowed.

Then sec. 205 provides for

A return in duplicate of the decisions reached by it on the qualifications of the several voters whose right to vote is the subject of dispute,

with the grounds of decision and provides that if the members of the Court of enquiry fail to agree as to whether a ballot paper should be allowed or disallowed, the returning officer (not the deputy) shall render a decision.

Then form 48B (sec. 207), a return by the deputy returning officer where there are disputed ballots, says:—

That in open Court before the Court of enquiry the said ballot box was opened by me as provided in sec. 195 of the said Act, and the envelopes containing the disputed ballots and poll book taken therefrom . . . that during the sitting of the Court of enquiry possession of the ballot box, the key thereof, the disputed ballot papers and the poll books, were retained by me; that immediately upon the close of the enquiry, and while the Court was still sitting, the ballot box was again unlocked and the envelopes containing the aforesaid disputed ballot papers, all evidence taken before the said Court in regard to the said disputed ballot papers, all exhibits relating thereto, and the poll book, together with the return of the decisions of the said Court, were placed in the said box, etc.

I am satisfied that these provisions intend that the individual envelopes containing the disputed ballots shall not be opened at the Court of enquiry; that the business of that Court is to decide only the question of the qualification of the several voters and the duty of the deputy returning officer is to return these individual envelopes unopened to the returning officer with the decisions of the Court as to qualification and its automatic decisions of allowance or disallowance or a statement of disagreement as the case may be.

Then we come to the question of the duty of the returning officer.

Sec. 210 declares these duties as follows:—

The returning officer . . . after having all the ballot boxes, shall open them and shall first open the large envelopes containing the poll books and the disputed ballots and returns, in respect thereof, if any, and render his decision regarding any ballot upon which the Courts of enquiry respec-

tively have failed to agree, having regard only to the evidence taken by the Court of enquiry that examined the same; he shall then open the sealed envelopes containing the statements of the polls and shall . . . add up the votes given for each candidate from the statements of the polls and the returns of the Court of enquiry, respectively, and shall add thereto any votes allowed by him as to which any Court of enquiry has failed to agree . . . and shall forthwith declare to be elected the candidate having the largest number of votes.

By sub-sec. 2 he is to state the ground of disallowance in case of disallowing any vote upon which the Court has failed to agree. There is, to my mind, a perfectly clear implication to be drawn from the words of this section, that while neither the deputy returning officer nor the Court of enquiry is at liberty to open the envelopes containing the disputed ballots, it is, on the other hand, the duty of the returning officer to do so. Otherwise it would be impossible for him to

> Add up the votes . . . from the statement of the polls and the returns of the Court of enquiry and . . . any votes allowed by him as to which any Court of enquiry has failed to agree.

In my opinion this is the necessary implication, and so clear is it, in my opinion, that the apparent inconsistency of the returning officer's return (form 52) creates no hesitancy in my mind. The form, I think, must be supposed to have been drawn in contemplation of a return in cases where there were no disputed ballots, such a case being considered as the general case, and that on which disputed ballots occur the exception; no matter how numerous such are, the exceptions which occur in practice and the form therefore must, in my opinion, be modified to meet special cases.

Sec. 299 contemplates cases of this sort, and though that section provides that the Lieutenant-Governor-in-council may vary the forms provided in the Act and also provide additional forms that, I think, cannot affect the right of any officer or official to modify any provided form to meet the facts of the particular case.

In the case before me the returning officer did not open the individual envelopes containing the disputed ballots, and consequently did not, as he could not, add the votes which they represent. He did so, I think, "wilfully" within the meaning of the Act—even though I should decide that he did it under a *bonâ fide* misapprehension of his duty. I, however, refrain from expressing any opinion in this regard.

Having concluded that the returning officer "wilfully" neglected to add the disputed votes allowed by the Court of enquiry, I think it is a proper case in which, under sec. 235, I should direct the issue of a mandamus to compel him to do so. It was urged that I should not do so, even if I came to the conclusion that he had failed in his duty in this respect, because

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there were other remedies open, namely, an appeal to a District Court Judge or a recount by him, but, in my opinion, as I have already indicated, the Act contemplates that at the time the matter comes before the District Court Judge, he shall have before him the decision of the returning officer, including, if the case should arise, his casting vote (sec. 211) to be given after his actual allotment of the disputed ballots. An appeal or recount is therefore, in my opinion, not another method of securing the relief now asked for. The position of the deputy returning officer and the Court of enquiry is analogous to the report of a referee to a Judge, the position of the returning officer to that of a trial Judge, the position of the District Court Judge to that of an appellate Court, but for the active intervention of which the decision of the returning officer is not only final but complete.

In conclusion I feel called upon to add a warning to the returning officer in regard to his duties in counting the disputed ballots. I think he should preserve their identity by restoring them to their respective individual envelopes. If he fails to do this, any right of appeal from the decision of the Court of enquiry or the returning officer would be rendered entirely nugatory. The effect of preserving their identity will, no doubt, be to destroy the secrecy of the ballot with regard only, however, to the disputed ballots. Confined in this way, no serious wrong is done, and in any case I fail to find any way in which it can be avoided and at the same time a possible failure of justice to the appellant in case of an appeal be avoided.

As to costs, I make no order as against the returning officer; he will be left to pay his own costs. As the candidate McKenney opposed the motion, which he need not have done, and by my judgment has failed in his opposition, I think he should pay the applicant's costs. I so order. These costs will be taxed by the clerk and will be payable within one week of the certificate of taxation.

Application granted.

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April 29.

FIRST NATIONAL BANK OF IOWA CITY v. ROONEY.

Saskatchewan Supreme Court. Trial before Johnstone, J. April 29, 1913.

1. BILLS AND NOTES (§ I D 2—46)—NEGOTIABILITY—PROVISIONS FOR DISCOUNT—PAYMENT IN INSTALMENTS—ACCELERATION ON DEFAULT.

A note given for the price of goods is valid and negotiable, though it provides for a discount at a fixed percentage for payment within a specified time from date, though it provides for payments in instalments of fixed amounts on specified dates, and though it provides that default in payment of any instalment shall, at the option of the payee, render the unpaid balance immediately due and payable.

[*Jury* v. *Barker*, E. B. & E. 459; and *Carlon* v. *Kenealy*, 12 M. & W. 139, referred to.]

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Johnstone, J.

ACTION to recover amount due on an alleged promissory note.

Judgment was given for the plaintiff.

G. E. Taylor, for the plaintiff.

W. C. Smyth, for the defendant.

JOHNSTONE, J.:—The plaintiffs' claim is founded against the defendant on the following document described in the statement of claim as a promissory note or agreement:—

Swift Current, Sask., March 1, 1910.

For value received I promise to pay to the order of the Equitable Manufacturing Co. (not incorporated) three hundred forty-two dollars ($342) at Chicago, Ill., in six instalments, payable as below:—

		Amount.	Date paid.
A discount of 5 per cent. will be allowed if paid in full within fifteen days from date. Instalments after maturity draw 6 per cent. interest.	Two months after date	$57.	
	Four months after date	$57.	
	Six months after date	$57.	
	Eight months after date	$57.	
	Ten months after date	$57.	
	Twelve months after date	$57.	

Default in payment of any instalment shall, at the option of the payee herein, render the unpaid balance immediately due and payable.

(Signed) J. P. ROONEY.

The defendant, contemporaneously with the giving of this promissory note or agreement, signed an additional document as follows:—

Equitable Mfg. Co.,
Chicago, Ill.

Gentlemen,—On your approval of this order, deliver to me at your earliest convenience, f.o.b. Winnipeg, Man., the piano and advertising matter described above, in payment for which I herewith hand you my instalment note, on which last payment falls due one year from date, with understanding that if the order is not approved, the note is to be cancelled and returned to me by registered mail, and further, that if 2½ per cent. of all my gross sales does not amount to $342 at the expiration of this agreement, that you will pay me the deficiency in cash.

To make the above paragraph binding upon you I am to take freight shipments promptly, carry out the advertising plan, meet all my obligations to you promptly, keep the piano well displayed in my store, issue piano votes for each cent purchased, and to report to you my gross sales each 60 days.

Swift Current, Jan. 17, 1910.

I desire mahogany finish on piano.

My gross sales for the last twelve months were $12,000.

(Signed) J. P. ROONEY.

County..... State, Swift Current.
Freight Station, Swift Current. State, Sask.

Salesman, C. Marshall.

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This request or agreement was made subject to cancellation up to April 1, 1910, by memorandum in writing across the face thereof, and the description of the piano together with a warranty thereof were provided for in printed matter on the same sheet of paper just before the request. Also the note or agreement on the same sheet of paper, with the request and the description of the piano sued on, was printed at the end of the sheet, and made detachable from the request or order through a punctured line across the sheet between the request and the note. Provision was made by a printed memorandum just above the note for the detachment of the note by the Equitable Co. upon their approval of the order or request.

No witnesses were called at the trial by either party, the parties relying on the evidence given in pursuance of an order for the examination of the officers of the plaintiffs and of the manager of the Equitable Manufacturing Co., and of the defendant given on his cross-examination for discovery, together with the exhibits used on the said examinations. Those examinations and exhibits I find disclose the following facts: The defendant failed to cancel the agreement or request on or before the 1st April, as was provided he might; he wired cancellation, however, on the 6th April, but the company by the uncontradicted statement of Loveland, the manager, had approved of the order on the 1st of April and had shipped the piano, in accordance with the agreement, on the same day, and in this he was corroborated by the defendant on his cross-examination for discovery.

On the 6th of April the company detached the note sued on and endorsed the same over as a note to one Hamilton from whom they obtained a loan, and Hamilton on the same day endorsed over to the plaintiffs for value, which bank I find as a fact became and were the holders in due course

The defendant, having made default in the payment of the first instalment, the instalment which fell due on the 1st of May, all subsequent instalments were declared due and the plaintiff sued. That all such payments were declared due was admitted by counsel on the trial.

The defendant's counsel, in his argument at the close of the trial, relied upon the defences that the plaintiffs were not the holders in due course, and that the note in question was not a valid note, and that it was non-negotiable. I cannot give effect to these objections, or to any of them. The plaintiffs, I have found, were the holders of the note in due course. This effectually disposes of any defects contended for. Further, the note, as far as I can see, is a good and valid note; it is an absolute and unconditional promise to pay a sum certain in instalments on certain specified days. The provision for a reduction of the sum certain if paid within fifteen days does not render that sum uncertain. The sum less the discount is easily arrived at. There

is nothing uncertain about the result: *Jury* v. *Barker*, E. B. & E. 459. Provision for repayment in instalments is made by the Bills of Exchange Act, and for the payment of interest. There is no uncertainty where default is made in the payment of the first instalment, whether the other payments are declared to be due or not: *Carlon* v. *Kenealy*, 12 M. & W. 139; Maclaren on Bills of Exchange, 1909 ed., pp. 90, 92, and 93.

Judgment for the plaintiff for $342 and interest at the rate provided.

Judgment for plaintiff.

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Re FRY.

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British Columbia Supreme Court, Hunter, C.J.B.C. April 30, 1913.

1. WILLS (§ III A—91)—LEGACY—ATTESTATION BY BENEFICIARY'S HUSBAND—EFFECT.

Under a will bequeathing the residue of testatrix's estate in trust, after a life interest, for the benefit of two named sisters equally, and providing that on either dying in testatrix's lifetime, leaving a son or sons who should survive testatrix and attain the age of 21 years, or a daughter or daughters who should attain that age or marry, such child or children should take the share which his, her or their parent would have taken, and providing for maintenance and advancement for the children "entitled in expectancy," there was intestacy as to the share of one of testatrix's sisters whose husband attested the will; his right is excluded, on the ground that the *jus mariti* only attached to property of which both the legal and beneficial ownership was undisposed of, and there is a resulting trust for the next of kin.

[*Aplin* v. *Stone*, [1904] 1 Ch. 543, followed.]

Statement

PETITION under the Trustee Act for the determination of the construction of the will of Margaret E. Fry.

The testatrix by her will bequeathed the residue of her estate to trustees upon trust, after a life interest, to pay and divide it between two named sisters equally; there was a clause providing that in the event of either sister dying in the testatrix's lifetime leaving a child or children who should survive the testatrix, and being a son or sons, should attain the age of 21 years, or being a daughter or daughters should attain that age or marry, such child or children should take the share which his, her or their parent would have taken if such parent had survived the testatrix; there then followed a clause of maintenance and advancement for the children "entitled in expectancy." The husband of one of the two named sisters attested the will.

Argument

A. Maclean, for the trustees, stated the facts of the case and read the will.

Mayers, for the sister, whose bequest was not nullified, contended that the present case was governed by *Aplin* v. *Stone*, [1904] 1 Ch. 543, there is a broad distinction between cases of a life estate and remainder and those of substitutional gifts; in the first class, the interest of the remainder man is vested at the

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death of the testator and only the possession is postponed, so that where the life estate ceases from whatever cause, the possession of the remainderman is accelerated; on the other hand, in the case of substitutional gifts, the interest of the primary legatee is vested subject to be divested when and only when a certain contingency happens, and it is only on the happening of that contingency that the secondary legatee acquires any interest at all. This is the case of a substitutional gift, and therefore *Re Maybee*, 8 O.L.R. 601, even if rightly decided, does not apply. The fact of the legatee's husband having attested the will renders the bequest to her "null and void," the contingency on which the interest of the substitutionary class, the children, are to take, is the death of the legatee in the testatrix's lifetime; to hold that their interest can arise on any other contingency is to make a new will for the testatrix.

He further contended that in the event of its being held that there was an intestacy, the *jus mariti* was excluded by the disposition of the legal estate, it was only in the event of both the legal and equitable interest being undisposed of that the right of the husband attached; the fact of a disposition of the legal estate caused the property to retain its character of separate property: *Re Lambert*, 39 Ch.D. 626, Stirling, J., at 633.

Mann, for the infant children of the legatee whose bequest was nullified, adopted the same argument.

Fell, for the adult children of the legatee whose bequest was nullified, contended that *Aplin* v. *Stone*, [1904] 1 Ch. 543, was wrongly decided, and relied on *Re Clark*, 31 Ch.D. 72.

Hunter, C.J.

HUNTER, C.J.B.C.:—The cases establish the clear distinction between gifts in remainder after a life estate, and substitutionary gifts; in the former case the failure from whatever cause of the life estate accelerated the gift in remainder; in the latter case there was no interest to be accelerated unless the exact contingency occurred. Any argument to be derived from imputing a supposititious intention to the testator was too frail to be relied on; here it was contended that the testator would have desired the children of the legatee to take in the event of their mother's interest failing in her lifetime, but *non constat* that he would not have wished the whole estate to go to the other sister; therefore, the pursuit of a supposed intention proving dangerous, His Lordship held himself bound by *Aplin* v. *Stone, supra*, a decision directly in point, to hold that there was an intestacy as to the share of the sister whose husband had attested the will. He acceded to the contention that the husband's right was excluded, on the ground that the *jus mariti* only attached to property of which both the legal and beneficial ownership was undisposed of and decreed that there was a resulting trust for the next of kin.

Judgment accordingly.

WALKER v. CANADIAN NORTHERN R. CO. and IDEAL FENCE CO., Limited, third party.

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April 21.

Saskatchewan Supreme Court. Trial before Haultain, C.J. April 21, 1913.

1. RAILWAYS (§ II D 2—37)—OPERATION—INJURY TO EMPLOYEE OF CONTRACTOR WITH RAILWAY.

A railway company is liable for injury to a fencing contractor's employee while at work in a car, caused by a negligently violent coupling of cars by the company's employees.

2. RAILWAYS (§ II D 2—37)—INJURY TO CONTRACTOR'S EMPLOYEE—ASSUMPTION OF RISK.

An employee of an independent contractor engaged by a railway company to fence its right-of-way does not assume the risk of being injured while at work in a car, through a negligently violent coupling of cars by employees of the railway company.

3. CONTRACTS (§ II D 4—185)—CONSTRUCTION CONTRACTS—CONTRACTOR'S INDEMNIFICATION OF EMPLOYER FROM LIABILITY FOR NEGLIGENCE OF HIS EMPLOYEES.

A contract to fence a railway company's right of way, in which the contractor further agreed to indemnify the railway company against claims for injury to persons or property "occasioned in carrying on the work," entitles the company to indemnity against a claim of an employee of the contractor for injury received while at work in a car caused by a negligently violent coupling of cars made by the railway company's employees.

[This finding does not seem to be in accord with the principles of interpretation laid down in Beal, Cardinal Rules of Interpretation, 2nd ed., 121.]

Statement

ACTION for damages arising from a bale of wire falling upon the plaintiff, an employee of the third party, while he was in a car of the defendants, caused by an engine of the defendants violently backing down upon the cars for the purpose of making a coupling.

Judgment was given for the plaintiff against the railway company, with right over against the third party on a covenant of indemnity contained in the contract entered into by them.

W. W. Livingston, and *J. T. Leger*, for the plaintiff.

J. N. Fish, for the defendants.

R. R. Earle, for the third party.

Haultain, C.J.

HAULTAIN, C.J.:—The Ideal Fence Co., Ltd., the third party to this action, was in the summer of 1911 carrying out the work of fencing the right of way of the defendant company under a written contract. It was a term of the contract that the defendant company would furnish the necessary fence posts on cars and also would furnish free transportation for men and materials over its lines. On July 19, 1911, the Fence Company's employees, having completed their work at a point called Maidstone, on the line of the defendant company's railway, were carried from Maidstone to a place called Highgate, on a train of the defendant company for the purpose of distributing the posts

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and wire required for the work of fencing at points west of Highgate. The train consisted of an engine, a number of cars loaded with posts, a car of wire, and the boarding cars used by the Fence Company's men. The Fence Company's men were in charge of a foreman named Beattie, and included the plaintiff, who was employed as a labourer. The work of distributing was done as the train was in motion, the posts and wire being thrown out at the points they were needed. When the train arrived at Maidstone, according to the evidence of Beattie, he asked the conductor of the train whether he was going to stop at Maidstone for dinner, and the conductor informed him that "he was going to pull right out" and to get the men ready to distribute the material. Beattie accordingly ordered the men into the several post-cars, and instructed one Tucker, a Fence Company employee, to take two men into the car containing the wire and to direct them in distributing it. Tucker, following out these instructions, took the plaintiff and another man into the wire car.

Shortly after the men had taken up their positions in the several cars, the engine, which had been "shunting," backed down to "couple on to" the post and wire cars, and according to Beattie's evidence, "hit the cars and hit them very hard." Beattie testifies that in making the coupling the engine backed down against the cars and then "started ahead" with a jerk. He says that the shock was so great that it knocked him against the posts of the car he was in, and that the bales of wire in the wire car were all more or less disarranged, and some of them were tipped over. He further said that this was the hardest shock he had ever experienced, and according to the evidence he had been employed in this class of work for more than three years. The plaintiff, who was in the wire car, was injured by a bale of wire falling on him, and there is no doubt from the evidence that the bale was displaced and fell owing to the shock or jar caused as already mentioned. There is really no dispute between the parties on that point.

The conductor of the train, James Fearnley, in his evidence, denies having told Beattie to get his men into the cars to be ready to distribute the material. He says that, on the contrary, having seen Beattie ordering his men into the cars, he told him not to do so until the "shunting" was done. He also says that he told Beattie that they would stop for dinner at Highgate, and denies that he said he would "pull out" immediately after coupling up again.

Fearnley, the conductor, and Hunt, the brakeman of the train, both state very strongly that the shunting was done in the ordinary way, and that there was only the ordinary amount of shock or jar when the coupling was made. According to the evidence, the bales of wire were properly loaded, and should not

have fallen down under ordinary conditions. So far as the facts are concerned, the case turns on (1) what instructions were given by the conductor, Fearnley, to Beattie immediately after arriving at Highgate, and (2) whether or not the accident was caused by the negligence of the defendant company's employees in making the coupling. The evidence on both these points is very conflicting. On the first point there is a direct contradiction between Fearnley and Beattie with regard to everything that was said or took place on arrival at Highgate. Beattie's evidence is corroborated in important particulars by the plaintiff, and I was not particularly impressed with the manner in which the witness Fearnley gave his evidence. I therefore find that on arrival at Highgate Fearnley instructed Beattie to get his men into the cars so as to be ready to distribute the material as soon as the train pulled out, and that it was the intention, or at least the stated intention, of Fearnley, to leave Highgate immediately the switching or shunting was done.

With regard to the question of negligence, the evidence again is equally conflicting. The railway employees, however, were not on the train when the coupling was made, but were standing on the ground. Beattie, who is a disinterested witness, and has had a good deal of experience, describes the shock or jar that occurred as being exceptionally violent; and I am inclined again to accept his evidence on this point. I find, therefore, that the injury to the plaintiff was caused by a bale of wire falling upon him, and that the bale fell owing to the negligent and violent manner in which the coupling was done. I do not think that there can be any doubt as to the legal liability of the defendant company. The negligent acts of their employees were in regard to a matter within the scope of and incidental to their employment, and their duty to use ordinary care and skill in order to avoid danger was neglected. Mr. Fish argued that the plaintiff voluntarily incurred the risk, and invoked the doctrine of *volenti non fit injuria*. The principle of that maxim does not, in my opinion, apply to the facts of the present case. The evidence entirely rebuts the suggestion that the accident which occurred was an ordinary incident of the plaintiff's employment, or could have been in any way anticipated or foretold by him.

I accordingly find for the plaintiff, and award him damages as follows: Loss of wages, $250; doctor's and hospital bills, $110; general damages, $500. There will be, therefore, judgment for the plaintiff as against the defendant company for $860 and his costs of this action.

The defendant company claims over against the third party on a covenant of indemnity contained in the contract between them, which is as follows:—

> The contractor shall be responsible for, and shall indemnify the company against, all damage, by whomsoever claimable, in respect of any

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injury to persons, live stock, lands, buildings, structures, fences, trees, crops, roads, ways, properties, rights, privileges or easements of whatever description, occasioned in the carrying on of the works or any part thereof, or by any neglect, misfeasance, or non-feasance on his part, and shall, at his own expense, make all necessary temporary provisions to ensure the avoidance of such damage or injury. The company may forthwith, after notice to the contractor, pay or compromise any claims for such damages, whether placed in suit or not, and may collect the amounts paid from the contractor or deduct the same from any amounts then or thereafter due by the company to the contractor.

It was argued before me at the trial by counsel for the third party that the damages in this case were not "occasioned in the carrying on of the works or any part thereof," and that the covenant did not extend to railway accidents. This point is not raised by the written pleadings; but in any event, my opinion is that the covenant does apply to this case and the defendant company is entitled to be indemnified by the third party. I find, therefore, that the defendant company is entitled to be indemnified by the third party herein against all amounts payable by it under the judgment in this action.

There will be judgment, therefore, for the defendant company against the third party, the Ideal Fence Co., Ltd., for any amounts paid by it under the judgment herein, and its own costs of this action, and of the third party proceedings.

Judgment for plaintiff with right over against third party.

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March 3.

DOMINION REGISTER CO. v. HALL.

(Decision No. 2.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. March 3, 1913.

1. SALE (§ I C—16)—NECESSITY OF RECORDING CONDITIONAL SALE AGREEMENT—N.S. STATUTES 1907, CH. 42.

Where the plaintiff sold an account register to a purchaser under a hiring and purchase agreement within the meaning of ch. 42 of the Acts of Nova Scotia, 1907, and where such agreement was neither accompanied by an affidavit nor filed in the registry of deeds, the agreement although valid as between the parties, is null and void as against the creditors, purchasers, and mortgagees claiming under the purchaser in question.

[*Dominion Register Co.* v. *Hall* (No. 1), 8 D.L.R. 577, affirmed.]

2. CHATTEL MORTGAGE (§ II C—15)—AFTER-ACQUIRED PROPERTY—EJUSDEM GENERIS.

Where a chattel mortgage instrument assumes to cover in a shop (*a*) a stock of hardware, crockeryware and groceries, (*b*) the shop and office fixtures, scales and appurtenances, (*c*) all other goods that may be put in said shop in substitution for or in addition to those already there, the same and as fully to all intents and purposes as if said "added or substituted stock" were already in said shop; the "stock" and the "fixtures" are distinct *genera*, and only within the latter can an "account register" properly come, hence it cannot be included in the "added or substituted stock."

[*Dominion Register Co.* v. *Hall* (No. 1), 8 D.L.R. 577, affirmed.]

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APPEAL by the defendants from judgment of Ritchie, J., *Dominion Register Co.* v. *Hall et al.* (No. 1), 8 D.L.R. 577.

The appeal was dismissed.

F. L. Milner, for appellant.

J. L. Ralston, for respondent.

The judgment of the Court was delivered by

RUSSELL, J.:—The plaintiff agreed to sell an account register to E. C. McDade, reserving the ownership and all right to the property until the price was paid. McDade is called the purchaser in the document in which the bargain is contained, but effect must be given to all its provisions so far as possible, and there is no difficulty in giving effect to this provision as to the ownership being retained by the vendors. The document was not filed and would therefore be void against creditors or mortgagees of or purchasers from McDade; but "creditor" has been interpreted as a creditor with process which the defendant is not. Neither is he a purchaser. He claims to be a mortgagee and has taken possession of the property under a chattel mortgage for breach of the condition as to payment of interest. There was a dispute as to this breach, defendant contending that the interest was not over-due, having been liquidated by a cheque for which there were no funds, but which was not dishonoured until after the seizure of the property by the defendants. It is not necessary to decide whether there was a breach or not if the property in question is not included in the chattel mortgage, and the learned trial Judge has decided that it is not so included. With that decision I agree. The mortgage was given to secure the sum of $3,000 advanced by the defendants to McDade, and the description of the property is as follows:—

All and singular the stock of hardware, crockeryware, groceries, including canned goods, fruit and general groceries, together with all and singular the contents, including shop and office fixtures, scales and appurtenances of the shop or store situate on Main street, in said town of Parrsboro, the said goods and chattels being or comprising what were purchased by the said Ernest C. McDade from one W. D. McLaughlin, and now in the possession of the said Ernest C. McDade and owned by him and in said shop and premises, and it is the intention hereof and of the parties hereto that these presents shall not only cover and include all and singular the present stock of goods and all other the contents of said shop so owned by the said Ernest C. McDade as aforesaid, but any other goods that may be put in said shop in substitution for or in addition to those already there the same, and as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned herein to which the parties hereto agree.

Also all the flour and feed, canned or other goods and chattels owned by the said Ernest C. McDade, and now in his possession in a certain warehouse occupied by him on said Victoria street in Parrsboro aforesaid,

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and this to cover and include any and all flour, feed, canned or other goods which may, by the said Ernest C. McDade, be added to or placed in substitution for said goods and effects now in said warehouse, and the same to be covered by and included in these presents as fully and effectually as if they were now on said premises and particularly mentioned and described herein: Also two horses, two waggons, sleds, gear, and all other property of any kind, nature or description owned by the said Ernest C. McDade and in said warehouse where the said horses, sleds and waggons now are, it being understood and fully agreed that the said property mentioned herein and every part thereof, and said added or substituted property, shall be included in and bound by these presents, whether the same is, or remains, or shall be placed or kept in said shop and warehouse or any other shop, place or building, the same to be covered hereby wherever the said goods, property, chattels and effects may be or may be placed.

It will not be contended that the account register, which was placed in the shop and retained there in the original package, can be included in the second paragraph of this description, which relates only to goods in the warehouse and horses which also seem to be described as if they were warehoused with the sleds and waggons. If the property in question is covered at all it must be in the first paragraph. In this paragraph the description of the property actually transferred, as distinguished from the property to be afterwards acquired and which could only be the subject of an agreement to transfer, seems also to draw a clear distinction between the "stock" of hardware, crockeryware, groceries, etc., on the one hand, and the contents which include shop and office fixtures, scales and appurtenances on the other. Of course these categories are not mutually exclusive; but the description seems to clearly set apart the office fixtures, scales and appurtenances as something different from the stock, and it is not singular that it should do so. They are things capable of constituting a genus different from the stock of hardware, etc., first referred to and described. Coming then to the provision as to after acquired property, the document describes as the subject of the agreement all other goods that may be put in said shop in substitution for or in addition to those already there, etc. If the clause had ended with these words I should have considered the terms large enough to cover the account register as sufficiently resembling one or other of the genera into which the antecedent description might be divisible. But it does not end there. The goods so to be covered are to be covered as fully and to all intents and purposes as if "the said added or substituted stock" were already in said shop. I do not think the parties can be held to have intended to include under the term "stock" in this phrase the account register purchased from the plaintiff. The term "stock" seems to be used as indicating something different from the fixtures, scales and appurtenances with which the account register would have to be grouped if it is *ejusdem generis* with any of the

articles named, and as the term "stock" has been used to describe the after acquired property intended to be the subject of agreement, I think that the property in question is not included in the mortgage.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

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BROWN v. COXWORTH.

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May 7.

Saskatchewan Supreme Court, Johnstone, J. May 7, 1913.

1. MASTER AND SERVANT (§ II B—125)—SERVANT'S ASSUMPTION OF RISKS —NEGLIGENCE OF EMPLOYER—EMPLOYEE'S DUTY TO AVOID CONSEQUENCES.

Notwithstanding negligence of an employer which imperils an employee, the latter is bound to use reasonable diligence to avoid the consequences thereof on becoming aware of the negligence.

2. MASTER AND SERVANT (§ II B 4—160)—KNOWLEDGE BY SERVANT OF DANGERS—DUTY TO WARN AGAINST DANGERS.

Though an employer must point out to an employee latent dangers, the latter must use ordinary care to ascertain dangers incident to his work.

Statement

TRIAL of an action for damages for personal injury through alleged negligence.

The action was dismissed.

H. E. Sampson, for plaintiff.

J. A. Cross, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff, a labourer, had been working with one Payne, who engaged to work for the defendant, both Payne and the defendant being by occupation house or building movers. The defendant was then under contract to move a building along Dewdney street, in the city of Regina, from west to east. Payne was an experienced hand, and, in going to work for the defendant on the morning of the day hereinafter referred to, took the plaintiff with him and set him to work on the job on which he, Payne, was working. This was afterwards approved of by the defendant, who paid the wages coming to the plaintiff to Payne for him. The moving of the building progressed favourably until about four o'clock in the afternoon, when the plaintiff met with an accident whilst engaged in the work. As far as I can make out, the accident occurred in this way. The moving was being done on rollers, that is, the building being moved was placed on rollers, which were supported by planks so that the surface upon which the rollers moved would be as level as possible. A capstan or windlass was used, around which a strong, heavy rope, one end attached to the building, the other to the capstan, was wound with the aid of a horse. This

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rope was run through a pulley fastened to an anchor post placed some distance ahead of the building. At intervals, as the building advanced, it became necessary to shift the anchor post, capstan, rope, etc. At about four in the afternoon of November 10, 1911, the parties engaged in the work were called upon to perform this necessary part of the work. The plaintiff up to this time had been looking after the rollers under the moving building. In obedience to a general order of the defendant to make the necessary shift, the plaintiff undertook to shift or handle the rope attached to the pulley and capstan. In doing this the plaintiff, no doubt as he had seen others do, took the rope upon his shoulder and pulled it ahead, dropping it presumably when far enough at his feet. In the falling or in the handling the rope formed a loop or snake-like shape. Where this condition of the rope existed, and where the plaintiff was standing, the evidence shews that the standing surface was ice, 40 x 60 feet in extent. The pulley containing this rope at some little distance ahead of the plaintiff was attached to the horse for the purpose of dragging the pulley and rope up to the anchor post. Orders were given to pull ahead. The rope in the pulling ahead became taut, and the plaintiff, owing to his standing in the loop on the ice or in the way of the straightening rope, had his feet tangled or taken from under him, through which he fell on the ice, sustaining a fracture of his leg.

The defendant and two of his men in giving evidence stated that before the horse started to pull the rope (the horse was being led by one of these witnesses) warning was given to all on the work to "look out for the rope." This warning the plaintiff and Payne say they did not hear. If the plaintiff did not hear, the fault was his; he was certainly within hearing distance.

The plaintiff claims that his injury was occasioned by the negligence of the defendant, in that

1. The horse was left entirely unattended by any person.

2. The horse was left hitched or tied to the rope at which the plaintiff was working.

3. The horse was untamed and unfit for the purpose for which the defendant used it.

4. The defendant did not have sufficient men engaged on the job.

5. The defendant should not have ordered the plaintiff to do the work without seeing that all proper precautions had been taken to safeguard the plaintiff against accident.

6. The defendant did not have sufficient or proper appliances for carrying out his work of moving the building.

7. The defendant did not instruct or inform the plaintiff of any danger in connection with the work at which the plaintiff was engaged at the time of the accident.

8. In the alternative to (1), if the horse was in charge of any per-

son, such person without any warning and with the knowledge of the danger to the plaintiff, suddenly started said horse up, and after the plaintiff had fallen and was entangled in the said rope, continued to work the said horse at the said rope.

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In view of the fact that the horse was attended by a man solely employed for that purpose, that he was not hitched to the pulley during the time the plaintiff was working on the rope, and that when the horse was started up to pull it is not shewn that he started up with a rush or otherwise in a dangerous way. On the contrary, the horse started quietly, and none of the alleged acts of negligence on the part of the defendant were in any way connected with the proximate cause of the injury—the case rests solely and wholly upon the question of what were the duties, if any, imposed by law by reason of the relationship of master and servant, under the circumstances.

In this case the question of primary or ultimate negligence does not arise. If there had been negligence on the part of the defendant in the first instance, and the plaintiff became aware of it, it was his duty to avoid it if possible, through the exercise of reasonable care and diligence. Moreover, it is the duty of the servant on all occasions when entering upon his duties in any employment involving risk of life or limb to inform himself of the danger to which he is to be exposed. It is the duty of the master to point out such dangers as are not patent, but it is the duty of the employee to go about his work with his eyes open. He must take ordinary care to learn the dangers to which his employment will subject him. He must not go blindly and heedlessly about his work where there is danger.

It must be conceded that the servant may recover against the master for injury sustained through the negligence of the latter, but the servant or employee must first shew that there has been a breach of duty towards him on the part of the master. I have failed to find any breach of duty on the part of Coxworth, a breach of which in any way induced the injury. The condition of the ground where the plaintiff was working demanded more care and caution from the plaintiff. He seems to me to have acted in an utter reckless and careless manner. The occasion of the accident was not the first occasion on that day when the plaintiff was found indifferent to danger. The plaintiff on the occasion in question undoubtedly placed himself in peril. Having regard to conditions, he handled the rope in such a way as to render the accident not only possible but probable. A reasonably careful man would, I venture to say, have gotten out of the way of danger as speedily as possible, knowing the rope had to be drawn ahead and made taut.

It was contended for the plaintiff that he should have been instructed or warned as to the danger to be met with in the work. The plaintiff was standing where he should not be, and

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where it was very evident he might sustain injury, just as evident as when he got on the roof of the building being moved. Yet to contend that it was the duty of the master to have warned the plaintiff to beware of the ice and the coil of the rope and not to step into danger, is about as reasonable as to say that the master should have warned his servant not to go on the roof, when he had nothing to call him there.

In my opinion the injury was the result of the plaintiff's own negligence, which he might have avoided by the exercise of ordinary care.

There will be judgment for the defendant, with costs.

Judgment for defendant.

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May 27.

HOWLETT v. DORAN.

Alberta Supreme Court, Beck, J. May 27, 1913.

1. PAYMENT (§ IV—34)—EXCESS PAYMENTS—CURRENT ACCOUNT—APPLICATION.

On the trial of a mechanics' lien action involving materials supplied to building contractors for distinct buildings, payments by the contractors for materials in excess of the amount due when the payments were made, will be applied to other items of the contractors' general account, in the absence of special agreement that the surplus should be credited against future orders for the particular buildings.

2. MECHANICS' LIENS (§ VI—47)—CREDITS—FICTITIOUS PAYMENTS.

On trial of a mechanics' lien action involving materials supplied to a building contractor, a receipt of the materialman for a fictitious payment intended to assist the contractor in obtaining an advance from the owners will not necessarily be charged against the materialman.

3. MECHANICS' LIENS (§ VIII—62*a*)—COSTS—RIGHT TO ALLOWANCE.

Where action has been brought to enforce a mechanic's lien under a building contract, other claimants against the same property should make ex parte application under Mechanics' Lien Ordinance, sec. 18 (Alta.) to be added to the action, instead of bringing separate actions, and where they pursue the latter course they are entitled to such costs only as they would have properly incurred in making an ex parte application.

[*Head* v. *Coffin*, 2 A.L.R. 663, referred to.]

4. MECHANICS' LIENS (§ VIII—62*a*)—COSTS—RIGHT TO ALLOWANCE.

In an action to enforce a mechanic's lien for materials supplied to a building contractor, the owner is ordinarily entitled to costs out of the fund in Court before it is distributed under Mechanics' Lien Ordinance, sec. 30 (Alta.).

[*Ross* v. *Gorman*, 1 A.L.R. 516, 520, 521, and *Breckenridge* v. *Short*, 2 A.L.R. 71, referred to.]

Statement

TRIAL of a mechanics' lien action.

H. H. Parlee, for Howlett & Bell.

C. A. Grant, for other lienholders.

J. B. Howatt, for Credit Foncier Franco-Canadien and General Administration Society.

BECK, J.:—Howlett & Bell claim a lien for $1,634.01 in respect of two buildings, one on James and Cleaver streets, and one on King street. The itemized account shews that the total amount of the material supplied to these two buildings was $1,851.74, commencing the 12th August and ending the 7th November. The monthly totals of these items were included in a large general account against the contractors, Doran & Gallant, amounting in the whole to $4,293.87, covering, however, an item for July of $935.28 not relating to these houses.

The following credits appear upon the general account:—

August 16	$400.00
August 21	200.00
September 6	328.00
September 24	650.00
October 10	600.00
November 2	400.00
	$2,578.00

The receipt for the $650 states it to be "a/c in full to date for material used in James & Cleaver job"; that for $600, "a/c in full for King street job." I allow these as specially appropriated by the debtors, Doran & Gallant, at the time of payment as signified by the receipts in part only, however, for this reason:—

On the 24th September there was owing in respect of the James & Cleaver street buildings only $552.49. No doubt by a special express agreement the difference between this amount and the $650 then paid might have been placed as a special credit against future orders in respect of this particular building, but there is no evidence of any such special agreement. I therefore appropriate of the $650 only $552.49 to the James and Cleaver street building. The subsequent items in respect of this building amount to $611.57. On the 10th October there was owing in respect of the King street building only $449.55. For the same reason I appropriate of the $600 only $449.55 to the King street building. The subsequent items in respect of this building amount to $238.13.

The surplus in each case will go to other items of the whole account. There are earlier items much more than sufficient to exhaust them. A receipt for $200 dated the 9th September stated to be "for material supplied to houses on James and Cleaver" is also produced. I am, however, not satisfied that this sum was ever paid. I suspect it was made for the purpose of assisting the contractors to get an advance from the owners. I therefore do not allow this as a credit.

The first three items of credit, $400, $200, and $328 = $928, practically settle the July account. As to the credit of $400, it should go on the earlier items of the account other than the two

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buildings in question which it will be insufficient to satisfy. In the result I find Howlett & Bell entitled to a lien for $611.57 plus $238.13, making $849.70 with interest to one date, to which the claims of all other lien claimants will be calculated.

As to costs: There are thirteen separate lien actions all based upon the same contract between the contractors, Doran & Gallant, and the owners, the General Administration Society, and all but two bringing into question a certain mortgage made by the society to the Credit Foncier Franco-Canadien. The earliest brought of these actions is that of Howlett & Bell in the Supreme Court, which was commenced on the 22nd January, and I assumed a certificate to that effect was immediately filed in the land titles office pursuant to the Mechanics' Lien Ordinance. This action comprised all the lots comprised in the subsequent actions. Under these circumstances none of the actions subsequent to the first ought to have been brought, but instead an *ex parte* application should have been made, in which, too, any number of lien claimants might have joined, under sec. 18 of the Mechanics' Lien Ordinance. The plaintiffs in the first action are entitled to their costs, the plaintiffs in each of the subsequent actions are entitled to such costs only as they would have properly incurred in making an *ex parte* application to be added to the first action under sec. 18. There was no reasonable excuse for incurring the larger costs. The provisions of the Act are clear and among other reported decisions of this Court there is one of the Court *en banc*, in which the rule I now apply was applied: *Head* v. *Coffin*, 2 Alta. L.R. 663. The plaintiffs' costs when taxed will be charged upon the fund in Court in accordance with sec. 30 of the Act. They will be taxed to the plaintiffs separately.

The defendant The General Administration Society are entitled to their proper costs when taxed and to have the amount as taxed paid out of the fund in Court before it is distributed under sec. 30.

The reasons why in my opinion the owner is entitled ordinarily to his costs out of the fund are indicated by me in *Ross* v. *Gorman*, 1 A.L.R. 516 at 520, 521; the reasoning there being evidently approved in the decision in *Breckenridge* v. *Short*, 2 A.L.R. 71.

The Credit Foncier Franco-Canadien are, I think, under the circumstances that have arisen in the case, entitled to their costs of defending in one action. I am not sure they have done more than this. If they have they should not have done so, but have moved to consolidate.

Order accordingly.

LASTUKA v. GRAND TRUNK PACIFIC R. CO.

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April 25.

Alberta Supreme Court. Trial before Stuart, J. April 25, 1913.

1. MASTER AND SERVANT (§ II A 2—49)—WORKMEN'S COMPENSATION — "COURSE OF EMPLOYMENT."

A claim for compensation against a railway company, under the provisions of the Alberta Workmen's Compensation Act, 1908, by reason of the death of an alleged employee, cannot be made unless it appears that the accident in question not only arose out of the employment, but also happened in the course thereof, as it is impossible to construe disjunctively the word "and" in the second line of sec. 3 of the Act.

[See also *Re Eddles and School District (No. 1) of Winnipeg*, 2 D.L.R. 696.]

2. MASTER AND SERVANT (§ II A 2—49)—WORKMEN'S COMPENSATION — "COURSE OF EMPLOYMENT."

Where one who has left the employ of a railroad company is killed while on his way to the office of the company to get his pay on the day following such abandonment of his employment, no compensation for his death can be claimed under the Alberta Workmen's Compensation Act, 1908, since the accident in question did not arise out of or happen in the course of his employment within the meaning of the third section of that Act.

Statement

ACTION for damages for the death of a former employee of the defendant railway company, who was killed by being run over by a train while walking along the railway track, and in the alternative a claim for compensation under the provisions of the Alberta Workmen's Compensation Act was made.

The action and claim for compensation were both dismissed.

W. J. Hanley, for the plaintiff.

S. B. Woods, K.C., and *S. W. Field*, for the defendant.

Stuart, J.

STUART, J.:—This was an action for negligence and in the alternative a claim for compensation under the Workmen's Compensation Act. At the close of the evidence I decided that the defendants were not liable at common law and dismissed the action. I reserved the question as to their liability to pay compensation under the statute. The plaintiff's deceased husband had been engaged on a section gang in the employ of defendant, and, on the afternoon of June 20, 1912, at a quarter to six o'clock he indicated his desire to discontinue his employment, to which the foreman, of course, assented. Some conversation occurred as to the method of his getting his pay. In order to get this, it was necessary that he should have an identification ticket. The foreman did not have any of these in his possession on the afternoon in question. The foreman, in his evidence, stated that he told the deceased to go to a certain office in the city of Edmonton at eight o'clock the next morning and that he would meet him there with the ticket. This was the office at which employees were paid according to the custom of the com-

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pany except at the regular pay day, which occurred once a month when the pay car came along. Employees, however, who ceased work in the middle of the month, and before pay day, were expected to go to this office with their identification ticket, and the practice was to pay them there. There was evidence on behalf of the plaintiff that the foreman told the deceased to go to the section-house, or what was used as a section-house, on the next morning, and that he would there get his ticket. This, of course, was in contradiction of the foreman's statement that he told the deceased to meet him at the office referred to. The next morning, namely on the 21st of June, the deceased was seen walking along the right-of-way of the defendant railway in a direction towards the section-house. A train, operated by defendants, came along behind the deceased, going in the same direction in which he was going. For some reason or other the deceased by misadventure stepped ahead of this train and was killed. I decided, at the close of the hearing, that there was no negligence shewn on the part of defendant or any of their servants. It was contended, however, on behalf of plaintiff that the accident occurred to the deceased while he was still in the course of his employment, or at any rate, that the accident arose out of his employment, and that the word "and" in the second line of the third section of the Act should be construed disjunctively. I cannot accede to this contention. I think it has long been held that, in such cases, the accident must both arise out of, and happen in the course of the employment. In my opinion the accident neither arose out of the employment nor happened in the course of it. At the close of the hearing I expressed my view, that the foreman's evidence was the more satisfactory as to what the conversation was on the afternoon before, and I expressed the opinion, to which I still adhere, that the best explanation of the circumstances is that the deceased misunderstood what was said and that he was really going to the section-house under a misapprehension, thinking that he was there to get his ticket. Even accepting this view, however, I don't think that the case comes within the Act. His employment had ceased the afternoon before, and I am unable to see how it could be said, in any reasonable way, to have arisen out of that employment. I think, therefore, that the application for compensation must also be dismissed.

In accordance with the consent given by counsel for defendants at the close of the hearing there will be no costs, either of the action or the application for compensation.

Action dismissed.

KNOX v. BUNCH.

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April 23.

Alberta Supreme Court. Trial before Stuart, J. April 23, 1913.

1. FRAUD AND DECEIT (§ III—12)—MATTERS OF OPINION—ESTIMATES AND VALUATION—LAND SALE.

Rescission of an agreement for the sale of land will not be allowed for an alleged misrepresentation on the part of the vendor as to the value of the land, where it appears that it is doubtful whether the vendee understood the statement of the vendor as to the value to be anything more than an expression of opinion, and it further appears that the vendee, at all events, did not rely upon that statement in making his purchase, but that the idea of rescinding on that ground was merely an attempt to get out of what proved afterwards to be a bad bargain.

Statement

TRIAL of an action to recover the second instalment due under an agreement for the purchase of land.

Judgment was given for the plaintiff with costs.

Mann, for the plaintiff.

Fenerty, for the defendant.

Stuart, J.

STUART, J.:—This is a case in which the plaintiff sues the defendant for the second instalment of the purchase price of certain lands lying about two miles northeast of the northerly limits of the city of Calgary. The agreement is admitted and the default in the payment is admitted. The defence is misrepresentation and there is a counterclaim for rescissions on the ground of misrepresentation. There were a number of misrepresentations alleged; these consisted of statements contained in a letter from the plaintiff's agent to the defendant, in which he spoke of the character of the land. It was admitted by counsel for the defendant at the close of the hearing that with respect to these representations made as to the character of the land, he could not succeed, but he insisted that he could succeed upon one other alleged misrepresentation which related to the value of the land. The letter contained this clause:—

> This land will not be required for subdivision purposes for some time yet, but is worth what I ask for dairying or gardening and if subdivided into five or ten acre tracts, would sell on easy terms for a much higher price.

The defendant ultimately rests his case, then, upon the contention that this is a representation that the land was then worth what was asked for it, namely $215 an acre, and further, the contention that it was not worth that and therefore he is entitled to rescind. Without saying that it is never possible to rescind for misrepresentation as to value, I come to the conclusion that in this case rescission ought not to be allowed; in the first place I have very much doubt whether the defendant really understood that to be anything more than an ex-

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pression of opinion, but even assuming it to be a statement of fact, I am of opinion after reading the defendant's evidence which was taken upon commission that he really did not rely upon that statement of fact in making his purchase.

It is significant that when he was asked upon his evidence as to what misrepresentations he complained of he only referred to the second part of the clause which I have quoted, namely, "If subdivided into five or ten acre tracts would sell on easy terms for a much higher price." At the beginning of his evidence, and then further on a second time he says it is that phrase that he refers to and it is not till further on still on his re-examination that he says something about the representation as to the then actual worth of the land. In addition to that, upon reading his correspondence, the letters which he sent to the plaintiff when he found himself unable to pay the instalment, it is quite evident that the idea dawned upon him very, very slowly that he had a right or might have a right to rescind on that ground. He was apparently groping around for some way out of what he had found to be a bad bargain. Instead of subdividing it into five acre lots forthwith after the purchase he divided it into city lots of small size, and forthwith sold a large interest in it to two people in Nova Scotia where he lived and it was only after they objected to carrying out their agreement and to pay him that he began to try and get out of paying the instalments which he had agreed to pay to the plaintiff. He is a man that had already been dabbling in Calgary real estate and knew something about it, I think.

It is quite evident from the whole correspondence that he bought this property, not relying upon the representation as to the present worth of it, but relying upon his gambling chances of re-selling it in small lots and making a big profit out of it, along with those to whom he had sold a part interest. I am very strongly inclined to the belief that he took these chances on the suggestion made in that letter about the Dominion Bridge Works going near there which the plaintiff's agent warned him against. I ought to say, in case of appeal, that in my opinion the land on the evidence, was not worth $215 an acre. There is some evidence of one man who had paid something more than that, I think, for land nearby, but on the whole evidence, I am satisfied that the property was not worth that at the time. However, I do not think he relied upon this representation when he bought it, and I think his whole defence is simply an attempt on a very weak ground to get out of a bad bargain. There will, therefore, be judgment for the plaintiff for the amount of that instalment, which is the sum of $4,816 and interest at eight per cent. from the 20th October to the date of the judgment. There will be the usual order which the plaintiff's counsel assented

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to and asked for at the trial that if the amount is not paid within three months the land will be sold under the direction of a Judge and the proceeds applied in payment of the amount due or to accrue due under the agreement of sale and of course if there is a deficiency plaintiff ought to have judgment for the deficiency.

The plaintiff is entitled to his costs.

Judgment for the plaintiff.

Re JOHN P. FRENCH.

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April 10.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. April 10, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ II—20)—FIRST REGISTRATION — FAILURE TO ESTABLISH LEGAL OR EQUITABLE TITLE.

Under the Land Titles Act R.S.S. 1909, ch. 41, an applicant is not entitled to be registered as owner where he fails to establish that he has any estate either legal or equitable in the land in question.

2. LAND TITLES (TORRENS SYSTEM) (§ II—20)—FIRST REGISTRATION — NECESSITY FOR DECREE ON PURELY EQUITABLE TITLE.

In Saskatchewan, a Master of Titles has no jurisdiction, on a reference to him by a registrar, to pass upon and direct the registration of a title which depends for its validity solely on the application of equitable doctrines, since a purely equitable claim not evidenced by any document cannot be made effective until a court of competent jurisdiction has declared the claimant entitled to an interest in the land.

Statement

APPEAL from judgment of Master in Chambers, holding J. P. French entitled to be registered as owner of certain lots, subject to a caveat filed against the same.

The appeal was allowed.

William Beattie, for appellant.

A. E. Doak, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The question involved in the appeal is, has the applicant, John P. French, established his right to be registered as the owner of lots 21 and 22, block 32, Prince Albert, according to plan P? French bases his right to bring these lots under the operation of the Land Titles Act, on the ground, that he is the eldest son and heir of John French, late of Fort Qu'Appelle, who received the patent from the Crown in 1884, for river lot 80, and that these lots in question comprise part of said river lot.

From the evidence and documents submitted to the Master of Titles the following facts appear: That in 1884, the late John French received letters patent from the Crown for all river lot 80, containing 181¾ acres. That prior to the receipt

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of the patents, he caused a survey of the river lot to be made by J. S. Dennis Sons & Company. Dennis & Company surveyed the lot on the assumption that it was twelve chains wide. On January 19th, 1884, French, by a deed, granted, released and quitted claim unto one John Breadon, all his estate and interest in lots 21 to 28, in block 32, river lot 80, "according to a plan made by J. S. Dennis Sons and Co., D.L.S." This plan will hereafter be referred to as the Dennis plan. When the letters patent for river lot 80 arrived, it was found that the river lot was eleven chains wide, instead of twelve as had been supposed. The evidence satisfied the Master, and it satisfies me, that Dennis Sons & Co., in making their survey, included a strip of land one chain in width belonging to river lot 81, which adjoins river lot 80 on the east. On discovering the error, French gave instructions to Col. Alexander Sproat to make a new survey of river lot 80, and a plan thereof in accordance with the boundaries of said lot as contained in the letters patent. Sproat made a survey and a plan was drawn. John French and Mrs. French signed their names to the plan as owners, but the plan never was issued, nor did it leave the possession of Col. Sproat. By deed, dated March 11, 1884, John French granted and conveyed to D. T. Barnett all of the said river lot 80, "saving and excepting those portions sold and conveyed, or agreed to be sold and conveyed by the said party of the first part." In this deed, Frances M. French joined to bar dower. Two days later Barnett conveyed Frances M. French a half interest of the property deeded to him by French on March 11, 1884. In May, 1885, John French was killed in action at Batoche. Subsequently his widow married E. C. Maloney. On October 16, 1889, D. T. Barnett and Mrs. Maloney by deed granted and conveyed to James McArthur all of river lot 80. Although this deed purported to convey the entire river lot, Barnett and Mrs. Maloney did not have the whole lot to convey. They only had that portion not "sold and conveyed or agreed to be sold and conveyed" by John French. And this is all that could pass to McArthur under his deed. From that time until July, 1907, nothing was done by anyone to secure a certificate of title to these lots. On that date, the executors of the last will of Helen Breadon, deceased, filed a caveat against the lots, claiming to be entitled thereto under the will of John Breadon, who died in 1890. From July, 1907, nothing further appears to have been done until this application was made. The registrar referred the application to the Master, raising the question as to the status of John P. French to make the application. The executors of Helen Breaden are consenting to title being issued to the applicant subject to this caveat, but their consent is not expressed as required by sec. 54 of the Act. The application was opposed by

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McArthur, who claims the lots under his deed of October 16, 1889, on the ground that they had never been sold by French. On these facts the Master held that John P. French was entitled to be registered as owner subject to the said caveat. From that decision McArthur now appeals. With deference to the learned Master, I am of the opinion that his decision cannot be supported.

1. In the first place, John P. French has not established that he had any estate or interest legal or equitable in the lots, which, under the Act, he must have before he is entitled to bring the lots under the operation of the Act and be registered as owner. The various deeds executed by John French under seal, transferred to the purchasers all the estate and interest which French had in the lots sold and conveyed. If the two lots in question were sold and conveyed prior to the deed to Barnett, all the estate French had in them passed to the purchasers. If they were not "sold and conveyed or agreed to be sold and conveyed" prior to the making of that deed, they passed to Barnett, and subsequently became the property of McArthur. The only way by which it could be made to appear that the personal representative of the late John French had any estate or interest in these lots, would be to shew that, before the making of the deed to Barnett, John French had entered into an executory agreement to sell these lots, and that such agreement had not been completed by a conveyance. Had such an agreement to sell been entered into, the lots would have been excepted from the Barnett deed, and if no conveyance had been made to the purchaser, the legal estate in the lots would never have passed from John French. No such agreement, however, was produced, nor was the existence of such suggested. The argument before us was, that John P. French should be registered as owner, so that he could make title to the executors of the last will of Helen Breadon, who, it was claimed, were the rightful owners. Section 49 of the Act makes provision that the owner of any estate, legal or equitable, may apply to bring his property under the operation of the Act, but nowhere does the Act provide that a person who has no estate or interest in the land may, with the consent of the person rightfully entitled, make the application and become registered as owner. As John P. French did not shew that he had any estate or interest in the lots, his application should have been refused.

2. Assuming, however, this to be an application properly made by the executors of the late Helen Breadon, and that they are entitled to all the rights of John Breadon under his deed of January 19, 1883, would they have been entitled to have the application granted? For two reasons I am of the opinion that they would not. First, because I do not think the Master

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of Titles has any jurisdiction, on a reference to him by a registrar, to pass upon and direct the registration of a title which depends for its validity solely on the application of equitable doctrines. And, secondly, because on the merits of the matter, the title of the executors has not been established. Dealing with the merits first. The applicants, it seems to me, are in this position. They are applying to become registered as owners of lots 21 and 22, in block 32, according to plan P. and in support of that application they produce a deed of lots 21 and 22, in block 32, according to a plan of river lot 80, made by J. S. Dennis Sons & Co. To succeed, they must shew that lots 21 and 22, according to the Dennis plan are identical with lots 21 and 22, according to plan P. The onus is on them and they have not discharged that onus. The Dennis plan has been lost, and there is no evidence of what it contained. Neither is there conclusive evidence that block 32, according to the Dennis plan, occupied the same position on the ground as block 32 of plan P. Both parties, however, on the argument before us assumed that plan P was identical with the Dennis plan with this exception, that in the Dennis plan block 32 included a strip of land one chain in width belonging to river lot 81, on which strip was located lots 27 and 28, which together were exactly one chain in width, while according to plan P, the survey covered only river lot 80, but in numbering the lots, numbers 9 and 10 and 19 and 20 were not given to any lots. Otherwise the lots numbered 1 to 28 as in the Dennis plan. The result was that lots 21 and 28 on plan P were identical with lots 19 to 26 on the Dennis plan. To make title therefore to lots 21 to 28 according to plan P, the applicants must establish ownership of lots 19 to 26 according to the Dennis plan. These lots were staked out on the ground and covered clearly defined parcels of land. Now, what title do the executors produce for those lots? The only document they have is their deed of January 19th, 1883, to John Breadon covering lots 21 to 28 according to the Dennis plan. This covers lots 23 to 28 on plan P and two lots on river lot 81, which French did not own and to which he could not make title. It does not convey any interest in the two lots which are the subject of this appeal, viz., 19 and 20 of the Dennis plan, or 21 and 22 according to plan P. The executors, therefore, cannot make title under this deed. How else can they make title? It was held by the learned Master, and argued before us, that as John French had, on discovering the error in the Dennis survey, directed a new and correct survey to be made, and as he had not dropped the numbers 27 and 28 of he lots staked out on river lot 81, but dropped the numbers of two lots in the centre of the block, and as it were moved the other numbers over, he had thereby indicated an intention that Breadon's

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deed should embrace lots 21 to 28, according to the correct survey. Assuming such to be his intention, I am of opinion, title to property cannot be made in that way. The parcels of land designated by lot numbers on the Dennis plan had been staked out on the ground by Dennis and were clearly defined when Breadon and French contracted for the purchase of the lots covered by the deed of January, 1883. They were dealing with certain specified parcels of land. Two of these parcels were on river lot 81 and of these French could not make delivery. French's failure to deliver gave Breadon a legal claim for damages against him. To satisfy that claim, French intimates an intention of giving Breadon two other lots. Before that intention can be effective to pass any property in these lots, it must not only be communicated to Breadon, but Breadon must have agreed to accept the lots. That French's intention ever was communicated to Breadon, or that Breadon ever agreed to accept these lots in lieu of lots 28 and 27 in river lot 81, there is not the slightest evidence. I am, therefore, of the opinion that no title of the lots in question on this appeal has been shewn to be in the representatives of John Breadon.

As to the jurisdiction of the Master. As there was no documentary evidence of title whatsoever to these two lots, and as the only claims put forward were based upon a right to have the deed to Breadon reformed to accord with the intentions of John French, and upon the doctrine of equitable estoppel, I am of the opinion that the Master has no jurisdiction to direct the registration of the title. To do so is, in effect, to reform the deed from French to Breadon. That deed, in my opinion, cannot be altered, because it contained exactly what the parties intended; but even if it could, a deed can only be reformed on an application to the Court in a cause or matter in the Court. The Master may pass upon documentary evidences of title, whether they shew a legal or equitable estate in the land; but a purely equitable claim not evidenced by any document cannot be made effective until a Court, on its equitable jurisdiction being appealed to, has declared the claimant to be entitled to an interest in the land.

The appeal, in my opinion, should be allowed with costs, in so far as it directs the registration of title to French. In so far as McArthur's title is concerned, I do not think we can direct its registration. McArthur is entitled if, but only if, the lots were not "sold and conveyed or agreed to be sold and conveyed" prior to his deed. The burden of proving that they were not sold rests upon him. On this point, the evidence before us is not conclusive. They were not sold to John Breadon by his deed of January 19, 1883, but they may have been sold to him later or to someone else. The fact that McArthur, in

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December, 1889, took a further deed and also a transfer from Barnett and Mrs. Maloney, in which lots 21 to 28 were excepted, and that this deed was taken after the Sproat survey, would lend colour to the view that they had been sold previous to the McArthur purchase. That being so, unless there is some further evidence that they were not sold, I do not see how a registrar could hold that McArthur had made out title. If all the evidence procurable was submitted to the Master of Titles on this application, I am of opinion that before McArthur can be registered as owner he must get a declaratory judgment of the Court, in an action brought for that purpose, that he is the owner of the two lots.

Appeal allowed.

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April 28.

CANADA LAW BOOK COMPANY, Limited v. FIELDHOUSE et al.

Alberta Supreme Court. Trial before Stuart, J. April 28, 1913.

1. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCES—SECURITY.

A mortgage taken in the name of the debtor's wife, and which is alleged to have been so taken in fraud of creditors, will not be declared in a creditors' action to have been taken with intent to defeat, hinder or delay the husband's creditors, if it appears that all the wife did with the mortgage when she got it was to assign it to certain of her husband's creditors as security for his debt.

Statement

ACTION to set aside mortgage as fraudulent and void as to creditors.

H. H. Parlee, for plaintiff.
Alex. Stuart, K.C., for defendant Fieldhouse.
S. B. Woods, K.C., for defendant Crawford.

Stuart, J.

STUART, J.:—At the close of the trial I dismissed this action as against the defendant Crawford. I think it should also be dismissed against the defendants Fieldhouse and Fieldhouse. In so far as the notes are concerned, it is obvious that the Court can do nothing with them, as they were returned to the maker. At the time this was done a mortgage was taken from the maker to the debtor's wife and it is really this mortgage that is attacked as being a fraudulent transfer of property by the debtor with intent to defeat, hinder or delay his creditors. In order to sustain the action it is necessary for the Court to find that the transaction was done with such an intention. It is somewhat difficult for me to see how this can be said to have been the case when all that the wife did with the mortgage when she got it was to assign it as security for the husband's debt.

The defendants, the Fieldhouses, will be entitled to their costs.

Judgment for defendants.

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April 10.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. April 10, 1913.

1. NEGLIGENCE (§ II F—120)—"LAST CLEAR CHANCE" — ACCIDENT PRIOR THERETO.

The doctrine of the "last clear chance" applies only where there has been a breach of duty on the part of the defendant arising after the danger to the plaintiff became or should have become apparent to the defendant and he fails to do, for the purpose of avoiding the accident, that which a reasonably careful man would have done, and hence where the accident has happened before the defendant became aware of the danger to the plaintiff, it is not error to refuse to submit to the jury the question of whether the defendant could by the exercise of reasonable care have avoided the accident.

[*Rice* v. *Toronto R. Co.*, 22 O.L.R. 446, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of Wetmore, C.J., after the trial with a jury, dismissing action brought by the plaintiff, an infant, by his next friend, for personal injuries, received while operating a printing press.

The appeal was dismissed.

G. H. Barr, for appellant.

W. U. Martin, for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an action for damages, brought by William Pratt, an infant, thirteen and a half years old, by his next friend, for injuries received while operating a press machine for the defendants. The plaintiff was in the employ of the defendants, and had been set at printing cards on the press machine, which was operated by electricity. From time to time a card, on being drawn off the feed board after receiving the impression, would drop down into the machine on to a clamp which, as the machine revolved, would rise up against an iron shaft. The plaintiff testified that, under the instructions given him by the defendant Nutty, he had to pick the cards which fell on the clamp out of the machine before they got dirty, and that to do this he had to reach down and put in his hand and get the card before the clamp came up against the bar, which was greasy and dirty, and which would therefore soil the card. While he was thus endeavouring to take out the card, his hand was caught by the clamp and crushed against the bar, and was so badly injured that it had to be amputated. The plaintiff claimed that the injury was due to negligence on the part of the defendants. The acts of negligence complained of were:—

1. That the defendants, well knowing that the plaintiff was inexperienced in the operation of a press machine, did not take proper pains to instruct him in the operation of said machine or as to the danger in the operation thereof.

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2. That the plaintiff was instructed in the operation of the said machine to pick up any cards that might fall, before they got dirty, and it was in the carrying out of these instructions, which incurred risk and danger that were not pointed out to the plaintiff, that the accident occurred.

3. No proper safeguard or covering was placed over that portion of the machine in which the plaintiff's hand was crushed.

The action was tried before Wetmore, C.J., with a jury. The following are the questions submitted to the jury and the jury's answers thereto:—

Q. 1. Did the defendants know, when the plaintiff first came to work, that the plaintiff was inexperienced in the operation of a press machine? A. Yes.

Q. 2. If not, was proper care taken to instruct the plaintiff in the working of such machine? A. Yes.

Q. 3. Was proper care taken to instruct him respecting danger in the operation thereof? A. Yes.

Q. 4. If both or either of the last two questions are answered in the negative, were the defendants guilty of negligence? A. That is not necessary to be answered.

Q. 5. Was a proper safeguard or covering placed over the portion of the machine in which the plaintiff's hand was crushed? A. Yes, but may possibly be improved.

Q. 6. Was the machine equipped, in so far as contributing to the accident is concerned, with the usual modern known appliances and inventions with which such a machine is usually equipped in order to avoid accidents? A. Yes.

Q. 7. If the fifth question is answered in the negative, were the defendants guilty of negligence in not placing such safeguard or covering? A. No.

Q. 8. Taking into consideration the nature and character of the machine at which the plaintiff was working at the time of the accident, and taking also into consideration the time during which he had been working it from time to time, was it work which the plaintiff, taking into consideration his age, would not have been put to do at the time the accident happened by a reasonably careful employer? A. It would be proper work.

Q. 9. Was the plaintiff, in view of his age, guilty of contributory negligence, and if so, in what respect? A. Yes, disregarding warnings.

On these findings of the jury the learned trial Judge entered judgment for the defendants. From that judgment the plaintiff now appeals.

For the plaintiff it is contended that the jury were not asked to find, and did not find, whether or not the defendants were guilty of the negligence complained of in the second act of negligence above set out. The plaintiff testified that the defendant Nutty had instructed him to pick out any cards that fell into the machine before they got dirty, and that to do this he had to pick them out while the machine was in motion. The

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plaintiff had been previously warned not to put his hand into the machine. The defendant Nutty, in his evidence, said:—

I gave him strict instructions that if any cards dropped on the floor or into the machine he had to immediately stop and pick them up, or pick them out, as the case may be.

It was contended that, on this testimony, there was ample evidence from which the jury could find that, in giving these latter instructions, the defendant Nutty was guilty of negligence which led to the injury, notwithstanding that the plaintiff had been previously warned of the danger to be apprehended in operating the machine. A perusal of the questions put to the jury satisfies me that the jury were not asked directly to find, whether or not the defendants were guilty of this act of negligence. For the defendants, however, it was contended that the omission of the jury to pass upon this act of negligence was immaterial, in view of their finding that the plaintiff was guilty of contributory negligence; that, even assuming the defendants to have been guilty of this negligence, the plaintiff could not recover, because, as the jury found, he himself was to blame for the accident. The jury found that, by his disregard of the warnings previously given him, the plaintiff had been guilty of contributory negligence. The plaintiff cannot recover if the negligence causing the accident was his own or the joint negligence of himself and the defendants. He is only entitled to succeed if he proves that the injuries received by him were caused by the negligence of the defendants. There is a class of cases in which it is necessary to have the jury determine whether or not the defendants could, by the exercise of reasonable care, have avoided the injury, notwithstanding that there may have been negligence on the part of the plaintiff. This class, however, forms no exception to the rule above laid down, because in such cases the negligence which is the immediate and effective cause of the accident, if the plaintiff is entitled to recover, is a breach of duty on the part of the defendant arising after the danger to the plaintiff became, or should have become, apparent. In other words, where the plaintiff has himself been guilty of negligence which contributed to the accident, the defendant will only be held liable where, after he became aware, or should have become aware, of the plaintiff's danger, he fails to do, for the purpose of avoiding the accident, that which a reasonably careful man would have done: *Rice* v. *Toronto R. Co.*, 22 O.L.R. 446. In the case at bar, the accident having happened before the defendants became aware of the danger to the plaintiff, it was unnecessary to ask the jury if, notwithstanding the negligence of the plaintiff, the defendants could by the exercise of reasonable care have avoided the accident, and the application by the plaintiff's counsel to have this question put to the jury was properly refused.

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This question being unnecessary, it only remains to determine if the jury could have found the plaintiff guilty of contributory negligence in disregarding the warnings he had received without at the same time determining whether or not the later instructions of the defendant Nutty to pick the cards out before they became dirty so nullified the previous warnings to the plaintiff not to put his hand into the machine that his disregard of those warnings did not constitute an absence of the care on his part which he should have taken. For the plaintiff it was contended that, before we could conclude that the jury passed upon this question, it must appear that the jury were expressly instructed that if they found that the accident occurred as the result of the plaintiff endeavouring to carry out the later instructions, his non-observance of the original warnings would not be contributory negligence. On this point the learned trial Judge instructed the jury as follows:—

Now, he (Nutty) says, "In view of that I want you to be especially careful, and if any of these drop on the floor or if any of them drop into the machine I want you to stop and pick them out." Now what would any person of any common sense, or an ordinary person—we will leave a child out of the question for the present—take that to mean? Would it mean that he was to stop and do the thing that he had been warned over and over against doing, and put his hand in where he was told not to put it? Was it to be assumed that the lad would come to the conclusion that because these directions were given to him that he was to pick these things out of the machine as quickly as possible, he was to disregard everything else and put his hand into danger for the purpose of doing it? It is for you to say whether it would be likely one way or the other, just as I have mentioned. Bear in mind this is a child. He is a little boy. And would he, hearing these instructions given to him—I do not know whether they were given sharply or whether they were not—in his eagerness, as Mr. Barr has put it, to do what his employer told him to do, forget about the instructions that had been given before? That is a matter for your consideration.

In my opinion the learned trial Judge has here plainly left it to the jury to say if the later instructions given by Nutty were such as to justify the plaintiff in disregarding the original warnings. The learned trial Judge left it to them to say if the plaintiff, hearing those instructions, would forget the warnings that had been given before. The jury, by their finding that the plaintiff was guilty of contributory negligence in disregarding these warnings, must, it seems to me, in the face of the above charge, be taken to have found that he would not. If this is the effect of the finding of the jury, and I think it is, the only conclusion to be drawn from such finding is that the immediate and effective cause of the accident was the plaintiff's own negligence in disregarding the previous warnings. The plaintiff therefore cannot recover.

The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed.

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April 9.

Alberta Supreme Court, Walsh, J. April 9, 1913.

1. ELECTIONS (§ III—82)—NOMINATIONS — REGULARITY — "NOT LESS THAN SIXTEEN DAYS" MEANS "CLEAR DAYS," WHEN.

Under sec. 105 of the Alberta Election Act, Alberta Statutes, 1909, ch. 3, providing that the Lieutenant-Governor-in-council may appoint a day not more than 20 nor less than 16 days from the date of the writs of election for the nomination of candidates, the 16 days referred to mean "clear days," in the computing of which the dates of the writs and the nomination must both be excluded.

[*McQueen* v. *Jackson*, 72 L.J.K.B. 606, applied.]

2. COURTS (§ II A—150)—PROVINCIAL COURTS—JURISDICTION — ALBERTA ELECTION ACT.

The Alberta Supreme Court has no jurisdiction to enjoin the returning officer from holding a nomination and election on the dates appointed in an election writ issued by the Lieutenant-Governor-in-council, under sec. 105 of the Alberta Election Act, Alberta Statutes 1909, ch. 3, notwithstanding that the provisions of that section had not been complied with, since the court has no jurisdiction over matters pertaining to elections unless specially authorized by statute.

[*Re Dubuc*, 3 W.L.R. 248, followed; *McLeod* v. *Noble*, 28 O.R. 528, referred to.]

Statement

APPLICATION by the plaintiff, an elector of the electoral district of Centre Calgary, to restrain the defendant, the returning officer, from holding the nomination and election on the dates mentioned in the election writ.

The application was dismissed.

A. A. McGillivray, and *J. E. A. Macleod*, for the plaintiff.

James Short, K.C., and *O. M. Biggar*, K.C., for the defendant.

Walsh, J.

WALSH, J.:—Section 105 of the Alberta Election Act provides that

> the Lieutenant-Governor-in-council may appoint a day not more than 20 nor less than 16 days from the date of the writs of election for the nomination of candidates,

and that the election shall be held on the seventh day thereafter. The writ of election directed to the defendant as the returning officer for the electoral district of Centre Calgary is dated on the 25th of March, 1913, and it directs the defendant to cause the nomination of candidates to be held on April 10 instant and the election, if any, on April 17. The plaintiff, who is an elector of this electoral district, and who sues on behalf of himself and all the other electors of the district asks that the defendant be restrained from holding such nomination and election on the days thus respectively named. The ground upon which he places his right to this relief is that the 16 days mentioned in the section are clear days, in the computation of which the dates of the writ and of the nomination must both be excluded. If he is

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right in this contention it follows that the time fixed for the nomination is one day short of the minimum period prescribed by the section, for the date thus set is the sixteenth day from the date of the writ.

I was referred by the plaintiff to the following authorities in support of his contention, namely: *Chambers* v. *Smith*, 13 L.J. Ex. 25; *Re Miller's Dale & Ashwood*, 55 L.J. Ch. 203; *Re Railway Supplies Co.*, 54 L.J. Ch. 720; *McQueen* v. *Jackson*, 72 L.J.K.B. 606; *Rex* v. *Turner*, 79 L.J.K.B. 176; *Re Ontario Tanners' Supplies Co.*, 12 P.R. Ont. 563; *Young* v. *O'Reilly*, 24 U.C.R. 172, and *Zouch* v. *Empsey*, 4 B. & Ald. 522. None supporting the opposite view were submitted to me. Some of these cases are decided upon the wording of statutes which differs from the language employed in the statute under consideration and are, therefore, distinguishable from this case. But through most of them runs the idea that such words as "not less than" preceding a period of limitation make that period clear of the events which give it its beginning and its ending. In the second edition of Stroud's Judicial Dictionary, p. 1287, under the words, "not less" it is said:

> where time is to be computed as "not less" than a given number of days that means clear days.

And in the fourth edition of Maxwell on Statutes 519, it is said, "again, when so many 'clear days' or so many days 'at least' are given to do an act or 'not less than' so many days are to intervene, both the terminal days are excluded from the computation." Some of the above authorities and others are given by these authors in support of their statements.

The case which to my mind most closely resembles this is *McQueen* v. *Jackson*, 72 L.J.K.B. 606. The section of the statute there construed provided that the summons

> shall not be made returnable in less time than 14 days from the day on which it is served.

Lord Alverstone, in this case says: "It seems to me that the words point to a limit of time within which the return is not to be made as plainly as if the expression 'clear days' had been used," and he held accordingly that a summons returnable on the 14th day from the day of its service was bad. Although there is some slight difference in phraseology between that section and the one which I am considering, there is to my mind absolutely no difference in meaning and Lord Alverstone's language applies as aptly to the one as to the other. My conclusion, therefore, is that the time between the date of the writ and the date fixed by it for the holding of the nomination falls short by one day of the shortest time authorized therefor by the statute.

I am of the opinion, however, that this Court has no jurisdiction to enjoin the defendant from acting under this writ. Scott, J., in *Re Dubuc*, 3 W.L.R. 248, held that the Supreme Court of the North-West Territories could not, in the absence of a statutory enactment conferring it, exercise jurisdiction over matters pertaining to elections to the legislature of this province. The authorities cited by the learned Judge in support of this proposition in my opinion amply justify it and I can see no difference in principle between that case and this. This Court has no greater power in that respect than had the Court of which Mr. Justice Scott was then a member except such as is given to it under the Controverted Elections Act, the provisions of which of course do not apply to such a case as this. The judgment of the Chancellor in *McLeod* v. *Noble*, 28 O.R. 528, is most instructive and a careful reading of it and of some of the authorities referred to in it has satisfied me that no such power rests in this Court as that which the plaintiff seeks to invoke. The defendant is but doing what he is commanded by the King's writ to do. So long as that writ stands he is not only entitled, but he is bound to obey it. Until it is either withdrawn by the Lieutenant-Governor-in-council, if such a thing is possible, or set aside by some tribunal having authority to set it aside, it amply justifies the defendant in doing what it directs him to do. I know of no authority in this Court to set aside such a writ as this. It was said by counsel for the plaintiff that this Court by its order often stays the execution of or sets aside writs which are just as much the King's writs as is the one in question. That is quite true, but it does so only in cases in which its jurisdiction is not open to question. Writs of its own are set aside when improperly issued because either of its express or inherent jurisdiction over its own process. Proceedings of Courts of inferior jurisdiction are in many cases subject to review by this Court under statutory authority, while its writ of prohibition lies to forbid any such Court from exercising a jurisdiction which it does not possess. But these are vastly different things from interfering with the execution of the royal command issuing from the Lieutenant-Governor-in-council in a matter respecting which jurisdiction has not been conferred upon this Court. I must, therefore, refuse the motion.

It was agreed that this should be turned into a motion for judgment and that no costs should be awarded to or against either party no matter what the result might be. The action is, therefore, dismissed without costs.

Application dismissed.

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April 7.

WINNIPEG ELECTRIC R. CO. (defendant, appellant) v. SHONDRA (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. MASTER AND SERVANT (§ II D 3—96)—OPERATION OF RAILWAY CARS—NEGLIGENCE.

A railway company is liable for injury to an employee who was caught in a narrow space between a car which he was moving and a nearby building, while he was climbing the nearest side-ladder to reach the brake to stop the car, though he could have safely used a ladder on the other side of the car, where, he, being ignorant of the closeness of the building to the track, naturally used the particular ladder, and where the danger must have been obvious to the foreman who directed him to move the car, and the foreman negligently failed to warn him of the danger.

[*Shondra* v. *Winnipeg Electric R. Co.*, 21 Man. L.R. 622, affirmed.]

Statement

APPEAL from the judgment of the Court of Appeal of Manitoba delivered on November 6, 1911, setting aside the verdict for defendants at the trial and ordering a new trial: *Shondra* v. *Winnipeg Electric R. Co.*, 21 Man. L.R. 622.

The present appeal was dismissed.

W. N. Tilley, for defendants, appellants.

W. H. Trueman, for plaintiff, respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The respondent received the injury complained of in executing an order given him in the course of his employment by the foreman of the appellants, his employers. It was held in both Courts below that the order was a negligent order in that it might be executed in two ways, one of which was necessarily dangerous because of the close proximity of the building to the car track, a fact which, in the circumstances, must be presumed to have been within the knowledge of the foreman. Further, the dangerous method adopted by the workman to carry out the order was the one which a reasonably prudent man ignorant of the local conditions would most probably adopt because convenient and effective, and this should have been foreseen by the foreman. I concur in that conclusion.

The order involved (*a*) the loosening of the brake, (*b*) the starting of the car down the grade, (*c*) its stoppage opposite the coal-chute by the side of the track. The accident happened as the workman was going up the side ladder after starting the car to reach the brake, and resulted from the fact that he was caught in the narrow space between the side of the car and the building. The brake could not be worked except from the roof of the car, and the car could not be started except from the rail-level. The whole operation required to be done promptly and involved going, in the first place, to the top of the car to loosen the brake, then coming down to the rail to start the car, and

finally going back to the roof to take control of the brake to guide the car to the chute. What more natural in such circumstances than for the workman to use the ladder nearest to hand to ascend and descend, namely, the ladder on the northwest corner of the car, instead of, as suggested by the appellants, the one on the northeast corner? If he had adopted this course the accident would not have happened; he adopted the other course in absolute ignorance of the relative positions of the car track and the building. The foreman should have given more explicit instructions in view of his knowledge of the risk, and for his failure to do so the company is liable.

That the company gave an order at all may be doubted, but that issue is admittedly not open on this appeal.

DAVIES, J.:—The substantial question to be determined in this appeal was whether the plaintiff in using the ladder on the car which he did use to reach the hand brake on the top of the car, was under the circumstances acting wrongly and improperly and was, therefore, the author of his own injuries. Davies, J.

The case has been twice tried. The jury found for the plaintiff at both trials and assessed the damages at the latter at $750, and the Court of Appeal for Manitoba refused to disturb the verdict.

To uphold the verdict the conclusion must be reached that the action of the plaintiff in going up the ladder he used was not, under the circumstances, unreasonable or improper. The jury must have so concluded, and I think there was evidence from which reasonable men could so fairly find. The plaintiff was, at the time, ordered to do work and was engaged in doing it, which, under ordinary railway practice, was done by two men.

He was to start the car and then "brake" it so that it would stop directly opposite the door of the coal-shed. He did "pinch" the wheel with the car-starting lever, started the car moving, and immediately started up the ladder alongside to get to the hand-brake with which he was to brake the car. I think, under the circumstances as detailed in the evidence, a jury of reasonable men could fairly find that in so doing he was not acting in a wrongful way. He was attempting in the way he thought best and in the absence of any instructions to the contrary, to obey the orders he received, which involved the doing of work which was usually done by two men.

I think the appeal should be dismissed with costs.

IDINGTON, J.:—I think this appeal ought to be dismissed with costs. Idington, J.

DUFF, J.:—The jury were, I think, entitled to conclude from the evidence of Dunderdale that a car situated as the car in question was, could not with safety and efficiency be moved and Duff, J.

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stopped at the chute by one man alone. The plaintiff said he thought he could not, by starting the car from the north end, reach the brake in time to bring the car to a stop at the chute. It is impossible to say that there was not sufficient evidence to go to the jury upon the proposition that the order, if given in the terms reported by the respondent—"brake it good"—required for its effect in execution the doing of exactly what the respondent did. Such being the purport and effect of the order, the jury would be entitled to find (contributory negligence apart) that the accident was due to McNaughton's negligence in giving it. Mr. Tilley objects that this question of McNaughton's negligence being the proximate cause of the injury to the respondent, was not really left to the jury; but, reading the charge as a whole, I think it is not fairly open to exception on that ground. Then as to contributory negligence, I think it is impossible to say that the finding that there was no want of ordinary care was an unreasonable finding. The jury might, I think, not unfairly take the view that considering the nature of the work he was engaged in, his failure to observe the danger created by the proximity of the track to the wall was what might reasonably be expected from a man in his situation. If in the opinion of the jury the respondent considered that the order he had received required him to take the way he did to reach the top of the car, the oversight would doubtless be regarded by them as the most natural thing in the world.

Anglin, J.

ANGLIN, J.:—A perusal of the testimony has satisfied me that there was evidence to support the finding involved in the verdict for the plaintiff that the defendants' foreman was negligent in giving the order in the course of conforming to which the plaintiff was injured. The risk involved in the execution of that order as it was carried out must have been obvious to the foreman. It was not necessarily so to the plaintiff, who was not shewn to have been familiar with the surroundings in which he was then working. I cannot see that the jury was unreasonable in drawing the inference that the foreman should have anticipated that the plaintiff would attempt to carry out his order by using the front side-ladder which was nearest to the brake that he had been directed to apply. It may be that the learned trial Judge did not direct the attention of the jury as explicitly as might be desired to the necessity of their drawing this inference before finding for the plaintiff. But exception on this ground was not taken to the charge either at the trial or in the reasons for appeal in the provincial appellate Court. In my opinion it should not be entertained.

I would, therefore, dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—I concur in the opinion of my brother Anglin.

Appeal dismissed.

NORTHERN CROWN BANK v. GREAT WEST LUMBER CO.

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May 5.

Alberta Supreme Court. Trial before Harvey, C.J. May 5, 1913.

1. CORPORATIONS AND COMPANIES (§ IV D 1—79)—LOAN CONTRACT—SHAREHOLDERS' CONSENT AS CONDITION PRECEDENT.

The borrowing powers under the Companies Ordinance (Ordinances 1911, Alta. ch. 61), sec. 98, conferred on a corporation when sanctioned by a resolution thereof previously given in general meeting, are strictly construed and can be validly exercised only when previously authorized by the shareholders, and to that extent the principle of ratification has been abolished, the import of the enactment being to enable every shareholder to deliberate upon and discuss the question in advance, on the theory that (when prudent and proper) he may at that stage withhold his consent, although after the unauthorized transaction has taken place, he might hesitate to condemn the directors.

2. CORPORATIONS AND COMPANIES (§ IV D 1—79)—LOAN CONTRACT—SHAREHOLDERS' LIABILITY—EXISTING DEBTS AFFECTED.

Where a corporation without the previous sanction of a formal resolution required by Alberta Companies Ordinance (Alta. Ordinances 1911, ch. 61), sec. 98, borrows money for the purposes of the corporation, and where the money so borrowed is applied to discharge existing enforceable legal debts of the corporation, the lender may recover though he knew that the authority to borrow was insufficient; since the transaction does not really add to the corporate liabilities, their amount remaining in substance unchanged, it being merely for convenience of payment a change of creditor.

[*Reversion Fund* v. *Maison Cosway*, [1913] 1 K.B. 364; *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. D. 61, 71, referred to.]

3. BANKS (§ I—2)—ENGAGING IN TRADE—POWERS—BANK ACT (CAN.)

Where a bank engages in trade or business in contravention of sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, such bank cannot recover from the company whose business the bank carries on or from its assets any moneys advanced by the bank in paying debts incurred by itself in the execution of acts prohibited and therefore illegal.

4. BANKS (§ VIII B—174)—STATUTORY SECURITY—WHAT BANKS MAY NOT LEND ON—GOODS.

A chattel mortgage, taken by a bank in violation of clause (*e*) of sub-sec. 2 of sec. 76 of the Bank Act (R.S.C. 1906, ch. 29) prohibiting banks from making advances "upon the security of any goods, wares and merchandise" (except as authorized by the Act), may be valid and enforceable if taken to secure an existing indebtedness, but not otherwise.

5. BANKS (§ I—2)—PROHIBITION AGAINST CARRYING ON TRADE—TAKING TRANSFER OF RE-ORGANIZATION SHARES WITHOUT MAKING ADVANCES.

Where a company is indebted to a bank and upon a re-organization of the company and new issue of shares of stock the bulk of the stock is transferred at the bank's request to its nominee for the purpose of introducing new interests; and where it has introduced no new interest and where the bank has paid nothing for such shares, it will be required to retransfer them to the company, as the bank is prohibited by sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, from acquiring any interest in the business and thereby engaging to that extent therein.

6. INTEREST (§ I B—20)—ON LOANS—INTEREST RATE UNDER BANK ACT—STIPULATION ULTRA VIRES AND INOPERATIVE.

Where a bank has charged on loans more than seven per cent. the maximum rate of interest or discount allowed by sec. 91 of the Bank Act, R.S.C. 1906, ch. 29, the stipulation is *ultra vires* and inoperative.

[*McHugh* v. *Union Bank*, 10 D.L.R. 562, applied.]

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ACTION to recover the amount of the balance due in respect to advances made by the plaintiff bank to the defendant lumber company, and to enforce certain securities held by the plaintiff as collateral.

Judgment was given referring the matter to the Master to take the accounts.

A. H. Clarke, K.C., for the plaintiff.

C. C. McCaul, K.C., and *H. P. O. Savary*, for the defendants.

Harvey, C.J.

HARVEY, C.J.:—The defendant company was incorporated in the early part of the year 1906 with its head office at Red Deer. During that year it borrowed from the Northern Bank, the predecessor of the plaintiff bank, through its Calgary branch, considerable sums of money, which in the spring of 1907 amounted to more than $50,000. In March of that year the bank sent to Red Deer as its manager a Mr. Menzies, who had been with the bank only about a year, but who before that time had had experience in lumbering interests in Ontario. More money was required by the company and on April 2, 1907, at a general meeting of the members, it was resolved:—

That the directors of the company be and they are hereby authorized to borrow from the Northern Bank a sum not exceeding the sum of $25,000, to apply in the reduction of the liabilities of the company and to bring down to the mill at Red Deer the logs now cut, at a rate not exceeding 7 per cent. per annum and as security for the repayment thereof and of the interest thereon and of the amount of the existing liability of the company to the bank to pledge or mortgage to the bank all or such part of the assets of the company as may be agreed upon between the bank and them.

The company's assets consisted of a mill at Red Deer and another in the bush and certain lands in Red Deer, several timber berths which it held under assignments from the licensees from the Crown, also lumber, logs, machinery and accessories for logging and milling operations.

On the 8th of April following the resolution quoted, an agreement was entered into between the company of the first part and the bank of the second part, and James W. Robinson, William McKenzie, William C. Sawyer, George W. Greene, and William E. Payne, called the guarantors, of the third part. This agreement recited that the company was indebted to the bank in a sum exceeding $50,000, and had applied for a further advance not exceeding $25,000,

for the purpose of paying certain of its liabilities hereinafter referred to and of bringing down from its timber berths to its mill at Red Deer the logs which have been cut and are now upon the said berths,

and that the bank had agreed to make the advance upon the security and terms set out. The bank then agrees that upon the

execution and delivery of the securities thereafter specified it will advance such sum not exceeding $25,000 as may be required for the purposes specified, viz., $12,000 to pay wages due; other specified sums amounting in the aggregate to between $7,000 and $8,000, and $5,000 for bringing down the logs, and the balance for small accounts. The agreement goes on to provide that the advances will be made by payment of the company's cheques and that the advances shall bear interest at the rate of 7 per cent. from the date of each advance and be repayable on November 1, 1907. It also provides that on the securities being given, the bank will extend the time for payment of the other liability to November 1, 1907.

The company agrees that in consideration of the advance it will give the securities specified, which include a chattel mortgage of all its personal property, an assignment of the agreements respecting the timber berths and a mortgage of all its real estate. The agreement also contains the following provision:—

9. It is agreed by and between the parties hereto that all moneys received by the bank from the sale of lumber manufactured by the company at its said mill, shall, after deducting therefrom the costs and expenses incurred in connection with the manufacture and sale of the same, including the stumpage thereon, be applied in the first place in and towards the repayment of the liability of the company in respect of the said advance of $25,000 and interest, and that when by this means the said advance and interest has been fully repaid to the bank the liability to the guarantors hereunder shall absolutely cease, provided, however, that if in the opinion of the bank it is necessary in the interests of the company and of the bank to pay out of the moneys so received by it, any claims of any creditors of the company other than the bank, it shall be at liberty to so pay the same with the consent of the guarantors, and thereupon the liability of the guarantors hereunder shall, notwithstanding such payments, continue until such advance and interest have been fully paid, and after said advance and interest have been fully paid, the bank shall apply all the further net proceeds received from the sale of lumber or otherwise out of the property mortgaged to it upon the existing liability of the company to the bank and interest thereon. Provided that whenever the bank shall receive one hundred dollars on account of the said advance or any multiple thereof the same shall be credited on account of this guarantee and interest on so much thereof shall thereupon cease. Provided further that upon payment in full to the bank, the bank will re-convey, re-assign and transfer to the company or to its nominees, all the property real and personal hereby assigned, transferred and conveyed to the bank, or agreed so to be, excepting such part thereof as may under the provisions hereof have been sold free from all encumbrances, liens or charges whatsoever done, made or suffered to be done by the bank.

It is also provided that the agreement is to be read into and form part of all the securities provided for.

On the same day the company executed a chattel mortgage to the bank covering all its personal property as security for

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$54,000, the current indebtedness, and another covering the same property as security for $25,000 to be advanced. It also executed a real estate mortgage as security for $54,000 and assigned the agreements relating to the timber berths as security for both sums. On April 23, $20,000 was credited to the company's account in the bank books, and on May 14, $5,000, notes being taken therefor.

This was all checked out apparently before the end of May, and the bank account shews the payment of all the accounts specified in detail in the agreement. In the minutes of a meeting of the directors of the company held on April 15, 1907, is copied an authorization to the bank from all the guarantors to pay a further sum of $4,000 to be repaid out of the proceeds of the logs in priority to the $25,000. On August 26, 1907, at a directors' meeting, a chattel mortgage for $25,000 was directed to be given to the bank to ratify and confirm the one for that amount given on April 8, and on the same day the mortgage was executed. The agreement of April 8 provided that the bank might employ some one at the expense of the company to take charge of the log drive and otherwise supervise, and in May or June the bank sent for this purpose one Kennedy, who is referred to in the minutes of a meeting of the directors held on July 31 as the acting manager of the company. While Kennedy acted as manager of the company he made weekly reports direct to the bank's head office at Winnipeg.

In September the liability standing in the books of the plaintiff's Calgary branch was transferred to the Red Deer branch, the amount then appearing as $55,810.80, and thereafter the Red Deer branch had charge of everything. In the meantime advances had been made by the bank in excess of the $25,000, and the liability to the bank at this time appears to have been slightly over $100,000.

The condition of affairs was not satisfactory to the bank, and in September the general manager proposed that there should be what was referred to as a re-organization of the company, and for that purpose he submitted the following memorandum to the directors:—

Memo. for the Great West Lumber Co.

Outline for proposed reorganization of the company.

The company is at present indebted to the bank for a large sum of money, and also has a number of outside creditors. The assets of the company apart from their interest in the timber berths which they have contracts to operate, are not sufficient to meet their obligations. If the company is liquidated there will not only be no residue for stockholders, but there will be an unsettled liability. The holders of the leases for which the company has contracts are both threatening to cancel their contracts. Messrs. Graydon & Graydon, representing heirs of the McMillen estate, state they are about to take immediate action to terminate the contract

entered into with them. Messrs. Carter & McEwen state it is their intention to give notice on September 25 that their contract is terminated.

The only possible way that appears to be open to save anything whatever for the stockholders of the present company, is to effect a reorganization of the company, and by introducing new interests secure either new arrangements with the holders of the leases or their consent to a continuance of the leases now in force.

The following proposal is submitted as a basis upon which this may possibly be accomplished:—

The present capital stock of the company issued amounts to $26,500. Of this amount there shall be transferred to such party or parties as the bank may indicate to be held by them for account of the new interests to be introduced, $16,500. There shall be transferred to a trustee to be chosen by the present stockholders, and to be approved of by the bank, the balance of the issued stock, amounting to $10,000.

It is claimed that the total amount of capital stock which should be issued is $116,500. If this amount of stock is issued, then the respective proportions to be allotted to the parties named by the bank and to the trustee selected by the present stockholders, shall bear the same relative proportions to the present issue as $16,500 does to $10,000.

The bank will release the stock of the Robinson McKenzie Lumber Co., which has been assigned to them as security for the debt of the Great West Lumber Co.

The reorganized company will make such new arrangement with the heirs of the McMillen estate and with Messrs. Carter & McEwen for the operation of the respective limits leased by these parties as may be possible to effect in the best interests of the company.

The reorganized company will protect the outstanding obligations of the Great West Lumber Co.

It shall be understood that there is no obligation on the reorganized company to continue the business indefinitely, but it shall be definitely understood that the company is to be at liberty to dispose of the business and plant as a going concern if a favourable opportunity to do so presents itself, and the price to be obtained is satisfactory to the majority shareholders.

It is to be understood that there will not be any distribution of profits from the results of the business while the company is indebted to the bank or to outside creditors.

Salaries of all employees engaged by the company are to be reasonable and such as shall be satisfactory to all parties interested.

It is understood that the rate of interest to be paid by the company to the bank shall be sufficient to compensate the bank for extra risk, anxiety and care, and that such rate of interest shall be higher than the ordinary rate of interest charged to first-class customers.

After some negotiations the directors at a meeting held on October 14, 1907, passed a resolution accepting unconditionally the propositions contained in the above memorandum.

It appears that the capital stock was $25,500, and not $26,500, and for the purpose of the reorganization 156 shares were transferred to the Western Trust Co., the nominee of the bank, who simply held them in trust for the bank, and in 1911, on pay-

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ment of a nominal sum for its services, transferred them at the request of the bank to one Yule, in whose name they now stand.

One of the shareholders transferred one share each to Robinson, one of the original shareholders; to Menzies, the bank's local manager, and to Kennedy, who had been sent by the bank to look after its interests. The remaining shares except two were transferred to W. E. Payne, who thereupon executed a document in the following terms:—

I hereby agree with the Northern Bank that I will hold the shares now standing in my name in the Great West Lumber Co., Ltd. (being all of the issue to this date except one share each held by J. H. Menzies, J. D. Kennedy and J. W. Robinson, and two shares held by G. H. Bawtinheimer and 154 shares held by the Western Trust Co., and all shares which may hereafter be transferred to me of the issue provided for by the agreement of November 28, 1907, between the said company and J. W. Robinson and Wm. McKenzie, for the term of three years from the date hereof, unless the liability of the said company to the Northern Bank is sooner satisfied, and 154 shares held by the Western Trust Co.), and all shares which may person, firm or corporation. This forms a part of the agreement upon which the reorganization of the said company has been this day effected and is in consideration of the consent of the said bank being given to said reorganization.

(Sgd.) W. E. PAYNE.

Red Deer, December 2, 1907.

These shares were in 1911 retransferred to the original shareholders or their assignees. The remaining two shares were in December, 1910, transferred to two nominees of the bank, one being the assistant manager of the bank at Red Deer. On December 2, 1907, at the shareholders' meeting, Kennedy, Robinson and Menzies were elected directors, and at their meeting subsequently they were elected respectively president, vice-president and secretary-treasurer.

There was no directors' meeting during 1908 until after the annual meeting on December 19, at which meeting Mr. Menzies is reported to be present representing personally one share, and by proxy 156 shares of Western Trust Co. and 94 shares of W. E. Payne.

At that meeting Menzies, Payne and Robinson were elected directors and at the subsequent meeting of directors Menzies became president and managing director, which latter office he still held at the date of the trial, though he left Red Deer at the end of 1911. The only meetings of the shareholders subsequent to December, 1908, were the annual meetings held in December, 1909, with two adjournments in January and February, 1910, and in January, 1911, and a general meeting in January 28, 1913. At all of these meetings Mr. Menzies represented by proxy 156 shares.

Balance sheets which have been given in evidence by the plaintiff shew that the company's liability to the bank, which

in December, 1907, at the time of the reorganization, was nearly $120,000, had in December, 1908, become a little more than $205,000 out of total liabilities of $214,000, at which time the assets are shewn as $26,000 less than the liabilities. On November 30, 1909, the liability to the bank was $260,000, all other liabilities amounting to less than $1,000. The total assets are shewn as $231,580, including $24,500 for equity in the large timber limits not shewn as an asset in the former balance sheet. On November 30, 1910, the indebtedness to the bank has increased to $288,000, the other liabilities being only $1,358, exclusive of capital, which for the first time is shewn as a liability. The assets are shewn as $209,500, including nothing as equity in timber limits, but including $24,400 as amount paid in advance for stumpage on the limits.

There are no balance sheets subsequent to this, but on November 1, 1911, this action was begun and in it a claim is made for $384,000, including interest, and on November 2, 1912, when plaintiff's general manager was examined for discovery, he stated that the company's indebtedness to the bank at that time was $596,900.

In addition to the claim for the money the plaintiff seeks to enforce the securities before mentioned and certain other securities given subsequent to the reorganization.

The directors met on November 3, 1911, for the first time since May 5 preceding, and the minutes of that meeting contain the following entry:—

> Mr. Menzies informed the meeting that he had been served with a writ by the solicitors of the Northern Crown Bank for the full amount of its (the bank's) indebtedness, and in view of the fact that this board of directors is not able to satisfy the bank's claims and as we have not sufficient assets to satisfy the claim, we will have to let the bank proceed and make use of what remedies it has for enforcing the claim of its debts.
>
> Menzies and Lyons that the secretary-treasurer be instructed to advise each of the company's shareholders of these facts by registered letter.

No further business was done at this meeting, and no meeting of any kind has been since held, with the exception of the meeting of the shareholders on January 28, 1913, and a formal directors' meeting following it.

J. W. Robinson, one of the shareholders, who has been already referred to, applied for leave to defend the action and he was given leave to defend on behalf of himself and all other shareholders.

In his amended defence and counterclaim delivered on January 11, 1913, he alleges among other things that all the advances made and securities given after the reorganization are invalid, not being real and *bonâ fide* advances and not being authorized by the shareholders. This defence was evidently the

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cause of the meeting of January 28, which was called by notice given on the 14th. On the 21st Mr. Menzies, who had about the end of 1910 become the holder of 38 shares by purchase in addition to the one he had theretofore held, transferred one share each to J. M. Campbell, his successor as plaintiff's local manager at Red Deer, and R. L. Gaetz of Red Deer.

These three and Mr. Robinson were the persons present at the meeting of 28th January. Against Mr. Robinson's opposition and against his protest that Mr. Menzies had no right to vote the shares in Mr. Yule's name, the meeting passed a resolution ratifying and confirming the borrowings theretofore made by the directors from the bank, and the giving of the securities therefor. On February 8, 1913, the plaintiff filed a reply setting up this ratification. At the opening of the trial an application was made to strike out this reply. There being no jury to be prejudiced, I refused to strike out the reply at that stage, preferring to receive all the evidence that might be available under it. I am of opinion, however, that the reply should be struck out as not furnishing an answer in law and without considering the other grounds raised.

It was held in *Adams* v. *Bank of Montreal* (1899), 8 B.C.R. 314, that a mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow, may be ratified by the shareholders. This was confirmed on appeal, 32 Can. S.C.R. 719, and leave to appeal to the Privy Council was refused. The section of the British Columbia Act then in question which conferred power to borrow, provided that "These powers shall not be exercised except with the consent of the shareholders representing two-thirds of the capital stock of the company actually paid in."

The section of our Ordinance, ch. 20 of 1901, is as follows:—

98. All companies under this Ordinance shall have power subject to the conditions of and in addition to all other powers conferred by this Ordinance to borrow money for the purpose of carrying out the objects of their respective incorporations; and to hypothecate, pledge or mortgage their real and personal property; to issue debentures secured by mortgages or otherwise; to sign bills, notes, contracts and other evidences of or securities for money borrowed or to be borrowed by them for the purposes aforesaid; and to pledge debentures as security for temporary loans.

(2) Those powers shall not be exercised except with the sanction of a resolution of the company previously given in general meeting.

Prior to March, 1907, a "special" resolution was required, but in the session of the Legislature then held the word "special" was struck out, but no other change made.

I can see no room for doubt that the acts specified in that section can be validly done only after they have been authorized by the shareholders, and that to that extent the principle of ratification has been abolished. Perhaps if every shareholder

had concurred there might be no one who could validly object, but it appears clear that it was intended that before the acts should be done they should be dealt with in general meeting, when every shareholder would have an opportunity to express his views and after all arguments had been advanced the majority decided to authorize them. As the section was originally framed, not merely had the authority to be that of three-quarters of the shareholders, but after time to consider it had to be confirmed by another meeting. One can easily see that a shareholder might quite freely express his disapproval of a borrowing before it was done, and yet might hesitate to condemn the directors for doing it after it was done. I am of opinion, therefore, that the borrowing by the directors without the previous authority of the shareholders was *ultra vires* and that all the securities given therefor are invalid. This applies to all the advances made after the $25,000 provided for in April, 1907, and to all the securities given therefor. I think I have specifically referred to all the other securities. It does not, however, necessarily follow that because the borrowing was *ultra vires* the bank may not recover the moneys advanced.

In *Reversion Fund* v. *Maison Cosway*, [1913] 1 K.B. 364, the Court of Appeal decided last December that when the money borrowed was employed to discharge existing legal debts of the company it could be recovered though the lending company knew that the director had no authority to borrow. This decision, however, was only that of a majority of two to one, Vaughan Williams, L.J., dissenting on the grounds that the knowledge of the lending company prevented it from recovering. As the decision reversed the Judge below, and the result is therefore that the opinion of two Judges is opposed to that of two others, I have looked to see if an appeal has been taken, but have been unable to find trace of any; but as the decision is only reported within the last few weeks, it is perhaps too early to expect that. In the meantime, of course, I must follow the decision.

At p. 377 Buckley, L.J., gives the principle of equity on which the Courts hold that moneys paid to satisfy just debts may be recovered by quoting from the judgment of Lord Selborne, L.J., in *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch.D. 61 at 71:—

> The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall

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not retain that benefit so as in substance to make those other people pay their debts.

I take that to be a principle sufficiently sound in equity and if the result is that by the transaction which assumes the shape of an advance or loan, nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing.

And again at p. 382 he says:—

I cannot find any reason for saying that in this second class of cases, namely, where the money is borrowed by an agent without authority from the principal, but is applied in paying debts of the principal, the question of knowledge by the lender of the agent's want of authority to borrow is material for the purposes of the equitable doctrine on this subject, the basis of that doctrine being that the transaction is not in substance one of borrowing at all.

It is apparent, of course, that the debts paid must be ones that the company was bound to pay, and the case, as well as the other cases referred to, decides only that debts existing at the time the advances are made are such that the advances to pay them may be recovered.

Mr. Menzies said on his examination that all the advances went to pay debts or obligations. This, however, is not conclusive of the matter, for it is objected that after the reorganization in 1907 the business was in fact carried on by the bank, and that advances made to pay any debts incurred after that time could not be recovered for two reasons, first because the bank was doing something illegal in carrying on a business in contravention of the Bank Act, and secondly, because apart from any question of illegality, the bank was in reality advancing money to itself for its own purposes, and on no ground of equity could the company be made liable. As to the first reason, it is contended on behalf of the bank that it was not carrying on the company's business, and that if it was it was doing so only for the purpose of protecting and realizing on its securities as incidental to the regular banking business. As to whether the bank was really if not nominally carrying on the company's business, I find in the examination for discovery of the general manager the following:—

107. Q. About that time you transferred the account from Calgary to Red Deer? A. Yes, in order to be able to look after it better.

108. Q. And from that time on the bank were administering the affairs of the company? A. Well, practically it was controlling the administration of the company.

109. Q. It was done nominally through a board of directors of the company itself, but really by the bank? A. The bank were endeavouring to liquidate the liability.

110. Q. And I say, though nominally the company was being administered by its own board, it was really being run by the bank? A. Yes, practically.

111. Q. And that has continued down to the present time? A. Yes.

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Question 64 and following questions of Mr. Menzies' examination for discovery were put in, but it is impossible to understand exactly what is meant without going back a few questions and commencing at 58 his evidence is as follows:—

58. Q. I see here, also, in the paragraph that we have numbered 10 (quoted). Was any new arrangement made? A. Yes.

59. Q. In writing? A. Yes.

60. Q. When was that? A. The arrangement held by the old company with Carter & McEwen was an absolutely impossible one for any company to operate under.

61. Q. Did you get a new contract with them? A. We did.

62. Q. Written? A. Yes.

63. Q. In whose name was that taken? A. The Great West Lumber Co. I might say it was arranged by the head office of the bank in letter form.

64. Q. Now you said that the object of this was to give the bank control of the management of the company? That was the object of it? A. Yes.

65. Q. And that object was effected, was it not? A. Yes.

66. Q. The bank has ever since controlled the operation of the company? A. Yes.

67. Q. To the exclusion of the former shareholders? No answer.

68. Q. Is that correct? A. To the exclusion of the former shareholders?

69. Q. Yes? A. Yes.

The whole correspondence between the bank's head office and Mr. Menzies shews that the business of the company was considered to be under the control of the head office as much as the bank's Red Deer branch's business. It is true that in many cases they followed the form of having the business done by its officers and under its directors, and they had Mr. Menzies' salary divided between the two, but in many cases they disregarded even the form, as, for instance, during the year following the reorganization not a meeting was held, though, as already pointed out, the liability of the company to the bank was increased by over $80,000. Likewise during 1912 no meeting was held, but the liability was increased by over $200,000 and the evidence shews that during that time the company's business was under the personal supervision of Capt. Robinson, the vice-president of the bank, and that expenditures were incurred in building a new mill and making other improvements.

During the bank's control of the business it began the operation of a larger limit not theretofore operated and established a retail lumber business not before engaged in, and the correspondence shews that the latter was done by direct authority from the head office of the bank.

The bank's general manager and board of directors seemed to have no doubt that they were conducting the affairs of the

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company as far as one can gather from their conduct and the correspondence, of which I quote one letter:—

The Northern Crown Bank,
Head Office, Winnipeg.
February 23, 1910.

The Managing Director,
Great West Lumber Co.,
Red Deer.

Dear Sir,—I have pleasure in advising you that the board of directors have authorized a gratuity of $400 to be paid to you for your services in connection with the business of the Great West Lumber Co., the amount of the gratuity to be charged up to the company.

Yours faithfully,

(Sgd.) R. CAMPBELL,
General manager.

I find it impossible to come to any other conclusion than that the bank was carrying on the company's business, if not in form, certainly in substance; if not directly, at least indirectly.

Sec. 76 of the Bank Act provides by sub-sec. 2 that:—

Except as authorized by this Act the bank shall not either directly or indirectly

(*a*) Deal in the buying or selling or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever.

The exception by the first part of the section is, "such business generally as appertains to the business of banking."

In *Ontario Bank* v. *McAllister* (1910), 43 Can. S.C.R. 338, reported in the Ontario Courts as *Peterboro Hydraulic Power Co.* v. *McAllister*, in 17 O.L.R. 145, the McAllister Milling Co., carrying on business as millers, being indebted to the bank in a considerable sum, and being unable to pay, entered into an arrangement with the bank whereby it was to pay the bank $10,000 and assign to it all its assets. The bank, in order to sell the business as a going concern, arranged that the business should continue to be conducted in the company's name under the management of one of them. The company held a lease from the Peterboro Co., the rent of which was paid by the bank, while the business was being conducted under its control. This continued for about a year, when the bank went into liquidation when the stock was sold and the premises abandoned. The Peterboro Co. sued the McAllister Co. for rent, and it claimed over against the bank.

One of the bank's defences was that the agreement to accept an assignment of the lease and carry on the business was contrary to the Bank Act and void. The Court decided that the bank having received the benefit of the lease as part of the settlement was, in the absence of any covenant, bound in equity to indemnify the McAllister Co. from liability under it.

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Of all the fourteen Judges who gave judgments in the case, Davies, J., in the Supreme Court alone was of opinion that the actual carrying on of the business was not a contravention of the Bank Act and even he expresses doubt. Duff, J., and Anglin, J., both were of opinion that the whole transaction was illegal and that the bank was therefore not liable.

In the Court below Maclaren, J.A., the author of the work on banking, at 169 says:—

> There can be little doubt that the taking over and carrying on of the milling business by the bank was a violation of sec. 64 of the Bank Act of 1890. . . . But this has nothing to do with the present case.

And Osler, J.A., says at 163:—

> I say nothing of the carrying on of the milling business by McAllister for the bank, for, whether this was *ultra vires* of the bank or not, it was separable from and not incident to the agreement for settlement.

In the Supreme Court the Chief Justice and Idington, J., both expressed concurrence in the reasons of Osler, J.A.

It appears to me perfectly clear from Mr. Justice Davies' remarks that he would have no doubt that under the circumstances of the present case the bank's acts were illegal.

The whole authority of that case is therefore, in my opinion, in favour of the conclusion that the bank's acts were illegal in carrying on the company's business as it did. Such being the case, without considering the other ground, I am unable to conceive of any equitable principle on which it can be held entitled to recover from the company or its assets any moneys advanced by it in paying debts incurred by itself in the execution of acts prohibited and therefore illegal.

The bank's claim, therefore, must be limited to the $54,000 secured by the land mortgage and the $25,000 authorized by resolution in April, 1907, and to such subsequent advances as were actually used in the payment of debts existing at the time of the advances and excluding all debts arising after December 2, 1907. A reference will be necessary to determine this.

Under the agreement entered into with the company and the guarantors in April, 1907, the net proceeds of the sales of lumber and other receipts were to be applied in satisfaction of the $25,000 advance and then in satisfaction of the remaining indebtedness of $54,000.

The bank opened a special account in its books apparently for the purpose of that agreement, but abandoned it in December, 1907, Mr. Menzies saying that it was considered that the guaranty was then satisfied. That account shews that from the 7th of August, when it was opened, to the 13th December, when it was closed, the bank received over and above payments, and transferred to the company's general current account, over $20,000. The current account shews receipts up to the end of

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the following March of another $20,000. There was also a considerable quantity of lumber on which the charges had been chiefly, if not wholly, paid, the receipts from the sale of which would come in later. These receipts are by the agreement all appropriated as specified, subject to the payment of other claims with the authority of the guarantors. The only claim of this sort of which there is any record is the one previously referred to of $4,000. There would appear little doubt, therefore, that the advance of $25,000 has been fully paid and that the indebtedness of $54,000 has also been paid in part if not in whole.

It was argued that the chattel mortgage to secure the $25,000 is invalid as being in violation of sec. 76 (2) (*c*) of the Bank Act, which prohibits banks from making advances "upon the security of any goods, wares and merchandise." As I have already indicated, this advance has almost certainly been paid in full, so that this is probably of no importance. But in case it may be, I may say that though it is admitted that the mortgage given on April 8, before the advance was made, was invalid, it is contended that the subsequent one given after the advance was made is a good security, and I am of opinion that this view is correct. The company could not have been compelled to give the second mortgage, the agreement being in contravention of the Act, but it did give it and it therefore has the same basis of support as any mortgage given to a bank to secure an existing indebtedness.

There remains to be considered the rights of the parties as to the 156 shares of stock transferred to the bank's nominee for the purpose of introducing new interests. The defendant claims that the bank, having failed to carry out the purpose for which these shares were transferred, it should be now ordered to have them retransferred to the shareholders, from whom they were obtained. I am of opinion that this claim should be allowed. The meaning of the parties is not very clearly defined, but the only meaning that it seems possible to take from the words is that the bank desired to interest other persons in the company in some way, probably by putting in money, certainly for the purpose of increasing its ability to meet its financial obligations, and for this purpose the bank required a controlling interest in the capital stock the more readily to accomplish this purpose.

The agreement created by the acceptance of the bank's proposals, I think, must be construed as meaning that such controlling interest would be transferred to the "new interests." It is suggested that the bank itself became the "new interests," but if so it has never paid one cent for these shares and has not in any way increased the company's ability to pay. It has treated the company as any other customer and charged it for every dollar advanced, and as the agreement suggests, has charged more than the usual rate of interest for the use of this

money. Moreover, it appears to me that it is not open to consider that the agreement contemplated the bank's acquiring an interest in the business and thereby engaging to that extent in the company's business in violation of sec. 76 of the Bank Act.

It is admitted by the bank's officials that no attempt has been made to sell the shares held by the bank's nominee or to induce anyone to come in to the company by means of them. They have tried to sell the whole of the company's assets, but such a sale, it appears to me, can by no possibility be construed as the introduction of new interests.

The bank received the shares upon a trust which for more than five years it has taken no step to carry out, but, on the contrary, it has used the shares for the purpose of itself controlling and operating the company's business illegally. I think clearly, therefore, it should be required to have these shares retransferred to the shareholders who transferred them or their assigns, who have always been the bank's *cestuis que trustent*, and there will be judgment accordingly. There is no claim that the bank may not hold beneficially the shares purchased by it, whether with the company's money or the bank's it does not appear, therefore I do not consider that question.

It is clear from the evidence that the bank has charged at times more than 7 per cent., the maximum rate of interest or discount allowed by the Bank Act. In *McHugh* v. *Union Bank*, 82 L.J.P.C. 65, 10 D.L.R. 562, the Privy Council last February held that a stipulation for more than 7 per cent. was *ultra vires*. It was admitted in that case that the bank was entitled to 5 per cent., the rate authorized by the Interest Act, and the Judicial Committee did not decide whether the whole stipulation as to interest would be void or only the portion which specified the rate, leaving effective the stipulation for interest without a rate being specified. I am of opinion that this point will not arise in this case, but if it does arise on the reference it will then be time enough to deal with it. I have already held that the only securities which are binding on the company are those executed in April, 1907, and the chattel mortgage given in August and these reserve interest at the rate of 7 per cent. only. Any moneys that were subsequently advanced which the bank is entitled to recover it does not recover because of any promise to repay them with or without interest, but only on grounds of equity, and any interest, therefore, will not be by way of contract, but by way of damages, and I can see no ground for allowance under the provincial statute of any rate in excess of the 5 per cent. authorized by the Interest Act.

I am of opinion that the burden should be on the bank of establishing to the satisfaction of the referee the amount to which it is entitled in accordance with the conclusion I have ex-

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pressed; its officials have always had its own books of account and since November, 1907, have also had the company's books.

There will therefore be a reference to the Master or the clerk to take the account between the parties and ascertain what, if anything, is due under the valid securities and for advances used in payment of debts as hereinbefore specified.

The referee will report his findings and further directions will then be given.

There may be some special directions or other details which can be provided for on the settlement of the judgment.

Both because the defence has succeeded on all the chief points of contest, and because of other facts disclosed by the evidence to which I have not found it necessary to refer, the plaintiff should pay all of the defendant's costs as well of the claim as of the counterclaim. The subsequent costs will be reserved to be dealt with later, and leave will be reserved to either party to apply for directions as may be required.

Judgment accordingly.

MAN.

K. B.

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April 7.

Re SIMPSON and HALFORD.

Manitoba King's Bench, Prendergast, J., in Chambers. April 7, 1913.

1. ALTERATION (§ IV—44)—ORAL SUBMISSION—ENFORCING AWARD.

An award made upon an oral submission to submit a dispute to arbitration cannot be entered as a judgment for enforcement under the Arbitration Act, 1911 (Man.); the empowering section (sec. 14) which declares that "an award on a submission" may be so entered, being controlled by sec. 2 defining a submission, unless the contrary appears, as a written agreement to submit.

Statement

MOTION to make an award as a judgment of the Court for enforcement under the Arbitration Act, 1911.

The reference in which the arbitrators acted had not been directed or agreed to in writing by the parties but was under an oral arrangement, and it was objected that there was therefore no jurisdiction to make the order applied for.

Section 14, sub-sec. 1, of the Arbitration Act, 1911 (Man.), 1 Geo. V. ch. 1, is as follows:—

14. (1) An award on a submission may, by leave of the Court or a Judge, to be obtained on notice of motion, be entered as a judgment of the Court of King's Bench and may be enforced in the same manner as a judgment or order to the same effect.

Section 2 of the same Act declares that:—

In this Act, unless the contrary appears, "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

P. J. Montague, for the applicant.

W. S. Lawrence, for the respondent.

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Prendergast, J.

PRENDERGAST, J., in an oral judgment, held that the word "submission" as used in sec. 14 of the Arbitration Act, 1911, 1 Geo. V. (Man.) ch. 1, dealing with "an award on a submission" must be given the statutory meaning of a "submission in writing" as declared by sec. 2 of the Act.

There is nothing to shew that its meaning as so used in dealing with awards on submissions is different from its meaning in other clauses of the Act in which "submissions" and not awards under them are dealt with.

Objection sustained.

LINDSEY v. LE SUEUR.

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Jan. 9.

Ontario Supreme Court, Britton, J. January 9, 1913.

1. FRAUD AND DECEIT (§ II—5)—CONCEALMENT — USE OF ANOTHER'S PROPERTY—INJUNCTION.

Where one person obtains the property of another upon the representation that he wishes to use it for a particular purpose, he is not entitled to use it for another purpose, and upon so doing will be restrained from further use, and the owner will be entitled to recover his property.

Statement

ACTION by George G. S. Lindsey to compel delivery by W. D. Le Sueur, the defendant, to the plaintiff, of certain documents and extracts and copies of documents which the defendant had, and which he had obtained from the collection of the late William Lyon Mackenzie, and for an injunction restraining the defendant from publishing or making public any of these documents or copies of or extracts from them.

The action concerned the publication of a book that was in question in *Le Sueur* v. *Morang & Co. Limited* (1910), 20 O.L.R. 594; *Morang & Co.* v. *Le Sueur* (1911), 45 S.C.R. 95.

An interlocutory application in *Lindsey* v. *Le Sueur*, is reported in 1 D.L.R. 61.

The defendant counterclaimed damages occasioned by the plaintiff's interference with the publication of his book.

November 11-14, 1912. The action was tried before BRITTON, J., without a jury, at Toronto.

Judgment was given for plaintiff.

I. F. Hellmuth, K.C., for the plaintiff.

G. F. Shepley, K.C., and *H. P. Hill*, for the defendant.

Britton, J.

January 9, 1913. BRITTON, J.:—The late Charles Lindsey was the son-in-law of the late William Lyon Mackenzie. The plaintiff, George G. S. Lindsey, is the son and sole executor of Charles Lindsey. Charles Lindsey was the owner of a large and valuable collection of books, papers, manuscripts, letters, etc., which had been the property of William Lyon Mackenzie. Prior

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to February, 1906, the publishing firm of Morang & Co. had determined to have written, for publication and sale, books on "The Makers of Canada."

To carry out this purpose, Morang & Co. chose to include William Lyon Mackenzie in the series, and they employed the defendant to write that book.

In February, 1906, Charles Lindsey resided with the plaintiff; and at that time the defendant sought and obtained an introduction to the plaintiff, and requested to be allowed access to the Mackenzie collection. It is alleged that the defendant represented to the plaintiff that he, the defendant, had undertaken to write the life of Mackenzie for the Morang & Co. series; that the life so written would be to the satisfaction of Morang & Co.; and that it would be published in the series mentioned. It is further alleged that the defendant represented that the work would be entered upon by him in sympathy with the character he was to depict, exhibiting in the book Mackenzie as one of "The Makers of Canada." Upon this representation, the plaintiff, acting for his father, allowed the defendant free access to the collection to make copies of and extracts from documents, and, generally, to obtain such information as was available.

The defendant for months resided in the plaintiff's house, and while there obtained the information sought.

The defendant completed his manuscript, sent it to Morang & Co., and it was rejected.

The plaintiff says that, by necessary implication from what took place, the agreement was, that the defendant, in writing such life of Mackenzie, as one of the class mentioned, would make fair use of the material he found. The plaintiff charges that the defendant did not do so, and for that reason the life written by the defendant was partizan and unfair; and, in consequence thereof, the manuscript was rejected.

I have spent a great deal of time in reading with care most of the evidence, given at great length upon the trial of this action. No useful purpose will be served by my referring at length to or quoting from the evidence.

It seems to me clear that the plaintiff and the late Charles Lindsey supposed that the defendant intended to write of William Lyon Mackenzie as one of the men in Canadian history who can fairly be called, speaking colloquially, one of the "Makers of Canada." The conduct of the defendant, and what he said, warranted the plaintiff and Charles Lindsey in so thinking. I must find as a fact that the defendant gave the plaintiff and Charles Lindsey to understand that the views and feelings of the defendant towards Mackenzie were friendly; that his attitude in presenting Mackenzie to the public was a fair one; that he had no bias against Mackenzie; and that he had no feel-

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ing or opinion which would prevent him, as a writer, from truly presenting the facts and circumstances of Mackenzie's life and character. The defendant, in my opinion, intended that the plaintiff and Charles Lindsey should believe as they did in reference to the defendant's feeling and attitude.

At the time of the defendant's arrangement with the plaintiff, the defendant did hold strong views against Mackenzie. At that time the defendant intended to write the life of Mackenzie on other than "conventional lines." He intended to write of Mackenzie, not as one of "The Makers of Canada," in the general acceptation of that term, but as a "puller down," as was stated during the trial.

I deal with this matter simply as a matter of contract and good faith between the parties, not expressing any opinion as to whether the defendant is right or wrong in his estimate of Mackenzie. It does not, so far as it affects this case, except as a matter of good faith on the part of the defendant, make any difference whether Mackenzie was a man of high aims and unselfish purpose, contending against real wrongs permitted by bad laws and perpetrated by unjust administration, or a mere adventurer, willing to point where he would not lead, a mere inciter to rebellion against laws that were just, and administered by men able and honest.

I quite recognise that the biographer should write truly of his subject. He should not, as the defendant said he would not, write any fairy tale or Jack the Giant-killer story. The defendant could write truly of the life selected, and draw such inferences as might please him from the facts; and any quarrel with his inferences would be in the nature of fair discussion. But this is a question of how the defendant came to get possession of what is now the plaintiff's property, and of the use he made of it, as distinguished from the use the plaintiff supposed the defendant would make of it, and as distinguished from the use the defendant led the plaintiff to think would be made of it, and as to the use the defendant now proposes to make of it.

If the defendant obtained possession of or access to property now belonging to the plaintiff, by misrepresentation or by concealment of facts which he was bound to disclose, then he must not further use that property.

I am of opinion, upon the evidence, that the defendant made use of the Mackenzie collection of books and papers otherwise than was in accord with the understanding between him and the plaintiff and Charles Lindsey.

The use made was contrary to the wish, and contrary to what was known to be the wish of the plaintiff, and contrary to the wish of the plaintiff's father. It is inconceivable, upon the facts, that either Charles Lindsey or the plaintiff would have per-

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mitted access to the Mackenzie papers had either known or supposed that such a manuscript as the defendant produced would have resulted. It is plain to me that the defendant knew that he could not have obtained access to the collection, had he revealed his true feelings or declared his real intention.

No question of copyright is involved. It is a question of getting access to the house of another and using the property therein for personal purposes different from what was consented to by the owner.

It has been held that to permit publication of musical compositions in "volume form" does not amount to a permit to publish one by one in a serial form: *In re Jude's Musical Compositions*, [1907] 1 Ch. 651.

It is not the right of a party to an action, who has obtained access to the papers of his opponent for use in the action, to make the papers public.

Just before the defendant's arrangement with Morang & Co., the life of William Lyon Mackenzie had been written by Mr. Hughes for the series mentioned. The criticism by the defendant upon the work of Mr. Hughes was severe. It was, in part at least, instrumental in having that work rejected by Morang & Co. The defendant, I think, intended that rejection should result. The language used in correction was such as to evince irritation on the part of the defendant at times when words of praise or commendation of William Lyon Mackenzie were used. The defendant concealed from Charles Lindsey and from the plaintiff the fact of his criticism of the work of Mr. Hughes. Whether the criticism was just or not—and assuming that the defendant thought it just—he should have informed Charles Lindsey or the plaintiff of it. The plaintiff is entitled, in his own right, to maintain this action. He is, as I have more than once stated, now the absolute owner of the Mackenzie collection, and is seeking to protect it from its unauthorised use by the defendant.

The plaintiff is not suing for and is not entitled to recover damages, if any, that accrued to Charles Lindsey in his lifetime. It is open to the plaintiff to say, if according to the facts, that the defendant improperly obtained access to the collection; that, when access was obtained, the defendant made an unfair use of the privilege; and that, the purpose for which he obtained access having been served, the defendant is not entitled further to deal with the extracts and copies made. It is not a question of damage to Charles Lindsey or of the survival of any right of action he had. Charles Lindsey did not so deal with this collection, by contract or consent or otherwise, as to prevent the plaintiff now asserting his right to guard it. Charles Lindsey permitted the defendant to use the collection to assist the defendant

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in writing a book to be published by Morang & Co. That book has not been published by them, and will not be. All negotiations between the defendant and that firm are at an end. The defendant has no right, as against the plaintiff, to have a book, the one written, or another book, using the extracts or copies from the plaintiff's collection, published elsewhere.

The statement of defence mentions the action of the defendant against Morang & Co., reported in appeal in 20 O.L.R. 594, and states, in substance, that the plaintiff took part in that for Morang & Co. In that action, very likely, evidence was given the same in part as was produced by the plaintiff on the trial of this action. No doubt, the plaintiff herein sympathised with Morang & Co., and possibly assisted in the defence. That is not material. The plaintiff was not a party to that action. There is no estoppel.

The plaintiff, before action, demanded from the defendant a return of the extracts and copies and an assurance that he would not publish them or make use of information derived from the collection. The defendant refused to deliver up the extracts and copies, and expressed his intention of publishing them in book form. In fact, the defendant, by counterclaim, alleges that, shortly before the commencement of his action, he was entering into arrangements for the publication of his book, and claims damages because of the plaintiff's interference. As to the "information" said to have been obtained by the defendant from the collection, it will be difficult, if not impossible, for even the defendant, at this stage, to say just what particular fact was learned there, instead of from the book of Charles Lindsey, or some other writer, or elsewhere.

The plaintiff is entitled: (1) to an order requiring the defendant to deliver up to the plaintiff all of the extracts from and copies of any documents in the William Lyon Mackenzie collection mentioned in the statement of claim; (2) to an order restraining the defendant, his servants and agents, from publishing or causing to be published any book which contains any of the said extracts or copies, or that contains information avowedly obtained from the Mackenzie collection.

The plaintiff has not sustained any substantial pecuniary damages, but a legal injury will be done if the collection without his consent is interfered with, and he is entitled at least to nominal damages, say $5. The judgment will be with costs, payable by the defendant to the plaintiff. The counterclaim will be dismissed with costs. If any difficulty is found as to form of judgment, I may be spoken to on settling the minutes.

Judgment for plaintiff.

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April 12.

ARCHIBALD v. HYGIENIC FRESH MILK CO.

(Decision No. 2.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Drysdale, JJ. April 12, 1913.

1. CORPORATIONS AND COMPANIES (§ II—27)—CONSOLIDATION OR RE-ORGANIZATION—LIABILITY OF TRANSFEREE TO EMPLOYEES.

Where a person is employed by a company for a period of years at a stipulated salary per year, and subsequently during the period of employment the company turns over its undertaking and assets as a going concern to a new company which assumes all liabilities, and the employee is told by the new company that the change would not affect him in his job, and he continues to work for the new company, an implied contract of hiring for one year from the date of the transfer to the new company may be inferred where the circumstances both as to the character of the service with the new company and the method of payment indicate that it was more than a monthly hiring.

[*Archibald* v. *Hygienic Fresh Milk Co.* (No. 1), 9 D.L.R. 763, affirmed.]

Statement

APPEAL by defendant from a judgment for plaintiff by Graham, E.J., *Archibald* v. *Hygienic Fresh Milk Co.* (No. 1), 9 D.L.R. 763.

The appeal was dismissed.

A. A. Mackay, K.C., and *H. Mellish*, K.C., for defendant, appellant.

T. S. Rogers, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—Several questions were argued here on the part of the defendant company attempting to justify dismissal of plaintiff from the company's employ on a month's notice. The learned trial Judge found, and I think properly found, from the facts proved, that the inferences to be drawn from such facts established a hiring by defendant company of the plaintiff for one year from the date of the transfer to defendant company of the Maritime Company's business, that is to say, under the circumstances in proof there was an implied contract of hiring for a year: Smith on Master and Servant, 6th ed., 51.

The notice of dismissal was not, I think, a reasonable notice such as would properly determine such a contract. It was also urged that the facts established such a state of circumstances as justified his dismissal for cause. This contention was found against by the learned trial Judge and after a perusal of the evidence I conclude such finding was correct.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

SCHAEFER v. MILLAR, and L. H. GOOD (The Battleford Realty Company).

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, Lamont, and Brown, JJ. April 10, 1913.

SASK. S. C. 1913 April 10.

1. BROKERS (§ II A—5)—REAL ESTATE BROKERS—LISTING AGREEMENT — AUTHORITY TO CONCLUDE SALE.

Where an owner places land in the hands of an agent for sale, under a listing agreement, which does not contain an express authorization to conclude a contract of sale, the authority of the agent is limited to finding a purchaser, and the agreement does not give him the right to conclude a contract of sale binding on the owner; and this is true whether the listing agreement authorizes the agent "to list the property for sale," or "to sell it."

[*Hamar* v. *Sharpe*, L.R. 19 Eq. 108; *Prior* v. *Moore*, 3 T.L.R. 624; *Chadburn* v. *Moore*, 61 L.J. Ch. 674, and *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, applied; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, doubted; *Boyle* v. *Grassick*, 6 Terr. L.R. 232, followed; *Schaefer* v. *Millar* (No. 1), 8 D.L.R. 706, affirmed.]

2. BROKERS (§ II A—5)—REAL ESTATE BROKERS—AUTHORITY — LISTING AGREEMENT, TO "SELL," EFFECT.

Where an owner in a listing agreement gives authority to a real estate agent "to sell his property," and in such agreement reserves the right to sell the property either by himself or through other agents, such reservation is to be interpreted as an intimation that the agent's authority is limited to finding a purchaser, since to hold otherwise would place the owner in an embarrassing situation if he had such an agreement with several agents.

[*Wilde* v. *Watson*, 1 L.R. (Ir.) 402, referred to; *Schaefer* v. *Millar* (No. 1), 8 D.L.R. 706, affirmed.]

Statement

APPEAL by the plaintiffs from the judgment of Haultain, C.J., *Schaefer* v. *Millar* (No. 1), 8 D.L.R. 706, dismissing action brought for the specific performance of an agreement for the sale of land.

The appeal was dismissed.

J. F. Frame, for the appellant.

W. M. Martin, for the respondent.

Newlands, J.

NEWLANDS, J., concurred with LAMONT, J.

Lamont, J.

LAMONT, J.:—This is an action for specific performance.

On December 1, 1911, the defendant Millar listed for sale with the defendant Good, who was doing business under the name of the Battleford Realty Company, two lots in Battleford. The listing agreement was as follows:—

To the Battleford Realty Company,
Battleford, Sask.

Dear Sir,—Please place the following property for sale on your list:
35-36 N. 25th st., W.C.A.
Cash price, $300. Time price, $350.
Terms on the balance, ¼, 6, 12, 18.

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Incumbrances: Amount..... To whom.....
Terms: Interest, etc.,.....7 per cent.....

I hereby agree to give you the right to sell the above property at the prices mentioned for four months from date and to pay you a commission of 5 per cent., the same to be paid out of the first instalment as soon as the sale is completed. Should the property be sold by myself or any other person I agree to give you half the above-mentioned commission on any such sale. This contract shall continue in force after the expiration of the listed period unless I give written notice to have the property withdrawn from sale.

STANLEY MILLAR,
Address: Battleford.

J. D. Noel, 4 lots.
Schaefer, 2 lots.
Witness: H. C. Adams, Power of Attorney.

Shortly after this agreement was signed the defendant Millar left Battleford for Europe, and was away several months. On January 12, 1912, Good saw the plaintiff, who agreed to purchase lot 35 on the terms set out in the listing agreement. The plaintiff paid $90, the first payment on this lot, and on January 20th, he agreed to take the other lot and make a similar payment thereon. When Millar returned, he refused to carry out the sale. The plaintiff brought this action and claimed specific performance as against the defendant Millar, and in the alternative, damages against Good. The action was tried before the learned Chief Justice, who held that the plaintiff was not entitled to succeed. From that judgment this appeal is taken. In the Court below, the plaintiff relied on the agreement signed by Good after Millar had repudiated the sale. Before us this contention was not relied on, but the plaintiff contended that a verbal sale had been made which was valid, as the Statute of Frauds had not been pleaded.

In order to succeed, the plaintiff must establish, first, that the defendant Good had authority from Millar to conclude a binding sale of the lots, and secondly, that he did conclude such a sale, with the plaintiff. That he had authority to conclude a binding sale depends upon the construction to be placed upon the listing agreement. Does that agreement authorize him to conclude a sale binding upon Millar, or does it only authorize him to find a purchaser and introduce that purchaser to the owner? The plaintiff contends that the words, "I hereby agree to give you the right to "sell" the above property" authorize the agent to make a contract binding on Millar. If that is so, he is entitled to succeed.

An agent authorized to find a purchaser has no authority to make a binding contract of sale. On that point the authorities are clear: *Hamar* v. *Sharpe*, L.R. 19 Eq. 108; Halsbury, vol. 1, 166. In *Hamar* v. *Sharpe, supra*, Vice-Chancellor Hall, said:—

I state my opinion to be that, when instructions are given to an agent to find a purchaser of landed property, he, not being instructed as to the conditions to be inserted in the contract as to title, is not authorized to sign a contract on the part of the vendor.

In *Prior* v. *Moore*, 3 T.L.R. 624, it was held that an agent appointed to sell land has, in the absence of express instructions, no authority to sign a contract for sale on behalf of his principal. In *Chadburn* v. *Moore*, 61 L.J. Ch. 674, Kekewich, J., said that,

> Unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract, the principal reserves his final right to accept or refuse.

In *Boyle* v. *Grassick*, 6 Terr. L.R. 232, the plaintiffs were employed to sell certain lots in the city of Regina, and, the vendor having refused to complete, they claimed to be entitled to their commission. One of the questions necessary to be determined was whether the plaintiffs' authority authorized them to make a binding contract and execute an agreement or whether it instructed them merely to find a purchaser. It was held that they were authorized only to find a purchaser. Wetmore, J., in giving the judgment of the Court *en banc*, said:—

> The question is, not what the impressions of these parties were according to the testimony they have given, but really, what was intended when the plaintiffs were authorized to sell. . . . The term "sell" is the term that would ordinarily be used when a person lists property with a broker to find a purchaser, and unless there is something to indicate that there was an intention to give authority to sell, it would be inferred that the intention merely was to authorize the broker to find a purchaser, and that, I think, is all that was intended in this case.

In *Gilmour* v. *Simon*, 15 Man. L.R. 205, the authority to sell was a verbal one, and there was some doubt as to the exact language which had been used. In that case Dubuc, C.J., said:—

> Egan does not pretend that Simon gave him express instructions as regards the title of the property, or as to receiving money for him, or as to signing any agreement on his behalf. He admits that Simon, on the agreement being shewn to him, immediately protested against the assumed authority of Egan to sign his name, and repudiated the sale. He admits also that he had made previous sales for Simon, and that, on those other occasions, Simon was in the habit of closing the sales himself; that he, Egan, had never before signed any agreement for sale in Simon's name; and that he had never received any money for him on such sales. This goes to shew that Simon, unless he had given special or express instructions to the contrary, had a right to expect that Egan would not, on this occasion, take upon himself to sign his name and collect money for him. And Egan states that Simon did not give him such special or express instructions. The inference to be drawn from these different circumstances is that this was merely the ordinary case of an owner putting his property in the hands of an agent to negotiate a sale for him; the agent in such

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a case is only authorized to find a purchaser who would accept the vendor's terms, and to bring him to the owner; he has no authority to sign a binding agreement in the owner's name.

And Richards, J., said:—

Primâ facie the duty of a real estate broker acting for an intending vendor goes no further than to procure a purchaser. It is not his ordinary duty to make a contract when he has found a buyer. An authority to do so, being unusual, must be specially given.

On appeal to the Supreme Court of Canada, *Gilmour* v. *Simon*, 37 Can. S.C.R. 422, it was held that there was not in that case that clear, express and unequivocal authority given to the agent to enable the Court to direct specific performance.

The conclusion from these authorities, in my opinion, is that it is the intention of the parties as expressed in the instructions to sell that is to govern; that *primâ facie*, where an owner places land in the hands of an agent for sale, whether he authorizes that agent to list it for sale or to sell it, the authority is only to find a purchaser and not to conclude a binding contract. In such a case the listing agreement is to be interpreted as reserving to the owner the right to accept or refuse the purchaser so found, and it is only in cases where the agent's authority contains clear, express and unequivocal instructions to conclude the contract that he is authorized to bind the owner.

As against this we have the authority of *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, which was relied on by the plaintiffs. In that case the authority was a written one, and was in these words: "Please sell for me my houses, and I agree to pay you a commission on the purchase-price accepted." Buckley, J., held that this was authority to conclude a binding contract of sale, and apparently he relied on the word "sell" in the instructions as being sufficient to give the agent authority. Some doubt, however, has been cast upon the correctness of this decision. In *Gilmour* v. *Simon*, 15 Man. L.R. 205, Richards, J., said:—

I do not feel sure that Mr. Justice Buckley meant to assert that the mere use of the word "sell" in instructions to a land broker by an intending vendor necessarily confers upon that broker the power to contract for that vendor; but if he did, I must decline to accept such dictum as an authority.

In so far as *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, is at variance with the decision of the Court *en banc* of the North-West Territories in *Boyle* v. *Grassick*, 6 Terr. L.R. 232, we are, in my opinion, bound by *Boyle* v. *Grassick*, 6 Terr. L.R. 232. But even if we were not, the conclusion of the Court as set out in the passage above quoted from the judgment of Wetmore, J., is, to my mind, an accurate statement of the law. The question we have, therefore, to ask ourselves in this case is, apart from the word "sell," do we find in the authority given anything

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to indicate an intention on the part of Dr. Millar, that the Battleford Realty Company were to do anything more than to find a purchaser? I can find no indication of any such intention. In his letter, Dr. Millar reserves the right to sell the lots, either by himself, or through other agents. Now, if he gave to other agents the authority he was giving to the company, as he had a right to do, in what position would he be if the contention of the plaintiff were upheld? If the property increased rapidly in value—as the evidence shewed these lots did—each agent would readily find a purchaser, and the owner might find himself bound to convey to several different purchasers at the same time. Only in the clearest case will an owner be held to have intentionally placed himself in this position. The fact that the owner might find himself in this position was held in *Wilde* v. *Watson*, 1 L.R. (Ir.) 402, to indicate that there was no intention to authorize the agent to do more than find a purchaser. In that case the Vice-Chancellor said:—

> A house or estate agent has no implied or general authority to conclude a contract for sale. His duty is to find a purchaser or tenant and communicate his offer to his principal. The judgment of Hall, V.-C., in *Hamar* v. *Sharpe*, L.R. 19 Eq. 108, states his opinion of the authority of such agents, and I quite concur in his view. It is a common practice to place houses or estates on the books of a number of these agents at the same time; and, if each had authority to conclude a contract for the owner, the result might be that he might become bound to let or sell the premises to several different parties at the same instant.

And in that case the agreement entered into by the agent was not enforced.

It would, therefore, seem to me to be clear that where an owner gives authority to an estate agent to "sell his property," and, in such authority, reserves the right to sell the property, either by himself or through other agents, such reservation, being consistent only with an intention on his part to retain the right to finally refuse or accept, is to be interpreted as an intimation that the agent's authority is limited to finding a purchaser. In such a case, to justify an agent in concluding a binding contract there must appear, in his authority, clear and explicit instructions to do so. No such instructions are to be found in Millar's letter. The listing agreement is a common one with real estate agents. The object of the agreement is to authorize the agent to offer the land for sale, and to enable him to collect his commission in case he succeeds in finding a purchaser. It makes no reference to any contract to be entered into with the purchaser. It is purely and simply an ordinary commission agreement, and the employment of the word "sell" does not enlarge its scope. The authority of the Battleford Realty Company, therefore, was, in my opinion, limited to finding a purchaser, and Millar had the right, on being informed by the company that they had found a purchaser, either to sell or to

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refuse to sell, as he deemed advisable. He could not, however, by refusing to sell deprive his agent of his right to commission, if the agent had done all that he was called upon to do to earn that commission. But that is an entirely different matter from the right of a purchaser to enforce a sale.

I am, therefore, of opinion that the judgment of the learned Chief Justice in dismissing the action was right. The appeal should be dismissed, with costs.

Brown, J.

BROWN, J.:—The defendant Millar signed and delivered to the defendant Good, a real estate agent carrying on business under the firm name of the Battleford Realty Company, the following document:—

To the Battleford Realty Company,
Battleford, Sask.

Dear Sir,—Please place the following property for sale on your list:
35-36 N. 25th st., W.C.A.
Cash price, $300. Time price, $350.
Terms on the balance, ¼, 6, 12, 18.
Incumbrances: Amount..... To whom.....
Terms: Interest, etc..... 7 per cent.....

I hereby agree to give you the right to sell the above property at the prices mentioned for four months from date and to pay you a commission of 5 per cent., the same to be paid out of the first instalment as soon as the sale is completed. Should the property be sold by myself or any other person I agree to give you half the above-mentioned commission on any such sale. This contract shall continue in force after the expiration of the *listed period* unless I give written notice to have the property withdrawn from sale.

STANLEY MILLAR.
Address: Battleford.

On the strength of this document the defendant Good sold to the plaintiff the property in question; and Millar, upon being apprised of the sale, repudiated same and contends that the document gave Good no such authority..

I am of opinion that Millar's contention is correct. I do not think it can seriously be contended that the first line of the document, "Please place the following property for sale on your list," gives the agent any authority, other than the right to secure or find a purchaser. The last part of the document should not be read so as to extend the power given in the first line, but merely as settling the terms on which the agent undertakes to do the work; that is, it merely, in my judgment, fixes the listing period and the rate of commission which the agent is to be paid, together with the manner of payment. The expression "listed period" in the second to last line of the document shews that the four months' term is to be applied to the listing as contemplated in the first line.

The appeal, therefore, in my judgment, should be dismissed.

Appeal dismissed.

REX v. PICARD.

B.C.

S. C.

1913

Feb. 28.

British Columbia Supreme Court, Clement, J., in Chambers.
February 28, 1913.

1. SUMMARY CONVICTIONS (§ II—20)—TERRITORIAL JURISDICTION OF MAGISTRATE—PROVING LOCALITY OF OFFENCE.

A summary conviction will be quashed where there was no evidence before the magistrate that the locality at which the offence was committed was within his territorial jurisdiction, the only reference to the place of the offence being in such general terms as "the landing" and the "coal company's offices."

[*R.* v. *Oberlander*, 16 Can. Cr. Cas. 244, 15 B.C.R. 134, referred to.]

Statement

MOTION to quash a summary conviction for vagrancy under sec. 238 (*c*) of the Criminal Code 1906, on the ground that the evidence did not shew an offence within the territorial jurisdiction of the magistrate.

C. Darling, for the prisoner.

O. F. Orr, for the Crown.

Clement, J.

CLEMENT, J.:—With reluctance I must give effect to the objection that there was no evidence before the magistrate that the place where the offence was committed was within the magistrate's territorial jurisdiction. There are local references to "the landing" and the "coal company's offices," and one constable says: "We were coming toward Cumberland," but nothing appears to shew that these places, *i.e.*, the landing, the offices, and the road between the landing and Cumberland, were within the electoral district of Comox, in and for which the magistrate had jurisdiction. Doubtless everyone at the hearing, including the magistrate, knew that they were within the district, and it may seem a refinement not calculated to increase public respect for the administration of justice to insist that this fact should be formally stated by some witness in the course of the proceedings; but it is undoubted law that the jurisdiction of inferior tribunals must appear upon the face of the proceedings and experience has shewn that it is dangerous to relax this rule, because in some particular instance it may seem absurd to the ordinary layman. It is difficult, if not impossible, to draw any line to warrant a disregard of the rule in one case and strict adherence to it in another.

As it happens, my brother Gregory has recently had to consider this question: *R.* v. *Oberlander* (1910), 15 B.C.R. 134, 139, 16 Can. Cr. Cas. 244, and he has adhered to the law as laid down as far back as 1811 in *R.* v. *Chandler*, 14 East 267; so that I feel that my reluctance to apply the rule should give way and that I should simply follow his decision.

It is not a case for costs, but the conviction must be quashed.

Conviction quashed.

ONT.

S. C.

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Jan. 21.

Re CITY OF TORONTO PLAN M. 188.

Ontario Supreme Court, Middleton, J. January 21, 1913.

1. HIGHWAYS (§ V C—263)—STREET — ACCEPTANCE AND IMPROVEMENT BY CITY—DISCONTINUANCE OR CLOSING.

A street that has been conveyed to and taken over as such by a city and in which a sewer has been constructed can be closed only by appropriate action on the part of the municipality, and not by an application by landowners to amend the registered plan under the Ontario Registry Act, 10 Edw. VII. ch. 60, sec. 85, or the Land Titles Act (Ont.), 1 Geo. V. ch. 28, sec. 110, by closing the street as laid out on the plan.

2. HIGHWAYS (§ I A—4)—DEDICATION—ACCEPTANCE BY CITY — SUFFICIENCY OF UNDER ONTARIO SURVEYORS ACT, 1 GEO. V. CH. 42, SEC. 44, SUB-SEC. 6, AS AMENDED.

A sufficient acceptance, under the Ontario Surveyors Act, 1 Geo. V. ch. 42, sec. 44, sub-sec. 6, as amended by 2 Geo. V. ch. 17, sec. 32, of the dedication of land for a public highway and its assumption for public use by a municipality, is shewn by a memorandum endorsed on a plan, as filed in the registry office by the mayor, treasurer and clerk of the city, under its corporate seal, to the effect that the consent of the corporation is given to the registration of such plan.

3. HIGHWAYS (§ V C—260)—DEDICATION — ACCEPTANCE BY CITY—ABANDONMENT—FAILURE TO OPEN—TITLE OF DEDICATORS TO.

Upon the failure of a city to open and use as a public highway the land dedicated therefor on a plan filed in the land titles office, and duly accepted by the city as a highway, the title thereto is not re-vested in the dedicators, under sec. 44 of the Ontario Land Surveyors Act, 1 Geo. V. ch. 42, as amended by 2 Geo. V. ch. 17, sec. 32, subject to the Land Titles Act, 10 Edw. VII. ch. 60, sec. 85, for the amendment or alteration of plans, notwithstanding that the city ignored such dedication and acceptance, and that the city council subsequently adopted by-laws looking towards the opening of such highway, but under which nothing was ever done.

4. HIGHWAYS (§ V B—255)—UNOPENED STREET—ALTERATION.

Where a dedication of land for a highway was duly accepted by a city, but the highway was not opened, the dedicators cannot proceed under sec. 44 of the Surveys Act, 1 Geo. V. ch. 42, sec. 44, sub-sec. 6, to secure the change of the plan, as filed in the registry office on which the highway was dedicated, in order to close such highway and open another in its stead.

5. TAXES (§ III F—145)—SALE — ENCUMBERED PROPERTY — RIGHT OF PURCHASE.

Notwithstanding a dedication of land for a highway may be ineffectual as against mortgagees, the latter's rights are divested and the dedication becomes effectual upon the land covered by the highway subsequently becoming vested in the municipality by title under a tax sale.

Statement

APPLICATION by the Toronto Housing Company, under the Registry Act, 10 Edw. VII. ch. 60, sec. 85, or the Land Titles Act, 1 Geo. V. ch. 28, sec. 110, whichever might be applicable, to amend plan M. 188 (City of Toronto), by closing Sparkhall avenue thereon, and opening, in lieu thereof, a new street some distance south of the present street, and by closing Bain avenue, and opening, in lieu thereof, a new street south of the present

street—the effect of which would be to give to the owners an additional tier of lots north of Sparkhall avenue.

A. C. McMaster, for the applicants, contended that they had acquired title to all the lots shewn upon the plan; and that, as the city corporation did not make any objection, what the applicants sought ought to be granted.

A. C. Craig, for certain owners of lands fronting on Albemarle avenue.

Several other property-owners appeared in person.

Middleton, J.

January 21. MIDDLETON, J.:—To apprehend the matter rightly, it will be necessary to describe the situation on the ground. At the time the plan M. 188 was registered in the Land Titles office, on the 29th April, 1893, Lillian Mills was the owner of the entire parcel of land covered by the plan, which included the southern 49 feet of what is there shewn as Sparkhall avenue, but did not cover Bain avenue, which is there shewn as "Cypress avenue."

Upon the hearing, it appears that Cypress avenue had theretofore been conveyed to the municipality as a highway, and that the municipality had taken it over as a highway and constructed a sewer thereon. So far as that street was concerned, I held that the statutes had no application, and that the street could be closed only by appropriate action on the part of the municipality.

The piece of land shewn as constituting Sparkhall avenue upon this plan is a strip running across the entire plan, 49 feet wide, immediately to the south of a strip shewn as 10 feet wide, the southern boundary of which is said to be the south limit of registered plan 60 E., upon which is written, "Dedicated by plan in registry office to widen Sparkhall avenue."

The continuation in a north-westerly and then in a westerly direction of Sparkhall avenue is similarly shewn, being marked, "Dedicated as a road by plans in registry office."

The Master of Titles has made annotation upon the face of the plan: "For consent of city to Sparkhall avenue being only 59 feet wide, *vide* No. 19403." It turns out now that there is no plan in the registry office shewing the dedication of this ten-foot strip for the purpose indicated.

Plan 60 E. in the registry office was registered on the 12th March, 1890. It is a subdivision of a parcel immediately to the north of the parcel subdivided by plan M. 188, and, like it, extending from Logan avenue on the east to the boundary between township lots 13 and 14 on the west. A street 154 feet north from the southern boundary is upon it, called Sparkhall avenue; but the name was, some time later, changed to Albemarle avenue; and it will be so called hereafter to avoid confusion.

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Along the southerly boundary of the land shewn on this plan, there is a one-foot reserve, running from the west of the entire parcel to the rear boundary of lot 55 on Logan avenue, some 110 feet from that avenue. North of this there is shewn a lane, 9 feet wide, at the rear of the eleven lots on the south side of Albemarle avenue; and the lane turns north when it reaches the rear of three lots facing on Logan avenue. This plan was registered by William Cook, who was then the owner.

Immediately to the west of the land covered by these two plans is the parcel covered by plan 685, registered on the 13th May, 1887. Upon it Sparkhall avenue is laid out to a point some forty feet west of the eastern limit of the lands which the plan covers, leaving a block 40 feet by 66 feet at the end of the street, designated "block X." The location of this block X. is correctly shewn on plan 60 E.; the northern boundary of Sparkhall avenue, according to plan 685, being a considerable distance south of the south boundary of Albemarle avenue on plan 60 E., and the southern boundary of Albemarle avenue, according to plan 685—if produced—being some ten feet north of the northern boundary of that part of Sparkhall avenue included in plan M. 188, and being about opposite the northern limit of the ten-foot strip designated as a lane on plan 60 E.

The history of the attempts to connect these two portions of Sparkhall avenue is involved in more than obscurity.

Referring to the instrument 19403, mentioned by the Master of Titles, it appears to be a copy of the same plan as that registered by the Master as M. 188, save that Cypress avenue is erroneously shewn thereon as part of the land covered by the plan. The strip to the north is, however, shewn, not as a ten-foot extension of Sparkhall avenue, but, as indicated on plan 60 E., as a nine-foot lane and a one-foot reservation. This ten-foot strip is also continued across the southern portion of lot 65 (the southern lot facing on Logan avenue). An irregularly-shaped parcel is laid out on the north side of the lane for the purpose of forming a connection with block X., across which it is apparently intended to extend Sparkhall avenue; and south of block X. another triangle is laid out for the same purpose.

This document is not an original, and, save as to the signature of the city, the different writings found upon it are copies only. The portions of the land covered by plan 60 E., above referred to, other than the lane, are coloured green; and Mr. Cook, who appears to have been the owner at that time, signs this memorandum: "I hereby dedicate for the purposes of a public highway the portions of this plan coloured green."

The triangular portion of land south of block X. is coloured yellow, and is dedicated by Mr. Williams, its then owner, by a similar memorandum "for the purpose of a public highway."

Mr. E. A. Macdonald also signs a memorandum dedicating as a public highway block X.

Attached to this plan is the following memorandum: "In accordance with report No. 28 of the committee on works, adopted by the city council December 21st, 1891, the consent of the Corporation of the City of Toronto is hereby given to the registration of this plan, shewing Sparkhall avenue as having a width throughout of 59 feet; the limits of said avenue being indicated by the lines between the red letters A, B, C, D, E, F, G, H, I, J, K, L; and the said avenue is accepted as a public highway." This is signed by the Mayor, Treasurer, and City Clerk, and the corporate seal is attached.

The boundaries so indicated include the whole of Sparkhall avenue as shewn upon plan M. 188, and the whole of the ten-foot strip to its north, and the two triangular parcels, and block X., necessary to unite this new section of the street with the portion shewn to the east on plan 685.

The report of the committee on works, referred to as the basis of this municipal consent, is a report recommending the adoption of a report of the City Engineer and Assessment Commissioner, as follows: "We hereby recommend that Sparkhall avenue, in the ward of St. Matthew, and as shewn in copies of registered plan herewith, be accepted as a public highway, free of cost to the city; with the stipulation that the portions of the land shewn on the said plan in green and yellow colour, and that portion of land shewn as block C., plan 685, be laid out as part of the said Sparkhall avenue, and that the reservation in light colour on the north limit of the said proposed avenue be removed free of cost to the city; the said Sparkhall avenue to be of a width of 59 feet throughout its entire length. We also recommend that the consent of the Corporation of the City of Toronto be given to the registration of the plan of said avenue, shewing it to be of said width of 59 feet throughout its entire length, and that the Mayor and City Clerk sign the said consent, and the city's seal be attached thereto."

From the copy of the plan filed, it is impossible to say what is meant by "the reservation in light colour" referred to in this document. It probably refers to the one-foot reserve, and not, as was suggested, to the southerly ten feet of lot 55.

All this seems to have been lost sight of; and the matter was taken up anew in 1907. Up to this time, nothing had been done upon the ground to connect the two portions of the street in question. Albemarle avenue had also a dead end to the west; and a by-law, No. 4961, was passed on the 10th June, 1907, for the purpose of extending Albemarle avenue by a southerly diversion so as to connect it with the western portion of Sparkhall avenue as shewn upon plan 685.

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By that by-law, lot 42 and part of lot 43, according to plan 60 E., and block X., according to plan 685, were expropriated and declared to form part of Albemarle avenue; the description of the land so taken crossing and also including the easterly 66 feet of the lane and the one-foot reservation, and following the northen limit of that part of Sparkhall avenue shewn upon plan M. 188. This work is directed to be done as a local improvement.

An earlier by-law, 4785, had been passed, referring it to the Engineer and Assessment Commissioner to report what the cost of the work should be and how it should be assessed. A report shewing the cost at $4,089, and providing for its assessment, was presented on the 14th December, 1906. This report was adopted by the council on the 28th January, 1907.

Notwithstanding this, the expropriation of the land referred to in the by-law does not appear to have ever been carried out, and no compensation ever appears to have been paid for any of these lands. Taxes seem to have been allowed to fall in arrear upon not only the land covered by plan M. 188, but also upon some of the lands covered by plan 60 E.; and the city acquired title at tax sales to all the land covered by the former plan, and the lands to the south of Albemarle avenue on the latter.

Some of the lands on the south side of Albemarle avenue have been sold. The deeds of some of these lands are produced, and I am told that I may assume that the remaining deeds are in similar form.

These convey the lots by number and by reference to the plan, and make no mention that the lots abut upon the lane or upon Sparkhall avenue.

The earliest conveyance put in is one dated July, 1906. The tax deed to the city is dated in 1902.

Lot 55 on Logan avenue was sold for taxes, and conveyed to the city on the 1st October, 1902. So that, either by the dedication or by virtue of the tax sale, the municipality has now title to the 10 feet necessary to continue Sparkhall avenue the full width of 59 feet through to Logan avenue.

By sec. 44 of the Surveys Act, now 1 Geo. V. ch. 42—subject to the provisions of the Registry Act as to the amendment or alteration of plans—allowances for roads shall be public highways; but by sub-sec. 6, as amended by 2 Geo. V. ch. 17, sec. 32, where the road "has not been established by by-law of the municipal corporation, or otherwise assumed by it for public use," and is closed, the part closed does not vest in the municipality, but belongs to the owners of the land included in the plan and abutting thereon.

The applicants desire to close the street, contending that in the result, by virtue of this statute, the portion of Sparkhall avenue laid out upon plan M. 188 would belong to them.

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Had it not been for what, I think, takes the case out of the statute entirely, I would agree with them, as the owners of the one-foot reserve, appearing upon the entirely different plan 60 E., acquired no potential interest in the portion proposed to be dedicated upon the registration of plan M. 188.

I am, however, of opinion that I must hold that the memorandum executed by the city, and attached to the instrument filed in the Land Titles office, which I have above quoted, amounts, within the meaning of the statute, to an assumption by the city of the road in question for public use. By this instrument the city has, in the most formal way, accepted the said avenue as a public highway.

The fact that this acceptance was ignored, and perhaps forgotten, when the by-laws of 1906 and 1907 were passed, is, I think, quite immaterial. The earlier deed, evidencing the municipal acceptance, stands unchallenged, and takes the case out of the statute.

Apart from this, I think that the municipal action amounts to an acceptance of the 10 feet dedicated by the different owners. It may be that, by reason of outstanding mortgages, this dedication was ineffectual as against the mortgagees; but the tax sales have extinguished the rights of the mortgagees.

Upon the argument it was stated that the mortgages did not cover the lane or any part of the reservation upon plan 60 E. Counsel promised to verify this; but no definite information has been given to me. If the case is carried farther, this should be shewn.

The by-laws of 1906 and 1907 also recognise the portion of Sparkhall avenue shewn on plan M. 188 as constituting a highway. They were passed to connect this with the street on plan 685.

Many other objections to the application were urged by counsel; but it is not necessary for me to deal with them.

The application fails, and must be dismissed. I give those represented by Mr. Craig their costs, which I fix at $50.

Application dismissed.

CAN.

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1913

April 7.

STARKE (appellant, defendant) v. **GERIEPY** (respondent, plaintiff).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. FRAUD AND DECEIT (§ II—7)—CONCEALMENT BY AGENT—PERSONAL ADVANTAGE NOT DISCLOSED.

An option to purchase lands given the defendant, a real estate dealer, who had acted for the plaintiff in other sales, in order to facilitate a sale by the former, will be cancelled where obtained by the fraudulent representation that another agent had a purchaser for the land, without disclosing the fact that the defendant himself was the prospective buyer.

Statement

APPEAL by defendant (Starke) from the judgment of the Supreme Court of Alberta in favour of plaintiff, respondent, for the rescission of an agreement for sale of lands.

The appeal was dismissed with costs.

Bicknell, K.C., for appellant.

S. B. Woods, K.C., and *O. M. Biggar*, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—This is an action brought by the respondent for rescission of an agreement, to which is joined a counterclaim by the appellant, defendant, asking for specific performance of the same agreement. Rescission was granted by the trial Judge and on appeal this judgment was confirmed.

The whole case turns upon the credibility of the parties. They were both examined in the presence of the trial Judge and gave very contradictory versions of the transaction, and there is evidence on which the learned trial Judge came to the conclusion that the transaction could not be maintained, that the document did not support any real agreement, and also that the appellant, while the agent of the respondent for the sale of his property, attempted to purchase it himself. He said, at the close of the trial:—

> That plaintiff and the defendant have told stories diametrically opposite and it seems impossible to reach the conclusion that they are both honest in their evidence. They could not have been mistaken to the extent to which they have sworn. It seems appalling that for the sake of a few thousand dollars in a real estate transaction a person could come into Court and commit deliberate perjury, as seems to have been done in the present case. Of course, it is not the first time it has happened and I suppose it will not be the last. In such case, where the evidence is contradictory, the Judge can never be sure that he is right, but he must use his best judgment on the facts. He has the privilege of seeing the witnesses and the manner of their giving their evidence, and other facts which are helpful, very frequently, and, taking all these facts into consideration, the conclusion I reach is that the plaintiff's testimony is more worthy of belief than that of the defendant, and I accept the story as given by him.

The Court of Appeal accepted this conclusion. One of the

parties has undoubtedly sworn to what he knows to be false, and it is peculiarly the province of the trial Judge to find out which one of the parties this is: *D'Avignon* v. *Jones*, 32 Can. S.C.R. 650; and with the conclusion which he has reached, when not clearly erroneous, we should not interfere.

The appeal is dismissed with costs.

Davies, J.

DAVIES, J.:—At the close of the argument I was of the opinion that the appeal should be dismissed. Subsequent examination of the evidence has confirmed this opinion.

The option in question was obtained on false representation as to the purchaser, and the 12 days' time and rate of interest and purchase money were all made and given on the assumption that these false representations were true. A "caveat" having been filed, the plaintiff has a right to have it declared that an option so obtained should not remain to form a cloud on his title, and that the "caveat" be vacated and set aside; and it seems clear that the counterclaim to have specific performance enforced of a contract alleged to have arisen out of a receipt embodying an option to purchase obtained on such false representations could not be entertained.

Idington, J.

IDINGTON, J.:—The appellant is an Edmonton real estate agent who had earned and been paid a commission in a real estate transaction in which respondent was concerned and had, a few months later, been entrusted by the latter with a limited agency to sell the lands now in question, situate in said city, but failed of success and a few weeks after that had induced the respondent to give him an option to purchase said lands. The means by which he induced the respondent to give such option were by posing as his agent, who had met an Ontario man, also supposed to be in the agency business and likely to bring about a sale of said lands whereby respondent would get $19,000 net and the appellant and the Ontario man each earn a commission of $1,000 within 10 or 12 days to be limited by the option.

The learned trial Judge finds as a fact that the belief of respondent in this agency of appellant and a supposed Ontario man upon which the option in question was founded had been induced as result of a tissue of falsehoods invented by the appellant; that the supposed Ontario man was a mere fiction produced by the brain of the appellant; and that his denial thereof on oath was quite untrue. What could have induced the appellant to resort to such improper expedients, unless he seriously believed that if he had, as was his right, in a straightforward manner proposed to respondent to give him the option on another basis than that of agency, he never would have obtained respondent's assent to such a personal option as the instrument

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in question shews? The respondent's accurate appreciation of the situation demonstrates the best basis for a righteous condemnation of his conduct. Such a device ought not to succeed, could be of no avail as foundation for an action for specific performance, and promptly repudiated as its result was by the respondent within 24 hours, the rescission ratified or granted by the Courts below pursuant to such repudiation ought, I submit, to stand good unless the findings of fact be reversed—which seems impossible.

The appeal must, therefore, be dismissed with costs.

Duff, J.

DUFF, J.:—I think this appeal should be dismissed. The learned trial Judge accepted the evidence of the respondent. That evidence being accepted, the only conclusion is that the appellant entrapped the respondent into the transaction in question by a most deliberate fraud. The only possible question on this appeal is whether the fraud was *fraus dans locum contractui*. I think it was. The evidence is, in my judgment, quite sufficient to establish that the respondent would never have given the appellant the option in question without inquiring if he had not been led by the appellant to believe that he (the appellant) was acting for somebody else. There can be no doubt that the object of the appellant's elaborate misrepresentations was to prevent inquiry. There seems to be no reason to suppose that the respondent on investigation would not have learned the true facts. That being so, I think the fraud was a material inducement in bringing about the contract within the rule of law invoked by the respondent.

Anglin, J.

ANGLIN, J.:—From a period anterior to the time when the appellant obtained the document which he seeks to enforce in this action, there existed, in my opinion, between him and the respondent a confidential relationship in regard to the property in question which precluded the possibility of his becoming the purchaser of that property without full disclosure of all circumstances within his knowledge which might affect its value in the estimation of the respondent, and particularly of the fact that he was to be himself the purchaser.

I am satisfied that the document obtained by the appellant took the form of an option nominally in his favour merely as a convenient means to enable him to effect as agent of the respondent a *bonâ fide* disposition of the property to a third person without it being necessary to obtain the respondent's signature to a formal contract with such third person, and not at all with the idea of enabling the appellant directly or indirectly to purchase for himself. That was entirely foreign to the intent of the respondent. The appellant wholly disregarded his obligations to his principal. He did not merely fail to disclose circumstances

known to him which were likely to enhance the selling value of the property, as well as the important fact that he was bargaining on his own behalf; the more effectually to conceal that fact he resorted to an elaborate series of deceptions which can only be adequately characterized as a deliberately designed scheme of fraud.

A Court of equity will never lend its aid to enforce a contract thus obtained; on the contrary, it will at the instance of the injured principal set it aside.

The judgment in the provincial Courts was, in my opinion, wholly right and this appeal should be dismissed with costs.

BRODEUR, J.:—The appellant was without doubt in a fiduciary relation with the respondent. He should have then acquainted him with all the material facts which he knew: *Bentley* v. *Naismith*, 3 D.L.R. 619, 46 Can. S.C.R. 477. On the contrary he made fraudulent representations which vitiated the transaction. The contract, if it ever existed, is certainly voidable: Kerr on Fraud, 4th ed., 10.

The trial Judge found on the facts in favour of the respondent. He had the opportunity of hearing both parties and of forming a good opinion of their respective veracity. I do not see any reason why we should not accept his findings. In maintaining this appeal that would be giving countenance to fraud and deception.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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VALCI v. SMALL.

ONT.
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May 5.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. TRIAL (§ II C 4—85)—QUESTION FOR JURY—EMPLOYEE'S KNOWLEDGE OF RISK.

The extent of the knowledge of an employee of the risk he runs in his employment is a proper subject for the consideration of the jury.

2. MASTER AND SERVANT (§ II B 4—160)—SERVANT'S ASSUMPTION OF RISKS —EXTENT OF KNOWLEDGE, ONUS.

Knowledge on the part of an employee of the risk he runs in his employment is not sufficient to bring him within the rule of *volenti non fit injuria*, but it is necessary also to prove that he knew the nature and extent of the risk.

Statement

APPEAL by the plaintiff from the judgment of Latchford, J., at the trial, withdrawing the case from the jury and dismissing the action, which was brought by the driver of a waggon against his employer to recover damages for injuries sustained by the plaintiff from the kick of the defendant's horse

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driven by the plaintiff, upon the allegation that the defendant was negligent in requiring the plaintiff to drive a kicking horse.

The appeal was allowed.

John MacGregor, for the plaintiff.

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

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The appellant is an Italian labourer, who was employed by the respondent as driver of a delivery waggon; he entered into the employment on the 29th October, 1911, and continued in it until the 16th December following, when the accident in respect of which the action is brought occurred.

There was evidence that the horse by which the waggon was drawn was in the habit of baulking and kicking, and that this was known to the respondent. The appellant testified that on several occasions before the accident happened the horse had kicked violently, so violently as to endanger the safety of the driver, though no injury had been done to him on any of those occasions. At the suggestion of the appellant, the respondent had directed him to purchase a kicking-strap, and that was done, and the horse was driven with this strap on him, and it appears to have answered the purpose for which it was intended until the time of the accident, when some part of the harness appears to have become disarranged, with the result that the kicking-strap fell down, and the horse kicked violently and struck the appellant as he sat in the waggon-seat, and injured him severely.

The appellant admitted that he knew that it was dangerous to drive the horse on account of its kicking habits, but there is nothing to indicate that he meant that there was danger when a kicking-strap was in use.

The learned trial Judge was of opinion that the appellant had voluntarily incurred the risk incident to the driving of the horse, and that he was, therefore, not entitled to recover; and he also held that the claim of the appellant was based only on liability at the common law, and that he was, therefore, not entitled to avail himself of the provisions of the Workmen's Compensation for Injuries Act.

In my opinion, the case should not have been withdrawn from the jury. It was open to the jury, upon the evidence, to come to the conclusion that, although the appellant knew of the danger incurred in driving a kicking horse, he was imperfectly informed as to its nature and extent, or, as it is put in some of the cases, that he did not fully appreciate the risk he was running in driving such a horse. As said by Bowen, L.J., in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, 696: "The maxim, be it observed, is not 'scienti non fit injuria,' but '*vol-*

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enti.' It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily.'' See also *Smith* v. *Baker*, [1891] A.C. 325.

As the case should, in my opinion, be tried again, I refrain from further comment upon the evidence.

The appellant should, I think, have leave to amend by making his claim in the alternative under the Workmen's Compensation for Injuries Act. Upon his present pleading he has not made a case for recovery under the Act, not because he does not in terms claim the benefit of it, but because the statement of claim does not set up facts sufficient to found a claim under the Act. I refer to the omission of an allegation that notice of the injury was given within the time and in the manner prescribed by the Act, or of such facts as would excuse the giving of the notice if it was not given.

The respondent should pay the costs of the appeal; and the costs of the last trial should abide the event of the action.

Appeal allowed.

CANADIAN NORTHERN R. CO. v. TAYLOR.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Brodeur, JJ. April 7, 1913.

1. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—ORDER IMPOSING UNENFORCEABLE CONDITIONS—ACCEPTANCE IN PART.

An order of the Board of Railway Commissioners imposing some conditions on an applicant railway company that the Board did not have power to impose *in invitum*, is void unless such conditions are assented to by the company, as it cannot accept part and reject the remainder of the order; and if the terms upon which the Board's order was made are rejected by the applicant company, and an appeal taken instead of a motion to rescind the order, it may be declared upon appeal that the order shall remain inoperative unless or until the terms are accepted.

Statement

APPEAL from an order of the Board of Railway Commissioners.

Wallace Nesbitt, K.C., and *George F. Macdonnell*, for the appellants.

Lafleur, K.C., for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I concur in the opinion of Davies, J.

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DAVIES, J.:—I do not formally dissent from the judgment of the Court as pronounced in this case, because I am not sure that, as expressed, it is materially different from the conclusion which I myself have reached. In my opinion it was not competent to the Commissioners to make the order complained of by the railway company except with its consent. I do not see or find any evidence of that consent, and I would, therefore, have declared the order to have been *ultra vires*.

Davies, J.

The judgment of the Court that the order is to remain inoperative until effect is given to it by consent may mean, possibly, the same thing as I express above; and, in that view, I will not dissent from it.

Idington, J.

IDINGTON, J.:—It is somewhat difficult to understand what appellants seek by this appeal. The order is a mere conditional one upon a subject over which the board has control, but not such as to enforce by active measures any compliance with the condition. The respondent's counsel expressly disclaimed, at the hearing before the board, any such attempt being made unless appellants should consent. It was for appellants to accept or leave such an order.

It was stated in argument, notwithstanding this, that the arbitrator named in the order had made an award. Of course if the parties attended the arbitrator and tried out the question of compensation referred to him, I do not see how either of them doing so can be heard to complain. Assuming, however, appellants may have attended merely to protest against his proceeding and have done nothing in the way of conforming to the terms of the order, they are entitled to resist such operation of the order.

It cannot, however, by any amount of persistence and importunity become entitled to maintain the order without observing the conditions.

I think the case is governed by the judgment in the case of *The Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Company*, [1912] A.C. 224.

The matter of granting an order or refusing it is entirely in the discretion of the board. The appellant must submit to the condition or the entire order be held null. In this sense the appeal should be allowed without costs.

Duff, J.

DUFF, J.:—It is clear enough that the conditions of the order are not conditions which the board could impose upon the company *in invitum;* and, until the company in some way signifies its acceptance of the conditions, the order is inoperative to confer any rights upon anybody.

The company now says that it never applied for such an

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order and that the board had no jurisdiction to make it. As the company applied to have the conditions of the former order varied in its favour, I think the board might make a formal declaration of the terms upon which such variation would be granted, and, if the terms were not acceptable, I should suppose that the order would be rescinded on application by the company; at all events, an application to rescind would have been a sufficient manifestation of an election not to accept the terms. The same purpose has, probably, been effected by this appeal; although, as I do not think the board was entirely without jurisdiction, I think the appeal must be dismissed. In the circumstances there should be no costs.

Brodeur, J.

BRODEUR, J., concurred with DAVIES, J.

Judgment accordingly.

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May 29.

PATTERSON v. TOWNSHIP OF ALDBOROUGH.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 29, 1913.

1. APPEAL (§ VII M 8—658)—JUDGMENT OF TRIAL JUDGE BASED ON ORAL EVIDENCE—FAILURE TO GIVE REASONS FOR—JUDGMENT NOT SUSTAINED BY EVIDENCE—REVERSAL.

A judgment of a trial judge based on oral evidence will be reversed on appeal where no reasons for his conclusions are given, and the appellate court is satisfied that the judgment is not sustained by the evidence.

Statement

APPEAL by the defendants from the judgment of Magee, J., dated the 4th June, 1910, whereby he directed judgment to be entered for the plaintiff against the defendants for $300 damages and costs; the action being for damages for personal injuries sustained by the plaintiff by falling into an excavation in a highway.

C. St. Clair Leitch, for the appellants.

J. D. Shaw, for the plaintiff.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—The plaintiff alleges in his statement of claim that the defendant corporation, in connection with the construction of a new bridge on a public highway, had dug an excavation across the travelled portion of the road, and negligently failed to provide a sufficient guard or barrier, or light or other warning, to prevent persons lawfully using the road from falling into the excavation; in consequence of which, he says, he, with his horse and buggy, fell into the excavation, and he was injured.

The defendants in their statement of defence say that, in the performance of their statutory duty to keep the highway in

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repair, it was necessary to replace a wooden culvert, and, in consequence, to make the excavation in question; and that, in order that travel on the highway might not be stopped, the defendants constructed another sufficient and safe driveway for travel at the side of the excavation. They also say that they erected a proper guard or barrier across the travelled portion on either side of the excavation. They further plead that the injuries complained of by the plaintiff were the result of his own negligence, and that he could have avoided them by the exercise of reasonable and ordinary care.

A perusal of the evidence leads me to the conclusion that the disposition of the case is unsatisfactory; and I think that the proper course is to send it back for a new trial.

The learned trial Judge has given no reasons which might afford a guide to us upon the appeal.

It is true that, in the case of the trial of an action by a Judge without a jury, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons": *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326.

It has, however, been frequently pointed out how desirable it is for a trial Judge to give the reasons on which he bases his judgment. "If the Judge simply disbelieved McFarquhar, his so finding would have been of assistance to us:" per Falconbridge, J., in *MacGregor* v. *Sully* (1900), 31 O.R. 535, at p. 539, referring to *Gurofski* v. *Harris* (1896), 27 O.R. 201, at p. 203.

"The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at": *per* Riddell, J., *Re St. David's Mountain Spring Water Co. and Lahey* (1912), 7 D.L.R. 84, 4 O.W.N. 32.

In this case one is at a loss to know just in what way the evidence impressed the trial Judge. While one hesitates, in proposing to send a case back for rehearing, to express an opinion upon the evidence taken at the first trial, it is perhaps necessary, where no reasons have been assigned in support of the judgment, to indicate from the written evidence one's reasons for so determining.

One can scarcely read the evidence of the plaintiff without coming to the conclusion that it would be very unsafe to act upon his unsupported testimony on the material facts.

There is also a considerable amount of what looks like reliable evidence given on the part of the defendants to the effect that a reasonable barrier had been erected by them at a suitable distance from the trench, and that it was in position just before the accident.

There is the evidence also of one witness to the effect that

the plaintiff admitted, when it was suggested to him that something must have been wrong with the mare before she would go over the pole put up by the defendants as an obstruction, that she could not help it, as she was going at lightning speed. It is true that the plaintiff denied this; but we are left to conjecture which of the two the trial Judge believed.

"Where a case tried by a Judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the Judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong:" per Lord Esher, M.R., and Lopes, L.J., in *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q.B. 38.

"The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them": *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, at p. 705.

Speaking for myself, a perusal of the written testimony would have led me to the conclusion that the defendants had reasonably protected the trench in question by a guard, and that the accident was occasioned by the negligence of the plaintiff.

In these circumstances, it was most desirable, if not actually necessary, to have the benefit of the views of the trial Judge as to the evidence and the weight to be attached to it. The defendants, against whom judgment has gone upon disputed facts and upon evidence which seems unsatisfactory to support it, are placed in an awkward position in supporting an appeal without having an opportunity to examine and criticise before an appellate Court the reasons on which the trial Judge has based his judgment.

One hesitates to reverse altogether the decision of the trial Judge on questions of fact.

I think the proper course to be taken is to direct a new trial; costs throughout to abide the event.

New trial ordered.

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April 18.

O'NEIL v. O'NEIL.

Saskatchewan Supreme Court, Parker, M.C. April 18, 1913.

1. WRIT AND PROCESS (§ II C—34)—SUBSTITUTIONAL SERVICE—WHEN ORDER MAY BE GRANTED—APPLICATION BY SOLICITOR, STATUS.

An application for an order for service *ex juris* of a writ of summons is properly made on the affidavit of the plaintiff's solicitor, if it appears that he is in as good a position to know the facts upon which the application is based as the plaintiff himself.

2. WRIT AND PROCESS (§ II—10)—SERVICE ON DEFENDANT'S HUSBAND — DEFENDANT'S KNOWLEDGE, EFFECT.

Under the Saskatchewan Practice, where it appears that a writ of summons which was to have been served *ex juris* was not personally delivered to the defendant, but was delivered to her husband for her, the service of the writ will be set aside on application of the defendant, in the absence of evidence shewing that a copy of the writ ultimately came to the knowledge or possession of the defendant herself.

[*Rhodes* v. *Innes*, 7 Bing. 329, distinguished.]

3. OATH (§ I—3)—COMMISSIONER OUTSIDE OF JURISDICTION.

A commissioner for taking affidavits for use in Ontario is not an official for taking affidavits for use in the courts of Sakatchewan, he not being one of the functionaries designated in the Evidence Act, R. S.S. 1909, ch. 60, sec. 40, in view of which Sask. practice rule 413 is to be interpreted when construing the phrase "person lawfully authorized to administer oaths in such country, etc.," contained therein.

4. OATH (§ I—3)—AFFIDAVIT—COMMISSIONER'S AUTHORITY—OATH EX JURIS.

An affidavit taken outside of Saskatchewan for use in that province is defective where it appears that the affidavit was taken by "a commissioner," but fails to shew that the commissioner was authorized to take oaths outside of Saskatchewan for use in Saskatchewan, under Evidence Act, R.S.S. 1909, ch. 60, sec. 40.

Statement

THIS is a motion to set aside the writ of summons herein and the order for service thereof *ex juris* upon the ground that the affidavit in support of the application for the order for service *ex juris* does not disclose a cause for granting the said order under the rules of Court, and does not sufficiently verify the cause of action or shew that the plaintiff has a good cause of action; and in the alternative for an order setting aside the service of the writ of summons on the ground that personal service thereof was not effected upon the defendant.

The application was granted.

A. L. Maclean, for the applicant (defendant).

W. B. Scott, for plaintiff.

Parker, M.C.

PARKER, M.C.:—The action is to recover the amount due on a promissory note dated at Earl Grey, Saskatchewan, December 7, 1911, made by the defendant in favour of the plaintiff, for the sum of $975 and also for the sum of $500, being the amount alleged to be due the plaintiff by the defendant under a certain agreement in writing made under date October 23, 1911,

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for services performed by the plaintiff for the defendant in connection with 11-23-20 11, in the province of Saskatchewan. By rule 23, sub-sec. 5, it is provided that service of a writ of summons on a defendant out of the jurisdiction may be allowed whenever:—

> The action is for the recovery of a debt contracted within the jurisdiction or founded on any breach or alleged breach within the jurisdiction, of any contract wherever made, which according to the terms thereof ought to be performed within such jurisdiction.

On February 19, 1913, I made an order for service of the writ *ex juris* on the defendant at London, Ontario. This order was made on the affidavit of the plaintiff's solicitors, with the statement of claim as an exhibit thereto, stating that in the belief of the deponent the plaintiff has a good cause of action against the defendant, and also setting forth the grounds of the application in almost the exact words of rule 23, sub-section 5.

It is not always necessary that an affidavit of this kind should be made by the plaintiff. It may be by the plaintiff or his solicitor, or anybody who can swear to the facts. Annual Practice, 1913, page 82. The main question is, who is the proper party to swear to the facts, the plaintiff or his solicitors? I am decidedly of the opinion that the present case is one where the solicitor is in as good a position to know the facts as the plaintiff himself, and is, therefore, the proper party to make the affidavit; and *Hawes* v. *Clarke*, 15 W.L.R. 516, does, therefore, not apply here. In that case it was held that the plaintiff was the proper party to make the affidavit, as he was in a much better position to swear to the facts than his solicitor was. I am, therefore, of the opinion that the order for service *ex juris* was properly granted and that part of the defendant's application will be refused.

It appears, however, that the copy of the writ was served on the defendant's husband instead of on the defendant herself. The plaintiff explains this transaction by filing an affidavit of one Judd who effected the service of the writ, in which it is set out that there are two actions, one *Uri O'Neil* v. *J. D. O'Neil*, and *Uri O'Neil* v. *S. J. O'Neil* (S. J. O'Neil being the wife of J. D. O'Neil and living at the same residence), that he received both writs at the same time, and that he attended at the residence of the O'Neils, where he asked to see both parties; that he was met by J. D. O'Neil, who informed him that S.J. O'Neil was his wife, and that he did all the business in connection with these matters, and knew all about it, and that he would take the writ for her as he had the notes and attended to all the matters. The affidavit further sets out that the active person in connection with J. D. O'Neil's business is

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J. D. O'Neil himself, and that he merely carries on business in his wife's name owing to his insolvency.

If the plaintiff could shew that the copy of the writ ultimately came to the knowledge or possession of the defendant I would under the foregoing circumstances be disposed to allow the service of the writ to stand. In the case of *Rhodes* v. *Innes*, 7 Bing. 329; a copy of a writ enclosed in a letter was left with the defendant's son at the defendant's residence; the son was desired to give the letter to his father, which he promised to do:—Held, equivalent to personal service. J. D. O'Neil, however, in his affidavit states that the writ was handed to him by Judd on the street, that Judd did not instruct him to give the writ to his wife, and that he did not do so then or at any time, and that his wife has informed him that she has never received a copy of the writ of summons in this action. I find, further, that Judd's affidavit is defective in several respects. The jurat is as follows:—

> Sworn before me at the city of London in the county of Middlesex this 8th day of April, 1913. Andrew Dale, of Middlesex, a commr., etc.

There is nothing whatever in the affidavit to shew where the city of London in the county of Middlesex is, whether in Ontario or in England; neither is it shewn that Andrew Dale is a commissioner authorized to take oaths outside of Saskatchewan for use in Saskatchewan.

Rule 413 provides,

> that affidavits . . . in causes or matters depending in the Supreme Court may be sworn and taken out of Saskatchewan in any part of the Dominion of Canada, or in Great Britain or Ireland, or the Channel Islands, or in any colony, island or plantation or place under the dominion of His Majesty in foreign parts, before any Judge, Court, notary public or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively . . . or before a Judge of a Court of record or a notary public under his hand and seal, or before a commissioner appointed for the purpose of taking affidavits outside of Saskatchewan to be used within Saskatchewan.

This rule is taken from English rule 526 under which an ordinary commissioner for taking oaths in Ontario could swear an affidavit to be used in England. But our rule is qualified by the addition of the words

> or before a Judge of a Court of record, or a notary public under his hand and seal, or before a commissioner appointed for the purpose of taking affidavits outside of Saskatchewan for use in Saskatchewan.

Our rule is also governed by the Evidence Act, R.S.S. 1909, ch. 60, sec. 40, which enumerates the persons who may administer oaths outside of Saskatchewan for use in Saskatchewan. A commissioner for taking oaths in Ontario or any other place for use in that place and not for use in Saskatchewan is

not included in the class of persons mentioned in section 40, and the affidavit of Judd, therefore, cannot be used on this motion. I, therefore, must rely on the material filed by the defendant, and this being the case the service of the writ will be set aside with costs in the cause to the defendant in any event.

Application granted.

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April 12.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Drysdale, JJ. April 12, 1913.

1. HIGHWAYS (§ IV B 6—203)—OBSTRUCTION BY STREET RAILWAY—SNOW REMOVED FROM TRACKS—DUTY TO LEVEL—NEGLIGENCE.

The failure of an electric railway company on removing snow and ice from its tracks into a highway, to level it to a uniform depth, as required by R.S.N.S. 1900, ch. 71, sec. 194, is negligence rendering it liable for injuries sustained as a result of such neglect.

2. EVIDENCE (§ II H 1 C—224)—STREET RAILWAY—SNOW AND ICE—REMOVAL FROM TRACK—LEVELING—ONUS TO SHEW.

The onus rests on an electric railway company, in an action against it for injuries sustained from snow removed from its railway tracks and left heaped up in a highway, to shew that it was levelled off to a uniform depth as required by R.S.N.S. 1900, ch. 71, sec. 194.

3. TRIAL (§ V C—280)—ANSWERS OF JURY — SUFFICIENCY TO SUSTAIN VERDICT.

An electric railway company is not entitled to the verdict on an answer of a jury, under proper instruction as to the duty of the company, in an action against it for injuries caused by the heaping up of snow by defendant company when removing same from its tracks, where the answer was to the effect that such accumulation of snow caused or contributed to the plaintiff's injury, although there was no express finding that the snow was negligently left in the highway, since the answer was sufficient to shew that the conduct of the defendant was inconsistent with due care, and that the snow was not levelled to a uniform depth as required by R.S.N.S. 1900, ch. 71, sec. 194.

Statement

THIS was an action brought by plaintiff, a contractor and truckman residing, and carrying on business at New Glasgow, in the county of Pictou, against defendant, a body corporate, incorporated by the Legislature of the Province of Nova Scotia, and, among other things, the owner and operator of an electric tramway or street car line extending from the village of Trenton to the town of Westville, through and over the public streets and highways of the town of New Glasgow, and in particular that public street within the town of New Glasgow known as the Stellarton road, claiming damages for the loss of plaintiff's horse and injury to his sled and harness, alleged to have been caused by the negligence of the defendant company, its servants, etc.

The particulars of negligence relied on consisted in failure to remove snow and ice properly and sufficiently from the de-

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fendants' track; piling snow and ice on the roadway contrary to the provisions of the Towns Incorporation Act, R.S.N.S. 1900, ch. 71, sec. 194; snow and ice piled too high and not sufficient space left between it and the car track, having regard to the use of the highway by teams; car equipped in such a way as to throw up snow in a manner calculated to frighten horses; a poster attached to the front of the car waving and moving in a manner calculated to frighten horses; car driven at an excessive rate of speed, and out of control; failure on the part of the motorman to stop promptly; failure to keep a sufficient lookout, etc.

The cause was tried before Laurence, J., with a jury, when questions were submitted to the jury and answered as follows:—

1. Did the motorman do everything possible to avoid the accident after it became apparent that there was danger of collision with the plaintiff's team? A. Yes.

2. Did any accumulation of snow on the highway placed there by the company cause the accident or contribute to its happening? A. Yes.

3. Could the plaintiff by the exercise of ordinary care have avoided the accident? A. No.

The damages were assessed at $150.

This was an appeal from the judgment and order of Ritchie, J., based on the findings, directing the entry of judgment in favour of defendant on the ground that, in order to enable plaintiff to succeed, the negligence which caused the accident must have been found by the jury, and that the answer to the second question did not amount to such finding, because the company had a statutory right to remove snow from its tracks in order to enable it to operate its cars.

The judgment appealed from is set out in full in the opinion of Russell, J.

The appeal was allowed and judgment entered for plaintiff.

R. H. Graham, K.C., for plaintiff, appellant.

H. Mellish, K.C., for defendant, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The right of plaintiff to judgment in this action depends on the sufficiency of the questions, and answers of the jury.

The second finding is the important one.

Did any accumulation of snow on the highway, placed there by the company, cause the accident, or contribute to its happening?

To which the jury reply, "Yes."

Under the company's charter, ch. 137, Act of 1902, schedule A, rule 9:—

The company may remove snow and ice from its tracks, or any portion of them, to enable it to operate its cars, provided, however, that in case

said snow and ice shall be removed from its tracks, it shall be its duty to level it to uniform depth, to be determined by the municipal council, and the town councils of the respective towns within their jurisdiction, and to such distance on each side of the track as said council shall direct, or to remove from the road, highway or street all snow or ice disturbed, ploughed, or thrown out by the plough, leveller or tools of the company within forty-eight hours of the fall or disturbance of said snow or ice, if either of said councils shall direct.

The learned Judge, whose charge is not complained of, instructed the jury very positively and correctly on the subject of negligence, and particularly drew their attention to the evidence on both sides in regard to the accumulation of snow on the highway, which it was alleged caused the accident. He says:—

For, did the accumulation of snow on the highway, not placed there by the elements, mind you, but placed there by the company, contribute to the accident? It does not make any difference how big a pile of snow there was there, if it came out of the heavens, what you have to determine is, whether there was a pile of snow there, placed there by the defendant, that contributed to the accident. The company is not responsible for snowdrifts, but they may leave them there. As long as they clear their tracks, and put the snow from the tracks off of the highway altogether they may leave the snowdrifts, and they may leave the public to fight them as best they can. It is not that, that you are asked. It is the accumulation of snow created by the company in the course of their operations, whether by their snow-plough or by the shovels of their men. If you think there was such an accumulation of snow there and that it in any way contributed, or helped, to bring about the accident, you should answer the question "Yes."

Now, it seems to me the learned Judge, having especially directed the attention of the jury to the matter of the accumulation of snow, as the act of negligence complained of, and the jury, under such direction, having distinctly found that it was this accumulation of snow which caused the accident, the plaintiff, on the present findings, is entitled to judgment for the damages assessed, $150.

My brother Ritchie, who granted the order for judgment, held, that because there was no finding as to whether or not the snow was levelled to a uniform depth to be determined as rule 9 provides, defendant company must have judgment, and he thinks negligence has not been found by the answers to the second question, because the defendant company had a statutory right to remove snow from its tracks. I cannot agree with him in either of these conclusions. While it is true the defendant company had the statutory right to remove snow from their tracks, it is also true that they cannot so remove it as to accumulate, that is heap it up on the highway, and that is what the jury have found they did. It was for the defendant company to

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shew that it was levelled to a uniform depth, if that was true. The plaintiff's case is founded on the fact that the snow was in heaps, or accumulated, and, if so, it could not have been uniformly levelled. The jury's answer to question No. 2 is clearly that defendant company were guilty of negligence in accumulating snow on the highway, and I do not think more is required.

Reference was made to the case of *Mader* v. *Halifax Electric Tramway*, 37 Can. S.C.R. 94. It will be found, on looking at the judgment of the Court, that the evidence and the findings in this case fully meet the requirements there suggested. Davies, J., says:—

> But, apart from this rule, but at the same time not inconsistent with it, there is a duty cast by law on the electric company to carry out their statutory privilege in the first instance in a reasonable and proper way, and without negligence. If after, or during, a snow storm, or at any time they remove snow and ice from their track, and throw it upon the parts of the highway adjoining the track in a careless or negligent way, and an accident is thereby caused to any person lawfully using the highway, the company would be clearly liable.

In my opinion, this order for judgment should be set aside, and judgment entered for plaintiff for $150, with all costs.

Russell, J.

RUSSELL, J.:—The plaintiff's horse was killed and his sleigh injured by a collision with the defendants' car. The horse and sleigh were coming along the road between New Glasgow and Stellarton, going southwards. The track was on the western side of the road, and the snow had been thrown off the track to the eastward by the snow-plough. According to the plaintiff's testimony, a portion of the road had been more or less levelled off on the east side of the roadway between the track and the sidewalk, leaving a bank of snow three feet high between the portion thus levelled and the sidewalk. The roadway left between this bank and the car-track sloped towards the track, according to the evidence of the plaintiff, so that his sleigh tended to tail in towards the track. But I do not think this is of much importance because the accident was not due to this cause. His horse began to prance on the approach of the car, possibly because of the snow spraying out from the flange of the car and it became unmanageable. The plaintiff's account of the matter is that he endeavoured to pull off into the snow-bank away from the track, but he did not cross through the bank. On the contrary, his horse, rearing upon his hind legs, turned in towards the track and was struck by the car. Plaintiff says that the tail of his sleigh caught in the snow and this prevented him from clearing the car. The only way I can understand this statement is, that he was endeavouring to back

away from the car and turn, so as to go in the same direction as the car. But he does not clearly explain whether this was his meaning or not.

Another witness for the plaintiff gives evidence that it would be more difficult to manage a horse under such circumstances on a narrow roadway, such as the plaintiff described, than if the whole of the highway between the track and the sidewalk had been available.

The learned trial Judge charged the jury in a manner which has not been criticized and which seems to be unobjectionable, and he put the following questions to them. [The learned Judge here set out the questions submitted to the jury and their answers.]

Plaintiff complains of the answer to the first question, but I think it was such as a reasonable jury might well give and I think I should have been myself inclined to answer it in the same way.

The trial Judge having died before the order for judgment was taken out, the application for that order based on the findings came before Mr. Justice Ritchie, who has held that the second finding does not establish any negligence on the part of the defendant company. His reasoning is as follows:—

> In order that the plaintiff succeed it is, of course, necessary that the negligence which caused the accident be found by the jury. The question for me is, have the jury found negligence by their answer to the 2nd question. I think not, because the defendant company has a statutory right to remove snow from its tracks to enable it to operate its cars. If this was done by the company in accordance with rule 9, in schedule "A" referred to in the Act incorporating the company, chapter 137, Acts of 1902, then there is no cause of action. The finding is consistent with due care on the part of the company in the exercise of their statutory right. There is no finding as to whether or not the snow was levelled to a uniform depth to be determined as rule 9 provides. The kind of questions which I think should have been put to the jury are indicated by Justice Davies, in *Mader* v. *Halifax Tram Co.*, 37 Can. S.C.R. 94, at 99. Not having tried the cause, I do not think the question as to whether or not the Judge has the right to supplement the findings by drawing inferences of fact can properly arise. I have read the evidence. If I had the power to draw inferences of fact, I think it would be very difficult, if not impossible, to come to a satisfactory conclusion from the written evidence. I suppose that the jury regarded the case as one of negligence and would have so found if the question of negligence had been put to them, but I cannot allow this to influence me as the sole question which I have to consider is whether there is a finding or not. Holding, as I do, that there is no such finding, I have no alternative but to decide that the order for judgment must go in favour of the defendant company.

I am unable to concur in this reasoning. Of course, the plaintiff is contradicted as to the existence of the bank of snow. But the jury was cautioned against placing implicit confidence

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in those of the witnesses for the defendant who were in the employment of the company, and they had a right to believe the witnesses of the plaintiff on this point. I cannot see that their finding is consistent with due care on the part of the company in the exercise of their statutory right. They have no statutory right to place an accumulation of snow on the highway, such as will cause or contribute to an accident by which the horse of another is killed. If we take it as a fact as found by the jury that there was evidence of an accumulation of snow placed on the highway which caused or contributed to the accident, I think the burden was upon the defendants to shew if they could do so that they had levelled it to a uniform depth to be determined as the rule referred to provide.

The finding here is that the snow had not been levelled at all, but had been piled up in such a way as to cause the accident that happened. I think that this was a sufficiently clear determination on the part of the jury, especially in view of the clear and satisfactory terms of the charge, that the defendants had been operating their road in a negligent manner and that their negligence contributed to, if it did not cause, the accident.

In the case of *Mader* v. *The City of Halifax*, 37 Can. S.C.R. 94, the charge of the learned Judge was considered such as to mislead the jury as to the duty of the company, and the finding of the jury, in view of the conception of the company's duty, given to them by the Judge, was held to be capable of a construction perfectly consistent with the performance of its duties by the company. I think the cases are therefore distinguishable. If the defendant desired a more specific finding as to the precise nature of the company's negligence and the precise manner in which that negligence contributed to or occasioned the accident, it was open to him to seek more explicit information. In the absence of further details, I think it cannot be said that the jury have failed to inform us in what respect the company was negligent, and they have found that the negligence contributed to the result. Our own common sense enables us to see how easily and naturally it might contribute to such a result, and I do not think we should decline to pronounce the logical conclusion from this finding, unless we are able to see that the negligence attributed to the company could not, in view of evidence that the jury had a right to believe, contribute to such a result. I think the appeal should be allowed and judgment entered for the plaintiff on the findings.

Drysdale, J.

DRYSDALE, J. (dissenting):—I feel obliged to differ from my learned brethren who sat with me on the hearing of this appeal.

The cause was tried before the late Mr. Justice Laurence with a jury, and after the death of that learned Judge, a motion

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for judgment on the findings of the jury came before Mr. Justice Ritchie.

It seems to me very clear that negligence and proximate cause was never submitted, and equally clear that the findings are all consistent with the absence of negligence on the part of the defendant company.

I agree entirely with the reasons given by Mr. Justice Ritchie, whereby that learned Judge directed that judgment on the findings should be entered for defendants. I cannot usefully add to such reasons.

For myself, I think the only correct course is to send the cause back for a new trial, and thereupon the usual and necessary questions as to defendants' negligence, if any, could be properly submitted.

Appeal allowed.

UNION BANK OF CANADA v. A. McKILLOP & SONS, Limited.

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May 5.

Ontario Supreme Court. Trial before Lennox, J. May 5, 1913.

1. COSTS (§ I—10)—DISCRETION—SUCCESS ON TECHNICALITY, MERITS WITH OPPOSITE PARTY, EFFECT.

Costs may be refused to a successfu litigant where he succeeds solely on a technicality, and the merits are with the opposite party.

2. CORPORATIONS AND COMPANIES (§ IV D 1—68)—POWER TO CONTRACT — CO-OPERATION WITH OTHER COMPANY.

A company cannot legally guarantee the repayment of money advanced to another company for the purposes of financing an undertaking not connected with the business of the first-mentioned company, and not within its corporate powers.

ACTION to recover $15,500 upon a guaranty.

The action was dismissed.

Hamilton Cassels, K.C., and *D. C. Ross*, for the plaintiffs. Statement
C. A. Moss, and *J. B. McKillop*, for the defendants.

LENNOX, J.:—Archibald McKillop, John Alexander McKillop, Daniel McKillop, Hugh Cummings McKillop, and Isabella Fuller were incorporated as a company "to buy, sell, and deal in timber and lumber, and for the said purposes to operate and carry on saw-mills, bending-factories, and other wood-working machinery and mills for the manufacture of woodwork, and implements, and carpenters and builders' supplies, and to carry on the business of a farmer and dealer in live stock and farm produce," on the 28th September, 1904, under the provisions of the Ontario Companies Act. Lennox, J.

On the 17th February, 1905, and before they had organised as a company, these same incorporators executed an instrument by which they jointly and severally bound themselves to be

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responsible to the Merchants Bank for the indebtedness of the West Lorne Waggon Company Limited, to the amount of $20,000. These incorporators appear to have regarded this as an obligation of the defendant company; and the reason assigned for not executing as a company is the non-organisation of the company. I understood the president of the defendant company to say on examination that "when the money was obtained from the Merchants Bank on our guaranty we were the West Lorne Waggon Company." It is a fact that the waggon company was launched by this witness, his brothers, and their friends. The charter members of the waggon company are still the only members of the defendant company. It is a family affair—arising out of property and business which the shareholders inherited from their father. At the time the defendant company executed the guaranty in question, they held one share in the West Lorne Waggon Company, and some of the members had shares. These shares were held in the same way when the waggon company assigned. In March or April, 1905, the West Lorne Waggon Company was taken over by the Wilkinson Plough Company, and the shareholders, or many of them, were paid by shares in the plough company. This latter company also assigned, and at the time of the assignment members of the defendant company held shares in the plough company to the amount of $25,000. These shares were held and treated as the property of the defendant company. In March, 1907, the waggon company owed the Merchants Bank about $40,000, and for $20,000 of this the members of the defendant company were responsible upon their guaranty. At this time it was arranged to transfer the West Lorne Waggon Company account to the United Empire Bank—this bank advancing the waggon company the money to enable them to pay off the Merchants Bank. It is admitted that the plaintiffs have succeeded to all the rights of the United Empire Bank. Of this $40,000 credit, $25,000 was advanced upon a promissory note of the West Lorne Waggon Company, secured by an assignment of the company's manufactures and raw material, under the provisions of sec. 88 of the Bank Act; and the balance was secured, or supposed to be secured, by a general guaranty of the defendant company for a sum not exceeding $15,000, and interest thereon at six per cent. per annum after demand. This is the situation in outline; but, so far as the facts or the inferences from facts are concerned, there is nothing to assist me which will not be equally available to an appellate Court in the event of an appeal, as there is no conflict of testimony and nothing turning upon the demeanour of witnesses.

The defence is two-fold, namely: that the guaranty never bound the company; and, if it did, that there is now no indebtedness within its terms. The first objection goes to the root of the

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action. Although not without doubt, I have come to the conclusion that the guaranty sued on did not and does not bind the defendant company. The money lent by the United Empire Bank upon the faith of this undertaking went in discharge of this amount of the liability of the members of the defendant company to the Merchants Bank. I don't think this matters. The Merchants Bank could not have recovered upon their security in an action against the defendant company; and, with all equities counted, the plaintiffs cannot be subrogated with higher rights. This is a family concern, a private company, it is said; but it appears to me that, to be binding at all, it must be binding to all intents, and so postpone the rights of creditors of the defendant company and its members if insolvency had supervened. The members of a company and the company are separate entities: *Soloman* v. *Soloman*, [1897] A.C. 22. The president and other members of the defendant company were keenly alive to the importance of retaining the operations of the waggon company in West Lorne, and looked forward to profitable sales, but their charter did not authorise the defendant company to engage in the business which the waggon company was incorporated to carry on. How then could it be said that the defendant company had power to finance a business which it could not engage in? Whether imprudent, or probably profitable, is not the question; and I cannot think that the transaction now repudiated was so clearly incidental to the purposes for which the defendant company was incorporated that there could be said to be "a potential necessity" for executing the guaranty sued on: *A. R. Williams Machinery Co.* v. *Crawford Tug Co.*, 16 O.L.R. 245; *Small* v. *Smith*, 10 App. Cas. 119; *Attorney-General* v. *Great Eastern R.W. Co.*, 5 App. Cas. 473, at 478, 481. What is not expressly authorized or incidental is prohibited: *Ashbury R.W. Co.* v. *Riche*, L.R. 7 H.L. 653. Nor do I think that the reference to this guaranty contained in the minute-book of the defendant company, and made subsequent to the new Act, constitutes an effective ratification This may happen if the thing done, though irregularly done, was within the authorised object of the company, was intra vires; otherwise, however, if it was impliedly prohibited by being clearly outside the declared and incidental purposes or objects of the company. Cases clearly marking this distinction are collected in the appendix to Pollock on Contracts, 7th ed., pp. 694-6.

Entertaining the opinion I have expressed, it becomes unnecessary to deal with the other objection to the plaintiffs' claim. The merits are with the plaintiffs; and it is, therefore, not a case for costs to the defendants. I shall not be sorry if my judgment shall be shewn to be wrong.

The action will be dismissed without costs.

Action dismissed.

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May 23.

PRESSICK v. CORDOVA MINES, Limited.

Ontario Supreme Court, Latchford, J. May 23, 1913.

1. EVIDENCE (§ XII—D)—VIOLATION OF STATUTORY DUTY BY EMPLOYER—INJURY TO SERVANT—PRIMA FACIE CASE—EFFECT OF CONTRIBUTORY NEGLIGENCE.

Notwithstanding a *primâ facie* right of action in favour of an employee is established by shewing his employer's violation of a statutory duty, such *primâ facie* right disappears where a finding of the contributory negligence of the employee is properly reached.

Statement

ACTION by the widow of John Arthur Pressick for damages by reason of his death while working for the defendants in their mine, owing to their negligence, as alleged.

Judgment was given for the plaintiff.

F. D. Kerr, for the plaintiff.

M. K. Cowan, K.C., and *A. G. Ross*, for the defendants.

Latchford, J.

LATCHFORD, J.:—But for the finding of contributory negligence, the plaintiff would be entitled to recover. Where a statute imposes a duty on an employer, and one for whose benefit that duty is imposed is injured by failure to perform it, the authorities are clear that, *primâ facie*, and if there be nothing to the contrary, a right of action arises.

But that *primâ facie* right disappears when a finding of contributory negligence is properly reached. If there was any evidence to warrant the conclusion at which the jury arrived in regard to the negligence of the plaintiff's late husband, I should, I think, in the present state of the law, be obliged to dismiss the action, notwithstanding the negligence of the defendants in not covering the dangerous winze or "glory hole," and in failing to supply Pressick with a proper wrench. But there is, in my opinion, no evidence whatever to support the particular and only finding of the jury that Pressick was negligent in not using with more care the defective wrench given him by the defendants, with knowledge that he would have to use it in a place dangerous because of their neglect. The tightening and loosening of the swing nut required the exercise of great force. The nut had to be unscrewed every time the drill was set for a new hole. The machine might have been more safely placed for the loosening of the nut if the valve had not been on the side on which it was at the time of the accident. This was the contributory negligence which the defendants sought to prove Pressick guilty of. By their verdict the jury shew that they rejected this contention, and accepted the evidence that the drill was properly placed. If it had been turned into the position suggested by the defendants as the only proper one, the peril resulting from a slip in tightening the nut would have been

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the same as would have existed in loosening the nut with the drill in the position it actually occupied. The jury found none of the grounds of contributory negligence sought to be established by the defendants, but evoked by some obscure process of reasoning a ground which is, in my opinion, unsupported by any evidence.

Entertaining this opinion, I reject their finding, and direct that judgment be entered for the plaintiff for the damages found by the jury, $1,750. There was, I may add, evidence to warrant a verdict for a much larger sum. The plaintiff is also entitled to her costs.

Judgment for plaintiff.

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May 29.

PHILLIPS v. LAWSON.

Ontario Supreme Court, Cartwright, M.C. May 29, 1913.

1. PLEADING (§ I N—110)—AMENDMENT OF STATEMENT OF DEFENCE—WHEN ALLOWED—CO-DEFENDANTS—INFORMATION FURNISHED BY ABSENT DEFENDANT.

After some of the defendants in an action have filed and served their defences they will be permitted to amend them where another defendant was absent from the province at the time such statements of defence were delivered, and it is shewn that upon his return he gave his co-defendants information of which they wish to avail themselves in their defence.

2. PARTIES (§ II B—115*a*)—IMPROPER JOINDER—UNDISCLOSED PRINCIPAL—ACTION AGAINST PRINCIPAL AND AGENT—NECESSITY OF ELECTION.

In an action against several defendants, one of whom, without disclosing the existence of his principal, acted as agent for the others in the transaction to which the action pertains, the plaintiff will be required to elect within a reasonable time whether he will treat principal or agent as the party with whom he dealt.

[*Smethurst* v. *Mitchell* (1859), 1 E. & E. 622, applied; *Tate* v. *Natural Gas and Oil Co.* (1898), 18 P.R. 82, distinguished.]

Statement

MOTION by the defendants (other than the defendant A.B.) for an order for leave to amend their statements of defence, on the ground that A.B. was absent from the Province when their statements of defences were delivered, and that since his return he has given them certain information of which they desire to avail themselves; also for an order requiring the plaintiff to elect against which of the four defendants he would proceed or to strike out the name of the defendant A.B.

C. A. Moss, for the applicants.

J. P. MacGregor, for the plaintiff.

Cartwright, M.C.

THE MASTER:—There is no doubt that the defendants should be allowed to amend so as to set up all defences on which they intend to rely. Owing to the absence of their co-defendant, who was the active member of the firm, and who signed his co-defendant Lawson's name to the agreement set out in the state-

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ment of claim, the facts, as he understood them, were unknown to the others. As the plaintiff has served a jury notice, the action cannot be tried until after vacation; and Mr. Moss is willing that proceedings should go on in vacation if the plaintiff so desires.

The other branch of the defendants' motion is supported by reference to Anson on Contracts, 12th ed., pp. 382, 383, and *Smethurst* v. *Mitchell* (1859), 1 E. & E. 622. These authorities shew that "where an agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom he dealt:" Anson, p. 383. In Smethurst's case, it was said by Hill, J. (p. 630): "All the cases establish that a vendor selling to the agent of an undislosed principal must elect to sue the principal within a reasonable time after he discovers him." Crompton, J., at p. 631, says: "The election to sue an undisclosed principal must be made within a reasonable time after he is discovered."

It was argued by Mr. MacGregor that there was here no case for election. His view was, that the plaintiff was suing only in respect of one bargain; that he was doubtful against whom his proper remedy was to be taken. He relied on *Tate* v. *Natural Gas and Oil Co. of Ontario* (1898), 18 P.R. 82. But that case is different in its facts. There is here no uncertainty as to the party liable. Both are liable if a definite bargain was made to buy the land in question. But this is not a joint but a separate liability, and the plaintiff must declare against which one he is proceeding, and all such amendments as result therefrom must be made, though nothing was said on this point in the notice of motion.

On the argument it was pointed out by Mr. Moss that the 8th clause of the prayer for relief asks, "in the alternative, for damages against the defendant firm and the defendant A.B. for breach of warranty of authority to make the said agreement for purchase for and on behalf of the said syndicate;" but that there is nothing in the statement of claim to support this. This seems true.

As the defendants have all pleaded, they were either not embarrassed by the statement of claim or were not able to deal with it effectively in the absence of A.B. In his statement of defence, delivered on 13th instant, in paragraph 13, he (A.B.) seems to have had this claim in mind when he said that he "gave no warranty of any sort in connection with his signature of the name of the defendant T. W. Lawson." The present notice of motion was served on the same day as that statement of defence was delivered.

The case is one of some complexity, and a very considerable sum is in question. This makes it desirable for all parties that

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the pleadings should be made as definite and correct as possible. In view of the fact that the cause was begun in August last, and of all that has taken place since, it seems fair, while granting the motion, to impose the usual term as to costs so far as applicable.

No amendment should be made of the statements of defence until the statement of claim has been amended. The statements of defence of the defendants other than A.B. were delivered in October last, and there have been examinations for discovery had since. The plaintiff can, if so advised, plead as in *Bennett* v. *McIlwraith*, [1896] 2 Q.B. 464. The defendants should amend within a week afterwards; and all costs lost or occasioned by this order should, in the special circumstances, be to the plaintiff in the cause. Pleadings may be delivered and other proceedings had in vacation at the will of either party.

Leave granted to amend.

WILSON v. TAYLOR.

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June 4.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 4, 1913.

1. MORTGAGE (§ VI G—100)—SALE EN BLOC LESS ADVANTAGEOUS THAN SALE IN PARCELS.

If, in the *bonâ fide* exercise of discretion, where there is a doubt whether the land would sell more advantageously *en bloc* or in parcels, a mortgagee prefers to sell *en bloc* and does so, he will not be charged on that ground with wilful default where, after the sale, it is made to appear that a sale in parcels would have been more advantageous.

[*Wilson* v. *Taylor*, 7 D.L.R. 316, 4 O.W.N. 253, affirmed; *Aldrich* v. *Canada Permanent Loan Co.* (1897), 24 A.R. 193, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of Boyd, C., *Wilson* v. *Taylor*, 7 D.L.R. 316, 4 O.W.N. 253.

J. A. Hutcheson, K.C., for the plaintiff.

J. L. Whiting, K.C., and *J. A. Jackson*, for the defendant.

Meredith, J.J.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—In the view of the Chancellor, the mortgagor has been damaged to the extent of at least $1800 as the effect of the sale of the mortgaged property *en bloc*, instead of in parcels.

I should not have reached that conclusion upon the evidence. As the Chancellor points out, the property was a difficult one to dispose of in any way, and there was little or no market for land in Gananoque, where the mortgaged property is situate, or for such a sized house as was on it.

The main part of the property consisted of a brickyard, which was not being operated and had not been since 1910; and

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the valuation of it as a going concern, such as that made by the witness Bechtel, forms no adequate guide as to its value in its then condition. As has been said, the house was too large for the property; and it was, therefore, difficult, if not impossible, to find a purchaser for it at anything like what it cost to build it. The village lots had been laid down on a registered plan, with streets running through the subdivision. No one suggested that the lots could have been sold separately; and the value placed upon them was based upon their being used as one parcel for grazing purposes—which could not be done unless these streets were closed.

The mortgage was for $4000, and was made on the 20th November, 1908. The principal was payable in annual instalments of $500, and interest at the rate of six per cent was payable annually.

Nothing has been paid on account of the principal, and of the interest only that for the first year. The appellant was unable to raise money to pay off the mortgage; his efforts to sell the mortgaged property had resulted in failure; and, even after the sale under the power, the purchaser was willing and offered to let the appellant have the property back at what he had bought it for, but neither the appellant nor his creditors availed themselves of the offer.

These latter facts, in my view, afford more cogent evidence against the contention of the appellant than the opinions, more or less speculative, as to the value of the mortgaged properties expressed by the witnesses called on his behalf.

Even if the Chancellor's view as to the loss sustained by not selling in parcels is to be accepted, I agree in his conclusion that, in the circumstances of the case, the respondent is not chargeable with the loss.

Aldrich v. *Canada Permanent Loan Co.* (1897), 24 A.R. 193, is not an authority for holding that, in the circumstances of this case, it was the duty of the respondent to sell in parcels; and that for the reason mentioned by the Chancellor at the conclusion of his judgment. The mortgaged property in that case consisted of a farm of forty acres, with two dwelling-houses and other farm-buildings on it, and of a village property, with two stores on it, situate half a mile or more from the farm.

Even in that case, Maclennan, J.A., said: "I do not say that in no case like the present would a sale in one lot be proper."

The facts were very different from those of the present case. The evidence shewed that the mortgagees had acted recklessly in selling in one lot. Bell, their agent in the locality in which the property was situate, was not consulted as to the best way of selling it, and testified at the trial that, as a prudent owner, he would not think of selling the two properties together and ex-

pect to get the best price for them. Indeed, no inquiry whatever was made by the mortgagees for the purposes of ascertaining what was the most advantageous way of selling the property.

In the case at bar, the properties are contiguous to one another, and were occupied and used by the mortgagor as one property. The dwelling-house was built for his own use, and was manifestly so situated that it was not a desirable place of residence for any one except the owner of the brickyard. The lots were grazing land, and were conveniently situated for use in connection with the brick business; indeed, some of them were used for obtaining clay for the manufacture of the bricks.

The conclusion to sell *en bloc* was reached by the respondent's solicitor after he had considered the question of selling in that way or in parcels; and there is no reason for thinking that he or the respondent had any other desire than to sell to the best advantage. It is not at all clear, I think, that, had the property been sold in parcels, the result would not have been that an unsaleable brickyard would have been left on the respondent's hands; and I very much doubt whether the other property would have realised anything like the value put upon it by the witnesses called on the appellant's behalf.

Baker, the auctioneer employed at the sale, had a long experience, and his testimony was that, in his opinion, the best price would be got for the property by putting it up for sale *en bloc*.

As said by Lindley, L.J., in *Kennedy* v. *DeTrafford*, [1906] 1 Ch. 762, 772, "a mortgagee is not a trustee of a power of sale for a mortgagor at all: his right is to look after his own interests first. But he is not at liberty to look after his own interests alone; and it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor, that is all."

The conduct of the respondent has been judged by the learned Chancellor according to that standard, and he has found that the respondent neither fraudulently nor wilfully nor recklessly sacrificed the property of the appellant. With that conclusion I entirely agree.

I would dismiss the appeal with costs.

Appeal dismissed.

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May 5.

Re MYERSCOUGH AND LAKE ERIE AND NORTHERN R. CO.

Ontario Supreme Court, Middleton, J. May 5, 1913.

1. ARBITRATION (§ III—17)—AWARD — REVIEW — REFERRING BACK FOR SUPPLEMENTARY CERTIFICATE.

An award under the Railway Act (Can.) will not be set aside by reason of the fact that after a view of the lands in question the arbitrators have not put in writing a statement sufficiently full to enable a judgment to be formed of the weight which should be attached to their finding, Arbitration Act, 9 Edw. VII. (Ont.) ch. 35, sec. 17 (3), but will be referred back for a supplementary certificate.

2. EMINENT DOMAIN (§ III E 2—170)—COMPENSATION — CONSEQUENTIAL INJURIES BY RAILWAY CONSTRUCTION—SEVERED PARCEL.

When a railway intersects a piece of land the company must pay not only compensation for the land actually taken, but also damages for injuries to the remainder of the parcel sustained by reason of the compulsory severance.

3. EMINENT DOMAIN (§ III D—160)—COMPENSATION — RAILWAY TAKING POSSESSION—DATE OF DEPOSITING PLAN, EFFECT.

The date of the deposit of a plan, profile and book of reference is the date with reference to which compensation or damages for land taken by a railway company under the Railway Act, 3 Edw. VII. (Can.) ch. 58, are to be ascertained, and subsequent dealings with the land by the owner cannot affect the amount of compensation or damages to be awarded.

Statement

APPEAL by the railway company from an award of two out of a board of three arbitrators allowing a land-owner $623 for a part of his land taken for the railway and $677 for injurious affection of the land not taken.

W. S. Brewster, K.C., for the railway company.

W. T. Henderson, K.C., for the owner.

Middleton, J.

MIDDLETON, J.:—The material dates are as follows. The railway company registered their plan and book of reference on the 20th February, 1912. Notice of expropriation, dated the 12th October, 1912, was served on the 17th October, 1912. Thomas Myerscough (who owned the land at the date of the filing of the plan), on the 8th July, 1912, conveyed to his wife, Rebecca Myerscough. On the 27th June, Thomas Myerscough agreed to sell part of the land to Smith et al. for $28,000. On the 5th August, 1912, a by-law was passed by the Council of the City of Brantford, by which permission was given to Rebecca Myerscough, the owner of the portion of lands mentioned in the agreement with Smith et al., to lay out upon these lands certain highways of a uniform width of fifty feet. These highways connect with Mount Pleasant street, the main thoroughfare, and provide a highway bordering upon the lands taken by the railway company. They cover all the lands on the one side of the railway allowance.

An agreement was entered into between the purchasers under

the Smith agreement and the municipality, providing that these streets should not be opened up as highways until certain works were done thereon.

The appeal is upon several grounds. First, it is said that the award is against evidence and the weight of evidence. Subject to what is to be said as to the particular grounds to be dealt with later, there is abundant evidence to support the award. There is the usual conflict between expert real estate valuators. Some place the value of the land and the injury to the land by severance at far higher figures than allowed by the Board. It is not without significance that the award is that of the third arbitrator and of the railway company's arbitrator; the land-owner's arbitrator refusing to join in an award for so small an amount.

Secondly, it is said that the arbitrators erred in allowing damages for depreciation for severance, as the sale to Smith of the portion severed by the railway precludes recovery upon this head.

I think this argument is based on a misapprehension of the real meaning of damages by reason of severance. When a railway intersects a parcel of land, damages are allowed in the first place, as here, for the land actually taken, and a further sum is allowed for the injury done to the land not taken, by reason of compulsory subdivision. In other words, the entire parcel has been rendered less valuable, not only by reason of the reduced acreage, but by reason of access from the main highway being only obtained after crossing a railway. Often, this damage may be, as here, confined entirely to the reduced value of that parcel by reason of its severance, as compared with the value it would have had if the severance had not been made.

The fact that, after the land has been injured in this way, the land-owner chooses to sell one parcel, even if that sale should be without any reservation of the right of way to the main highway, seems to me to be quite irrelevant. It may have been the most prudent thing the owner could do, or it may have been utterly imprudent. The effect of the taking by the railway company is to be judged in view of the situation created at the time by the taking of the land, and not in view of the subsequent developments.

Quite apart from this, I do not think that there was, in this case, a sale without ample provision being made for access. It was the intention of the parties that the land should be laid out as shewn in the plan. The agreement for sale was made, too, before the property was conveyed; and, while Mrs. Myerscough was still the owner, she obtained the necessary municipal consent, and registered the plan. This was apparently done with

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the full approval of the purchasers and in pursuance of the real understanding between the vendor and purchasers.

Upon the evidence, the amount allowed for the injuries caused by the severance upon the forty-five acre parcel would appear to me to exceed the amount which has been allowed by the arbitrators.

Then it is said that the arbitrators have not sufficiently appreciated the increased value resulting to the claimant's lands from the construction of the railway. Section 198 of the Railway Act limits the factor to be considered to the increased value "beyond the increased value common to all lands in the locality."

I fail to see that these lands will be materially increased in value beyond other lands in the neighbourhood by reason of the existence of this railway. If the line is to be operated as an electric railway, no doubt it will greatly enhance the value of the lands; but there is no assurance that this is to be the way in which the line is to be used; as the charter provides that the line may be operated by steam. In the latter event, a through track crossing over the lands will for many purposes be detrimental. The arbitrators have considered, and, they say, given effect to, the evidence; and I certainly cannot see any room to differ from the result arrived at, by way of reducing the sum awarded.

Two technical objections are also taken. The arbitrators, it is said, did not at their first meeting fix a date on or before which the award was to be made. This, it is contended, invalidates the proceedings. The fact is not shewn, and counsel disagree in their recollection.

In *Re Horseshoe Quarry Co. and St. Mary's and Western Ontario R.W. Co.*, 22 O.L.R. 429, 2 O.W.N. 373, a Divisional Court held that the omission does not invalidate the award, and that the objection is waived by proceeding with the arbitration.

Then it is said that the arbitrators took a view of the property, and that the award is not in conformity with sec. 17(3) of the Arbitration Act, 9 Edw. VII. ch. 35. The section relied upon provides that where the arbitrators proceed wholly or partly on a view or on any 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.

In the award the arbitrators recited the hearing of evidence —"and having at the request of the parties concerned, and accompanied by their respective counsel, viewed the lands and premises in question." The arbitrators have not said, nor is it otherwise shewn, that they have proceeded upon anything

learned by them upon the view, and possibly the objection is not technically made out; but I think the railway company, if they desire, should have an opportunity of having the award referred back to the arbitrators, so that they may certify in accordance with the section in question.

In the case already cited, the Court took the view that the Ontario Arbitration Act applied to arbitrations under a Dominion statute; so the section in question is applicable to this case.

I do not think that the award should be set aside altogether by reason of the failure to certify in accordance with the section; and, therefore, the only effect that should be given to the objection is a reference back, as I have suggested. If the railway company desire this reference back to the arbitrators to certify as referred to, then the motion will be reserved until a supplementary certificate is made; and, if the railway company do not desire this relief, the motion will be dismissed with costs. The railway company must elect as to this within a week's time.

On the argument, an objection was taken based on the fact that the arbitration was with the wife, and that the deed from the husband to her was after the expropriation proceedings. This was not mentioned on the hearing, and the point is not taken in the notice of appeal. The husband, it is said, will join in any release the railway company desire; so the point is not of any real importance.

Judgment accordingly.

CARDWELL v. BRECKENRIDGE.

Ontario Supreme Court. Trial before Hodgins, J.A. May 14, 1913.

1. WITNESSES (§ I A—1)—DISQUALIFICATION—COMPETENCY OF ONE NOT ONTARIO LAND SURVEYOR.

Secs. 3 and 25 of 1 Geo. V. ch. 41 (Ont.), respecting land surveyors, does not prohibit a surveyor who is not an "Ontario land surveyor" from testifying as to surveys made by him, although the weight of this testimony may be measured in some degree by sec. 25 of such Act.

2. EASEMENTS (§ II B—19)—FLOODING LANDS—DAM — TIGHTENING — INCREASED USER—PRESCRIPTION.

In order that a dam may be tightened so as to hold back all the water of a stream to a greater extent than an original prescription right permitted, there must be shewn a user, although not absolutely continuous *de die in diem* so constant as to disclose the existence of a consistent course of action and user, even though periods elapse without an active assertion of such right.

3. INJUNCTION (§ I F—59*a*)—STREAMS — OBSTRUCTIONS — TIGHTENING DAM—INCREASED FLOODING OF LAND.

Where, for many years, a seven-foot water level was maintained by a dam only during spring freshets and late in the fall and winter, the maintenance, by tightening the dam, of water at such level during the

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entire year, in the absence of a prescriptive right, will be enjoined so as to prevent the flooding of the land of the plaintiff during the summer months.

4. WATERS (§ II K—95)—DAM — TIGHTENING — INCREASED FLOODING OF LAND.

Where, for many years, a seven-foot level of water was maintained by a dam only during the spring freshets and late in the fall and winter so as to raise a prescriptive right. The dam cannot be tightened, under such prescriptive right, so as to retain water at such level during all of the year.

Statement

ACTION by four plaintiffs for damages for the flooding of their lands and for an injunction.

The complaint of the plaintiffs was that the defendant's dam, built across the river Ouse, in the township of Asphodel, had been raised twenty-one and a half inches since 1885, and had been tightened, resulting in a great increase in the water backed upon their lands, with consequent damage, in later years.

The defendant denied the raising and tightening of the dam, and claimed the right to flood the plaintiffs' lands whenever the natural flow of the Ouse required him to do so in operating his mill.

G. H. Watson, K.C., and *L. M. Hayes*, K.C., for the plaintiffs.
I. F. Hellmuth, K.C., and *F. D. Kerr*, for the defendant.

Hodgins, J.A.

HODGINS, J.A.:—The defendant purchased the mill and appurtenant lands in 1885; and in his conveyance from George Read there are included "the mills, dam, and machinery now therein" and a right to enter into and upon an embankment on the west side of the Ouse for the purpose of repairing, amending, and rebuilding the same.

This mill was a going concern when purchased by the defendant; and his predecessor in title, John Powell, had for many years maintained the dam in question with a seven-foot head, according to the evidence of H. J. Walker, who had run it for seven years until 1884 or 1885. The embankment mentioned in the defendant's deed was then in place, and has been maintained ever since.

In 1886, 1900, 1901, and 1908, some repairs and improvements were made to the dam.

In 1886, the two inside sections of the dam and the timber slide were taken down and repaired. In 1900 and the winter of 1901, steam was put in, the posts replaced in the timber slide, and the old saw-mill on the west was taken down, as well as its flume; and the dam was repaired. In 1903, shafting was put across below the dam, a chopper put in, and steam was used to saw and grind chop. In 1908, the old grist-mill flume was made into a sluiceway, and a new concrete flume put in to the east.

The chief disputes were: (1) was the dam raised? (2) was it tightened? (3) had the defendant acquired the right by prescrip-

tion to collect and retain whatever amount of water the dam, if it remained unaltered, could contain at any time? (4) the question of damages and injunction.

In discussing the question of the exact height of the present dam and the height of the dam at the time spoken of by one Lobb, in 1902 or 1903, and also the height of the embankment and of the water at several dates, a number of plans and elevations were put in. There are four plans which give elevations; exhibits 13, 14, and 28 being confined to the dam, the former taking in the embankment on the west or left side of the mill-pond; exhibit 30 dealing with portions of the lands involved.

Mr. Watson, for the plaintiffs, objected to the later plan, on the ground that it professed to give surveys, and that Mr. Wright, its draftsman, was not an Ontario land surveyor. Mr. Watson referred to 1 Geo. V. ch. 41, sec. 25. I overruled the objection; but Mr. Watson relied on it, and in consequence did not cross-examine at length.

I think that Wright was a competent witness; and the only restraint that I can find in the statute is in sec. 3, which does not in any way affect his right to give evidence. The weight to be attached to it might be measured in some degree by sec. 25.

Having regard to the detailed evidence of the repairs that were done, how they were carried out and why, and particularly to the dates and the present height, as well as the user sworn to, I have come to the conclusion that the dam was not raised during these repairs; but that confusion has been caused regarding the effect of the work of repair and by the lapse of time, and that what has been spoken of as additional timber is in reality timber used to replace, at the same height, that already in use or worn out.

I am, therefore, unable to find that the dam was in fact raised by the defendant.

As to the tightening of the dam, the evidence varies. The method of putting in sawdust, etc., originally used, has been followed by the defendant, and was in use as late as December, 1912, when Wright took his measurement. It might have been done oftener of late years, and there is some evidence of this.

Counsel for the defendant, upon the assumption that the dam has remained at the same height—which I have found to be correct—argued at the trial that he had the right to hold all the water that in its natural course came down the Ouse, for so long and during such periods, long or short, as the supply enabled him so to do. In other words, this means that the capacity of the dam and the supply of water were the only limitations on his right to dam the flow of the stream.

I think the right of the defendant must be qualified in some way, and that at least it must be shewn that the user, while not

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absolutely continuous de die in diem, must at all events be so constant that a consistent course of action and use must exist, even though periods elapse without the user being actively asserted. I have, therefore, to determine what the actual user has been, as defining the scope of the defendant's rights.

In the view I take, it is unnecessary to follow out the devolution of title. The property conveyed was a mill property, with an existing dam; and whatever rights the defendant has acquired depends upon prescription, and not upon the conveyances subsequent to his deed from Read, in none of which is there any express recognition of his rights, and, therefore, no express servitude. But I cannot see that the plaintiffs, because they bought from Read, are debarred from claiming that the defendant has exceeded his rights.

There is, to my mind, until after 1908, a great preponderance in favour of the view that the water was used regularly during the spring freshets up to a seven-foot head, and not after that, and again in the late fall and winter.

In 1900, the defendant put in steam; and, between that time and 1908, David Breckenridge says, they did not use so much "continuous" water power. They abandoned steam in the sawmill and went back to water power for both in 1908. From that time on the trouble dates.

It may be that the defendant did not use more water power, but, having abandoned steam—which his son David said he only used when there was not enough water—i.e., in the summer time—the use of the water was made more continuous, and included the summer months. The history of the years after 1908 shews that something had changed.

It is a question whether the temporary holding of the water for use of the mill in the summer, when there were occasional heavy rains, justifies or is a use similar to the holding of the water during the summer, when these rains occurred at a time enabling the defendant practically to continue the high water of the spring freshets, either by better management or by a tighter dam, in such a way as to overflow the lands of the plaintiffs. If so, the defendant can practically, during the summer, or at all events for a longer time than formerly, flood the plaintiffs' lands.

It may be said that, apart from the question of tightening, the systematic holding up of every increase of water during a dry season, and making use of every rainfall, while a much less lengthy process than during a wet season, is in its legal effect the same. That is, it is a user of the water so far as user can be had, having regard to the season. If so, can the fact that the rains occur immediately after the spring freshets cease, deprive the defendant of the right to use the rain water which happens opportunely to lengthen the spring user, if he has the right to use it if and when it occurs, after an interval?

In Innes' Law of Easements, 7th ed., p. 57, this proposition is laid down:—

> If a person . . . has obstructed or diverted the waters of a defined natural . . . stream, whether continuously or at regularly recurring intervals, for a period and under the other conditions required for the acquisition of easements by prescription, he may thereby acquire an easement against riparian owners affected by his conduct.

Goddard, 7th ed., p. 346, states it thus:—

> A right may be acquired to obstruct the water of a stream from flowing in its usual course, and to pen it back on the land of riparian proprietors, if the practice of obstructing and penning it back has continued for twenty years uninterruptedly, and if the servient owner has been prejudiced thereby.

In another part of this author's work, at p. 269, he adverts to the condition described by Innes as "at regularly recurring intervals," thus:—

> It should be mentioned that . . . an accidental stoppage in the flow of water is not an interruption which will prevent prescription; for, if such interruptions had that effect, said Tindal, C.J., the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment.

See *Hall* v. *Swift*, 4 Bing. N.C. 381. In that case, where a stream of water, from natural causes, ceased to flow in its accustomed course and did not return to it until nineteen years before action, the lapse of time did not cause the loss of the right to the flow of water. Goddard prefaces the above statement with the following remark:—

> Mere non-user will not, in every case, prevent acquisition of an easement; but, to have that effect, it must be coupled with some act indicative of an intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user.

To the same effect is the statement in Angell on Watercourses:—

> It need not be shewn to flow continually; and it may at times be dry; but it must have a well-defined and substantial existence.

Channell, B., in *Hall* v. *Lund* (1863), 1 H. & C., at p. 685, says that in order to be continuous the user need not be on every day of the week. I do not find anything to warrant the use of the word "regularly" as meaning at defined or stated time. But there is authority for a qualified meaning, *i.e.*, a systematic or necessary recurrence arising either from the course of nature or the necessities of the enjoyment of the easement. This is illustrated not only by the case of *Hall* v. *Swift*, 4 Bing. N.C. 381, already cited, but by the opinion of Mr. Justice Willes, cited in Gale on Easements, 8th ed., p. 139:—

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In the case of drains the easement is not strictly continuous; the drain is not always flowing; but there is a necessary and permanent dependence upon it for its enjoyment as a house.

In *Betchel* v. *Street* (1860), 20 U.C.R. 15, Robinson, C.J., holds it sufficient to maintain a prescriptive right, that the party has kept the water back, not at all times—*i.e.*, through the whole of each day or week or month—but whenever it was necessary for working his mills, letting the water down when it was not necessary for his purpose to keep it up, provided the privilege was so exercised as a matter of right and without denial or interruption by the other party.

I see no reason, therefore, contrary to my first impression, to quarrel with the statement of counsel for the defendant that prescriptive right might be acquired to hold as long as he could all the water that comes down in its natural course for such period or periods as the water lasts. But it equally follows from the cases that there must be a constant and systematic user to support that claim, and the user is the test of the prescriptive right.

Neville, J., in *Attorney-General* v. *Great Northern R. Co.*, [1909] 1 Ch., at p. 779, says:—

> The prescription must depend upon and is limited and defined by the user that is proved.

In *Crossley* v. *Lightowler*, L.R. 2 Ch., at p. 481, Lord Chelmsford, L.C., says:—

> The user which originated the right must also be its measure.

Graham, B., in *Bealy* v. *Shaw* (1805), 8 East 208, speaking of the right to enjoy or divert water, charged the jury that "every such exclusive right was to be measured by the extent of its enjoyment"; and his direction was upheld by the full Court.

In *Calcraft* v. *Thompson* (1867), 15 W.R. 387, Lord Chelmsford, L.C., speaks of the easement of light in language which is applicable to an easement such as this, *i.e.*, a right which is gradually ripening—and which after twenty years is absolutely acquired—and continues:—

> When the full statutory time is accomplished the measure of the light is exactly that (neither more nor less) which has been uniformly enjoyed previously.

This is the rule in this province. The headnote of *McNab* v. *Adamson* (1849), 6 U.C.R. 100, is as follows:—

> The right which a party has acquired by twenty years' uninterrupted user to pen back the water of a stream, in certain quantities, for the purposes of his mill, will be strictly confined to the right as actually exercised.

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Robinson, C.J., in *Bechtel* v. *Street*, 20 U.C.R. 15, says at p. 17:—

> The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time.

Cain v. *Pearce*, 1 O.W.N. 1133, 2 O.W.N. 446, 1496, 3 O. W.N. 1321, 5 D.L.R. 23, is, I think, quite to the same effect.

From the above authorities I conclude that, even granting that the use of summer water, when it came down, is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In *Hall* v. *Swift*, 4 Bing. N.C. 381, the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is, that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased: Goddard on Easement, 6th ed., pp. 398, 399. The exact point is, in my judgment, a narrow one, and the dividing line hard to draw.

But I think that the real answer in this particular case is, that the sort of user practised during the summers prior to and after 1886, and down to 1908, was merely to use such head as there ordinarily was—say five and a half feet—and to cease working when that gave out, except after a heavy rain; and not, as has been done since, so to manage and conserve the water that a full seven-foot head could be maintained much longer into the summer than formerly.

I think the fair result of the evidence is, that the full use of the mill privilege prior to 1908 was confined to the time during the spring freshets, and that after they subsided the mill was worked with a lower head, and was suffered to be idle from time to time rather than injure the lands above it.

The time of the spring freshets has been variously stated. I think that the 15th May is a reasonable time to fix as that on which the spring freshets are over.

Upon the question of damages, I am not impressed with the idea that the plaintiffs have suffered to the extent indicated by their particulars or as deposed to before me. I have not been convinced that the trees have been injured. If they have been, their commercial value is trifling; and it was left for counsel to suggest that they had in these cases some other value to the plaintiffs or that the serious consequences argued for will necessarily follow.

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I think, also, that the plaintiff Thomas Cardwell is, to some extent, the author of his own damage; and that, while he has suffered, the defendant has not been shewn to be the source of all of it.

I do not set out in this judgment a detailed examination of the dispute over the effect of the making or closing of the cuts in and north of the embankment, or of the old ditch and its continuation into Mrs. McMullen's property. I have, however, gone over it with care, and my judgment is against the plaintiff Thomas Cardwell and in favour of the defendant upon what was done and its effect.

The plaintiffs are entitled to some damages. It is hard to say just how much of the damage has been caused by the defendant's action and how much would have naturally flowed from the wetness of the seasons.

Having regard to the circumstances in each case, the weather records, the time specified during which it is said damage occurred, including any detriment to the trees—and the want of any exact date of the real damage—I fix the damages of Thomas Cardwell at $100, of Benjamin Cardwell at $50, of Fitzpatrick at $75, and of Garvey at $75.

In addition to damages, the plaintiffs are entitled to an injunction to restrain the defendant, after the cessation of the spring freshets or after the 15th May, whichever shall be the latest, and until the autumn freshets begin or until the 1st November, whichever shall be the latest, from maintaining the water by his dam so as to overflow the embankment mentioned in his deed; except that in the case of the plaintiff T. Cardwell the injunction shall not extend so as to protect him from flooding occasioned by any cuts or openings beyond the north end of the embankment mentioned in the evidence.

The defendant had the right to stop the old ditch where it entered his land, and is entitled, under his conveyance from Read, to enter on and repair the embankment, and may, if he desires it, have it so declared, especially with reference to the cut or opening known on plan exhibit 12 as "B."

As to the costs. While the plaintiffs succeed in their claim for an injunction and damages, they fail upon a most important part of their claim, namely, the assertion that the dam had been raised; and they have not proved their damages as set out before the trial. While, therefore, they are entitled to the general costs of the action other than those relating to the taking of Lobb's evidence and the application therefor, I think that there must be deducted from these costs one-half of the counsel fees taxed against the defendants for the trial.

Judgment for plaintiff.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 3, 1913.

1. HIGHWAYS (§ IV A 4—147)—DUTY TO KEEP IN REPAIR—OBSTRUCTION—OBJECT BY ROADSIDE FRIGHTENING HORSE—MUNICIPAL LIABILITY.

To permit a milkstand to be constructed upon the highway for the loading of milk cans close to the travelled portion of the road, does not of itself constitute a breach of a municipality's statutory duty to keep the road in repair, so as to make it liable for injuries sustained by a horse taking fright at the milkstand without coming into actual contact with it.

[*Maxwell* v. *Township of Clarke* (1879), 4 A.R. 460, and *O'Neil* v. *Windham* (1897), 24 A.R. 341, followed; *Rice* v. *Town of Whitby* (1898), 25 A.R. 191, distinguished.]

2. HIGHWAYS (§ IV D 1—230)—OBSTRUCTION—NOTICE OF—LIABILITY OF MUNICIPALITY.

Notice of the existence of a milkstand close to the travelled portion of a highway is not sufficient to render a municipality answerable for damages sustained by a horse taking fright at it without actual contact therewith, where it appeared that the stand had been erected but two or three weeks before the injury without the knowledge of the municipal council or of the municipal officers other than the pathmaster, and it did not appear either that it was his duty to guard or remove the stand or to notify the municipal council of its existence.

Statement

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Perth dismissing an action in that Court, with costs to the defendant corporation and without costs to the third party, Clark.

The action was for damages for the loss of a horse, caused, as alleged, by reason of an obstruction at the side of a highway.

Argument

R. S. Robertson, for the plaintiff, argued that the learned trial Judge took too narrow a view in thinking that actual collision between the horse and the milk-stand must be shewn in order to fix liability on the defendants: *Rice* v. *Town of Whitby* (1898), 25 A.R. 191, 199. [RIDDELL, J., referred to *Lawson* v. *Alliston* (1890), 19 O.R. 655.] The general rule governing such case is laid down in the head-note to *Castor* v. *Corporation of Uxbridge* (1876), 39 U.C.R. 113, which has been generally accepted as a correct statement of the law. Reference was also made to *Foley* v. *Township of East Flamborough* (1899), 26 A.R. 43, 51; *Howarth* v. *McGugan* (1893), 23 O.R. 396; *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730; *Durochie* v. *Town of Cornwall* (1893), 23 O.R. 355, 360 (note *a*); *Hogg* v. *Township of Brooke* (1904), 7 O.L.R. 273, 276; *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457, a decision which shews that all cases of this kind are to be dealt with in connection with their peculiar circumstances.

Glyn Osler, for the defendant corporation and the third party, argued that the case, both as to its facts and the principles of law

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applicable to such facts, fell within *Maxwell* v. *Township of Clarke* (1879), 4 A.R. 460, 470, approved in *O'Neil* v. *Windham* (1897), 24 A.R. 341. The *Rice* case turned mainly on the want of notice—moreover, in that case the obstruction was on the travelled portion of the highway, as appears from p. 199 of the report.

Robertson, in reply.

Mulock, C.J.

February 3. MULOCK, C.J.:—The facts of the case are as follows. At about 9.30 p.m. of the 11th October, the plaintiff was driving southerly on the Mitchell road, in an open buggy, and, on reaching the concession road, turned westerly. At the north-west corner, formed by the intersection of the two roads, was a pool of water about six inches deep; and, in order to avoid it, the plaintiff drove along the southerly side of the travelled road, and close to a milk-stand standing on the road allowance, but a foot or two south of the travelled portion. The night was dark, and the plaintiff was unable to see the milk-stand. The horse, however, saw it, was frightened by it, and shied to the right, whereby he broke his leg and had to be destroyed; and the plaintiff seeks to recover from the township damages for the loss of his horse.

The third party, Clark, without authority from the township, placed the stand where it was at the time of the accident; and the township, if responsible, claims indemnity over against him.

There is no evidence to shew that the horse touched the stand; and I accept the learned trial Judge's finding of fact, that the accident was caused by the horse shying because of being frightened by the stand.

Mr. Robertson argued that the position of the stand in such close proximity to the travelled portion of the highway created a condition of nonrepair, and he cited *Rice* v. *Town of Whitby*, 25 A.R. 191, as supporting his contention that, in the case of an obstruction to the highway, actual contact with it is not necessary in order to render the corporation liable. In that case, the third party was moving a house along a public street; and, not having completed the work during the day, left the house for the night standing on the part of the travelled portion of the street. The plaintiff was driving past the house in the evening, and, when close to it, his horse swerved to one side, throwing the plaintiff from his carriage and injuring him; and he sought to render the municipality liable. The Court of Appeal did not decide that the street was in a state of nonrepair, within the meaning of sec. 606 of the Consolidated Municipal Act, merely because of the building being moved along the street, or being allowed to remain upon it during the night; holding that it was lawful to move the building along the street, and that at most there was no liability on the part of the municipality until the building was brought to

a standstill for the night, and until it became apparent that it was likely to become a dangerous obstruction; and that, even then, there was no liability unless the municipality had notice of the obstruction in time to guard or remove it. It was not necessary for the Court to decide, and it did not decide by that judgment, that such an obstruction, where it merely frightens horses and thereby causes damage, creates a condition of nonrepair, within the meaning of sec. 606 of the Consolidated Municipal Act.

On this point we are bound by *Maxwell* v. *Township of Clarke*, 4 A.R. 460, followed by *O'Neil* v. *Windham*, 24 A.R. 341; and, following those cases, I am of opinion that the existence of the milkstand, off but close to the travelled portion of the road in question, did not, in itself, constitute a breach of the municipality's statutory duty to keep the road "in repair." Still, what is at one time a lawful, may grow into an unlawful, obstruction of a highway, and perhaps be then properly construed as creating a condition of nonrepair; and, if it be shewn that the municipality consented to its continuance when it became such unlawful obstruction, although the municipality was no party to its being originally placed there, still it might be liable: *Barber* v. *Toronto R.W. Co.* (1896), 17 P.R. 293; *Castor* v. *Corporation of Uxbridge*, 39 U.C.R. 113; *Howarth* v. *McGugan*, 23 O.R. 396; *Rice* v. *Town of Whitby*, 25 A.R. 191.

In the present case the evidence shews that the milk-stand, at the time of the accident, was a dangerous obstruction to the highway; and the question is, whether the defendants can be held to have had such reasonable notice of its existence as to render them liable for not causing its removal. It was erected without the knowledge or consent of the defendants, and they were at no time aware of its existence. It had been in place two or three weeks. It may be assumed that the members of the council reside in different parts of the township, and that the meetings of the council are held at intervals of several weeks. It is not shewn that any member or officer of the municipal council, except pathmaster Pridham, knew of the milk-stand being where it was at the time of the accident; and it is not shewn that he communicated its existence to any member of the council, or that it was his duty to guard or remove it. He did neither, and the council, neither collectively nor individually, had any knowledge of its existence.

I, therefore, fail to see how, under such circumstances, the defendants can be charged with notice which would render them liable for negligence in permitting the stand to remain where it was.

I, therefore, think the learned trial Judge was right in his disposition of the case, and that this appeal should be dismissed with costs.

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COLQUHOUN v. TOWNSHIP OF FULLERTON.

SUTHERLAND and LEITCH, JJ., concurred.

Riddell, J.

RIDDELL, J.:—I can see nothing to justify us in reversing the Court below. An "obstruction," a fixed structure by the roadside, away from the *via trita*, frightens a horse driven along the road—the horse shies and breaks his leg, the roadway not being out of repair.

Unless we are prepared to overrule *Maxwell* v. *Township of Clarke*, 4 A.R. 460, *O'Neil* v. *Windham*, 24 A.R. 341, and other such cases (which may be found referred to in Judge Denton's valuable work on Municipal Negligence, pp. 83-85), we cannot give judgment for the plaintiff. While, speaking for myself, I am not satisfied with the reasoning or result of these cases, we cannot overrule them; that must be done, if at all, by the Legislature or a Court superior to us.

Appeal dismissed with costs.

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April 16.

CANADIAN AGENCY Limited v. TANNER.

Saskatchewan Supreme Court. Trial before Haultain, C.J. April 16, 1913.

1. MUNICIPAL CORPORATIONS (§ II E 1—156)—BORROWING MONEY—INDEBTEDNESS—CONSOLIDATING BY-LAW COVERING CONSTITUENT BY-LAWS—TAXPAYERS' RIGHTS.

A city council has the power in consolidating by-laws under sec. 209 (c) of the City Act (ch. 84, R.S.S. 1909), as amended by sec. 7, Statutes of Saskatchewan 1910-11, ch. 18, to provide for a higher rate of interest to be paid on consolidated stock of the municipality, than the aggregate amount of annual interest on such stock as provided for under the constituent by-laws which authorized the issue of such stock; and a ratification of such consolidating by-law by the burgesses is not essential to the validity of such increase in the rate of interest where the constituent by-laws had been previously ratified by the burgesses.

2. MUNICIPAL CORPORATIONS (§ II E—150)—BORROWING MONEY—INDEBTEDNESS—BY-LAW CERTIFIED BY MINISTER OF MUNICIPAL AFFAIRS, CONCLUSIVENESS.

Under sec. 207 of the City Act, R.S.S. 1909, ch. 84, the discretion given to the Minister of Municipal Affairs to grant a certificate approving a city by-law authorizing the borrowing of money by the municipality, is absolute, and its validity cannot be attacked in any court.

Statement

ACTION for the balance due on the purchase of stock issued by the plaintiffs, as fiscal agents for the city of Saskatoon.

Judgment was given for the plaintiffs.

T. P. Morton, for the plaintiff company.

R. W. Shannon, for the city of Saskatoon.

C. A. Irvine, for the defendant.

Haultain, C.J.

HAULTAIN, C.J.:—In this case the plaintiff company is the fiscal agent of the city of Saskatoon, duly appointed under the

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provisions of sec. 209 (*g*) of the City Act (sec. 7, ch. 18, of the Statutes of Saskatchewan, 1910-11). As such fiscal agent the plaintiff company is authorized to issue stock of the said city, to issue allotment letters and provisional scrip certificates to represent moneys paid on account of any stock pending the issue of the final certificate, and generally to conduct all business connected with the issue of stock, and the registration and transfer thereof.

On March 28, 1913, the defendant made application in writing to the plaintiff company for the purchase of £200 of city of Saskatoon stock issued under the authority of by-law number 563, of the city of Saskatoon, as amended by by-law number 573. The correspondence in connection with this transaction is as follows:—

Saskatoon, Sask., March 28, 1913.

Messrs. The Canadian Agency, Limited,
Saskatoon, Saskatchewan.

Gentlemen,—I enclose herewith my cheque for $48.67 (£10) to apply on the purchase price of £200 of city of Saskatoon five per cent. consolidated stock, issued under by-laws Nos. 563 and 573, and I agree to pay the balance of the purchase price when I am notified that a certificate has been issued.

Yours truly,

P. D. TANNER.

March 28th, 1913.

P. D. Tanner, Esq.
Secord avenue,
City.

Dear Sir,—We acknowledge receipt of £10 ($48.67) and in pursuance of your application of to-day's date, we have issued certificate No. 250 for £200, city of Saskatoon 5 per cent. consolidated stock, issued under by-laws 563 and 573, and hold same at your disposal at this office.

We shall be glad if you will carry out your agreement and pay us the balance of the purchase price forthwith.

Yours faithfully,

THE CANADIAN AGENCY, LIMITED,
Fiscal Agents for the city of Saskatoon.
Per W. Laidlaw.

Dict. W.L.

Saskatoon, Sask., March 29, 1913.

Messrs. Canadian Agency, Limited,
Saskatoon, Saskatchewan.

Gentlemen,—I am in receipt of your letter of yesterday's date accepting my application for £200 city of Saskatoon five per cent. consolidated stock, and asking for payment of the balance of the purchase price.

Since making application for this stock I have ascertained that by-law No. 573 did not receive the assent of the burgesses. Such being the case I refuse to accept the stock or pay anything further on account of the purchase price, and I request that you immediately return to me the deposit of $48.67 made with my application.

Yours truly,

P. D. TANNER.

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Following the refusal of the defendant to complete the transaction, the present action was brought for the balance of the purchase price of the stock which had been issued to him. For the purposes of this action the following facts have been admitted:—

1. That the corporation of the city of Saskatoon secured from the Minister of Municipal Affairs, in connection with by-laws No. 563 and 573 of the said corporation, certificates under secs. 206 and 207 of the City Act of the Province of Saskatchewan, and that the said certificates were in due form.

2. That by-law No. 563 of the said corporation received three separate readings by the municipal council of the said corporation, as required by the said Act, and was finally passed on October 4, 1912.

3. That by-law No. 573 of the said corporation received three separate readings by the municipal council of the said corporation and was finally passed on November 5, A.D. 1912.

4. That by-laws Nos. 428, 437, 438, 439, 440, 441, 442, 443, 462, 465, 468, 473, 475, 476, 477, 478, 479, 480, 481, 483, 484, 485, 487, 520, 521, 523, 540, 541, 554, 555, 556, and 557, of the corporation of the city of Saskatoon, being the constituent by-laws of said by-law No. 563, were in due order and passed by the council of the said corporation as required by the said Act.

5. That such of the said constituent by-laws as required the approval of the burgesses, under the said Act, were duly approved of by the burgesses of the said city.

6. That the Minister of Municipal Affairs issued his certificate in accordance with secs. 206 and 207 of the City Act in connection with each of the said by-laws and the said certificates were in due form.

By-law No. 563 consolidated the amounts authorized to be borrowed under its thirty-two constituent by-laws, and provides for the issue of consolidated stock therefor to the amount of £570,166 11s. 10d. sterling, to bear interest at the rate of four and one-half per cent. per annum. It then goes on to make provision for the redemption of the stock at maturity as follows:—

4. There shall be levied annually upon the whole rateable property in the city of Saskatoon from year to year, beginning with the year 1912, and ending with the year 1961, in addition to all other taxes a rate or rates sufficient to raise the sum of twenty-five thousand, six hundred and fifty-seven pounds ten shillings sterling (£25,657.10) for interest and also the sum of three thousand nine hundred and nine pounds twelve shillings and eight pence (£3,909.12.8) sterling, as and for a sinking fund to pay the said debt on October 1, A.D. 1961, less such sum or sums in each year as shall be available out of the proceeds of the special rates levied under the by-laws creating the debts which are included in the debt hereby created and less in each and every year an even proportion of the net revenue of the municipal waterworks system, applicable to waterworks interest and sinking fund under by-law numbered 442, above-mentioned as collected in the immediate preceding year; and also less in each and every year an even proportion of the net revenue of the municipal electric light

and power plant applicable to electric light and power, interest and sinking fund, under by-laws numbered 477 and 478, above-mentioned as collected in the immediate preceding year; such special rates shall be so levied that (including the proceeds of the special rates levied under the by-laws creating the debts which are included in the debt hereby created and also the proportion of waterworks revenue and of electric light and power revenue above-mentioned) the amount to the credit of the sinking fund account shall always be at least equal to the sum of three thousand, nine hundred and nine pounds, twelve shillings and eight pence (£3,909.12.8) sterling, for each year beginning with the year 1913, together with interest thereon at the rate of four per cent. per annum compounded yearly, and that there shall be available for the payment of interest on the 1st days of April and October in each year at least the sum of twelve thousand, eight hundred and twenty-eight pounds, fifteen shillings (£12,828.15) sterling.

5. The rate of taxation to be imposed in each year for the purpose of paying the interest, twenty-five thousand, six hundred and fifty-seven pounds, ten shillings (£25,657.10) sterling, and the sinking fund, three thousand nine hundred and nine pounds, twelve shillings and eight pence (£3,909.12.8, sterling, to repay the capital debt at maturity shall be such rate upon the total rateable property of the city of Saskatoon as shall produce said sums, less deductions, if any, as provided by clause four (4) hereof.

Shortly after by-law number 563 was passed, the city authorities discovered that, owing to the condition of the money market, it was necessary that the proposed issue of stock should bear interest at a higher rate than four and one-half per cent. An amending by-law, number 573, was accordingly passed by the council, and the rate of interest was thereby raised to five per centum per annum.

The contention of the defendant is that by-law number 573 should have been submitted to a vote of the burgesses, under sec. 185 (*d*) of the City Act, ch. 84. R.S.S., inasmuch as, by the increase in the rate of interest it imposes a larger burden of debt on the city than had been previously authorized. This contention, to have any meaning, must refer to an increase in the aggregate amount of interest payable under the constituent by-laws which have all been ratified by the burgesses. It cannot be contended that the council had not the power to amend by-law number 563. See sec. 6 (45) of the Interpretation Act, ch. 1, R.S.S. I must, therefore, assume that the point at issue is, whether the council, without the ratification of the burgesses, when passing a consolidating by-law under sec. 209 (*c*), has the power to fix a rate of interest for the stock thereby created which would necessitate a larger annual amount of interest to be paid on the stock than the aggregate amount of annual interest payable under the constituent by-laws. In the absence of any information or evidence on the subject, I must also assume that this is the effect of by-law 563 as amended. There is nothing

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before me to shew what rate of interest is provided for in the several constituent by-laws.

Section 209 (*c*) evidently contemplates the existence of several authorized by-laws creating debt. These constituent by-laws may provide for different rates of interest upon various sums of money borrowed and chargeable against the municipality at large, or partly or wholly against certain portions of the municipality, and repayable within different periods. Is the council to make an elaborate mathematical calculation to arrive at the exact rate of interest required in order to meet such an objection as is raised in this case? The several provisions relating to the issue of stock seem to leave it to the discretion of the council as to what interest the stock shall bear. (Secs. 209 (*b*) and 209 (*d*) (*c*)). Section 209 (*f*) enacts that the provisions relating to stock "shall not operate to authorize an increase in the authorized amount of any loan except that in the case where stock is issued in exchange for debentures or other securities bearing a higher rate of interest than such stock, an additional amount of stock may be issued to make up the difference in the current saleable value between such debentures and stock." This section recognizes the obvious fact, that the rate of interest determines, to a great extent, the net value of the securities on the money market, and it expressly authorizes what, by a change in the current saleable value of the securities would amount to an increase in the authorized amount of a group of loans. The same thing takes place every time municipal debentures are sold at a discount, and no one would seriously contend that the municipal authorities should go back to the burgesses whenever a stringency in the money market necessitates the sale of authorized securities at less than par. That is practically the position in the present case.

A consideration of the various sections relating to the issue of stock leads me to the opinion that an absolute discretion as to the rate of interest it should bear, is given to the council. The sections are not arranged logically and sec. 209 (*b*) should come after sec. 209(*c*) as it, in my opinion, applies to stock issued under the latter section. Section 209(*d*) provides for a special majority of the council in order to the exercise of the powers given by 209(*c*). This would not have been necessary if it had been intended that by-laws passed under that section should also be ratified by the burgesses. In the present case, each of the constituent by-laws has already been so ratified. The passage of the consolidating by-law does not in any way affect the provision for the levying of the annual rates provided for in the constituent by-laws. The several amounts required will be assessed and levied under each of the constituent by-laws according to the terms thereof, and in order to meet any in-

creased amount of interest made necessary by the current saleable value of the stock, provision is made in the consolidating by-law for a special rate for that purpose. This, in my opinion, is within the competency of the council. In the case of a consolidating by-law the terms for which the consolidated loan is made may be fifty years (sec. 209 (*c*)), while the terms of repayment in the several constituent by-laws may be of varying lengths, but in no case more than forty years (sec. 185 (3)). The effect of this might be and probably would be to require a special assessment pending the maturity of the consolidated stock to make up the possible, or rather, the probable difference between the interest resulting from the investment of the several sinking funds and the total interest payable on the stock. If all the constituent by-laws have already been ratified by the burgesses, can it be seriously argued in face of the special provisions of section 209(*d*) that the consolidating by-law must also be referred to the burgesses?

I will now assume for the sake of argument that the contention of the defendant is correct, and that the council should have obtained the consent of the burgesses to the consolidating by-law. The question then arises as to how far the objection is removed and the fault cured by the certificate of the Minister of Municipal Affairs given under secs. 206, 207 and 208 of the City Act (ch. 84, R.S.S.).

206. The council of any city which has heretofore and in pursuance of the authority of any law, authorizing such city so to do, passed, and the council of any city which shall hereafter, in pursuance of the authority of this Act pass a by-law for contracting a debt or incurring a liability, or for borrowing money, may apply to the Minister of Municipal Affairs for a certificate approving the by-law.

(2) No certificate shall be granted while any action or proceeding in which the validity of the by-law is called in question, or by which it is sought to quash it, is pending, nor until two months after the final passing of the by-law, unless notice of the application shall be given in such manner and to such persons, if any, as the Minister of Municipal Affairs may direct.

(3) The certificate may be in the following form:—

In pursuance of the City Act, the Minister of Municipal Affairs hereby certifies that the within by-law is valid and binding and that its validity is not open to be questioned in any Court on any ground whatever.

Dated this day of 19 .

(Seal.) .....

Minister of Municipal Affairs.

207. The Minister of Municipal Affairs may grant the certificates notwithstanding any defect or irregularity in substance or in form, in the proceedings, prior to the final passing of the by-law or in the by-law itself, if in the opinion of the said Minister the provisions of the Act, under the authority of which the by-law was assumed to be passed, have been substantially complied with.

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208. Every by-law approved by the certificate of the Minister of Municipal Affairs, and the debentures issued or which may thereafter be issued in conformity with its provisions, shall be valid and binding upon the city and upon the property liable to the rate imposed by, or under the authority of the by-law, and the validity of the by-law and of every such debenture shall not thereafter be open to question in any Court.

These sections are made applicable to consolidating by-laws by secs. 209(*a*) and 209(*j*). Assuming that the by-law is open to the objection which has been taken, is not the alleged defect cured by virtue of the certificate under secs. 207 and 208? The alleged neglect to submit to the burgesses is a defect "in substance in the proceedings prior to the passing of the by-law." "Defect" has been defined as "the fact of being wanting, or falling short, lack or absence of something essential to completeness": New English Dictionary; *Tate* v. *Latham* (1897), 1 Q.B. 502, 66 L.J.Q.B. 351. Under sec. 208, by-laws numbers 563 and 573, having been approved by the certificate of the Minister and the stock issued thereunder, are valid and binding upon the city and upon the property liable to the rate imposed thereunder and their validity is not open to question in any Court. The discretion granted to the Minister by sec. 207 is absolute. I do not know of any rule of construction which would limit the meaning of the words "their validity is not open to question in any Court."

A number of Ontario decisions were cited to me on this point: *Alexander* v. *Howard* (*Township*), 14 O.R. 22; *Re Clark* and *Howard* (*Township*), 16 A.R. (Ont.) 72; *Confederation Life* v. *Howard* (*Township*), 25 O.R. 197; *Sutherland* v. *Romney* (*Township*), 26 A.R. (Ont.) 495, 30 Can. S.C.R. 495; *Village of Georgetown* v. *Stimson*, 23 O.R. 33. In connection with these authorities reference was made to secs. 185(*d*), 193 and 204 of the City Act. Owing to the substantial difference between the provisions of the Ontario and Saskatchewan statutory law, these cases do not lend very much assistance to the present discussion. The last case cited, *Village of Georgetown* v. *Stimson, supra,* is most in point, and if the reasoning in that case is correct, it applies *a fortiori* in the present case. The cases against the township of Howard were decided on other grounds and the effect of registration was not considered. The by-law in question was never published, and it was held in *Alexander* v. *Howard* (*Township*), 14 O.R. 22, that as the by-law had not been published, it did not come within the section of the Ontario Act which established the validity of a by-law, in case no application to quash it was made within three months *next after its third publication.* It was also held that the by-law was void because it was passed irregularly, but further because it "was passed upon a subject and for a purpose, or for purposes in respect of which there was no power to pass such a by-law at

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all": *Confederation Life* v. *Howard, supra, per* Ferguson, J., at 202. In the case of *Sutherland* v. *Romney, supra,* the township of Tilbury had passed a by-law which assumed to impose a burden, in connection with certain drainage works, on the lands of the appellants situated in the township of Romney. To give effect to the Tilbury by-law the township of Romney passed the by-law which was the subject of the action. On appeal, the Supreme Court held that the township of Tilbury had no jurisdiction to charge lands in Romney for the particular works in question, the works were not drainage works within the meaning of the Act, and that the lands of the appellants were not liable to a special assessment therefor, and that the registration of the Romney by-law was ineffectual and void, and imposed no lien upon the appellant's lands. Mr. Justice Gwynne, who delivered the judgment of the Court, said that the Tilbury council had no more jurisdiction to charge lands in Romney for the work mentioned in the by-law than they had to charge lands in any township on the other side of the River Thames.

Here we have a by-law dealing with a subject within the jurisdiction of the council, and an alleged substantial defect which, as I have already stated, is in my opinion cured by the certificate of the Minister. The whole object of the sections providing for that certificate would be lost if, in spite of the clearest and widest language to the contrary, the validity of the by-laws we are discussing could be open to question in this or any other Court. The object of this legislation was to put municipal stock and debentures upon a stable basis and thus to enable municipalities to go into the money markets of the world with unquestionable securities. This, in my opinion, has been accomplished in the present case.

There will be judgment, therefore, for the plaintiffs for $924.64, with their costs of the action.

Judgment for the plaintiff.

HUDSON v. SMITH'S FALLS ELECTRIC POWER CO.

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May 5.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. APPEAL (§ VII M 8—657)—JURY FINDING — INSUFFICIENCY — SPECIFIC QUESTIONS ANSWERED BY GENERAL FINDING.

The answers of a jury to questions put to them by a judge, must be such that, having regard to the evidence adduced, the court can say that there is evidence to support their finding, and that that evidence discloses a ground of legal liability, and where several questions respecting definite and specific possible acts of negligence of a certain kind are put by the judge, and the jury find negligence of that kind generally, a new trial will be ordered.

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HUDSON v. SMITH'S FALLS ELECTRIC POWER CO.

APPEAL by the defendants from the judgment of Sutherland, J., upon the findings of a jury, in favour of the plaintiffs, in an action for damages arising from injuries sustained by the plaintiff Elizabeth Hudson by coming in contact with a broken live wire of the defendants upon a street in the town of Smith's Falls. The plaintiff Elizabeth Hudson was awarded $800 damages, and the plaintiff Henry Hudson, her husband, $500 damages.

A new trial was ordered.

C. A. Moss, and *H. A. Lavell*, for the defendants.

D. L. McCarthy, K.C., for the plaintiffs.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS, J.A.:—The respondent Elizabeth Hudson is found by the jury to have met with an accident by the negligence of the appellants, which negligence is, according to the answer to question 2, "insufficient inspection of service wire." There was evidence that the electric light service wire, running into Captain Foster's house, broke, and fell upon the street, and that the respondent Elizabeth Hudson, while walking along the street, came in contact with it and received a shock affecting her health and bringing on a miscarriage. There was a considerable difference among the witnesses called as to whether the wire broke on Saturday night or on Sunday night, the 19th or 20th March, 1910. Mrs. Hudson placed it definitely on Saturday night, while Captain Foster was certain it was on Sunday night. Both related circumstances which rendered the true date a question of considerable doubt, but no question was put to the jury on the subject.

If the accident happened on Saturday night, the appellants did not render the wire harmless until Sunday night; whereas, if it occurred on Sunday evening, they attended to it that night. It was upon the question of negligence in this regard that the pleadings were framed and the case opened.

The Bell Telephone Company having been brought in as third parties, evidence was given throughout the trial upon much larger questions, namely, the cause of the break, the condition of the service wire, of the main street wires of the appellants and those of the Citizens Company and the Bell Telephone Company. In addition, the stretching by the latter company of a cable along the street, and the inspection by each of the other companies of that work, as well as their care and attention to the various wires, was gone into.

The learned trial Judge consequently allowed the respondents, after the evidence was closed, to amend their statement of claim by alleging that the appellants were negligent in allowing one of their wires to break—in addition to the negligence

originally charged, i.e., that after the break the electric wire was allowed to remain on the street.

In his charge to the jury, the learned Judge went very fully into the facts in evidence; and, had the jury followed his directions, the case would be much clearer than it is put in the answer which they gave. After finding that the appellants were guilty of negligence causing the accident, the jury defined the negligence as "insufficient inspection of service wire." There are several possible explanations of this answer if the charge of the learned Judge is examined. The following matters were pointed out by him:—

At p. 232, the learned trial Judge said: "If the plaintiffs shew that the defendant company allowed their wire to get out of repair, or by lack of proper inspection were negligent, then the defendant company would be liable. If, on the other hand, it is shewn by the evidence that it was the cable of the Bell Telephone Company which caused the accident, and the defendants could not, by reasonable inspection and oversight which they should have exercised, have discovered it in time, then, it may be, you will come to the conclusion that the defendant company are not liable, that the cause of the accident was the misconduct of the Bell Telephone Company. But, even if it were caused by the cable of the Bell Telephone Company, or in some way that you cannot see a primary blame to be placed upon the defendant company, and it appears in a satisfactory way to you from the evidence, or you can reasonably deduce it from the evidence, that, after the defendant company's wire was broken, the matter was brought to their attention, or such a time elapsed that they should have discovered it, and that in the meantime they did not repair it promptly, and the injury occurred, then, even though the Bell Telephone Company's cable did cause the break, it might be that you would come to the conclusion that, owing to the dilatoriness—if there was such—of the defendant company in failing to repair the trouble after they were told of it, or after they should have discovered it, they would be liable."

And at p. 240 he said: "The plaintiffs also say that, in any event, if the defendants had been watching and inspecting as they should, the possibility or probability of the break would have been apparent, and could have been avoided, and should have been. And then they say that, in any event, the defendants had opportunities to learn of the defect in time to have prevented the accident."

At p. 245 he said: "If it occurred through a defect in the wire, through age or otherwise, through lack of proper insulation or anything of that sort, and you find that that is the cause of the breaking; if it occurred because the Bell Tele-

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phone Company's cable had got in such a position that it might break it, and the defendant company, by the exercise of proper precautions and reasonable inspection, could have discovered that and rectified it before the break occurred; if, in any of these ways, you think the wire broke—these are ways which may appear to you to be properly developed in or deducible from the evidence—the defendant company may, in your opinion, be properly made liable for the breaking of the wire, and that is negligence which you would hold them liable for."

At p. 248, he said: "In that connection you will have to determine whether the defendant company's wire was properly insulated at the point where it came in contact with the wire of the Citizens Company. And, in considering all this, you will have to determine where these wires were situated, the wires of the respective companies, and how close they were to each other."

In discussing question 2, the learned trial Judge thus instructed the jury: "If so, what was the negligence? Was it lack of inspection of the wire, was it through leaving a wire up that was not strong enough, was it through lack of inspection of the situation and the nearness of the Bell Telephone Company's cable—if you think that is the case—or what was the negligence of the defendant company? If there is one act of negligence, set it out there; if there is more than one act of negligence, set them out."

It is, therefore, clear that there were six points that the jury were asked to consider, involving lack of or careless inspection as an element of negligence. They were, in regard to the wire, its age, its strength, its insulation, its proximity to the Bell Telephone Company's heavy cable, its nearness to the Citizens Company's wire—which is said not to have been properly insulated—and the prompt discovery and removal of it after it fell.

If the accident happened on Saturday night, then negligence in inspecting the wire, in the sense of not having an efficient watch for dangerous and possible accidents therefrom, would be enough, apart from any antecedent neglect on the other five points; whereas, if it happened on Sunday night, the answer might refer to this kind of negligence, the less flagrant, or to any one of the other kinds of inefficient supervision.

The jury may have known what they meant; but this is not sufficient. Their answer must be such that, having regard to the evidence adduced, the Court can say that there is evidence to support their finding, and that that evidence discloses a ground of legal liability. In this respect the appellants have a right to complain, especially in view of the sharp conflict among the witnesses as to the night of the occurrence and to the fact

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that throughout the trial the appellants, so far as the respondents were concerned, had their attention fixed on the one issue raised by the pleadings, and dealt only with the other points so far as they afforded an answer to the defence of the third parties.

Upon one of the charges of negligence—and the one perhaps most forcibly presented—a learned Judge has, in *Roberts* v. *Bell Telephone Co.*, 10 D.L.R. 459, 4 O.W.N. 1099, expressed the opinion that there is no duty to inspect wires periodically for the purpose of seeing that other wires have not been improperly placed in undue proximity. This, if correct, is an additional reason for ascertaining the exact meaning of the answer to question 2.

I do not think it is unreasonable, under these circumstances, to insist that the answers of the jury should be clear and intelligible in order to support their verdict: *Clarke* v. *Rama Timber Transport Co.* (1885), 9 O.R. 68; *Stevens* v. *Grout* (1893), 16 P.R. 210; *Cobban* v. *Canadian Pacific R.W. Co.* (1895), 23 A.R. 115.

I think there should be a new trial; the costs of the former trial and of this appeal to abide the result.

Judgment accordingly.

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April 12.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Drysdale, JJ. April 12, 1913.

1. EASEMENTS (§ I C—20)—RIGHT-OF-WAY AS APPURTENANT—HIGHWAY BETWEEN DOMINANT AND SERVIENT ESTATES—TERMINUS A QUO.

The fact that a highway intervenes between the dominant and the servient estate is not a bar to the existence of a right-of-way as an easement.

2. EVIDENCE (§ XII E—945)—PRESCRIPTIVE WAY—SUFFICIENCY OF EVIDENCE TO ESTABLISH.

A claim of continuous user relied upon as creating a prescriptive right-of-way across lands, is negatived by evidence that a fence had stood at one end of the way for 12 years, over which persons using the way had to climb, although a gate was maintained at the opposite end of the way for the convenience of the owner of the servient estate, that the way varied greatly as to locality, and that in several different years before the bringing of action, the servient owner had plowed the *locus in quo* and sowed grain thereon. (*Per* Townshend, C.J., and Drysdale, J.)

Statement

ACTION claiming damages for trespass in breaking and entering plaintiff's land and destroying his fence thereon.

Defendant denied the trespass alleged, and said in the alternative, that, at the time of the alleged trespass, there was of right a common and public highway over the said land of the

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plaintiff, for all persons to go and return on foot at all times of the year at their free will and pleasure, from a certain point at or near the dwelling-house of the defendant to the public highway leading from Antigonish to the Strait of Canso, and the acts complained of, if done at all, were a user by the defendant of the said highway, and were necessarily done in using the said way.

The cause was tried before Graham, E.J., who gave judgment as follows:—

Graham, E.J.

GRAHAM, E.J.:—The plaintiff's farm at Tracadie, at the point of dispute, lies between the public highway and the Intercolonial Railway.

In this action for trespass upon these lands the substantial question is, whether the defendant has acquired by prescription a right of way about 480 feet long across this land.

In my opinion he has not done so. He lives on the other side of this highway, and his place is separated from the alleged private way by the highway in question. It lacks a *terminus a quo*. Then, for the last 12 years, the plaintiff has fenced along the highway, and there is no gate which the defendant could use to get from the highway to the railway. Persons using it get over the fence. There is a gate on the railway, but the plaintiff says that the gate is for his place.

For three years, commencing seven years before action, the plaintiff ploughed this field, and across the alleged way, and sowed grain on it all.

The way has been used by anyone who wishes to take a short cut to the railway or in going to church.

It has varied a good deal as to locality.

I think the alleged right of way is not established.

Judgment was given in plaintiff's favour for one dollar damages.

The defendant appealed from the foregoing judgment, and the appeal was dismissed.

A. A. Mackay, K.C., for defendant, appellant.

C. J. Burchell, K.C., for plaintiff, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—After a careful perusal of the evidence in this case, I have come to the conclusion the learned trial Judge was right in both of the grounds on which he decided. First, that no *terminus a quo* had been shewn, and secondly, that no prescriptive right of way has been proved.

The highway was between the defendant's house and the field through which the right of way is claimed. This creates at once a break in the path on which the claim is made. The right must exist, if at all, as appurtenant to defendant's lands, and must therefore extend directly to them, which it does not. Apart

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from this the evidence fails to shew that continuous user in the same track which is necessary to be proved to establish a right of way by prescription. Brett, L.J., in *De la Warr* v. *Miles*, 17 Ch. D. 535, at 593, says:—

> I think it is necessary for the defendant to shew that the right was exercised year by year, and that if, as regards some parts of the intermediate period, he failed to shew that the right has been exercised, he would not prove that which lies upon him under the statute.

The learned Judge must have taken this view, and while there may be some contradictions, there is evidence to justify his conclusion, or, rather, defendant has failed to supply evidence to shew such a constant exercise of the right claimed. No doubt, as appears from the evidence, this path has at times been used by all the people in the neighbourhood as a short cut to the railway or church, but there is nothing to justify the conclusion that there is a public path or roadway across plaintiff's land. It is not indeed so pleaded, and if it had been, there should have been much more testimony to shew a dedication by the plaintiff, or his predecessors, in title.

In *Attorney-General* v. *Esher Linoleum Co.*, [1901] 2 Ch. 647, at 650, Buckley, J., says:—

> You cannot acquire a right of public way under the Prescription Act. If you want to acquire a right by prescription, you must go back to the time of Richard I., to the time before legal memory. In most of these cases dedication, it is true, is proved by user, but user is but the evidence to prove dedication. It is not user, but dedication, which constitutes the highway, therefore what always has to be investigated is whether the owner did, or did not, dedicate certain lands to the use of the public.

Reference may further be made to the judgment of Moss, C.J.O., in the case of *Macoomb* v. *Town of Welland*, 13 O.L.R. 335.

On the question of *terminus a quo*, the whole subject is discussed with the authorities in Gale on Easements, 8th ed., 14 and notes. In the latter, the editor speaking of easements in gross, says:—

> But there is no case (except, perhaps, *Senhouse* v. *Christian* (1787), 1 T.R. 560) which supports the position that there may be private, or prescriptive, easements in gross.

The reasoning in *Ackroyd* v. *Smith* (1850), 10 C.B. 164, and the allied cases is distinctly opposed to the contention, and the judgment in *Rangeley* v. *Midland Railway Company* (1868), L.R. 3 Ch. 310, is an authority on the other side.

For these reasons, I am of opinion this appeal should be dismissed with costs.

Drysdale, J.

DRYSDALE, J.:—I agree that the appeal herein ought to be dismissed, but I wish to base my opinion on the sole ground

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that there is an absence of proof of that continuous user of a definite way necessary to create an easement.

The mere fact that the alleged easement began across the public highway from the alleged dominant tenement, does not create, in my mind, an obstacle to recovery.

I do not think, either on principle or authority, there is anything in this point that alone should defeat recovery, and in so far as the learned Chief Justice bases his opinion on this point, I respectfully dissent. I agree, however, in that part of the learned Chief's opinion, which holds that there is an absence of the necessary proof to create a right to the use of the foot-path in question.

The appeal should be dismissed with costs.

Russell, J.

RUSSELL, J.:—I concur in the result, but I think that there was a sufficient *terminus a quo*, and that the intervention of the public highway would not prevent recovery.

Appeal dismissed.

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May 20.

CRAPPER v. CANADIAN PACIFIC R. CO. and THE REGINA CARTAGE CO., Ltd.

Saskatchewan Supreme Court, Johnstone, J. May 20, 1913.

1. APPEAL (§ III F—95)—NOTICE OF—EXTENSION OF TIME FOR GIVING — MISTAKE OF SOLICITOR NOT GROUND FOR.

The mistake of a party's solicitor in giving notice of appeal from the District Court one day too late is not a sufficient ground under the Saskatchewan practice for granting an extension of time for serving such notice.

[*Re Coles and Ravenshear*, [1907] 1 K.B. 1, followed.]

Statement

APPLICATION made on behalf of the plaintiff for an order extending the time for the giving of notice of appeal from a judgment of the Judge of the District Court of Regina in favour of the defendants, on the ground of inadvertence on the part of the solicitor in the service of the notice one day too late.

The application was refused.

W. A. Beynon, for appellant.

P. H. Gordon, for respondents.

Johnstone, J.

JOHNSTONE, J.:—There are no special circumstances shewn on this application. As far as this motion is concerned I venture to say the practice is for the present settled by the decision in *Re Coles and Ravenshear*, [1907] 1 K.B. 1. In this case it was held that a mistake made by a solicitor seeking an extension of time was not a sufficient ground or reason for extending it.

The practice seems to be widely different in Ontario: *Ross*

v. *Robertson*, 7 O.L.R. 464, and perhaps in Alberta: see *Hill* v. *Barwis*, 9 W.L.R. 274. No matter how much I might feel disposed to grant this application, the authorities, in my opinion, are against it.

The application is therefore refused.

Application refused.

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CAVENDISH v. GASSON.

ALTA. S. C. 1913 May 27.

Alberta Supreme Court, Beck, J. May 27, 1913.

1. JUDGMENT (§ I A—)—MOTION FOR — FAILURE TO COMPLY WITH ORDER FOR SECURITY FOR COSTS—ADJOURNMENT.

A motion to strike out defendant's appearance and to enter summary judgment against him cannot be proceeded within the face of an order against the plaintiff to give security for costs although the order was made after service of the notice of motion for judgment, but the motion may be adjourned until the security order shall have been complied with or vacated.

MOTION by plaintiff for judgment. Statement

C. B. F. Mount, for plaintiff.

C. Y. Weaver, for defendant.

BECK, J.:—A motion for security for costs came before the Master. It was adjourned, the solicitor for the plaintiff stating, as I understand him, that he wished to ascertain whether the plaintiff had not property within the jurisdiction and thus furnish an answer to the defendant's application, the plaintiff admittedly residing out of the jurisdiction. The plaintiff's solicitor at the same time stated that he was preparing to make an application to strike out the appearance under rule 103 (Eng. Or. 14). This latter motion came on before the Master at the same time as the adjourned motion for security for costs. The Master holding that the motion for judgment was opposed and therefore could not be heard by him, adjourned it for hearing before the presiding Judge in Chambers on the next regular day for Judge's Chambers. This, undoubtedly, was the right course. He heard the motion for security for costs, which was opposed only by the affidavits upon which the motion for judgment was founded. He reserved judgment and it turns out made an order for security on the day preceding the next regular day for Judge's Chambers on which the motion for judgment came before me. His order was the usual order staying proceedings until security should be given. Beck, J.

In face of this stay I can do nothing but adjourn, as I do, the motion for judgment *sine die* to be brought on for hearing upon two days' notice after the order for security is complied with. Had the plaintiff upon the motion for security for costs asked for leave to cross-examine the defendant upon his affidavit, I

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think he would have been entitled to leave as of course, and if on the examination he had got such admissions from the defendant as to shew that he had no defence, the motion for security would have been dismissed: *De St. Martin* v. *Davis & Co.* (1884), W.N. 86.

The plaintiff not having taken this course the Master had before him only two contradictory affidavits and it seems to me could do nothing else than order security. His order being effective when the motion for judgment came before me I can do nothing but adjourn it as I have already done.

It appears that the settled practice in England is that laid down in *Banque des Travaux* v. *Wallis* (1884), W.N. 64, and *Gottliet* v. *Geiger* (Bucknill, J., and C.A. 1905), referred to in Ann. Prac. 1912, p. 1155, namely, that where a motion for judgment is only pending or contemplated when the motion for security comes on for final hearing, security should be ordered only to an amount sufficient to cover the costs of defence up to and including the motion for judgment with leave to the defendant to apply to increase the amount if the motion for judgment is not brought on within a limited time or fails.

Perhaps it would be convenient to modify this practice so as to provide in the same order for the amount of the increased security to be given in these events.

Motion adjourned sine die.

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April 12.

STARRATT v. WHITE.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, Drysdale, and Ritchie, JJ. April 12, 1913.

1 APPEAL (§ VII I—345)—DISCRETIONARY MATTERS—INTERFERENCE WITH. The Supreme Court of Nova Scotia will not interfere on appeal with the exercise of discretion of a county judge, acting as a Master of the Supreme Court, on a discretionary question of practice, except when an error in principle appears.

2. APPEAL (§ VII I—345) — MATTERS OF DISCRETION — ABUSE OF — DISALLOWANCE OF INTERROGATORIES SUBJECT OF CROSS-EXAMINATION OR DEMAND OF PARTICULARS.

No abuse of discretion by a county judge, acting as a Master of the Supreme Court, sufficient to justify interference by the Supreme Court, is shewn by the disallowance of interrogatories propounded by the defendant to the plaintiff relating wholly to matters necessary for the plaintiff to prove in order to succeed in the action, which were essentially matters for cross-examination, and the nature of which could have been obtained by a demand for particulars.

[*Peek* v. *Ray*, [1894] 3 Ch. 282; *Marriott* v. *Chamberlain*, 17 Q.B.D. 154; *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, and *Attorney-General* v. *Gaskill*, 20 Ch.D. 519, referred to.]

Statement

APPEAL from an order of the Judge of the County Court for district No. 3, refusing an application made on behalf of defen-

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dant for leave to administer certain interrogatories to plaintiff, and refusing to order that plaintiff answer said interrogatories as prescribed by O. 30, rr. 8 and 25, of the rules of the Supreme Court.

The action was brought by plaintiff who was engaged in the business of buying, selling, and shipping apples, against defendant, a dealer in fruit and general produce, residing at New York, in the State of New York, claiming damages for breach of a contract whereby plaintiff, by letters and telegrams, entered into a contract with defendant for the purchase of 5,000 barrels of apples to be delivered F.O.B. steamer at Halifax, at the price of $2.50 per barrel.

Plaintiff alleged that he purchased the apples and prepared them for shipment in accordance with the terms of the contract, and offered them for delivery to defendant, but defendant refused acceptance and made a breach of the contract.

Defendant denied the making of the contract as alleged, the purchase and preparing for shipment of the apples, the offer for delivery, and further, that the apples, if offered for delivery, were not so offered within the stipulated time, and that they were in bad condition and not up to the standard stipulated. The interrogatories disallowed related to the parties from whom plaintiff purchased the apples in question, the dates of purchase, date and place of delivery, and the disposition made of the apples after the alleged failure of defendant to take delivery.

D. Owen, for defendant, appellant.
C. J. Burchell, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

Townshend, C.J.

TOWNSHEND, C.J.:—This appeal is of a class which should be discouraged, involving, as it does, only a question whether the County Court Judge, acting as a Master of this Court, properly exercised his discretion in a point of practice. All authorities agree that, unless he has erred in principle, the Court will not interfere on appeal. I make this observation because, in my opinion, the action is of a very simple character, for the breach of a contract, the particulars of which contract have already been furnished to defendant, contained in letters and telegrams. I further think that examination by interrogatories was entirely unnecessary, and is applying an expensive procedure, not intended for the simple issues in this case. Moreover, all that is wanted by defendant could have been obtained by a demand for particulars, and if refused, then there might be some reason for this application. I find the English authorities in line with what I have said on the subject of such appeal: see *Peek* v. *Ray,* [1894] 3 Ch. 282. The result of such an appeal as this is to

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largely increase the costs to one or the other of the parties without any adequate return for the expense involved. On examination of the pleadings I can only find one, the 7th defence, to which the interrogatories disallowed were relevant, that is to say:—

> The defendant denies that the plaintiff purchased said apples and prepared them for shipment in accordance with the terms of said alleged contract, or at all.

The disallowed interrogatories 1 to 7 all relate to this subject, that is to say, whether the plaintiff purchased the apples, the dates of the purchases, and the persons from whom they were purchased, with the prices and varieties, and particulars as to plaintiff's disposal of the apples purchased, when defendant failed to take them.

Now it is very clear that plaintiff in order to succeed in this action would be obliged to prove that he purchased and prepared for shipment, in accordance with the contract set out, the 5,000 barrels of the kind contracted for, otherwise he must fail. The burden of that issue was on plaintiff, not on defendant, and the answers to such interrogatories could not assist, or rather were not necessary to enable defendant to make out his defence. The question was in fact a cross-examination of the plaintiff, and as I understand the practice, such will not be permitted in interrogatories. Again, the answer to the 8th, 9th, 10th, 11th, and 12th interrogatories allowed would, in my opinion, supply all the information to which defendant was entitled. If, in answer to the 8th interrogatory, plaintiff gave the place and date where he offered delivery of the 5,000 barrels, and the steamer, and whether inspected, I should think that defendant should be in a position to meet any untrue statement in that respect at the trial.

Turning for one moment to the authorities, it will appear that interrogatories must be confined to facts which are relevant to some question in issue between the parties: *Marriott* v. *Chamberlain*, 17 Q.B.D. 154. In *Kennedy* v. *Dodson*, [1895] 1 Ch. 334, Lord Herschell, L.C., at 338, says: "I entertain a strong opinion that interrogatories of this description, unless they are strictly relevant to the question at issue in the action, ought to be rigorously excluded"; and A. L. Smith, L.J., at 341, says:—

> The legitimate use, and the only legitimate use, of interrogatories is to obtain from the party interrogated admission of the facts which it is necessary for the party interrogating to prove, in order to substantiate his case, and if the party interrogating goes further, and seeks, by interrogatories, to get from the other party, matter which it is not incumbent on him to prove, although such matter may indirectly assist his case, the interrogatories ought not to be allowed.

In this same case it is also laid down that interrogatories, in

the nature of cross-examination should not be allowed. In the case of *Attorney-General* v. *Gaskill*, 20 Ch.D. 519, the Court affirms the same principles in regard to the object, an intent to which interrogatories should be allowed.

In view of these decisions, I am not prepared to say that the Master wrongly disallowed the interrogatories mentioned. It was a matter for the exercise of his sound discretion, and I cannot see that he was violating any rule or principle in its exercise. As already intimated, in my opinion, it was an unnecessary use of the power conferred by order 30, only calculated to add expense, when all the information could have been obtained in a simpler way. Still less was there any justification for this appeal, which should be dismissed with costs.

Appeal dismissed.

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LEONARD v. KREMER.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

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April 7.

1. DAMAGES (§ III P 2—342)—BREACH OF CONTRACT—SALE OF GOODS—DELAY IN DELIVERY—PURPOSE OF PURCHASE KNOWN.

Where the seller of a boiler and attachments agrees to deliver at a certain time, and at the time of the agreement of sale knows the purpose for which the buyer is purchasing and that prompt delivery is essential and subsequently before the date for delivery is warned by the buyer of the necessity for prompt delivery, and where the goods are shipped twenty days later than the date agreed upon and there is additional delay because one of the essential attachments had not been shipped at all and another of them was a misfit, the seller is liable in damages, but such damages must not exceed a reasonable assessment.

[*Leonard* v. *Kremer* (No. 1), 7 D.L.R. 244, affirmed with a reduction of damages, by an equally divided court.]

2. EVIDENCE (§ II K—311)—ONUS — SALE OF GOODS — SAVING PROVISO "IF UNABLE TO DELIVER PROMPTLY."

Where a written contract for the sale of goods contains a clause for delivery on a certain date with a proviso that "if for any reason the seller may be unable to fill the order or deliver the goods at the time stated, the buyer will not in any way hold the seller responsible for damages," the onus is upon the seller, in case of failure to deliver promptly to establish his inability to deliver at the stated time.

[*Leonard* v. *Kremer* (No. 1), 7 D.L.R. 244, affirmed with a reduction of damages, by an equally divided court.]

Statement

APPEAL by the plaintiffs F. Leonard & Sons from the judgment of the Supreme Court of Alberta, *Leonard* v. *Kremer* (No. 1), 7 D.L.R. 244, 4 A.L.R. 152, allowing the defendant's appeal from the dismissal of his counterclaim. The present appeal was allowed by reducing the amount allowed in respect of the counterclaim.

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G. S. Gibbons, for plaintiffs, appellants.
H. Mellish, K.C., for defendant, respondent.

SIR CHARLES FITZPATRICK, C.J.:—I agree with Mr. Justice Idington. The damages incurred by reason of the breach of the contract to deliver "the boiler complete and all fittings" are, in my opinion, fully covered by the amount awarded by the trial Judge. That amount adequately compensates the respondent for all the damages which, in view of the terms of the contract, can fairly and reasonably be considered as having been in contemplation of both parties as the probable result of the breach, and that is all that he is entitled to. The judgment appealed from proceeds on the assumption that the respondent is entitled to be compensated for loss of custom or of business profits, and I do not think it can be reasonably assumed the parties had in contemplation that a claim for such damages would arise from a breach of this contract. I would allow the appeal with costs.

Davies, J.

DAVIES, J.:—I concur with the reasons and conclusions of my brother Anglin.

Idington, J.

IDINGTON, J.:—The appellants, who are manufacturers of engines and boilers at London, Ontario, received from respondent an order signed by him dated February 28, 1910, as a result of negotiations through their Calgary agent, which is substantially as follows:—

> Sirs,—You will manufacture for the undersigned and deliver on cars at Calgary, Alta., on or about the 28th of April, 1910, one . . boiler complete with all fittings . . . which the undersigned agree to receive and pay you therefor the sum of seven hundred and forty-four dollars . . . cash in hand when ready to ship, $300. . . . The above goods to be shipped . . . to Innisfail, Alberta . . . at the risk of the undersigned, on or about the time above mentioned; but if for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages.

The respondent had in enclosing this order to the said agent urged earlier delivery if possible. The agent responds on the same day thereto:—

> We will get this boiler put in hand for you at once and will try and have it brought up a little sooner than stated,

acknowledges receipt of order and thanks respondent.

Such is the contract between these parties, which herein resulted in the learned trial Judge allowing respondent $100 to cover omitted and defective fittings and damages caused by trouble and expenses which the respondent had incurred in rectifying the defective nature of others supplied, and on appeal to the Supreme Court of Alberta the allowance by it of a further

sum of $720 damages for loss of profits suffered by respondent through the appellants' alleged breaches of said contract. It is not often we find such remarkable results from such small causes as appear in the facts herein. Indeed, I have failed to find a single case when the price earned has been wholly obliterated, as here, by loss of profits awarded the purchaser. The pump and other articles which the learned trial Judge found defective and deducted from the price reduced that cost price below the amount of these remarkable damages. The boiler was shipped at Calgary on May 18th. The correspondence indicates that it had left London at the end of April or the beginning of May and must have taken an unexpectedly long time in reaching Calgary. It seems, then, to have taken five days to get it from Calgary to Innisfail.

The respondent, who is a certificated and presumably a qualified engineer, found on the arrival of the shipment that a flange was missing, and promptly reported this fact to the agent of the appellant at Calgary. The agent seems also to have acted promptly and that was remedied within the time it took respondent to get the boiler otherwise so installed as to be really in need of the flange. And then the remarkable thing happened that the respondent discovered something else missing or not properly fitting the boiler to the engine's corresponding attachment.

Why a certificated engineer is to be excused for not discovering this earlier and appellants are to be made to bear all the blame for his slowness in remedying the defect, is past my comprehension. Not only is that hard to understand, but when we find that the misfit was finally overcome by intelligent application of a simple method which in a few hours set everything so far right that the machinery ran with it so adjusted for the rest of the season, it is still harder to see how that delay or cause of delay can be made the basis of damages for loss of profits to be recovered by a man whose duty it was to have done everything in reason to avoid any such loss. True, the job when so done was so clumsy and possibly dangerous that a year later it was duly condemned by the inspector. But what really was the cause of the misfit I am unable, after a perusal of the entire evidence, to clearly comprehend.

It is quite clear that getting a boiler in one place and an engine in another needed the greatest care on the part of the man so going about his business, and I do not think he exercised that care or looked for the probable consequence with an eye to speedily overcoming the misfits or defects an intelligent man might under such circumstances have anticipated. The piping for making the connection does not seem to have been provided for by the contract or by the respondent, who, in the absence of

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such provision in the contract, ought to have provided it. Hence that, or want of energy, lost several days to respondent. These omissions of a flange and defective valve, called a pop by some, with a flange not suited to fit properly to the flange on the engine, as the inspector described its defects, should have caused no serious delay and in fact did not, as I read the evidence, seriously hinder the operations of the outfit. The defective pumps and the missing iron posts to suspend the boiler by and the substitution of wood therefor, are allowed for by proper deductions in price. These accidental things had no effect in delaying operations. The respondent did not begin to operate till June 18th. But why? It is clear as can be it was the want of a governor which weighed on his mind for a fortnight or more. The appellants may have been negligent in shipping the governor, which was ordered later than the boiler, but a breach of that contract, if any, cannot be made the basis of damages founded on delay in starting to make brick and consequent loss of profits.

It is clearly established by the evidence of the inspector and the admission of respondent that the governor was not necessary to the actual running of the machinery. It is tolerably clear that, as respondent first swore, he thought the governor was necessary. As Mr. Justice Simmons points out, respondent's letter to Stewart, wherein he says, "I am delayed now anyway on account of the governors, so long as I get it as soon as they arrive," demonstrates why he failed to start sooner.

The majority of the Court below awarding the damages for loss of profits do not see their way to resting claim thereto on the absence of a governor.

I respectfully submit that I cannot well see, when these several grounds I have dealt with are removed, on what they do rest the claims allowed. The delay from April 28th to May 18th seems to enter into the computation of lost time, though the whole of that, or indeed any of it, is not very clearly relied upon. It is by the implication resting upon the interpretation and construction of the contract relative to this provision therein—"but if for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages"—that the result seems to be reached.

Now let us see what the law is governing such damages as loss of profits, and then apply this provision thereto in the intelligent way that men of business would be likely to understand and act upon. In ordinary cases where the article can be bought in the market, no such damages are recoverable. In the cases of contracts for manufactured goods which cannot be procured in the market, a claim for loss of profits caused by breach of a contract for delivery of the goods at a stated time, such damages may be under certain special circumstances allowed.

The knowledge of the special circumstances which may so entitle to recovery for loss of profits has always been held as one of the essential conditions precedent to such recovery. But knowledge does not alone carry with it of necessity such liability.

In the case of *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499, 37 L.J.C.P. 235, Willes, J., developed so fully the current view of how and why knowledge may be a basis to act upon I would refer anyone desiring light to his whole judgment at pp. 508 *et seq.*

The pith thereof for my present purpose is contained in the following:—

> To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances, that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

How can anyone read this contract shewing such a manifest purpose to exclude the reasonable belief or any belief on the part of the respondent that the contract is to be accepted by appellant with full responsibility for such risks of delay? Can anyone suppose that the respondent reading the contract ever believed he had any contract with the appellants to accept such risks and indemnify him against same?

It is a pure question of contract or no contract against such risks. Business men do not break up their sentences into the members thereof and speculate upon the possibilities of what each of the words of such a phrase may mean. And even if they did, the principles upon which the law proceeds in regard to such a subject as the liability of damages measured by loss of profits do not permit of such treatment. The broad question is whether or not it may be reasonably supposed to have been in the contemplation of the parties at the time of making this contract that the appellants assumed such risk as incidental to the manifold contingencies of business which the manufacturer and shipper has to face in such matters. The contractor often has inserted in his contracts limited provisions against strikes or other like causes to anticipate the possible consequences that but for the like provisions might be implied in their undertaking to complete by a given time. This provision was intended to be much more comprehensive and obviously was intended to cover the whole ground. It simply rebuts what might otherwise have been said to have been the reasonable contemplation of the parties.

The doctrine of *Hadley* v. *Baxendale*, 9 Ex. 341, 2 C.L.R. 517, 23 L.J.Ex. 179, as elucidated by the Courts in such cases as the one already cited, and of *Elbinger Actien Gessellschaft* v. *Armstrong*, L.R. 9 Q.B. 473, at 478 and 479, 43 L.J.Q.B. 211; and *Cory* v. *Thames Iron Works Co.*, L.R. 3 Q.B. 181, 37 L.J. Q.B. 68, shew what is meant.

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The peculiar facts of this case furnish another reason which excludes all the time involved in this period of delay between April 28th and May 18th. The respondent could not without tendering the cash payment have brought any action on the contract. He failed in his payment or tender thereof and thus deprived himself of any right of action. He was not entitled to complain until he had prepared himself to insist on the contract. His right to delivery at all was dependent thereon if insisted upon by appellants. His seeking such modification of the contract as he did bound him to accept the necessary implication involved in his asking such a waiver by appellants of his obligation which took place within the time now in question. The very terms of the date to be observed for delivery being on or about April 28th are another obstacle in his way, and coupled with his default in payment seem to me a complete answer as to this period of the time to be reckoned with.

The conclusion I reach is that this period of time, from April 28th to May 18th or 23rd, must in any event be excluded from consideration and all that happened afterwards is excluded by the facts which I have above dealt with in detail, and hence there is no ground for assessing damages on a basis of loss of profits.

If the omissions to fulfil the contract completely had from the time of actual delivery and acceptance of the boiler led to unreasonable delay in respondent beginning his work, then it might have been said the term of the contract providing against damages for non-delivery "at the time stated" might have been said to have been exhausted and the general principle of law thus become operative. Such would have been fairly arguable considerations, but in view of the facts dealt with are of no avail here.

I think, therefore, the appeal should be allowed with costs and the judgment of the learned trial Judge be restored.

DUFF, J.:—The respondent is the owner of a brickyard in Innisfail, Alberta. Requiring a boiler to supply steam for working his plant during the summer of 1910, he ordered one with the necessary fittings from the appellants on February 28th of that year. The order was given on a printed form supplied by the appellants, which provided:—

> the above goods to be shipped via C. P. Railway to Innisfail, Alberta, or by such other route as you may direct at the risk of the undersigned, on or about the time above mentioned (April 28, 1910), but if for any reason you may be unable to fill this order or deliver the goods at the time stated, the undersigned will not in any way hold you responsible for damages.

The contract was closed by letter from the appellants' agent at Calgary on the same date. The boiler was not shipped until

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April 4th, and arrived at Innisfail at some time between May 18th and 23rd. Certain necessary fittings were missing, others were defective, and there was, in consequence, delay in commencing the operation of his plant. The respondent, being sued for price, counterclaimed for damages for delay. The counterclaim was dismissed by Harvey, C.J., who tried the action, but the full Court of Alberta awarded the respondent $720 in respect of it. The plaintiffs appeal from the judgment.

The first objection taken by the appellants is that the clause quoted exempts them from all liability to make compensation for damages due to delay. In this contention they fail, in my opinion, because there is not the least evidence to justify the assertion that the appellants were "unable to deliver the goods" in question "at the time stated." The defence cannot be sustained in the absence of such evidence.

The respondent is entitled, therefore, to damages for delay if he can shew that he has suffered any for which, according to the general principles of law, the appellants are responsible. The evidence shews clearly enough that the appellants were made aware at the time of entering into the contract that the boiler was required for the working of the respondent's plant. They were also told that the respondent had disposed of all his prospective output for the summer of 1910 and that he was looking to the appellants to supply him with a boiler and fittings on the date stipulated to enable him to commence operations as soon as the season should permit him to do so. In these circumstances the appellants are liable to pay such damages as are reasonably attributable, in fact, to the delay and might fairly have been contemplated as likely to result therefrom by persons having the knowledge of the circumstances above mentioned which the appellants possessed. I have come to the conclusion that the amount awarded by the full Court ought to be considerably reduced.

I think there is no foundation whatever for the contention advanced for the first time in reply by the appellants' counsel that either of the valves which the respondent was obliged to obtain after the boiler reached him was not included in the contract. The evidence of Watson is clear and conclusive that both were included in the description "boiler and fittings." But I am satisfied that from the first the respondent had no intention of going on without a governor, and second, that, if at the time he discovered the defects complained of he really considered that the company's default was alone causing him a loss of $50 or $60 for each day until the defects were remedied, a reasonable view of the situation would have led to much greater activity on his part. I think $200 would be fair recompense for damages properly attributed to the company's default.

ANGLIN, J.:—I entirely agree with the disposition made by

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the learned trial Judge of the plaintiff's claim. The deduction of $100 which he made from it was, I think, well supported by the evidence. But I am unable to concur in his dismissal of the defendant's entire counterclaim. On the other hand, the allowance made upon the counterclaim by the full Court seems to me, with respect, to be extravagant and unwarranted by the evidence. While I agree that the plaintiffs, inasmuch as they failed to give any evidence that the delivery and the absence of certain material parts was due to inability on their part to fill the defendant's order or to deliver the goods, were not entitled to any benefit from the exemption clause in their contract, I am of opinion that the defendant by his letters and conduct, especially in regard to the $300 payment, waived the delay which occurred in the delivery of the boiler itself. No doubt when delivered it lacked some important fittings. One of these—the steam flange—I rather incline to think upon the evidence of Boiler Inspector Watson, was not covered by the contract. But if it was, it was supplied within a few days after the defendant had the boiler set up. Another—the steam pump—certainly could have been, and I rather think was, speedily obtained from another source. The difficulty in regard to the "pop" or stop valve—the only other part specifically complained of—was not discovered until the boiler had been set up. I cannot say that its non-discovery earlier was due to any lack of care or diligence on the part of the defendant. It is not unreasonable to believe that it would have been within the contemplation of the parties that to replace this stop-valve or to alter it so as to make it suitable for use on the boiler supplied would entail some few days' delay in commencing to operate the brick making plant, but not any such delay as from May 30th to June 18th. The plaintiffs knew the purpose for which the boiler was required. The defendant has proved the very profitable contract which he held for the output of his plant. The plaintiffs were notified of that contract before the boiler was ordered. I do not think that the fact that defendant was without a governor which he deemed important but not essential for the operation of his engine, suffices to excuse the plaintiff's default or to relieve them from the consequences of pecuniary loss to the defendant of such loss of time as may reasonably be ascribed to the necessity of making alterations in the stop-valve which they furnished. Taking all the circumstances into account and assessing the defendant's damages as a jury would—it is not possible to ascertain them with anything approaching mathematical exactitude—I think that if the defendant is allowed $200 on his counterclaim, at least approximate justice will be done, which is the most that can be hoped for under circumstances such as those with which we are confronted.

I would therefore allow the defendant's appeal with costs,

would maintain the judgment of Harvey, C.J., in respect of the plaintiff's claim, and would reduce the judgment for the defendant on his counterclaim to the sum of $200 and costs. There should be no costs to either party of the appeal to the Supreme Court of Alberta or in this Court.

BRODEUR, J.:—I do not think that the respondent should succeed on his counterclaim by which he asks damages for delay in delivering the boiler and other goods sold to him by the appellants. No absolutely fixed date had been set up in the contract for the delivery of the goods. It was to be "on or about" April 28, 1910. The vendors or manufacturers are living in London, Ontario, and the purchaser at Innisfail, in Alberta, a very wide distance.

On May 4, 1910, the defendant was advised by the appellants' agent in Calgary, Alberta, that the goods had been shipped from the manufacturers in London and would be in Calgary in about ten days. The goods arrived on the 17th in Calgary, which was by the contract the place of the delivery, and they were re-shipped from there to Innisfail. The respondent proceeded to set up the boiler. He then noticed that a steam flange was missing. The appellants' agent in Calgary being apprised of that had one made in Calgary and it was shipped on the 28th. On May 31st, without relying on his right to damages for the delay, the respondent makes a part of the cash payment, asks delay for the balance of that cash payment, and gives his note for the balance of the purchase price. It seems to me, however, it would have been the proper time for him to make his claim for damages. But not a word is then said. These facts and circumstances should constitute a waiver of the breach. It is true that two or three days later, when the steam flange arrived at Innisfail, the respondent found that the safety valve did not fit the corresponding part of the boiler.

But all that could have been easily remedied by doing some chiseling. In fact, he did that chiseling later on after having sent the valve to Calgary, when he found he could not get it worked up in Calgary.

The trial Judge, Chief Justice Harvey, in giving judgment for the appellants, reduced their claim by $100 for certain attachments not supplied with the boiler and certain other machinery and for the inconvenience in getting those things done. The Supreme Court *en banc* reversed that decision of the trial Judge and granted damages for a much larger sum than the value of the goods sold.

As I am of the opinion that the facts and circumstances of the case constitute a waiver of the breach on the part of the respondent, the appeal should be allowed and the appellants should have judgment for the amount given by the trial Judge.

Appeal allowed.

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Re PHILLIPS.

Ontario Supreme Court, Middleton, J. February 3, 1913.

1. PERPETUITIES (§ II—14)—POWERS—CREATION AND EXERCISE OF POWER OF APPOINTMENT—WILLS.

Where under a will a general power of appointment, exercisable by will only, is given to members of a stated class, for instance, grandchildren who may be born after the death of the testator at any time during the life of his widow, and the property is to go over in default of appointment, and such gift over is to take effect on the death of such unborn grandchildren, the provision in question is void as offending the rule against perpetuities.

[*Wollaston* v. *King* (1869), L.R. 8 Eq. 165; *Tredennick* v. *Tredennick*, [1900] 1 I.R. 354, referred to.]

2. PERPETUITIES (§ II—11)—POWERS—REMOTENESS IN GENERAL—POSSIBILITY OF OFFENDING RULE, EFFECT.

Under the rule against perpetuities the mere possibility of the limit allowed by law being exceeded renders the whole provision of a will giving rise to the question void *ab initio*, thus precluding the splitting up of the clause with a view to giving effect to some of its parts to the exclusion of others.

[*Hutchison* v. *Tottenham*, [1898] 1 I.R. 403, specially referred to.]

Statement

MOTION by the executors of Francis J. Phillips, deceased, upon the return of an originating notice, under Con. Rule 938, for an order determining a question arising upon the construction of the will of the deceased.

January 25. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

E. G. Long, for the executors.

W. N. Tilley, for the children of the deceased.

A. W. Ballantyne, for the widow.

F. W. Harcourt, K.C., Official Guardian, appointed to represent those opposed in interest to the claim put forward by the children.

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February 3. MIDDLETON, J.:—By his will, dated on the 28th January, 1908, Francis J. Phillips, after certain specific legacies, devised all his estate to his executors, upon trust to pay the income to his wife during her life or until her second marriage, charged with the maintenance and education of his children during minority. Upon the decease or marriage of the wife, the trustees are directed to hold in trust for the children then alive, and the issue of any children who may then be dead, and to pay them the income of their respective shares.

The will then provides, by clause 9: "And on the death, after the death or second marriage of my wife, of any of my said children or of any of my grandchildren who shall have been receiving the income of any share of my said estate as hereinbefore provided, I hereby direct my said trustees to pay over the share of the residue of my estate of which such child or grand-

child had been receiving the income during his or her life to such person or persons and in such manner as such child or such grandchild respectively shall by his or her last will and testament appoint, and in default of such appointment to such person or persons as would be entitled to the same under the provisions of the statutes which may be in force in this Province for the distribution of the estates of intestates if the said child or grandchild should die possessed of such share and intestate."

There is no doubt as to the validity of the provisions of the will relating to the gift to the children and to the grandchildren, issue of any children who may die during the lifetime of the mother. The interests of the children and of such grandchildren vest during the mother's life estate.

It is, however, contended that the provisions of clause 9, above-quoted, by which a general power of appointment exercisable by will is given to the members of this class, and by which the property goes over in default of appointment, are void as offending the rule against perpetuities, as such power is given to grandchildren who may be born after the death of the testator at any time during the life of the widow, and the gift over takes effect upon the death of such unborn grandchildren.

It is clear that, in determining the validity of a provision such as this, it is not enough that the estate or interest may vest within the period limited by the rule. If it is possible that it may not do so, the possibility of the provision in question exceeding the limit allowed by law renders the whole provision void *ab initio;* so that, in this case, the validity of the whole clause must be determined in view of the possibility of some one or more of the daughters dying in the lifetime of the widow and leaving them surviving—and surviving the widow—issue born after the death of the testator.

Moreover, the clause cannot be split up and so treated as to render valid the provision so far as it relates to the testator's children and invalid so far as it relates to the after-born grandchildren. This, I think, is the effect of the decision of the Court of Appeal in *In re Bence*, [1891] 3 Ch. 242, where Fry, L.J., said (p. 249): "But the argument of the appellant is that the terms of the gift over can be split up into so many separate gifts over as there are possible events, and that, whenever the actual event falls within the limits of perpetuity, the gift over is good; whenever it falls beyond the limit, it is bad. There appears to us to be a great cloud of authorities opposed to this view."

The precise point is clearly stated in accordance with Mr. Tilley's contention in authoritative text-books: *e.g.*, Halsbury's Laws of England, vol. 22, p. 354, where Mr. Justice Barton says: "A general power of appointment conferred on an unborn per-

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son, who must necessarily be in existence within the proper period, for example, the child of a living person, exercisable by deed or will (*but not when exercisable by will only*), being equivalent to absolute ownership, is not invalid. . . . A power exercisable only by the will of a person unborn at the creation of the power is invalid, since it ties up the property until the death of such person, and, therefore, beyond the perpetuity period."

See also Gray on Perpetuities, 2nd ed., paragraph 378: "A power given to the unborn child of a living person is too remote, that is, if it is a power to be exercised by will only, or a special power to be exercised by deed; but if such unborn child has a general power to appoint by deed, he has an absolute control exactly as if he had the fee, since he can at once appoint to himself."

The opposite view is taken in Farwell on Powers, 2nd ed., p. 287, where the learned author says: "On principle it is submitted that for the purposes of the rule against perpetuities a general power to appoint by will, following a life estate in the donee of the power . . . is equivalent to absolute ownership."

Turning then to the cases:—

Wollaston v. *King* (1869), L.R. 8 Eq. 165, forms a convenient starting-point. There the testatrix, having under her marriage settlement power to appoint in favour of children, by her will appointed in favour of her son for life, with remainder to such persons as he should by will appoint. It was held that the appointment in favour of the son's appointees was void for remoteness. The argument presented was, that the appointment tied up the property during the natural lifetime of the son, who was not *in esse* when the power was created; and, therefore, the rule was violated. This reasoning was apparently accepted by the Vice-Chancellor, Sir G. M. Giffard, who, the report says, was "clearly of the opinion that the power of appointment by will given" to the son "was void."

In the following year, *In re Powell's Trusts* (1869), 39 L.J. Ch. 188, was determined by James, V.-C. There a general power of appointment was given, after a life estate in the appointee. This general power, exercisable by will, was held not to be equivalent to ownership; so that the operation of the rule against perpetuities must be considered with regard to the origin of the power; and the attempted exercise was void for remoteness.

In *Morgan* v. *Gronow* (1873), L.R. 16 Eq. 1, Lord Chancellor Selborne had before him a case in which property was settled upon one, with a power to appoint among his children. He appointed in favour of his daughter for life, and after her death as she should by will appoint. It was held that the power of appointment conferred by will upon the daughter was void; the Lord Chancellor stating (pp. 9, 10): "If she had been living

at the date of the instrument creating the power, I should have thought that this was within the terms of the power. She was not, however, then living; and inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limit allowed by the rule as to perpetuities, not only *Wollaston* v. *King*, but principle, obliges me to hold, very reluctantly, that that is void. It is the same thing as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time. . . . *A fortiori*, such a gift as this, depending upon the exercise of the power, must be too remote also."

In *Rous* v. *Jackson* (1885), 29 Ch. D. 521, we strike a discordant note. Property was settled upon a married woman for life, and she was given a general testamentary power. In pursuance of this, she made a will purporting to exercise the power, which would be valid if the rule was applied at her death, but which would be invalid if the rule had to be applied at the date of the original settlement. Chitty, J., took the view that the power possessed by the woman was a general power, because it enabled the donee to limit the fee; he, therefore, upheld the validity of the will against the rule, thinking that *In re Powell's Trusts* was wrongly decided.

In *In re Flower* (1885), 55 L.J. Ch. 200, a testator devised lands to his daughter, with a restraint against alienation during her life, but with power to deal with it as she pleased upon her death. It was held that, inasmuch as the power was general, the limitations created by her will must be calculated from the date of her death in order to ascertain whether they offended against the rule; North, J., purporting to follow the decision of Chitty, J., in *Rous* v. *Jackson*, in preference to *In re Powell's Trusts*.

In *Cooke* v. *Cooke* (1887), 38 Ch. D. 202, a father, having power to appoint, appointed to his daughter, with the provision that, if the daughter left issue, the property should go upon her death as she should appoint, and, in default of appointment, over. North, J., says: "It is not disputed that the effect of that would be to tie up the shares longer than the rules against perpetuity allow."

In *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494, Kay, J., had before him a case in which the lands were, by settlement, limited to the use of the husband and wife for life, with remainder to the use of their issue (born before any appointment) as they should by deed appoint. They appointed part of the lands to the use of the daughter for life, and after her death to the use of such person as she should by will appoint, and, in default of appointment, to her children. It was held that the only part of

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the appointment which was good was the gift to the daughter. The learned Judge says, referring to various unsuccessful attempts to tie up land: "One of the things attempted has been to make successive limitations of life interests to unborn persons and to the children of those unborn persons. That has always been treated as being an invalid limitation of real estate. You may limit for life to an unborn person; but you cannot limit it for life to the unborn person so as to tie it up until the death of that unborn person—that is to say, any remainder limited after the life estate must be to a person *in esse* at the time that it was made." This rule is said to be an absolute rule, independent of the rule against perpetuities, and of feudal origin. This case was affirmed in (1890), 44 Ch.D. 85.

This decision gave rise to much discussion upon the question of the existence of the two rules: that against a possibility upon a possibility, and the rule against perpetuities. See, for example, 14 L.Q.R. pp. 133 and 234; 15 L.Q.R. p. 71; and 27 L.Q.R. p. 150. Into this discussion it is not necessary to enter for the purposes of the present case.

In *In re Frost* (1889), 43 Ch. D. 246, a somewhat similar point was before the same learned Judge, and his decision is on precisely the same lines.

In the Irish case of *Hutchinson* v. *Tottenham*, [1898] 1 I.R. 403, the Vice-Chancellor—in dealing with a very similar case to that in hand—held that the validity of the power must be determined with reference to the original instrument creating the trust. This decision was affirmed upon appeal in [1899] 1 I.R. 344.

In *Tredennick* v. *Tredennick*, [1900] 1 I.R. 354, *Wollaston* v. *King* was again followed by the Vice-Chancellor.

The conclusion at which I have arrived, on this branch of the case, is, that the attempt to tie up the property during the lifetime of grandchildren not born in the lifetime of the testator brings the case well within the rule against perpetuities, and is void. Had the power been a general power, capable of being exercised at any time during the lifetime of the grandchildren, this would have been equivalent to an absolute ownership, and the provision would have been good. But the cutting down of the power, and making it exercisable by will only, carries the provision beyond what is permitted, and is void.

I think this conclusion is supported by the great weight of authority, and no good purpose could be served by attempting a criticism of the authorities opposed to this view.

I can, however, see a clear distinction between the case in hand and cases in which there is a gift for life, with a power to the life-tenant of appointment by will. In that case, necessarily, those taking under the appointment by will must be *in esse* dur-

ing the life of the life-tenant who was *in esse* at the testator's death; but what is here sought is to give an unlimited power of appointment by will to one not born at the testator's death. This is what is objected to and which, I think, is impossible.

This is in accordance with view well stated by Joyce, J., in *In re Thompson*, [1906] 2 Ch. 199, where he says (p. 202): "In the case of a will made in exercise of a special power of appointment,—as to any estates or interests given which vest immediately upon the testator's death, or must vest within twenty-one years afterwards,—if the testator, the donee of the power, was living at the time of its creation, there is no objection on the ground of remoteness, since what is given must vest immediately upon, or within twenty-one years after, the termination of a life (that of the donee of the power) which was in existence at the time of the creation of the power."

So far as personal estate is concerned, the rule of *Whitby* v. *Mitchell* cannot apply, but the rule as to perpetuities does apply, and makes void the provisions in question: see *per* Farwell, L.J., in *In re Bowles*, [1902] 2 Ch. 650, 653.

Assuming, as I hold, that everything after the gift to the children and grandchildren on the wife's death is invalid, is there an intestacy, or does the case fall within the principle of *Hancock* v. *Watson*, [1902] A.C. 14? In other words, is there a sufficient gift to the children and grandchildren on the death of the life-tenant to give to them an absolute interest when these limitations and provisions fail?

I think there is; for there is more than a gift of a mere life estate. By clause 7, the testator directs that, after the death or second marriage of his wife, his trustees shall hold the residuary estate "in trust for my children who shall be then alive, in equal shares;" and, by clause 8, in the event of the death of any of his children before the decease of his wife, leaving issue, such issue shall stand in the place of its parent. See also *Cooke* v. *Cooke*, 38 Ch. D. 202.

There is enough here, I think, to make the principle applicable, and to avoid that which the testator certainly did not intend —an intestacy.

Costs of all parties may come out of the estate.

Order accordingly.

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Jan. 27.

LESLIE v. HILL.

Ontario Supreme Court (Appellate Division) Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. January 27, 1913.

1. PARTNERSHIP (§ IV—15)—PARTNERSHIP REAL ESTATE—ORAL AGREEMENT —STATUTE OF FRAUDS.

There may be an agreement of partnership by parol, notwithstanding that the partnership is entitled to deal with land, and to an action to enforce such agreement the plea of the Statute of Frauds will not avail.

[*Leslie* v. *Hill*, 25 O.L.R. 144, affirmed.]

2. CONTRACTS (§ I E 4—83)—CONTRACTS AS TO REALTY—ORAL PARTNERSHIP—MONEY HAD AND RECEIVED.

Where an agreement of partnership by parol, under which it is intended that the partnership shall deal with land, is the basis of an action for money had and received, the Statute of Frauds (even if it could otherwise avail) is in such event inapplicable. (*Per* Meredith, J.A.)

[*Leslie* v. *Hill*, 25 O.L.R. 144, affirmed.]

3. APPEAL (§ VII M—520)—FINDINGS OF TRIAL JUDGE—WHAT ERRORS WARRANT REVERSAL—PROBABILITIES—WEIGHT.

An appellate court reviewing the weight of evidence adduced at a trial without a jury where it appears that the probabilities of the case are strongly against the trial judge's findings of fact and that the weight of the testimony is in accord with those probabilities, will set aside such findings. (*Per* Meredith, J.A.)

Statement

APPEAL by the defendants Hill and Paget from the judgment of a Divisional Court, 25 O.L.R. 144.

Argument

W. M. Douglas, K.C., for the appellants, argued that the six original leases were never completed, and, if not completed, could vest no interest in the plaintiff. The position was the same as if the leases had never been drawn at all. No partnership has been established, and the defence of the Statute of Frauds is a complete answer to the plaintiff's claim: Lindley on Partnership, 8th ed., pp. 98, 99; *Archibald* v. *McNerhanie* (1899), 29 S.C.R. 564, 569; *Stuart* v. *Mott* (1868), 14 Can. S.C.R. 734; *Caddick* v. *Skidmore* (1857), 2 DeG. & J. 52; *Isaacs* v. *Evans*, [1899] W.N. 261.

G. Lynch-Staunton, K.C., for the respondent, the plaintiff, argued that a partnership did exist between the parties; if not, a fraud had been practised upon the plaintiff, and *Ross* v. *Scott* (1874), 21 Gr. 391, was in point. The judgment of the majority of the Divisional Court is right, and should not be disturbed.

Douglas, in reply.

Meredith, J.A.

January 27, 1913. MEREDITH, J.A.:—All things about which there can be no dispute as to their truth support the judgment appealed against, and are altogether opposed to the conclusions of the County Court Judge; indeed, the probabilities are so

strongly in favour of the plaintiff's claim that it ought to have required a very considerable weight of testimony to turn the scale the other way; but, in truth, the weight of the testimony is more in accord with the probabilities of the case than opposed to them.

The appellants were wholly inexperienced men in the business of gas and oil production and speculation; the plaintiff's husband was not only a man of considerable knowledge of that kind, but was a practical well-digger and had on hand the machinery required for the work; and was, at the time in question, engaged in sinking such a well for the appellants on the land of one of them; and, indeed, the enterprise in question seemed to have arisen out of this circumstance. The appellants' inexperience was such that, even in regard to the form of the ordinary gas and oil lease, they admittedly had to seek, and at once accepted, the advice of the respondent's husband. The association in partnership of these two wholly inexperienced men with one who not only had the needed knowledge and practical experience, but also had the machinery needed in the work required in the development of their enterprise, was so desirable a thing as to make that which the respondent contends for at the least very probable. Then the respondent's husband was consulted regarding the conduct of the enterprise, and the form of the intended leases was altered at his instance; and after that the business was done—the leases taken—in the names of the three; the very strongest evidence of the joint interest of all of them, and entirely inconsistent with the appellents' contention that they alone were entitled to them.

And how is this met? By the extremely weak and improbable story that the respondent's name was inserted with a view to securing work for her husband in sinking wells on the leased lands, if the leases should be assigned, though it is not even asserted that there was any contract on the respondent's part to give him such work if the lands were developed by them. How could such a thing bring about such a result, apart from the want of honesty, towards the lessors, in it? And why should the untruth, and the danger of it, be uttered and incurred if they were under no obligation to the respondent? The story seems to me quite too infantile, from business men in a business transaction. The much more probable story is, that, if the leases had not been quickly found to be saleable at a profit, had mining operations gone on, as was at first expected, or had any difficulties arisen, the partnership would have been clung to, and the harder work would have fallen to the experienced man with the machinery and knowledge; but when neither experience nor machinery became necessary, when it was little more than a matter of dividing a handsome profit, the working man and his

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plant were excluded; but fortunately his wife's name could not be erased from the leases without leaving an indelible mark.

And the bulk of the disinterested testimony supports this view.

There is, of course, no law against reversing the findings of the County Court Judge; if they are wrong. And, with the fullest appreciation of, and giving the fullest weight to, the many advantages of a trial Judge, who sees and hears the witnesses, over any court of appeal that does not, I cannot but agree in the conclusion of the Divisional Court, that the judgment at the trial was wrong and should be reversed.

Without at all differing from the view of the Divisional Court on the question of the Statute of Frauds, I feel bound to say that I do not see how that enactment can be, on any question affecting land, applicable to this case, which is substantially but one for money received by the defendants for the use of the plaintiff.

Hodgins, J.A.

HODGINS, J.A.:—Having regard to the learned County Court Judge's statement, as given in the reasons for judgment in the Divisional Court, I do not think that, in affirming that judgment, this Court is offending against any reasonable rule regarding a trial Judge's finding on disputed facts.

I agree in the main with the judgment appealed from; but I think it goes too far when it gives the plaintiff a share in the sale-price of all the oil and gas leases sold to Waines & Root.

If the result of all the evidence is, that this case can be treated as a partnership dealing with land, or the claim as one for money had and received, so as to exempt it from the operation of the Statute of Frauds, I think the plaintiff's rights may fairly be limited to a share in the proceeds of those leases got while the arrangement lasted. If it can be carried far enough to include leases acquired subsequent to the notice given to the plaintiff on the 19th April, 1911, then until it is properly terminated it covers all similar transactions.

Leslie admits that on the 19th April, 1911, he found out that he and his wife were being "thrown down," as he expresses it. The defendants put it earlier, but I do not think the plaintiff can complain if the later date is taken; and, in my judgment, the agreement ought to be treated as having been put an end to then. The leases of McNinch, Pettigrew, and McLaren are dated the 22nd, 23rd, and 24th April, 1911, respectively. While covered by the option to Waines & Root, dated the 18th April, 1911, as having been acquired within two weeks from that date, they were not then obtained.

I am unable to see why the agreement deposed to by the plaintiff should bind the defendants for all time, or why it could not be terminated by the notice given on the 19th April, 1911.

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I think the judgment of the Divisional Court should be varied by confining it to the leases other than those I have named, leaving it to the Local Master to determine whether the $2,200 mentioned as the consideration in the option and in the subsequent assignment should be reduced, having regard to these three subsequently acquired leases, and to the state in which negotiations for them were on the 19th April, 1911, for it may be that they had then been practically arranged for.

Hodgins, J. A.

With this variation, I would dismiss the appeal.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

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

Judgment varied accordingly.

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Jan. 27.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, R. M. Meredith, Magee, and Hodgins, JJ.A. January 27, 1913.

1. BUILDINGS (§ I A—5)—MUNICIPAL REGULATIONS — DISTANCE FROM STREET — CORNER LOT — BUILDING FRONTING ON UNRESTRICTED STREET.

A house upon a corner lot facing and opening upon one street with one side abutting on another street, is not within a municipal building restriction prohibiting the erection of houses within 40 feet of the line of the latter street where the authority to restrict was further limited to streets "in front of" the building.

[*Re Dinnick and McCallum*, 5 D.L.R. 843, 26 O.L.R. 551, reversed.]

2. BUILDINGS (§ I A—1)—DISTANCE FROM STREETS—MUNICIPAL BY-LAW REGULATING BUILDING FRONTING OR "ABUTTING" ON STREET—VALIDITY OF.

A municipal by-law regulating the distance at which buildings may be built or erected on lots fronting or "abutting" on a designated street is not authorized by 4 Edw. VII. (Ont.) ch. 22, sec. 19, permitting municipal councils to regulate and limit by by-law the distance from the line of the street in front thereof at which buildings on residential streets may be built, since the word "abutting" in the by-law was not authorized by such Act.

[*Justices of Bedfordshire* v. *Commissioners for the Improvement of Bedford* (1852), 7 Ex. 656, and *Governors of the Bedford General Infirmary* v. *Commissioners* (1852), 7 Ex. 768, distinguished.]

Statement

APPEAL by W. L. Dinnick from the order of a Divisional Court, *Re Dinnick and McCallum*, 5 D.L.R. 843, 3 O.W.N. 1463, 26 O.L.R. 551, dismissing a motion for a mandamus to the Corporation of the City of Toronto and the City Architect (McCallum) to issue a permit to the appellant for the erection of an apartment house on the north-east corner of Avenue road and St. Clair avenue, in the city of Toronto.

Argument

W. C. Chisholm, K.C., for the appellant. The by-law upon which the respondents rely for their refusal of the building permit is *ultra vires* and invalid, because it purports to be passed under the Municipal Amendment Act of 1904, 4 Edw. VII. ch.

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22, sec. 19, which gives extraordinary and unusual powers to the municipality, and the by-law does not conform with that statute: *Re Kinghorn and City of Kingston* (1866), 26 U.C.R. 130, at p. 134; *Re Peck and Township of Ameliasburg* (1889), 17 O.R. 54; *Re Hay and Town of Listowel* (1897), 28 O.R. 332. It is unreasonable and not passed in good faith. Avenue road north of St. Clair avenue is 125 feet wide, and south of St. Clair avenue is only 66 feet wide. Upon the south-east corner of Avenue road and St. Clair avenue is a large building which is built out to the street line of Avenue road, and so obstructs the view from any point on the east side of the street north of St. Clair avenue. The by-law, even if valid, and assuming that it uses the language of the statute, does not apply to the building in question, because the building in question will not be on Avenue road—it will be on St. Clair avenue; and, therefore, not affected by the by-law: *Hall* v. *City of Moose Jaw* (1910), 3 Sask. L.R. 22. As to prohibition against "building on narrow streets," see the Municipal Act, 1903, sec. 553 (1). Avenue road is not "in front" of the proposed building, according to the ordinary use of words; it is at the side of it: see Murray's New Eng. Dict., vol. 4, p. 564, col. 2, 1 (*b*); *Connecticut Mutual Life Insurance Co.* v. *Jacobson* (1899), 75 Minn. R. 429, at p. 432; *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at p. 99. The statute can never have been intended to apply to a corner lot. It does not affect the value of a building on a street to compel it to be kept back a certain distance from that street; but to enforce the by-law in accordance with the respondents' contention would mean a confiscation of land worth from $8,000 to $10,000.

G. R. Geary, K.C., for the respondents. The respondents the city corporation owe no duty to the appellant to issue him a permit; and it is not the duty of the respondent McCallum to issue a permit unless the plans and specifications of the building to be erected conform to all civic regulations. By-law No. 4891 of the City of Toronto prevents the erection of a building as proposed by the appellant or the issuing of a permit therefor. That by-law was passed by the city council under the authority of the Municipal Amendment Act, 1904, sec. 19, and in its provisions does not exceed the authority given by that Act. The by-law has not been quashed or repealed, and is, and was when the appellant applied for his permit, in full force and effect, to the knowledge of the appellant: *Regina* v. *Osler* (1872), 32 U.C.R. 324. The by-law is not unreasonable, and was passed in good faith; and, even if it were unreasonable, it should not on that account be disregarded: *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; *Stiles* v. *Galinski*, [1904] 1 K.B. 615; *Leyton Urban District Council* v. *Chew*, [1907] 2 K.B. 283; *Simmons* v. *Malling Rural District Council*, [1897] 2 Q.B. 433, at p. 437.

Chisholm, in reply.

January 27, 1913. The judgment of the Court was delivered by MEREDITH, J.A.:—It may be that there may be four fronts to a house, or indeed eight, or more or less than eight; but how does that affect the case of a house indubitably intended to have but one, and that front upon the highway upon which the lot it is intended to be built upon also fronts—St. Clair avenue?

In this Province, where nearly all lands, and intersecting streets, are laid out in rectangular fashion, and where, almost invariably lots are laid out fronting upon some concession, or other highway, no one would ever think of saying that any lot fronted upon any highway except that upon which it is numbered; lot 10 in the 10th concession, for instance, would never be said to front upon the side-road between lots 10 and 11; nor would it ever be said that any lot on St. Clair avenue fronted on any other street, although a corner lot abutting upon a side street; nor, if the land in question were sold, as such land nearly always is, at so much a foot "frontage," would any one dream of measuring all the "four fronts" of the lot to make up the price, or of charging more than for the width of the lot on St. Clair avenue; nor would any one, unless very hard driven in argument, seek refuge in an assertion that any lot on St. Clair avenue really fronts on Avenue road, any more than a lot on Avenue road fronts on St. Clair avenue. And all this applies, with equal if not with greater force, to a building actually fronting, as the land it is built upon does, upon St. Clair avenue; but, if it did not, would still be of vital importance because, although the legislation deals only with the front of the house, the by-law in question deals, and deals only, with the lot upon which it is built: "No building shall . . . be built . . . on the lots fronting or abutting . . ." In the argument here it was assumed throughout on all sides that the land in question is a lot on St. Clair avenue, and not, except as to one of its side-lines, on Avenue road; and, if so, how can it be within the by-law except under the word "abutting," which the legislation does not authorise? It would seem, from the adding of that word, that the municipal council saw that the Act does not include such lots as that in question, and sought in the by-law to extend its effect.

Much of this view of frontage can be easily learned from a perusal of the statutes of the Province, especially the Surveys Act; which are much more helpful to me than a case decided in another country, under very different circumstances, involving a different question; indeed, it may possibly be that, if the question in this case, with all its differences of circumstances, were, whether the owner of a building upon the lot in question could be taxed for a sidewalk in front and at the side of his property, the benefit of which he had, equally, in connection with that property, the meaning of the words "in front" might be stretched

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to include the sidewalk on both sides; but I must say that I would not care to be the first to take such liberty with the words. In that case—*Justices of Bedfordshire* v. *Commissioners for the Improvement of Bedford* (1852), 7 Ex. 656—it was said that in England the words "in front," as used in the enactment there in question, were ambiguous; here, under the Surveys Act, and the thoroughly understood meaning of the words "front," "rear," and "side-lines" of almost all lots of land, it could never be well said that there was any ambiguity in any one of these words as applied to lots of land; in that case, under its special circumstances, the word "fronting" seems to have been treated as if having the same meaning as abutting, which, of course, could not be here; land abuts upon all adjoining land, whether in front, at the rear, or at the side, but almost invariably here fronts upon one highway; and residential buildings, as a rule, are altogether within the limits of the lot and do not abut upon other lands at all; though, of course, buildings often abut upon one or two highways, and in some cases upon the surrounding lands on all sides. And, while referring to that case, it should be mentioned that in the next following like case—*Governors of the Bedford General Infirmary* v. *Commissioners for the Improvement of Bedford* (1852), 7 Ex. 768—between the like parties, considered by the same Court in the next following term, Martin, B., who sat in each, referring to the former case, used these words: "With respect to the other point, we are bound by the decision of last term; though I own that, in my opinion, the judgment might have been correct if it had been the other way, for we were called upon to construe an Act of Parliament, with regard to a state of circumstances which the framer of it never thought of." So that, all things considered, I cannot think either of the cases to be very, if at all, helpful to the respondents.

The difficulty I find in this case, and some others, is not in interpreting the words which are used, but is in preventing the mind giving effect, not to its words, but to that which one may think the Legislature ought to have said, forgetting that this is Osgoode Hall, not the Parliament Buildings.

If it were meant by the Legislature that building on either side of any street, or part of a street, within any prescribed distance of it, could be prohibited, the Legislature would have said so; and, if it were meant that such prohibition should or could more plainly include corner lots, or land fronting on other streets or public places, coming within the prohibited area, it could, and undoubtedly would, have said so; it is quite as capable of expressing accurately its mind as any of us are ours; and it surely needed no great capability to say plainly as simple a thing as that; but the Legislature has not said it, it has said a very different thing, with equal plainness; and only to that

which it has said can effect be given; if more be desired, it must be obtained from the Legislature, not the Courts.

The Legislature has plainly permitted interference with the ownership of land, on a residential street, in regard to the distance from such street at which buildings fronting upon it may be erected, but that only. Apply that to this case: the land in question fronts on St. Clair avenue, one of its side-lines only is upon Avenue road; the house intended to be built is to front on St. Clair avenue only; there is not to be even a way in, of any kind, on Avenue road; the building will be numbered, and known only by its number, on St. Clair avenue; there is not a circumstance that would, in ordinary common sense, warrant the assertion that Avenue road is in front of it; nor can I think that any one, even those who uphold the judgment in question, would ever dream of saying that the building is to front on Avenue road, or that Avenue road would be in front of it.

One whose land really fronts on Avenue road could not, of course, escape the law by building a house with its back to the road; it would still be the only road to it; the only front way of approach to it. But, equally, I think it impossible to deprive the owner of a lot really fronting on St. Clair avenue of his property rights under a pretence that his building fronting, as his lot does, on that avenue and on that avenue only, also fronts on Avenue road, merely because one side of it faces that way.

This view of the case is also strengthened by the words "buildings on residential streets," contained in the statute. No one would think of describing the building to be erected—with no means of access to it from Avenue road, but actually and altogether fronting on and having means of access to St. Clair avenue only—as "on" Avenue road; it would be numbered, named, and invariably described as "on" St. Clair avenue; with the addition perhaps occasionally of "at the corner of Avenue road."

It is, of course, important that the building schemes, and possibly the building visions, of the residents of Avenue road, should have weight, and indeed that their picturesque desires should be satisfied, as far as they can be reasonably; but we must not concentrate all our thoughts upon their desires; it must be always remembered that there are other avenues and streets with their residents' schemes and desires; all of which the Legislature had, doubtless, in mind in passing the legislation in question; though it may perhaps be that the mind of the Divisional Court was too much set upon the relief of the æsthetic soul of Avenue road, to protect that of St. Clair avenue—not even to mention its possible commercial spirit.

Questions of this kind are, of course, difficult ones, and are largely for the consideration of the municipal council, though,

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of course, they are not without some significance on the question of the meaning of the Legislature in the words it has used.

My conclusion then is, that the proposed building is not within the by-law, which relates only to Avenue road, and so can affect only lots fronting upon it.

If St. Clair avenue be a residential street, the by-law might have included it, but does not.

Also that, if the by-law followed the statute, this case would not be within it, because the proposed building is not to front on Avenue road, but is to front on St. Clair avenue, and so could be affected only by a by-law respecting that highway; and, in my opinion, the street in front of a building is, under this enactment, the one really in front of it, not another at the side, which no one would ever think of describing as in front of it.

I have not considered whether the legislation can be applied to a part of a street; the point was not raised. The statute expressly provides that the prohibited distance may be different in different parts of the same street, but not that the prohibition may be applied to any part of any street.

The legislation is confiscatory in its character, though, of course, intended to be put in force for the general benefit—including the benefit of each owner generally only; and, although it must be treated as remedial in regard to all that comes within its grasp, it ought to be applied only to cases which plainly are there.

But all these considerations seem to me to be but wasted energy, as far as this case is concerned; because, as I understand it, other legislation, and another by-law, prevent the erection, at the place in question, of such a building as that in question; and as the case is one to compel the granting of permission to erect such a building at that place only, no order, such as is sought, should go, if there be the right to refuse the permission by reason of the other, and subsequent I understand, legislation and by-law; I would, therefore, allow the appeal, but give the appellant no other relief than such as the opinions expressed may be; with his costs throughout.

Appeal allowed.

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March 3.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. March 3, 1913.

1. AUCTION (§ I—1)—PUFFING—SELLER'S RIGHT TO BID NOT RESERVED—SALE OF GOODS.

Where at an auction sale of a horse it appears that the vendor employed a "puffer" to bid at the sale, without reserving the right to do so, and the price was bid up to much beyond the value of the animal without the knowledge of the person who became the purchaser, the latter would be entitled to rescind the transaction upon discovering the fraud, even before the passage of the Sale of Goods Act, 1910, N.S. Stat. 1, sec. 58, sub-secs. 3 and 4, making a sale under such circumstances unlawful.

[*Mortimer* v. *Bell*, L.R. 1 Ch. 10, and *Smith* v. *Clerke*, 12 Ves. 482, referred to.]

2. SALE (§ III C—74)—RESCISSION—REJECTION—RETURN IN "REASONABLE TIME"—QUESTION OF FACT.

Whether a purchaser at an auction sale, which was fraudulently conducted in that the seller employed a "puffer" to bid up the price far beyond the actual value of the chattel, has repudiated the purchase and returned the chattel within a reasonable time, is a question of fact in each case.

[*Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, referred to; and see Leake on Contracts, 6th ed., 259, 269.]

3. COURTS (§ I—1)—JURISDICTION OF MAGISTRATE'S COURT—CIVIL ACTION—FRAUD.

In an action in a magistrate's court (N.S. on a promissory note given for the purchase price of a chattel, the defence of fraud connected with the sale may be set up as in any other court. (*Per* Sir Charles Townshend, C.J.)

Statement

APPEAL from the judgment of the Judge of the County Court for district No. 4, in favour of plaintiff in an action on a promissory note for $60 given by defendants for the purchase price of a horse. The animal in question was sold at auction. Prior to the sale, one of the defendants had a conversation with plaintiff in which he told him that he knew nothing about horses, having been engaged all his life in mining, but that he required another horse for going into the woods, to which plaintiff replied:—

I'll guarantee that that mare will do your work and raise you a colt.

In further conversation plaintiff said:—

That mare up there is in foal by one of the finest horses in Stewiacke and I would advise you to buy her if you can get her at the auction for $60.

There was evidence to shew that plaintiff instructed the auctioneer who acted for him at the sale to "drop her" whenever he got a bid for $60 and that plaintiff's son, who was unknown to defendant bid against the latter at the sale running the price up to $60 at which amount she was at once knocked

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down to defendant. Defendant retained the mare from the date of the sale, October 15, 1909, until the 27th November following, when, having found that she was unfit for any work for which he required her, he returned her to plaintiff, who later re-sold her for $10. The defence to the action was fraud. The action was originally brought in the magistrate's Court and was carried on appeal to the County Court, where the judgment appealed from was affirmed on the ground that the defence of fraud, even if it could be proved, could not be set up in the magistrate's Court, but should have been raised by way of cross-action or counterclaim for damages.

The appeal was allowed with costs.

H. Putnam, for appellant.

S. D. McLellan, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This action on a promissory note was begun in the magistrate's Court where judgment was in plaintiff's favour. On appeal to the County Court that judgment was affirmed, and from that decision defendant has appealed to this Court.

The Judge of the County Court did not decide the case on the merits, but held that the defence of fraud was not available in an action in the magistrate's Court. In that opinion he was clearly wrong as the statute admits of any defence being set up that could be urged in this or any other Court. It is therefore necessary for us to give the judgment on the merits which the Court below should have given.

The whole transaction on the part of the plaintiff in selling the horse to the defendant, or, rather the devices to which it is evident he resorted in his endeavour to induce defendant to buy the horse, were questionable if not fraudulent. Although his representations as to the horse's capacity for work were in the event proved untrue, they do not appear to have amounted to a warranty. It is proved, however, that he had instructed the auctioneer as soon as he got a bid of $60 to knock her down quickly to the bidder. This with the further fact that his son bid her up against the defendant's bid until $60 was reached is significant and sufficient to justify us in the inference that the son was simply a puffer at the auction sale instructed for the purpose. When defendant offered her to him for the price he had bid her in he answered at once that he did not want her. It is significant, moreover, that neither this son nor the father gave evidence on the trial. It is proved beyond question that this horse was not worth $60 or anything like it and that the defendant was completely deceived as to the ability of the horse to do the work for which he required her, and had told plaintiff before the sale what kind of a horse he wanted. I enter-

tained some doubt whether the defendant's delay in returning the horse after he discovered her defects would not preclude his defence in fraud, but on consideration I think he has fairly accounted for the time which passed without his doing so.

The appeal should be allowed with costs and judgment for the defendant with all costs in Courts below.

Graham, E.J.

GRAHAM, E.J.:—The auction sale of the animal in question took place just before the passage of the Sale of Goods Act, 1910, N.S. Stat. 1, sec. 58 (3) (4), following the Sale of Goods Act, 1893, ch. 71, sec. 58, sub-secs. (3) (4), of the United Kingdom, but I think it fairly indicates what the common law before the statute was, namely, that—

where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.

The common law Judges had held this in England from the time of Lord Mansfield, in *Bexwell* v. *Christie*, 1 Cowp. 395, down to the time of the passing of the statutes on the subject in respect to real, as well as personal property. There were great names in connection with the decisions. I have mentioned Lord Mansfield. Then there were Lord Kenyon, in *Howard* v. *Castle*, 6 T.R. 642; Lord Tenterden, C.J., in *Wheeler* v. *Collier*, 1 Moo. & Malk. 123; *Crowder* v. *Austen*, 3 Bing. 368; *Rex* v. *Marsh*, 3 Y. & J. 331; *Thornett* v. *Haines*, 15 M. & W. 367, and Willes, J., and Byles, J., in *Green* v. *Baverstock*, 14 C.B.N.S. 204.

And in the Courts of the states of the United States, both at law and in equity the same principle prevailed: 4 Am. & Eng. Ency., 2nd ed., 505; *Pennock's Appeal*, 14 Pa. St. 446. But in England some of the equity Judges held differently. They distinguished. Perhaps there could not be better evidence of what the law in England had been than a recital in a statute passed by the Parliament of the United Kingdom. This was the statute which was passed to make the law uniform. Sale of Land by Auction Act, 1867, ch. 48, sec. 4:—

And whereas there is at present a conflict between Her Majesty's Courts of common law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the Courts of law holding that all such sales are absolutely illegal, and the Courts of equity under some circumstances giving effect to them, but even in Courts of equity the rule is unsettled;

And whereas, it is expedient that an end should be to such conflicting and unsettled opinions;

Be it therefore enacted that . . . whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer the same shall be deemed invalid in equity as well as at law.

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In section 3 there was this definition:—

3. "Puffer" shall mean a person appointed to bid on the part of the owner.

Then as to the distinction before these statutes it is said in Kerr on Frauds, 4th ed., 292:—

In sales by auction the employment by the vendor of a puffer or agent to bid for the purpose of increasing the price without disclosing the fact was held by the Courts of common law to be fraudulent and the purchaser might avoid the sale, and bids by the auctioneer as the vendor's agent had the same effect. Courts of equity drew a distinction between the employment of a bidder for the purpose of protecting the property from being sold at an undervalue which was not considered fraudulent, and the employment of a bidder to increase the price, but the employment of more persons than one to bid was held to be fraudulent because only one could be necessary for the protection of the property and the employment of more could only be for the purpose of increasing the price.

I refer to Lord Cranworth's judgment in *Mortimer* v. *Bell*, L.R. 1 Ch. 10, which led to the passing of the Act, 1867, ch. 48, and to *Smith* v. *Clerke*, 12 Ves. 482, in which Sir William Grant said:—

For, if the person is employed not for the defensive precaution with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, I am not ready to say that is such a transaction as can be justified in a Court of equity.

There would be much good reason, especially after the passing of these statutes in England and in Nova Scotia indicating which decisions were right, to follow the common law Judges and the American Judges. But this case can so easily be determined even under the opinions of the equity Judges with the same result as it would be determined under the common law Judges that it would be mere affectation to say which ought to be followed. Mark the distinction. A person could be employed to run up the bidding to prevent a sale at an "undervalue." But not a step beyond. As Willes, J., pointed out in a case I have mentioned the equity Judges were just following out the ideas of the sales of their own Courts.

Now, here, I propose to shew that a vendor's bidder, after any real bidder had dropped out ran the vendee up by small bids to a price far in advance of the value of the horse; that there was a palpable fraud practised on the vendee in this transaction. The learned County Court Judge says nothing on this point. His view was that this action is on a note of hand and the horse must have been worth at least $10, and therefore he makes no finding on the question of fraud. The defendant's case was that there was fraud and a return of the horse within a reasonable time and therefore a defence to the note. So that I have not to meet any finding of facts against the view I hold.

The plaintiff had an auction sale on October 15, 1909, of certain stock and farm stuff, this mare included. The defendants, Fred Bentley, and his mother, who is a party to the note, attended the sale and before the sale they saw the plaintiff and they talked about this mare. Their conversation is corroborated by an independent witness, Burpee Miller. The plaintiff did not come to the trial. It was said that he was ill, but there is always a provision for taking the evidence of such a person *de bene esse* at his residence.

Fred Bentley had never seen this mare before and knew nothing except what the plaintiff told him, and he says he believed the plaintiff. He had recently returned after an eight years' absence in the West where he had been mining, and moreover, he knew nothing about horses, and he told the plaintiff he did not, that he had been mining all his life. (The learned Judge here read extracts from the evidence.)

Then the auctioneer, Samuel Cox, not a willing witness for the defendant, I should judge, says, that before the sale the plaintiff spoke to him:—

> He then said, "Whenever you get a bid of $60 you can drop her." My answer was, "Will I drop her quick?" and he replied, "Yes."

Fred Bentley started the mare at $30 and it went on at dollar bids. The son made a $50 bid. The auctioneer thinks that a man from Musquodoboit—he cannot give his name—bid $55.

One would like to know more about that bid. I shall deal with the real value presently. But the plaintiff's son, Alexander, who held the horse while the bidding was going on from that time by winking to the auctioneer sent the bids up by fifty cent bids to $60. Fred Bentley says:—

> When the bidding stopped my bid was $60 and the horse was dropped to me quick without another bid being asked for.

Now there is evidence tending to shew that Alexander Wright did not want a horse at all, that he already had a horse, and Fred Bentley says he did not know that the person bidding was the plaintiff's son until he was told so after the sale. Fred Bentley says:—

> When we were about leaving, my mother pointed out to me the man who she said bid against me. And I asked why he run the mare up so, bid her up so high. He answered he wanted the mare. I then told him he could have her at the same as the last bid. He answered, "I don't want her at all now."

Alexander does not go into the witness-box at all. Another son does, but not Alexander, nor, as I said, the plaintiff himself.

Now as to the real value, first, by estimates of persons who knew something of horses, and, secondly, by the quality of the

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animal. Not a witness to prove that this animal was worth more than $20 went into the box. As a fact, the mare was after her return sold again at auction after due advertisement when seven or eight farmers were present and she sold for $10. (The learned Judge here set out extracts at length from the evidence.)

Thomas Francis, called by the plaintiff, in his examination said after the sale to the defendant:—

> Fred, she's no good, I never thought she was any good . . . wouldn't have her on any consideration . . . I had a poor opinion of the horse.

This witness, about a fortnight after the sale, was chaffing Fred Bentley about his evidently wretched bargain and the plaintiff, because the other had used words attempting to defend it, for fear of being considered a fool, I suppose, called him as a witness as to what Bentley had said. But the plaintiff was in the midst of his friends at Upper Stewiacke, farmers and so on, who knew the mare. Not one apparently could be got into the box to shew that the beast was worth anything like $60 or was fit for hauling logs or plowing. Of course she was not fit for the woods, nor for any of the defendant's purposes. Where was the man from Musquodoboit who, it was claimed, bid $55? The plaintiff's auctioneer could have directed him to that man for a witness.

It is clear that the sale was an absolute fraud and the price which the defendant was run up to much beyond the value of the animal. Therefore even according to the equity Judge's decisions, it was within the cases.

Then it is contended that the defendant did not repudiate the purchase and return the beast within a reasonable time. And in connection with that I shall quote some evidence that will also bear on the point I have just left, the quality or value of the animal.

It takes a little time to find out the quality or value of a horse. The horse must be tried and for that a reasonable time is allowed, particularly when the purchaser knows nothing about a horse and thinks it requires resting and feeding, when this horse had been resting and feeding all summer and the application of liniment would cure the bog spavins. I really think that what did convince him at last was when the beast was foolish enough to lie down in the stable and Mrs. Bentley had to send for the neighbours to help it to get on its feet again. At any rate the sale took place on October 15, 1909, and the return was offered the 26th of November and actually made on the 27th. The last three weeks of this period the defendant Fred Bentley had been absent lumbering in the woods, having gone without the horse, and on his return learned of the incident of the animal not being able to get on its feet once it was down. (The learned Judge here referred to the evidence of Fred Bentley.)

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This is also testified to by the co-defendant. Then there is this corroboration in addition that when Fred Bentley went to the plaintiff to offer to return the mare and to make known his reason for so doing, namely, the condition of the animal, he took with him the witness Burpee Miller and we have from these two what the plaintiff said in reply to the charges. (The learned Judge here quoted at length from the evidence of Burpee Miller and Mrs. Wright.)

When the animal was returned the plaintiff had it sold, apparently by a constable. However, it ought to be said in connection with the right to return the animal that it was in as good condition as ever and the position of the plaintiff had not been altered during the period the defendant had kept the horse. This is not dealing with a staple article in a city but with a horse in a country place and for the purposes of trial and because all of the circumstances of the fraud would not reach at once the defendant's knowledge, I am of opinion and it is a question of fact, that the horse was returned within a reasonable time.

The case of *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, supplies principles for determining such a question. Moreover, it was held that—

> Fraud being established against a party it is for him, if he alleges laches in the other party, to shew when the latter acquired knowledge of the truth and prove that he knowingly forbore to assert his right.

I also refer to Leake on Contracts, 6th ed., 259, 269.

For instance, while Fred Bentley might have found out very shortly after the sale that the person bidding against him was the plaintiff's son, there was a further link necessary, that supplied by Cox, the auctioneer, that the plaintiff had a puffer to bid up to $60. When did Bentley acquire this knowledge? *Staines* v. *Shore*, 16 Pa. 200. There the horse died on the bidder's hands about thirty days after the sale and it was not shewn when he found out that a puffer was bidding.

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

RUSSELL, and DRYSDALE, JJ., concurred.

Russell, J.
Drysdale, J.

Appeal allowed with costs.

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REX v. BACHRACK.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, R. M. Meredith, Magee, and Hodgins, JJ.A. January 15, 1913.

1. INDICTMENT (§ II E 2—30)—SUFFICIENCY OF—CONSPIRACY TO PROCURE ABORTION—CRIMINAL CODE SECS. 303, 852.

An indictment for conspiracy to procure an abortion is sufficient under secs. 303, 852 of the Criminal Code, 1906, where it alleges that the defendants did, at a place in the Province of Ontario, at a given time, conspire, combine, confederate, and agree together to commit a certain indictable offence, to wit, the crime of abortion, by then and there conspiring, combining, confederating, and agreeing together to procure the miscarriage of a named woman, thereby committing an indictable offence, contrary to the Criminal Code.

[*Regina* v. *Rowlands* (1851), 17 Q.B. 671, specially referred to.]

2. EVIDENCE (§ X F—727)—CONSPIRACY TO COMMIT CRIME IN ONTARIO—COMMISSION IN FOREIGN COUNTRY—EVIDENCE OF ACTS IN—COMPETENCY.

Where, on a criminal trial for conspiracy to procure an abortion, it appeared that the defendants conspired to procure its performance in Ontario, but finding it difficult to do, went to a foreign country, evidence is admissible as to what occurred there in furtherance of the conspiracy.

3. EVIDENCE (§ X F—727)—CONSPIRACY TO COMMIT CRIME—ACTS AND DECLARATION OF CONSPIRATORS AFTER COMMISSION—RELEVANCY.

Acts and declarations of those charged with the crime of conspiracy to procure the performance of an abortion, occurring immediately after its commission and made while procuring care for the person upon whom the abortion was performed, are admissible as tending to establish the conspiracy.

Statement

CROWN case reserved by DENTON, Jun. Co. C.J., as follows:—

This case came on for trial before me, sitting as Chairman of the Court of General Sessions for the County of York, with a jury, on the 20th, 21st, 22nd, and 23rd days of May, 1912. John Willis was acquitted and Julius Bachrack and Emmanuel Bachrack were convicted upon the following indictment, which the grand jury had found on the 11th day of March, 1912, the indictment having been preferred with my consent in writing, as acting Chairman of the said General Sessions:—

"That Julius Bachrack, Emmanuel Bachrack, and John Willis, at the city of Toronto, in the county of York, in or about the month of November in the year of our Lord one thousand nine hundred and eleven, did conspire, combine, confederate, and agree together to commit a certain indictable offence, to wit, the crime of abortion, by then and there conspiring, combining, confederating, and agreeing together to procure the miscarriage of a certain woman named Maud McComb, thereby committing an indictable offence, contrary to the Criminal Code."

Particulars were demanded by counsel for the accused on the 13th day of March, A.D. 1912, as follows:—

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(1) Particulars of the overt acts of the several accused relied on by the Crown to prove the existence of the conspiracy charged.

(2) Particulars of the place where the indictable offence referred to in the said indictment was committed or was to be committed, and particularly whether the place relied upon was or is within the Province of Ontario or the Dominion of Canada.

(3) Particulars of the place or places and time or times when the alleged unlawful conspiracy or agreement was entered into, and whether within the Province of Ontario or the Dominion of Canada, or not.

Subsequently a motion was made for an order directing the Crown to furnish such particulars, but before the return of the motion the particulars hereinafter set out were furnished by the Crown, which, in the exercise of my discretionary powers, I ruled to be sufficient.

The particulars served in writing by the Crown upon the counsel for the accused were as follows:—

"In answer to the demand for particulars dated the 13th March, 1912, by the defendants' solicitors herein, the following, among other facts, will be relied upon at the trial hereof in support of the case of the Crown:—

"(1) The intercourse between the defendant Julius Bachrack and Maud McComb in the month of November, 1911, at the city of Ottawa.

"(2) The condition of pregnancy of the said Maud McComb thereafter.

"(3) The joint actions of the three defendants in the city of Toronto in providing pills, tea, and medicines to produce abortion.

"(4) The visits to Dr. Fish of the defendants Emmanuel and Julius Bachrack to request him to perform an operation on the said Maud McComb to procure an abortion, and the introduction of a strange woman to her by them to take her to Dr. Fish.

"(5) The fact that the defendant Julius Bachrack and the defendant John Willis accompanied the said Maud McComb to Buffalo, and their efforts to secure the operation there, and their subsequent visit to Rochester, where the operation was performed.

"(6) The payment of $25 to the said Maud McComb to have the operation performed in the city of Toronto.

"(7) The fact that the defendants accompanied the said Maud McComb to Hamilton and had Dr. Mullen called to attend her.

"The above are the facts to be relied upon by the Crown, in addition to such evidence in support thereof as may be adduced generally to prove the same."

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After these particulars had been given, and before pleading, counsel for the accused filed a demurrer in the following form (omitting the preliminary recital):—

"Julius Bachrack, Emmanuel Bachrack, and John Willis say that they are not guilty of the alleged offences in the indictment charged.

"And for a further plea, nevertheless, say that our Lord the King ought not further to prosecute them by reason of the premises in the said indictment mentioned, because the said indictment and the matters therein contained are not sufficient in law to compel the said accused to answer thereto, and they state and shew to the Court here the following causes for demurrer to the said indictment, that is to say:—

"The said indictment does not sufficiently shew where any indictable offence, which the Crown desires to charge as the indictable offence which the accused conspired and agreed to commit, was committed within the Province of Ontario, or even within the Dominion of Canada, and the said indictment is bad at law, in that it does not charge that such indictable offence as the Crown desires to allege was committed or was contemplated or intended or agreed to be committed within the jurisdiction of the said Court in which the said indictment was preferred and found.

"The said indictment does not disclose any indictable offence at law.

"The said Court has, for the reason above set out, no jurisdiction to try the said indictment.

"And this the accused are ready to verify.

"Wherefore the said accused pray judgment, and that by the said Court here they may be dismissed and discharged from the said premises in the said indictment specified, and so forth; and in default thereof that the said accused may be allowed to plead over to the said indictment."

This demurrer came on for argument on the 21st day of March, 1912 and I gave judgment on the 25th day of March, 1912, holding that the indictment, read in connection with the particulars thereof delivered, sufficiently charged an indictable offence.

The accused were then allowed to plead over, and pleaded "not guilty."

As John Willis was acquitted, this reserved case deals only with Julius Bachrack and Emmanuel Bachrack.

Counsel for the accused has requested me to reserve a case, not only as to the judgment I gave upon the demurrer, but also upon the points hereafter detailed, which arose in the consideration of the evidence.

It was objected by counsel for the accused that, even if the

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indictment was good, as I had ruled, in any event evidence could not be admitted of any agreement to go to the United States for the purpose of having an operation for the purpose of an abortion performed there, or of any acts that took place in the United States, or of the operation that was alleged to have been performed there, these not being as alleged in furtherance of the evidence of conspiracy to procure the commission of the unlawful act in Canada, but subsequent thereto, and relating to a matter not within the jurisdiction of our Courts.

It was also urged by counsel for the accused, having regard to the evidence of Dr. Mullen, that this evidence could not be admitted, it having relation to acts and declarations after the event conspired for had happened, and that these acts and declarations were not receivable in evidence, since they could not be in furtherance of the conspiracy charged. I ruled on this branch of the case that declarations of the accused were always evidence against the person who made them, but that the acts and declarations of one conspirator at this stage of the case were not evidence against his co-conspirator, and the witness was warned to confine his evidence to such declarations as implicated only the person making them.

At the request of counsel for the accused, I have reserved for the consideration of the Court of Appeal for the Province of Ontario the following questions of law arising upon the demurrer and upon the evidence:—

First, was I right in overruling the demurrer and in holding that the indictment was good in law, and did sufficiently charge an indictable offence, and that the offence charged in the said indictment and in the particulars was within the jurisdiction of the Court in the Province of Ontario in which the said indictment was preferred?

Second, was I right in admitting the evidence of the agreement to go to the United States for the purpose of having an operation performed there and of the occurrences in Buffalo and Rochester outlined in the evidence of Maud McComb?

Third, was I right in admitting the evidence (restricted in the manner above stated) of Dr. Mullen as to acts and declarations of the accused?

Fourth, in case your Honourable Court should be of opinion that the evidence referred to in the second and third questions or any part thereof was improperly admitted, was any substantial wrong or miscarriage of justice thereby occasioned on the trial, as called for by sec. 1019 of the Criminal Code?

Argument

H. H. Dewart, K.C., for the defendants. The indictment is bad as charging a conspiracy to commit an offence in the United States, and is not within the jurisdiction of our Courts. The indictable offence which the parties are charged with conspiring

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to commit must be an offence indictable in Canada. Procuring an abortion in the United States is not an indictable offence in Canada. See secs. 653, 656, 888, 974, 976, and 977 of the Criminal Code; *Regina* v. *Bernard* (1858), 1 F. & F. 240; *Regina* v. *Kohn* (1864), 4 F. & F. 68. The particulars of the indictment here sever the charge into its threefold character, all improperly charged in one count, because each is, if at all, the subject of a separate conspiracy: (1) conspiracy to commit abortion in Toronto; (2) conspiracy to commit abortion in Buffalo; (3) conspiracy to commit abortion in Rochester. The indictment is clearly bad: *Rex* v. *Walkem* (1908), 14 Can. Crim. Cas. 122, at p. 132. Conspiracy to procure an abortion is not indictable. There is no crime of abortion, and the added words in the indictment, "to procure the miscarriage of a woman," do not help. Abortion may be perfectly legal under certain circumstances. The offence in sec. 303 of the Code is: with intent to procure miscarriage, either unlawfully to administer or cause to be taken a drug or noxious thing or unlawfully to use an instrument, etc. These essential ingredients of the offence must be charged in the indictment: *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359, 10 Can. Crim. Cas. 424; *Ex p. O'Shaughnessy* (1904), 8 Can. Crim. Cas. 136; *Regina* v. *Cameron* (1898), 2 Can. Crim. Cas. 173, at pp. 174, 175; Taschereau on the Criminal Code, ed. of 1893, pp. 675, 678; *Regina* v. *James* (1871), 12 Cox C.C. 127; *Regina* v. *Norton* (1886), 16 Cox C.C. 59; Stroud's Judicial Dictionary, 2nd ed., vol. 3, p. 2248; *Rex* v. *Cook* (1909), 19 O.L.R. 174. The evidence of the agreement to go to the United States and of the occurrences in Buffalo and Rochester was improperly admitted: *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57; *Regina* v. *Debruiel* (1861), 11 Cox C.C. 207; *Regina* v. *Ellis*, [1899] 1 Q.B. 230, 19 Cox C.C. 210, at pp. 216, 217; Phipson on Evidence, 4th ed., p. 45; *Price* v. *Worwood* (1859), 4 H. & N. 512, 514; *Regina* v. *Boulton* (1871), 12 Cox C.C. 87, at p. 92; *Regina* v. *Rowlands* (1851), 5 Cox C.C. 436, 497, 17 Q.B. 671; *Regina* v. *Holt* (1860), 1 Bell C.C. 280. Dr. Mullen's evidence was clearly inadmissible. Declarations made by confederates after the event cannot be in furtherance of the common purpose, and must, therefore, be rejected: Wright's Criminal Conspiracies, ed. of 1887, p. 217; *Regina* v. *Blake* (1844), 6 Q.B. 126; *Wright* v. *Tatham* (1838), 5 Cl. & F. 670, at p. 689; *Heine* v. *Commonwealth* (1879), 91 Pa. St. 145; *Patton* v. *State of Ohio* (1856), 6 Ohio St. 467. As to any substantial wrong having been done, see *Allen* v. *The King* (1911), 18 Can. Crim. Cas. 1, and *Rex* v. *Sunfield* (1907), 15 O.L.R. 252.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown. No fault can rightly be found with the form of the indictment.

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It charges the accused with the "crime of abortion." The Code specifies, in sec. 303, what the crime of abortion is. There can be no doubt that the accused received ample notice of what they were charged with. The evidence of the agreement to go to the United States for the purpose of committing the offence was rightly admitted: *Regina* v. *Kohn*, 4 F. & F. 68. The jury found that the prisoners conspired to procure an abortion in this Province. The evidence shewed that what the prisoners did was all part of one criminal scheme, and so the evidence was properly admitted, both in regard to what had taken place before and after the event: Wright's Criminal Conspiracies, p. 216; Archbold's Criminal Pleading, 24th ed., pp. 1410 to 1418.

Dewart, in reply. There is nothing in sec. 852 of the Code that overrides the rule that the offence must be charged in the indictment.

Meredith, J.A.

January 15, 1913. The judgment of the Court was delivered by MEREDITH, J.A.:—The objections, made here, to this conviction, technical as well as substantial, seem to me to be quite without weight.

The form of the indictment is, in my opinion, quite sufficient; it charges the prisoners with having conspired to commit "an indictable offence," "the crime of abortion;" and the law makes very plain what the indictable crime of abortion is: see sec. 303 of the Criminal Code.

"Every count of an indictment shall contain, and shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified.

"Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

"Such statement may be in the words of the enactment describing the offence or declaring the matter to be charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged."

These are the provisions of the Criminal Code, sec. 852, expressing the modern reasonable and sensible rule as to pleadings; and, under it, the objection to the form of the proceeding seems to me to be plainly untenable; as I think it would also have been under earlier methods: see *Regina* v. *Rowlands*, 17 Q.B. 671.

Then, in regard to matters of substance, it was contended for the prisoners: that they were charged with a conspiracy to do an act beyond the jurisdiction of the Courts of this Province; and that that was no crime; or, if that were not so, then all evidence of attempts to commit, and of the commission of, the act beyond such jurisdiction, was irrelevant, and so had been wrongly admitted, to the prisoners' prejudice.

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But this contention I am unable to consider right in fact, in law, or in logic.

The jury have found, upon evidence quite sufficient to warrant the finding, that the prisoners conspired to procure the abortion in this Province.

If that had not been so, the question would have arisen whether a conspiracy to do a wrong, or commit that which would be a crime if committed in the country where the conspiracy was hatched, could be there punished if the act were to be done in some other country.

The law would be lame if it were powerless to reach conspirators so long as they took care to agree to carry into effect their wrongs beyond the borders of the country in which they conspired to do the wrongs. It must be borne in mind always that the crime of conspiracy may be complete without any thing having been done to carry it out. And the cases, as far as they go, are against the contention for the prisoners; these cases were dealt with in the case of *Regina* v. *Connolly and McGreevy* (1894), 25 O.R. 151, to some extent, and were all, as far as I know, referred to and discussed on the argument here; see also *Commonwealth* v. *Corlies* (1869), 8 Phila. (Pa.) 450; and *Ex p. Rogers* (1881), 10 Tex. App. 655, referred to in the Cyclopædia of Law and Procedure ("Cyc.") vol. 8, p. 687. But it will be time enough to consider this interesting question when it has to be considered.

The latter part of the contention I am now dealing with seems to me to disregard the fact that, if the law were as contended for, there would yet be two things to be proved: (1) a conspiracy to do the act; and (2) to do it within the jurisdiction; and so the evidence as to what took place without the jurisdiction might be the best of evidence for the Crown on the first question; as well as helpful to the prisoners on the question of the place where the thing was to be done. The prisoners wholly denied any conspiracy to procure an abortion; what took place in the State of New York was the strongest kind of evidence that they were guilty of such a conspiracy; and the prosecution, giving it for that purpose, had to take the chances of its effect as to the place where the wrong was to be done; chances which, in view of what was proved to have taken place in this Province, might confidently be taken. There was evidence upon which any jury might find that the prisoners had conspired to procure the abortion in Toronto; but, finding it difficult, if not impossible, to succeed in their nefarious design there, went further afield.

Beside this, the things proved were all part of the one criminal plan; and I know of no reason why the whole story may not be told, although it involve other crimes, or things which are not crimes. If one set out to commit murder and arson, or the

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murder of more than one person, and does it, may not the whole story be told in evidence?

So, too, in regard to the last point—evidence of what took place after the abortion—it was all part performance of the one conspiracy; the care of the woman immediately after the criminal act was necessary for the fulfillment of their design to do the wrong and escape detection and punishment.

I would answer the first three questions in the affirmative, and confirm the conviction.

Conviction affirmed.

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Re GIBSON and CITY OF TORONTO.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Magee, and Hodgins, JJ.A. January 15, 1913.

1. HIGHWAYS (§ V B—257)—STREET WIDENING—BUILDING RESTRICTIONS—EXPROPRIATION—COMPENSATION.

Upon an arbitration to determine the compensation to which a land owner is entitled for the expropriation under a city by-law of a strip of his land for the widening of a contiguous street, the arbitrator may properly consider (*a*) the damage suffered by the owner in being precluded from erecting commercial buildings on the expropriated strip, (*b*) that, although the city had passed a prior by-law rendering the property residential and restricting the erection of any building within a fixed distance of the street, such by-law might later on be repealed and the property might thereupon become commercial.

[*Re City and South London Railway and St. Mary Woolnoth*, [1903] 2 K.B. 728, [1905] A.C. 1; *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *Cunard* v. *The King* (1910), 43 Can. S.C.R. 88; and *Re South Twelfth Street* (1907), 217 Pa. St. 362, specially referred to.]

2. EMINENT DOMAIN (§ III E—165)—RIGHTS AND REMEDIES OF OWNERS—WIDENING STREET—CONSEQUENTIAL INJURIES.

Upon an arbitration to determine the compensation to which a land owner is entitled for the expropriation under a city by-law of a strip of his land for the widening of a contiguous street, the arbitrator will consider whether or not certain conditions, predicated as necessarily reducing the value of the expropriated land, are merely temporary, for instance, a prior city by-law rendering the property in question residential, thus opening to the owner the right in such event to shew that the restrictive by-law might later on be repealed and the property thereby might become commercial and in consequence more valuable.

[*Re City and South London Railway and St. Mary Woolnoth*, [1903] 2 K.B. 728, [1905] A.C. 1; *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *Cunard* v. *The King* (1910), 43 Can. S.C.R. 88; and *Re South Twelfth Street* (1907), 217 Pa. St. 362, specially referred to.]

Statement

APPEAL by James Robert Gibson from the award of P. H. Drayton, Official Arbitrator for the City of Toronto, in respect of the expropriation by the city corporation of the southerly seventeen feet of block A, plan 1307, on the north side of St. Clair avenue, Toronto, whereby he fixed the amount due to the

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appellant as compensation for the land taken and for injury to the rest of the appellant's land at $1,328.50.

The appeal was based upon the ground that the arbitrator should have taken into account the damage suffered by the appellant by being deprived of the advantage of erecting commercial buildings on the seventeen feet taken, in connection with the adjoining land south of the dwelling-house erected on the lot.

Statement

On the 18th August, 1910, the city council passed a by-law declaring the part of St. Clair avenue on which the appellant's land fronted to be a "residential" street, and prohibiting the erection of any building within seventeen feet of the north and south lines of the street. This by-law was in force when the expropriating by-law was passed, on the 23rd June, 1911; but was repealed on the 24th June, 1912.

Argument

G. F. Shepley, K.C., and *J. S. Fullerton*, K.C., for the appellant, argued that the by-law of the 18th August, 1910, imposing the restriction on building, must be treated as a part of the expropriation proceedings, and the value of the land must be considered apart from the effect of the by-law thereon. The dictum of Meredith, C.J., in *Toronto R. W. Co.* v. *City of Toronto* (1906), 13 O.L.R. 532, relied upon by the Official Arbitrator, has to do with a subject not cognate to the present inquiry, and has no bearing upon it. They referred to *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, at p. 24, also at p. 28, *per* Vaughan Williams, L.J., and at p. 32, *per* Fletcher Moulton, L.J. That case was not "on all fours" with the case at bar, but it illustrated the principles which should guide the Court in dealing with such matters, and shewed that possible and potential values should not be excluded from consideration. They also referred to *In re Countess Ossalinsky and Manchester Corporation* (1883), reported in Browne and Allan's Law of Compensation, 2nd ed., pp. 659-661. The arbitrator further erred in treating the by-law as if it were of perpetual obligation, which was never intended by the corporation; it was in fact subsequently repealed.

G. R. Geary, K.C., for the city corporation, argued that, so long as the by-law remained in force, the arbitrator had no right to assume that in the future the circumstances might be different. The future is uncertain, and the prices at present prevailing are extravagant. He referred to *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37, as a case which went a long way in the respondents' favour, and had not been overruled; also to *In re City and South London Railway and St. Mary Woolnoth*, [1903] 2 K.B. 728; *Slattery* v. *Naylor* (1888), 13 App. Cas. 446; *Simmons* v. *Malling Rural District Council*, [1897] 2 Q.B. 433, 437; and the judgment of Buckley, L.J., in the *Lucas* case, at pp. 35, 36.

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Shepley, in reply, urged that the by-law, while it might not be an improper one in itself, was used by the respondents for an improper purpose.

January 15, 1913. MACLAREN, J.A.:—This is an appeal by the owner of a certain lot on the north side of St. Clair avenue, in Toronto, from the award of the Official Arbitrator as to the compensation to which the owner is entitled for the taking of the southerly seventeen feet of his lot for the widening of St. Clair avenue, by a by-law passed on the 23rd June, 1911.

The owner claimed that the arbitrator should take into account the damage suffered by him by being deprived of the advantage of erecting commercial buildings on these seventeen feet in connection with the adjoining land south of the dwelling-house erected on the lot in question.

The arbitrator held that he was precluded from taking this into consideration by the fact that the city council had, on the 18th August, 1910, passed a by-law declaring that part of St. Clair avenue to be a residential street, and prohibiting the erection of any building within seventeen feet of the north or south line of the street.

In the reasons for his award he says: "The real reason for the passing of this by-law is found in the evidence of Mr. Forman (the City Assessment Commissioner), given in these proceedings, viz., that, it being the intention of the city at a later date to expropriate seventeen feet for the purpose of widening St. Clair avenue, it was deemed expedient to prevent buildings in the meantime being placed on this seventeen feet, thereby increasing the amount of compensation which would have to be paid to the owners when their land was taken under the expropriating by-law. There is no doubt that the by-law must be repealed and will be."

As a matter of fact the by-law was repealed on the 24th June, 1912.

The arbitrator bases his conclusion, as to the above effect of this by-law, upon a dictum of Meredith, C.J., in a case of *Toronto R. W. Co.* v. *City of Toronto*, 13 O.L.R 532. I am unable, however, to find anything in this case to justify the decision arrived at by the arbitrator.

On the other hand, it was the duty of the arbitrator to have taken into account the probability, or, as he puts it, the certainty, of the by-law being repealed in the near future. Even apart from what he states was the reason for its being passed, the evidence shews that, from the rapidly changing nature of that part of the city, it was only a question of a short time when that part of St. Clair avenue would cease to be a purely residential neighbourhood, and such a by-law would require to be

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amended or repealed, and this is a matter which, the authorities shew, the arbitrator should take into account. Even when it is contingent or uncertain, it is an element which he should take into his consideration, or, as put in one of the cases, when they are "reasonably fair contingencies." For illustration of these rules, see *Hilcoat* v. *Archbishop of Canterbury* (1850), 10 C.B. 327; *In re City and South London Railway and St. Mary Woolnoth*, [1903] 2 K.B. 728, [1905] A.C. 1; *In re Countess of Ossalinsky and Manchester Corporation*, approved in *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; Browne and Allan's Law of Compensation, 2nd ed., p. 102; Cripps on Compensation, 5th ed., p. 117.

It would indeed be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property which it was about to acquire.

It was also urged on behalf of the city that, even if the by-law of the 18th August, 1910, were not an insuperable obstacle in the way of the appellant, the possibility of his being able to use the land in question for stores at some future date is too remote to found a claim for compensation upon. Some of the expert witnesses speak of its being likely to be profitably used for such a purpose "in the near future;" another says, in "eighteen months at the very latest;" while others speak more or less indefinitely as to the prospects. The authorities above cited shew that a much more remote period, and even greater contingencies, are proper matters for arbitrators to weigh and take into account.

The appeal in this case should, consequently, be allowed, and the award referred back to the arbitrator that he may take the foregoing matter into account, with the right to hear further evidence if he considers the same to be necessary or desirable.

Hodgins, J.A.

HODGINS, J.A.:—The land-owner's case was put in two ways: first, it was said that by-law 5545, passed under 4 Edw. VII. ch. 22, sec. 19, was in fact part and parcel of the expropriating machinery, and as such its effect in restricting the use of the land could not be regarded; secondly, that the arbitrator, if he did give weight to the by-law, should have also considered the fact that the City of Toronto might hereafter repeal the by-law. I think there is a feature common to both these objections, which I shall deal with first.

In the reasons given by the arbitrator, it is stated that by-law No. 5545 was passed only for a limited purpose, i.e., to prevent any building upon the seventeen-foot strip in the meantime and until the city expropriated it in order to widen St. Clair avenue to that extent.

If it is competent for the arbitrator to consider the possi-

bility of the repeal of such a by-law owing to changed conditions, he must be at liberty to have regard to its temporary or limited purpose as proved or admitted before him. The difference between the two aspects is one of degree only.

The potential use of property, even when hampered by dedication to uses which may require legislation or an Order in Council to remove, and cases where consent by the expropriating authority is essential to give substance to the anticipated use, have been considered in some of the cases cited.

In *In re City and South London Railway and St. Mary Woolnoth*, [1903] 2 K.B. 728, [1905] A.C. 1, the point for decision was, whether the purchase-money or compensation to be paid by the company for (*inter alia*) damage (if any) sustained by the severing of the lands taken from the other lands of the rector and churchwardens, or otherwise injuriously affecting such other lands by the exercise of the powers of the Acts, was to be assessed upon the bases: (1) that the site of the church (severed from the subsoil and crypt and from part of the surface land) might, under some Act of Parliament, or under a scheme under the Union of Benefices Act, 1860, or otherwise, at some future time have ceased to be the site of a church, and have become available for building, the arbitrator being at liberty to draw his own conclusion as to when that time was likely to arrive; or (2) that all the lands taken were the site of the church of St. Mary Woolnoth, and that the same could never be used for any other purpose: [1903] 2 K.B. at p. 731. It was argued that, because the City and South London Railway Company's Act of 1896, sec. 7, prohibited the railway company from acquiring or taking any part of the church itself, the object of the Legislature was, that the church should remain as a church, and that it could not be treated as an available site for a building, because its removal would require an Act of Parliament. And it was urged that the contingency of such an Act being passed was a matter which the arbitrator was not entitled to take into account, for it would be impossible for him to say when, if at all, such an Act would be passed. The Court of Appeal decided that, there being no words in the company's Act of 1896 indicating that the church was to stand on the land in perpetuity, it was proper for the arbitrator to consider the fact that, under the Union of Benefices Act, 1860, sec. 17, a scheme might be properly initiated which would enable the church to be sold. It is to be observed that such a scheme must, under that Act, be initiated by the Bishop of London or of Winchester, reported upon by a commission, consented to by the patrons of the benefices affected and the vestries of the churches, certified by the Ecclesiastical Commissioners, and finally directed by an Order in Council.

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In *Hilcoat* v. *Archbishop of Canterbury*, 10 C.B. 327, it was left to the jury to settle the compensation for the value of ground and buildings, not upon the assumption that they were consecrated, and, in the owner's hands, inapplicable to any secular purpose, but with reference to all the circumstances that had appeared in evidence before them, which included evidence both of the fact that the church property had been sold for enough to purchase another site and to compensate the owner, though not sufficiently in his opinion, and that, if applied to ordinary purposes, his interest was worth £1,540. This direction was approved by the full Court.

The decision is criticised by the Court of Queen's Bench in *Stebbing* v. *Metropolitan Board of Works*, L.R. 6 Q.B. 37; but in the latter case it is evident that the Court regarded the dedication to religious uses as absolute. The approval by Lush, J., of the charge to the jury in *Hilcoat's* case shews that the decision cannot be taken as deciding more than that, where land in the hand of the rector can never be devoted by him to secular uses, he cannot get compensation based upon its value freed from the dedication to religious services. Lush, J., at p. 45, says that the jury were directed to take into account "all the circumstances, the possibility, or perhaps probability, of the plaintiffs in that case being able to make some profit of it hereafter; but, if not, then its value actual or potential." And Hannen, J., at p. 46, speaks of the Metropolitan Board of Works having to make compensation to the rector for the freehold, subject to this particular restriction, which diminished its value in its hands.

In *Cunard v. The King* (1910), 43 S.C.R. 88, a majority of the Judges assume that the Judge of the Exchequer Court might have considered and given weight to the appellant's right as grantee of the soil to apply for and possibly obtain a license from the Dominion Government to build out in the waters of the harbour, but thought the award large enough to cover any possible benefit therefrom (see pp. 90, 91, 104). Mr. Justice Duff considered that the possibility of obtaining such authority was an element of value which should be considered in ascertaining the compensation.

And Bray, J., in *In re Lucas and Chesterfield Gas and Water Board*, [1908] 1 K.B. 571, at p. 580, in speaking of the grant of compulsory powers by Parliament, says: "It may be true that parliamentary powers may be difficult to obtain, but that is for the umpire to consider, not for me."

These cases are authority for the proposition contended for by the claimant, namely, that the arbitrator erred in not considering the possibility or likelihood of the consent of the City of Toronto being had by the repeal of the by-law, either because

of its temporary character or on account of a change in the character of the locality. The repeal of the by-law does not seem to be a more remote possibility than the passage of an Act of Parliament or of an Order in Council or of the obtaining of a license from the Dominion Government to build in the waters of a harbour, in the cases above referred to. Indeed, one might adopt as the statement of a fair principle the charge to the jury in the *Hilcoat* case as described by Lush, J., in the *Stebbing* case (already quoted), namely, that it is proper to take into account all the circumstances, the possibility, or perhaps probability, of the (owner) being able to make some profit of the land thereafter, but, if not, then its value actual or potential.

The rule is stated in almost the same words by Collins, L.J., in *In re Gough and Aspatria, etc., Water Board*, [1904] 1 K.B. 417, at p. 423: "To exclude the element of adaptability it would be necessary, as it seems to me, to shew that there is no reasonable possibility of the site coming into the market. The value of the possibility, if it exist, is a question entirely for the arbitrator." See also *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, which is dealt with hereafter.

But, apart from the decided cases altogether, or perhaps to put it more correctly, having regard to the principle underlying the various decisions, it would seem to me that in no case could an arbitrator disregard or refuse to receive evidence that any condition of affairs relied on by the expropriating body as reducing the value of the land taken or injuriously affected, was merely temporary or was likely to change in the future. In the case in hand, if it is proper for the City of Toronto to set up its by-law, it must be equally open to the claimant, if he concedes its validity, to urge that it was likely to be soon repealed, that it was not intended to be permanent, or that some movement was anticipated in the direction of business extension which would render it wise to do away with the restriction.

The giving of this evidence does not in any way impeach the right of the municipality to pass the by-law, and would only be ascribing to the city council sufficient wisdom to keep pace with the changing requirements of the different parts of the city. The cases cited by counsel for the respondents as to the reluctance of the Court to interfere with by-laws properly passed and within the competence of the council, are, in my view, quite consistent with the position which I think this claimant can, in this view, take before the arbitrator.

It follows from the above that the arbitrator should, if by-law 5545 is set up by the city as affecting this land, hear any evidence to shew: (1) that conditions may change and that the by-law may be repealed; and (2) that when passed it was intended to be only temporary or limited in its operation—provided

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that this evidence bears upon the potential use of the lands, as I think it does. The general scheme was widening St. Clair avenue by expropriating this seventeen-foot strip and payment of the value of the land to the land-owners. In anticipation of this, it is asserted, by-law 5545 was passed to prevent buildings being erected on the seventeen-foot strip meanwhile. If that was its sole purpose, then, I think, it became part of the general scheme and should be so treated. If it is not part of the expropriating machinery as such, it is part of the plan adopted, of which it and the valuation of the lands by arbitration were essential factors. I see difficulties in the way of holding that by-law No. 5545 should be treated as part of the expropriation proceedings. But in this case it makes little difference in the result. It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able, by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which it is contemplating expropriation.

I have not been able to find any English or Canadian decision exactly in point. *Gough* v. *Mayor, etc., of Liverpool* (1891), 65 L.T.R. 512, depends somewhat upon special legislation; but in it the order of the grand jury for the demolition of the houses under the expropriating Act was held inadmissible.

In *In re Lucas and Chesterfield Gas and Water Board,* [1909] 1 K.B. 16, which was much relied on by the appellant, the opinion is expressed that, where a public body has obtained authority to expropriate land, the special adaptability of which depends upon the consent of the public body, the latter cannot eliminate from consideration by the arbitrator that element of special adaptability, by asserting that it can and will refuse its consent. I do not think that this case goes so far as to disable a public body from asserting in an arbitration those private rights which it possesses. But it is authority for the proposition that those private rights which may give it a commanding position when the matter comes to be dealt with practically, cannot be set up, if a market exists, though it be limited in extent, as destroying the natural adaptability of the site so that the arbitrator cannot consider the possibility of those rights being reasonably used to promote, instead of to defeat, the suggested use of the land.

The Canadian case which comes nearest to the point is *In re Brown and City of Owen Sound* (1907), 14 O.L.R. 627, where the inclusion of the closing of a street in a general scheme was held not to defeat the land-owner's claim for compensation

unaffected by the benefit which the whole scheme conferred upon her lands. Mr. Justice Mabee there said, at p. 629: "In so far as the respondent was concerned, the 'contemplated work' was the closing of the road. This was part of the general scheme, and was necessary for the Carney company's works, and it seems impossible to believe that the corporation could, in effect, deprive the respondent of her right to compensation by including the proposal to close the road in the bonus by-law."

The rule which excludes evidence of the rise in value caused by the particular scheme under which the compulsory powers are exercised, ought equally to prevent evidence of the loss of value caused by the same scheme. As Mr. Justice Duff puts it in *Cunard* v. *The King*, 43 S.C.R. 88, at p. 100: "The circumstance that it is so required" (for a public purpose) "is not to enter into the computation of value as either enhancing or diminishing it."

A case in Pennsylvania, *South Twelfth Street*, 217 Pa. St. 362, was decided in 1907, under circumstances very closely resembling those in this case. In that State they have a system of plotting and placing streets in city plans prior to the condemnation of the land for that purpose, which plotting is not in itself a taking of the land. A street, South Twelfth street, was ordained, plotted, and placed on the city plan in 1870, and it was urged that, the claimant having purchased the property subject to this so-called restriction, the jury were bound to consider the value as in the open market, but subject to the restriction just mentioned. The Supreme Court of Pennsylvania, affirming the decision of the trial Judge, held that the jury were not so bound. Mr. Justice Stewart, in delivering judgment, said (p. 366): "Equally untenable is the other position taken, viz.: that if the true measure of compensation be the market value of the land when taken, the fact that no compensation could be recovered for the removal of any buildings erected on the bed of the proposed street after the same had been plotted, is to be considered as a circumstance affecting such market value. This is simply asserting the right of confiscation in a modified form, only feebly disguised. By reason of the plotting the owner is virtually denied the privilege of building on his land, and it is argued that with this privilege extinguished the land would have a much reduced value in the estimation of the average buyer. Of course, it would. But who is responsible for this reduction? Not the owner; the impairment of value resulted from nothing he had done, but as the immediate consequence of the steps taken by the municipality towards the appropriation, *in invitum*, of the owner's land. In the present case it is quite clear that without the right to build upon the land, this narrow strip, sixty feet wide,

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located as it is, would be of little if any value. This is the contention, that the municipality, in the furtherance of public ends, having stripped the land of nearly its entire value, now when it seeks to accomplish fully its purposes in connection therewith, is to be allowed to acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the constitutional provision which requires in all such cases just compensation to be made for the property taken . . . . ."

In this view I quite agree. I think the constitutional provision referred to in that judgment is no wider than is our statute. The decision goes farther than it is necessary in this case. There the plotting was in 1870. Here it was done just before expropriation proceedings were begun.

If the City of Toronto sets up this by-law as a valid exercise of its powers, and its effect as reducing the value of the land to the claimant, I think the latter ought to be allowed to object to its admissibility or its effect as infringing the rule I have quoted, and, if necessary, to prove that it was not really an independent legislative act, if that is important, but had an intimate connection with, and was really part of, the scheme for widening St. Clair avenue. In view of what was stated during the argument, the City of Toronto should, however, have the right to offer evidence to shew, if they can, that Mr. Forman was mistaken in his evidence upon this point.

The claimant did not contend that the by-law in itself was such an exercise of the powers as required the City of Toronto to make compensation for injuriously affecting this land; and, therefore, it is not necessary to consider the question.

Upon the whole, I think the proper disposition to make of this case is to allow the appeal and to set aside the award and refer the matter back to the arbitrator to be dealt with by him in the light of this judgment. I agree entirely with the remarks quoted by him from the judgment of Meredith, C.J., in *Toronto R. W. Co.* v. *City of Toronto*, 13 O.L.R. 532, but I do not think that they are in any way inconsistent with the views I have expressed.

The respondents should pay the costs of the appeal.

Garrow, J.A.
Magee, J.A.

GARROW and MAGEE, JJ.A., concurred.

Appeal allowed with costs.

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Nova Scotia Supreme Court, Graham, E.J., and Russell, and Drysdale, JJ. March 15, 1913.

1. DEEDS (§ II E—45)—ESTATE OR INTEREST CREATED—WANT OF EXPRESSION "HIS HEIRS"—MORTGAGE.

Apart from any question of rectification, a mortgage by way of grant containing the words "has sold and by these presents doth grant and convey," and further stating that such grant is intended as security for a specified payment which "if duly made will render this conveyance void," passes only an estate for the life of the grantee for want of the expression "and his heirs."

[*Re Ethel and Mitchell's Contract*, [1901] 1 Ch. 945, referred to.]

2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—LAND PURCHASE—DEFECT IN TITLE.

A contract purchaser of land is entitled to rescind his agreement for defect in the vendor's title consisting in the fact that a mortgage under which the vendor derives title conveyed a life estate only.

[*Childs* v. *Stoddard*, 130 Mass. 110, referred to.]

3. VENDOR AND PURCHASER (§ I E—25)—CONTRACT TO PURCHASE—RESCISSION FOR DEFECT IN TITLE.

A contract purchaser of land is entitled to rescind his agreement for a defect in the vendor's title, consisting in the fact that a mortgagee who exercised a power of sale under which the vendor derives title was administrator of the mortgagor's estate; it being his duty, as administrator, to satisfy the mortgage out of personal assets of the estate and otherwise look after the interests of the estate.

[*Jenkins* v. *Jones*, 2 Giff. 99, 29 L.J.Ch. 493; *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; and *Grey Coat Hospital* v. *Westminster Improvement Co.*, 1 DeG. & J. 531, referred to.]

4. ADVERSE POSSESSION (§ II—60)—EFFECT—TIME REQUIRED—COMMENCEMENT OF RUNNING OF LIMITATIONS.

On sale of land by a mortgagee under power of sale, his interest being a life estate only, the Statute of Limitations did not commence to run in favour of those claiming under such sale, until the death of the mortgagee.

5. VENDOR AND PURCHASER (§ I E—29)—RESCISSION—DEFECTIVE TITLE—CONTRACT TO PURCHASE—USE AND OCCUPATION—LIABILITY OF PURCHASER.

Ordinarily, on abandonment of a contract to purchase land for a defect in title, the purchaser in possession is not liable for its use and occupation for a reasonable time, but he must not remain in possession after the contract is clearly abandoned.

[*Temple* v. *McDonald*, 6 N.S.R. 155, and *Howard* v. *Shaw*, 8 M. & W. 118, referred to.]

6. VENDOR AND PURCHASER (§ I E—29)—RESCISSION—DEFECTIVE TITLE—CONTRACT TO PURCHASE—RESTORATION OF VENDOR.

In relieving plaintiff from a contract to purchase farm land and farm utensils and stock, as an entire agreement, because of defective title to the land, defendant vendor is entitled to be restored to his original situation, so far as possible, and an allowance for articles not restored by the purchaser.

Statement

APPEAL from the judgment of Sir Charles Townshend, C.J., in favour of defendant with costs in an action to recover a sum of money paid by plaintiff on account of the purchase price of

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land. The grounds relied upon by the plaintiff were fraudulent misrepresentations on the part of the defendant, and that the title of defendant was defective, and one which plaintiff should not be obliged to accept.

The judgment appealed from proceeded on the ground that there was no evidence of fraudulent misrepresentations and that while there might be some question as to the documentary title, after considering all the documents, defendant's title was sufficient, especially in view of the continued possession of defendant and his predecessors in title for over twenty years.

The appeal was allowed, DRYSDALE, J., dissenting.

Jas. Terrell, for plaintiff, appellant.

J. B. Kenny, for defendant, respondent.

Graham, E.J.

GRAHAM, E.J.:—This is an action to recover back a sum of $300 paid by way of deposit on the price of a farm at Fall River, in this county, on the ground that the defendant's title was defective and one which the plaintiff should not be required to take.

Originally, James Rutherford, who was the owner, having purchased from Thomas J. Wallace, by deed of the first of November, 1871, on the 3rd of January, 1872, mortgaged the property, 370 acres, to James Farquharson, to secure the repayment of $300, in fee simple in the usual form of mortgage duly registered. We hear nothing further about this mortgage, and I shall have to deal with this phase by and by. On the first of February, 1882, James Rutherford, in consideration of $814.94, mortgaged the property to James Farquharson to secure the amount in the following terms, and it is contended that it conveyed only an estate for life:—

> This indenture made this 1st day of February in the year of our Lord 1882, between James Rutherford, of Fall River, in the county of Halifax, in the Province of Nova Scotia, in the Dominion of Canada, yeoman, of the one part, and James Farquharson, in the said city and province and Dominion of Canada, of the other part, witnesseth, that the said James Rutherford, in consideration of the sum of $814.94, lawful money of Canada, to him duly paid by the said James Farquharson at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, has sold and by these presents doth grant and convey to the said James Farquharson, all that lot, piece or parcel of land . . . (here follows a description by metes and bounds of the whole 370 acres of land described in exhibit "A.").
>
> This grant is intended as a security for the payment of $814.94 on February 1, 1883, with interest thereon payable half-yearly at the rate of 6 per cent. per ann., which payment, if duly made, will render this conveyance void. And if default should be made in the payment of the principal or interest above mentioned then the said James Farquharson and his assigns are hereby authorized to sell the said property by public auction

for the best price he can get for the same, and after deducting the amount due as above *to pay the balance, if any*, to the said James Rutherford, his executors, administrators or assigns, and further, that until default in payment of the said principal sum and interest, if any, the said James Rutherford, his heirs or assigns, shall be at full liberty to occupy and possess the said granted property for the term of one year from date, without payment of rent or for use and occupation. In witness, etc.

On April 16, 1896, James Rutherford, who up to that time had been in possession, died. On January 19, 1897, administration with the will annexed of his estate was granted to James Farquharson and to Bamford Rutherford, the sole executor and legatee having died in the lifetime of the testator. On June, 19, 1897, Farquharson, having professed to act under the power of sale contained in the mortgage of the first of February, and having sold by auction, conveyed the property (less 120 acres sold by James Rutherford to Wilson) to one Arthur J. Drysdale for $400. The deed recited that there was due on the mortgage the sum of $258.67. From Drysdale the defendant derived his title. On April 1, 1899, James Farquharson died.

Taking the mortgage of February, 1882, I think that the authorities shew, that for want of the expression "his heirs" it must be held that James Farquharson did not take the fee simple, but only a life estate. We have not enacted the English Conveyancing Act of 1881, by which another expression will answer to create a fee simple. I refer to Williams on Real Property, 202, and to *Ethel and Mitchell's Contract*, [1901] 1 Ch. 945. There, for want of the expression "heirs" and because the deed had only the expression "in fee" instead of "fee simple" which would make the conveyance sufficient to convey the fee simple under the Conveyancing Act, it was held that the legal estate in fee simple had not passed and the purchasers were not required to take the title.

Then as I have intimated, Farquharson, instead of going to Court, sold under the power of sale. It is quite possible that the Court, if it was shewn that there was a mistake in the second mortgage as to the estate intended to be conveyed, and if it had been shewn, as I think was the case, that the first mortgage was paid off and the second mortgage included the balance due on it, would have decreed that the first mortgage should stand as security, notwithstanding it had been paid off for the amount due. My reason for inferring that the first mortgage was paid off is that in the second mortgage there is a provision for paying the balance of proceeds of the sale in pursuance of the power of sale over to the mortgagor, which would not be likely if the other mortgage was outstanding. The cents, too, look like as if that had been done. However, there was no relief sought and that remedy is not now available. I think the defect in the title

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is such that the purchaser is not obliged to take it. I refer to the case of *Childs* v. *Stoddard*, 130 Mass. 110.

The first mortgage presumably, the mortgagor, Rutherford, having been in possession, is barred by the Statute of Limitations and therefore cannot be used to aid the later mortgage, but if it is alive, it is a cloud on the title.

The sale by auction did not profess to deal with that first mortgage. It is not referred to in the second mortgage. But the power of sale in the second mortgage (there is none in the first one) would not give power to the mortgagee to sell more than what was thereby mortgaged, namely, the life estate of Farquharson.

There is another point. On June 19, 1897, when the power of sale was exercised, not only was James Rutherford dead (he died April 16, 1896), but Farquharson was administrator with the will annexed of his estate appointed January 19, 1897. It was his duty, as such administrator, to satisfy out of the personal assets the mortgage to the exoneration of the land, instead of availing himself of the power of sale; moreover he was selling behind the dead man's back, when he, as such administrator, should have been watching the sale in the interest of the dead man, to whose estate the surplus proceeds would go. Of course, if he had gone into Court for a sale, provision could have been made both for the protection of the estate and for his protection. In *Jenkins* v. *Jones*, 2 Giff. 99, 29 L.J. Ch. 493, Vice-Chancellor Stuart said:—

> A mortgagee with such a power stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain.

I refer also to *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143. Look at the vagueness of the power of sale, as to how it is to be exercised. Then there is no statute to make the recitals in the deed, even if they were sufficient *primâ facie* evidence as to the regularity of the proceedings and no statutes as in England such as the Conveyancing Act, 1881.

I think that the sale is liable to be ripped up, and on this ground the title is defective. In the *Grey Coat Hospital* v. *The Westminster Improvement Company*, 1 DeG. & J. 531, Knight Bruce, L.J., said:—

> When a vendor is seeking to enforce the specific performance of a contract against a purchaser, if a question, whether of title or conveyance, arises between them, it is generally enough for the purchaser to shew that the case is one of reasonable doubt.

In this case, it is said in the judgment:—

> As to the title, so far as the documentary part of it is concerned, there

may be some question, but after considering the effect of all the deeds and mortgages, I come to the conclusion that defendant's title is sufficient, especially in view of the continual possession of the defendant and his predecessors in title for over twenty years.

With deference, I think that no statute of limitation was running in favour of the defendant or his predecessors until the life estate had terminated upon Farquharson's death. No entry could be made until then. James Rutherford, the mortgagor, himself died in possession on April 16, 1896.

The plaintiff is claiming interest, also expenses incident to the sale, which he would be entitled to, and also expenses incurred clearing an acre of woodland and for seeds and fertilizer used for the land. The defendant claims compensation for use and occupation, and for damages to which I will refer presently.

The contract for sale was entered into May 2, 1912, and the plaintiff was let into possession on that date. On the second of June, a deed and mortgage were formally tendered to him by defendant, and I infer the title was investigated after that. On July 12, the plaintiff personally quit the possession. It appears that the plaintiff and his wife on July 15 entered into a deed of separation, with an allowance to the wife, who has means, and the wife and children remained in possession, but under an arrangement with the defendant. The defendant witnessed the deed of separation and appears to have heard it read and to have known of its purpose, and it appears that he was in negotiation with the wife to purchase on her own account.

Ordinarily use and occupation for a reasonable time, when the title fails in such a case, is not allowed for, but the purchaser must not remain in possession after the contract is clearly abandoned: Dart, Vendors and Purchasers, 999; *Temple* v. *McDonald*, 6 N.S.R. 155; *Howard* v. *Shaw*, 8 M. & W. 118.

There is another matter. This purchase included, not only the farm, but farming utensils and stock, and these are not severable. After the plaintiff left possession of the farm and abandoned the contract, his wife remained in possession. There was a deed of separation and the defendant was aware of its terms. This is in the evidence:—

Alfred Gregoire cross-examined by Mr. Terrell.

Q. You were present when that separation deed was signed? A. Yes.

Q. You witnessed their signature? A. Yes.

Q. You knew then that Millard was leaving the property? A. I did not know anything about leaving the property. That had nothing to do with me. I was asked to sign it as a witness. Mr. Murray read it over and I heard it.

Q. You knew Millard was leaving under the terms of the agreement? A. That had nothing to do with me.

Q. Did you know that it was one of the terms of the agreement? A. That they were to live apart.

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Q. That he was not to go there? A. Yes.

Q. You say he went there afterwards? A. Yes, very shortly after. I would not like to be certain of the day. Within a week as near as I could say. I know he went because Mrs. Millard told me he had been there.

Q. Did she tell you what he went for? A. He was supposed to go for some of his things, and I was to go with him.

Q. And that was part of the agreement? A. Yes.

Q. Was it in the agreement that you were to go with him? A. No, I don't think. He agreed to that.

Q. He went there to get his things in accordance with the agreement? A. As near as I could figure.

Q. You know he has not been there since? A. I was told he was, twice. Mrs. Millard told me. Did not tell me what he went for.

After the plaintiff went out, a horse went upon the highway and got bogged there and died. A mowing machine was injured in use. Two calves and one pig were used for food, one calf died. There is no counterclaim, and the plaintiff contends that these at most would only amount to torts of the wife, and for such a claim, husband and wife should be sued together.

But I think, upon equitable principles, in giving the plaintiff this relief, there can be required of him the restoration of the defendant to the original situation as far as possible. The plaintiff should have seen to it that these articles taken over by him were restored to the defendant. The defendant has raised this defence equitably. I think that a reasonable allowance to the defendant would be a balance in the defendant's favour for the plaintiff's occupation of the land, etc., thirty dollars; and for the articles in question not restored, the sum of ninety dollars. The plaintiff is entitled to have the appeal allowed with costs, and will have judgment for the sum of one hundred and eighty dollars with costs.

Russell, J.

RUSSELL, J., concurred.

Drysdale, J.

DRYSDALE, J.:—The objection to the title tendered here by defendant under his contract of sale to plaintiff arises under the sale made by James Farquharson to one Drysdale, in June, 1897.

It seems Farquharson took a mortgage of the lands in question from one James Rutherford, on January 3, 1872. This mortgage was in the ordinary form and conveyed the fee subject only to a right to redeem and was to secure $300 and interest. Subsequently, on February 1, 1882, the said Rutherford, by way of mortgage, further changed the said property to secure $814.94 and interest to the said Farquharson, and in this instrument a power of sale was inserted authorizing the sale of the lands on default of payment of principal or interest. This deed was to Farquharson himself only, and not to himself and his heirs.

On June 19, 1897, Farquharson exercised his power of sale and sold and conveyed the property to one Drysdale, through whom defendant acquired title. It is objected on the part of the plaintiff, that Farquharson, by the second mortgage, which contained the power of sale, only acquired a life estate, and that a sale by him under the power contained in said instrument does not carry the fee.

I do not think this objection is well taken. Farquharson, by the deed, or mortgage, of 1872 acquired the fee. The deed of 1882 only further clogged the equity of redemption. By virtue of the two instruments of 1872 and 1882, Farquharson had the complete title coupled with a power of sale in case of default. The power of sale is personal to the mortgagee and is a thing with which his heirs are not concerned, and it would seem that Farquharson was in a position on default to sell at public auction and give a good title. This he seems to have done according to the title deeds produced. Another objection was urged against the title thus made through Farquharson; it was said, that before he exercised his power of sale in 1897 he had, in January, 1897, become the administrator of the mortgagor. I cannot see how this fact could prevent the exercise of the power. A mortgagee is not a trustee of a power of sale for the mortgagor, and his right to look after himself is not affected, I think, by the fact of taking administration of the mortgagor's estate: see Coote, on Mortgages, 928. As the only objection to a complete documentary title arises under the Farquharson transfer mentioned, I think effect should not be given to the objections. There was a good power of sale in Farquharson. On the face of the deeds it would seem to have been properly exercised and that a mortgagee, with a power of sale, can give a good title is beyond dispute.

It was objected on the argument before us that the acreage of the farm had been misrepresented. This was not made an issue in the pleadings and I agree with the learned trial Judge in his findings on this, as well as the other questions of fact found by him.

I would dismiss the appeal with costs.

Appeal allowed, DRYSDALE, J., *dissenting*.

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March 31.

BANK OF NOVA SCOTIA v. McDOUGALL & SECORD, Ltd., et al.

Alberta Supreme Court, Scott, Stuart, Simmons, and Walsh, JJ. March 31, 1913.

1. CONTRACTS (§ I D 3—55)—MEETING OF MINDS—DEFINITENESS.

In order to constitute an agreement between two parties there must be a *consensus ad idem*, a meeting of the two minds upon ascertained terms.

[*Brogden* v. *Metropolitan R. Co.*, 2 A.C. 666; *Pearson* v. *O'Brien*, 10 D.L.R. 175, referred to.]

Statement

THIS is an appeal by the defendants from a judgment of the Chief Justice in favour of the plaintiff whereby he directed specific performance of an agreement for a lease of certain property in the city of Edmonton.

The appeal was allowed.

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

Frank Ford, K.C., for defendant.

Scott, J.

SCOTT, J.:—I concur with Stuart, J.

Stuart, J.

STUART, J.:—In the year 1904 the defendants, John A. McDougall and Richard Secord, were carrying on business in Edmonton in partnership under the firm name of McDougall & Secord. After the negotiations had taken place out of which this action arose a joint-stock company was formed under the name of McDougall & Secord, Limited, which acquired the assets of the former partnership including the property in question. It was agreed at the trial that the company should be held bound by any obligations entered into with the plaintiffs by McDougall & Secord relating to the matters in question in this action. For this reason it will be sufficient to refer to the defendants generally without any further distinction. The plaintiffs are a banking corporation with their head office at Toronto. In January, 1904, they had a branch office at Edmonton under the direction of one Hammett, as local manager or agent.

The negotiations about the case seem to have begun by some conversation prior to the 8th of January, 1904, as to which there is little if any evidence. On that date the defendants wrote a letter to Hammett in which they referred to this conversation and offered to erect a building suitable for bank premises and to lease a portion of the same to the bank for a term of ten years at a rental of $2,400 a year and agreed to pay taxes and keep in repair. In this letter three alternative sites were mentioned, viz.: lot 15 or lot 2 or lot 1, all in river lot 6. On January 11, 1904, Hammett acknowledged the receipt of this letter and stated that he would forward it to the general manager of the bank for consideration. In this letter he asked the defen-

dant to say whether they would consider a proposal to erect a building for bank purposes only to be leased to the bank at a rental to be fixed at a fixed percentage on the value of the land and cost of construction, the lease to be for "ten years or more," and he suggested a fourth alternative site. On the same day the defendants replied offering to consider the proposal on two alternative bases as to rental and mentioning the proposed term to be "ten years or more." This letter was merely acknowledged by Hammett on January 12th. On February 8th, 1904, Hammett, having apparently consulted his superior officers and also having had some conversation with the defendants wrote to the defendants the following letter:—

Edmonton, February 8th, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—With reference to your letter of the 8th January, and our conversation of Saturday last, we beg to state that we will accept the proposal contained in that letter to erect a building on lot 1, R.L. 6, leasing to us 25 by 80 on Jasper avenue and First street, steam or hot water heated, and fitted up as bank offices, with vault, private office, lavatory, and other necessary fittings and counters, for a period of ten years *at $2,400 per annum, with option of renewal*, taxes to be paid, and building to be kept in good repair by you; upon the completion of the general plans and specifications, when the exact dimensions and lights and door are decided upon we will submit plans of the interior arrangement. A lease upon these lines may be prepared for joint execution at once. We understand that you will have the plans and specifications put in hand at once and the contracts let for construction at the earliest possible moment. If at all possible we would like to have it ready for occupation in the closing months of the summer.

Your obedient servant,

(Sgd.) E. T. HAMMETT,
Manager.

To this letter the defendants replied as follows:—

Edmonton, 9th February, 1904.

Mr. E. T. Hammett,
Manager, Bank of Nova Scotia.
Edmonton.

Dear Sir,—We beg to acknowledge receipt of your favour of the 8th inst.

We will immediately have plans and specifications of building prepared and submit same for your approval and details of interior arrangements, including vault, etc.

We will lose no time in getting the work under way and hope to have the building completed and ready for occupancy early in the fall.

As soon as the plans are approved of we will have a lease prepared for joint execution.

Yours truly,

(Sgd.) MCDOUGALL & SECORD.

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The premises referred to in these two letters were those on the south-east corner of Jasper avenue and First street. Some further conversation seems then to have taken place and then Hammett sent the defendants the following letter:—

Edmonton, Alta., February 12th, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—With reference to your offer of yesterday to lease to us quarters in the building to be erected on the N.E. corner of Jasper avenue and First street, thereby giving us possession at as early a date as possible, I beg to advise you that we prefer to abide by our first decision accepting your proposal for an office on the S.E. corner of the above streets.

Thanking you for your courtesy in submitting the choice to us, believe me,

Yours faithfully,
(Sgd.) E. T. HAMMETT,
Manager.

Then some further conversation occurred and Hammett sent the defendants the following letter:—

Edmonton, February 13th, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—With reference to our conversations of yesterday and this p.m. I beg to confirm my statement then made that our general manager has decided to accept your offer to lease to us 25 feet by (at least) 70 feet on the south-west corner of the building to be erected on lot 21, R.L. 6, on similar terms to those already approved for the corner of lot 1, R.L. 6.

Trusting this will be satisfactory to you, believe me,

Yours faithfully,
(Sgd.) E. T. HAMMETT,
Manager.

The defendants made no further reply. There is no evidence of any further reference to the terms of the lease either in correspondence between the parties or in conversations for over four years. What happened was that the defendants proceeded to erect and did erect a building on lot 21 which was ready for occupation about February 10th, 1906. The plaintiffs then went into possession of that part of the building intended for them and paid the rental of $200 on the first of every month. Hammett had ceased to be local manager for the plaintiff and had died before the trial. One Mooney had succeeded him for a short time and then one Macleod became local manager for the plaintiffs within a few days after occupation was taken. It appears that Mooney before leaving had, early in February, 1906, had some dispute with the defendants as to the question of electric light fixtures and in a letter of February 9, 1906, to his general manager, he quotes from the first letter of January 8th, 1904, written by the defendants and refers to it as "part of

our agreement." On February 28th, Macleod, after taking charge wrote to the general manager about the same question and said that "misunderstandings might easily have been avoided by a more definite agreement at the outset." The bank apparently put in the fixtures. Then on October 24th, 1907, the defendants rendered to the bank an account for electric light charges amounting to $210, being at the rate of $10 a month for 21 months. This sum the bank paid and continued thereafter to pay light, heat and water charges in addition to the rental of $200 each month. Whether it was this circumstance of the arrears of light charges that aroused Macleod's curiosity or not, he did, for some reason or other, shortly before the 17th of December, 1907, for the first time apparently, become curious as to the whereabouts of a supposed lease. He seems to have searched for a lease and failing to find one went to the defendant's office and enquired about it. He saw only a clerk in charge who said, after searching, "there doesn't seem to be one here." Then, on December 17th, he wrote to his general manager saying, "We do not appear to have a copy of our lease at this branch. Do you hold a copy?" On December 24th, 1907, the assistant general manager at Toronto replied saying that there was no copy of any lease of the Edmonton premises at the head office, that Hammett had apparently overlooked the necessity of getting one, as there was no reference to one in the correspondence, and continuing as follows:—

> There should be some memorandum in your office shewing the arrangements that was made with the landlord; if not, possibly Mr. Mooney can give particulars. At any rate before further misunderstandings arise, it would be well to have our status clearly defined in the form of a proper lease.

Macleod then went to the defendants and asked to have a draft lease prepared but it was not till March 11th, 1908, that the defendants handed him a draft lease in triplicate. This was sent to the general manager for completion but was returned unexecuted on March 21st, 1908. (I think it necessary always to observe the year because the lapse of a year or two never seemed to worry the parties particularly and this is not altogether without significance.) Along with the draft the general manager returned a document containing certain proposed clauses which he desired to have inserted, and asked Macleod to get as many of the concessions as he could if they were in accordance with the agreement that passed between Hammett and the defendants. One of these reads as follows:—

> The lessees to have the right to the extension of the term hereby granted for other successive terms of five years each after the expiration of the said term or any renewal thereof upon same conditions and covenants and at the same rental, upon giving the lessors notice in writing six

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months prior to the expiration of each of said respective terms of the intention of the lessees to avail themselves of that right.

If the lessors do not care to fix the rental for the succeeding term or terms, now, instead of the words "at the same rental," the following will answer: "at a rental to be mutually agreed upon or settled by arbitration in the usual way during the three months next succeeding the latest date upon which the said notice may be given."

The draft leases with this document were taken to the defendants' office and apparently remained there until August, 1908, when they were all handed back to Macleod with the letters "O.K." or the word "no" written opposite the different suggested clauses and with certain other alterations in the draft itself. The word "no" was opposite the clause above quoted. Some verbal negotiations seem then to have taken place, but no definite evidence of these was given, apparently the renewal clause was the point on which the parties could not agree. On August 13th, 1908, Macleod returned the drafts to the head office. Sometime between March and August, Macleod had discovered the letters of February 8th and 9th, 1904, and when returning the drafts in August pointed out to the general manager that these letters provided for a renewal and enclosed copies of those letters. On August 18th, 1908, the assistant general manager returned the drafts to Macleod still unexecuted and in his letter returning them said:—

> We cannot execute the lease submitted, as it is not in accordance with the letters which passed between McDougall & Secord and the bank in 1904, returned herewith, in which the rental to be paid for the further term, of ten years, while not distinctly stated, is implied, and we propose to stand by the agreement then arrived at.

Macleod then took the draft leases again to the office of the defendants. That is the last trace of them that could be found. The drafts were never discovered and were not produced in evidence although notice to produce was served on the defendants. No evidence of their contents was given.

The parties engaged in no further negotiations, although the plaintiffs continued to occupy and pay rental as before until August 3rd, 1909, on which date the general manager wrote to Macleod saying, "Please see the landlord about having a lease of the premises drawn up and send it here for signature." Macleod then interviewed the defendants' clerk and he said, "we will see." Then the matter dropped for more than another year. On December 17th, 1910, the head office by a general circular apparently sent to all local managers asked Macleod to

> examine the papers you hold in connection with your office premises and advise us whether the necessary deed or lease is in your possession.

On December 28th, 1910, Macleod wrote to defendants, saying, "Our head office has again asked me for a copy of lease of

the bank premises at this point. Kindly have one made out in accordance with the agreement entered into with you in February, 1904, as per copies of correspondence which you will find enclosed." The copies enclosed were of the letters of February 8th and 9th, 1904. On January 11th, 1911, the defendants wrote to Macleod, saying,

> as you have refused to sign a lease according to the terms of our letter to you of the 8th of February, 1904, for that portion of the Empire Block which you now occupy, we hereby give you notice that we will require possession of these premises and we do hereby give you notice to vacate the said premises on or before the 1st day of February, 1912.

The next day, January 12th, 1911, the defendants wrote to Macleod a somewhat similar letter saying that the bank had no lease of the premises, asserting that they, the defendants, were always willing to give a lease according to the agreement and repeating the notice to quit. Macleod immediately replied again demanding a lease. On the 25th of January, 1911, the plaintiffs filed a caveat to protect their interests. Some further correspondence including a tender to defendants of a lease to be executed by them passed between the solicitors of the parties in May, 1911, and on May 16th, 1911, the plaintiffs commenced this action wherein they claim specific performance of the alleged agreement for a lease and in the alternative $20,000 as damages for breach of the agreement.

The only evidence given other than above set forth which appears material on the question of specific performance was that given by the defendant, McDougall, who stated that in his verbal negotiations with Hammett the understanding was that it was to be a ten year lease, "that they would probably want it longer but that meant a different arrangement and they would get the option—the preference," and that the terms as to heating, light and water and the date of the commencement of the term were to be settled when the lease was prepared.

The learned Chief Justice gave judgment at the close of the hearing directing specific performance and ordering the defendants to grant a lease for ten years from February 1st, 1904, with a right of renewal for another ten years upon the same terms and with a clause to be inserted that the plaintiffs should pay $10 a month for heating. With this latter exception, which he made on account of the plaintiffs having in the meantime paid for the heating, he held that the terms set forth in the correspondence should apply. The judgment proceeded on the ground that by the letters of February 8th and 13th, 1904, to which the defendants had, in their replies and by proceeding with the construction and by giving plaintiffs possession, impliedly assented, an agreement for a lease with a right of renewal had been arrived at.

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There are two questions involved in the appeal and I confess I have had as much difficulty with the one as with the other. The first is whether there ever was a concluded agreement of any kind. The second is as to the effect to be given to the expression "with option of renewal" in Hammett's letter of February 8th, 1904.

To my mind, sufficient importance has not been attached so far to the circumstance that the premises which were the subject-matter of the negotiations were not in existence at all while the negotiations were going on. The defendants offered to erect a building and to lease a portion of it to the plaintiffs. But throughout the whole correspondence and down to the very last letter of February 9th, 1904, from defendants to Hammett there is clearly shewn a plain intention in the parties that no final and binding agreement was to be arrived at until the plans and specifications of the proposed building were prepared and approved of by the plaintiffs. That last letter says,

> we will immediately have plans and specifications of building prepared and submit same for your approval and details of interior arrangements including vaults, etc. . . . As soon as the plans are approved of we will have a lease prepared for joint execution.

It seems to me that the inevitable inference from this is that the parties had not arrived at and did not intend to arrive at a final agreement until the plans and specifications were prepared and approved of. There were many things still left open. The letter of February 9th says that the defendants *hope* to have the building completed and ready for occupancy in the fall. Can it be thought for a moment that the parties did not intend to arrive at and agree upon some definite date by which the building should be agreed to be completed? The bank would certainly not give the defendants an indefinite time to complete. Or can it be supposed that the bank were not seriously interested in the plans and specifications, in the questions as to how many doors and windows there were to be and as to their position in the building, in the height of the ceiling, in the nature of the flooring and other things of that kind? It appears to me beyond question that the passing of the letter of February 9th did not form and was not intended by either party to form a final binding and concluded agreement. If there was one, then when was it arrived at? There is no evidence before us as to when the plans were approved, or even that they ever were approved of by Hammett or Mooney or, indeed, that there ever were any plans in existence at all. For two years there is nothing but silence and darkness and then an entry into possession without any communication whatever as to the terms upon which possession was being taken. If

the letters of February 8th and 9th, 1904, were not intended at the time, as they certainly were not, to constitute a concluded agreement, can it be contended for a moment that by the bare taking of possession on February 10th, 1906, when Hammett had long since departed, when Mooney from whom we have nothing and who, for all that *appears*, may not have known the contents of the letters at all, was just on the eve of departure when the plaintiff's head officers in Toronto knew nothing of the letters in question (because, on the evidence, they first became aware of them in August, 1908)—that by such taking of possession without a word of negotiation the parties evinced an intention to be bound by those letters as their final agreement?

I have always understood that in order to constitute an agreement between two parties there must be a *consensus ad idem*, a meeting of two minds upon certain terms. As the plaintiffs are a corporation, in their case the minds must be the mind of an agent. Certainly the head officers' minds never took part in a consensus in February, 1906. As to Mooney, who took possession on their behalf we have no evidence of what he knew or thought or did or that he even knew or thought or did anything except take possession, which itself we only know inferentially. As to what either of the defendants, McDougall or Secord, though at the time we have no evidence either. We have only two letters (which had been filed away for two years), evidently either unknown or forgotten. In my view of the case what happened was that the parties thought that they had at some time or other in the past arrived at some agreement by correspondence, a reference to which would shew the terms, that they were mistaken in so thinking, but did not find out their mistake until after three or four annual, but very momentary, flickers of consciousness which merely revealed their real disagreement. The lack of agreement was not revealed earlier because what the plaintiffs wanted mainly was possession and they got it, and what the defendants wanted was their monthly rental of $200.00, which both would naturally have in mind without reference to correspondence, and they got it. It is noteworthy that neither party woke up to the question of paying for heat or who should bear that burden until October 24th, 1907. In view of that single fact itself, how it can be said that the taking possession in February, 1906, indicated a final agreement upon all the terms of the lease is something that I am unable to comprehend.

The question is entirely one of fact and authorities are therefore of little assistance, but I have found the case of *Brogden* v. *Metropolitan Railway Co.*, 2 A.C. 666, of some considerable help. It is unnecessary to refer in detail to the facts of that

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case, but a reference to it will shew that the facts were far stronger than here. A very formal draft agreement was drawn up by one party, marked "approved" by the other party with some very slight alterations, then sent to and retained by the first party and acted upon by that party immediately and in such a way that the House of Lords thought they had thereby evinced their acceptance of it. But it will be observed that Lord Chief Justice Cockburn dissented in the Court of Appeal, that Lord Blackburn hesitated in the House of Lords and that the other members of the House of Lords felt compelled to deliver very considerable argument to support their judgment that an agreement had been arrived at. After reading that case and comparing its strength with the weakness of this, I am unable to see how it can be maintained that the parties here had ever been at one as to the terms upon which the property in question was to be leased. The only way it could be worked out would, in my opinion, be thus: to say that because the two parties to a proposed lease of a proposed building, to be erected, agreed upon terms A and B (the rental and length of the initial term) in February, 1904, and upon terms C, D, and E (the character of the building, the date of its completion and the date of commencement of the term) in February, 1906 (by taking possession and accepting the premises as erected) and upon term F (who should pay for the heat) in October, 1907, and because these terms might be sufficient to form an agreement, and although in 1904 one party suggested a term as to renewal to which the other party did not then directly assent, because it was then plainly intended to discuss in detail the terms of the lease later on when the plans of the proposed building would be approved, yet this might be taken as forgotten (as indeed it was by the party in whose favour it would be) and as dropped out of consideration and so, therefore, nothing was left but what had at some time or other during a period of nearly four years been agreed upon; and therefore, as possession had been taken and sufficient had been agreed upon at some time or other to form an agreement, although the parties never did in fact agree that these things were all that was to be agreed between them and although one of them did in fact try later on to get a renewal clause different from the one formerly proposed by that party, and yet so the consequence was that an agreement for a lease had been made.

If the Court could feel justified in such circumstances in finding a *consensus ad idem*, a completed contract, then I think we could give specific performance for a ten year term. But for my part, I find myself unable to assent to such a proposition, and I think there was never any concluded and completed agreement between the parties at all.

There is a good example of how a disagreement upon a very small matter may prevent the existence of any agreement at all, even when the main questions have been decided between the parties to be found in the case of *Pearson* v. *O'Brien* recently decided in the Privy Council and reported in 10 D.L.R. 175, 22 W.L.R. 703.

In that case the Privy Council held that a disagreement as to whether purchase money for land in Winnipeg was to be paid in Moosejaw or Winnipeg, prevented a *consensus ad idem* although the main items of agreement had been fixed.

I think, therefore, that the appeal should be allowed with costs and the judgment below set aside and the action dismissed with costs and that there should be judgment for the defendants on their counterclaim declaring the plaintiffs only tenants at will of the premises in question and directing the plaintiffs to deliver possession of the premises to the defendants and for their costs of the counterclaim.

In accordance with the usual practice in overholding tenant cases, I think a reasonable time should be allowed for the plaintiffs to vacate, and I think in the circumstances of this case six months would not be unreasonable.

I should have been glad if I could have found an agreement for a ten year lease only. If the Court had power to arbitrate I think the just thing to do would be in view of the defendants' letter of January 12th, 1911, in which they insist on the letter of January 8th, 1904, as being the basis of the agreement, to award a ten year lease to the plaintiffs. But the trouble is that the plaintiffs always tried to get something added in regard to a renewal with the result that there was no agreement at all. I shall be surprised and disappointed, however, if the defendants who are honourable and not vindictive men should not still, notwithstanding this judgment, adhere to their original view as to a ten year lease and make a settlement upon that basis.

Since writing the above, a suggestion has occurred to me, that the facts shewn here would really create a tenancy from year to year, but no such point was raised, either at the trial or before us on appeal, and I do not think, therefore, that it is necessary to consider it.

Simmons, J.

SIMMONS, J.:—In the month of January, 1904, oral negotiations took place between Mr. Hammett, local manager of the Bank of Edmonton and the plaintiffs, who were then a partnership, regarding a lease by McDougall & Secord to the bank of part of a building on Jasper avenue, Edmonton, which McDougall & Secord proposed to build. The parties exchanged letters specifically referring to these oral negotiations and making counter proposals. These letters, as will appear hereunder,

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contained a request by Mr. Hammett that the details of the interior arrangements and fittings would be subject to the approval of the bank before being executed, and this was assented to by McDougall & Secord, who stated also in their acceptance of the bank's request as to approval by the bank of the interior arrangements, that as soon as these were approved by the bank, that McDougall & Secord would have a lease prepared for joint execution.

The correspondence also discloses that three alternate sites were named by McDougall & Secord, but none of these was selected. The parties, however, orally agreed to substitute a site on the corner of Jasper avenue and First street, but no question or dispute arises out of this fact.

Subsequently McDougall & Secord transferred their partnership business to McDougall & Secord, Ltd., and their counsel at the trial assented that McDougall & Secord, Ltd., should be bound by any contract in this instance made by McDougall & Secord as individuals or by the partnership.

The appellants in pursuance of the arrangement referred to completed their building and erected interior fittings and arrangements for the bank on the first floor and the bank entered into possession in February, 1906, said premises being the north-east corner of the Empire block and paid the rent monthly at the rate of $2,400 per year from that time till 1911, when the facts arose which lead to this action. Mr. Hammett ceased to be local manager before the bank entered into possession and apparently no lease was actually executed by the parties. No notice was taken by either of the parties of the fact that no lease had been executed until December, 1907, when Mr. McLeod the local manager of the bank wrote his general manager at Toronto, calling his attention to the fact that no lease was on file at the bank at Edmonton, and asking the general manager if a copy was at the head office. On being informed that the head office had no original or copy of a lease, Mr. McLeod interviewed John C. McDougall, son of the defendant McDougall and a clerk in the office of McDougall & Secord, Limited, if the appellants had a copy of the lease and was informed by him that he thought McDougall & Secord, Limited, had a copy, but he could not find it. On making subsequent requests to John C. McDougall for a copy of the lease and failing to get one, McLeod asked him to have a lease prepared. Correspondence of a desultory character was carried on between the appellants and respondents regarding the execution of a lease till March, 1911, during which the appellants prepared a lease in triplicate and submitted it to the bank. The bank suggested some changes in regard to a provision for an option for renewal for five years at the same rental or rental to be

agreed upon by arbitration and a provision in regard to removal of fixtures at the end of the term. McDougall & Secord did not assent to these provisions and after counter propositions regarding the right of the bank for an option for renewal, the bank asserted their claim to a lease with an option for renewal for the term of ten years at the end of the alleged existing term of ten years.

The appellants refused and claimed for the first time that the bank had no lease and made a formal demand on the bank for possession, whereupon the bank brought this action claiming specific performance of an agreement for a lease for ten years with an option for renewal for the same term and at the same rental. An application was made by the plaintiffs at the opening of the trial for leave to amend claiming in the alternative specific performance of an agreement for a lease for ten years. The action came on for trial before the Chief Justice and he reserved his decision at the opening of the trial on the application by the plaintiffs to amend. He gave judgment that the plaintiffs were entitled to specific performance of an agreement for a lease for ten years, with option of renewal for another ten years. It therefore was not necessary for him to deal with the proposed amendment of the plaintiffs. If this Court should find that the plaintiffs were entitled to specific performance on an agreement for a lease for ten years only, then we would have a right to deal with the application of the plaintiffs at the opening of the trial for leave to amend in that regard.

The correspondence which is material is as follows:—

Edmonton, 8th January, 1904.

Mr. Hammett,
Manager, Bank of Nova Scotia.
Edmonton.

Dear Sir,—With reference to your conversation with us about the erection of bank premises for your bank. We have thought the matter over and now beg to submit the following proposition for your consideration.

We will erect a solid brick building probably 50 by 80 feet, three storeys high, of good appearance, with plumbing and hot water or steam heating; we will fit up about 25 by 80 feet on the first floor for suitable and up-to-date bank office premises, with vault, private office, all the necessary fittings and counters, lavatory, etc., etc., and rent the same to you for a term of ten years for $2,400 a year; we to pay all taxes on the lot and building and keep the same in good condition.

We would erect this building on lot 15, R.L. 6, adjoining the Bank of Montreal, or on lot 2, R.L. 6, or possibly on lot 1 R.L. 6, the corner east of the Windsor Hotel.

If this offer meets with your approval we would immediately get

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out plans and specifications and let the contract for the erection and completion of the building.

This offer is good for 30 days only.

Yours truly,
(Sgd.) McDOUGALL & SECORD.

Edmonton, January 11, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—We are in receipt of your esteemed favour of 8th instant, submitting your promised proposition regarding premises for us. This offer I shall forward to our general manager for consideration without delay; I infer that the details of interior arrangements and fittings would be subject to our approval before being executed.

In order to place the whole question before Mr. McLeod at one time, I shall be obliged if you will advise us whether you would care to entertain an alternative proposition on the following lines, viz.: To erect a building according to plans and specifications to be prepared by the bank, to be leased only to the bank, at an annual rental equal to a fixed percentage on the value of the land and the cost of construction; lease to be for ten or more years; taxes and fire insurance to be paid by you. We may explain that, under this proposition, the building would be smaller than the one you propose to erect, and would be for bank purposes only; if you did not care to put it up on either of the lots mentioned in your letter of 8th instant, it might possibly be placed on the lot adjoining on the east corner of Jasper avenue and First street.

Awaiting the favour of your reply, believe me,

Yours faithfully,
(Sgd.) E. T. HAMMETT,
Manager.

11th January, 1904.

Mr. E. T. Hammett,
Mgr., Bank of Nova Scotia,
Edmonton.

Dear Sir,—In answer to your favour of the 11th inst., *re* our proposition of the 8th inst., the details of interior arrangements and fittings would be subject to your approval before being executed.

Re the erection of a building according to plans and specifications to be prepared by your bank and to be leased only to the bank for a term of ten years or more, we would consider such a proposition at an annual net rental of 8 per cent. on the value of the land and cost of construction. The rental to commence on the acceptance of this proposition so far as the value of the lot is concerned, and on the money as it is paid out for construction, together with taxes and insurance to be paid by the bank.

Or we would erect such a building and rent it to you for a term of ten years or more at a rental of twelve (12%) per cent. on present estimated value of lot and cost of building, rent to commence only on completion of building or taking possession. We to pay taxes and fire insurance.

Yours truly,
(Sgd.) McDOUGALL & SECORD.

Edmonton, Alta, January 12th, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—We are in receipt of your esteemed favour of 11th instant, for which we beg to thank you.

Yours faithfully,
(Sgd.) E. T. HAMMETT,
Manager.

Edmonton, February 8th, 1904.

Messrs. McDougall & Secord,
Edmonton.

Dear Sirs,—With reference to your letter of the 8th January and our conversation of Saturday last, we beg to state that we will accept the proposal contained in that letter to erect a building on lot 1, R.L. 6, leasing to us 25 by 80 on Jasper avenue and First street, steam or hot water heated, and fitted up as bank offices, with vault, private office, lavatory and other necessary fittings and counters, for a period of ten years at $2,400 per annum, with option of renewal, taxes to be paid, and building to be kept in good repair by you; upon the completion of the general plans and specifications, when the exact dimensions and lights and door are decided upon we will submit plans of the interior arrangement. A lease upon these lines may be prepared for joint execution at once. We understand that you will have the plans and specifications put in hand at once and the contracts let for construction at the earliest possible moment. If at all possible we would like to have it ready for occupation in the closing months of the summer.

Your obedient servant,
(Sgd.) E. T. HAMMETT,
Manager.

Edmonton, 9th February, 1904.

Mr. E. T. Hammett,
Manager, Bank of Nova Scotia,
Town.

Dear Sir,—We beg to acknowledge receipt of your favour of the 8th inst.

We will immediately have plans and specifications of building prepared and submit same for your approval and details of interior arrangements including vault, etc.

We will lose no time in getting the work under way and hope to have the building completed and ready for occupancy early in the fall.

As soon as the plans are approved of we will have a lease prepared for joint execution.

Yours truly,
(Sgd.) MCDOUGALL & SECORD.

Mr. John A. McDougall on examination for discovery says he thinks a lease was prepared by their solicitors, Emery & Newell. He cannot remember much about it and he never anticipated there was any trouble or difference till about a year before this action began.

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When examined in chief on behalf of the defendants, he says his understanding was that there was a ten year lease. He qualifies this by stating that the terms as to heating and lighting were to be settled when the lease was prepared. He also says the rental of $2,400 per year was satisfactory for the ten years and that it was clearly understood between him and Mr. Hammett, that it was only a ten year lease. The appellants set up that there was no completed agreement to which the alleged part performance can refer because there was no approval by the bank of the interior plans and fixtures and no agreement as to the heating and lighting and no agreement as to the option for renewal. It does not seem to me that the first and second grounds require serious consideration.

In regard to the interior arrangements and fittings, it is admitted that the appellants completed these and the bank went into possession and there is nothing to suggest that the bank did not approve of them. Mr. Hammett left before the bank went into possession and died in April, 1907, and his knowledge of the transaction which was not committed to writing is not available. He was succeeded on January 12th, 1907, by Mr. Mooney and we have not got Mr. Mooney's evidence. Mooney was succeeded on February 19th, 1908, by Mr. McLeod and the fixtures were practically all in place then.

In regard to heating, the appellants' letter of January 8th, 1904, specifically states that the appellants will erect a solid brick building with plumbing and hot water or steam heating.

The bank's letter of February 8th, 1904, accepts the offer of the appellants of January 8th, and specifically says: "Steam or hot water heated." No claim was made by the appellants in regard to heating until December, 1907, when they sent in a bill for the heating from the beginning of the bank's occupancy which the bank paid and it appears that the bank continued to pay the appellants for the heating. It seems obvious that the question of the bank's liability for the heating is one of law having regard to the expressions above referred to and even if the bank under a mistake as to the legal interpretation of the words "with plumbing and hot water or steam heating" paid the appellants $10 per month for heating, that is no ground for setting up now that the question had not been considered by the parties when negotiations were going on. Electric light fixtures were not specifically enumerated in the letters and the same rule would apply, namely, that it is a question for the Courts to say whether the appellants were bound to instal electric light fixtures as a part of "necessary fittings" or "details of interior arrangements." The appellants took the ground in any case that they were not included and the bank assented and I cannot see how the appellants can say now that it was a

question which they contemplated would be discussed and settled when the formal lease came to be drawn up.

It is only when the drawing up and signing of a formal contract was contemplated as a condition precedent to the final transaction by which the parties were to be bound, there is no contract until this is done: *Winn* v. *Bull*, 7 Ch.D. 29; *Rossitter* v. *Miller*, 3 A.C. 1124.

How can the appellants contend that such was their intention when they wrote on February 9th, 1904, "We will lose no time in getting the work under way and hope to have the building completed and ready for occupancy early in the fall. As soon as the plans are approved of, we will have a lease prepared for joint execution"?

There is not the slightest suggestion of failure or refusal on the part of the bank to approve the plans. There was a definite declaration upon the part of the appellants that they would elect to proceed in carrying out their part of the contract before a formal lease was executed. A very good test to apply to their agreement would be this: assuming they had proceeded as they actually did and erected their premises and expended considerable money in fitting up a bank premises could the bank have stood by and then in February, 1906, objected that there was no binding agreement on them to accept a lease because some minor detail such as the electric light fixtures were not installed by the appellants and the liability for the erection of the same had not been included in the negotiations.

It is brought home conclusively to my mind, that no such consideration ever entered into the minds of either of the contracting parties and that the raising of them now arises out of the dispute which occurred later in regard to the option for renewal. The learned Chief Justice was of the opinion that the evidence of the original transaction is all in writing. That finding should, I think, be qualified to this extent, that the writing indicated other material parts of the contract which were properly a matter of negotiation, namely, the plans and interior arrangements. Part performance has taken the contract out of the Statute of Frauds and we are quite justified in taking into consideration not only the writing, but such facts as indicate that the uncompleted terms were agreed upon and, whether possession was obtained under a completed agreement for lease.

An agreement is the result of mutual assent of two parties to certain terms and if it is clear there is no consensus, what may have been written or said becomes immaterial.

Chinnock v. *Marchioness of Ely*, 4 D.J. & S. 638.

The fact that a formal contract is intended or specifically provided for

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will not affect the validity of the agreement if there has been a consensus between the parties.

Fowle v. *Freeman*, 9 Vesey 351.

This brings us then to the most serious question arising out of this transaction, namely, the effect of the added term "with option of renewal" in the bank's letter of February 8th, 1904.

The learned Chief Justice took the view that these letters of January 8th, 1904, and February 9th, 1904, of the appellants read with the letter of February 8th, of the bank constituted a binding agreement, although he suggests that part performance may enter into the question. I am not able to go far as the learned Chief Justice in finding that there was an assent by the appellants to the added term "with option for renewal" in the letter of Mr. Hammett of February 8th, 1904. A much more reasonable view seems to be that if there had been failure on the part of the appellants to implement their promise to get things under way and submit plans and specifications within a reasonable time or failure on the part of the bank to approve of the plans and specifications within a reasonable time, there would have been no completed contract as both parties had in contemplation the settlement of what at least to the bank must have been a very important term of the agreement, namely the suitability of the premises for their bank business. But as I have already indicated these matters were all concluded and the only one left open was the added term in the bank's letter.

Having in view then the fact that when the appellants wrote the letter of February 9th, 1904, there was not a concluded contract it does not seem that they should be legally bound by the added term unless there was a subsequent assent thereto. There was clearly no subsequent assent, so that in the result there was a consensus between the parties in every essential term except the added term "with option of renewal."

The question then as to whether there was a concluded contract depends upon whether this was an essential term of the contract or merely a collateral requisition not warranted by the terms of the offer in which case it does not prevent the contract being complete: *Jordan* v. *Norton*, 4 M. & W. 155. Or in the alternative was there a waiver by the bank of the added term. It is urged against the bank that because between 1907 and 1911, they asserted there was a right of renewal indicates that there was no concluded agreement. But this is an incorrect proposition. It is what the parties said and did at the actual time of making the contract that is material and not the construction they attempt at a subsequent time to attach to these occurrences.

Though a parol waiver of a written contract amounting to a complete abandonment and clearly proved would bar a specific performance or even

parol variation so acted upon that the original agreement could no longer be enforced without injury to one party, variations verbally agreed upon are not sufficient to prevent the execution of the written documents, the situation of the parties in all other respects remaining the same: *Price* v. *Dyer*, 17 Ves. 356, and even as to leases where a first lease had been granted and then a second, which recited the surrender and acceptance of surrender of the first, but which turned out itself to be inoperative, it was held the first remained in force.

See *Hussey* v. *Horne-Payne*, 3 A.C. 316, Ruling Cases, vol. 6, pp. 155, 160.

It is true that in order to interpret the doctrine of oral variation in this case, it is necessary to deduce the same from the acts of the bank in going into possession without obtaining a lease and waiving the added term. With some hesitation, I come to the conclusion that such was the case and there was a waiver of the bank in regard to the added term in their letter. When they afterwards insisted upon effect being given to it they did not have in their possession a knowledge of the actual circumstances in relation to the completion of the contract in so far as it affected the approval of the plans and specifications and the failure to have a lease executed before they went into possession.

The bank find themselves in this position that on account of Mr. Hammett's death they are not able to establish any material evidence between the writing of the letters of February, 1904, and the entering into possession in 1906. Mr. John A. McDougall, who conducted the negotiations for the appellants, says he understood the bank went into possession under a ten year lease. The respondents now ask leave to amend their pleadings setting up a ten year lease and this is tantamount to a waiver of the added term.

It seems to me that in view of the position the bank is in through the death of their manager and the admission in the statement of Mr. John A. McDougall, that there was a consensus in regard to a ten year lease, the Court is justified in giving effect to specific performance of a lease for ten years from February 10th, 1906, the date on which the bank went into possession. It does not seem necessary therefore to determine whether the words "with option of renewal" was a material term or a collateral requisition in view of my finding that even if it was a material term which they intended, they waived it and the appellants completed the contract on this basis.

WALSH, J.:—I concur with Stuart, J.

Walsh, J.

Appeal allowed.

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Re FORT FRANCES ASSESSMENT.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. January 15, 1913.

1. TAXES (§ III D—138)—ASSESSMENT—APPEAL FROM.

The time for appealing against an assessment of property in a municipality in an unorganized district is one month after the time fixed for returning the assessment roll.

2. TAXES (§ III D—135)—ASSESSMENT — REVIEW AND APPEAL FROM GENERALLY—BOARD—COURTS—CONCURRENT JURISDICTION.

The right of appeal from the Court of Revision to the Ontario Railway and Municipal Board given to a person assessed for over $10,000 has not taken away the right to appeal to the District Court judge.

3. TAXES (§ III D—135)—ASSESSMENT—APPEAL — RAILWAY AND MUNICIPAL BOARD—DISTRICT COURT—CONCURRENT JURISDICTION.

Even where there has been an appeal to the Ontario Railway and Municipal Board from the Court of Revision, it is the duty of a judge of the District Court to hear and determine an appeal to him from the Court of Revision.

Statement

A STATEMENT of facts in the nature of a case transmitted by the Judge of the District Court of the Provisional Judicial District of Rainy River, in the matter of the assessment of A. S. W., a ratepayer of the town of Fort Frances, in the district of Rainy River, and in the matter of an appeal therefrom to the Court of Revision, and of a further appeal from the decision of the Court of Revision to the said District Court Judge, was referred, by order of the Lieutenant-Governor in Council, pursuant to sec. 77, sub-sec. 1, of the Assessment Act, 4 Edw. VII. ch. 23, to a Judge of the Court of Appeal for his opinion thereupon, and was referred by that Judge to the Court of Appeal.

The statement of facts referred to was as follows.

FITCH, Judge of District Court:—

An appeal against the assessment of A. S. W., a married woman, was lodged with the Clerk of the Town of Fort Frances, after the expiration of fourteen days from the return of the assessment roll, but within one month after such return, and some time before the sitting of the Court of Revision of the Council.

A. S. W., the person assessed, was duly notified of the sittings of the Court, both by posting up and by personal service, but refused to attend the sittings.

The property appealed against had been assessed *en bloc*, instead of in the separate lots appearing on the plan into which the property is divided, as required by 4 Edw. VII. ch. 23, sec. 22. The Council's Court of Revision, relying on this as being "a palpable error," within the meaning of sec. 65, sub-sec. 19, of that Act, and also on sub-sec. 21 (the assessment having been

opened by appeals undoubtedly lodged properly), and also being of the opinion that the time for appealing in municipalities in unorganised districts was, under R.S.O. 1897, ch. 225, sec. 43, one month, instead of fourteen days, adjudicated upon the appeal. An appeal from the Court of Revision was taken to myself as District Court Judge, within the proper time, by a member of the Court of Revision, who was a ratepayer. Subsequently, an appeal was launched from the decision of the Court of Revision to the Ontario Railway and Municipal Board, by a notice signed by H. W., the husband of A. S. W.—the name of A. S. W., the party assessed, not appearing in the notice.

The matter coming before me in due course, I held: first, that the original appeal was properly before the Court of Revision of the Council, and that, therefore, the matter was properly before me; second, that a statutory right of appeal to the District Court Judge having been given, and having been taken advantage of by a ratepayer, I was bound to determine his appeal; third, that that statutory right to appeal to the District Court Judge was not taken away by the provisions of sec. 76 of ch. 23, 4 Edw. VII., and amending Acts, or by R.S.O. ch. 225, sec. 48, and amending Act 5 Edw. VII. ch. 24; fourth, that even if such right was interfered with by the said Acts, the person assessed, A. S. W., could not take advantage of that fact in this instance, as the notice of appeal to the Ontario Railway and Municipal Board was not signed by her, or in her name, as provided by 5 Edw. VII. ch. 24, sec. 48*a*, but in the name of her husband, whose name did not appear in the assessment roll in connection with the properties in question.

Was I right in holding as I did?

The assessment roll being before me on appeals, undoubtedly properly launched, was I justified, under the provisions of 5 Edw. VII. ch. 24, sec. 3, in considering the particular appeal (even if not properly launched), if evidence was produced to shew that the property was insufficiently assessed, the person assessed having had ample notice of the hearing?

I may add that, subsequent to my holding as above, the Ontario Railway and Municipal Board heard the appeal lodged by the husband, H. W.; and, amongst other findings, held, in effect, that, where a person assessed for over $10,000 appeals to the Board, the right of other ratepayers to appeal to the District Court Judge ceases.

All of which is respectfully submitted for the opinion of the Court, under the provisions of 4 Edw. VII. ch. 23, sec. 77, this 5th day of June, 1912.

By sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, the appeal provided for by sec. 76 of the Assessment Act shall be to the Ontario Railway and

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RE FORT FRANCES ASSESSMENT

Statement

Municipal Board, instead of to the Board of County Court Judges, as therein provided; and, by sec. 52 of the said Act of 1906, instead of the appeal provided for by sec. 48*a* of the Act respecting the Establishment of Municipal Institutions in Territorial Districts being to a Judge of the High Court in Chambers in Toronto, it shall be to the Ontario Railway and Municipal Board.

By sec. 18 of the Assessment Amendment Act, 1910, 10 Edw. VII. ch. 88, sec. 76 of the Assessment Act, 4 Edw. VII. ch. 23, was repealed, and a new section was substituted therefor, in part as follows: "(1) Where there is an appeal from any Court of Revision under section 68 to a Judge of the County Court . . . and the person desiring to appeal has been assessed to an amount aggregating $40,000, such person shall have the right to appeal from the Court of Revision to the Ontario Railway and Municipal Board. . . . (3) Sections 68 to 75 and sections 77 and 78 shall apply to all appeals taken under this section, and such Board shall have the powers and duties which by the said sections are assigned to a Judge of the County Court. (4) An appeal shall lie to the Court of Appeal from the decision of the Board, as provided by section 51 of the Ontario Railway and Municipal Board Act, 1906."

Section 43 of the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897, ch. 225, as amended by 4 Edw. VII. ch. 24, sec. 5 (2), reads as follows: "Any person assessed who thinks that he or any other person has been assessed too high or too low or who complains of any error or omission in regard to the assessment of himself or any person may, within one month after the time fixed for returning the roll, give to the clerk written notice of his grounds of complaint."

Section 45 of R.S.O. 1897, ch. 225, as enacted by 5 Edw. VII. ch. 24, sec. 1, is as follows: "Notwithstanding anything in the Assessment Act, or in any special Act contained, an appeal shall lie from the decision of the council or of any Court of Revision upon any complaint in respect of the first or any subsequent assessment, to the District Judge in the same manner as to the County Judge in other municipalities, and such appeal shall lie whether the municipality was organised under any general Act relating to municipal institutions or to municipalities of any class, or was incorporated by special Act or otherwise."

Section 48*a* of R.S.O. 1897, ch. 225, as enacted by 5 Edw. VII. ch. 24, sec. 3, is in part as follows: "(1) Where there is an appeal from any municipal council or Court of Revision under section 45 of this Act, to the District Judge, and a person desiring to appeal has been assessed upon one or more properties

to an amount aggregating $10,000, such person may, if he so desires, appeal to a Judge of the High Court in Chambers at Toronto . . . (2) An appeal shall lie to the Court of Appeal from any judgment or decision of the said Judge of the High Court in Chambers . . ."

September 27, 1912. The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

Statement

J. Bicknell, K.C., for the Corporation of the Town of Fort Frances, stated to the Court the nature of the questions submitted for their consideration, which arose in connection with the rights of appeal from the judgment of a Court of Revision given under R.S.O. 1897, ch. 225, and subsequent statutes. Counsel called the attention of the Court to the sections of the various statutes, which are cited and discussed in the judgments, and mentioned the fact that the stated case did not refer to the amending Act, 4 Edw. VII. ch. 24, sec. 5 (2). The main question was, whether the right of appeal to the District Court Judge was ousted by the appeal given to the Ontario Railway and Municipal Board.

No one appeared for the individuals interested.

Maclaren, J.A.

January 15, 1913. MACLAREN, J.A.:—Upon the facts contained in the statement of His Honour C. R. Fitch, Judge of the District Court of the Provisional Judicial District of Rainy River, referred by an order in council approved by His Honour the Lieutenant-Governor on the 10th day of July, A.D. 1912, to a Judge of this Court, and by him referred to the full Court, for hearing and adjudication, this Court is of opinion:—

1. That the time for appealing to the Court of Revision against the assessment in this matter was one month after the time fixed for returning the assessment roll.

2. That the right of a ratepayer to appeal from the decision of the Court of Revision to the District Court Judge has not been taken away or interfered with by the appeal to the Ontario Railway and Municipal Board, given to a person assessed for over $10,000, but not to the adverse party in such appeal.

3. That, notwithstanding such appeal to the said Board by the person assessed in this matter, it was the duty of the District Court Judge to hear and dispose of the appeal properly brought before him by the ratepayer.

The decision of the said Board not having been brought before this Court by appeal or otherwise, no opinion is expressed regarding it.

Garrow, J.A.
Magee, J.A.
Lennox, J.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

Meredith, J.A. (dissenting)

MEREDITH, J.A. (dissenting):—Whether this case comes within the provisions of the general enactment respecting the

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assessment of property in this Province for the purpose of municipal taxation, or within those of the special enactment respecting the establishment of municipal institutions in territorial districts, upon that subject, the proceedings before the District Court Judge, after the appeal to the Railway and Municipal Board, were, in my opinion, wholly unwarranted, as well as objectionable from every proper point of view.

In sec. 76 of the general enactment (the Assessment Act, 4 Edw. VII. ch. 23), and in the enactment, in the year next following that of the enactment of the general Act, of the Act relating to municipal institutions in unorganised territories, the Legislature was very careful to give to a person assessed a right of appeal to a higher Court, and to one more removed from local influences, than a local Judge—limited, however, to important cases, under the one enactment, only when the person appealing was assessed to the amount of $20,000, and under the other, $10,000; and it is important to observe that the appeal in the latter case was to the High Court of Justice, with a further appeal to the Court of Appeal, of the Province: see also 10 Edw. VII. ch. 88, sec. 18, as to appeal to the Board in cases coming under sec. 76 of the general assessment enactment.

In the year next following that in which the later of these enactments was passed, the Ontario Railway and Municipal Board was created by legislation which, in the plainest language possible, transferred the right of appeal, with which I have been dealing, from the tribunals upon which the jurisdiction was conferred by the earlier enactments to this Railway and Municipal Board; that under the general enactment by sec. 51, and that under the special enactment by sec. 52, 6 Edw. VII. ch. 31 (O.) So that, unquestionably, the person assessed has in this case a right of appeal to the Board; and, not only is that so, but has appealed to that tribunal, which, after hearing the appeal fully on all questions of law and fact, has allowed the appeal. And upon that appeal the whole question of the assessment was reopened in all respects: see sec. 78 of the Assessment Act.

All this is, as I understand the case, not disputed; and is in any case indisputable. But it is contended that, because there is under each enactment a right of appeal, in all cases, to the Local Judge, from the Court of Revision, that Judge can exercise that jurisdiction in the special cases in which the Legislature has been so careful to give a right of appeal to a higher tribunal—to the Board and from the Board, on all questions of law, to this Court. A contention regarding which, however, as it seems to me, it is needful only to state the facts, to entirely condemn it.

The Courts do not sit for the purpose of making a farce of

legislation; and what else would an adjudication, that a Local Judge has power to nullify the whole effect of an appeal given to the Board, and from the Board to this Court, by his interposition and contrary adjudication, be? The Legislature, in giving to the person assessed the appeal which she has taken, intended to give a substantial legal right, which no Court has any right to deprive her of in any way. Indeed, I would have thought that the absurd results which might flow, and probably would flow, if the District Court Judge is right in his view of the question, from effect being given to this contention in this case, ought to have been more than enough to have prevented the case which has been stated for our opinion ever coming to this Court.

Let me state the simple facts again, so that it may very plainly appear just what is being contended for, and which, indeed, the District Court Judge has attempted to uphold.

An appeal rightly taken to the Board and confirmed in this Court may be nullified by an appeal to the Local Judge; there may be conflicting appeals and conflicting decisions upon the very same question; the Court of Appeal holding one way and the Local Judge the opposite, each holding being final.

Should I not add, too, that, even if such were the unfortunate state of the legislation, comity would require that the Local Judge should desist from anything that would lead to conflicting adjudications?

One of the first principles of the interpretation of statutes should, I have no doubt, have prevented any sort of encouragement being given to such a contention. Where there is a general enactment and a special enactment which may both cover the same thing, if there is any conflict between them, the provision of the special enactment must prevail.

Here there is a general right of appeal to the Local Judge, but the Legislature has seen fit to give to an aggrieved person a special right of appeal; if that right be not taken advantage of, then the general right remains intact—to appeal to the inferior tribunal; but, when it is once rightly invoked, it must override the general right, in so far as it is necessary to give full effect to the special legislation in favour of the person assessed.

It seems to me to be proper to add that, not only is that so, but that this case affords strong evidence of the wisdom of such legislation; for, as I understand the facts, the opponent of the person assessed is now, and throughout has been, a member of the Court of Revision—both judge and an active party litigant in his own case; and at his instance the ruling of the Local Judge, which, in my opinion, is entirely wrong, was made.

Questions respecting the time within which an appeal may be taken, and whether proper notice of appeal was given, were proper for the Board upon the appeal to them; and if any one,

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having a right to question their rulings, desire to do so, on any question of law, it must be done by way of appeal to this Court in regular manner; the Local Judge, having no jurisdiction over the case, cannot deal with them by adjudication or by way of a stated case.

I would answer the questions asked accordingly.

Answers as stated by MACLAREN, J.A.

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SWEET v. ARCHIBALD.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Drysdale, J. March 15, 1913.

1. CONTRACTS (§ I D 3—55)—DEFINITENESS.

Uncertainty in a contract can be cured by a later agreement or transaction by the parties; *e.g.*, any uncertainty in a contract to continue financing a company as the obligor has done in the past.

2. GUARANTY (§ I—6)—AGREEMENT TO GUARANTEE BANK OVERDRAFT—DURATION OF LIABILITY—BREACH OF CONTRACT.

In an action on a note made by a corporation in favour of defendant, who held practically all the company's stock, and endorsed by him to plaintiff, defendant was entitled to counterclaim for plaintiff's breach of agreement, on which defendant claims the note was endorsed by him, that plaintiff would continue to guarantee the company's overdraft at a bank up to a stated amount; the breach consisting in stopping payment on a cheque, rendering the company insolvent and defendant's shares worthless.

[*Tweddle* v. *Atkinson*, 1 B. & S. 393, 396, referred to.]

Statement

APPEAL by the plaintiff from judgment of Russell, J., allowing the defendant damages on his counterclaim, and cross-appeal by the defendant from that part of the judgment below which ordered the recovery by the plaintiff from the defendant of the sum of $10,515.30.

The appeal and cross-appeal were both dismissed, DRYSDALE, J., dissenting.

T. S. Rogers, K.C., for the defendant.

H. Mellish, K.C., for the plaintiff.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred with GRAHAM, E.J., with some doubt.

Graham, E.J.

GRAHAM, E.J.:—This is an action upon a promissory note of February 25, 1910, for $9,666.26 made by the Canada Condensed Milk Co. to the defendant and endorsed by him to the plaintiff.

The company did business with the Canadian Bank of Commerce at the Antigonish branch. The defendant was very largely interested as a shareholder, holding all the shares but two. The plaintiff held of the company's $20.000 bonds, some $11,000 worth as security for indebtedness. Besides he was guaranteeing an overdraft to the extent of $7,500, for which he was receiving a commission of 3 per cent. quarterly on $7,500. Then he was

endorsing the paper of the company at the bank agency for a commission at 2 per cent., the bank discounting it for 6 per cent., and it was for this the note sued on was used for retiring.

The defendant himself was not on any of the paper or in any way liable, personally, for the indebtedness of the company. The note in question for $9,666.26 was given at the plaintiff's instance, and at his instance, the defendant, for the first time, became personally liable.

The last guaranty for the overdraft (it appears that it was customary to give fresh guaranties) was given January 2, 1909, to the extent of $7,500 and was to last until April 1, 1909. For this, the company paid the plaintiff, as I have intimated, $22.50, 3 per cent. on the $7,500.

The note sued on is the result of the defendant's agreeing to become liable for the notes then current in the bank. Those notes were retired, the principal and interest made up, and this one given.

There is a conflict in the evidence as to the consideration which the defendant was to receive for his becoming so liable. The plaintiff says it was given that the notes of the company then current, might be taken up and thus gain three months' additional time to prolong the company. The defendant says that in addition the plaintiff agreed—

> If I consent to do it (*i.e.*, to become personally liable) will you agree to continue financing this thing as you have done in the past? and he said he would.

The trial Judge has not decided this conflict in the evidence in favour of the plaintiff. But he inclined to the view that it was too uncertain to constitute a binding agreement. An agreement to continue financing a company as he had in the past (covering a period of years) may be too uncertain or it may not; it is not very material to determine it now on this case. Because uncertainty in a contract can be cured by a later agreement or transaction by the parties. And here it was cured *pro tanto* by a transaction which took place in pursuance of the uncertain agreement.

As to the facts, I think the probabilities are in favour of the defendant. I cannot believe, that merely for the purpose of prolonging the company's existence for three months, the defendant became personally liable on this note without more. Then we find the plaintiff actually giving financial assistance afterwards.

Now the first matter requiring financial assistance brought about a transaction that was certain. Some milk accounts were due from the company to the patrons. The company, on the other hand, had held some drafts accepted by customers in its favour, which were current, but would not mature in time for the

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payment of the patrons. So that the defendant, on the 10th March, went to the plaintiff and this transaction was entered into. The plaintiff gave to the defendant his cheque for $600 payable to the company to be used at the branch of the Canadian Bank of Commerce to raise funds to pay off the patrons their accounts. The bank assented. The defendant says:—

About ten o'clock, when I thought the bank would be open I telephoned up to the bank and asked for Mr. Harrison. I said, "Mr. Harrison, I received a cheque from Mr. Sweet last night for $600 to pay for the milk cheques for last month of February which are being issued to-day. I will send it up for deposit." He said, "All right." That was about ten o'clock.

The defendant also had given to the plaintiff the company's cheque for $600 in exchange for the other, and the plaintiff agreed to hold the latter over for a certain number of days, no doubt to give time for the drafts to mature. The defendant sent the plaintiff's cheque for $600 to the bank. Then, thinking there were funds there, he gave one of the patrons a cheque, and when the cheque was presented it was dishonoured, and the collapse followed. The plaintiff had, meanwhile, countermanded the payment of the $600 cheque, or, rather, he, contrary to his promise to the defendant, presented the company's cheque for $600 to the bank, and thus withdrew the funds credited by his cheque by cross entries.

The plaintiff says:—

Q. You told Mr. Harrison that $600 was not to go to the credit of the company? A. I think so.

Q. Do you tell me, on the pinch of this case, that you don't know whether you forbade Harrison to put that $600 cheque through? A. I do.

Q. You tell us you don't know whether you did or not? A. I do.

Q. Did you not tell me a moment ago that you did tell him not to? A. I did not mean to.

Q. Did you not say it? Do you not know you said it? You said that you did, you supposed you did tell Harrison? A. I may have said I supposed I did.

Q. Did you say it or not? A. I don't know.

Q. Do you suppose that you did tell Harrison not to let this $600 cheque go to the credit of the company? A. I might have.

Q. Do you think you did, or do you think you did not? A. I don't think, I don't know.

Q. You don't think? What do you mean? I ask if you think you told Harrison not to let it go to the credit of the company? A. I don't know.

Q. What do you think? A. *I think I gave him a cheque of the same amount to put against it that Archibald gave me.*

Q. Did you not arrange that day, that that cheque which you gave to Mr. Archibald should not be used A. Not to my knowledge. It is a good while ago. . . .

Q. What was the agreement with Mr. Archibald at the time you gave him the $600 cheque? A. He wanted me to swop cheques and hold his cheque *for about five days, which I agreed to do,* and he had made drafts

against different parties which amounted to considerably more than that, and they would be applied to this.

The plaintiff has brought an action on the note. It is defended upon the ground, among others, that at the time when the defendant became personally liable, the plaintiff had already notified the bank manager to make no more advances under the guarantee, although the overdraft was less than the guaranty. The learned Judge says, in his judgment:—

> It is in fact, a little singular that while the plaintiff was exacting and receiving three per cent. from the defendant upon the whole amount, $7,500, up to the first of April, he admits that a month or two before the tenth of March (that would be earlier than the giving of the endorsement) he had told the bank manager to make no more advances, although the amount of the advances must have been at the time considerably less than the amount guaranteed.

In the ordinary case, when one is asked to become liable as a surety, where he was not liable before, and a direction like that is concealed from him, something that the person becoming liable would not at all expect to happen, it would amount to a fraud, and it would vitiate the liability incurred. For some reason, the trial Judge has not dealt with the transaction, and it is very difficult to make a finding on the facts and deal with it now.

But there is a counterclaim in respect to the plaintiff's stopping his cheque, or preventing its proceeds from going to the credit of the company's account in the way he did at the bank, whereby the defendant has suffered damages in having the company rendered insolvent and his shares rendered useless. It is answered that the plaintiff has no action for that injury, that it is the company which would be the party to sue.

That depends, I think, upon the question of who were the parties to the agreement. In my opinion, it was the defendant, not the company, who entered into the agreement, that the company was a stranger to the consideration and to the contract.

The consideration moved from the defendant personally and he became liable personally on this note where he was not liable before.

Even supposing that the defendant was the agent of the company, the consideration actually moved from the defendant (that is to say, he endorsed the note) not from the supposed principal, the company. Although the plaintiff and the defendant agreed that the plaintiff should give his cheque for the benefit of the company (it was also a benefit to the defendant) yet that would give the company no right to maintain an action in respect to the benefit. The company, as I said, was a stranger, and the defendant is the person to maintain the action.

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In *Tweddle* v. *Atkinson*, 1 B. & S. 393, at 396, Wightman, J., said:—

On the contrary, it is now established that no stranger to the consideration can take advantage of a contract although made for his benefit.

Crompton, J., said:—

The modern cases have in effect overruled the old decisions; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage and not a party to it for the purpose of being sued.

I also refer to Langdell's Summary of Contracts:—

Sec. 62. A binding promise vests in the promisee and in him alone a right to compel performance of the promise and it is by virtue of this right that an action is maintained. In the case of a promise made to one person for the benefit of another, there is no doubt that the promisee can maintain an action, not only in his own name, but for his own benefit. If, therefore, the person for whose benefit the promisee was made could also sue on it, the consequence would be that the promisor would be liable to two actions. In truth, a binding promise to A. to pay $100 to B. confers no right on B. in law or in equity.

Sec. 63. What has been said in the preceding paragraph does not in strictness relate to the subject of consideration, but it was necessary to say it in this connection because the case of *Dutton* v. *Poole*, 2 Lev. 213, has given rise to the notion that the consideration of a promise need not move from the promisee, though that case really only decided that it need not always move from the person who sues on the promise. It is clear from the definition of consideration that it must move from the promisee. Indeed it is of the very essence of consideration that it must move from the promisee. What is received from one person cannot possibly be a consideration for a promise to another person.

In my opinion, the plaintiff was not justified in recalling the funds from the milk company's credit at the bank. The defendant had *bonâ fide* placed the drafts upon the customers with the bank for collection. The bank, without instructions from him, discounted the drafts (apparently afterwards) so as to have the cover of the plaintiff's guaranty. And the plaintiff, seeing that the overdraft would not be reduced if this cheque was used, took this course.

I think the damages have been properly assessed. The appeals of both plaintiff and defendant ought to be dismissed, each with costs.

Drysdale, J.

DRYSDALE, J.:—The action herein, is upon a promissory note for $9,666,26, made by a body corporate called the Canada Condensed Milk Co., Ltd., in favour of the defendant, and by him indorsed to the plaintiff. There is, so far as I can see, no answer to the action on this note, unless an agreement set up in the defence, whereby the plaintiff is alleged to have agreed with defendant to finance the said milk company is an answer.

The first thing to be noted about such an agreement, is that it has not been found by the trial Judge, and secondly, under the evidence, no such agreement could, I think reasonably be found. The defendant's version of the facts relied upon for establishing such an agreement is met with a flat contradiction on the part of the plaintiff, and this, coupled with an admission by defendant to the effect that if such an agreement were entered into it was to be reduced to writing, leads one, in the admitted absence of such a writing, to find against the existence of such an undertaking.

The plaintiff was admittedly a guarantor of the milk company to the Canadian Bank of Commerce, under a written guarantee appearing in the case to the extent of $7,500 to expire on April 1, 1910, unless terminated by notice in writing before that date by the guarantor. This guarantee was really to cover, as I understand it, the milk company's running account, or overdraft, and by the admission of both parties to this action, was to be kept as low as reasonably possible by the milk company.

On or about March 9, 1910, it seems the plaintiff refused to make an advance to the milk company of $600 requested of plaintiff by defendant as the manager of the milk company, and on, or about, that time notified the bank not to increase the bank's loans to the milk company. This refusal and notification is made the basis of a defence to the note under the alleged agreement set up in the defence and is also made the subject of a counterclaim by defendant against plaintiff. On the claim by plaintiff, I would find on the facts no such agreement as is set up in the defence as an answer to the note; on the counterclaim I am at a loss to understand how defendant can recover damages against the plaintiff on any theory that plaintiff is guilty of a breach of contract or wrongdoing as against the milk company. This company was a body corporate, incorporated under the Joint Stock Act, and the defendant's only interest in its affairs is that of a shareholder. It matters not that he owned most of the shares. Since the case of *Salomon* v. *Salomon*, [1897] A.C. 22, 65 L.J. Ch. 35, 4 Mans. 89, it no longer avails to talk of a one-man company, and the rights of creditors, shareholders and debenture holders of such a company are precisely the same as if the stock were vested in a number of holders.

It may be that the milk company can complain of the plaintiff's actions and dealings with the bank as affecting its interests —I am not prepared to find that under this record and I am certainly not prepared to find that the defendant is entitled to damages by reason of statements that affect the company only and not the defendant. If the milk company can maintain its right to damages by reason of any act or omission of the plain-

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tiff, the moneys it is entitled to recover will go either to its creditors, debenture holders or shareholders on a proper winding up.

I would dismiss the defendant's appeal from the judgment on the claim and allow the plaintiff's appeal against the judgment on the counterclaim.

Appeal dismissed, DRYSDALE J., *dissenting in part.*

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Re SHEARD.

Ontario Supreme Court, Middleton, J. June 5, 1913.

1. WILLS (§ II G 1—120)—BEQUEST OF INCOME—FUND TO BE INVESTED IN REALTY FOR HOME FOR DONEE ON MARRIAGE—ESTATE CREATED.

An absolute estate was vested in the testator's son by a bequest, without a gift over, to executors of a sum of money to be invested in their names for the payment of the income to such son, with a further provision that on the marriage of the son such fund should be invested in real estate so as to give him a home for his absolute use and benefit for life.

[*Rishton* v. *Cobb*, 9 Sim. 615; *Re Howard*, [1901] 1 Ch. 412; *Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. 445, specially referred to.]

Statement

PETITION to determine questions arising in the administration of the estate of the late Joseph Sheard.

W. D. McPherson, K.C., for the petitioners.

N. W. Rowell, K.C., for Elizabeth Sheard.

Middleton, J.

MIDDLETON, J.:—The affidavits filed make it clear that the wife, notwithstanding the suggestions contained in the will, is of perfect mental capacity, and sui juris.

The testator directs that $4,000 shall be invested, in the names of his executors, for the benefit of his son Frederick, and that the income shall be paid to him; and, if Frederick "shall take unto himself a wife," then the money shall be invested in real estate "so that my said son shall have a home for his absolute use and benefit." There is no gift over.

It is clear upon the authorities that this confers an absolute estate in Frederick. In *Rishton* v. *Cobb*, 9 Sim. 615, it was held that the estate would be absolute even if the gift of income terminated upon marriage. This decision has the approval of Farwell, J., in *Re Howard*, [1901] 1 Ch. 412. Upon the whole subject see *Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. 445, 4 O.W.N. 441, and in appeal, 4 O.W.N. 1170.

Declared accordingly. Costs out of the estate.

Order accordingly.

O'CONNOR v. CITY OF VICTORIA.

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March 29.

British Columbia Supreme Court. Trial before Hunter, C.J. March 29, 1913.

1. PARTIES (§ I A—1)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT—ACTION FOR—TITLE NECESSARY TO SUSTAIN.

One who does not have the title to a cemetery plot cannot maintain an action for the wrongful removal of human remains therefrom.

2. CORPSE (§ II B—13)—WRONGFUL REMOVAL FROM BURIAL LOT BY MUNICIPAL OFFICER—LIABILITY OF MUNICIPALITY.

A municipality is answerable in damages to the owner of a cemetery plot for the wrongful removal by municipal officers in the course of the construction of a roadway, without the lot owner's consent or other lawful authority, of human remains interred therein.

3. DAMAGES (§ III K 1—212)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT—PUNATIVE DAMAGES—WHEN AWARDED.

Punative damages will be awarded in an action for the wrongful removal of human remains from a burial lot, where the boxes containing two remains were enclosed in rough lumber boxes and re-interred elsewhere, one above the other, in a common grave, and the place of re-burial of the body of a child was left uncertain by the defendants.

4. DAMAGES (§ III T—360)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT—AGGRAVATION OF DAMAGES—TENDER OF SMALL SUM.

The tender into court of $40 as satisfaction for the unlawful removal of human remains from a burial lot, where the liability of the defendant is unquestionable, amounts to an aggravation of the wrongful act.

5. EVIDENCE (§ XI—915)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT—CARE BESTOWED ON LOT, EVIDENCE OF—MATERIALITY.

In an action for the wrongful removal of human remains from a burial lot, evidence as to the amount of care bestowed on the lot by the plaintiff is immaterial.

Statement

TRIAL of action by three plaintiffs for damages for removing human remains interred in the cemetery plot of the plaintiffs O'Connor without their permission or other lawful authority. The removal had been directed by the city officials in the course of operations to construct a new roadway adjacent to the plot in question.

The city municipality paid $40 into Court as a tender of amends, but the plaintiffs declined to accept the same.

Judgment was given for the plaintiffs O'Connor for $2,000 damages and the action dismissed as to their co-plaintiff McGeoghegan without costs.

W. J. Taylor, K.C., and *F. A. McDiarmid*, for plaintiffs.

T. R. Robertson, for defendant municipality.

Hunter, C.J.

HUNTER, C.J.:—The legal basis of this action of course is trespass to the realty. So far as concerns the bodies which have been removed and which removal has led to this action, when the body is deposited in the ground it becomes in law a part of the

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freehold, as it does in the course of time in fact. That being the basis of this action and it being shewn that the title to these particular lots is vested in the two Misses O'Connor and in them alone, it follows that the plaintiff Mary McGeoghegan has no cause of action; and as to her I think the action ought to be dismissed without costs. As to the other two plaintiffs, the two Misses O'Connor, the trespass has been admitted. I do not see how it could have been otherwise; in fact, I think the city would have pursued a much better course if they had at once admitted the trespass and had not made any small payment into Court, but had allowed the matter to rest in the discretion of a Court or jury, as the case may be.

Not only is the trespass now admitted, but it appears that no attempt whatever was made to get any legal authority to interfere with these bodies; no attempt was made to pass or secure the passage of a resolution by the municipal council, or to get a direction from the coroner in accordance with the positive legal requirements under the Act respecting Graveyards. Not only that, but little if any time was lost in at once getting to work in removing these bodies, without giving the persons who had any concern in respect to their removal a reasonable opportunity of presiding at the obsequies. So far as I can gather from the evidence there was not more than a month elapsed between the time at which the order was given for the removal of the bodies and the actual removal. Not only that, but in the case in hand the two bodies were not only removed from the respective graves that they then occupied, but the boxes were apparently piled into two ordinary lumber boxes and these bones deposited on top of each other in a common grave. And notwithstanding the evidence that has been adduced as to that, I am not at all in my own mind clear as to whether or not their exact location now is a thing that is beyond doubt. We have it also in evidence from the mouth of an independent witness, that a child's body has disappeared and the place of deposit of the remains of the child is no longer certain.

Now, one would have thought that reasonable men, acting in a reasonable way, would have seen to it that those persons who had any interest in these bodies had received a reasonable opportunity to make known their wishes in connection with these remains.

One would have expected to find that due notice would have been given in the two leading newspapers and that several months would have been allowed to have elapsed before an interference actually took place. Nothing of that kind is done, but the matter is hurried through, apparently under the orders of the individual who was then in charge of the municipal affairs. Not only that, but the evidence seems to shew that assuming that

it was a desirable thing to have a roadway built there, it was not actually necessary to remove these two particular bodies at the time they were removed, because according to the evidence of the caretaker, those bodies might have been there yet and remained there for considerable time before any interference would have taken place by the action of the elements. There is, therefore, so far as I can see, absolutely nothing from first to last to justify the interference with these bodies in the way in which they were interfered with.

There is no doubt, of course, if they had proceeded strictly according to law, it would have disarmed the plaintiffs and robbed them of any remedy. But the fact is that they did not proceed in accordance with law, and not proceeding according to law, the plaintiffs having come into Court claiming their rights, they ought to have their rights adjudicated upon in the way which seems just, in the sound discretion of the Court.

Now, having committed this illegal trespass, we find the city coming into Court with the paltry sum of $40; I should say that really added insult to injury; that if persons had any care or concern in connection with the removal of the remains, the offer of $40 was not calculated at all to assuage their feelings or appease their just resentment. I should think that the city would have taken a much better course if they had made no payment into Court, but admitted the trespass and left it to the sound discretion of the Court or jury to say what damage they would have to pay.

That, to my mind, aggravates it, and I think in this particular case the Court would be remiss in its duty if it allowed a claim of this kind to be settled by payment of merely nominal damages. It is hard, of course, to measure the damages which one really ought to assess in a matter of this sort; it depends of course largely on the point of view that one would have actually to take of the affair from first to last. It is true that the corporation has made a sort of apology by a subsequent resolution, but that in no way, I think, legitimately serves to assuage the natural resentment of the plaintiffs.

It has also been made a matter of comment that these graves were not looked after and not cared for in an ordinary way. As to that, I think it is common knowledge that most if not all graves are not looked after in the way in which theoretically they ought to be, and their care is generally left to that of a paid caretaker; and in the great majority of cases, the majority of people having cemetery plots being poor people and their relatives poor people, it is natural to suppose that their graves do not receive the attention that perhaps they should. I do not think it matters much whether these graves were cared for or not, and therefore I do not take that into account.

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There was nothing shewn by the evidence as to whether these people had means to properly attend to these graves, but it has been shewn that of late years, at all events, one of the plaintiffs has been engaged in looking after the others, who were invalids. Now, as I say, the Court would be remiss in its duty if it allowed this claim to be satisfied by the payment of a small amount. I think it is distinctly a case where punitive damages are not only allowable by the Court, but ought to be awarded to the plaintiffs. The action is dismissed without costs so far as Mary McGeoghegan is concerned; the other two plaintiffs will get judgment for $2,000 and costs.

Judgment for plaintiffs O'Connor.

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OVERSEERS OF THE POOR v. BURBINE.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, Drysdale, and Ritchie, JJ. April 28, 1913.

1. JUSTICE OF THE PEACE (§ IV—16)—NOTICE OF APPEAL—EXHIBITS — AUDI ALTERAM PARTEM—COUNTY COURT JURISDICTION.

The County Court has no jurisdiction to entertain an appeal from an order of filiation made by justices of the peace against the defendant until the order of filiation and all the papers connected therewith shall have been sent by the justices, as prescribed by sec. 69 of the County Court Act, R.S.N.S. 1900, ch. 156, to the clerk of the County Court for filing and production upon the appeal.

[*Gilmor* v. *McPhail*, 16 P.R. (Ont.) 151; *Reekie* v. *McNeil*, 31 O.R. 444, referred to.]

Statement

APPLICATION to quash an order made by the Judge of the County Court for district No. 5, setting aside an order of filiation made against defendant.

The order of the County Court was quashed.

The grounds relied on were:—

1. Because no sufficient notice of appeal or other proceedings to assert an appeal from the alleged order of filiation was ever given or taken.

2. Because there was no evidence before the County Court that the alleged or any order of filiation had ever been made.

3. Because the County Court had no jurisdiction to hear and determine the said appeal until the alleged order of filiation sought to be appealed from and the papers in connection therewith had been sent by the justices of the peace who made the alleged order to the County Court, and neither the said alleged order nor any of the papers connected therewith were ever sent by the said justices or either of them to the said County Court or were ever on file in the said County Court.

F. L. Milner, K.C., for plaintiffs, appellants.
C. J. Burchell, K.C., for defendant, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an application to quash an order made by the County Court Judge of district

No. 5, setting aside an order of filiation made against defendant. The filiation order was made in the usual form by two justices of the peace, and defendant had appealed from the order to the County Court. The defendant had not entered his appeal on the docket, nor were any of the original papers in the case on file in the Court, in fact, the justices had not returned the papers to the clerk of the Court as required by sec. 69, ch. 156, County Court Act. It further appears that the plaintiffs, Overseers of the Poor, were not aware that the defendant had appealed, and no person appeared in their behalf. The solicitor for defendant, on the first day of the Court on his own affidavit, moved to enter the appeal on the docket, and on April 23, the Judge made an order placing the appeal on the docket. On the next day, April 24, he made an order setting aside the order of filiation with costs, on the ground that the appellees, the Overseers, had not appeared. The Overseers did not become aware of this proceeding until it was too late to apply to the Judge to set aside his order under sec. 73, subsec. (3), and application was made to Drysdale, J., at Chambers for a writ of *certiorari* to bring the proceedings into this Court.

Plaintiff's principal ground of attack is, that the County Court had no jurisdiction to hear and determine the said appeal until the order of filiation, and all the papers connected therewith, had been sent by the justices to the clerk of the County Court, there to be on file. Ch. 156, sec. 69, says:—

> The justice or justices, or stipendiary magistrate, or clerk of the Court, before whom the cause or matter appealed was tried or heard, shall, not later than one week after the appeal is granted, or notice of appeal is given, send (*a*) to the clerk of the County Court for the county, etc., all the papers in the cause or matter appealed, together with the appeal bond, and a transcript of the judgment and a statement of the costs, etc., subsec. 2, gives the Judge power to extend the time, and also to make an order on the justices directing them forthwith to send the papers up in case they have not done so, and in his discretion to make them pay the costs. Sec. 70 provides for the entry of the appeal on the docket, and for the trial of the case at the first sittings of the Court after the appeal.

Now in making such order under the circumstances disclosed in the affidavits, it seems to me the Judge was acting irregularly, and without jurisdiction. In order to entertain such a motion, it is clear that he must have the original order of filiation, and other papers on which it was based on file in the Court, and before him, and if not there, the statute has provided a very summary way to obtain them. One of the best proofs to shew that such should be the case, is to read the order the Judge made which recites that "upon hearing read the said order of filiation," which is untrue, as he had not the original order on which he could act, that is, the original order of filiation signed and sealed by the two justices who made it. He

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had no evidence before him that the Overseers had any notice of the appeal being taken, and even though not necessary, the want of it should have made him more cautious. Of course it is not meant to intimate in any way that any of these matters were brought to his attention, but the order was made without consideration of the statute, as no one was present for the plaintiffs to draw his attention to its requirements.

The authorities on this question are all decisive on the point taken, that the appeal is not properly in the Court until the original papers are sent up by the justices and duly filed in the Court.

In *Gilmor* v. *McPhail*, 16 P.R. (Ont.) 151, it was held that until the proceedings in the Court below have been sent up to the Court of Appeal by the County Court Judge, as directed by sec. 51 of the County Court Act, the appeal is not lodged, and the Court can neither dismiss it nor extend the time for setting it down for a hearing.

Osler, J.A., in giving judgment says: "There is nothing before the Court, nothing upon which it can found jurisdiction, etc., etc." In the same way here, until the justices, or stipendiary, have sent to the clerk of the Court all the original papers with the notice of appeal as required by sec. 69, there is nothing before the County Court Judge on which he could found jurisdiction.

In *Reekie* v. *McNeil*, 31 O.R. 444, Armour, C.J., the above decision was approved, and the learned Chief Justice says it is a condition precedent to the exercise of jurisdiction. In *Smith* v. *Hay*, 19 C.L.T. 231, the same doctrine is stated, that is to say, that the Court of Appeal cannot deal with a case on appeal until the original papers are duly certified, and on the files of the Court.

I may add that the practice in this Court on appeals from the County Court has been invariably the same. Until the papers duly certified are in the hands of the prothonotary, the Court will entertain no jurisdiction over the case.

In conclusion I might refer to sec. 70 of ch. 156, which provides that the appeal shall be entered on the docket for trial, whether he receives an entry from the appellant or not. Surely this provision presupposes the original papers on appeal to have been first sent to the clerk; otherwise how would he know of the appeal so as to enter it.

In my opinion the order of the County Court Judge should be quashed, and further proceedings be taken as if no such order had been made.

The defendant to pay all costs of proceedings on writ of *certiorari*.

Russell, J.

RUSSELL, J.:—I think the proper course for the appellant to have pursued in this cause was to move the County Court

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Judge for an order directing the justices to send up the papers. I do not think it follows from the Judge having power to make such an order, that the cause is in the County Court; or at all events, it does not follow that the Court can proceed to deal with the appeal without having the papers in Court.

The Ontario cases cited seem to shew that the Court has not jurisdiction to hear the cause in the absence of the papers: *Gilmor* v. *McPhail*, 16 P.R. (Ont.) 151; *Reekie* v. *McNeil*, 31 O.R. 444.

In this case the decision of the justices has been set aside and the order of filiation quashed without the parties most interested, and interested on behalf of the general public, having had any opportunity to know anything about the matter.

I agree with the learned Chief Justice in the conclusion at which he has arrived.

Ritchie, J.

RITCHIE, J.:—I cannot say that the question of construction in this case is free from doubt but I think the Ontario authorities cited by Mr. Milner, as to lack of jurisdiction in the County Court Judge, are in point, and I follow them. These cases are referred to in the judgment of the learned Chief Justice, and it is not necessary for me to add anything to what he has said in regard to them.

The practice which the defendant asks this Court to sanction makes it not unlikely that a litigant in the justices' Court, who has there obtained judgment, may have his judgment reversed *ex parte*. This has actually occurred in this case.

In taking out an appeal no notice is required by the statute; all that is necessary is the filing of an affidavit and bond with the justices, and the Overseers, in this case, had no notice that these steps had been taken until after the appeal was disposed of.

Section 69 of the County Court Act, which is imperative in its terms, requires the justices, not later than one week after the appeal is granted, to send the papers to the County Court clerk. I think the office of the County Court clerk is the place where a man is entitled to go to ascertain if an appeal has been asserted from a judgment in his favour in the justices' Court, but if the practice contended for is established by this Court, then the day before the County Court opens the litigant may go to the office, find no papers and consequently no entry for trial by the clerk. The next day there may be judgment against him. In this way, a maxim, perhaps the most important known to the law, *audi alteram partem*, would be violated.

In my opinion, the Court should, if at all possible, avoid the construction of a statute which might bring about this result.

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I concur in the conclusion arrived at by the learned Chief Justice.

MEAGHER, J., was of the opinion that the County Court had jurisdiction, and that the appeal should be dismissed.

DRYSDALE, J., concurred.

Order to quash.

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BARTLET v. DELANEY.

Ontario Supreme Court. Trial before Latchford, J. January 10, 1913.

1. WATERS (§ I C 4—47)—RELATIVE RIGHTS OF PUBLIC AND INDIVIDUALS—CROWN GRANT—BED OF RIVER.

The Act, 1 Geo. V. ch. 6, applies only to presumptions, and not to a case where the bed of the river is granted in express terms.

2. PARTIES (§ III—122)—CROWN LICENSE—PRIOR PATENTEE—INTERVENTION BY ATTORNEY-GENERAL NECESSARY, WHEN.

A plaintiff claiming under a patent from the Crown may maintain an action to recover from a defendant who claims part of the same land under a subsequent license of occupation from the Crown without making the Attorney-General a party, and such license may be set aside.

[See *Martyn* v. *Kennedy* (1853), 4 Gr. 61; and *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275.]

3. ESTOPPEL (§ III L—146)—BY RELATION OF PARTIES—TENANT'S ESTOPPEL UNDER LEASE, DURATION.

A lease which has expired by effluxion of time does not estop the former tenant from subsequently denying the title of his sometime landlord, but it is admissible in evidence to prove that the tenant admitted that lands covered by it were included in an ambiguous description contained in the landlord's title deeds.

4. WATERS (§ II A—65)—WHAT ARE WATERCOURSES—RIVERS—"CHANNEL" DEFINED.

The word "channel" as applied to a river means primarily the place or bed in which the river flows, but this meaning may be modified by the circumstances in which the word is used, for instance, a well defined deep channel used for navigation, there being no difference, however, between the meaning of "channel-bank" and "side of the channel."

5. EVIDENCE (§ XI U—890)—TITLE OR POSSESSION OF REAL PROPERTY—DESCRIPTION IN PATENT SUPPORTED BY EVIDENCE OF OCCUPATION.

Where the description of an island referred to fixed points on the mainland and the sides of the channels were given as its limits, no area being given, and a plan referred to in the patent did not shew the locality by reference to fixed points but was said to render the description ambiguous, evidence of the circumstances including correspondence leading up to the grant and of prior occupation of the land described in the patent was held to be admissible for any purpose of identifying the parcel intended to be granted.

[*Gordon-Cumming* v. *Houldsworth*, [1910] A.C. 537, 541, and *Grey* v. *Pearson* (1857), 6 H.L.C. 61, 106, followed.]

Statement

THE plaintiff, the administrator in Ontario of the estate of the late Francis F. Palms, of Detroit, Michigan, who died on or about the 4th March, 1905, brought this action against the original defendants to recover from them certain property situate in the

Detroit river, into possession of which they had entered about the month of April, 1907, under a contract of sale and purchase made between their predecessor in title, one Behen, as purchaser, and the heirs of the said Palms, as vendors.

The original defendants declared that they were ready and willing to carry out the terms of the contract; but they alleged that, owing to a grant to one Gauthier by the Province of Ontario of part of the property, which they understood to be included in the agreement, and the entry into possession of the same by Gauthier, the plaintiff was unable to make a good title.

In 1827, the Crown issued to P. a license of occupation for an island in the Detroit river called "Fighting Island," "containing by computation about twelve hundred acres." In 1863, an order in council was passed accepting a surrender of the island to the Crown by the Wyandotte Indians; and on the 28th June, 1867, a patent of the island from the Crown to P. was issued, expressing that, in consideration of $6,000 paid by P. to the Superintendent of Indian Affairs, Her Majesty had granted to P., his heirs and assigns forever, the island in the Detroit river known as "Fighting Island," as shewn on a plan of record in the Crown Lands Department, and described, by the surveyor who made the plan, as lying between two lines extending from a point on the north nearly opposite Turkey creek to a point on the south nearly opposite the mouth of the Rivière aux Canards —the line forming the easterly boundary following the westerly side of the Canadian channel along its windings, and the line forming the westerly boundary following similarly the easterly side of the American channel. On the plan referred to, the island was marked as containing 90.9 acres. The plan also indicated a marsh surrounding the island proper; the total area of marsh and island shewn on the plan being 1,350 or 1,400 acres.

The action came on for trial at Sandwich in March, 1912, before FALCONBRIDGE, C.J.K.B., who directed that the case should stand over for trial until notice of the proceedings should be served on the Attorney-General for the Province of Ontario, and that Gauthier should be added as a party defendant.

Notice was duly given to the Attorney-General, and Gauthier was added as directed. Amendments were made to the original statement of claim, alleging that, in derogation of the plaintiff's title to the lands in question, the Crown—represented by the Minister of Lands Forests and Mines of Ontario—had assumed, in the year 1909, to grant to the defendant Gauthier a license of occupation of certain lands covered by water which were included in the prior grant; and that Gauthier had entered into and was in possession of such lands.

As against the original defendants, the plaintiff claimed possession and mesne profits; and, as against Gauthier, a declaration

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that his license of occupation was issued in derogation of the plaintiff's title, and should be cancelled. An injunction was also asked for to restrain the defendant Gauthier from further entering upon the property in dispute.

E. D. Armour, K.C., and *A. R. Bartlet*, for the plaintiff.

J. H. Rodd, for the defendants Delaney, Ritchie, and Glukoff.

McGregor Young, K.C., and *H. C. Clay*, for the defendant Gauthier.

The Attorney-General was not represented.

Latchford, J.

January 10, 1913. LATCHFORD, J. (after stating the facts as above):—It was stated that the fisheries carried on by Gauthier upon the property have an annual value of many thousand dollars. Owing to the importance of the interests involved, and the possibility that a higher Court might take a different view from that which I entertained as to the issues to be determined, the evidence was allowed to cover a wider field than I was inclined to think necessary. My opinion was, and is, that the main question for determination, if not indeed the only question, is, whether or not the description in the letters patent from the Crown to the plaintiff's predecessors in title includes the land covered by water now in possession of Gauthier under his license of occupation.

If the description were clear and unambiguous in its terms, the purpose for which the property was originally obtained from the Crown could not be shewn by the correspondence which led up to the grant. Such is, as I understand it, one of the two principles of the decision in *Attorney-General of Quebec* v. *Fraser* (1906), 37 S.C.R. 577, and, *sub nom. Wyatt* v. *Attorney-General of Quebec*, [1911] A.C. 489. The question of navigability, also there dealt with, is not in issue here. But all that passed is admissible to prove what was in fact the subject of the sale: not to alter the contract, but to identify its subject: *Gordon-Cumming* v. *Houldsworth*, [1910] A.C. 537, at p. 541.

The description in this case is far from plain. It appears to be contradictory. Some of its terms are certainly ambiguous. It purports to grant an island according to a plan, and by reference to physical features grants much more than the island shewn on the plan. In it the word "channel" is used to signify the easterly and westerly boundary of the property granted. "Channel" is a word of many meanings. As used in the description, what meaning is it intended to convey? Obviously, only such as will be reconcilable with the other terms of the description. Any meaning involving repugnance to or inconsistency with the rest of the instrument may be modified to the extent of removing that repugnancy or inconsistency: *Grey* v. *Pearson* (1857), 6 H.L.C. 61, 106.

Some light may also be thrown upon the matter by a consideration of the circumstances attending the grant of the patent.

During the early part of last century, Fighting Island, otherwise known as Grosse Isle aux Dindes, was occupied by the Wyandotte Indians, a branch of the once powerful Hurons. Near by, on the Rivière aux Canards, was shed the first blood of the war of 1812. Since then, the Indian and the wild turkey have alike vanished, but the island still worthily perpetuates one of its ancient names.

In 1827, Thomas Paxton presented a petition to His Majesty, setting forth that he is the second eldest son of Captain Thomas Paxton, who had most faithfully and honourably served His Majesty's late father, of glorious memory, for a period of thirty-five years, in various parts of the world, and was lost in 1804, with His Majesty's schooner the "Speedy," belonging to what was then called the Provincial Navy, on Lake Ontario. The petitioner states that his father was peremptorily commanded by the then Governor of this Province, General Hunter, to embark with the Judge and officers of the Court going on the circuit to open the assizes in the district of Newcastle; that, owing to the utter unseaworthiness of the vessel, he protested, but unavailingly; and that from the time of leaving the port of York no tidings were ever heard of the schooner.

Mr. Paxton added that nothing was ever heard of the passengers; who included a prisoner to be tried for murder, his counsel, and the witnesses, as well as Mr. Justice Cochrane, Solicitor-General Gray, Sheriff McDonell, and other Court officials.

The petitioner sets forth the helpless circumstances in which his mother and family were left, his own services during the late war with the United States, and that he had never received any lands of the Province, either for his personal services or as the son of a person who met his death in the employment of the Government. He then states that he has lately obtained from His Excellency Sir Peregrine Maitland a license to occupy an island in the Detroit river called Grosse or Fighting Island, which, upon the recent survey under the Treaty of Ghent, fell within His Majesty's Dominions. The island, he says, contains about twelve hundred acres of low, flat marsh land, wholly unfit for cultivation or fortifications, but which would, "if possessed by your petitioner, be of great value for various purposes." He, therefore, asks a grant of the island for a fair consideration.

The petition was favourably entertained; and on the 30th September, 1827, a license of occupation issued to Thomas Paxton, gentleman, for the island, "containing by computation about twelve hundred acres."

How Paxton availed himself of the license of occupation may

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be gathered from the memorial presented thirty years later to His Excellency General Sir William Eyre by the Honourable John Prince. After referring to the services of Mr. Paxton and his father, to the loyalty of the family, and to the fact that they have never been blessed with an abundance of this world's goods, the memorial proceeds: "The main dependence of Mr. Paxton for the support of himself and his family is this island, because of the fishery attached to it. For years after the license was granted to him, the island was entirely useless to him; but he afterwards, by the assistance of friends, obtained the means of clearing the river from rocks and boulders, and removing the many impediments which existed to the establishment of a fishery. To effect that, many years of labour and much money were expended, and he was at length induced to embark all he had in the enterprise; and it is only within the last few years that he has been at all remunerated. He has erected houses, curing sheds, and other buildings there, and in fact has embarked there all he has in the world."

Colonel Prince then asks that Mr. Paxton be allowed to hold the island for his life or be permitted to purchase it at a fair valuation and on a long credit.

The Superintendent-General of Indian Affairs was not disposed to entertain favourably this application made on behalf of Mr. Paxton. Under date of the 8th August, 1857, he reports that he thought Mr. Paxton guilty of bad faith in suppressing the mention of his license of occupation until he found other ground failing him; and that, having further regard, *inter alia*, "to the long time which he (Paxton) has enjoyed a most valuable fishing at a nominal rent," he considered that Paxton should be satisfied if he had the pre-emptive right to purchase "at a valuation based on the present state of the island, including improvements. . . . If on these conditions he declines to accept the pre-emption, the island and fishery might be sold by auction for the benefit of the Indians."

On the 8th December, 1857, Mr. Froome Talfourd—who succeeded Mr. Pennefather as Superintendent of Indian Affairs—wrote to Colonel Prince informing him that the Executive Council had recommended "that the island be sold to Mr. Paxton at its present value (irrespective of his improvements thereon), but subject to his obligation under the lease and certain bonds" which he appears to have executed, apparently securing some compensation to the Indians of Anderdon for his interference with their rights.

An arbitration to determine the value of the island was subsequently had; and in 1858 the price was fixed at £1,500, payable in five equal annual instalments.

The title to the island was, however, still in the Indians. On

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the 23rd March, 1863, an order in council was passed accepting a surrender executed on the 27th February, 1863, by the Wyandotte Indians of Anderdon, conveying to the Crown this island, "with all the appurtenances thereunto belonging in trust to sell and convey the same for the benefit of the said Indians."

Paxton appears to have paid the purchase-money for the island prior to the 28th June, 1867, when a patent issued to him under the Great Seal of Canada. The patent expressed that, in consideration of the sum of $6,000 by Thomas Paxton paid to the Superintendent of Indian Affairs, Her Majesty has granted to him, his heirs and assigns, forever, all that parcel or tract of land situate, lying, and being in the county of Essex, of "Our said Province," which said parcel or tract of land may be otherwise known as follows, that is to say: being composed of the island in the river Detroit known as "Fighting Island," as shewn on a plan of survey by Provincial Land Surveyor O. Bartley, dated the 20th August, 1858, of record in the Crown Lands Department, and which is described as follows by the said O. Bartley, that is to say: commencing at the upper or northerly end of the said island, north-westerly of and nearly opposite to Turkey creek, in the Petite Côte, in the township of Sandwich, in the said county of Essex; thence southerly with the stream along the westerly side of the channel of the Detroit river known as the "British channel." and following the windings thereof to the lower or southerly end of the said island nearly opposite the mouth of the river (*sic*) aux Canards, in the township of Anderdon; thence northerly against the stream along the easterly side of the channel of the said river known as the "American channel," and following the windings thereof, to the place of beginning: reserving free access to the shore of said island for all vessels, boats, and persons. "To have and to hold the said parcel or tract of land hereby granted, conveyed, and assured unto the said Thomas Paxton, his heirs and assigns, forever; saving, excepting, and reserving, nevertheless, unto Us, Our Heirs and Successors, the free use, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

The grant is of "all that parcel of land . . . otherwise known as . . . the island in the river Detroit known as Fighting Island . . . as shewn on a plan . . . and described," by the surveyor, as lying between two lines extending from a point on the north nearly opposite Turkey creek to a point on the south nearly opposite the mouth of the Rivière aux Canards—the line forming the easterly boundary following the westerly side of the Canadian channel along its windings, and the line forming the westerly boundary following similarly the easterly side of the American channel.

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A copy of Bartley's plan has been produced from the Department of Indian Affairs at Ottawa. The legend is: "Plan of Fighting Island, Detroit River, with the Adjacent Marshes." It does not purport to be drawn to any scale.

Turkey creek and the Rivière aux Canards are not shewn on Bartley's plan; but the relation of each to the island and marshes has been established by the evidence of Mr. Newman.

On the north-easterly portion of the plan, a relatively small, wedge-shaped area is shewn, marked "Fighting Island or Isle aux Dindes, 90.9365 acres." The marsh, indicated by conventional signs, almost surrounds the island proper, and extends down the river a further distance of five miles or more, when its southerly extremity ends, not in a point, but in a line bearing east and west. The total area of marsh and island shewn on Bartley's plan is 1,350 or 1,400 acres.

The water in the Detroit river varies in level about three feet; and the area of island and marsh is diminished when the water is high and increased when it is low. At places there is no marked line between land and water. The marsh grasses and weeds extend far into the river in certain localities, especially at the lower end of the island, where the reeds come up through the water for nearly a mile south of what may properly be called land.

There is not a defined shore-line to the island and marsh, taken together, as they are shewn on Bartley's plan. In fact, the plan indicates that towards the north no definite line could be drawn between land and water.

The points of the extended description at the north and south are fixed in the description by reference to physical features on the mainland which cannot have changed materially since the grant was made. There can be no doubt that Turkey creek and the Canards river still discharge into the Detroit river in the same localities as in 1858. These streams at their mouths are approximately six miles apart.

The "nearly opposite" north and south points of the area granted to Paxton are necessarily separated by nearly the same distance.

Loose and general words in a description yield to particular and specific words in the same description. I, therefore, find that the area granted by the patent is not merely the 90.9 acres called on the plan "Fighting Island," but a very much greater area, including Fighting Island as shewn on the plan, and at least the marshes surrounding it, though they form according to the plan no part of Fighting Island.

Upon the plan itself Bartley expressly distinguishes the island from the adjacent marshes. His description manifestly covers much more than the island as shewn on his plan. Even

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the inclusion, in addition, of the marshes indicated, does not satisfy the description.

This clearly appears when the physical features of the island are considered, and the relation to it of the streams on the mainland, "nearly oposite" to which lie the northerly and southerly points respectively of what was granted by the Crown in 1867.

From what is ordinarily above water, shelving beaches extend out on both sides, a varying distance, to what is known as the "channel-bank" of the river. The beach on the east side of the island is very narrow: from sixty to a hundred feet. On the west side, the beach is as wide in places as 2,500 or 3,000 feet; and where it is wide it forms one of the greatest spawning beds known of the true white-fish.

The point of departure of the line enclosing the area granted cannot be exactly determined from the description or plan, or from the physical features of the locality as they exist to-day.

The island itself has doubtless greatly changed. It has been subject for more than fifty winters, especially at the north end, to the erosive action of the ice swept down the stream; while, summer and winter, the powerful currents of the great river have attacked the sandy and marshy shores. The broad "fish-tail" at the lower end of the marsh, as outlined by Bartley, has been cut away. A point described in 1858 as "at the upper or northerly end of the said island north-westerly of and nearly opposite Turkey creek" must be a distance—how little or how great it is impossible to state with accuracy—above the present head of the dry land.

The terms "at," "nearly opposite to," and "north-westerly of," are loose and indefinite expressions. Having regard, however, to all three, and to the evidence of the present physical condition in the vicinity, I can reach no other conclusion than that the northerly point in the description, where the enclosing lines of the area granted begin and end, is now—if indeed it was not in 1858—under the water of the Detroit river. A point opposite Turkey creek might be on the island itself; but "opposite" in the grant is qualified by "nearly;" and a point "north-westerly of Turkey creek" would necessarily be above the head of the island.

The "lower or southerly end of the said island nearly opposite the mouth of the river aux Canards" is quite clearly not the lower or southerly end of "Fighting Island or Isle aux Dindes," as shewn on Bartley's plan. If the scale of the plan is one inch to 400 feet, as conjectured by the official who produced it, the southerly end of the island proper, as distinguished from the marshes, is nearly six miles north of the mouth of the Canards. If, as I think, the scale is in fact a little greater, the

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distance would be at least five miles. The "lower or southerly end of the said island," mentioned in the description as nearly opposite the small river on the Canadian shore, is not the southerly end of the area of less than a hundred acres, but of a much greater area, ending at the south nearly opposite the mouth of the Rivière aux Canards.

The plan shews a broad end to the marshes on the south. The description, if intended to follow what was outlined on the plan, would at the south take a bearing westerly a distance of one-third to one-half a mile. Instead of this, the bearing "southerly with the stream" is reversed to a bearing "northerly against the stream." I am quite unable to see how this requirement of the description can possibly coincide with the southerly outline of the marsh as shewn by the same hand that drew the description. Having regard to conditions at the lower end of the island, I am satisfied that no plan could or can accurately represent the changeful boundary between land and water at the southerly end of the property granted to Paxton. Newman's plan—the most accurate filed—and his evidence fully warrant this conclusion.

There is, however, a point, "nearly opposite the mouth of Rivière aux Canards," which satisfies the other controlling terms of Bartley's description. At that point, a bearing southerly may be directly reversed to a bearing northerly. At it, also, the line following the westerly side of the Canadian channel, along the easterly side of the island and marsh, meets a line following the easterly side of the American channel along the westerly shore of the island and marsh. It is to be noted that none of the terms—"shore," "shore-line," "water's edge," "high water mark," "low water mark"—so common in surveyors' descriptions of the time—is used by Bartley. It would have been improper for him to apply any such word as a limit to property not in fact so bounded. But here again, as at the northerly and southerly points, he made the description as definite as it could be made, by reference to physical features of the island but little subject to change—the channels of the river Detroit. These separate at the head of the island: the point where the description begins and ends. Their sides form the limits to the east and to the west of the property granted to Paxton; and the point where the west side of one channel meets the east side of the other conforms to another dominant call or requirement of the description.

"Channel," as applied to a river, may mean the place or bed in which the river flows. That is perhaps its primary meaning: Murray's Dictionary; *Dunleith and Dubuque Bridge Co.* v. *Dubuque County* (1881), 55 Iowa 558. Where the word has that meaning, the side or bank of the channel is, of course, identical

with the side or bank of the stream. But, as is pointed out in the case cited, the primary signification may be controlled by the circumstances.

The Imperial Dictionary, while stating the usual meaning to be "the place where the river flows," adds, "more appropriately the deeper part or hollow in which the principal current flows." To a like effect is the definition of the Century Dictionary.

As the word was, no doubt, first applied to the Detroit river by the French explorers and voyageurs, or by the French settlers who followed their adventurous courses, the meaning of the word in their language may not be unworthy of a reference. Littré, whose authority is pre-eminent, defines "*chénal*" as primarily meaning, "*Passage pratiqué dans une rivière ou à l'entrée d'un port.*"

I think "channel" is used in the description in this case to designate the deeper parts of the Detroit river most convenient as a track for shipping. Mr. Molliter, a Michigan engineer, called on behalf of the defendant Gauthier, so understood the word as applied to the Detroit. Such a channel exists on both sides of the island. It has well-defined and fairly permanent banks. In fact, "channel-bank" is a term that has long been used as a designation of boundary in the Detroit river. It was so used in the conveyance of the 13th January, 1883, to one Charles H. Gauthier, mentioned in *Barthel* v. *Scotten* (1895), 24 S.C.R. 367, 369. This property in question in that case is about a mile above the upper end of Fighting Island. The channel-bank of the Detroit river is there stated to be distant from the water's edge "six hundred feet more or less."

"Channel-bank" is a term also used in the license of occupation issued to the defendant Gauthier—who may or may not be the person of the same name referred to in *Barthel* v. *Scotten*. Each of the lots covered by Gauthier's license of occupation is "west of Fighting Island;" and the westerly boundary of each lot is "the channel bank of the Detroit river . . . following the windings of the said channel bank."

The westerly boundary of Paxton's grant is, as has been stated, "the easterly side of the channel of the said river, known as the American channel, and following the windings thereof."

I am unable to distinguish between "channel-bank"—that is, bank of the channel—in the license of occupation, and "side of the channel"—that is, channel-side—in the patent. In my opinion, there is no difference in meaning between bank of a channel and side of a channel, or between channel-bank and channel-side, when used to define a boundary in the same locality.

When the identity of the words "side of the channel" and "channel bank" is made plain, the description in the patent becomes clear and consistent. The point of origin and completion

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is where the channel bank on one side of Fighting Island begins to diverge from the channel bank on the other side. Such a point is at "the upper or northerly end of said island, north-westerly of and nearly opposite to Turkey creek, in the Petite Côte" of Sandwich. The channel-banks on each side of the island continue "to the lower or southerly end of the said island nearly opposite the mouth of the Rivière aux Canards." The area thus enclosed corresponds in length to the distance called for by the physical features on the main shore. It is wider, in fact, than the plan indicates the island to be; but there is no limitation of area in the grant. A limitation which did exist was deleted, and bears opposite to it in the margin of the parchment the initials of the Assistant Commissioner of Crown Lands. On the east, the side of the channel almost coincides with the line of the plan indicating the east side of the island and marshes. On the west, as stated, the side of the channel is farther out from the line of the marshes—the distance varying from 200 feet to nearly 3,000 feet.

The purpose for which the grant was sought could not be effective unless Paxton's rights extended to the channel-bank. It was on the beaches between the channels and the island and marshes that he had made the improvements mentioned in Colonel Prince's memorial—"clearing the river of rocks and boulders, and removing other impediments to the establishment of a fishery."

The report to Council of Commissioner Pennefather (8th August, 1857) refers to "the long time" that Paxton has "enjoyed a most valuable fishery at a nominal rent," and suggests that, if Paxton is not willing to purchase at a valuation based "on the present state of the island, including improvements . . the island and the fishery might be sold for the benefit of the Indians." The "improvements" are obviously those mentioned in the application to purchase on which the Superintendent was reporting.

There is in evidence an order in council (Dominion) which may be of value as shewing what was contemporaneously understood to be the meaning of the grant. It bears date the 5th December, 1870, or but little more than three years after the date of the grant itself. Trouble had arisen between Paxton and the fishery inspector for the district; and Paxton had paid under protest $200, not, as he stated, as rent, but, I think, as a license fee. He petitioned the Minister of Marine and Fisheries for a refund, and the Minister of Justice was asked for a report, which is embodied in the order in council. So far as material, the report is as follows:—

"It is evident that the original occupancy of the island in 1827 under license of the Lieutenant-Governor was with a view

to its advantages as a fishery; that the award as to the value of the island was based on the fishery; that, in effect, Paxton has paid a capitalised rent for the acquisition of the fishery, and that the Wyandottes confirmed that sale by the Crown when surrendering the same.

"It would, therefore, be most harsh and unjust to compel Paxton to pay again yearly for that which in one sum the Crown purported to sell him forever."

After pointing out that the Fisheries Act, 31 Viet. ch. 60, sec. 2, does not render it imperative to issue fishing licenses, but is merely permissive, the Minister of Justice concludes: "I am of opinion that Paxton should be permitted to remain unmolested in possession of the fishing rights exercised by him for the last 48 years." A license to Paxton was, therefore, regarded as "unnecessary and improper," and a refund was ordered of the $200.

Paxton died in 1874, devising the island to his son Ethelbert B. Paxton for life; remainder to the heirs of the body of his son.

The defendant Gauthier recognised, in several leases which he executed, the right of Paxton's devisees to the fisheries, including the pier lying between the island proper and the easterly side of the American channel.

By agreement under seal, dated the 20th August, 1877, Ethelbert B. Paxton leased to Gauthier, for a term of eleven years, "the fishery on the west side of Fighting Island that has been used by Noel Joli for the three years just past and below the one now occupied by the said Gauthier." Gauthier, on his part, covenanted to render to Paxton one-fourth of the fish caught or marketed, as the lessor might prefer.

The location of the pier of the Joli (or Paré) fishery was near the head of the island and marshes, and about halfway between the indicated westerly shore line and the channel-bank.

Nearer the upper end of the island was the pier called the Coté or Dufort fishery. This had previously been leased by Mrs. Paxton to Gauthier. Its location was about 360 feet out from the marsh. Farther down, between the marsh and the channel bank, were the piers used in connection with what were known as the Girard and the Clark fisheries. For these, as well as for the Joli fishery, the defendant Gauthier was for many years under obligation to pay a rental.

An adjustment was made on the 19th November, 1881, before the lease of the Joli fishery expired, by which all four fisheries were leased to Gauthier by Ethelbert B. Paxton. A right was given Gauthier to establish a new fishery below the Clark fishery; Paxton demising and leasing to Gauthier "a sufficient portion of land and land covered with water to erect, put up, and work

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said fishery." The lease covered a term expiring on the 1st May, 1889. For arrears under one of the prior leases referred to in the recitals, and as rent to the 1st January, 1886, Gauthier covenanted to pay, and no doubt did pay, upon the execution of the lease, a lump sum of $3,600. For the next three years the rent payable and paid was $900 a year.

Gauthier says that he went out of possession after the leases expired; and, as there is not the slightest evidence to the contrary, his statement must be accepted.

The leases, therefore, do not operate by way of estoppel. It is now open to Gauthier, as a matter of law, to deny the title which he at one time accepted. But the documents which he executed are not, I think, without a significance when there is question of the true construction of a loose and latently ambiguous description.

Before the expiry of the lease on the 7th November, 1888, the interest of Ethelbert B. Paxton was transferred to his wife Felice; who, on the 11th February, 1892, in consideration of $100,000, conveyed the island, as described in the patent, to E. H. Gillman and others; taking a mortgage back securing payment of the purchase-money. After a number of mesne conveyances, a final order of foreclosure, which became absolute on the 6th July, 1903, again vested the title to the island in Felice Paxton. From her Mr. Palms, one of the mortgagors foreclosed, purchased it, two weeks later, for $88,361.17—approximately, if not exactly, the amount due to her under the judgment, with interest and costs.

What happened to the fisheries between the expiry of the lease to Gauthier in 1889 and the purchase by Palms in 1903, is in evidence only from Gauthier. He says that the Dominion Government operated the fisheries from 1892 to 1902. It does not appear whether compensation was made or not to the several owners during this period. Gauthier says that he began fishing again at the Clark pier in 1903. He paid no rent, and was asked for none. Subsequently he operated the other fisheries or some of them.

In May, 1904, while Gauthier, without colour of right, was operating the Clark and other fisheries purchased by Palms from Mrs. Paxton, the Canadian solicitors for Palms applied to the Commissioner of Crown Lands for Ontario for a patent for the water lot surrounding the island; stating that the water lot was not included in the patent. If my view is right, they were mistaken. In reply, the Department asked for the area. The solicitors answered that they had nothing but a map made by the War Department of the United States, and suggested as bounds of a description "the channel-bank and water's edge, following the course of the water's edge and the channel-bank."

To this the Department replied declining to accept the plan referred to, and insisting on compliance with the usual conditions: a special plan in triplicate; a description by metes and bounds, made by a surveyor; an abstract of title to the island; and a declaration by the owner verifying ownership, shewing no adverse claim, and stating the purpose for which the grant was desired.

There is no evidence as to what happened in the interval between the date of the letter and issue, on the 15th February, of the license of occupation to Gauthier, except his testimony that he continued as from 1903 to operate the fisheries, and what may be gathered from the letter of the Minister of Crown Lands of the 3rd November, 1909, to Mr. Hanna, K.C., of Windsor, who on behalf of the Palms estate had asked for the cancellation of Gauthier's license of occupation—a right expressly reserved by the Crown.

What does appear beyond question is, that Gauthier was not required to comply with the conditions prescribed to Palms in 1904. No plan except the rejected plan was furnished, no survey, no surveyor's description.

From the Minister's letter it is clear, not only that material facts were suppressed, but that there was gross misrepresentation by Gauthier, who did not disclose that he had rented the pier fisheries as well as the shore from the owners of the island, nor that the fisheries on the front of the island, which he claimed to have "built and established as long ago as 1873 or 1876 or thereabouts," were the fisheries he had leased from the Paxtons. He falsely pretended "that his lease"—only one is mentioned by the Minister, when in fact there were several—"did not cover the water front or the fisheries in any way, but only the shore." He did not inform the Minister that—as he swore at the trial—it was the Dominion Government, and not himself, that operated the fisheries from 1892 to 1902, or for fully one-half of the time he professed to have been in undisturbed occupation of them. He gave to the Palms estate no notice of his application, and is unaware that the estate had any knowledge of it. I have no hesitation in finding that, in obtaining the license, Gauthier perpetrated a deliberate fraud.

That there was knowledge on the part of the Crown of an adverse claim, and some doubt as to the right to issue a license, is manifest from the provision "that the licensee, his heirs . . . shall have no recourse against the Province of Ontario for any loss or damage that may be sustained by reason of any adverse claim of the Government of Canada or any other party or parties or corporation whatsoever."

The recent statute regarding presumptions in grants from the Crown, 1 Geo. V. ch. 6, does not, in my opinion, assist Gauthier. The grant to Paxton, as I interpret it, is not a matter

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of presumption, but of fact, supported by the attending circumstances. Even if the Crown had not granted to Thomas Paxton the island as far as the channel-bank, the license of occupation to Gauthier should, on other grounds, be set aside.

The advantage to the Province—$50 a year—is trivial as compared with the wrong to the real owners of the fisheries, even though their rights did not extend to the channel-bank. As I have already mentioned, a Minister of Justice, reporting to His Excellency in 1870, regarded it "as most harsh and unjust to compel Paxton to pay again yearly for that which in one sum the Crown purported to sell him forever." It is obviously still more unjust that, by reason of Gauthier's license, obtained by fraud and misrepresentation, the grantees of Paxton should be deprived of the chief element of value in the property for which they have agreed to pay $125,000.

Following the long line of decisions referred to in *Martyn* v. *Kennedy* (1853), 4 Gr. 61, and continued to *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, determining that, though the Attorney-General is not a party to the suit, a grant made by the Crown through error or improvidence, or procured by fraud, may be set aside, I consider that the prayer of the plaintiff as against Gauthier should be granted, and Gauthier's license of occupation declared cancelled and void. An injunction should issue against Gauthier's further interference with the fisheries and lands of the plaintiff. I also direct a reference to the Master at Sandwich to determine the damages.

As between the original parties, the plaintiff is entitled to possession of the property conveyed; to mesne profits, as to which there will be a reference; and to costs up to the time Gauthier was added as a party. Costs subsequently—other than of the references, which I reserve—with costs of trial, are to be paid by Gauthier.

Judgment for plaintiff.

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REX v. DEAN.

British Columbia Supreme Court, Gregory, J., in Chambers. January 21, 1913.

1. HABEAS CORPUS (§ I C—10)—SCOPE OF WRIT—PERSON COMMITTED FOR TRIAL BUT NOT INDICTED AT NEXT ASSIZE—REMEDY.

A person committed for trial but not indicted at the following Assize, is not entitled to his discharge on *habeas corpus*, under sec. 7 of the B.C. Habeas Corpus Act of 1897, his only right under such Act being to make application for release on bail.

Statement

MOTION to make absolute an order *nisi* for a writ of *habeas corpus*.

Adam S. Johnston, for accused.
H. A. Maclean, K.C., for Crown.

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Gregory, J.

GREGORY, J.:—The prisoner alleges that he was committed for trial on September 5, 1912, and that he was not tried or indicted at the next following Court of Assize, and that no application to traverse or postpone was made by the Crown, and he claims that in such circumstances he is entitled to be discharged from custody.

The Crown disputes the statement that no postponement was ordered. The stenographic copy of the proceedings before Mr. Justice Murphy, made by the official stenographer, and the official record by the clerk of the Assize Court of proceedings, shew clearly that the matter was discussed at least, and the opinion expressed by Mr. Justice Murphy that the Crown had a right to a traverse at the first assize. Mr. Justice Murphy's recollection as expressed in his letter to me is that no order was actually made. I do not think it necessary for me to come to any conclusion as to whether an order was actually made or not.

The question to be decided here is: Is the prisoner entitled to be discharged from custody? He has been regularly committed and is held under a warrant of commitment according to form 22 of the Criminal Code, 1906, which directs the jailer to "safely keep him until he shall be thence delivered by due course of law."

Prisoner's counsel has referred me to a number of authorities, but they for the most part deal with the question of the material necessary to be laid before the Court in order to obtain an order postponing a trial. He has not produced a single authority or even reference to shew that in such circumstances as he alleges exist in the present case the accused is entitled to be discharged from custody. He is charged with the theft from the Bank of Montreal of the sum of $200,000 and I do not feel that it is my duty to be astute or diligent to find a means of giving him his freedom without a trial.

The Habeas Corpus Act provides by sec. 7, as reprinted in R.S.B.C. 1897, that in case a prisoner is not indicted at the first Court of Assize after his committal, he shall be entitled to be set at liberty upon bail, unless it appears to the Court upon oath that the witnesses for the Crown could not be procured; and if not brought to trial at the second assize, he shall be discharged from his imprisonment. I see nothing in this Act entitling the accused to at present do more than make an application for bail. If the Crown does not proceed at the next assize, and obtain a postponement, he might then be entitled to his discharge, but that is not the present case, and I make no ruling on that point. The order *nisi* will be discharged.

Order nisi discharged.

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CANADIAN PACIFIC R. CO. v. QUINN.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. EVIDENCE (§ IV R—480—DOCUMENTARY — ADMISSIBILITY — HOSPITAL CHART.

A chart made by hospital nurses, one of whom was not available as a witness at the trial, shewing the plaintiff's condition while an inmate of a hospital, is not admissible against him in an action for negligent injuries, but may be used to refresh the memory of the nurse as to entries thereon which she herself made.

2. DAMAGES (§ III I 4*a*—192)—PERMANENT PERSONAL INJURIES—EXCESSIVENESS.

$6,532.25 damages for injuries resulting from negligence, is not excessive for a man thirty-four years of age, capable of earning $700 a year, where his injuries were found to have resulted in a life-long loss of earning power.

Statement

APPEAL from a judgment by which the appellant was condemned to pay $6,532.25 to the respondent for injuries resulting from a railway collision.

The appeal was dismissed.

T. P. Foran, K.C. (*F. E. Meredith*, K.C., counsel), for appellant.

Aylen, K.C., for respondent.

The opinion of the Court was rendered by

Cross, J.

CROSS, J.:—There are two questions raised upon the appeal. One question is whether evidence was erroneously excluded or not. The other is whether the amount awarded as damages is so excessive that the findings and judgment should be set aside or not. The complaint of wrong exclusion of evidence is to the effect that the hospital card or chart of the respondent's case while he was a patient in the Water Street Hospital should have been admitted as evidence at the trial, whereas the order of the learned trial Judge was that it could not be admitted as evidence, but might be looked at by any witness to refresh his memory. The chart was in fact shewn to one of the hospital nurses and used by her to refresh her memory concerning entries which she had herself made upon it during two or three days while she attended the patient. The objection to making the chart evidence arose upon the examination of that nurse and also upon the examination of the superintendent of nurses of the hospital. The object of putting in the chart was to make proof of entries made upon it by nurses, one of whom was said not to be available as a witness at the trial. It would appear that the appellant considered these entries of importance as matter upon which the medical specialists who gave evidence for the defence might base inferences. The entries in question are not sworn evidence and, by application of the general rule in

such a matter, would consequently not be admissible. There are recognized exceptions to the general rule, and one of them consists in the admission of what are generally referred to as "entries made in the course of business," provided that certain conditions are shewn to exist. It was long ago said in the work of Starkie (ed. 1833), vol. 1, 300, in speaking of the effect of the fact that an entry is against interest:—

> Upon a question like this, the rule of law, unless some collateral inconvenience would follow, ought to depend on the intrinsic weight of the evidence admitted or excluded; and it would be advisable, for the sake of adherence to principle, as well as on grounds of convenience, to avoid an arbitrary rule, founded on a casual circumstance, which affects at most the weight of the evidence, not its value or quality, and which would in many instances operate to exclude the stronger and admit the weaker evidence.

It would appear that the view favourable to the admission in evidence of such entries thus expressed did not find acceptance in the Courts of England for some time after the publication of the edition of Starkie quoted from, but that in still more recent years it is being more generally given effect to. Thus in Am. and Eng. Enc. of Law, 2nd ed., title "Documentary Evidence," at p. 898, it is said:—

> Entries made by third persons are not generally admissible, since they are not made under the sanction of an oath, and there is no opportunity for cross-examination; but such entries are admissible when they accompany and explain a material fact, being thus a part of the *res gestae*, and again, upon a principle of necessity warranted by particular circumstances which afford a reasonable assurance that the person who made the entry, whose testimony is no longer attainable, knew the fact and recorded it faithfully, as when the entry was against the pecuniary or proprietary interest of the person making it, or was made at the time by a person whose duty it was to make it, and in the ordinary course of his business, and when recourse cannot be had to his testimony in consequence of his death.

I would regard that as being a right view, subject to the qualification that there is no reason in principle why the entries which would be admitted in case of the person who made them being dead, should not likewise be admitted if that person is not dead but is not available as a witness.

In the present case I cannot say that the Judge erred in excluding the card or chart. The proof of who it was who made the entries other than those testified to was incomplete, and the existence of the conditions requisite to render the entries admissible as evidence, such as the fact of the entries having been made immediately upon the occurrence of the facts recorded, was not so definitely established as to enable us to say that the chart ought to have been admitted as evidence. I therefore conclude that the appellant has not made good its first ground of appeal.

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Cross, J.

The other and principal ground of appeal accordingly falls to be considered. The relevant findings of the jury as to the effect that as a result of the collision the plaintiff's right collar bone was broken and his head was injured, and that the plaintiff is entitled to recover the sums following:—

For sufferings before the trial	$1,000.00
For sufferings to come	250.00
Doctor's expenses and loss of property	582.25
Loss of wages to date	500.00
One year's wages hereafter	700.00
Loss of earnings for rest of his life	3,500.00
In all	$6,532.25

Before the accident the plaintiff was a man about thirty-four years of age, and somewhat of an athlete. He had been a police constable and later a lumber worker, and for one season a forest guard. He could earn $700 a year. There is no doubt that he was severely and seriously injured in the collision. There was a comminuted fracture of the collar bone near the shoulder and a serious injury to the head, either inside of the ear or at the base of the skull. The pieces of the collar bone could not be brought into proper position and have overlapped, so that the bone is shortened three-quarters of an inch, and there is restricted movement of the right arm. At the trial medical experts and surgeons ranged themselves in contradicting groups upon the question whether the injury to the head would have permanent effects in the way of impaired hearing, headaches and dizziness, and whether the arm would regain full freedom of movement and natural strength or not. I do not find that objection was made to the instructions of the learned trial Judge to the jury. The appellant's contention is that it was shewn by the weight of evidence that the injuries were not permanent or life-long. I cannot say that the jury decided unreasonably in finding that the plaintiff has sustained a life-long loss of earning power. They decided between conflicting bodies of testimony. If I were to decide in an opposite sense I might be mistaken. The appeal is dismissed.

Appeal dismissed.

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May 5.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. JUDGMENT (§ II D—100)—INTERPLEADER—WHAT MATTERS CONCLUDED.

Where one real estate agent procured the execution of the contract of sale providing that the commission to himself should form part of, and be paid out of, the purchase money, and on another real estate agent making an adverse claim thereto as against the fund out of which it was so payable upon an allegation that the first agent had acquired the information which led up to such contract while in the employ of such adverse claimant, an order made in interpleader proceedings finding the first agent entitled to that proportion of the purchase money so set apart for the stipulated commission should not bar the claimant from an independent action against the vendor for any commission to which he may be entitled by reason of having acted for the vendor in finding the party who eventually purchased through the other agent; the formal judgment on the interpleader may in such case properly include a statement that its determination is without prejudice to the latter claim against the vendor.

Statement

APPEAL by the defendants in an interpleader issue from the judgment of the County Court of the County of York determining the issue in favour of the plaintiff.

The appeal was dismissed with condition as mentioned.

J. Bicknell, K.C., and *M. L. Gordon*, for the appellants.

W. H. Irving, for the plaintiff in the issue, the respondent.

Hodgins, J.A.

The judgment of the Court was delivered by HODGINS, J.A.:—An interpleader order was made on the 14th November, 1912, by His Honour Judge Denton, in an action in the County Court of the County of York, between the appellants, as plaintiffs therein, and one R. A. Baldwin, directing an issue to be tried between Morley B. Rice, the respondent and the appellants.

In that action the appellants were suing Baldwin for a commission on the sale of No. 33 Whitney avenue, Toronto.

That sale was evidenced by an agreement in writing, exhibit 1, dated the 28th May, 1912, in which Rice and McMullen, now represented by the respondent, are described as the agents of Baldwin and Woods, the vendors (now and at the date of the interpleader order represented by the said R. A. Baldwin). In the agreement it was provided that the agent's commission was to be paid out of and to form part of the purchase-money.

It is not disputed that the respondent procured the actual signing of this offer. The action of the appellants was apparently begun upon the theory that the respondent, while their servant, had acquired his knowledge on the subject, and had really made all the arrangements which enabled him to procure the signing of the agreement above-recited, and that the commission, therefore, belonged to the appellants. This is the only foundation upon which an interpleader order could be made, relating,

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as it did, to the specific commission which Baldwin had, in the agreement, consented to pay to the respondent.

It now transpires, and was so stated during the argument, that the appellants may have a claim to a commission, depending upon their introductions, while they were Baldwin's agents, of the property in question to the purchaser, Trow. The interpleader order, while purporting to release the said R. A. Baldwin in respect of the commission referred to in the statement of claim in the action first-mentioned, must be taken to be limited to the state of facts which I have mentioned as then asserted by the appellants. If it were construed so as to bar the appellants' claim to any commission arising out of their dealings with Baldwin just referred to, it would be too wide, and would to that extent be beyond the competence of the County Court to make, upon an application for an interpleader order. See Con. Rule 1103, and *Greatorex* v. *Shackle*, [1895] 2 Q.B. 249.

The purpose of an issue is to inform the conscience of the Court; and in this case its trial disclosed to the County Court that there was or might be a claim for commission, quite apart from that properly dealt with in the interpleader order. But the judgment in appeal does not deal with anything beyond the money in Court; and, if the respondent is entitled to that money, the appeal should be dismissed.

It appears that No. 33 Whitney avenue was not listed with the appellants until after the middle of March, 1912, and that on the 7th March, 1912, the respondent left their service; and, while doing business on his own account, was asked by Trow to get the property for him at the lowest price. To do so, the respondent finally agreed to hand back to Trow $200 of his commission.

I am unable to see how, under the circumstances, and upon the evidence adduced, the appellants can claim this particular commission, earned in the way I have stated, and dealt with by the agreement just mentioned.

I think the appeal must be dismissed; but the order should contain a statement that the dismissal is without prejudice to any right or claim which the appellants may have for commission other than that which could properly be dealt with by the interpleader order of the 14th November, 1912.

Appeal dismissed.

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June 4.

Ontario Supreme Court. Trial before Lennox, J. June 4, 1913.

1. GIFT (§ I—7)—JOINT BANK DEPOSIT—RETENTION OF CONTROL BY OWNER—INTENDED TESTAMENTARY GIFT.

A deposit of money in a bank by a person in his lifetime, in the joint name of himself and another, over which the former retained absolute control during his life, does not amount to a testamentary gift of the balance on deposit at his death, notwithstanding such was the intention of both parties.

[*Hill* v. *Hill* (1904), 8 O.L.R. 710, followed.]

2. EXECUTOR AND ADMINISTRATOR (§ II C—55)—ESTATE OF DECEASED—ASSETS—UNDISPOSED PORTION—VOID GIFT OF BANK DEPOSIT.

Upon the failure of a testamentary gift of a bank deposit in the joint name of a testator and another, where the money was not disposed of by will or otherwise, it becomes undisposed property of the testator's estate.

3. INTEREST (§ I C—25)—RECOVERY—MONEY ACQUIRED UNDER VOID TESTAMENTARY GIFT.

One who withdraws money from a bank during the lifetime of and at the request of and for the use of a depositor, notwithstanding the deposit was made in their joint names for the purpose of creating a testamentary gift, which, however, was ineffectual, on accounting to the estate of the depositor for what remains in his hands at the former's death, he will be charged with interest thereon from the passing of accounts by the Surrogate Court.

4. COSTS (§ I—16)—OUT OF ESTATE—SUCCESSFUL CONTEST OF CLAIM TO DECEDENT'S PROPERTY.

Where the plaintiff successfully contested the defendant's right to money belonging to a deceased person, and the defendant was the recipient of two-thirds of all the property of the former, the plaintiff's costs, as between solicitor and client, will be paid from the estate of the deceased; the defendant being left to pay his own costs.

Statement

ACTION to set aside a conveyance of land by John L. Campbell, deceased, to the defendant, and for an account, and for other relief.

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

M. Wilson, K.C., for the defendant.

Lennox, J.

LENNOX, J.:—I stated my conclusion as to the deed at the trial.

As to the money in the Traders Bank, $2,029.35, standing in the names of the deceased John L. Campbell and the defendant, it is impossible to distinguish it from the money on deposit in *Hill* v. *Hill* (1904), 8 O.L.R. 710; and the result must be the same. Here, as in that case, the plaintiff's own evidence and depositions, and a great deal of other evidence in the case, shew that the purpose of the deceased in associating the defendant's name with his own in the bank account was, by this means, to make a gift to the defendant in its nature testamentary. The money continued to be the money of the deceased; it was drawn

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upon by him only; and, whatever was the form of the instrument, upon the understanding with the banker, and in the understanding of the parties, the defendant could not touch the money in the lifetime of the deceased. The evidence of the bank officials, the practice pursued, and above all the conditions attending the signing of the final cheque for $500, shew this. When the $500 was withdrawn on this cheque, it was distinctly for the personal use of the deceased; the defendant took it as an agent or trustee; it was not used; and it must be accounted for. This $500 and the $1,529.35 carried to the credit of the defendant's account on the 2nd April, 1912, making a total of $2,029.35, I find and declare to be money of and belonging to the deceased John L. Campbell, and undisposed of by will or otherwise at the time of his death. The defendant has appropriated this money to her own use. She is or has been the administratrix of the estate of the deceased, and must account for the money to the estate, with interest at five per centum per annum from the 25th February, 1913, the date when the accounts were passed by the Surrogate Court. I am not sure that I should charge the defendant with interest from the time the money was carried to the credit of her account.

The action, so far as it relates to setting aside the deed from John L. Campbell to the defendant, will be dismissed.

But the plaintiff was justified in having this matter investigated, and the manner in which the deceased dealt with his property has been a very direct cause of litigation.

The plaintiff has succeeded as to her other claims.

It is a case for costs of both parties out of the estate or the equivalent of this; but, if I were making the order, I should feel that the defendant, who, including the farm, gets two-thirds of all her father had, should contribute in some such proportion. I think it will be just, then, and avoid complication, if I direct that the plaintiff shall have her costs of the action as between solicitor and client out of the estate, and that the defendant shall pay her own costs.

The defendant having paid, advanced, or lent to her brother, John Campbell, a sum greater than his share in the bank money, the defendant will not be called upon actually to hand over or pay out this share, and she will be taken to have accounted for this part of the moneys of the estate by applying and endorsing the same upon the $800 promissory note which she holds against John Campbell.

Judgment accordingly.

STARRATT v. THE DOMINION ATLANTIC R. CO.

(Decision No. 2.)

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April 12.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Ritchie, JJ. April 12, 1913.

1. TRIAL (§ II D 3—180)—TAKING CASE FROM JURY—WHETHER CAUSE OF ACT MIGHT HAVE BEEN FOUND—REVERSIBLE ERROR.

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.

Statement

THIS was an action by plaintiff against the defendant company claiming damages for breach of an alleged contract to furnish cars for the carriage of apples, by reason of which breach plaintiff was unable to perform his contracts and lost the profits which he would otherwise have made.

The cause was tried before Drysdale, J., with a special jury.

At the conclusion of the trial the learned Judge withdrew the case from the jury and directed judgment to be entered for the defendant company on the ground that there was no evidence on which the jury could base answers shewing a completed contract to supply cars.

The case is reported on a preliminary motion as to jury notice and venue, *Starratt* v. *Dominion Atlantic R. Co.* (No. 1), 5 D.L.R. 644.

The plaintiff's appeal was allowed and a new trial ordered.

W. E. Roscoe, K.C., and *J. L. Ralston*, in support of appeal.
W. A. Henry, K.C., contra.

Townshend, C.J.

TOWNSHEND, C.J.:—The learned trial Judge, after hearing all the evidence on both sides, withdrew this case from the jury, stating "that he was unable to find that there is any evidence of any definite contract to supply this man with cars, and unable to find that there is any evidence of a definite contract produced here." I find myself unable to reach the same conclusion. I think there is evidence, which, if believed by the jury, is sufficient to maintain a verdict in plaintiff's favour, and therefore the case should not have been withdrawn. Robert Lang, the Winnipeg dealer, who was purchasing plaintiff's apples, and finding out what arrangements could be made for their transportation by defendant company, says:—

I was very emphatic to see that Starratt should get his cars supplied there for him. He semed to be able to give us the right kind of stuff and the stuff that we wanted, and he said he would be able to do the whole of it.

Q. Did you take that point up with Mr. Fraser? A. Yes.

Q. In the presence of Mr. Starratt? A. Yes, and Mr. Fraser said he would be able to supply the cars.

Q. Refrigerator cars or ordinary cars? A. Both.

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Plaintiff's evidence and the correspondence between plaintiff and the railway officials and their action in supplying some of the cars required by plaintiff, all go to shew that a contract was duly made between plaintiff and defendant company for the transportation of the apples he had bought, and was buying, and especially refrigerator cars when demanded, and further, that Fraser was shewn the memo. of car required W/64 in which they are specified.

I do not think it necessary here to discuss in detail all the evidence in support of plaintiff's case, but merely to refer to the prominent facts, which in my opinion constitute a contract, if made. It is clearly proved, that after October 18 plaintiff called for refrigerator cars, informing defendant company of the large quantity of apples ready for shipment, and that defendant company failed to supply them, in consequence of which he was forced to cancel his contract, entailing upon him heavy loss.

It is true the main facts on which plaintiff relies are contradicted by the company's official, but it was a matter for the jury to decide who was to be believed.

For these reasons I think that the appeal should be allowed with costs and a new trial granted.

Meagher, J.

MEAGHER, J., concurred with much doubt in allowing the appeal.

Russell, J.

RUSSELL, J.:—The plaintiff, a dealer in apples in Annapolis county, on August 28, 1911, made a contract with a Winnipeg dealer to supply the latter with apples. A few carloads were to be sent at first and the understanding was, that if these turned out well a large quantity would be required. Nothing definite, however, was at that time agreed upon, except as to the first shipment, which proved satisfactory and led to further orders on a large scale.

The parties to this deal were of course desirous of having an arrangement for transportation and a conference took place between them and an official of the defendant company. This suit has arisen out of the arrangement between the plaintiff and the defendant company for the transportation of the apples and the plaintiff's claim is, that the company did not fulfil its contract. The learned trial Judge, after hearing all the evidence, defendant's as well as plaintiff's, withdrew the case from the jury, because he could not discover any evidence upon which he could ask the jury to find a contract or to find a contract of which there was any breach. What I mean by this is that apples were delivered from time to time by the plaintiff as to which contracts were made by their acceptance for transporta-

tion and these were duly forwarded. But the plaintiff claims that the defendant company was under an obligation to furnish a particular kind of car, that is refrigerator cars, in sufficient number to transport in such cars a much larger quantity than that actually forwarded in the ordinary cars, the plaintiff having purchased on the faith of the defendants' undertaking to that effect.

The learned trial Judge withdrew the case from the jury, because he could find no evidence of any definite contract between the plaintiff and the defendant company and there is much to be said in favour of that view. It was after the Winnipeg dealer had left this province, where the arrangement between him and the plaintiff was made, and returned to Winnipeg, that he objected to the apples being sent otherwise than in refrigerator cars. The first lot of apples forwarded had been sent, some in ordinary box cars and others in refrigerators as an experiment and it was early in October that the plaintiff received a telegram from his correspondent that he would not take the apples otherwise than in refrigerators. Plaintiff communicated that fact to Mr. Murphy, one of the defendant's officials, and told him that he would not dare to use ordinary box cars and ordered refrigerator cars. Plaintiff adds, "He told me he would give me them as soon as he could." What happened after this is described in the following extract from the evidence of the plaintiff:—

Q. You were buying these apples during what time? A. During the latter part of October, from the time I received Lang's first telegram until the latter end of October. (Objected to.)

Q. What were you doing about cars? A. I had ordered them and was continually calling Mr. Murphy and trying to get the cars, calling him on the telephone. I called him and was talking to him three times a week. Sometimes three or four times a day before I would get him. I have gone from the warehouse to the station where the telephone was.

Q. What took place when you did get Mr. Murphy? A. I would tell him that I was looking for these cars and ask him where they were, and if it happened to be about the first of the week he would say the cars would be right along probably the last of the week or a day or two. If it was the last of the week he would say: "We will try to have them the first of the week." Gave me to understand that they would be right along in the course of a few days. I told him I had orders for a large quantity of apples I had been buying, had the warehouse and cellars full and apples standing on their track and waiting for cars to ship them.

It seems evident from this that the defendants were desirous of supplying cars such as the plaintiff required, but I do not find, thus far, any evidence of an obligation to supply refrigerator cars that they did not own.

In the meantime, the Winnipeg dealer had been making

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efforts to get refrigerators from the Grand Trunk and it seems as if he had succeeded to a certain extent for plaintiff says:—

I had received word from Mr. Lang (the Winnipeg dealer); I told Mr. Murphy that ten refrigerator cars were coming from the Grand Trunk for me and asked him to see that I got them. He seemed to be indignant and said: "I do not know whether we can place these or not." He said there was no need to order them, as fifteen C. P. R. cars were coming to Halifax and as soon as they were unloaded we will give them to you. I did not get one of them.

The reason why he did not get them is, I think, satisfactorily explained.

This is the nearest approach to a contract that I have been able to find in the evidence of the plaintiff and I must say that I do not think any finding could be based upon it by a reasonable jury.

The contract in the first instance as made on August 28 was of the kind described by Brett, J., in *Great Northern R. Co.* v. *Witham*, L.R. 9 C.P. 16 at 19, as in one sense a "unilateral contract" by which he must have meant that it was not any contract at all. There was merely a statement of rates for transportation of the apples to be offered for transportation, but there could be no contract except so far as apples were actually tendered for transportation from time to time.

But these considerations do not exhaust the inquiry. Stating the question in the manner least favourable to the plaintiff I think that if on the whole evidence a verdict could have been found in plaintiff's favour for any amount by a reasonable jury the case could not properly be withdrawn from them. Now there was some evidence, which it is true was contradicted by defendant's witnesses but which if believed by the jury would, I think, have warranted a recovery, whether for much or little is, I think, immaterial here.

When Lang was conferring with the defendant's agent at Montreal in view of a possible transaction in apples, he says he asked the latter whether, in case he should make a contract for winter apples, the company could provide refrigerator cars for them, in reply to which Comeau, the agent, said they would have ample refrigerator cars to take care of the business for later shipments. This evidence is objected to as irrelevant, and further as a mere representation as to present expressions of opinion as to future probabilities; but it is stated that when the plaintiff and Lang met Fraser, another agent of the defendants in Nova Scotia, what had been said in the interview with Comeau was repeated. The following is an extract from Lang's evidence, taken under the commission, with reference to the conference of plaintiff and Lang with Fraser in Nova Scotia:—

Q. What else took place at this interview? A. Well, I told Mr. Star-

ratt all that Mr. Comeau had told me about these cars, and I said: "You can get a car to-morrow?" and Mr. Fraser said: "Yes, we can get you a car to-morrow." We talked about the business done then, and if our returns to Mr. Starratt proved satisfactory, and if the apples carried all right we were to get all the apples we required, and if the early apples proved satisfactory we were to go on and handle the winter apples from him.

Q. That arrangement was made there? A. Yes.

Q. In the presence of Mr. Fraser? A. He was not there through all the arrangement, but he was there when I told Starratt what Mr. Comeau had told me regarding the cattle cars, and I also told Mr. Starratt that in the event of the deal going through satisfactorily, that refrigerator cars were to be furnished for later shipments and Mr. Starratt was quite well satisfied with that.

Q. What did you mean by later shipments? A. I meant winter shipments for Spys, Baldwins and that class of apples.

Q. From what date would you call them winter shipments? A. From the middle of October and on.

Q. You mean to say that you would require refrigerator cars from the middle of October on? A. Yes, we pretty nearly have to have them.

Q. Did you have any conversation with Mr. Fraser at that interview about that particular point, that refrigerator cars would be required after October 15th? A. Yes, when we were going up I asked him about refrigerator cars, and he said they had no refrigerator cars to furnish at the present time, *but if these apples proved satisfactory they would be able to furnish refrigerator cars for later shipments.*

Q. Did he say they would furnish them? A. Yes, he said they would.

Q. What further took place at this conversation—anything further? A. I was very emphatic to see that Starratt should get his cars supplied there for him. He seemed to be able to give us the right kind of stuff and the stuff that we wanted, and he said he would be able to do the whole of it.

Q. Did you take that point up with Mr. Fraser? A. Yes.

Q. In the presence of Mr. Starratt? A. Yes, and Mr. Fraser said they would be able to supply the cars.

Q. Refrigerator cars or ordinary cars? A. Both.

Q. Did you tell Mr. Fraser by what date refrigerator cars would be required? A. No, because at that time I did not know whether these apples were going to give absolute satisfaction or not. They were a new thing for me to handle in the west.

Q. Why had you taken up this question of transportation facilities in the first place? A. Because, knowing the business as I do, I know that it is one of the things we have got to know, how stuff is going to be handled. This is a northern country and it is a long haul from Nova Scotia to Winnipeg, and we get sometimes very cold dips here.

There is nothing very definite about all this, and the statement in answer to the last question rather weakens the force of the evidence I have italicized in the first extract, but it does not destroy its effect, and if the plaintiff, relying upon an assurance from the company that refrigerator cars would be supplied for the transportation of his apples at the rates mentioned in

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the correspondence, proceeded with his purchases and tendered them for transportation before any withdrawal of this assurance, assuming, as I do, for the purpose of argument in the defendant's favour, that it might have been withdrawn before any apples were tendered to them for transportation, I think that there would be an obligation on the part of the company to provide the cars for the apples so tendered and forward them to their destination, according to the case already cited of *Great Northern R. Co.* v. *Witham*, L.R. 9 C.P. 16. It is of no consequence that Mr. Fraser is contradicted. A reasonable jury might have believed him notwithstanding the contradiction, nor is it of any consequence that he stated the plaintiff's case for him better than the plaintiff stated it for himself. A reasonable jury could have found the facts according to Lang's statement notwithstanding the plaintiff had stated them in less distinct or emphatic terms, neither is it of consequence at this stage, that the defendant's agent in his correspondence had carefully guarded himself from contracting absolutely for the supply of refrigerator cars. All this was for the jury. I think that in view of the evidence I have quoted the matter should have been submitted to the jury and that the appeal must therefore be allowed with costs and a new trial ordered.

RITCHIE, J., concurred in allowing the appeal.

Appeal allowed.

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May 28.

LAMB v. THOMPSON.

Manitoba King's Bench, Metcalfe, J. May 28, 1913.

1. LANDLORD AND TENANT (§ III E—115)—ABANDONMENT OF DEMISED LANDS—RE-ENTRY BY LANDLORD—LIABILITY FOR.

Where a tenant, under a crop sharing lease moved from the lands before the expiration of his term, on failing to obtain a cancellation of his lease, and left some of his chattels thereon, substantial damages for a subsequent entry and taking possession by the landlord will be refused him where, after the re-entry and before the expiration of his term, the tenant removed all of his chattels and his servant from the land and abandoned it to the landlord, who subsequently occupied it without objection from the tenant, particularly where no claim was made to oust the landlord or to re-enter in continuance of the term.

2. DAMAGES (§ III A 3—64)—LANDLORD AND TENANT—RE-ENTRY BY LANDLORD—CONVERSION OF CROPS.

Where, after a tenant removed from demised premises before the expiration of his term, under a crop sharing lease, leaving a servant in possession to work the land, the landlord re-entered and took possession of, harvested and threshed the growing grain, he is answerable to the tenant for the conversion of his share of the crop, including grain killed by the frost and not harvested, which had some value for feed, less the damages suffered by the landlord for the tenant's failure to summer fallow in the manner required by his lease.

Statement

TRIAL of an action for trespass and conversion.

J. F. Kilgour, for plaintiff.

C. Blake, for defendant.

METCALFE, J.:—The plaintiff by indenture bearing date December 15, 1910, leased from the defendant certain farm lands for the period of three years from March 1, 1911, and agreed to pay therefor a yearly rental of one-third of the grain crop.

By the said lease the plaintiff agreed that he would in each year of the term, in a good husbandlike and proper manner, either crop or summer fallow every portion of the demised premises then or thereafter under cultivation.

The demised premises consisted of three quarter-sections, about 360 acres of which were cultivated. The plaintiff thereafter bought a farm, referred to as the Fitzgerald farm, situate at some distance from the premises leased from the defendant.

In the fall of 1911 he evidently desired to leave the defendant's farm, to surrender the lease and move on to the Fitzgerald farm. He says that about December he met the defendant at Margaret and after some conversation, becoming angry, he told the defendant he would leave, and that the defendant replied he might do so; but that in the following March, still residing upon the premises, he again met the defendant and the subject again being broached, the defendant told him that he would not allow him to leave as he would then have difficulty in getting a new tenant. Apparently the plaintiff accepted the situation, but decided that he would divide his farming force, moving from the defendant's farm himself with some of his horses and implements, and leaving the farming operations on the demised premises in charge of a man hired for that purpose with the remainder of his horses, which consisted of one working four-horse team.

However, the land which was intended for wheat had been plowed the previous season. This man, Dennis, with the one four-horse team thereupon proceeded to sow the wheat land, to plow and sow the land intended for oats, being about forty-five acres, and also the land intended for barley, being about forty acres.

The plaintiff evidently had enough to do himself in seeding the Fitzgerald farm. He rendered no assistance to Dennis on the Thompson farm until harvest, when he sent a man named Jeffery to assist Dennis, and was also there himself some of the time. The defendant lives at Brandon, a long distance from the demised premises, and in so far as the evidence shews, visited the farm only twice during the spring and summer, once in May, when he says things did not appear very good for him, and once in August, when as he says he found things in very bad shape.

Dennis still continued at the work and stacked the wheat; the oats were not stacked; the barley was not cut. In November the defendant engaged threshers and threshed and took possession of the wheat. The oats had been killed by the frost and were not worth threshing. The barley had not ripened, had also

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been killed by the frost and not being worth cutting had been left uncut.

The plaintiff sues the defendant for trespass and for conversion. The defendant pleads forfeiture, and counterclaims for rent and for damages for breach of the covenant to properly farm. The plaintiff denies the breach and the forfeiture, and in any event pleads waiver.

There was some discussion upon these points. Counsel for the defendant admitted that he must account for the value of the goods which came into his client's hands. I do not think the plaintiff is entitled to any substantial damage other than the value of the goods. He appeared only too anxious to leave the place, and apparently has no desire to retain any rights under the lease. While he left some of his horses and implements upon the farm until some time after the entry, he did, during the following winter, remove all his chattels therefrom and apparently abandoned the premises. The farm is now being occupied and farmed by the defendant without any objection being raised by the plaintiff or any relief claimed therefor.

I think the plaintiff is entitled to the value of the wheat. I think he is also entitled to something for his share of the oats. While these oats were not fit to thresh, they are of some value for feed. The wheat itself, however, while apparently originally fit for contract grade, had been damaged by the rain and snow so that out of 29 tickets produced, 4 went 2 Northern, 9 went 3 Northern and 16 went 3 Tough. The wheat, therefore, was not of great value.

I therefore allow the plaintiff as follows:—

For the wheat	$1,200
For the oat sheaves	100
Total	$1,300

In doing this I have taken into consideration the threshing item. While I have allowed what appeared to be a reasonable compensation therefor, I have not allowed the full threshing bill, as I think it was excessive.

I allow the defendant upon his counterclaim as follows:—

The value of his share of wheat	$445
For his share of oats and barley, lost through improper husbandry	260
Loss through improper summer fallowing	275
Total	$980

The plaintiff therefore recovers on his claim $1,300 and the defendant recovers on his counterclaim $980. Judgment will be entered for the plaintiff for $320. Costs to follow these events in the usual manner.

Judgment for plaintiff.

Re BROWN.

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June 7.

Ontario Supreme Court, Lennox, J. June 7, 1913.

1. WILLS (§ III G 9b—165)—REMAINDERS—DEVISE TO WIFE FOR LIFE—REMAINDER TO CHILDREN OF TESTATOR—TIME OF VESTING.

Under a bequest of personalty to a testator's wife for life with remainder to his children, the interest of the latter became vested at the testator's death, so as to determine the right of distribution at the termination of the life estate.

[*Packham* v. *Gregory*, 4 Hare 399; *Leeming* v. *Sherratt*, 2 Hare 14; *Mory* v. *Wood*, 3 Bro. C.C. 473; and *Rogers* v. *Carmichael*, 21 O.R. 658, referred to.]

Statement

APPLICATION by the executors of Thomas Brown, late of the township of Egremont, in the county of Grey, farmer, deceased, for an order declaring the true construction of the will of the deceased and determining the persons entitled to share in his estate and the proportions in which they were respectively entitled.

W. M. Douglas, K.C., for the applicants.

F. W. Harcourt, K.C., for James Thomas Hamilton, an infant, and for George P. Leith.

H. G. Tucker, for Sarah Jane Brown, Ellen Henry, Alice Truax, W. J. Brown, and Thomas Brown.

Lennox, J.

LENNOX, J.:—With the exception of James Hamilton, the father of the infant Thomas James Hamilton, and the husband of Mary Brown, deceased, a daughter of the testator, all proper parties have been served and were represented in Court. As the interest of James Hamilton is the same as the interest of his infant child, he is sufficiently represented, and I dispense with service upon him.

The will of the said Thomas Brown, deceased, contained the following provision: "I will and bequeath unto my wife Sarah Ann Brown all and every of my personal estate whatsoever and wheresoever for and during her natural life, and at her death I give and bequeath all and every of my personal estate to my six daughters, Elizabeth Ann, Sarah Jane, Ellen, Maria, Alice, and Mary, share and share alike, to be paid to them within three months after my said wife's death."

W. J. Brown and Thomas Brown are sons of the testator and brothers of the six daughters designated as legatees in the will. Two of these daughters, who had married, died during the lifetime of the widow Sarah Ann Brown, namely: Elizabeth Ann, who died intestate and without issue on the 26th April, 1911, leaving her surviving her husband, George P. Leith; and Mary, who died intestate on the 3rd February, 1897, leaving her husband, James Hamilton, and her infant son, James Thomas Hamilton, her surviving. Sarah Ann Brown died on the 17th October, 1912.

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The distribution to be made depends upon whether or not the shares of the deceased daughters vested at the time of the testator's death. I am clearly of opinion that these shares became vested at that time. This is a case in which the enjoyment of the gift by the six daughters "is only postponed to let in some other interest," as was said in *Packham* v. *Gregory*, 4 Hare 399; and the gift vests at once. The decisions in *Leeming* v. *Sherratt*, 2 Hare 14; *Mory* v. *Wood*, 3 Bro. C.C. 473, and *Rogers* v. *Carmichael*, 21 O.R. 658, may be referred to. This point being decided, the distribution of these two shares presents no peculiar difficulty. If, however, it is desired that I should direct the actual distribution in detail, counsel for the executors may file a schedule for my approval and to be incorporated in the order.

The costs of all parties will be paid out of the estate—the executors' costs as between solicitor and client.

Order accordingly.

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ZWICKER v. McKAY.

Nova Scotia Supreme Court, Graham, E.J., and Russell, and Drysdale, JJ. April 12, 1913.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—UNGUARDED SET SCREW IN SHAFT—BREACH OF STATUTORY DUTY.

The failure to guard a projecting set screw in a rapidly revolving shaft, as required by ch. 1 of the N.S. Factories Act of 1901, near which a servant was required to work is negligence sufficient to render an employer liable for an injury to a servant caused by his clothing catching on the set screw.

2. MASTER AND SERVANT (§ II C 1—185)—LIABILITY OF MASTER — UNGUARDED SET SCREW IN SHAFT—BREACH OF STATUTORY DUTY—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence sufficient to defeat a right of action under the Employers Liability Act (R.S.N.S. 1900, ch. 179), for a servant employed to remove slabs from a machine in a sawmill near a rapidly revolving shaft, to wear gauntlet gloves in order to protect his hands from splinters and the cold, where he was injured while obeying an order of his superior to remove a piece of bark from beneath the shaft, by his glove catching on a projecting set screw in the shaft, which was not guarded as required by ch. 1 of the N.S. Factories Act of 1901.

Statement

ACTION by plaintiff, a workman employed in or about a sawmill, the property of defendant, claiming damages for personal injuries caused to plaintiff by reason of a defect in the condition or arrangement of the ways, works, machinery or plant, consisting in a set screw or bolt on a metal collar attached to and forming part of an unguarded and rapidly revolving shaft connected with a circular saw driven by mechanical power—in such a manner as to be highly dangerous to and liable to catch the clothing of or otherwise injure anyone in the vicinity of the same while it was working.

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Plaintiff while employed as helper to the workman operating the circular saw and bound to obey the orders of such workman had the sleeve of his coat caught by the screw or bolt, and, in consequence, his arm was caught in the shafting while it was rapidly revolving, and his arm was severely lacerated and broken, for which he claimed damages.

The cause was tried before Sir Charles Townshend, C.J., with a jury, and on the findings of the jury, judgment was entered for defendant.

Plaintiff appealed.

The findings and other facts are set out in the judgments.

J. Terrell, for plaintiff, appellant.

J. J. Power, K.C., for defendant, respondent.

Graham, E.J.

GRAHAM, E.J.:—This action is brought under the Employers' Liability Act (N.S.).

The plaintiff was an employee in the defendant's sawmill. His duty was to take away slabs and lumber from the rotary as they came along, and for this purpose he worked within three or four feet of a revolving shaft connected with the saw. There was a collar on this shaft with a screw or bolt on the collar. It revolved 800 times in a minute, and was unguarded. A piece of bark near this dropped, and his superior told him to reach in and get it, he did so, and his gauntlet glove got caught by this screw, and his arm was badly broken. These are the findings of the jury:—

1. Did plaintiff receive injury from the machinery in defendant's mill? Yes.

2. Was the dangerous part of the machinery, especially that part which caused the injury, securely guarded as far as possible? No.

3. If not, in what way could it have been more securely guarded? Countersink the set screws, or put metallic shield over the collar.

4. Was the injury to plaintiff caused by his obedience to order of defendant's superintendent? Yes.

5. Was the plaintiff aware of the defective or dangerous character of the machinery, and if so, did he, without reasonable excuse, fail to give notice thereof to his employer? No.

6. Was the machinery which caused the injury of the usual and most improved kind? Of the usual kind used in this province.

7. Did the accident occur through the plaintiff's own negligence? Yes, by wearing loose wristed gloves.

8. What damage had plaintiff suffered? Three hundred dollars ($300).

At plaintiff's request the following questions were submitted:—

9. Could the set screw have been countersunk, and if so, would it have been a protection? Yes.

10. Was plaintiff, at time of the accident, performing his ordinary duties as helper to the sawyer? By evidence given, yes.

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In respect to the 7th finding, the trial Judge has given effect to it by dismissing the action, finding himself, though passed on by the jury, that the glove was the proximate cause of the accident.

The whole reference to the 7th question in the summing up was as follows:—

One other question. Did the accident occur through the plaintiff's own negligence? If the plaintiff, himself, without any orders from Superintendent Munroe, went into the dangerous place and picked out this slab, which act caused the injury, it should be known. If you think it was his own negligence, that is one matter, but if you think it was done by the orders of the superintendent, that may lead to a different result in this case.

Nothing other than this was said on the subject of contributory negligence. The dispute seemed to be whether or not the direction to remove the piece of bark had been given. This is an application on the part of the plaintiff to set aside the 7th finding or for a new trial.

I think that it is not satisfactory to have the case dealt with in this way. I am not satisfied that wearing gauntlet gloves was an act of negligence or the efficient cause of the injury. For handling slabs and lumber, the evidence tends to shew that gloves should be worn as a protection to the hands against splinters and also because of the cold at that time of year, and a gauntlet glove would protect the wrist and it needs protection. The plaintiff had bought these gloves at the defendant's shop at the mill. The defendant himself says:—

Q. It is customary for a man in that position in taking away the slabs, to wear gauntlet gloves? A. I could not say that. I saw them worn there. Why not remonstrate if it was negligence?

The plaintiff says:—

Q. Is it usual to wear gauntlets for this work? A. Yes.

And in re-examination:—

Q. With regard to this glove, does Mr. McKay keep a store there for supplying things to his workmen? A. Yes.

Q. And where did you get that gauntlet? A. At Mr. McKay's.

Q. So that Mr. McKay himself supplied you with the gauntlet? A. Yes.

ASKED BY THE COURT:—Is it usual for men to wear a gauntlet at that work? A. Yes.

Q. To protect their hands? A. Yes.

COURT:—These boards, did they afford any protection against this? A. No.

Q. From where you were standing, was there any danger of getting caught in the collar? A. Not unless I reached for a piece of bark or slab that fell there.

Q. If you had not shoved your hand in the way you did you could not have got caught in the collar? A. It is apt to catch any time.

Q. You would have to be right up against it? A. Yes.

The last case of this kind we had was a case in which a man was caught by the bib of his overalls by a revolving shaft. And in that case, a case was cited of a girl in a factory being caught by her long hair by such a shaft. In neither was the jury ingenious enough to say that the accident was caused by the plaintiff wearing a bib on his overalls, or, in the case of the girl, by her hair not being made up.

Without instructions from the Judge, I think that a layman is apt to be mistaken on this subject. The jury found that there was negligence, a breach of the statute in fact, not having the shaft guarded. Employees cannot get the proper clothing for such a defect, because they cannot foresee when it is going to catch them, and whenever it does, an uninstructed jury may say, if the plaintiff had not worn this or that the accident would not have happened; therefore it was negligence on his part. If the shaft had been properly guarded, the plaintiff could have worn either kind of gloves, and, of course, the better kind for the work. That would have been proper protection for all kinds of ordinary clothing. I think that this injury was not the ordinary, natural or probable consequence of wearing, at such work, gauntlet gloves instead of short gloves. The guarding of the shaft would have prevented the plaintiff's alleged negligent act from causing the injury. The want of guarding the shaft was a cause, an act of negligence, remaining in force. A further usual question in such a case, if submitted to the jury would, in all probability, have elicited this answer, namely, that if the shaft had been properly guarded according to the statute the accident, notwithstanding the use of gauntlet gloves, would not have happened. No doubt that was not submitted because the learned Judge did not anticipate that there was anything likely to turn on this question of gloves, although it was mentioned in the evidence.

It is strange, that the superior who gave the direction, and to which the plaintiff was bound to conform, did not take account of the fact that the plaintiff had these gloves on, if they were dangerous when he sent him to this dangerous position. However, I think that the decisive, or efficient, cause of the accident was the want of a guard.

In my opinion, the judgment should be set aside and a new trial had with costs.

Russell, J.

RUSSELL, J.:—I think the plaintiff had a right to wear a gauntlet to protect his hand from splinters in handling the slabs from the saw. The jury has found that the injury was

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caused by obedience to the order of defendant's superintendent. They have therefore believed that he was ordered to take the bark from under the shaft. It was not negligence, as I read the evidence, to use his hands instead of using a stick. One way was at least as usual as the other.

The principal question in the case, was, whether it was negligence to wear gauntlets. I cannot think that it was, and the evidence does not convince me that it was. I do not think that when a workman is buying a pair of gloves to protect his hands from splinters, he is bound to consider what sort will give him the best chance in case the machinery he is called upon to work with should turn out to be dangerous beyond what he has a right to expect.

The jury has found that the machinery, in this case, although usual, was unduly dangerous, that is, that it was not guarded to the degree required by the statute.

DRYSDALE, J., concurred.

New trial ordered.

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May 23.

MONDOR v. MUNICIPALITY OF TACHE.

Manitoba King's Bench. Trial before Metcalfe, J. May 23, 1913.

1. MUNICIPAL CORPORATION (§ II G 3—235)—DRAINS — IMPROPER CONSTRUCTION—FLOODED DRAINS—LIABILITY FOR.

It is negligence for a municipality to begin digging a ditch at the wrong end, the result of which was to bring large quantities of water to a point on the land of the plaintiff, where it remained an unreasonable time, and it is answerable in damages for same.

Statement

TRIAL of action against a rural municipality by the plaintiff, a farmer living within the municipality, for that the defendant did negligently and wilfully construct a ditch in consequence of which the water flowed upon the plaintiff's lands, causing damage to the lands and to the plaintiff's crops.

W. F. Hull and *J. Mondor*, for plaintiff.

H. P. Blackwood and *A. Bernier*, for defendant.

Metcalfe, J.

METCALFE, J.:—The plaintiff owns and farms the south-east quarter of section 12, township 9, in range 6, east of the principal meridian in the Province of Manitoba. The country in the immediate vicinity appears to be flat prairie land, having no deep watercourses; but there seems to be a geenral tendency for the water to flow north-westerly, in some places over the prairie on the lower levels, and in some places in swales and small runways.

The plaintiff has been on the land for about ten years. Prior to that time there appears to have existed some old ditches dug for local drainage purposes on the quarter section east of his farm, and which ran to a point opposite his land about midway

between his north and south lines. At this point on the plaintiff's land water used, in the spring time, to lie; but in the year 1905 the plaintiff himself constructed a ditch from that point westerly to a swale which crossed his farm in a north-westerly direction and from that time onward the plaintiff says he suffered no damage from water lying on his farm until after the ditch was constructed by the municipality.

The swale running across the plaintiff's farm appears to have come from section 6 in township 9, range 7 east, to have extended northerly across the north-east quarter of section 1 and thence onward in a north-westerly direction.

On the 25th May, 1909, the plaintiff and some 19 others presented the following petition to the councillors: "We, the following petitioners, petition your honourable body to grant a ditch to draw about 18 inches of water, said ditch to commence at the north-west corner of section 7-9-7 east, running south about one mile and a half. Said ditch would require about three culverts." It appears that at the north end of this proposed ditch it would empty into a well-defined waterway which would carry off the water.

The inspector of works for the municipality inspected the locality and on the 19th of June, 1909, reported that the work should be done. Thereafter tenders were called for in the usual way and the work was let to individuals who, instead of commencing the ditch at the north end, where it would have an outlet, commenced it at the south end, and did not continue it through to the point of outlet. The plaintiff says that it tapped the swale running north-westerly across his farm at a point further south and brought water on to a part of his farm where it would not otherwise have flown, and that it also collected water from the low spots and damaged his crop.

In the following year he, with some others, wrote the councillors, calling their attention to the urgent necessity of completing the ditch, notifying the council that it was causing considerable damage and stating that they did not feel inclined to sustain any further damage. In 1911 the municipality actually did complete the ditch, and the plaintiff says that thereafter he suffered no damage from water.

I am inclined to the view that before the south end of the ditch was constructed, while a large quantity of the water from section 6 did flow through the swale running north-westerly across the plaintiff's land, a considerable quantity also flowed north-westerly across the quarter section to the east of the plaintiff's land and lodged about the place where the ditch privately constructed, before mentioned, crossed into the plaintiff's land. I have no doubt that in the years 1910 and 1911 a considerable quantity of water lodged upon the plaintiff's land, but I do not

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think that it is all, or nearly all, attributable to the ditch then constructed by the municipality.

However, I think that more water was brought upon the easterly part of the plaintiff's land than would have been there had the ditch not been constructed. I think that some portion of the damage caused may quite reasonably be charged to the construction of this ditch.

Was it negligently constructed? It may be said that a municipal corporation, charged with the development of the country, with the grading of roads and the digging of ditches, should receive great consideration in the matter of liability consequent thereon.

It is necessary for the development of the country that roads should be constructed and ditches should be dug, and to establish as a principle that the municipality is liable for such consequences, might unreasonably retard municipal works. This, of course, does not apply to larger matters where the provisions of the Municipal Act protect the municipality, but does apply to smaller and minor matters.

However, it does seem to me that a municipality must exercise some care in the doing of its work, and if it begins to dig a ditch at the wrong end, bringing water to a point where there is no outlet, and lets that water lie there for an unreasonable time, it must be held that it is guilty of negligence of the grossest kind and it must pay for such negligence.

Although I have arrived at the conclusion that the plaintiff has established a case against the municipality, I have great difficulty in assessing the damage. The plaintiff has sworn to large damage. I think, however, that he will be sufficiently compensated on a considerably lower basis than his own estimate. It is impossible for me to say to a nicety how much of the damage was caused by the action of the municipality. I believe, however, that the plaintiff's damage was considerable, and exercising the best judgment that I can under the circumstances, I find for the plaintiff for $500 and costs upon the King's Bench scale.

This case was tried before me in December last. Although I reached the above conclusions immediately after the trial and extended my notes of judgment, the delivery thereof, for reasons obvious to counsel, and counsel assenting thereto, has been delayed until this date.

Mr. Blackwood recently made an application to introduce evidence that since the trial the plaintiff has been damaged by water, notwithstanding the outlet to the north. I refused to reopen the case.

Judgment for plaintiff.

Re PELTON.

(Decision No. 2.)

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, and Drysdale, JJ. April 12, 1913.

JUSTICE OF THE PEACE (§ I—1)—STIPENDIARY MAGISTRATE—STATUS—RELATION TO THE MUNICIPALITY—REDUCTION OF SALARY—REMEDY.

Notwithstanding that a stipendiary magistrate of a town was appointed by the Lieutenant-Governor-in-council, he is, by virtue of secs. 111-120 of ch. 71, R.S., of the Nova Scotia Towns Act, an officer of the town, and therefore he may, under sec. 121 of the Act, apply to the court for the rescinding of a resolution of the town council reducing his salary.

[*Re Pelton*, 7 D.L.R. 465, reversed.]

Statement

APPEAL from the judgment of Meagher, J., *Re Pelton* (No. 1), 7 D.L.R. 465, dismissing with costs an application on the part of Charles S. Pelton, stipendiary magistrate of the town of Yarmouth, to have a certain resolution of the town council of Yarmouth, passed on April 18, 1912, and purporting among other things to reduce the salary of the said Charles S. Pelton as such stipendiary, rescinded.

H. Mellish, K.C., for appellant.

W. E. Roscoe, K.C., for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—I am of opinion that the stipendiary magistrate is a town officer, although appointed by the Governor-in-council. The statute, ch. 71, provides one way of appointing town officers applicable to the town clerk, the solicitor and deputy stipendiary, and ch. 33 provides that the stipendiary shall be appointed by the Governor-in-council, and be paid by the town. On referring to the Towns Incorporation Act it will be seen that the different officers of the town are enumerated: (sec. 111 to sec. 120) (1) The town clerk, (2) stipendiary magistrate and deputy, (3) town solicitor and deputy. Section 126 deals with other town officers.

There can be no question then that the statute classes stipendiary magistrates as town officers, and as such subject to the provisions of sec. 121, as an officer of an incorporated town, the tenure of whose office is during good behaviour. The mere fact that he is appointed by another authority cannot affect his status as a town officer, nor does ch. 33 involve any such result. The legislature, for some reason, possibly to secure his independence of the council, has directed that his appointment shall be made by the Governor-in-council, while providing that the town shall pay such salary as it deems right subject to certain restrictions.

Moreover, it will be found that there are instances of other town officers paid by the town appointed by an outside power, such as the ferry commissioner appointed by the Chief Justice,

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and the chief assessor of the city of Halifax also appointed by the Chief Justice, and yet no one ever doubted that these appointees were town and city officers. Although town officers, and paid by the town, the legislature for some special reason has thought fit to place the appointment in some power outside the town council, and one can conceive many good reasons for such legislation. I thoroughly endorse the comments of the learned Judge below on the gross impropriety of the actions of the town council in this matter, and I should regret to know that any member of the bar would accept the position of additional stipendiary under the humiliating conditions implied in the council's action, that is to say, to hold a judicial position with a biased mind against parties who might be brought before him on charges of a criminal character.

I am of opinion acting under sec. 121, that the resolutions of the town council reducing the stipendiary's salary be rescinded and that he is entitled to receive the full amount of his salary as originally fixed.

This appeal should be allowed with all costs.

Russell, J.

RUSSELL, J.:—I agree that the stipendiary magistrate is an officer of the town in the sense in which the words are used in sec. 121. There can be no doubt that he was an officer of the town from 1888 down to 1891 in precisely the same position in this regard as the recorder, or town solicitor. He was appointed by the town council and was generally the same person as the recorder or town solicitor. In 1891 his appointment was placed in the hands of the Governor-in-council by ch. 43 of the Acts of that year, but it was provided that he should be appointed for the town and should still be paid by the town, a minimum salary being provided for. I think that sec. 127 clearly indicates that the legislature regarded him as an officer of the town after the appointment was given to the Governor-in-council, just as he was before the appointing power was changed. That section speaks of every person appointed to a corporate office other than a stipendiary magistrate. The office of the stipendiary magistrate is, therefore, a corporate office. The person who holds a corporate office must, I think, be an officer of the corporation, and an officer of the corporation is an officer of the town.

Drysdale, J.

DRYSDALE, J.:—The sole question here is whether the stipendiary magistrate appointed by the Governor-in-council for the town of Yarmouth is an officer of an incorporated town within the meaning of the Towns Incorporation Act, ch. 71, R.S. By the Act under which he is appointed it is provided that the town shall pay his salary by sec. 121 of the Towns Act. Any officer of that town whose tenure is good behaviour is given a remedy in the event of a resolution to reduce his salary. The

question is, does this section and the sections following deal with the stipendiary as well as those appointed by the town where the tenure is good behaviour.

The whole question resolves itself into a proper interpretation of the sections of the Towns Act beginning with sec. 111 and ending with sec. 127, both inclusive, that portion of the statute is divided into five sub-headings under the heading

Officers, viz.: 1. The town clerk. 2. Stipendiary magistrate and deputy. 3. Town solicitor and deputy. 4. Officers where the tenure is good behaviour; and 5. Other town officers.

Do these sections mean to deal with town officers only who receive their appointment from the town, or all town officers no matter what provision is made by law respecting their appointment? In our sense the stipendiary magistrate may be said to be a state officer because although appointed for the town his jurisdiction is large; in another sense he is a town officer by the terms of his appointment.

The real question is, did the legislature by sec. 121 and following sections intend to include such an officer in its provisions? It was within their power to do so and I ask myself on a close reading of this statute what was the legislative intention?

This officer is appointed by the Governor-in-council for the town and should be paid by the town but shall hold office during good behaviour; others are appointed for the town on the same tenure by the town and shall be paid by the town. Was it the intention to group all these officers in a legislative scheme against starving them out at the caprice of a council, or was it the intention to apply such a scheme of legislation only in favour of the good behaviour tenure where the appointment is by the town? Section 121 taken alone may be fairly argued to apply to one class only, viz., the town appointment class, but am I at liberty to disregard the obvious headings "officers" and the subdivisions numbering five clearly including the stipendiary officer? I think not. Again I find in sec. 127 a clear guide as to the intention of the Act and its scheme, if it had not been the legislative intention to deal with all town officers no matter how appointed, including stipendiaries, you would not find an express provision dealing with such an officer (by way of exception) as a town corporate officer.

The question is wholly one of construction of the Towns Act statute and I am (not without some doubt) convinced that the order appealed from should be overruled and with costs.

Appeal allowed.

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ECROYD v. RODGERS.

Manitoba King's Bench. Trial before Galt, J. May 13, 1913.

1. VENDOR AND PURCHASER (§ I A—1)—RIGHTS OF PURCHASER—LAND CONTRACT—TRANSFER TO DISINTERESTED NOMINEE—RATIFICATION.

Although a purchaser of lands who has completed his purchase may direct the vendor to convey the property to a nominee not bound by the contract, this rule does not apply as to an executory contract in which the proposed nominee is in no way interested, and the doctrine of ratification of agency cannot be resorted to in such a case, either for the benefit of the original contracting parties or of the third party.

[*Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240, applied.]

2. PRINCIPAL AND AGENT (§ I A—12)—RIGHTS OF UNDISCLOSED PRINCIPAL—MUTUALITY—LAND SALE—"DUMMY" TRANSFEREE.

A contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party so as to render him able to sue or liable to be sued on the contract.

[*Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240, applied.]

3. PARTNERSHIP (§ IV—15)—PARTNERSHIP REAL ESTATE—SALE CONTRACT—SUFFICIENCY OF WRITING.

Where three persons enter into a partnership dealing with lands, stipulating that the partnership lands should be sold for such price as the partners might from time to time agree upon and that should any disagreement arise in regard to the sale of or other dealings whatsoever in such lands the mutual decision of any two must bind the three partners, with mutual covenants and agreements to effectually carry out the stipulation; a subsequent memorandum of agreement of sale of the land, signed by two of the partners, is good as to all of them, notwithstanding the Statute of Frauds.

Statement

ACTION for specific performance of an agreement for the sale of lands.

The action was dismissed.

R. M. Dennistoun, K.C., and *J. R. Higgins*, for the plaintiff.

H. W. Whitla, K.C., for the defendants.

Galt, J.

GALT, J.:—In this action the plaintiff seeks specific performance of an alleged agreement of sale of certain lands, being a portion of lot 59 in the parish of Kildonan, owned by the defendants. An alternative claim for damages was abandoned by the plaintiff at the trial.

The defendants deny the agreement, plead the Statute of Frauds and contend that the alleged agreement was not completed within the stipulated time.

It appears by the evidence that the defendants, on April 29, 1912, had purchased the lands in question, and that they had agreed amongst themselves that the property should be sold for such price as the parties (defendants) should from time to time agree upon; and that should any disagreement arise in regard to the sale or other dealings whatsoever in the said lands

the mutual decision of any two of the said parties should be binding on the three parties; and each of the above-mentioned parties covenanted and agreed each with the other to carry out the wishes of the majority and to execute such documents and conveyances as should be necessary in the carrying out of said agreement.

On or about May 3, 1912, one F. A. Clark, a member of the real estate firm of Clark & Munro, had an interview with the defendant Whitlock, during which Whitlock told him that the property in question was for sale. Thereupon Clark called on one Nassau Preston, a real estate agent, and gave him particulars shewing the description of the lands, containing 16.82 acres at $1,200 per acre. Preston then communicated with John McRae, with whom he had had previous real estate dealings, and McRae expressed his willingness to purchase the land, but stated to Preston that, for business reasons, he did not wish his name to appear in the transaction. Preston said that his sister, Emma Ecroyd (the present plaintiff) would probably allow her name to be used, to which McRae assented. Preston communicated with Mrs. Ecroyd, residing at Gladstone, by telephone, and obtained her consent. He merely mentioned to her that he desired the use of her name in a purchase of some land, but did not give her any particulars either of the land or of the real parties to the transaction. On May 4th, Preston informed Clark that he had someone who would take the property, but did not mention Mrs. Ecroyd's name.

Clark says he understood that McRae was to purchase the property on behalf of himself and two or three other persons. Thereupon Clark went to the defendant Rodgers and told him that he did not know who was buying, but Clark gave Rodgers a cheque for $500 by way of a deposit on the sale, and took from him a receipt expressed as follows:—

May 4, 1912.

Received from Messrs. Clark & Munro a cheque for $500, being a deposit to purchase the following property: being in the parish of Kildonan, in the Province of Manitoba, according to the Dominion Government survey thereof, and being all that portion of lot 59 of the said parish, bounded as follows: on the west by the easterly limit of the main highway or Bird's Hill road, as surveyed by R. C. McPhillips, M.L.S., in 1906; on the north by a line drawn south of and parallel with the northern limit of the said lot, and distant therefrom 264 feet on the course of the said easterly limit of the said Bird's Hill road; on the east by a line drawn east of and parallel with the said easterly limit of the Bird's Hill road, and distant therefrom 2640 feet, on the course of the said northern limit of the said lot, and on the south, by the southerly limit of the said lot, containing 16 and 82/100 acres, more or less, at and for the price and sum of $1,200 per acre, on terms of one-quarter cash, and the balance in three equal consecutive instalments. Such instalments to become due and

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payable on the following dates, March 26, 1913; March 26, 1914; March 26, 1915, together with interest at 6 per cent. The purchasers are to have all the privileges that are covered by the agreement in which the vendors purchased the property, and are to be given 10 days from the date hereof to close the sale, subject to forfeiture of the deposit, and subject to the usual commission to agents.

(Sgd.) W. F. RODGERS.

Accepted as above.

(Sgd.) F. A. CLARK.

The receipt appears to have been drawn in duplicate. The one filed in Court as exhibit 3 contains the signature of Rodgers only, but the evidence satisfies me that there was a duplicate receipt signed by both Rodgers and Whitlock. Clark then handed the receipt to Preston, and on May 6, 1912, McRae gave Clark a cheque for $500, thereby reimbursing him the amount paid as a deposit. Clark says that the first he heard of Emma Ecroyd was a day or two after receiving repayment of the $500, and that he then took the name to Rodgers' office to have it filled into an agreement of sale which Rodgers was preparing.

The proposed agreement of sale was prepared under Rodgers' instructions in his own office and was sent over to Egerton W. Marlatt (of Hudson, Ormond & Marlatt, solicitors) for revision on behalf of the purchaser. During the currency of the ten days' time limit mentioned in the receipt Mr. Marlatt had examined the title and was prepared to close with the defendants; but the balance of the first cash payment had not been given to him. Rodgers says that he did not hear of Emma Ecroyd as the intending purchaser until three or four days after the agreement of sale was drawn up, and her name was then inserted in the draft agreement.

With a view to shewing waiver of the time limit by the defendants, the following answers in the examination for discovery of Whitlock were put in evidence:—

59. Q. You were urging Mr. Clark to hurry and get it closed? A. Certainly.

65. Q. When was the last occasion on which you asked him that question? A. I may have asked him the 16th of May.

39. Q. You had an agent? A. Yes.

40. Q. Who was the agent? A. Mr. W. P. Rodgers.

41. Q. Mr. Rodgers was looking after it? A. Yes.

42. Q. I suppose what Mr. Rodgers did in connection with preparing those agreements was done with your authority then? A. I cannot say that—he had to prepare them and submit them to me to sign—I haven't got to sign everything he has prepared.

43. Q. And they were never submitted to you for signature prior to the 18th? A. No.

44. Q. So that you could not very well have signed them prior to the 18th? A. I was at Mr. Rodgers' office on the 18th, prepared to sign them.

On May 20th, McRae gave a cheque to Preston for $4,546 to complete the first cash payment. Preston was in partnership with one Charles Smith, who did business as a real estate agent under the name of Charles Smith & Co. Preston endorsed McRae's cheque to Charles Smith & Co., and the latter gave a cheque to Hudson, Ormond & Marlatt, on May 20th, for $3,536.80, thereby deducting $1,000 by way of commission, to be distributed between Clark & Munro, John McRae, Preston and Charles Smith.

As soon as Marlatt received the cheque for $3,536.80, he states that he rang up Rodgers, told him he had the money to complete the payment, but as it was after banking hours he would call around with a marked cheque early the following morning, and that Rodgers replied, "That will be all right."

Rodgers states that on that day, May 20th, he had determined to call the deal off, and that he drew up a cheque for $500 (the deposit which had been paid on the sale), and handed it to Clark. The accounts given by Rodgers in regard to what transpired on May 20th in his examination for discovery and at the trial are unsatisfactory and contradictory. I should gather from the evidence that after the conversation which he had with Mr. Marlatt by telephone, Rodgers determined to call the deal off.

Next morning Marlatt called twice at Rodgers' office with a marked cheque, but could not find him. On the same day, May 21st, Marlatt wrote to Rodgers stating that he had just been notified that Rodgers had returned the deposit, and expressing his surprise, especially in view of the arrangement he had made the evening before with a view to closing up the purchase on the morning of the 21st. The letter also notified Rodgers that the sale must be put through and that Hudson, Ormond & Marlatt were prepared to pay the balance of the cash payment in exchange for a copy of the agreement executed by the vendors. No reply was received to this letter and the action was thereupon commenced.

The mode in which the plaintiff has become a party to these proceedings strikes me as being somewhat remarkable. She never had any intention of purchasing the land in question; she did not know who were the owners of it, nor who the real purchasers were to be, and she had in fact no interest whatever in the transaction. She was nothing more nor less than a "dummy" utilized by John McRae, the real purchaser, on behalf of himself and those with whom he intended to act in concert. I am assured by the learned counsel for the plaintiff that this is a very common mode of carrying out real estate transactions in this province, especially where syndicates are concerned, and that there is usually a trust agreement entered into between the parties concerned.

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If the agreement of sale in the present case, which was prepared, but not executed by anybody, had been completed, plaintiff would have obligated herself to the extent of $20,184 in favour of the defendants and left herself open to expensive legal proceedings in case default were made in paying any of the instalments.

In answer to an inquiry I put to one of the witnesses as to the object of such machinery in real estate transactions, the witness said it would have the effect of relieving the parties interested from liability in case of default. So far as the evidence goes, no indemnity of any kind appears to have been demanded or received by the plaintiff for placing herself in such a position. Unless she could claim indemnity under the principle applied in *Bank of England* v. *Cutler*, [1908] 2 K.B. 208, she would seem to be without remedy.

However, that is not the point in issue here. Even "dummies" may have rights, and the question is whether the present plaintiff is entitled to the relief she seeks.

Apart from the question of the Statute of Frauds, which I will deal with presently, I see no reason for refusing the relief which the plaintiff claims. Assuming an agreement by the defendants to sell the lands to the plaintiff, I do not think she is debarred by the expiration of the ten days from May 4, 1912, within which time the sale was to be closed; for after the expiration of that period, on May 16th and 18th, the defendant Whitlock clearly shews a continuation of the negotiations. As to the communication on May 20th between Marlatt and Rodgers, I would accept the testimony of the former in preference to that of the latter, and would find that Rodgers acquiesced. Under such circumstances, the renunciation of the contract was wrongful, and, in my opinion, the plaintiff was relieved of the necessity of tendering the balance of the cash payment.

The question still remains, was there any agreement in writing between the plaintiff and the defendants sufficient to comply with the Statute of Frauds?

On May 4, 1912, the defendants Rodgers and Whitlock signed the receipt for $500 handed to them by their own agent Clark, and I think their signatures bound the defendant Sumner also. At that date both Clark and Rodgers knew that John McRae was the party really interested in purchasing the property, either for himself or for himself and others.

Neither Clark nor any of the defendants had heard of the present plaintiff Emma Ecroyd. Clark heard of her for the first time a day or two after May 6th, and subsequently her name was communicated to Rodgers.

Under the above circumstances counsel for the plaintiff contends that there was a contract of sale entered into between the

parties on May 4, 1912, and that the receipt signed by two of the defendants was a sufficient memorandum in writing. It is contended that the plaintiff's consent to let her name be used as purchaser was obtained by Preston on May 3rd, and that Clark was in truth acting as agent for both vendor and purchaser when, on May 4th, he paid the $500 deposit to Rodgers, and that consequently Preston's knowledge of Emma Ecroyd's position should be imputed to both Clark and Rodgers.

In my opinion Clark was acting throughout as agent for the defendants and not for the plaintiff at all. If Clark cannot be regarded as an agent for the plaintiff, it is clear that she can have no interest in the agreement which was made. But even assuming that Clark was acting as agent for the purchaser (whoever he might be) and that Preston's knowledge should be imputed to both Clark and Rodgers, I think the same result must follow. They would in such case be aware that John McRae (acting either for himself or for himself and others) was the real purchaser and that the plaintiff was a mere dummy. McRae was the principal in this transaction, and was merely acting under the name of the plaintiff. As a matter of fact both Clark and Rodgers understood that John McRae was the real purchaser, and if he had been the plaintiff in this action different considerations might well arise.

When a purchaser has completed his purchase he may no doubt direct the vendor to convey the land to a nominee not bound by the contract; but this is a very different thing from the right claimed by the plaintiff to make herself a party to an executory contract in which she was in no way interested. The doctrine of ratification cannot be resorted to in such a case, either for the benefit of the original contracting parties or of the third party: see *Keighley Maxsted & Co.* v. *Durant*, [1901] A.C. 240.

The only written contract which I am at liberty to refer to, as regards the Statute of Frauds, is the receipt given by Rodgers and Whitlock to Clark on May 4th. That document professes at most to treat Clark & Munro as purchasers. At that date Clark was entirely without authority from the plaintiff, and indeed without any knowledge of her existence, so that he could not in any way profess to be acting on her behalf. Under the *Keighley Maxsted* case, above referred to, the plaintiff could not thereafter ratify or take advantage of the contract as against the defendants.

The action must be dismissed with costs.

Action dismissed.

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Mar. 14.

MASSEY-HARRIS CO., Ltd. v. ELLIOTT.

Saskatchewan Supreme Court. Trial before Haultain, C.J. March 14, 1913.

1. SALE (§ II A—27)—SALE OF GOODS ACT (SASK.)—EFFECT OF EXPRESS WARRANTY.

Section 16 (1) of the Saskatchewan Sale of Goods Act, Sask. R.S. 1909, ch. 147, relating to implied warranties on the sale of chattels, does not apply to a sale under an express warranty.

2. SALE (§ II B—30)—BY DESCRIPTION—WARRANTY—FULFILMENT.

A contract for the sale of a portable engine is not fulfilled by furnishing an engine that, by reason of its construction, is not portable.

3. SALE (§ III C—74)—BY DESCRIPTION—FAILURE TO COMPLY WITH—REJECTION OF GOODS.

Under a contract for the sale of a portable engine it may be returned to the dealer where, upon a fair test, on account of its construction, it does not prove to be portable nor to work satisfactorily as such.

4. SALE (§ II E—44)—WARRANTY—TEST AND DEMONSTRATION—WRITTEN NOTICE OF DEFECTIVE WORKING OF MACHINE.

Written notice by the buyer of the defective working of an engine in pursuance of his contract of purchase, required as a condition to the buyer's right to return the engine for breach of warranty, may be waived by the seller sending out an employee to remedy the defects after the time for giving such written notice, had expired.

5. EVIDENCE (§ II C—115)—CONTRACT OF SALE—CONDITION AS TO NOTICE OF DEFECT—ONUS TO SHEW NON-COMPLIANCE WITH.

In an action to recover the price of an engine, the onus rests on the vendor raising the issue in his reply, to shew that the vendee did not give notice in the manner required by the contract of sale, of the failure of the engine to work properly.

Statement

TRIAL of action for the price of an engine sold and delivered which the defendants claimed was not in accordance with the contract of sale and offered to return.

F. M. MacDermid, for plaintiffs.

T. P. Morton, for defendants.

Haultain, C.J.

HAULTAIN, C.J.:—This case presents the usual conflict of evidence between the vendor and purchaser which seems to be an unfortunate incident of nearly all "machine cases." There is a written agreement for the engine in question which in its language and its terms is singularly free from the complexities and hopeless difficulties in which the ordinary purchaser of agricultural machinery finds himself enmeshed. So far as the written agreement is concerned the case presents no difficulty. But the defendants in their evidence claim that they were induced to purchase the engine and sign the agreement by an express warranty by Mr. Aird, the agent of the plaintiff company, that the engine would operate a 28-49 Gaar Scott separator, which they informed him they had purchased or were about to purchase.

This evidence was given in support of paragraph 8 in the statement of defence setting up an implied warranty in the terms of sec. 16 (1) of the Sale of Goods Act.

In my opinion no effect can be given to this part of the defence. The evidence shews that the warranty relied on was not an implied warranty of fitness for specified purposes based on conditions set forth in sec. 16 (1) but an express warranty or representation that the engine would operate a 28-49 Gaar Scott separator. In any event, the defendants did not rely on this warranty or representation, for after purchasing the engine they cancelled their order for the Gaar Scott separator and bought another separator called a 28-44 Advance separator. The expert evidence on both sides shews that both of these separators require a 35 h.p. engine to operate them successfully and that a 25 h.p. engine like the one in question is not powerful enough for that purpose. The defendants were informed by Mr. Chinnock, a threshing machine expert, before purchasing the engine that it would require a 35 h.p. engine to operate a Gaar Scott separator. Mr. Kellar, the warehouse foreman for the Rumely Co., from whom the defendants purchased the "Advance" separator, testified that a 35 h.p. engine was necessary to operate it. Having decided to get another separator the defendants might reasonably be expected to make some enquiry as to the power required to operate it and a single enquiry from the Rumely Co., from whom they had ordered both separators, would have saved all the subsequent trouble and this litigation.

The defendants further alleged in their pleadings that the engine was not well made or of good material and would not work well on a fair trial as warranted in the written contract. With one exception to be mentioned later there is no evidence to support this defence. Independently of the separator the engine apparently did work well but it would not operate the "Advance" separator which, according to all the evidence, required an engine of great power.

This brings me to the third ground of defence raised by the defendants. They say that the engine is not a "portable" engine and the contract calls for a portable engine. Mr. Wilkins, the inspector and tester for the manufacturers of the engine, said that this type of engine was originally intended for a stationary engine and that no other portable engine on the market which he knew of weighed as much. A difference of 3,000 to 4,000 pounds in weight would make a very material difference in deciding upon the adaptability of this engine for field work. The evidence on this point convinces me that this engine is not a portable engine in size, weight or design. There was also some evidence going to shew that owing to some features of construction this engine was not altogether adapted to convenient work in the field.

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I find therefore that the engine is not a portable engine and that, leaving out of consideration the question of power, it did not work well after a fair trial owing to its construction as a stationary engine. Counsel for the plaintiffs denies the right to return the engine because the defendants after one day's trial did not give written notice to the plaintiff company as required by the written contract. There is no evidence that notice was not given and as this point was raised in the reply the onus was on the plaintiffs to prove the want of notice. In any event I should hold that the plaintiffs waived notice by sending out an expert some days after the engine was first taken out. The expert was not able to make the engine work and the defendants promptly returned it free of charge and in good condition. There will therefore be judgment for the defendants with costs of the main action. As the defendants did not claim any special damages in their counterclaim, the counterclaim is also dismissed with costs. Costs in each case to be set off and judgment for the balance as it may appear.

Action dismissed.

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Feb. 18.

INTERNATIONAL CASUALTY CO. (defendants, appellants) v. THOMSON (plaintiff, respondent).

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 18, 1913.

1. CONTRACTS (§ V C 3—401)—RESCISSION—GROUNDS — STOCK SUBSCRIPTION — COMPANY'S REPRESENTATION OF INTENTION.

Where the plaintiff, a physician, made a contract with an insurance company to buy shares of its stock, on condition that, within a fixed time, the company would be in active business in a certain city and plaintiff would be appointed its medical examiner for that city; upon breach by the company of a material part of the stated condition the agreement may be rescinded and any payments made may be recovered back at the instance of the plaintiff.

[*Thomson* v. *International Casualty Co.*, 7 D.L.R. 944, affirmed.]

2. CONTRACTS (§ V C 3—402) — RESCISSION — MISREPRESENTATION — GROUNDS—MANIFESTING "FIXED INTENTION" — "INTENTION" IS A FACT, WHEN.

Where the plaintiff was induced to buy shares of the capital stock of an insurance company upon its manifesting and expressing a "fixed intention, readiness and capacity" to commence its regular insurance business in a certain city on a fixed date, the existence or non-existence of that "intention" is a fact, and, if the plaintiff entered into the contract to buy and parted with the purchase price on the faith of the statements made in respect of such intention and those statements were material, his right (if misled) to rescind the contract is the same as if he acted on and was misled by a representation of any other material fact. (*Per* Fitzpatrick, C.J.)

[*Thomson* v. *International Casualty Co.*, 7 D.L.R. 944, affirmed.]

3. APPEAL (§ II A 1—35)—SUPREME COURT OF CANADA—APPEALABILITY OF JUDGMENT INVOLVING MERELY COSTS.

The Supreme Court of Canada will not entertain an appeal from

any judgment for the mere purpose of deciding a question of costs. (Dictum *per* Idington, J.)

[*Schlomann* v. *Dowker*, 30 Can. S.C.R. 323; *Moir* v. *Huntington*, 19 Can. S.C.R. 363, referred to.]

4. APPEAL (§ VII J 3—400)—QUESTIONS NOT RAISED BELOW—RECORD SHEWING CAUSES NOT RELIED UPON—SCOPE—JUDGMENT.

Where a party holds a judgment in his favour and the record discloses grounds upon which such judgment can justly be supported, an appellate court may give effect to those grounds although they were not relied upon at any stage of the proceedings in the courts below, and will therefore refuse to reverse a judgment thus solidly based on the record merely because counsel for the party who has succeeded did not in the courts below put his case in the strongest way. (*Per* Duff, J.)

Statement

APPEAL by the defendants from the judgment of the Court of Appeal for British Columbia, *Thomson* v. *International Casualty Co.*, 7 D.L.R. 944, allowing a cross-appeal by the plaintiff from the judgment at trial.

The present appeal was dismissed.

A. W. Anglin, K.C., and *D. J. McDougal*, for appellants.

Hellmuth, K.C., for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—In this case the plaintiff, now respondent, asks for the rescission of a contract to purchase shares of stock in the appellant company on the ground of misrepresentation. It was argued that the contract between the respondent and the company was never executed, inasmuch as his offer to subscribe for shares in the capital stock of the company was not acted upon. Undoubtedly Thomson's application purports on its face to be for treasury stock, the property of the company, and not for shares which were already allocated to Van Hummell. It is equally certain, if we believe the evidence of President Ritter and of Van Hummell, that the certificate issued to Thomson was for 250 shares of the stock previously purchased by Van Hummell and held by the company subject to his order, and counsel, at the oral argument here, pressed upon us this consideration—that, not having got the shares he applied for, Thomson is now entitled to recover his money back. That, however, is not the case upon the pleadings and, although there is some evidence to support it, the course of the trial was not directed towards that issue, nor is it discussed in the factum here. I also doubt very much whether Thomson would have refused to accept the shares if he had known of their previous allotment to Van Hummell if all the other conditions of the transaction had been faithfully fulfilled.

Dealing with the issues presented to the Courts below, I am satisfied that the plaintiff has made out a case which entitled him to succeed.

On the pleadings and evidence two questions fell to be considered and decided: first, who were the parties to the contract?

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secondly, the character of the representations made on behalf of the company and their effect upon the transaction. Both Courts found that Van Hummell acted throughout merely as the agent of the company and that the contract respecting the purchase of the shares was made by him for the company and not for himself.

This concurrent finding of the two lower Courts is supported by the documentary evidence, and Van Hummell, when examined as a witness on discovery, admits that the contract was between the company and Thomson and that he was merely the agent "in the sale of the shares." The application for the stock is addressed to the company and the two cheques given in part payment are made to its order. The notes for the balance of the purchase price are made payable to the order of Van Hummell—why, I do not pause to inquire; they were apparently signed after the transaction had been submitted to the head office. The receipt for the money and notes is also signed in the name of the company.

As to the second question, I have read the evidence over very carefully and, if we believe Thomson, as the trial Judge evidently did, I fail to see how we can refuse to grant rescission. Entering into the contract for the purchase of the shares meant the assumption of an obligation to pay $4,250 in monthly instalments, and having, as the trial Judge says, been relieved of all his ready cash, nothing could be more natural than that Thomson should be concerned about the payment of his notes at maturity. Dependent, apparently, upon his professional income, he relied upon the increase resulting from the new business to meet these notes. In such circumstances he naturally made inquiries as to the probabilities and says that he received from the authorized agent of the company positive assurance that it would be in business by the 1st of November, and in this he is corroborated by Wilmot. On the faith of this assurance he signed the notes and parted with his money. Time and again he repeats that he relied upon the business of the company to increase his revenue so that he might be in a position to meet his notes, and he most emphatically states that the agent affirmed the intention of the company to begin business on the first of November.

The existence or non-existence of that intention is a fact, and, if he signed the application and parted with his cheques and notes on the faith of the statements made with respect to it, his position is the same as if he acted on a representation of the existence of any other fact. See Halsbury, vol. 20, par. 1617. Both Courts below are agreed that Van Hummell, to induce the subscription for the stock, made certain statements with respect to the time at which the company would be prepared to start business in Vancouver.

The point of difference between them is just this: the trial Judge found that the words used amounted merely to a qualified promise, and no more, that the company would be so far organized by the time fixed as to be then in a position to start business, that with this assurance the respondent was content, and that he was not induced to enter into the contract on the faith of what was said about the business beginning in November. The Court of Appeal came to the conclusion that the words manifested and expressed and were intended to manifest and express a then "fixed intention, readiness or capacity on the part of the company" to commence operations on that date, and that the respondent was induced to apply for the shares on the faith of that representation.

There is certainly room for much difference of opinion in the appreciation of the language used by the agent, but, on the whole, after giving the evidence the most careful consideration, I have come to the conclusion that Van Hummell did not give the respondent a mere promise or undertaking which was not fulfilled, but that, being in the position of one who had special knowledge, he deliberately used language calculated to convey the impression that, at the time, there was an existing fixed intention on the part of the company to begin business on the first of November, and that the respondent was induced to subscribe for the shares on the faith of the representation made with respect to that intention. I am also satisfied on the evidence that such a representation made by one who had intimate knowledge of the then state of the company's affairs was false. The application for the Dominion license, without which it was impossible to begin business, was not made for a month after the transaction was closed, and did not in fact issue until this suit was brought and more than half the notes had matured. The strongest evidence in support of my conclusion I find in the terms of the bargain. The trial Judge says:—

> Evidence is before me uncontradicted, and I think very probable, that the agent of those shares endeavoured to ascertain how much ready money the doctor had, and then gave him such terms as would induce him to make this purchase; that he pointed out to him that doctors in other places made $1,500 to $2,500 from their connection with this company, and thereby led him to infer that he could expect something, at any rate, for acting in connection with this company enabling him, in part at any rate, to meet those notes.

All the probabilities support this view. As I have already said, the immediate benefit Thomson expected to derive from his connection with the company was to earn money with which to pay his notes as they matured, and this he could not do if the company was not in business during their currency. Can it be

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said, therefore, that the date at which the company would be a source of revenue was not a determining factor or an inducing cause? The appointment as medical examiner was valuable only in so far as it placed him in funds to meet the liability he was induced to assume. Further, although it is exceedingly difficult to prove the presence or absence of an expressed intention, on all the facts it appears to me impossible that Van Hummell could, in August, have been at all certain if he had taken reasonable care or made reasonable inquiries that the company would have been in possession of the necessary Dominion and provincial licenses to do business in November. If this is merely a case of error, it is an error which should have been avoided. The company was then only in the preliminary stages of its organization in so far as the Canadian branch was concerned. The necessary deposit to satisfy the requirements of the Insurance Act had to be found out of the sales of stock in Canada and there remained the formalities with respect to obtaining of the provincial license to be fulfilled. In fact the license did not issue until May of the next year.

On the whole I am of opinion that the consent of the respondent was given on the condition that the company would be in business on November 1, 1910, and the appeal of the company should be dismissed with costs.

On the issue with Van Hummell, I agree that this appeal also should be dismissed with costs.

Davies, J. (dissenting)

DAVIES, J. (dissenting):—I am to deliver the judgment of myself and Mr. Justice Anglin in this case.

In his pleading the plaintiff seeks rescission of a contract for the purchase of 250 shares of the capital stock of the defendant company on the ground that two definite misrepresentations were made to him by the defendant Van Hummell when selling these shares as agent of the company. No other cause of action against the company was disclosed in the pleadings, or suggested at the trial, or on appeal to the Court of Appeal for British Columbia, or in the appellant's factum on his appeal to this Court.

The two misrepresentations relied upon were that the plaintiff would be appointed the company's sole resident physician for the city of Vancouver, and that the company would commence and actively carry on business in Vancouver on or before the first day of November, 1910.

As to the former, it was established that the plaintiff was appointed the company's physician for Vancouver as had been undertaken; and the claim for rescission, as far as it was based upon that alleged misrepresentation, was abandoned.

The trial proceeded wholly upon the other ground of misrepresentation. The evidence in respect of it was somewhat con-

flicting. But at the close of the case the trial Judge reached the conclusion that it had not been established that the alleged misrepresentation "was unqualifiedly made" and added that he could "not hold that it essentially entered into the inducement" or "was made so clear as to operate on the doctor's mind to induce him to purchase in the sense set out above." The learned Judge, therefore, dismissed the plaintiff's action as against the company.

On appeal the learned Chief Justice, delivering the judgment of the Court of Appeal, said that:—

> In obtaining subscription for stock from the plaintiff it was made part of the arrangement that the plaintiff should be physician of the company and it was represented that the company should commence business at a date set out as the first of November, which representation was not made good. Then we have the evidence of the plaintiff himself that that representation was material to him; that it was of the essence of the contract. The plaintiff is entitled to the rescission.

In both the trial Court and the Court of Appeal it was held that as put by the learned trial Judge:—

> The relation that existed between the International Casualty Company and Van Hummell was that of principal and agent for the sale of stock. I can put no other interpretation on the documents that were placed before me, and on the history of what happened between them. . . . Van Hummell was the agent of the company and if there had been misrepresentation here which would entitle Dr. Thomson to rescission of this contract the company would be bound.

And as put by the learned Chief Justice on appeal:—

> I think it is manifest that the arrangement between the company and Van Hummell was only a contrivance between themselves to constitute him agent of the company; and that as such agent any representations made by him were within the apparent scope of that arrangement. He had authority as agent to sell stock.

Neither in the trial Court nor in the Court of Appeal was it found that the alleged representation as to the time when the company would commence business was fraudulently made. On a careful perusal of the evidence the conclusion of the trial Judge upon the question of fact as to the character of the statements made in this connection to the plaintiff appears to be correct.

It is not possible in our opinion to contend successfully that it was made a term or condition of the plaintiff's contract that it should become void if the company did not commence business on or before the first of November, 1910. The application for stock is in writing. It contains no provision of this kind. At the time of his application the plaintiff stipulated for his appointment as physician and had this term of his bargain put in writing, with the following provision:—

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This agreement to be ratified by the president of the company, and if not so ratified, application for stock together with cheques and notes to be returned.

It would be contrary to the elementary rule of evidence which excludes parol testimony of a term varying or altering a written contract to permit the plaintiff to prove that the commencement of business by the company on or before the first of November was also a condition subsequent, the non-performance of which would avoid his obligation to take the stock for which he subscribed. Regarded as a misrepresentation the alleged statements made by Van Hummell as to the commencement of business by the company, in view of the fact that they relate to matters of mere intention, would require to be very clear and positive in order to support the claim for rescission.

I agree with the learned trial Judge that the onus upon the plaintiff in this connection was very heavy. The mere fact that the stipulation as to his appointment as resident physician and for the cancellation of his subscription, should that appointment not be made, was so carefully reduced to writing, gives rise to serious doubt as to whether there was any definite or unqualified representation as to the time when the company would begin business, and casts still greater doubt upon the position taken by the plaintiff that the representation, if made, was a material inducement for his subscription. The plaintiff admits that he was told the commencement of business would be contingent upon the company's obtaining necessary licenses, and he must have known that the issue of these could not be absolutely controlled by it.

Taking all the circumstances of the case into account and allowing for the advantage which the learned trial Judge had in observing the plaintiff's demeanour when giving his evidence, my conclusion would be that his findings of fact that no unqualified misrepresentation was made and that whatever was said in this connection did not essentially enter into the inducement for the contract should not have been disturbed. Assuming, however, for the moment that there was an unqualified misrepresentation by the company's agent and that it did materially induce the contract, inasmuch as it related to a matter of intention and expectation on the part of the company it would not afford a ground for relief by way of rescission, unless it had been clearly established that it was falsely and fraudulently made. *Clydesdale Bank* v. *Paton*, [1896] A.C. 381 at 395, 65 L.J.P.C. 73, 74 L.T. 738; Kerr on Fraud, 4th ed., pp. 53-5.

This has not been found either by the trial Judge or by the Court of Appeal, and I have discovered nothing in the evidence which would justify such a finding, especially at this stage of the proceedings. We are therefore, with respect, of opinion that

the judgment of the Court of Appeal reversing the trial Judge on the question of fact and awarding judgment against the defendant company is not sustainable either in fact or in law.

In the course of his argument in this Court, however, counsel for the respondent put forward an entirely new ground of claim not disclosed in the pleadings, not taken at the trial or in the Court of Appeal, and not mentioned in his factum on the appeal to this Court. He claims judgment for return of the moneys paid by the plaintiff to the company on the ground that while his application was for unallotted treasury stock of the company he was given not such stock but stock which had been already allotted to the defendant Van Hummell and was transferred by him. In the first place, I do not think the plaintiff should be allowed now to set up this new ground of claim. Had it been raised in the pleadings or even at the trial there might have been more satisfactory evidence than is now before us as to the real nature of the arrangement between Van Hummell and the company and as to the character in which he held the 30,000 shares of stock which stood in his name. Notwithstanding the evidence given by the company's president, Ritter, in support of its defence that the plaintiff's contract was with Van Hummell and not with the company, to the effect that Van Hummell was in fact as well as in name the holder of 30,000 shares, I am by no means satisfied that, had the issue now presented been before the Court, other evidence might not have been forthcoming which would have made it clear why Van Hummell became the nominal holder of all the company's treasury stock and what were precisely his rights and obligations under his arrangement with the company. The circumstances of this case and particularly the documentary evidence seem to indicate that all the facts are not before us. Moreover, from the examinations for discovery of Van Hummell and of Ritter, the plaintiff was made fully aware of all that he now knows concerning the alleged allotment of the 30,000 shares to Van Hummell and of the means taken to satisfy his own application for stock. With that knowledge he deliberately elected to proceed with the branch of his action in which he sought to hold Van Hummell liable to him on an alleged agreement to take the stock off his hands and dispose of it. He could only make and enforce such an agreement with Van Hummell on the basis that the stock was his to dispose of. At the trial he succeeded in convincing the learned Judge who presided that he had made such a bargain with Van Hummell, and obtained a judgment against him for damages for breach of it.

Having elected, with full knowledge of the circumstances upon which he now relies in order to recover back his moneys from the company, to proceed with a claim based upon his own-

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ership of the shares which he obtained, he should not, in my opinion, be now allowed to take the stand that he never became owner of these shares and is entitled to a rescission of his contract because they were not what he had bargained for. But if, notwithstanding these objections, the plaintiff should be allowed now to set up this new ground of claim, in my opinion he cannot succeed upon it.

As pointed out by the learned trial Judge, the documentary evidence makes it reasonably clear that Van Hummell had no beneficial interest in or ownership of the 30,000 shares which stood in his name. He held them merely as agent of and trustee for the company. Concurrently with his subscription, an agreement was made between him and the company which recites that "the said casualty company is desirous of disposing of its unsold treasury stock within the shortest possible time," and that Van Hummell had agreed "to subscribe for and purchase the unsold stock of the company for the purpose of resale, said subscriptions to be made from time to time as sales are made." The agreement then provides:—

(1) That the said casualty company, so long as it has unsold treasury stock, shall fill all orders for stock received by or through said Van Hummell at the agreed price of $15 per share, said stock to be sold at $20 per share.

(2) That the said Van Hummell is to pay for the stock so ordered with the proceeds of sales made by him or by his agency . . .

(3) That this contract is to continue in full force and effect so long as the said company has unsold treasury stock with which to fill the orders presented by the said second party (Van Hummell) or his agents.

The certificate issued to Van Hummell was in a special form and certified him to be the owner of 30,000 shares "subject to payment in cash." As pointed out by the learned trial Judge there is no covenant by Van Hummell to pay for the shares. The agreement is made upon the basis that, although the 30,000 shares put in Van Hummell's name constituted its entire unsold stock, the company would still have unsold stock. It provides that out of its unsold stock the company will fill orders for stock received by or through Van Hummell and it is only for such stock as he sells for the company that he agrees to pay anything to it. The price at which he is to dispose of the stock is fixed. The certificate issued makes his ownership conditional on payment.

The obvious purpose of the transaction was, for some undisclosed reason, to place the company's treasury stock in the name of Van Hummell, and to have him dispose of so much of it as he could as the company's agent. The company undertook to honour his orders for shares out of those so held by him and it was understood that it would take off his hands whatever might not be sold, under the provision enabling it to forfeit for non-

payment at the end of a year. This was in fact done. Upon the incomplete evidence before us it is sufficiently clear that this was the substance of the arrangement between the company and Van Hummell. However irregular the transaction may have been, and although, as between himself and the company's creditors on liquidation, Van Hummell might be held to be a contributory in respect of the entire 30,000 shares, as between him and the company, it seems impossible to escape the conclusion that he had no beneficial interest in the stock, that he could neither be compelled to pay for, nor could he insist on holding as his own any of the shares which he had not sold. Under these circumstances, while the shares which the plaintiff received may have been nominally Van Hummell's, they were in reality and in substance the company's treasury stock.

If, therefore, the plaintiff should be allowed now to put forward the new ground of claim devised by the ingenuity of counsel representing him in this Court, possibly because he regarded the grounds on which the action was launched as of very doubtful value, he should not, in my opinion, succeed upon it. He has got in substance that which he contracted for and he should not be allowed to recover back what he paid for it.

I would for these reasons allow this appeal with costs in this Court and in the Court of Appeal and would restore the judgment of the learned trial Judge in so far as it dismissed this action as against the defendant company with costs.

Idington, J.

IDINGTON, J.:—Notwithstanding the many legal questions argued, I think if we can find as the Court of Appeal did that in fact there was a representation made to respondent at or before the time of his making the application for stock, to which I will presently refer at length, that the appellant company would by first of November following, have begun business in Vancouver, the problems involved are not difficult of solution. The company was incorporated in 1909 in the state of Washington for the purpose, as its name indicates, of engaging in the business of casualty insurance. On the solicitation of appellant, Van Hummell, whose relations to the company will presently appear, the respondent made in writing on August 26, 1910, an application to the company for two hundred and fifty shares of its capital stock.

The making of this application appears in said writing as follows:—

> Said stock being of the par value of ten dollars ($10) per share. I agree to pay the sum of twenty dollars ($20) per share for said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of said company, and for the creation of a surplus. Payable on demand.

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All amounts must be paid by cheque, draft or money order made payable to the company.

At the same time he got a letter addressed to him as follows:—

Dear Sir,—The International Casualty Company of Spokane, in consideration of your subscription for $5,000 of the capital stock of said company, does hereby appoint you (said Dr. J. W. Thomson), the company's sole resident physician for the city of Vancouver.

This agreement to be ratified by the president of the company, and if not so ratified your application for stock, together with cheques and notes, to be returned to you.

H. VAN HUMMELL,
For International Casualty Co.

He gave them, at same meeting as he thinks (but later, according to Van Hummell) two cheques together amounting to $750 payable to the company and twenty notes, each, except the last, for $200, and the last for $250 made payable in twenty successive monthly payments to Van Hummell or order. He got therefor the following receipt:—

International Casualty Co.,
Spokane, Washington.
Capital stock $1,000,000.

Received of J. W. Thomson....Five Thousand....cash and notes.... Dollars in full payment for 250 shares of the capital stock of the International Casualty Company of Spokane, Washington.

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$5,000. Per H. Van Hummell.

In evidence he speaks as follows:—

Mr. Deacon:—Q. Whose shares were you buying? A. I understood it was treasury stock of the International Casualty Company, the receipt was signed—

Q. On what ground did you understand that? A. I understood from Van Hummell he was the agent selling stock for the company, and I asked him what authority he had to sell stock for the company, and he told me he was vice-president of the company, and as near as I can remember he shewed me a letter authorizing him to sell stock for the company.

THE COURT:—Did he tell you he was selling stock for the company? A. Yes, sir, and the receipt I received was a printed form, signed by the International Casualty company, per Van Hummell. . . .

Mr. Deacon:—Q. You didn't know that they were Van Hummell's shares? A. I heard nothing to that effect whatever.

The argument is put forward notwithstanding said documents that the transaction was one between Van Hummell and the respondent in respect of shares which had been allotted by the company to Van Hummell by what he calls an underwriting agreement.

He, however, with commendable frankness in his examination for discovery, states the matter thus:—

Q. Now you see this receipt is signed by the International Casualty Company. Did you tell Dr. Thomson that they were your own shares that you were selling him? A. No. . . .

Q. What did you tell him about the shares? A. Nothing at all, as to whose or what shares they were.

Q. You gave him a receipt signed by the International Casualty Company per H. Van Hummell? A. As agent.

Q. There is no mention of agent on this receipt? A. That was what he understood and what I understood.

Q. That you were signing as agent for the company? A. Yes.

Q. Was anything said in the course of the conversation which would lead him to believe that the shares which you were selling him were your own? A. Nothing at all.

Q. So he had no reason whatever to believe that the shares were not the treasury shares of the company? A. I cannot say what he thought or understood about the matter, because there was no discussion regarding that point.

Q. Had he any reason that you know of to suspect that these shares were not the treasury shares of the company? A. None that I know of.

He repeats this in substance in his examination taken under commission. The above nomination of respondent by Van Hummell was sent to the head office of the company in Spokane and returned with the written approval of the president of the company signed by him at the foot thereof. Curiously enough neither Van Hummell nor respondent is very positive as to when or how it was returned. The former seems to think it came back to him before he got the cheques or notes above referred to. The latter thinks it came to him by mail.

If, as seems quite probable from the care respondent took to make sure of his appointment as the basis of his whole dealing, Van Hummell is right, then the circumstance of the notes being made payable to him is easily explained, if indeed needing any explanation. The company set up in its defence that it had in short nothing to do with the transactions beyond appointing respondent as its local physician; that the stock was Van Hummell's and the transaction his own. This has been in fact its attitude throughout though not distinctly pleaded affirmatively. Its denial of plaintiff's (now respondent's) statement of claim enabled it to make such contention.

The effort to make the transaction wear that appearance and to carry it out in ways inconsistent with the documents, do not agree very well with what straightforward dealing required. The truth seems accurately stated in the above evidence of both those who ought to know; the written parts of the agreement in question here bear that out; the cheques of respondent pursuant thereto were made payable to the company and received by it; and the agreement between the company and Van Hummell, relied upon to displace all that, was hidden from the respondent and was nothing more or less than a roundabout

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method of constituting him the agent of the company and giving him such terms of commission as it could not well do to a mere purchaser. The power thus given was capable of great abuse and if the company adopted that method of creating agents so that it might be in a position to repudiate them and their acts when leading to inconvenient results, it may as well understand such notions cannot avail anything herein. The notes given in this case by respondent to Van Hummell ought in light of the foregoing, to have gone directly to the company as no doubt was intended by respondent, though a different purpose may have been in the minds of the company's officers. Van Hummell explains that in some other cases this was in truth what was done with such notes. I infer it was well understood between him and the company that either of them might use and discount them as occasion and opportunity might best promote the interests of the company, so long as it got three-fourths and Van Hummell one-fourth of the proceeds. I, however, suspect there was another purpose possibly arising from a necessity to shew cash subscriptions instead of notes as a payment for shares.

An improper use of the company's shares was thus possible and in this case was the direct result of the methods of doing business which the company thus adopted. The respondent's notes were used by Van Hummell at the bank to obtain the money wherewith to pay the company for its shares taken out of Van Hummell's allotment instead of from the treasury and issued as if for the respondent and then put up as collateral security at the bank along with the same notes that represented their purchase from the company.

These were acts which the company could not, I imagine, do directly, and unless duly provided for by its charter powers, which is improbable, were improper methods. All these contrivances for whatever purpose were, if not *ultra vires* the company, at least beyond the scope and purpose of the plain contract entered into between the company and respondent, which was clearly intended to have been the foundation for a purchase from it of its treasury stock and to have remained executory instead of being apparently executed in ignorance of respondent and to his detriment in the way it was. The company must herein be treated as owner of these notes and in all else as if the agreement had proceeded in the regular way it manifestly was intended should have been done.

I have no difficulty, therefore, in holding as did the Court of Appeal, that the transaction was between the company and respondent, and I have no further difficulty in holding that the company, under the circumstances, is bound by any material representation or misrepresentations made by Van Hummell in the course of the negotiations inducing respondent to enter into the contract, and it must answer for the legal consequences

thereof. Any difficulty in the case seems to have arisen from the gravity in form of the charges of misrepresentation, so called, inducing the contract.

It seems to me as if the learned trial Judge was so oppressed by the nature of the charges that he shrank from believing and finding as fact, that the representations had been made as sworn to by the respondent and another witness, yet seems to have no hesitation in believing the same two witnesses as against Van Hummell regarding the agreement for cancellation or the taking back by Van Hummell of the shares. In this latter instance he finds corroboration in the circumstances.

With great respect it seems to me that those same circumstances he relies upon, reflect as strong light upon and give as much strength to the first contention set up by the respondent, as to this found in his favour by the learned Judge. And added thereto in support of said first contention which is the real matter in dispute herein, are the peculiar circumstances I am about to advert to. The respondent says, and is corroborated by Mr. Wilmot, his witness (and both are reported by the learned trial Judge as appearing credible) that at the bargain which the above-mentioned documents set forth, it was distinctly stated that the company would likely be ready for business in Vancouver by October 1, but absolutely sure to begin by November 1, 1910. I see nothing improbable in supposing such a statement might be made by Van Hummell. And if made I see no reason why the company should not be bound by it when a determination has to be reached relative to the said contract and the inducements leading thereto and the bearing of statement thereon, either as representation or as misrepresentation, has to be considered.

On the contrary it seems, from the nature of the business in hand, the terms made relative to the payments, and the facts (which all agree were mentioned) as to some doctors elsewhere earning $1,500 to $2,500 a year from such positions as the respondent was bargaining for, to be inherently a thing one should expect to be discussed, just as respondent and Wilmot say it was discussed.

I agree, therefore, with the Court of Appeal in accepting the version of the respondent, and any uncertainty I have is as to whether or not the representation I so find to have been made should be classed as a misrepresentation as the learned trial Judge thought, if in fact made and found untrue, it should be so held, or as a condition of the contract. It may well have been both. It clearly was a very material part of the consideration inducing respondent to act and being so I do not think we need go further. I really cannot say that it makes much practical difference which view is taken. Neither the company nor Van Hummell were as careful to shew respondent all they meant, or

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as artless as they might have been. Yet a perusal of Van Hummell's evidence does not impress me unfavourably as to his veracity, though I am holding he is in error in his recollection and the respondent right.

It is not perhaps a case of gross fraud or deceit. It is rather a case of undue want of care in making the statement. No reasonable man could well suppose that negotiations for a license begun in July should not end successfully by November 1, if properly pressed. The thing seemed so probable that Van Hummell was likely to assert it as certainty if asked. At the same time he should have been able to shew on what ground he founded his belief if he wanted to escape the suspicion of misrepresentation. His single answer is he never said so. I prefer to accept respondent's version corroborated as it is.

I think he and the company were called on by the *primâ facie* case made to shew they had, and how they had been misled after taking due care to make such representations, or abide by the legal result flowing from a misrepresentation whether wilful or looked upon as recklessly made. But passing that I think it must be taken as between the parties now in issue in this appeal, as a condition of the contract, and clearly in any case a material part of the consideration inducing it and entitling respondent to rescission of the contract in the executory condition it is found when stripped of the false appearances already shewn it is made to wear by means of improper contrivances.

One objection is that it is not in the written contract, and therefore, is not credible. I do not think this can avail the appellant under the circumstances. The other is that it is a variation of the written contract. I do not think so. It varied nothing. The contract was not necessarily all in writing, nor did it pretend to be so. Under the circumstances an oral term or condition not contradictory or varying that written might be shewn to exist or to have been a material inducement as part of the consideration. I, moreover, think there always was in this peculiar contract an implication that the business should be carried on within a reasonable time at least, and this verbal part of the contract may be well held good for fixing as between the parties what might be termed reasonable.

Suppose the company after assenting to this contract had decided never to enter the field of business contemplated, could it be said it might yet hold the respondent bound? I do not think so. It seems impossible to believe that such a defiance of the clear understanding in writing upon which the parties proceeded could be so tolerated in law. It is clear to my mind that the respondent had a right when this suit was entered in April, 1911, to have treated the reasonable time allowed even by implication as ended, unless some better reason shewn than the appellants have suggested. And in proof there has been nothing

offered to justify the delay. Glittering generalities can hardly be permitted to take the place of substantial details of fact to enable a Court to judge for itself.

There is a curious piece of evidence not observed, or, at all events, remarked upon at the argument. It is as follows:—

> He then made the excuse that there was certain red tape in regard to the State Insurance Commission that had to be gone through with, that he was not aware of when he promised the return of the cash and notes. He said that that sometimes took as long as thirty days and as soon as the red tape was gone through with, the money and notes would be returned to me.

The company's president offered no explanation of this in his evidence given later, yet it seems to me suggestive of a great many things that lay in the path of getting licenses issued. Did the very method I have adverted to find a rebuke and form a difficulty? He does in effect testify the company could not traffic in its own stock. The time for earning money by virtue of the contract which the respondent had a right to expect had been so long passed as to render it inequitable to hold him longer in suspense, especially seeing the terms of payment on his part had been, in a measure, made to be met by part of such earnings.

I think the appeal of the company should be dismissed with costs. The action was dismissed by the Court of Appeal as against Van Hummell. Respondent has acquiesced in that judgment and thus there can be nothing involved in Van Hummell's appeal but a question of costs.

This Court has repeatedly refused to hear any appeal involving only a question of costs. *Schlomann* v. *Dowker*, 30 Can. S.C.R. 323, seems exactly in point, even if we have jurisdiction. *Moir* v. *Huntington*, 19 Can. S.C.R. 363, is likewise.

There the Court said:—

> The Court will not entertain an appeal from any judgment for the purpose of deciding a mere question of costs.

No authority has been cited to the contrary. It is suggested that by reason of a recent statute requiring in the Court of Appeal that costs of appeal should, except in specified cases of which this is not one, follow the event, therefore the appellant has been improperly deprived of a statutory right. That can create no new right of appeal here. Besides there is nothing to shew that the statute in question was brought to the notice of the Court of Appeal and that thus an exceptional case has arisen to which it might not be proper to apply the settled jurisprudence of the Court even where an appeal might lie but has by virtue of such jurisprudence been denied a hearing. Then if the appeal had to be considered on its merits and we had to determine what the proper judgment was in the Court

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below as a basis of an inference, I should say that the Court below erred in dismissing the action as against Van Hummell. The very cases cited in that regard here and below, if closely examined and applied to the peculiar facts herein, should lead to the conclusion that he was improvidently dismissed. It was assumed below that unless Van Hummell was guilty of deliberate misrepresentation, he was not a necessary party and hence entitled to be dismissed. He was, unless previously instructed by the company to do so in such cases, guilty of most reprehensible conduct in suppressing the respondent's application instead of filing it with the company and thus inducing the company to act as if the application had never existed and to found its issue of shares to respondent on the hidden contract between him (Van Hummell) and the company instead of on this respondent's said application.

Even if this was done with the connivance of the company it was as regards the respondent an improper thing for him to have done. He took to himself notes which clearly ought to have been taken to the company, and concealed the true situation from respondent. He then used these notes as if his own property and has them yet or subject to his redemption of them from his hypothecation of them so far as unpaid and for that apparent reason if no other as well as foregoing reasons was a proper party and ought to have been held jointly answerable for the surrender of the respondent's notes or due cancellation of same and return of the moneys paid by him.

The inference is clear from full consideration of all the facts that the company and Van Hummell jointly entered upon a course of dealing that should never have been used towards the respondent. I have found his evidence so clearly fastening agency for all he did upon the company that I have had no difficulty in holding it liable, but that is no reason for excusing the appellant, Van Hummell, or holding he was entitled to be dismissed and hence entitled as of right to his costs either preceding the appeal to the Court of Appeal or costs of such appeal. I think he was not entitled to either and what I have said must answer as my reasons in case the appeal were founded independently of the statute on the rule as to just cause in respect of costs.

I may refer to sec. 53 of the Supreme Court Act as sufficient ground, besides or independently of all I have said, for dismissing this appeal and depriving appellant of his costs below and giving costs of his appeal here against him.

DUFF, J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia in an action brought by the respondent Thomson for the recovery back of certain sums of money and the cancellation of certain promissory notes paid

and delivered by the respondent to the appellant Van Hummell (as the proposed purchase price of certain shares in the capital stock of the appellant company upon an application by the respondent to the company for such shares) in which the Court of Appeal held that the respondent was entitled to succeed. I think the appeal ought to be dismissed first upon the short ground that the plaintiff's offer to purchase shares (which was an offer to the company and was intended by the plaintiff to form the basis of a contract between him and the company) was never accepted and that no contractual relation was ever established between them. The moneys in question and the promissory notes having been received by the appellant Van Hummell who was the company's agent to receive the same for a purpose which has entirely failed, the plaintiff is entitled to recover them back.

The first point is that no contract was ever concluded between the plaintiff and the company. The fact is undisputed. That fact was the ground upon which the company mainly based its defence at the trial. On that they relied in the Court of Appeal (as the judgment of the Chief Justice shews) and in this Court Mr. Anglin, who appeared on behalf of the company, took the same position as that taken at the trial both orally and in his factum.

> The contract was not a contract between the company and the plaintiff, but between Van Hummell and the plaintiff.
>
> The contract was not between the plaintiff and the company, but between the plaintiff and Van Hummell personally.
>
> Whatever may have been the conception of the parties or any of them in this connection, the facts appear to be that Van Hummell sold for himself shares which he had bought or had a right to buy from the company.

I shall presently discuss the question whether the contention that the plaintiff entered into a contract with Van Hummell can be sustained. In the meantime I am emphasizing the point that at the trial and every subsequent stage of the litigation the company has deliberately taken the position that it had never entered into a contract with Thomson in respect of the sale or allotment of any of its shares and never gave Van Hummell any authority to enter into any such contract in its behalf.

It was in May, 1911, that the company entered into its arrangement with Van Hummell. The company desired to sell its unsold shares. An agreement was entered into with Van Hummell in which it was recited that Van Hummell had "agreed to subscribe for and purchase the unsold stock of the company for the purpose of resale, said subscriptions to be made from time to time as sales are made." The subscription price was fixed at $15 per share and it was provided that Van Hummell should sell the shares at $20 per share. Pursuant to

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this agreement, on the same day, Van Hummell applied to the company to have allotted to him 30,000 at the price of $15 per share. The application as was stated by Ritter, the president of the company, in his evidence given on discovery, was accepted by the company and the shares applied for were allotted to Van Hummell. They were allotted, however, subject to the condition expressed in a special share certificate which is in evidence bearing the same date as the application that none of the shares comprised in the allotment should be transferable except on the payment of the subscription price of $15 per share.

The plan of the company is plainly disclosed by these documents and the oral evidence. The intention was, that the company should not enter into contractual relations with the ultimate purchasers of the shares. Van Hummell was to sell shares allotted to him pursuant to his agreement with the company and he was to sell them at the price of $20 per share. This sum of $20 per share was not intended to pass through Van Hummell's hands as the agent of the company but as the seller of shares which either belonged to him or which he was entitled to have allotted to him on his own account. From the point of view of the company Van Hummell was to be the subscriber and the only subscriber.

What the object of the company was in proceeding by this method is not expressly stated; that this was the nature of the arrangement as the company intended it to go into effect is not open to dispute. As between the company and Van Hummell this design was adhered to. It is stated both by Ritter and by Van Hummell whose evidence was put in by the company that all shares sold by Van Hummell were transferred at his request from shares which had already been allotted to him under the terms of the agreement. It is stated by both of them that the practice was for Van Hummell to pay the company for shares so transferred, but looking in turn for personal reimbursement from the persons to whom he had sold them. This course was observed on the occasion of the transaction with the plaintiff. Van Hummell applied to have the requisite number of shares transferred from those standing in his name under the allotment already referred to, to Thomson, and he paid for them in full at the subscription price, $15 per share, and the shares were accordingly transferred. The company according to Ritter's evidence, had no further concern in the matter. Van Hummell's recourse was against Thomson and against him alone. The understanding between the company and Van Hummell then was perfectly clear and precise, that Van Hummell while representing himself as the company's agent to take subscriptions for shares was to transfer to subscribers shares which had been already allotted to him under his own subscription contract.

But the transaction as it presented itself to the ultimate purchaser with whom Van Hummell was dealing, wore a very different aspect. To him Van Hummell represented himself as the agent of the company to receive subscriptions addressed to the company and to receive on behalf of the company the subscription price of shares at $20 a share. To the subscriber dealing with Van Hummell the form of subscription placed before him was not merely an application to the company for shares but an application setting forth the terms of what, if the proposal should be accepted by the company, would become a contract between him and the company. One of the terms of the application is as follows:—

> I agree to pay the sum of $20 per share for the said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of the said Company and for the creation of a surplus.

The contract proposed by the subscriber was in a word to involve this obligation on the part of the company. The subscriber having placed this proposal in the hands of Van Hummell, together with the amount he had agreed to pay, afterwards received a share certificate which he regarded as an acceptance of this proposal. The respondent's proposal was never presented to anybody who had authority in fact on behalf of the company to accept it. Nobody had authority on behalf of the company in fact to enter into such a contract on behalf of the company with Thomson. The sum of $20 per share paid by Thomson according to his belief into the coffers of the company was never intended by the company to pass through the hands of anybody who should be accountable for it as an officer of the company. It was the essence of the company's plan that, while Van Hummell represented himself as the company's agent to obtain subscriptions, the company itself should not enter into any agreement which would make it accountable to any purchaser of shares under a subscription contract for the disbursement of the subscription price.

In fact then, there was no contract between the plaintiff and the company. It does not follow of course that the plaintiff might not have been in a position to shew that the company was estopped from denying the existence of such a contract. But that does not prevent the plaintiff himself from setting up the true facts if he chooses to rely upon the facts.

The respondent is entitled to say:—

> You permitted Van Hummell to represent himself as your agent to receive on your behalf proposals for contracts to be entered into with you, together with moneys which should become payable to you on the formation of those contracts. I acted on the belief that he was your

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agent for those purposes. When I seek to hold you responsible for the representations upon the faith of which my subscription was given, you declare that my proposal was never in fact accepted by you, that you never had any intention of accepting it, and that you have no contract in fact with me.

He is entitled to say that, and is entitled on discovery of these facts to insist that the moneys and securities which were handed to Van Hummell for a particular purpose, and which pursuant to the arrangement between Van Hummell and the company had been applied to another purpose, should be restored to him. There are two points which perhaps call for some observation. The first point is this: it might be suggested that in substance the plaintiff has got what he expected to get. That, in a word, it was immaterial to him whether a contract was in fact formed between him and the company or not, so long as he got shares in the International Casualty Co., and as might perhaps be added, the company by its conduct was estopped from denying that it had entered into such a contract. I do not think there is any substance in this. The evidence demonstrates and the company by its officials and its counsel in effect avows that the persons having the charge of the company's affairs concocted this scheme with Van Hummell which I have described, one object of which certainly was to conceal from persons applying for shares the fact that out of the sum of $20 per share which they believed to be paying into the coffers of the company as for the application of which the company was directly contracting with them, twenty-five per cent. was to be intercepted before any part of it reached the hands of the company and that this part of the subscription price was not to pass into the hands of any officer of the company who should be accountable for it as such. It was I say obviously, in part at all events, to conceal this state of facts from the subscribers that this scheme was designed. It involved of course deception. It was, in plain words, a fraud upon the subscribers. And it will not do for those who conceived and carried out that fraud to escape the consequences of it by saying that "now you have found us out, the law will compel us to give effect to the transaction according to your conception of it." Or in other words, "we elected to be bound by the transaction as you conceived it." The authors of such a fraud are not entitled to any such privilege.

The other point is this: it is now suggested that this ground upon which I think the plaintiff was entitled to proceed was not put forward at the trial, and the plaintiff ought not to be permitted now to rely upon it. This also appears to be without substance. The plaintiff has a judgment in his favour and if the record discloses grounds upon which that judgment can justly be supported, it is our duty to give effect to them even

although those grounds were not relied upon at any stage of the proceedings in the Courts below.

The judgment of course could not be justly supported upon grounds relied on for the first time in this Court if there were any danger of this Court being led into a mistaken conclusion by reason of not being informed of all the relevant facts but in the absence of any such danger it would be the merest pedantry to reverse a judgment which according to the record is the judgment that ought to have been pronounced by the Court below, merely because counsel for the party who has succeeded did not in the Court below put his case in the strongest way. I have already pointed out that all the facts necessary to form a complete foundation for the plaintiff's title to relief upon the ground I have stated had either been deliberately put forward by the company as a part of its case or are proved irresistibly.

It is a mistake, however, to suppose that this point was not taken in the Court below. The plaintiff made it a part of his case both in the cross-examination of Van Hummell and in the examination of Thomson to shew that Van Hummell represented to Thomson that the shares with which Van Hummell was dealing were "treasury" shares. The observations of the learned trial Judge indicated that the hearing of this evidence was present to his mind and I see no reason to believe that the effect of it was not dwelt on both at the trial and in the Court of Appeal. It would be a great mistake to suppose that the fact that the point is not mentioned in the judgment of Mr. Justice Murphy or of the Chief Justice in the Court of Appeal affords any ground whatever for supposing it was not referred to in argument. This would be a sufficient ground for dismissing the appeal.

There is, however, another ground on which the respondent based his claim to relief and upon which I think he is entitled to succeed. The respondent alleges that for the purpose of procuring his subscription Van Hummell on the day on which the subscription was given as well as before that, told him in answer to his inquiry that the appellant company would probably commence business before October 1, and that it would certainly commence business before November 1. The company did not in point of fact commence business until the first of June in the following year; and if this statement of Van Hummell's was made with the object of inducing the respondent to subscribe for shares by creating in Thomson's mind a belief that such was Van Hummell's real opinion based upon his knowledge as an officer of the company and if such a belief was thereby created and operated as a material inducement in bringing about Thomson's decision to subscribe and if in fact Van Hummell did not believe that the company would commence business as early as

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November 1, or if he had no opinion or belief on the subject, that is to say, no real belief, then there can be no doubt the respondent is entitled to recover back the notes and money delivered and paid to Van Hummell.

The first question is: Did Van Hummell tell the respondent that the company would certainly commence business not later than November 1 in Vancouver? On this point the evidence of the respondent and one Wilmot is explicit. That evidence was accepted by the Court of Appeal. I do not understand the learned trial Judge to have any doubt upon the point that the statement was made as reported by the respondent; but he thinks the effect of the statement was qualified by the further statement that it would be necessary to obtain a license from the Insurance Department in Ottawa and that the statement was subject to the condition that such license should be obtained before the date mentioned. It is quite true, of course, that this statement of Van Hummell's was a statement as to something which was to happen in the future, and that being so, the respondent must have understood Van Hummell to be only giving an opinion which might be falsified in the event. But I see no reason to doubt that the respondent was entitled to regard it and did regard it as a positive assurance by Van Hummell who represented himself to be the vice-president of the company that the necessary license would be procured and the company established in Vancouver and in operation before November 1.

Then, was the assurance given with the object of inducing the respondent to subscribe for shares? About that there is little room for doubt. As the learned trial Judge mentions, there is uncontradicted evidence and there seems no reason for disbelieving it, shewing that Van Hummell proceeded first to ascertain how much ready money the respondent had and then proceeded to arrange the transaction upon terms likely to induce the respondent to subscribe. But the main inducement was that the respondent, who had been for a comparatively short time practising his profession in Vancouver, was to be appointed the resident physician of the company. As Van Hummell says he urged upon the respondent the advantage of such a connection, and as the respondent says, no doubt truly, the terms of payment were so arranged as to give some prospect that the instalments of the subscription price could be made from time to time out of fees earned through his connection with the company.

The date at which the company should commence actively to carry on business in Vancouver was, therefore, of the very first importance and the object of the assurance perfectly clear. Then was this assurance a material inducement in bringing the mind of the respondent to assent to Van Hummell's proposal? I think there was no room for doubt that it was. There can be no doubt that the main inducement operating on the mind of

the respondent was the undertaking given to him to appoint him a resident physician of the company. The virtue of that undertaking, of course, rested in the assumption that the company was to carry on business in Vancouver actively, and that the judgment of the respondent should not have been influenced by the probable date when active business was to commence is a supposition most difficult to accept. Having regard to the terms of payment of the subscription price one might almost consider it impossible to suppose that that would not be a most material consideration. The evidence of Thomson is explicit to the effect that the assurance did operate on his mind as one of the principal inducements and the learned Judge appears to accept the statement of Thomson and the witness Wilmot that at an interview which took place in October between Thomson and Van Hummell at which Wilmot was present, Thomson charged Van Hummell with having misled him with respect to the date on which it was expected that the company was to commence business. The learned trial Judge seems to say that at that time the respondent honestly believed he had been so misled. That, of course, is strong corroboration of the respondent's statement that he was misled.

The view of the learned trial Judge appears to be that because the respondent did not insist upon this arrangement being inserted in the written contract between him and the company is conclusive against him on the question as to whether it operated on his mind as the "essential" inducement. If the assurance was relied upon as a condition or warranty I think the learned Judge's reasoning would be unanswerable to say nothing of difficulties in point of law which such a contention would raise. But if the assurance involved a fraudulent representation as to the state of Van Hummell's opinion on the point then it is sufficient that that representation should have been one of the inducements affecting Thomson's mind; and I think Van Hummell succeeded in his purpose of producing in the mind of the respondent such a degree of certainty that the company's business would be in operation in Vancouver within the two months at the very most, that it never occurred to him to ask for anything in the nature of a written undertaking upon the subject. Consider the situation. When the respondent having finally decided to take shares in the company comes to sign his application and give his cheque he is presented with a formal appointment in writing as resident physician in Vancouver and he insists on having that confirmed by the president of the company as a condition of his subscription.

Can it be supposed, if the possibility had suggested itself to his mind, of the company not commencing business for nine months, that he would have gone on with the transaction in

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the form in which he actually did enter into it? I think it is impossible to suppose he would.

The last point is: Were the assurances fraudulent? I think the evidence justifies the conclusion that Van Hummell knew he was not in a position to form any belief or opinion upon the point as to when the company would be ready to start business in Vancouver of such a character as could reasonably be regarded as forming a ground for action in any matter of business. As to the probability of the company commencing business in Vancouver as early as November 1, he either did not believe that it would be in a position to do so or he had no actual belief or opinion upon the point at all. That is shewn very clearly by his own evidence. Van Hummell indeed does not deny that he had no ground whatever for making any such statement as that attributed to him. His defence is that he did not make the statement. Unfortunately there is too much reason to think that on other points also he was not unwilling to deceive the respondent in order to induce him to become a subscriber. The respondent, for example, says he told him he was vice-president of the company which was untrue. The respondent also says that Van Hummell stated the shares were "treasury" shares. Van Hummell admits that he regarded these shares as his own but denies he made the statement. With regard to all these matters he was given to understand in the clearest way on examination for discovery that his honesty would be attacked. Yet he does not appear at the trial and there is no explanation of his absence. The defence relied upon at the trial by the company in itself involved a rather grave imputation against the good faith of Van Hummell.

The defence was, as I have pointed out already, that Van Hummell had no authority to act as the agent of the company in the sale of its shares, and that he represented himself as the company's agent is indisputable. At the time of the trial when this defence was set up Van Hummell was vice-president of the company; and in face of all this he does not appear at the trial in person. All these circumstances, I think, powerfully supported the inference that Van Hummell and the company had few scruples, if any, respecting the means they adopted in order to procure subscriptions.

I shall dismiss the appeal with costs.

Anglin, J.
Davies, J.

ANGLIN, J., agreed with DAVIES, J.

Appeal dismissed.

KNOWLES v. McLAUGHLIN.

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New Brunswick Supreme Court, Landry, McLeod, White and Barry, JJ.
February 21, 1913.

1. PARTIES (§ I B—55)—PLAINTIFFS—WHO MUST SUE—JOINT LESSORS—NON-JOINDER.

Where two lessors have a joint right to be paid a certain amount as rent, the neglect by the debtor to pay the amount gives the two lessors together a right of action, but such neglect is not an interference with any right possessed by either of them singly, and under the New Brunswick County Court practice neither can bring action without joining the other as co-plaintiff.

2. PARTIES (§ I B—55)—PLAINTIFFS—NON-JOINDER, EFFECT OF, REMEDIES FOR.

In an action *ex contractu*, a non-joinder of plaintiffs is always, unless amended, a fatal error under the New Brunswick County Court practice; if the non-joinder appear on the face of the pleadings, the mode of attack is demurrer; if only disclosed at the trial, the result is a nonsuit or adverse verdict.

[*Vassie* v. *Chesley*, 33 N.B.R. 192, distinguished.]

Statement

APPEAL from the Victoria County Court on the following grounds:—

1. Misjoinder of causes of action.
2. Improper admission of lease in evidence.
3. Variance.
4. Improper instruction to jury to find for both causes of action.
5. Verdict contrary to law and evidence.

The appeal was allowed in part and the judgment reduced.

T. J. Carter, K.C., for the appellant.

J. D. Phinney, K.C., for the respondent.

The judgment of the Court was delivered by

Barry, J.

BARRY, J.:—Appeal by defendant from the Victoria County Court. The plaintiff's declaration in the County Court contained a count for use and occupation of a mill-site, and the common counts for goods sold and delivered, goods bargained and sold, work and labour and interest. The particulars of the plaintiff's demand indorsed upon the writ of summons claimed $65.71 for work and labour and goods sold and delivered, and $112 for use and occupation with $5 for interest. At the trial before Judge Carleton and a jury, counsel for defendant admitted the defendant's liability to the amount of $65.71 as claimed by the plaintiff for work and labour and goods sold and delivered, but disputed the $112, claiming that it was for rent due, in respect of a lease made between the plaintiff and one Samuel Lovely as joint lessors and the defendant as lessee. In the plaintiff's case a lease was put in evidence shewing that Knowles and Lovely were the lessors of the premises, and that the rent was payable to them jointly and not to Knowles singly.

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At the close of the plaintiff's case, counsel for the defendant moved for a nonsuit in respect of the count for use and occupation, or that the claim for rent be withdrawn from the jury, upon the ground that the plaintiff could not, in the same action, recover a debt due to himself personally and one due to himself and another person jointly. This the learned Judge refused, basing his refusal on *Vassie* v. *Chesley* (1895), 33 N.B.R. 192, and directed a verdict for the plaintiff for the full amount claimed.

The case mentioned decides that the non-joinder of a party as a defendant in an action *ex contractu*, can only be taken advantage of by a plea in abatement, and does not, so far as I can see, touch the question raised at the trial of this action.

It is a general rule, under the system of pleading that obtained in the County Courts, that where an action is founded upon a contract, made with several persons jointly, they should all, if living, and entitled to sue thereon, join in the action as co-plaintiffs. Lindley on Partnership, 7th ed., 311 *et seq.*; 1 Wms. Saund. 1871 ed., 162 *et seq.*; Bullen & Leake on Pleadings, 3rd ed., 471.

In an action *ex contractu*, a non-joinder of plaintiffs is always, unless amended, a fatal error. If A sues where A and B ought to sue, the error, if it appears on the pleadings gives rise to a demurrer; if it appears at the trial, gives rise to a nonsuit or adverse verdict: Bullen & Leake, 3rd ed., 469. The rule is a rigid application of the principle that no one can sue for anything that is not an infringement of his rights. The plaintiff and Lovely may have a joint right to be paid a certain sum of money as rent, and if so, the neglect to pay it gives them together a right of action, but such neglect is not an interference with any right possessed by either of them singly: Dicey on Parties to Actions (Am. ed.) 524, 525.

The appeal must, therefore, be allowed to the extent of a reduction of the verdict, but under the circumstances, without costs. Directions will be given to the Court below to reduce the verdict to $65.71, and to enter a nonsuit in respect of the count for use and occupation.

Appeal allowed in part.

BLANK v. ROMKEY.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, Drysdale, and Ritchie, JJ. April 28, 1913.

1. ADVERSE POSSESSION (§ I—1)—WHAT CONSTITUTES—LAND — ELEMENTS OF ABSOLUTE, ACTUAL, NOTORIOUS POSSESSION.

Where an adverse claimant by possession has held beyond the period prescribed by the Nova Scotia Statute of Limitations and such possession has been (*a*) open, visible and continuous; (*b*) not equivocal or occasional; such elements of absolute, actual, notorious possession clearly establish the class of possession imposed by the statute.

Statement

APPEAL from the judgment of Graham, E.J., in favour of plaintiff in an action claiming damages for trespass to land and an injunction to restrain defendant, his servants, etc., from continuing the acts complained of.

The appeal was allowed.

The facts are fully set out in the judgments.

H. Mellish, K.C., and *R. H. Murray*, for defendant, appellant.

W. F. O'Connor, K.C., and *J. Terrell*, for plaintiff, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J., concurred with DRYSDALE, J.

Russell, J.

RUSSELL, J.:—I have come to the conclusion, though not without doubt, that the learned trial Judge was right in his construction of the document under which plaintiff claims.

But I think the evidence, as to possession, is overwhelming, and that the appeal should be allowed.

I concur on this point, and as to costs, in the judgment of Drysdale, J.

Drysdale, J.

DRYSDALE, J.:—One John Horn, sr., by his will left all his real estate to his two sons, John and Edward. At this time he owned and there passed by his will a block of 189 acres, or thereabouts, situate at Eastern Passage, in Halifax county.

Edward died intestate, leaving brothers and sisters, and this block of land became vested in John Horn, jr., and the brothers and sisters of Edward, subject to the right of dower therein of Elizabeth Stratton, the widow of John Horn, sr. On February 3, 1851, a partial partition deed of said lands was executed between John Horn and a large number of the heirs of Edward Horn. By this deed, and the plan therewith, and made part thereof, the said block of 189 acres was divided into three blocks marked on the said plan A, B and C, and a small part marked A containing 16 rods, upon which a dwelling-house stood. The scheme of partition by this deed seems to have been to set aside block A, containing 51 acres, as well as the small

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part containing 16 rods and the house for the widow for life, block C, containing 93 acres, to John Horn, and block B, containing 45 acres, to the heirs of Edward Horn. Of course this is not a complete and effectual partition of the whole block, first, because of the absence of Mrs. McNamara (one of the sisters), or her heirs, as a party to the deed, and, secondly, because it does not deal with the property set apart for the widow for life or make any provision for its division after the widow's death. However, it is by reason of this partition deed the present controversy arises. The parties thereto undertook to divide block B, as shewn on said plan, into ten subdivisions, and to convey the same to the heirs of Edward Horn, parties to said deed. The said heirs seem to have exchanged with one another separate deeds, whereby the individual heirs acquired the title of the individual lots from 1 to 10 in block B, as described and marked on said plan (except as to No. 8). Isabella Horn, one of the said heirs, received a deed of lot No. 7, dated February 4, 1851. The plaintiff acquired this lot No. 7 through Isabella Horn. The description in all the deeds is in substance the same. The defendant is in possession of lots 8, 9 and 10 and claims title thereto. The plaintiff claims that lot 7, shewn on said plan, extends across the creek, or inlet from the harbour, and takes in a portion of the point upon which the old house stood, coloured red on same plan and marked "A", widow's house and 16 square rods, and being a portion of the lands by the partition deed set aside for the widow. The extreme point, coloured red and marked "A" as aforesaid, is the piece plaintiff claims, and in respect to which this action is brought. If the deed to Isabella Horn of February 4, 1851, printed on p. 71 of the case, does not convey this point to her, the plaintiff has not title. He claims under her by deeds containing the same description. By the deed to Isabella Horn of lot 7 the recitals and description both shew that she was to take the lot designated on the division plan made by Alexander Campbell, deputy surveyor, then in the possession of William Sutherland, as lot No. 7 and marked, or designated, thereon "Isabella Horn." A copy of said plan was annexed to said deed. The actual description in said deed is as follows:—

All the estate, right, title, claim and demand whatsoever; both at law and equity, of them, the said parties hereto, of the first part, of in to and out of all that certain lot of land situate, lying and being in the south-east passage aforesaid, being the lot represented on the said plan and the annexed copy thereof as lot No. 7 and designated "Isabella Horn," running from the seashore at the south-west bound of lot No. 8 north 55 degrees, east 81 chains in length until it strikes the second division lots and thence south 35 degrees east 62 links and one-half link in breadth until it meets lot No. 6 as shewn in said plan, thence south 55 degrees west 81 chains or until it meets the shore, thence northerly along the shore to the place of

beginning, together with all the buildings, ways, waters, watercourses, privileges and appurtenances thereto belonging and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and thereunto appertaining, to have and to hold the said lot of land last above described and all and singular other the premises hereby granted or conveyed unto the said Isabella Horn, her heirs and assigns, forever.

The trouble arises over the starting point. I should have thought, were it not for the judgment below, that on looking at this plan (made part of the deed) it was very obvious that lot No. 7 ran north-easterly from the seashore, as it is very plainly depicted on the plan, but was never intended to not only come down to the seashore, but also to cross the creek and take in a part of "Romkey" point, so called at that time, a point set apart for the widow and so specially marked on the said plan. The plaintiff contends, however, and the learned trial Judge has so found, that by the description and plan the north side line of No. 7 was intended to cross the creek, or inlet, and actually take in part of the said point. In this I am obliged to say I cannot agree with the trial Judge.

First, the plan is against any such contention, and, secondly, the description in the deed cannot be applied to the plan if you extend the north line of No. 7 across the creek over the point and out to the shore to the south of the point. Taking the description as it is in the deed and applying it to 7 as shewn on the plan, viz., as all lying east of the creek, or inlet, you apply the description and its four sides as therein stated without trouble and accurately, whereas to take the plaintiff's contention as to 7 being intended to take in a portion of the point, you not only do violence to the plan, but you cannot possibly apply your fourth course in the description. I think this is not a case of the plan not agreeing with the description, but rather a case where the description accurately fits and describes what was obviously intended on the plan to be allotted as No. 7.

There is another ground upon which I am of opinion the plaintiff must fail. The evidence, to my mind, discloses such a case of actual possession of the point in question for upwards of twenty years as to prevent any recovery herein. It seems to me, after a careful perusal of the whole evidence, since the argument, that the great weight of testimony is entirely in favour of defendant on the question of actual possession by defendant of the point in dispute for a period extending upwards of twenty years before action. During all this period he has been asserting rights as owner. His possession was open, visible and continuous, not equivocal or occasional, and it seems to me the evidence very clearly establishes just that class of possession that gives title under the Statute of Limitations.

I am of opinion the appeal ought to be allowed with costs and the action dismissed with costs.

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Ritchie, J.

RITCHIE, J.:—I am of the opinion that the appeal must be allowed with costs on the ground that the defendant has made out a good title by possession. In view of the findings of fact as to this point, the burden is on the defendant, but the evidence sustains that burden to my satisfaction. The only doubt I have is, that I am coming to a conclusion of fact different from that of the learned trial Judge, and this has caused me to read, and re-read the evidence and give it very careful consideration.

The dispute is, as to the title of a piece of land at Eastern Passage known as Romkey's Point. The defendant purchased the land in question from one Power, and got a deed of it, but not a good paper title.

The defendant says:—

I had it fenced since I was there. That is forty years. I fenced it and I had a gate where I went in and out with my boat and I shut my gate in the evening.

His evidence continues as follows:—

Q. At the time you purchased from Power you went over the land with him? A. Yes, I was there and seen what I bought.

Q. About this point of land, what about that fence running straight across, as Blank says? A. It does not run straight across, it runs round the point. You could not go too far down or the water would take it. I went around the shore to my landing and then I had a post put down and poles to prevent my cattle going on my neighbour, and always had it that way since I bought it. I remembered it was always fenced.

Q. On this point, what had you? A. I had fish-flakes there before Blank was born. I had hand-flakes to air fish. That was just a little below the house, E.S.E. from the house.

Q. That is on the point Blank is claiming? A. Yes.

Q. What else had you on the point? A. I had wood there and hauled boats up when the tide was high. I had fishing traps there; always piled them up on it, and all that belongs to a fisherman.

Q. Has anybody else ever claimed that point? A. Nobody ever interfered with me.

Q. When was the claim to this property first made by anybody else? Did Blank make a demand of you for the point? A. He done nothing.

Q. What did he do? A. I was at home at the wood pile, cutting wood. Blank come down and says, "Romkey, I am going to straighten that line out." I said, "What line are you talking about?" He says, "I am going to straighten it out over the point." I said, "You are? You can't do it." He said, "I will spend $100 on it." That is all the conversation at the time.

Q. You say you fenced all round the point? A. Yes. I piled stones under the wharf to make the wharf.

Q. You say Fraser at no time claimed this point? A. No.

Q. Clearly did not? A. Never claimed it.

Q. Did they ever use it in any way, Cleary or Fraser? A. No, never made use of it.

Q. Did people ever use that point, a right of way, going through it? A. No, sir.

Q. Fraser and Cleary both lived on the land for a number of years? A. Fraser lived and died there and Cleary took it afterwards and lived there until he moved away, and we parted like brothers.

Q. During the season how often did you use this piece of land? A. I used it the year round. In the winter season we put stuff there and left it to save it.

Q. You had a wooden fence there first? A. Yes.

Q. The wooden fence ran from the gate to where? A. It extended round the point to my landing.

Q. How far up towards the brook? A. Away up the brook a good piece up.

Q. When was that wooden fence washed away? A. Been washed away half a dozen times. The last fence was wood and wire. First it was all wood.

Q. How long ago did that wooden one get washed away? A. Part of it washed away this winter.

Q. How long ago since the gate was washed away? A. This winter, the last heavy storm we had.

Q. There was a gate right up to this winter? A. Yes, sir.

Q. And a fence? A. Yes, sir, until a heavy sea took it this winter.

Q. When did you put the wire fence there? A. I could not tell you. The wire was just about three or four years ago.

Q. As soon as the wood was washed away did you put the wire there? A. Yes, as soon as I could get the stakes there.

Q. When was the wooden fence washed away? A. I could not tell you, I did not put the date down.

Q. Some years ago? A. Certainly some years ago.

Q. Good many years ago? A. Yes.

Q. When was the wire fence put there? A. Two or three years ago.

Q. You say you had a fish flake there? A. Yes, sir.

Q. To what extent did you land manure? A. I used to land a good deal, spring and fall. I have hauled there as much as ten and fifteen and twenty and twenty-five loads. I do that in the spring and in the fall, what we call banking it; it lies there sometimes one or two months.

Mr. Terrell:—Q. Did you get manure every season? A. Spring and fall. It is sea manure. It is the makings of my land.

Arthur Romkey's evidence as to possession is as follows:—

Q. You are a son of the last witness? A. Yes, sir; I live near the point on the north strip on the side nearest the Eastern Passage. I use the point that is in dispute in conjunction with my father. We both use it together.

Q. You heard the plaintiff state that after he claimed the land your father put a wire fence around the point—is that correct? A. No, sir. The wire has been around the point, or there has been a wooden fence there, ever since I can remember, 20 or 25 years; it was wood there and then it was wire. The wire has been there some couple of years. I cannot say exactly. Before that it was what they call a pole fence. There was two stakes drove down and a bit of wire put round them and poles between them. It went round the point.

Q. What part of the point was it on? Was it inside the land or outside it? A. Just somewhere about high water.

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Q. Was there more than one panel? A. Yes, a dozen, I suppose. There are three or four poles in a panel.

Q. I think your father was stating the number of fathoms of nets? A. We have two, forty fathoms long. We have three boats. We have them between us. We have everything together. The boats and the nets and the fishing gear, it is between the two of us. It is not mine personally and it is not his. We both work together and share everything.

Q. About the use of this point, what do you know about it? A. I have used that ever since I can remember and was able to go in a boat. That is twenty to twenty-three years. I am 35 the 31st of June coming. Ever since I can remember I have been using it myself.

Q. What use have you made of the point? A. Both of us have used it. I have used it for wood. Wood to burn for fuel. All our fuel does not come that way; but we get the best part of it there, driftwood out of the harbour, and we pile it up there. Then there is kelp, manure and moss. We get it most every year. When we cannot get that we cut rock weed for manure.

Q. That kelp, does it rot on this land? A. Yes, it very often rots.

Q. Did you notice your father spoke of it rotting between the time you got it in the spring and the time you use it? A. We put it there in the fall and it lays there until the spring. It did not rot in the spring when we put it there in the spring. It has not time. We very often get it in the fall. The kelp lands fall and spring. And I use it for seaweed banking for the house.

Mr. Murray:—Q. What about fishing? A. I pile my traps there every spring from the time I make them until I put them in the water. And then, about the 15th of June, we stop and bring our traps in again and they remain there the rest of the season till we put them away for the winter. Sometimes we have 40 or 60. We pile our net moorings and grapples. The point is not very large, but we can put quite a little stuff there, rope and things. We have quite a pile of wood. I had on an average five cords there last winter. It was piled over my head last winter, but not this winter.

Q. Anybody could see it? A. Yes, sir; it was piled over my head last winter.

Q. Did you bring your boats there? A. Yes, hauled my boats there and painted them. Very often we have to shift them on account of the seas and storms. That is the inside of the breakwater.

The plaintiff claims through Thomas Fraser and William Cleary. I regard it as a most important factor in the defendant's case that neither Fraser nor Cleary ever claimed Romkey Point. This is sworn to by the defendant, and he is fully corroborated by Cleary, from whom the plaintiff purchased. Fraser is dead.

Cleary's evidence is as follows:—

Q. Mr. Cleary, you at one time owned the Fraser three lots? A. Yes.

Q. You now reside in the city of Halifax? A. Yes, sir.

Q. You were a fisherman? A. Yes, sir.

Q. How many years did you fish there? A. About 40 or 50 I suppose. I fished with Thomas Fraser. We both occupied the land. I know the

Romkey Point you are talking about. I never owned it. I never occupied it nor used it.

Q. Do you remember when Mr. Blank purchased the property from you? A. Yes, he bought the property. He bought two lots from me.

THE COURT:—Q. Did you shew him the boundaries? A. I shewed him what I had knocked off. I shewed him down by the brook where the lines were run.

Q. As far as you were concerned, did you ever use that point? A. No, sir, I never used it.

Q. Do you know about Mr. Romkey using that point? A. Yes, sir, I do.

Q. Did anybody but Mr. Romkey ever use that point? A. Nobody else.

Q. What did Romkey use it for? A. For a fishing stand. He built a breakwater round it and hauled boats into it.

Q. Anything else he did on that point? A. No, I don't remember anything. I heard the evidence that was given.

Q. Did you ever see anything in relation to fishing gear on the point? A. Only what he had. He had grapples and nets and one thing and another and used to pile his wood there and one thing and another.

Q. Did you ever have any trouble with Mr. Romkey about that point? A. No.

The cross-examination of Cleary is as follows:—

Q. You remember Fraser? A. I do, I remember him dying. He lived on the property with his wife. She left it to me. I had these three lots. One of these I sold to Quigley and the other two to Mr. Blank.

Q. What you wanted to sell to Mr. Blank was these two plots you got from Fraser? A. Yes, sir.

Q. The whole of it? A. Yes, sir.

Q. You did not want to keep anything out? A. No, sir.

Q. So when you told Blank what you were selling to him you told him, "I am selling you the two lots that I got from Mrs. Fraser?" A. Yes, sir.

Q. What do you mean by saying you took him down and shewed him? A. I shewed him where the boundary was down by the brook, that is as far as I shewed him. I never went on the north side. I had the south side to go on. I never crossed over.

Q. About this fence that used to run down there? A. This was used to keep the critters out. He used to keep his nets there.

Q. Inside the fence? A. Yes, there was a kind of pole fence, a sort of fence and then he had a wire. From my place it come a little around to keep the critters from coming down. It came down my boundary to his fish house.

Q. Straight line? A. Straight line, kind of crooked.

Q. Sometimes a little zig-zagging? A. In and out.

Q. It did not go any further than Romkey's fish house, did it? A. No.

Q. There was land on the lower side, below Romkey's fish house? A. There was no land at all, but a pile of rocks he had hauled. Only up above where he had his fish houses. There was no land below where he had his fish houses. The fence went to the lower one.

Q. Did it pass the upper one? A. They had a gate down there. It was his upper one.

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Q. Came down to the upper one? A. Yes.

Q. And there was another one below it? A. Yes, on the wharf, on the end of the wharf. What he kept his fish in on the end of the wharf, where the boats come in.

Q. You do not understand the plan? A. I do not understand it.

Re-examined by Mr. Murray:—

Q. You said the end of the wharf; you mean the end nearest the land? A. Yes.

Q. And about this fence, you said it was round the point? A. Round the point.

Margaret Allen Brown also proves that Cleary never used Romkey Point and Jane Power, formerly Jane Horn, the widow of John Power, from whom the defendant got his deed, proves that he always occupied it. This I suppose means given the deed forty years ago.

George Moreash strongly corroborates the plaintiff as to the fence round the point and says it has been there ever since he can remember. James White proves the occupation by the defendant, and the existence of the fence, and the evidence of Edward Horn is to the same effect. Walter Quigley proves the existence of the fence at the present time and says it is just as it was when he came to the place four years ago.

I have perhaps quoted the evidence more exhaustively than necessary, but it seems to me the most effective way of stating why I am unable to agree with the trial Judge as to the facts.

In my opinion the evidence discloses an exceedingly strong case of just that kind of possession which is necessary to make title. Having in view the character of the land, I cannot conceive what other acts the defendant could have done in order to give him absolute, actual, notorious possession. The case made as to the fence is attempted to be met by the evidence of the plaintiff and Walter Blank, they deny the fact of the fence. But the weight of evidence is, in my opinion, too strongly against them. In regard to the question of construction of the description in the light of the plan, I am far from coming to the conclusion that the learned trial Judge was wrong, but in consequence of the opinion which I hold on the question of possession, it is not necessary for me to decide the point.

Appeal allowed.

CHAMBERS v. CANADIAN PACIFIC R. CO.

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April 7.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Brodeur, JJ. April 7, 1913.

1. RAILWAYS (§ II A—10)—BOARD OF RAILWAY COMMISSIONERS—WIDENING RIGHT-OF-WAY—RETROSPECTIVE ORDER—VALIDITY.

The Board of Railway Commissioners cannot, seven years after the filing and approval of the location plans of a railway, by an order not based on sec. 162 or 167 of the Railway Act (R.S.C. 1906, ch. 37), permit the filing of a new plan to take effect as of the date of the original, so as to increase the width of the company's right-of-way.

Statement

APPEAL from the Board of Railway Commissioners of Canada as to the jurisdiction of the Board with reference to the alteration of location plans for a railway.

The appeal was allowed.

G. F. Henderson, K.C., for appellant.

F. H. Chrysler, K.C., for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., agreed with DUFF, J.

Davies, J.

DAVIES, J.:—I concur in the opinion stated by DUFF, J.

Idington, J.

IDINGTON, J.:—The respondents filed under the Railway Act, plans and profiles which claimed a right-of-way only 99 feet wide. Some time later the Board of Railway Commissioners approved thereof, and still later the railway was built without making compensation for the lands so taken.

In course of doing so, the company included by its fences a space 100 feet wide instead of the 99 feet claimed by the plans and profiles filed. Some months after obtaining the approval of the Board to the first plans and profiles filed, the railway company saw fit to file another set of plans claiming a right-of-way 100 feet wide, but never applied for approval thereof. Years afterwards the railway company gave notice of expropriation under this unauthorized set of plans and profiles and proceeded to arbitration as to the compensation to be made to the appellants.

On the proceedings being objected to, the Board made an order rescinding its original order of approval and permitting the railway company to file a new location plan of its railway as of the date of the plans filed and approved, said new plans to shew a width of land to be taken which will coincide with the arbitration notice filed by the railway company. The question is now raised by this appeal of the jurisdiction of the Board to make this last mentioned order.

I have no hesitation in saying such an order is entirely beyond the powers of the Board. It would be a stretch of authority that in some conceivable cases might work most grievous wrong. The claim seems to me hardly arguable.

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No such thing as antedating the operative effect of such an order is contemplated by the Act. It should not be permitted unless with the consent of all who by any possibility might be affected thereby. The Board's extensive powers of rectifying errors do not countenance such a proceeding as this.

The appeal should be allowed with costs.

DUFF, J.:—I think there was no power to make the order impeached on this appeal. The order does not profess to be made, and clearly enough it is not made, under sec. 162 or sec. 167 of the Railway Act, which are the enactments Mr. Chrysler invoked in support of it.

It is simply an order permitting the company "to file" a new location plan of its railway, known as the "Molson-St. Boniface Branch" as of the date of the plan filed and approved of "by said order No. 544, dated July 12, 1905." That is an order which can only mean that the plan so authorized to be filed shall be deemed to have been filed and shall take effect as having been filed on a date seven years before the date of the order.

It is admitted that according to the plan which is to have this *ex post facto* effect, the land occupied by the railway mentioned in the order is not identical with that occupied by it according to the plan it is to displace. I think it is clear that the Board has no jurisdiction by an order of this description to authorize the railway company to alter retrospectively the location plan of its railway. The remedy of the railway company, if it is in any difficulty, is by way of sec. 162 or sec. 167 of the Railway Act.

Brodeur, J.

BRODEUR, J., concurred with DUFF, J.

Appeal allowed.

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May 12.

PERRY v. DOWNS.

Alberta Supreme Court. Trial before Stuart, J. May 12, 1913.

1. FRAUD AND DECEIT (§ III—12)—MATTER OF OPINION—ESTIMATE OF QUANTITY.

An action for deceit in the sale of lands for the vendor's misrepresentation of the amount of timber thereon, will not lie where such estimate, as the purchaser must have known, was one of opinion only, and it was not found that the defendant either knew it to be untrue or knew that he had no ground for believing it to be the case.

2. FRAUD AND DECEIT (§ IV—17)—MISREPRESENTATION — RELIANCE ON — ACTION FOR.

The false representation of the seller of farm lands that two valuable springs of water were located thereon amounts to actionable fraud where the purchaser relied thereon.

Statement

ACTION for damages for false representations as to the nature of certain land in British Columbia which the defendant con-

veyed to the plaintiff in exchange for certain lands near Claresholm, Alta., under an agreement of exchange dated March 15, 1912.

Judgment was given for the plaintiff for $1,000.

J. B. Roberts, for the plaintiff.

Shaw, for the defendant.

STUART, J.:—The plaintiff examined the lands in person before agreeing to take them. But he complains, first, that the defendant misrepresented the exact location of the western boundary of the land so as to induce him to believe that a certain hillside was not included in the lands in question, whereas the fact turned out to be that the hillside, containing about twenty-five acres, was so included according to the description. He complains, secondly, that the defendant represented that there was 5,000 feet of lumber to the acre upon the land which, as he contended, was not the fact. He complains, thirdly, that the defendant represented that there were two springs of flowing water on the land, which also turned out as a matter of fact to be untrue.

The plaintiff did not ask for rescission because it was admitted that the Claresholm lands could not now be returned. The action is therefore one of tort, for deceit. In order to succeed the plaintiff must shew fraud on the part of the defendant. With respect to the first and second complaints I am of opinion that the plaintiff did not make out a case. As to the boundaries it seems clear that the survey had only recently been made; indeed, between the first and second interviews between the parties. The defendant I think had no very clear knowledge himself where the lines were. This of course would not in itself relieve him if he made an untrue representation as to the boundaries, well knowing that he himself did not know whether it was true or false. But taking the plaintiff's evidence along with that of his witness Schram I have been unable to conclude that the defendant acted thus deceitfully in regard to this point.

Then with regard to the question of the timber, the plaintiff has also failed to convince me that there was a knowingly false representation made. The matter was obviously one of estimate and of opinion. The plaintiff was warned by Murdock against the estimate made by the defendant. Of course, he was entitled notwithstanding that to rely upon what the defendant said. But he must have known that the defendant could only be expressing an opinion. What I should have to find in order to make the defendant liable would be that he knew perfectly well that his expressed opinion was untrue or possibly that he knew that he had no ground whatever for holding any such opinion. Upon the evidence I have been unable to make this finding against the defendant.

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There remains the question of the springs. Here I think the defendant did represent to the plaintiff that there were two springs upon the land, that the plaintiff relied upon this representation in entering into the contract and that of course the representation was very material. I also find that the defendant knew that he himself had no accurate knowledge upon the subject and yet instead of merely expressing an opinion he asserted as a fact the existence of the springs upon the land. I do not believe him when he says he told Perry that the springs were either upon this land "or upon the adjoining land." That is not a very probable way for a vendor to talk, and I accept the plaintiff's account. This, I think, constitutes fraud and deceit and renders the defendant liable in damages.

I have found much difficulty in arriving at the proper amount of damages. On June 12 the plaintiff wrote the defendant complaining about the absence of the springs and the deficiency of timber and threatening litigation. He had taken the land at a valuation of $50 an acre for part and $60 an acre for the rest. On June 14, two days after his letter of complaint, he wrote a letter to a Mr. Cornwall, a bank manager at Claresholm in which he said:—

> We like our new home very much and I think the prospect ahead for a good increase in value is bright. The Government bridge across the Kootenay River is going to the S.W. corner of my place. The Scotch Co. just across the river sold quite a bit of land the other day at $245 per acre. Should you ever get up in our country let me know and I will arrange to shew it to you. I think inside of three years land here will all be at $300 per acre up.

On the other hand plaintiff swore at the trial that the land was not worth half what he gave for it. There was some evidence as to the value of surrounding land but it is of little assistance to me. If I could conclude that the land is worth a good deal more than what was given for it there might be a nice point to decide as to the true measure of damages, that is, whether, although the land owing to the absence of the springs is worth less than it would be with the springs, there would even then be any damage really suffered. However, I do not think it is very necessary to consider that, because I am not satisfied that the land is really worth more than the valuation placed upon it in the agreement of exchange. The plaintiff's letter to Cornwall is evidently a piece of "boosting" and in any case deals more with expectations than anything else. It is true five acres were sold to Nash at $100 an acre but that little bargain ought, I think, to be treated as exceptional.

In any case it seems to me that the true measure of damage is the difference between the value of the land as it stands without the springs and its value assuming the springs to be upon it as represented. The plaintiff and one witness swore that it

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made a difference in value of $10 an acre. As there are 414 acres this would be $4,140. Yet in his letter of complaint of June 12 the plaintiff only puts his damage at $3,500 for both the absence of the springs and a deficiency of one-half in the timber. A deficiency in one-half the timber would on the evidence amount to about $2,500 and $2,580 is what plaintiff claims for this in his statement of claim. It seems to me that there should be some consistency in the claims made by a person who is estimating the damages he has suffered.

I do not think I can accept $10 an acre in these circumstances as the true amount of the damages.

Some attempt was made by defendant to shew that there is an opportunity for the plaintiff under the laws of British Columbia to avail himself of a spring on adjoining land which as it was alleged would involve an extra expenditure of only $160. I have examined the statute of British Columbia and it evidently involves considerable formality and trouble before rights can be obtained under it. Furthermore, it is, I suppose, subject to repeal. I do not think I ought to consider this means of lessening the damage.

Not being able to accept $10 an acre as the true amount of damages I find it difficult to say what the amount should be fixed at. I think it is undeniable that there is some substantial damage. I see no reason why the plaintiff should complain if I accept his statement of $3,500 as the loss on springs and lumber together and also his statement of $2,500 as the loss on timber. This leaves $1,000 as the damage in respect of the spring which after all appears to me to be perhaps a not unfair allowance for either party.

There will be judgment for the plaintiff for $1,000 and costs.

Judgment for plaintiff.

Re LAND TITLES ACT.

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May 27.

Alberta Supreme Court, Beck, J. May 27, 1913.

1. LAND TITLES (§ III—30)—CROWN LEASE—REGISTRATION AS A GRANT—ALBERTA LAND TITLES ACT.

A lease of land containing quarriable stone, issued by the Minister of the Interior, under sec. 38, ch. 20, of the Dominion Lands Act (7 and 8 Edw. VII.), although not in the form of a grant, is registrable as such under sec. 2 (e) of ch. 24 of the Alberta Land Titles Act of 1906.

2. LAND TITLES (§ III—30)—CROWN LEASE—DELIVERY DIRECT TO LESSEE—REGISTRATION—EFFECT OF ALBERTA LAND TITLES ACT.

Since sec. 26, sub-sec. (1), of the Alberta Land Titles Act of 1906, applies only to grants in fee, a lease of lands made by the Minister of the Interior, under sec. 38 of ch. 20, of the Dominion Lands Act (7 and 8 Edw. VII.), is registrable in the land titles office, notwithstanding it was sent direct to the lessee instead of to the registrar.

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3. LAND TITLES (§ III—30)—CROWN LEASE—ASSIGNMENT—REGISTRATION.

A lease of lands made by the Minister of the Interior, and accompanied by an assignment that had been duly registered in the Department of the Interior, is registrable in the land titles office, under ch. 24 of the Alberta Land Titles Act of 1906.

REFERENCE by the registrar at Edmonton on the question whether a lease of land containing quarriable stone not being in the form of letters patent but issued by the Deputy Minister of the Interior in accordance with regulations of the Governor-in-council ought to be registered.

P. L. McNamara, the registrar in person.

O. M. Biggar, K.C., contra.

Beck, J.

BECK, J.:—The Dominion Lands Act, 1908, 7-8 Edw. VII. (Can.) ch. 20, sec. 38, says, "Land containing quarriable stone may be sold or leased under regulations made by the Governor-in-council."

The Land Titles Act, Alberta, 1906, ch. 24, sec. 2 (*v*), says:—

> The expression "grant" means any grant of Crown land, whether in fee or for years, and whether direct from His Majesty or pursuant to the provisions of any statute.

This provision with, I think, quite obvious intention differentiates between "grants direct from His Majesty," that is to say, letters patent and "grants pursuant to the provisions of any statute," that is to say, grants, which but for statutory provisions, would have to be by way of letters patent, but which by virtue of the statutory provisions may be made in a less formal way, although in many cases the method of grant by way of letters patent may not be abrogated. The lease in question here is a "grant of Crown lands for years pursuant to the provisions" of sec. 38 of the Dominion Lands Act. A parallel case is that of the incorporation of a joint stock company by certificate of a registrar instead of, as formerly, letters patent.

As to sec. 26, sub-sec. (1), of the Land Titles Act, I think, looking at the whole of its provisions, it refers only to grants by way of letters patent and those only when in fee. But in any case the words: "Whenever . . . the letters patent . . . have been forwarded from the office whence the same have issued to the registrar of the registration district in which the land so granted is situated" do not apply to the present lease.

The Department of the Interior has chosen to send the lease direct to the lessee. Merely the words I have quoted from the section cannot interfere with the lessee's right of registration, clearly provided for, as I think it is in other parts of the Act: but on the other hand in the absence of explicit directions relating to such grants as the present one the registrar should, I think, by analogy apply the directions of this section upon the grant being produced to him.

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In the present case there is also an assignment of the lease. It is attached to the lease and purports to have been registered in the office of the Department of the Interior.

The Dominion Lands Act, sec. 86, enacts that the Minister of the Interior shall cause to be kept in the Department of the Interior books for registering, at the option of the persons interested, assignments of any right or interest; with some restrictions and with a proviso that no assignment shall be registered unless it is unconditional and unless its execution has been proved to the satisfaction of the Minister. The assignment upon its face is unconditional. Its registration in the Department should, I think, be taken as shewing not only that its execution has been proved to the satisfaction of the Minister and that it is in accordance with any directions there may be in the regulations with regard to form but also that it does not fall within any restrictions against registration laid down by the Dominion Lands Act or regulations made in pursuance thereof. These regulations provide that no assignment shall be made without the written consent of the Minister. The certificate of registration is signed "for the Deputy Minister of the Interior." I think this evidences the consent of the Minister to the assignment. I have already held the lease to be a grant. Under sec. 2 clause (*k*) of the Land Titles Act a grant is an instrument. Under sec. 22 there is a clear implication to the same effect and also a clear implication that on presentation such an instrument is to be registered.

Complete registration clearly includes the "embodying" of the title created by the instrument "in the register" (sec. 22) which means the making of the certificate of title (sec. 2, clause (*o*). So that the lease should be registered and a certificate of title to the lessee should be granted by the registrar and entered and kept in the register and a duplicate issued to the lessee (26).

Section 66 provides for the registration of transfers of leases. The assignment is an instrument (sec. 2, clause (*k*)). I think it is "substantially in conformity with the proper form in the schedule" to the Act (sec. 46, form 66) and should therefore be registered.

I am told that the Department of the Interior does not intend or desire that such leases as the one in question should be registered in the land titles office. I doubt if this represents the carefully considered opinion of the Minister or his Deputy. The official who has immediate charge of these matters very likely considers it a matter of great convenience to the Department that the sole place of registry should be the Department—that in that case in the event of default no legal proceedings would be necessary while if registered in the land titles office such

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proceedings would be necessary in order to clear the title. This after all is a small matter involving no great amount of costs and my holding puts the Department—nominally the Crown—only in the like position to that of any individual and I know of no reasonable reason why the Department should object to this. Quite probably I think when the matter is called to the attention of the Minister he will approve. It will be a great convenience to lessees and will remove obstacles to their getting the full benefit of their rights in connection with financing their undertakings.

Direction for registration.

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May 30.

DAGENAIS v. DENIS.

Alberta Supreme Court, Simmons, J., May 30, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND — UNDISCLOSED COAL RESERVATION—DEDUCTION FOR.

Where a vendee agreed in a contract for the sale of lands, to give such title as his original Crown grant contained, and produced a certificate of title shewing a reservation by another of the coal under the lands, and the vendee, who at the time of entering into the contract was unaware of such reservation, did not demand rescission of the agreement on that ground, specific performance may be ordered against an assignee of the vendee who will be required to pay the amount due under the contract, less compensation for the value of such coal rights.

Statement

ACTION by the vendor for specific performance of an agreement for sale of lands and payment of the balance of purchase money.

Judgment was given for the plaintiff.

E. B. Edwards, K.C., for plaintiff.

G. B. O'Connor, for defendant Denis.

O. M. Biggar, K.C., for other defendants.

Simmons, J.

SIMMONS, J.:—On February 15, 1911, the plaintiff and the defendant Denis entered into an agreement in writing for the sale by the plaintiff to the defendant of certain parcels of land containing 270 acres more or less for the price of $12,150, payable $1,000 cash; $1,000 on August 15, 1911; $2,000 on February 15, 1912, and $8,150 on February 15, 1913. The agreement contains *inter alia* the following clauses:—

(*a*) In consideration whereof and on payment of all sums due hereunder as aforesaid the vendor agrees to convey the said lands to the purchaser by a deed without covenants other than against encumbrances by the vendor and for further assurance and subject to the conditions and reservations contained in the original grant from the Crown,

and

(*b*) It is further agreed that the purchaser hereby accept the title of vendor to said lands, and shall not be entitled to call for the production

of any abstract of title or proof of evidence of title or any deeds, papers or documents relating to said property other than those which are now in the possession of the vendor.

The purchaser made default in the payment of $2,000 due in February, 1912, and interest, and in an action in this Court for the payment of same judgment was given in favour of the plaintiff for specific performance of the agreement above referred to and in default of payment of same within forty-five days together with costs of the action, that the defendants' interest in said lands be foreclosed and the moneys already paid by him forfeited to plaintiff. The judgment further provided that upon payment into Court of the instalment of $8,150 with interest from February 15, 1912, to February 15, 1913, together with the sum of $2,895.29 then due and costs, that the plaintiff convey to the Morinville Oil City Land Co., Ltd., or to whom they shall appoint, the lands in question free from encumbrance. The judgment also provided for a reference to the clerk of the Court as to the title. The defendants paid the amount of $2,895.29 and costs. When the final instalment of $8,150 and interest became due the defendants made default in payment and this action was brought to recover the same.

The defendant on May 15, 1911, assigned to his co-defendant the Morinville Oil City Land Co., Ltd., all his interest under the agreement for sale which assignment is endorsed upon the said agreement. The defendants the Morinville Oil City Land Co., Ltd., in their defence plead that they have not agreed to become liable to the plaintiffs in respect of the purchase money or interest. The defendant Denis alleges that the plaintiff is not the owner of the lands agreed to be sold. The plaintiff produced at the trial his duplicate certificate as evidence of title. From certificate of title 187K20 covering the south-east quarter of section 33-55-25 west 4th meridian is disclosed a reservation unto the Canadian Pacific R. Co. of all coal on or under the said quarter-section. The defendant Denis has not asked for rescission on account of this deficiency in title, and consequently his rights now are that the vendor give him as much as the vendor is able to convey of what he has contracted to sell (as there is no evidence that the purchaser was aware of this deficiency when he contracted to purchase), with the right of the purchaser to compensation in respect of the defect. See Dart on Vendor and Purchaser, 7th ed., 680. No evidence was offered at the trial of the value of the coal rights. There will, therefore, be judgment for the plaintiff against the defendant Denis for the sum of $8,150 and interest at eight per cent. per annum from February 15, 1912, a rest being made on February 15, 1913, in computing interest, and costs of the action—the same to be reduced by the value of the coal rights reserved.

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For the purpose of inquiry as to title and as to the value of said coal rights a reference is made to the clerk of the Court. In default of payment within sixty days of the amount so found by the clerk to be due from the defendant the said lands are to be sold under the directions of a Judge.

Judgment for plaintiff.

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Re FILLINGHAM.

Ontario Supreme Court, Middleton, J. June 5, 1913.

1. WILLS (§ III K—185)—BEQUESTS — CHARGE ON — CONSTRUCTION.

Where a will gave the proceeds of an insurance policy on the life of the testator in equal shares to his children, and a later clause declared that, if money enough to pay certain legacies, which were a charge on real estate devised to one of his children, was not realized from the sale of property specifically designated, other than that on which the legacies were chargeable, the difference should be paid from the insurance money, the latter provisions of the will are not in derogation of the earlier bequest of the insurance money, and the two will be construed so as to give the money to the children of the testator subject to the payment of any deficiency in such legacies.

[*Re Wrighton*, 8 O.L.R. 630, followed.]

Statement

MOTION by the executors of James Fillingham for an order, under Con. Rule 938, determining questions arising upon the will of the testator.

G. A. Radenhurst, for the executors and (by appointment of the Court) for the infant Herbert E. Fillingham.

J. R. Meredith, for the Official Guardian, representing the other infants.

Middleton, J.

MIDDLETON, J.:—The testator died on the 21st August, 1909, leaving him surviving five infant children; his wife having predeceased him.

The testator had a policy of insurance in the Independent Order of Foresters for $1,000. This had been made payable to his wife, and was not otherwise dealt with save by the provisions contained in his will. By his will he gave his homestead to his son Herbert Edward, charged with the payment of certain legacies in favour of his brothers and sisters. This farm had come to the testator from his father, charged with the payment of an annuity in favour of his mother and some legacies in favour of the testator's brothers and sisters. The deceased then directed that the insurance money over which he had control, by reason of his wife having predeceased him, should be divided between his sons and daughters, share and share alike. He then provides that, if enough money is not realised from the sale of his interest in another parcel of land, and the money to his credit in the bank, and upon a note (which was paid off in

his lifetime), to pay his brothers and sisters' legacies, "the balance to come out of the insurance money I have in the Independent Order of Foresters."

The contention made on behalf of the son Herbert Edward is, that the insurance money must, under the terms of the will, be applied in discharge of these legacies, and that the provision found in the later clause derogates from the gift contained in the earlier clause. The contention on behalf of the other infants is, that the earlier clause in the will amounts to an instrument operative under the Insurance Act, and that the later clause is nugatory.

I do not think that this is so. I think that the two clauses in the will can be read together, and that the effect is to give the insurance money to the children, subject to payment thereout of the money necessary to discharge the legacies due to the testator's brothers and sisters.

The principle applicable is that acted upon by Mr. Justice Anglin in *Re Wrighton*, 8 O.L.R. 630: "The very instrument conferring title . . . makes that title subject to the payment" of the legacies.

Mr. Meredith argues that the insurance policy is sufficiently identified in the earlier clause, but insufficiently identified in the later. I think that the two clauses must be read together, and that possibly neither clause under the statute (as it was at the date of the will and at the date of the death) sufficiently identifies. But, if the identification is sufficient, then I think that the two clauses must be read together.

This may be so declared. Costs out of the estate.

Order accordingly.

BEAHAN v. NEVIN.

Ontario Supreme Court. Trial before Lennox, J. June 5, 1913.

1. DAMAGES (§ III I—165)—ELEMENTS—FATAL ACCIDENTS ACT—FUNERAL EXPENSES.

The amount paid for the funeral expenses of a child cannot be taken into consideration as an element of damage in an action by his parents, for his death, under the Ontario Fatal Accidents Act, 1 Geo. V. ch. 3.

2. DAMAGES (§ III I 4*d*—196)—MEASURE OF—DEATH OF CHILD—RECOVERY BY PARENTS.

$300 to the father and $230 to the mother was awarded as damages under the Ontario Fatal Accidents Act, 1 Geo. V. ch. 33, for the death of a bright, clever boy seven years of age, as the result of the negligent operation of a motorcycle.

Statement

ACTION by Dennis Beahan, on behalf of himself and wife, under the Fatal Accidents Act, to recover damages for the death of his son, William Beahan, a boy of eleven years, who was struck

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by a motor bicycle ridden at a rapid rate along a street in the city of Windsor by the defendant Gordon Nevin, against whom and his father, the defendant Frederick Nevin, the plaintiff charged culpable negligence.

F. D. Davis, for the plaintiff.

T. G. McHugh, for the defendant Frederick Nevin.

E. S. Wigle, K.C., for the defendant Gordon Nevin.

Lennox, J.

LENNOX, J.:—On the 29th October, 1912, the defendant Gordon Nevin was riding a motor bicycle in the city of Windsor, and ran over and knocked down William Beahan, a son of the plaintiff. The boy was so seriously injured that he died within a few hours. The plaintiff is a labourer, and brings this action on behalf of himself and his wife, Ollie Beahan. William was a little over eleven years old at the time of the casualty. He was a good boy, attended school, ran errands, was executing an errand at the time, and was strong, healthy, and clever.

Both parents swear that they expected him to be of assistance to them, and in their position in life it is not unreasonable to expect that before long he would be earning money and contributing to the upkeep of the family. There are seven other children. The eldest is twenty-three, and is still living at home—and, as I understand, the parents are gainers by this.

The casualty was caused by the negligence and want of care of the defendant Gordon Nevin in riding the cycle. It was a dark night—he was running without a light, and in passing a vehicle he was running, as he says, twelve to fifteen miles an hour. He was almost able to stop as it was; and, if he had slowed down in passing to the seven miles an hour limited by the statute, he would have been able to stop in time to avoid collision.

The measure as well as the basis of damages has been very much discussed in our own Courts. It is said here that the funeral expenses amounted to $200. I am not at liberty to take this into account.

Based upon a reasonable expectation of pecuniary benefit, I think a fair assessment of damages will be $530; and there will be judgment against the defendant Gordon Nevin for this amount, with the costs of the action—$230 of this will belong to the mother, Ollie Beahan.

The action will be dismissed as against the defendant Frederick Nevin without costs.

Reference may be made to *Thompson* v. *Trenton Electric and Water Power Co.*, 11 O.W.R. 1009; *McKeown* v. *Toronto R. Co.*, 19 O.L.R. 361; *Ricketts* v. *Village of Markdale*, 31 O.R. 180, 610; and article on Lord Campbell's Act, 46 C.L.J. 1.

Judgment accordingly.

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Exchequer Court of Canada, Audette, J. January 22, 1913.

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT FOR CUSTOMS PURPOSES — DEFRAUDING CROWN—CONVERSION OF MONEY FURNISHED FOR PAYMENT OF DUTIES—LIABILITY OF PRINCIPAL TO CROWN.

Where, without the knowledge of a railway company an agent appointed by it under R.S.C. 1886, ch. 32, sec. 157, etc., for customs purposes, by a system of frauds in the under-payment to the Crown of customs duties converted to his own use moneys furnished by the company for the payment of the rightful amount of duties, the company is answerable to the Crown upon the discovery of the fraud, for duties on all goods, which, by reason of the agent's fraud, were not declared or entered and the customs paid thereon, since the agent's acts in which the frauds were committed were within the scope of his employment.

[*Lloyd* v. *Grace*, [1912] A.C. 735; *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A.C. 173; *Fry* v. *Smellie*, [1912] 3 K.B. 295, specially referred to; *Erb* v. *G.W.R. Co.*, 5 Can. S.C.R. 179; *City Bank* v. *Harbour Commissioners of Montreal*, 1 L.C.J. 288, distinguished.]

2. ESTOPPEL (§ III D—63)—AGENCY — ESTOPPEL TO DENY—SCOPE OF — CLOTHING AGENT WITH FULL INDICIA OF AUTHORITY.

Where a railway company furnished its customs agent with the necessary documents, including accepted cheques, for the payment of duties necessary to enter goods through the customs house, and the agent, by a system of frauds, was able to pass a large quantity of goods free of duty, receiving back from the customs officers, on the assumption that all imposts had been fully paid, the difference between the face of the cheques and the duty actually paid, which the agent converted to his own use, the company is estopped in an action by the Crown for the duties unpaid on goods so passed and not entered for duty from claiming that in accepting the money returned, he was not acting within the scope of his employment.

[*Fry* v. *Smellie*, [1912] 3 K.B. 282; *Whitechurch* v. *Cavanagh*, [1902] A.C. 117-130; *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Lloyd* v. *Grace*, [1912] A.C. 716, specially referred to; *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, 18 Q.B.D. 714; *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439, distinguished.]

3. DUTIES (§ I—1)—ACTION TO RECOVER UNPAID—RETURNED CHANGE — EFFECT OF RULE OF CUSTOMS HOUSE PROHIBITING MAKING OF CHANGE FOR MORE THAN FIFTY CENTS.

An internal rule of a customs house prohibiting the cashier from furnishing change beyond fifty cents, is not a limitation of his authority sufficient to relieve a company from liability for unpaid duties on goods entered fraudulently by its duly appointed customs agent, where the company furnished cheques for the correct amount of duties and the cashier returned to the agent, who converted it to his own use, the difference between the amount of the cheque and the duties actually paid, since the agent's authority was broad enough to include the receipt of such moneys.

4. EVIDENCE (§ II L—345)—ACTION FOR UNPAID CUSTOMS DUTIES — PAYMENT—ONUS TO SHEW.

In an action by the Crown to recover customs duties on goods not entered or declared, the onus rests upon the defendant to shew payment and full compliance with the requirements of the customs Act.

Statement

THIS was an information to recover the amount of certain customs duties alleged to be due and owing by the defendant company to the Crown.

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Statement

The facts of the case are, briefly, as follows:—

One Hobbs was appointed agent of the defendant company for customs purposes, under a power of attorney in the usual form provided by the customs authorities, in conformity with the provisions of R.S. 1886, ch. 32, sec. 157 *et seq.* Armed with this authority, Hobbs entered upon a career of fraud and deception whereby he succeeded in converting to his own use a large sum of moneys entrusted to him by the defendant company for the purpose of paying customs duties upon goods imported into Canada. Upon discovery of the frauds Hobbs was prosecuted, convicted, and sentenced to the penitentiary. The Crown then sought payment of the duties which were payable on the goods improperly passed through the customs by means of the fraud of Hobbs.

The plan adopted by Hobbs was simple in the extreme. As customs agent for the defendant company he was in possession of the invoices which had to be entered from time to time; and as required he obtained cheques for the duties payable on the invoices from the treasurer of the defendant. As a rule, he had to obtain a cheque for each invoice. He apparently saw, that if by the production and payment of the duties on one invoice he could pass the goods covered by two invoices, and cancel the manifest for the goods covered by the two invoices, that he would be in possession of a cheque for which all apparent liability on the part of the defendant to the Crown had disappeared and which he could, therefore, turn to his profit. The manifest having been cancelled, the Crown no longer had any claim for duties on the goods so far as its records would shew. So far as the records of the Crown would shew, the claim would have disappeared.

That appears to have been seen by Hobbs—and as he was acting as customs attorney at this time for other importers, from whom he received remittances to pay duties, and as he found it possible to obtain refunds in cash, it is quite clear that it was a profitable system to him that he put in force.

His plan was, as the evidence shews, so far as the goods on schedule "A" are concerned, to prepare an entry covering a definite number of packages, and purporting to cancel a definite manifest for those packages; and then to attach to the entry an invoice for the amount stated in the entry, as the value of the goods covered by the entry, but which in reality covered only a part of the goods contained in the packages entered, and to suppress the invoices for the balance of the goods. In that way he would have in his possession the cheques obtained from the defendant company for the duties payable on the other goods, and he could get these goods through without disclosing their existence in any way to the customs officers. The customs offi-

cers would be ignorant of any liability with respect to the duty on the goods, and it would be possible for him to use the cheques for his own profit.

In regard to schedule "B," the method adopted by Hobbs was somewhat different. Under sections 29 *et seq.* of the Customs Act, if an importer wishes to enter goods, and he has not the invoice in his possession, he is permitted, on making an affidavit to that effect that he has not the invoice, to make a sight entry declaring the value of the dutiable goods and on payment of the amount of duty according to that declaration, the goods may be obtained.

As regards the goods shewn on schedule "B," Hobbs apparently took advantage of the provisions of these sections and made affidavits that the invoices were not in the possession of the defendant, and so passed the goods on sight entries. As a matter of fact the affidavits were false, because it was proved that at the time the affidavits were made, the invoices were in the possession of the defendant.

The sight entries understated the dutiable value of the goods. The representation made by Hobbs with respect to the value in those sight entries was apparently accepted by the officers of the customs as the value of the goods, they were apparently accepted after the representation he made in the entries—and as appears in the cash book the amount shewn in the sight entries was the amount on which duty was collected. As a matter of fact Hobbs had obtained from the defendant a cheque for the duties payable on the real value, as shewn by the invoices. He therefore had in his possession a very much larger amount than he had represented to be payable to the Crown—but he used it for some other purpose.

As regards the items on schedule "C," the method adopted by Hobbs was again different. With regard to those goods, Hobbs did not conceal the fact of their importation or their value; but he concealed the fact that they were dutiable. It was a little variation. He represented that they were not subject to duties, and the entries shew that they were passed as free goods. The entries are free entries, and they appear in the customs' cash book as free entries also.

The case having been referred to Mr. Justice Audette, for enquiry and report whilst he was registrar of the Court, after his appointment to the Bench was continued before him in his judicial capacity under the provisions of ch. 21 of the Statutes of Canada, 1912 (2 Geo. V. ch. 21).

E. L. Newcombe, K.C., and *A. Wainwright*, K.C., for the plaintiff.

E. Lafleur, K.C., and *J. J. Creelman*, for the defendant.

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AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby, *inter alia*, it is sought to recover, from the defendant, certain customs duties alleged to be payable upon goods imported by them at the port of Montreal, between the month of January, 1904, and the month of November, 1905. Set out in schedule "A" to the information is a list of the goods alleged to have been imported into Canada by the defendant, during the above-mentioned period, without entry and without the payment of duties.

In schedule "B" to the said information is a list of dutiable goods alleged to have been imported and entered, during the same period, under certain fraudulent "sight entries," accepted by the customs authorities upon the false representation that the invoices for the said goods could not be produced, resulting in a case of undervaluation.

In schedule "C" to the said information is a list of the goods alleged to have been imported by the defendant, during the same period, and entered free, under the false representation by the defendant's agent, that they were goods of "Canadian origin," or goods imported for "manufacturing purposes."

The defendant, by its plea, admits, subject to certain modifications therein mentioned, the importation of the said goods mentioned in schedules "A," "B" and "C." With respect to schedule "A," defendant says it has imported and entered these goods and issued cheques to the order of the collector of customs, representing the true duty thereon. These cheques the defendant alleges were handed to its customs agent for payment, and that they have found their way into the hands of the Crown, having thereby discharged all liability on the part of the defendant. The defendant further denies any fraud and fraudulent representation with respect to schedules "B" and "C." With its plea the defendant has also paid into Court a certain amount to cover the duty on the bridge material, less the amount of the cheque already issued under circumstances which will be hereafter referred to.

The question of the claim under the bonds has been removed from controversy. Evidence has been adduced on behalf of both parties with respect to the several transactions above mentioned. The defendant having, after some discussion, which is set out in the record of the proceedings, assumed the burden of proof.

Inasmuch as schedule "A" was composed of a great number of items, evidence was restricted to a comparatively small number of them, sufficient to determine the question of liability involved in the case.

The parties at this stage of the case, realizing that there was spread on the record ample evidence to establish in a general

way the various classes of fraud involved in the several items of schedule "A," and that such evidence also adequately disclosed the method pursued by the defendant's customs agent in his fraudulent dealing with the documents and cheques handed to him by the railway company, filed the following consent:—

Inasmuch as the items of the schedule as to which the evidence has been taken and completed are thought to be sufficiently representative of the remaining items so far as concerns any question affecting liability, the case shall now proceed to argument and final judgment, subject to appeal, as to defendant's liability with respect to such items, the items as to which proof has not been made to be subsequently adjusted as between the parties upon the principles of liability determined by the ultimate judgment, with the right of further reference to the Court in case of difference, and judgment of the Court for the total amount, of the defendant's liability as so adjusted or found.

With the commendable object of still further shortening the evidence, the following admission by and between the parties was filed:—

The parties admit for the purposes of this case only, under reserve of all objections as to the relevancy of the facts submitted, that the defendant issued to its agent, Hobbs, cheques payable to the order of the collector of customs sufficient to cover all the duties payable by the defendant during the period covered by this action, except as to the amounts which have been paid to plaintiff or into Court by the defendant herein. These cheques were used in the Bank of Montreal with moneys received for customs duties to buy drafts for the Receiver-General representing the amounts of customs duties actually received from day to day from all sources according to the entries made at the Montreal custom house, but certain of the entries made by or on behalf of defendant at customs during said period, as a result of manipulation and alteration of documents, such as disclosed by the evidence of record, represented the amounts payable for customs duties by defendant during said period to be less in the aggregate than the total amount of the said cheques or of the duties actually payable.

The further testimony which might be adduced before the referee if proceeded with would be similar in character to that which has already been given as to the way in which the entries, cheques and goods and the clearance of the goods were dealt with, prepared, appropriated or effected.

While the facts of the case, as a whole, are manifold and complex, yet the law of the case falls wholly within the well settled domain of principal and agent. For a proper understanding of the material facts upon which a decision as to the liability of the defendant must be based, it will be well to examine with some detail the method of operation of the defendant's agent, Hobbs, in passing the goods in question through the customs.

The moment goods belonging to the defendants had arrived at the port of Montreal, some of the defendant's employees would prepare the entries and all the necessary papers to pass

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the goods through the customs, and make a cheque for the true amount of the duty payable thereon. When completed these documents and cheques were handed over to the customs agent, David Hobbs, to enable him to pass the goods through the customs, pay the duties and secure the delivery of the goods by means of a landing warrant, in the usual and ordinary way. It was not disputed at Bar that Hobbs was the customs officer of the defendant charged with passing the goods through the customs and paying the duties thereon. His appointment was made under the provisions of secs. 157 and 158 of the Revised Statutes of 1886, ch. 32 (now secs. 132 and 133 of R.S. 1906, ch. 48) in force at the time of the importation in question in this case. These two sections read as follows:—

157. Whenever any person makes application to an officer of the customs to transact any business on behalf of any other person, such officer may require the person so applying to produce a written authority from the person on whose behalf the application is made, and in default of the production of such authority, may refuse to transact such business; and any act or thing done or performed by such agent, shall be binding upon the person by or on behalf of whom the same is done or performed, to all intents and purposes, as fully as if the act or thing had been done or performed by the principal.

158. Any attorney and agent duly thereunto authorized by a written instrument, which he shall deliver to and leave with the collector, may, in his said quality, validly make any entry, or execute any bond or other instrument required by this Act, and shall thereby bind his principal as effectually as if such principal had himself made such entry or executed such bond or other instrument, and may take the oath hereby required of a consignee or agent if he is cognizant of the facts therein averred; and any instrument appointing such attorney and agent shall be valid if it is in the form prescribed by the Minister of Customs.

The power of attorney under which Hobbs acted all through these transactions is filed herein as exhibit No. 1, and Robert S. White, the collector of customs of the port of Montreal, testified, at p. 48 of his evidence, that it is the ordinary power of attorney used in such cases, printed forms of which are kept in his office and supplied to importers.

The power of attorney reads as follows:—

DOMINION OF CANADA.

Appointment of an attorney or agent.

Know all men by these presents that we have appointed and do hereby appoint David Hobbs, of Montreal, to be our true and lawful attorney and agent for us and in our name, to transact all business which we may have with the collector of the port of Montreal or relating to the department of the customs of the said port, and execute, sign, seal and deliver for us and in our name, all bonds, entries and other instruments in writing relating to any such business as aforesaid, hereby ratifying and confirming all that our said attorney and agent shall do in the behalf aforesaid.

In witness whereof we have signed these presents and sealed and delivered the same as . . . act and deed at Montreal in the said Dominion, this eighth day of April, one thousand nine hundred and three.

Signed and sealed in presence of

J. W. NICOLL,
B. BARBER,

JOHN CORBETT (L.S.),
Foreign Freight Agent
for Canadian Pacific Ry.

Now Hobbs, when receiving these documents and cheques, would go to the customs house and would, in some instances, deposit the cheques with the cashier before entering any goods. In some cases he deposited cheques to an amount covering as large a sum as $15,000. The cashier would keep a memo. of these cheques on separate lists or slips and hold them for safe keeping, not depositing them with his cash. In the meantime Hobbs, having in his possession several invoices, would alter them to suit his fraudulent purpose. For instance, if he had three cars of machinery, with an invoice for each car representing $5,000—in all $15,000—he would alter the invoice for car No. 1, by shewing that the machinery mentioned in the invoice for that car, instead of being contained only in car No. 1, was contained in cars Nos. 1, 2 and 3, and would pass and enter the goods mentioned in the three cars as of the value contained in only one car, and a sum equal to that amount of the duties would be taken out of the total amount of cheques in the hands of the cashier to satisfy the duties apparently due thereon. Later on in the course of the day he would go to the cashier and ask him for cash, to be accounted for against the several cheques in his (the cashier's) possession—*i.e.*, the balance of the amount represented by the cheques; or, in other instances, he would ask for a sum of $200 or $300 as the case may be, which in both of these cases he would pocket and keep for himself. Now Hobbs was also acting as customs agent for other commercial firms. He would at times pass and enter their goods, paying the duties thereon with some of the defendant's cheques in the hands of the cashier, as already mentioned, and retain for himself the amount of the duties handed to him by these commercial firms. Meunier even says that sometimes he would pay the defendant's customs duties with the cheques of some Toronto firms, and *vice versa* (p. 353).

His fraudulent devices were numerous and complex. It is pertinent to mention in dealing with these other firms he was able to pocket money, without obtaining change from the customs house cashier. He would simply retain the moneys paid over by them for the purpose of passing their goods through the customs and use the defendant's cheques for paying the duties.

Therefore, of the amount of the company's cheques issued to pay the duties, it is obvious that the Crown only obtained and

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deposited to its credit the amount of the duties upon the goods actually entered. For the goods mentioned in the information, which were never declared or entered at the customs house it is equally obvious it was impossible for any amount to be credited to the Crown in the absence of any entry. It was impossible to make a remittance to the Crown unless there was an entry to cover the remittance, and it cannot be maintained that the Crown received the full benefit of these cheques.

In the case of schedule "B" Hobbs, availing himself of the provisions of sec. 39, R.S. 1886, ch. 32, would falsely represent that for want of the invoices, or for some other reason, he had to pass the goods on a bill of sight, he having authority to make, and making, the declaration required by the statute, whereby he would undervalue the goods and pay only part of the duty.

With respect to the items of schedule "C," Hobbs adopted a different method. Disclosing the nature of the goods, he would conceal the fact that they were dutiable. Take, for instance, the item representing fire-brick—he would falsely represent that they were for manufacturing purposes and thus enter them free. The bridge material he would represent as scrap iron and also enter it free.

At the request of the Court, Mr. Blair, a customs officer, heard as a witness in the present case, prepared a summary shewing cases illustrating some of the methods adopted by Hobbs, as the defendant's customs attorney or agent. [The learned Judge here read the summary referred to.]

This statement contains specific references to the evidence and exhibits, and conveys a clear idea of the frauds involved in the case.

The effect of this lucid statement of the transactions of Hobbs with his principals and the customs authorities, is to brand the transactions with ineradicable fraud. On the other hand it is established beyond controversy that the Canadian Pacific R. Co. as a body never had the remotest idea of passing any of these goods through the customs without paying the proper duties thereon—there is no suggestion of a dishonouring or disparaging kind made against them. Hence the question of liability must be approached upon that basis. Upon that basis too, it must be inferred, that the Crown by its information is not asking for any penalties. The company, on the receipt of the invoices, prepared the necessary cheques for duty and handed them over to their agent for payment, but he managed to pocket part of the duties. There is no evidence that the defendant did, at any time, pay the duties otherwise than by cheque, but there was nothing in the law or in the power of attorney to prevent them paying in cash. However, the goods could not be passed without paying the duties, and Hobbs was specially authorized to pay the same.

What is the substantial result of all of these customs transactions conducted by Hobbs? Is it not obvious that through Hobbs' false and fraudulent dealings, offences for which he was convicted and condemned to the penitentiary, the duties in question have not been paid to the customs but found their way into that convict's pocket? The duties not having been paid, the indebtedness to the Crown remains unsatisfied. The refunds to Hobbs are just as much refunds to the company as if the company had been a private individual importing goods, who, instead of paying an agent, had gone to the customs personally and paid his money or cheque and received his refund without any power of attorney. And these refunds must be a matter of every day occurrence at the customs, as few persons making entries would present the exact sum payable, hence the necessity for a certain amount of change being handed back to them by the customs people.

Under the circumstances, who is to bear the loss? That is the only question to be decided in the ultimate analysis of the case. Let us first enquire what was Hobbs' authority under the power of attorney already referred to.

The trite maxim and rule of law for deciding whether a principal is civilly liable for the fraud of his agent is clearly laid down in such text-books as Bowstead's Law of Agency, 4th ed., 332-338, and Story on Agency, 9th ed., secs. 17, 18, 452 and 456. The principal is civilly liable for fraud committed by his agent while acting within the scope and in the ordinary course of his employment, whether the result is or is not for the benefit of the principal. The same principle is recognized in the case recently decided by the House of Lords, in *Lloyd* v. *Grace*, [1912] A.C. 735, wherein Lord Macnaghten says:—

> Lord Blackburn's view of the judgment in *Barwick's Case* requires no explanation. It is clear enough. After referring to *Barwick's Case* (L.R. 2 Ex. 259) he expresses himself as follows (5 App. Cas., at p. 339): "I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question"; and then comes these important words: "The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."
>
> That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions, "acting within his authority," "acting in the course of his employment," and the expression, "acting within the scope of his agency" (which Story uses), as applied to an agent, speaking broadly, mean one and the same thing. What is meant by these expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the

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other. Whichever expression is used it must be construed liberally. In the case of *Udell* v. *Atherton*, 7 H. & N. 172, at 198, Martin, B., stated the question to be, "Was his (the agent's) situation such as to bring the representation he made within the scope of his authority?" In those passages the true principle is, I think, to be found.

It is quite clear in this case that the defendant did not authorize the fraudulent acts in question, but solemnly appointed Hobbs as its agent, and it must be answerable for the manner in which the agent has conducted himself in doing the business which it entrusted him to perform. The agent was empowered to enter these goods through the customs, and he did so, but in a fraudulent manner, which resulted in depriving the Dominion exchequer of its duties which are still remaining unsatisfied. Can it be reasonably contended that, because the cheques were handed by the principal to their agent to discharge the liability, that the Crown must lose the amount of the duties which, under the provisions of sec. 7 of R.S.C. 1886, ch. 32, constitute a debt due to His Majesty? In the revenue case of *Cliquot's Champagne*, 3 Wall. 114, it was also held that:—

> Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker.

On the other hand, can it be contended that the agent in passing the goods through the customs—with or without fraud—would be acting beyond the scope of his power of attorney? The answer must obviously be in the negative. He was doing the "class of acts" for which he had a mandate.

Of course principals do not authorize their agents to act wrongfully, and consequently frauds are beyond the scope of the agent's authority in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. The best definition of it is found in *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, where it is stated that in all cases it may be said, as it was said here, that the principal had not authorized the act. It is true he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the principal to place him in: *Lloyd* v. *Grace*, [1912] A.C. 733.

It will be observed that the power of attorney gave Hobbs power "to transact all business which we (the defendants) may

have with the collector of the port of Montreal or relating to the department of customs of the said port, and to execute, sign, seal, and deliver for us (the defendants), and in our name, all bonds, *entries* and other instruments in writing relating to any such business as aforesaid."

The language of this document is broad enough to cover all power and authority respecting the entry of the goods through the customs. The power of the agent covered the power to pay and the power to receive moneys relating to the business in question. The relation of principal and agent for the purpose of passing goods through the customs is recognized in the Customs Act, and the power of acting therein is in the form prescribed by the Act.

Under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 31, the word "power" is defined as follows:—

> Whenever power is given to any person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such persons, officer or functionary to do or enforce the doing of such act or thing.

Taking the matter at its worst, it has been proven and admitted by both sides that Meunier, the cashier, had power to give change not exceeding the sum of fifty cents. Can it be contended that Hobbs had no power to take change to that amount or to any amount? The giving and taking of change must be a daily occurrence at the customs house.

In Story on Agency, 9th ed., secs. 17-18, the learned author considers the nature and extent of the authority which may be delegated to an agent. He observes:—

> 17. It is commonly divided into two sorts: (1) a special agency; (2) a general agency. A special agency properly exists when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment. Thus, a person, who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. But a person who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business or employment, is a general agent in that trade, business or employment.
>
> 18. A person is sometimes (although perhaps not with entire accuracy) called a general agent, who is not appointed with powers so general as those above mentioned; but who has a general authority in regard to a particular object or thing, as, for example, to buy and sell a particular parcel of goods, or to negotiate a particular note or bill; his agency not being limited in the buying or selling such goods, or negotiating such note or bill, to any particular mode of doing it.

Does not the power of attorney in question in this case come within Judge Story's definition of a general agency as applied

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to a particular business? Hobbs was vested with general power and authority respecting anything to be done at the customs for the entry of the defendant's goods. Of course in doing what he did fraudulently the agent was not following the instructions of his principal, but he was doing acts within the course of his employment; and the authorities go as far as to say that even if a specific prohibition of the very act had been made and that the agent had transgressed it, the principal must be held liable: Story on Agency, sec. 452. The case of *Collen* v. *Gardner*, 21 Beavan 540, is also authority for the principle, that where a general authority is given to an agent, this implies a right to do all subordinate acts incident to, and necessary for, the execution of that authority, and if notice be not given that the authority is specially limited, the principal is bound.

Hobbs committed frauds in carrying out one of the "class of acts" which he was employed by his principal to do; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the principal's liability. The true principle is that the principal has put the agent in his stead and place and he is acting for him.

In Story on Agency, 9th ed., the learned author states, in sec. 452:—

> It is a general doctrine of law that the principal is liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances or omissions of duty, of his agent, *in the course of his employment*, although the principal did not authorize, or justify, or participate, in or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.

And again in sec. 456:—

> But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort of negligence occurs in the course of the agency.

The defendant further contends that its agent had no power to receive money in change as he did, and that the customs house cashier had only the power to give change up to the sum of fifty cents. We find in the collector's (Mr. White's) evidence that there existed at no time departmental regulations forbidding the cashier from handing back change; but that from January, 1902 to 1907, he (Mr. White) had issued instructions in the customs house at Montreal, forbidding the return of change over the counter in any amount exceeding fifty cents—any larger refund having to be made the following day by a cheque to the importer. That was a matter of internal administration in the customs house and was subsequently reformed by the Department at Ottawa. There was no statutory power for it. The practice prevailing now since 1907, is to give over the counter whatever change is due. In view of these facts can it be

seriously contended by the defendant that the fraud of their agent was assisted and facilitated by an officer of the Crown, namely, the cashier of the customs house, who was exceeding his power and authority in making refunds to Hobbs? The question was mooted at Bar that the customs cashier was an accomplice in the frauds perpetrated by Hobbs, but the evidence failed to disclose this fact, and as fraud is not to be presumed, it cannot be considered. The violation of this rule of internal administration in the customs house would not amount to such a breach of duty as would give rise to any liability on the part of the Crown, particularly in view of the law of the prerogative that the Crown is not bound by the laches of its officers. And so far as the defendant is concerned, Hobbs had power to receive fifty cents in change, surely the scope of his power and authority would allow him also to receive one dollar, or any amount on behalf of the defendant. Then the refunds are really refunds made to the defendant although the company never received any benefit from them by reason of the fraud of its agent. The money refunded was money that belonged to the Crown and taken from the customs till. The substantial result being that the amount of the accepted cheque, which eventually went to the credit of the Crown, was made equal to the amount of the duty due upon the goods actually declared, by reducing the amount of that cheque by the amount of the refund, made in actual cash, belonging to the Crown.

Let us suppose the company, instead of paying by accepted cheques, had given its agents bank-notes, can it seriously be contended that, with the power of attorney above referred to, the agent had no power to receive any change? Had the agent given a bank note of $100 in payment of $50.75 of duties, could it be successfully contended that he had no power to receive the difference in change, *i.e.*, $49.25? Putting the question is to answer it. The agent had full power to transact and do "all business" respecting the entries at the customs.

Hobbs was given all the necessary documents to pass and enter the company's goods through the customs, including the accepted cheques to pay the duties, and it is with these documents that he approaches the customs official. Thus he was entrusted by the defendant with full *indicia* of title enabling him so to act. The principal cannot be heard to say there is limit to the authority given. If the *indicia* of title are apparently coextensive with the authority claimed there *is nothing to suggest any limit*: *Fry* v. *Smellie*, [1912] 3 K.B. 282, 301.

The customs house cashier believed Hobbs' statement (and his evidence did not disclose any participation by him in these frauds) and he acted accordingly, returning balances of cheques on the faith of Hobbs' representations, treating and believing him as having full authority to deal with such moneys.

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If the company has entrusted Hobbs with such *indicia* of title, enabling him to deal with these customs entries, then it cannot be heard to say that there is a limit on the authority so given; *Fry* v. *Smellie*, [1912] 3 K.B. 282, 301. The company is estopped from saying that while their agent had authority to pass the entries and to pay the duties, he had none to receive change if any there was. It is so estopped by representation as referred to in *Whitechurch* v. *Cavanagh*, [1902] A.C. 117, 130, wherein Lord Macnaghten says that "is a very old head of equity." See also *Low* v. *Bouverie*, [1891] 3 Ch. 82.

Then this is a case arising in the Province of Quebec. What is the law of agency in that Province? We find the principles of the law of agency very clearly defined in the iron framework of the Civil Code of the Province, and the provisions pertinent to the questions arising herein are set out in the following articles:—

Art. 1704. The mandatary can do nothing beyond the authority given or implied by the mandate. He may do all *acts which are incidental to such authority and necessary for* the execution of the mandate.

Art. 1715. The mandatary acting in the name of the mandator and within the bounds of the mandate is not personally liable to third persons with whom he contracts.

And again art. 1727:—

The *mandator* is bound in favour of third persons for all the acts of his mandatary, done in the execution and within the powers of the mandate.

The doctrine embodied in the above articles of the Code was also recently reviewed by the House of Lords in *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716. That Court expressed the opinion that the language of Mr. Justice Willes in *Barwick* v. *English Joint Stock Bank*, 16 L.T. Rep., 41 L.R. 2 Ex. 259, had been misunderstood, and that that case was not an authority for the proposition that a master was not liable for the wrong of his servant or agent committed in the course of his service, if it were not committed for the master's benefit. They stated the true principle to be that a principal is liable for the act of his agent in the course of his employment, whether he is acting for the benefit of his principal or not. In this they dissented from the dicta of Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest R. Co.*, 57 L.T.R. 833, 18 Q.B.D. 714, and of Lord Davey in *Ruben* v. *Great Fingall Consolidated*, 95 L.T. Rep. 214, [1906] A.C. 439.

This decision of the House of Lords in the case of *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716, affirms the view taken by Mr. Justice Quain of the decision in *Barwick* v. *English Joint Stock Bank*, 16 L.T. Rep. 461, L.R. 2 Ex. 259, in *Swift* v. *Winterbotham*, 28 L.T.R. 339, L.R. 8 Q.B. 244, that is to say, pro-

vided that the agent's fraud is committed in carrying out one of the "class of acts" which his principal employs him to do, the principal is liable; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the liability.

Lord Macnaghten, in *Lloyd* v. *Grace*, [1912] A.C. 738, says:—

> The only difference, in my opinion, between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

The English law and the law of the Province of Quebec are practically identical upon the question of agency or mandate. Is not also, in the result, the present case an instance of the application of the rule that when one of two innocent persons must suffer, the person who renders it possible for the wrongdoer to do the wrong, by reason of the trust he reposed in the wrongdoer, must suffer rather than the person who suffers from the agent having that opportunity? The person who, by trusting the agent, makes his fraud possible, is to suffer rather than the person who has no relation to the agent. See Lord Macnaghten's judgment in *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A.C. 173, and *Fry* v. *Smellie*, [1912] 3 K.B. 282, at 295.

The Crown, relying on sec. 167, ch. 32, R.S. 1886, as amended by 51 Vict. ch. 14, sec. 43, and 52 Vict. ch. 14, sec. 13 (now sec. 264, R.S. 1906, ch. 48) contends rightly that the burden of proof that the proper duties payable upon the goods mentioned in the information have been paid and that all the requirements of the Customs Act with regard to the entry of these goods have been complied with and fulfilled—lies upon the defendant company, whose duty it was to comply with and fulfil the same.

It is found for the purpose of this case, that the duties claimed upon the goods in question herein, with the exception of the payments made since the beginning of the action, which will be adjusted after the question of liability has been finally determined, have not been paid or satisfied. On this branch of the case it is contended, that it is not a question of agency, as to whether a principal directed his agent to do a given thing which the latter did not do; but the question is that the goods of the defendant were passed through the customs without being entered or declared, and the defendant, whether it had an agent to do this class of work or not, is liable for the duties remaining actually unpaid upon the goods which were so fraudulently passed through the Customs. The onus is upon the defendant

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to shew the duties were paid; failing to do so it is liable under the above mentioned sec. 167.

The plaintiff cited in support of this contention the case of *Hendricks* v. *Schmidt*, 68 Fed. Rep. 425, wherein the headnote reads as follows:—

In respect to a single consignment of goods covered by a single entry, the lien of the government for payment of the whole duties attaches to each and every part thereof; and where the whole consignment is warehoused under bond, and parts of it are fraudulently withdrawn without payment of duties, the collector is entitled to hold the remainder until the duties on the entire consignment are paid, and is not bound to surrender the same upon tender of the amount of duties payable upon that part alone.

To constitute a payment of duties upon any particular consignment of goods, there must be an intent, both on the part of the importers and of the collector, to apply the money to that consignment. Held, therefore, that where a cheque was given by the importers to an employee with directions to pay the duties upon a particular consignment, but he absconded with the same, and it afterwards came into the hands of the collector, and was applied by him to the payment of duties upon a different importation, this was not a payment of the duties upon the former consignment.

The defendant cited, on the question of agency, the case of *Erb* v. *G.W.R. Co.*, 5 Can. S.C.R. 179, but this case must be distinguished from the present one, inasmuch as the fraud was committed by a member of the firm benefiting by the fraud. This is what Ritchie, C.J., says, at page 189 of that case:—

I fail to see how such wilful fraud committed by T. Brown & Co. through their partner Carruthers, on plaintiffs, with whom they were dealing, can be considered an act within Carruthers' agency.

The defendants further cited the case of the *City Bank* v. *Harbour Commrs. of Montreal*, 1 L.C.J. 288, but there is hardly any analogy between that case and the present one. However, as has already been said, the authorities upon this subject have been recently clearly and ably disentangled and reviewed up to the present date by the House of Lords, the highest tribunal in the kingdom, in the leading case of *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 738, and this Court is bound to follow that case.

There will be judgment in favour of the plaintiff for the amount of the duties due upon the goods mentioned in the information herein, subject, however, to the payments made on account since the institution of the action. Failing to agree in the adjustment of the amount actually recoverable against the defendants, the parties will have leave to apply to the Court for further directions upon these matters. The whole with costs in favour of the plaintiff.

Judgment for the Crown.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, R. M. Meredith, Magee, and Hodgins, JJ.A. January 27, 1913.

1. NEW TRIAL (§ III B—16)—VERDICT — ULTIMATE NEGLIGENCE—SUFFICIENCY OF FINDINGS TO SUSTAIN.

In a personal injury action arising from a street car colliding with a rig where the findings of the jury were in effect that the negligence of the defendants' motorman and that of the plaintiff were concurrent and simultaneous negligence of similar character by both parties and that there was not any new negligent act by the defendant in addition to its first act of negligence, verdict was properly for the defendant and will not in that respect be disturbed.

[*Herron* v. *Toronto R. Co.* (No. 1), 6 D.L.R. 215, reversed.]

2. NEGLIGENCE (§ I A—3)—AS BASIS OF ACTION—CONCURRENT NEGLIGENCE.

In an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, the mishap, in which the injury was received, would not have occurred.

[*Herron* v. *Toronto R. Co.* (No. 1), 6 D.L.R. 215, reversed.]

3. STREET RAILWAYS (§ III C—42)—COLLISION WITH VEHICLE—ULTIMATE NEGLIGENCE.

In a personal injury action arising from a street car colliding with a rig, where both the plaintiff and the defendants' motorman were guilty of negligence, each in not seeing the danger and avoiding the injury of a collision, if it appears that when the motorman first saw the impending danger it was too late to prevent the injury, the plaintiff's action fails.

[*Herron* v. *Toronto R. Co.* (No. 1), 6 D.L.R. 215, reversed.]

4. NEW TRIAL (§ III B—15)—JURY FINDINGS—UNCERTAINTY—CURING OF CONTRADICTORY WRITTEN ANSWERS, BY VERBAL CORRECTION IN OPEN COURT.

Where a jury's original written findings of answers to questions submitted are inconsistent, and, in an answer to an enquiry by the trial judge, the jury orally explains and harmonizes the various answers in open court, the result from this course is, that the earlier written findings are displaced *pro tanto* by the final verbal findings, and the inconsistency of the findings may thereby be cured.

[*Herron* v. *Toronto R. Co.* (No. 1), 6 D.L.R. 215, reversed.]

Statement

ACTION by William Alfred Herron for damages for personal injuries sustained by him in a collision between one of the defendants' electric street cars and a vehicle in which the plaintiff was driving, at the junction of Margueretta and Dundas streets, in the city of Toronto.

Upon the answers of the jury to questions submitted to them, Meredith, C.J.C.P., before whom the action was tried had directed judgment to be entered for the defendants, dismissing the action with costs; and from that judgment the plaintiff appealed to a Divisional Court of the High Court of Justice, which allowed the appeal and ordered a new trial: *Herron* v. *Toronto R. Co.* (No. 1), 6 D.L.R. 215, 28 O.L.R. 59, 14 Can. Ry. Cas. 124.

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The jury's answers to the questions were as follows:—

"Q. 1. Was the motorman guilty of negligence? A. Yes.

"Q. 2. If so, of what negligence? A. By not applying the brakes when he first noticed the plaintiff heading across the tracks.

"Q. 3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"Q. 4. If he could, in what respect was he negligent? A. In not seeing he had sufficient time to cross to the north side of the tracks in safety.

"Q. 5. Was the accident caused (a) by the negligence of the motorman? (b) or by the negligence of the plaintiff? (c) or by the negligence of both? A. Both.

"Q. 6. Could the motorman, after he saw the plaintiff was about to drive across the tracks, by the exercise of reasonable care, have avoided the accident? A. No.

"Q. 7. If he could, of what negligence was he guilty? A. In waiting until too late before applying the brakes.

"Q. 8. At what sum do you assess the plaintiff's damages? A. $800."

HIS LORDSHIP: Your answer to the 6th is inconsistent with the answer to the 7th.

Mr. Dewart (counsel for the defendants): I submit not.

HIS LORDSHIP: Plainly so. You find they are both guilty of negligence, and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

FOREMAN OF THE JURY: He was too near to the man in the rig to stop to avoid the accident.

HIS LORDSHIP: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or they are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all these answers. Just state generally what you think was the position of the parties and the negligence of both.

FOREMAN: According to the evidence, he had not a chance to do anything but what he did.

HIS LORDSHIP: Then you should have answered this 7th question—you should not have answered the way you did—"he was negligent in not applying the brakes"—because that means that, after he became aware that the plaintiff was in danger, he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

FOREMAN: We mean the contrary—that he could not have done it in the time.

HIS LORDSHIP: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

FOREMAN: We said he could not have avoided the accident when he noticed it.

HIS LORDSHIP: Then the answer to the 7th should be struck out; because you say, in effect, that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

The jury then retire, and after some time return again to the court-room. Statement

HIS LORDSHIP: The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car That is the effect of it?

THE FOREMAN: Yes.

HIS LORDSHIP: Mr. MacGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the street railway company. I cannot help it.

MR. MACGREGOR asks for a stay.

HIS LORDSHIP: I had not observed that the jury had struck out the "no" in answer to the 6th question. But I have asked them if their idea was, that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care, have prevented the accident. They said that was their view. I will give you a stay.

The defendants appealed to the Court of Appeal from the order of the Divisional Court.

The appeal was allowed and the action dismissed.

H. H. Dewart, K.C., for the defendants. The evidence shewed that the plaintiff, in crossing Dundas street as he did, was violating the city by-law with reference to the direction that traffic should take; and, therefore, coming from a point and in a direction from which the motorman would not expect him. The plaintiff also, by driving as he did, failed to face the approaching car, which would have enabled him to appreciate any impending danger. The breach of this by-law clearly contributed to the happening of the accident. The finding of the jury was a finding of contributory negligence, and against any suggestion of ultimate negligence on the part of the motorman. This finding should not be disturbed. The finding of the jury that the motorman's negligence consisted in not applying the brakes when he first noticed the plaintiff, negatives all other grounds as to sounding the gong, etc., which were urged by the plaintiff and laid before the jury in the charge of the learned trial Judge: *McGraw* v. *Toronto R. W. Co* (1908), 18 O.L.R. 154. The judgment of Riddell, J., in the Divisional Court, is right and should be upheld: *Jones* v. *Toronto and York Radial R. W. Co.*, 25 O.L.R. 158. Argument

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Alexander MacGregor, for the plaintiff. The jury's findings establish a conclusive case of actionable negligence sufficient to entitle the respondent to recover: *Toronto R. W. Co.* v. *Gosnell* (1895), 24 S.C.R. 582; *Halifax Electric Tramway Co.* v. *Inglis* (1900), 30 S.C.R. 256; *Milligan* v. *Toronto R.W. Co.* (1908), 17 O.L.R. 530; *Toronto R.W. Co.* v. *King*, [1908] A.C. 260. In particular, the jury intended that their answer to question 2 should refer to the third ground of negligence put to the jury by the trial Judge; and that negligence was subsequent to any alleged negligence of the plaintiff. There was, as the charge clearly indicates, and as the Divisional Court specially held, ample evidence warranting a verdict for the plaintiff. The plaintiff is, at least, entitled to the new trial directed by the Divisional Court: *Hanly* v. *Michigan Central R.W. Co.* (1907), 13 O.L.R. 560; *Cobban* v. *Canadian Pacific R.W. Co.* (1895), 26 O.R. 732; *Hinsley* v. *London Street R.W. Co.* (1907), 16 O.L.R. 350; *Brenner* v. *Toronto R.W. Co.* (1907), 15 O.L.R. 195, *per* Osler, J.A., at p. 198; *London Street R.W. Co.* v. *Brown* (1901), 31 S.C.R. 642, at p. 651; *Jones* v. *Canadian Pacific R.W. Co.* (1912), 3 O.W.N. 1404. A second court of appeal will not interfere with a conclusion on the facts successively reached by the trial Judge and a Divisional Court: *Grand Trunk R.W. Co.* v. *Weegar* (1894), 23 S.C.R. 422. There was not, as the appellants contend, clear and ample evidence for the finding by the jury of contributory negligence of the respondent: *Rowan* v. *Toronto R.W. Co.* (1899), 29 S.C.R. 717; *The Bernina* (1887), 12 P.D. 58, at p. 63; *Wakelin* v. *London and South Western R.W. Co.* (1886), 12 App. Cas. 41; *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Grand Trunk R.W. Co.* v. *Hainer* (1905), 36 S.C.R. 180, *per* Davies, J., at p. 186, citing *Barry R.W. Co.* v. *White* (1901), 17 Times L.R. 644; *Wallingford* v. *Ottawa Electric R.W. Co.* (1907), 14 O.L.R. 383. It is not open to the appellants to set up the plaintiff's alleged violation of a city traffic by-law; for "the rule of the road does not apply as between a street car and a waggon:" *per* Armour, C.J.O., in *Balfour* v. *Toronto R.W. Co.* (1901), 5 O.L.R. 735, at p. 739, citing Booth's Street Railway Law, sec. 302. Such by-law, even if it does apply, was not properly proved at the trial. Further, as the plaintiff was going north when struck, he had, under the very by-law invoked, the right of way over the west-bound car that ran him down, and any alleged violation of that by-law, by reason of the plaintiff facing west, instead of east, was over when the collision occurred. The case of *McGraw* v. *Toronto R.W. Co.*, 18 O.L.R. 154, cited by the appellants, is clearly distinguished from the present case. There, as in all other cases where the rule in *Andreas* v. *Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1, has been applied, the plaintiff's evidence was very weak. Here, there was misdirec-

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tion to the jury on the evidence as to whether or not the gong was rung; and this misdirection, which, of itself, is a ground for new trial: *Turner* v. *Burns* (1893), 24 O.R. 28; was promptly objected to by the plaintiff's counsel, but such objection was overruled. It would be doing the injustice that Garrow, J.A., stated, in the *McGraw* case, should not be done, if the rule in *Andreas* v. *Canadian Pacific R.W. Co.* were applied here. There was, too, misdirection by the learned trial Judge on the law as to the motorman's duty, in this remark: "He is in duty bound, *as soon as he discovers* that a man has placed himself in danger, to try to avoid injury to him in every way that is practicable, with the appliances at his command." All reference to the motorman's duty to be on the look-out is omitted. This same omission can be traced all through the charge. There is no direction whatever for the jury as to what the motorman, in course of a reasonable look-out, ought to have seen. Viewing the evidence in the light of the criterion proposed by Garrow, J.A., in *Jones* v. *Toronto and York Radial R.W. Co.*, 25 O.L.R. 158 (which Riddell, J., applies in his dissenting judgment in this case), the plaintiff is entitled to recover.

Dewart, in reply.

Meredith, J.A.

January 27, 1913. MEREDITH, J.A.:—Unless the general rule that a verdict once found ought to stand is to be modified so as to except a verdict for the defendants in such a case as this, the verdict in this case ought to stand—a second trial ought to be out of the question.

It would be very hard to put in plainer words than the words which were used in this case, the final, and second time carefully considered, findings of the jury, which I shall now read:—

The jury then retire, and after some time return again to the court-room.

HIS LORDSHIP: The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car. That is the effect of it?

THE FOREMAN: Yes.

The same thing too was made equally plain before they were sent out a second time. My excuse for taking up the time needed in reading the account of it, too, lies in the fact that a new trial has been granted, because "what took place . . . with reference to their"—the jury's—"answers . . . leaves it uncertain . . . as to what they meant."

That which I have read, and this which I now read, is what took place:—

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HIS LORDSHIP: Your answer to the 6th is inconsistent with the answer to the 7th.

MR. DEWART: I submit not.

HIS LORDSHIP: Plainly so. You find they are both guilty of negligence, and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

"FOREMAN OF JURY: He was too near to the man in the rig to stop to avoid the accident.

HIS LORDSHIP: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or they are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all these answers. Just state generally what you think was the position of the parties and the negligence of both.

FOREMAN: According to the evidence, he had not a chance to do anything but what he did.

HIS LORDSHIP: Then you should have answered this 7th question—you should not have answered the way you did—"he was negligent in not applying the brakes"—because that means that, after he became aware that the plaintiff was in danger, he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

FOREMAN: We mean the contrary—that he could not have done it in the time.

HIS LORDSHIP: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

FOREMAN: We said he could not have avoided the accident when he noticed it.

HIS LORDSHIP: Then the answer to the 7th should be struck out; because you say, in effect, that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

The word "no" in the answer to the sixth question has been erased, and it may be that was done by the jury when they went back to reconsider their verdict; but how could that, in view of all that was said in open court as to their findings, be any sort of excuse for any sort of misunderstanding of their meaning, and for declining to give full effect to it? To contend that the jury have not sufficiently expressed their mind on this question would, to my mind, be but useless, tiresome quibbling.

We know beyond peradventure what the actual findings of the jury were; and, knowing that, it is our obvious duty to give effect to them, as was done at the trial, unless they are shewn

to be insufficient to support the judgment directed, there, to be entered in the defendants' favour.

Both were guilty of negligence, each in not seeing and avoiding the danger and the injury it might cause the other; and, when the motorman first saw the danger the plaintiff's own negligence put him in, it was too late to prevent the injury.

In these circumstances, how can there be any but the one result—dismissal of the action?

Two things are suggested as creating difficulties: (1) that the question of ultimate negligence was not properly dealt with at the trial; and (2) that the answer to the second question is inconsistent with the final findings.

In regard to the first point, it is said that the jury should have been required to find, not whether, after seeing the danger, the motorman could have avoided the injury, but whether, after he should have seen it, he might.

This contention seems to me not only to be erroneous but to be based upon a misconception of the facts of the case, as, in like manner, is the second contention. The findings, when the real facts are looked at, are entirely consistent and right in law, as well as in fact. When the motorman first saw, or might have seen, the plaintiff, there was no reason why he should expect that the man would negligently run into danger and possible death; it is not ordinarily a motorman's duty to stop his car at the sight of every one coming towards the tracks; if it were, he would never get on; under ordinary circumstances, he may act as if the on-comer will not put himself, as well as the motorman and all those upon the car, in needless jeopardy. When the motorman saw that the plaintiff was negligently going on, so that a collision was probable, a new duty arose, but it was then, as the jury have found, too late to prevent the injury by anything he could do. The jury, in their first finding, said that the motorman, when he first saw the plaintiff driving towards the tracks, should have applied the brakes, though there was nothing to indicate danger, nothing to indicate that he would not let the car pass before attempting to cross if he were really going to cross; and so there was no apparent danger until a later moment, when it was too late.

On what principle, or with what logic, can it be contended that ultimate negligence in such a case as this can be something prior to knowledge of the danger?

It is a motorman's primary duty to be upon the lookout for persons who may possibly put themselves in danger, and to warn them by sounding the gong; and when, in the extremely few, comparatively, cases that that proves ineffectual and danger is apparent, a new duty arises, a duty to avoid injury to a negligent person or even a trespasser, in those circumstances,

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if reasonable efforts can prevent it. The duty to have the car under control, to apply the brakes as a general measure of precaution, was a part of the motorman's first duty; and his failure to do that was set off by the plaintiff's neglect of his primary duty to do the same thing with himself and his horse and carriage; as well as to keep a look-out and keep out of harm's way. Just as soon as the motorman could have seen the plaintiff, the plaintiff could have seen the car; it was quite as much the primary duty of the one as of the other to see the danger at the earliest moment possible, and not only to see the danger, but, each before that, to see the vehicle of the other and to take all reasonable means to avoid a collision; this was all the primary duty of each; forgetting these things is largely accountable for a supposed haziness on the subject of ultimate negligence.

Ultimate negligence was very properly negatived in this case by the jury, in the plainest and most unmistakable language; and there is no inconsistency in the findings; whilst, if there had been, the earlier written findings must, of course, have been displaced by the final verbal findings.

I would allow the appeal, and restore the judgment at the trial.

Magee, J.A.

MAGEE, J.A.:—The jury have not found that there was any original excessive speed of the defendants' street car or any failure to give warning. The only negligence of the defendants' motorman that the jury have found, in any of their original or ultimate written answers, or in any of the verbal answers or statements of their foreman, is that mentioned in the answer to the second question, and that mentioned in the original answer, which they have struck out, to the 7th question.

To the 2nd question they answered that he was negligent "in not applying the brakes when he first noticed the plaintiff heading across the tracks."

To the 7th question their answer, subsequently struck out, was that he was guilty of negligence "in waiting until too late before applying brakes."

Leaving out of consideration all other charges of negligence as being in effect negatived by the jury, and confining oneself to the application of brakes, there were two periods at which, according to the evidence for the plaintiff, there would be negligence of the motorman. One would be at or after the moment when the motorman first actually saw or could have seen the plaintiff heading in such a direction as indicated his intention to cross the tracks. The other would be the later time, when he could see that the plaintiff was actually about to drive across the north track.

At the first period, it would be the motorman's duty to

approach with care, as he could not know that the plaintiff would not stop or change his course before crossing, and to apply the brakes so as to have his car under reasonable control until it became reasonably clear that the plaintiff was likely to attempt to cross.

The defendants do not attempt to shew that the motorman did not see the plaintiff as soon as the east-bound car passed and made it possible for the plaintiff to be seen by the motorman; and, so far as appears, no obstacle intervened, nor was the motorman's attention diverted; and no question really arises on the evidence as to whether or not the motorman could have seen him earlier than he did.

In his charge to the jury, the learned Chief Justice directed the attention of the jury to the two periods I have referred to; and their answers are, in my opinion, directed thereto.

In their first and second answers, the jury say that the motorman was negligent by not applying the brakes when he first saw the plaintiff heading across the tracks. That, I think, clearly refers to the first period and to the only and primary negligence of the motorman. In effect, the jury say that he was approaching possible danger without having the car under control.

The 6th question related to the later period of actual probable danger, when the motorman "saw the plaintiff was about to drive across the tracks;" and the jury, in their original answer, explicitly found that the motorman could not then, by the exercise of reasonable care, have avoided the accident. That there was no mistake in this written answer was made clear by the repeated statements of the foreman in court.

The 7th question—following the 6th—asked, "If he could, of what negligence was he guilty?" The jury must have misunderstood that question as referring to whatever negligence they found, and they answered it practically as they did the second question: "In waiting until too late before applying the brakes." When their attention was called to the apparent inconsistency of their 6th and 7th answers, they struck out this answer; so that there is no finding of negligence after the actual apparent danger.

As they found the plaintiff guilty of contributory negligence —which negatived the negligence of the motorman in approaching without brakes applied—this striking out of the 7th answer would have ended the matter and entitled the defendants to judgment. But, unfortunately, the jury also struck out their answer to the 6th question, absolving the motorman of the later negligence.

Had nothing taken place in court after they brought in these final written answers, the plaintiff would have been en-

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titled to a new trial, inasmuch as he had a right to a clear finding on the question of ultimate negligence. But, after they had thus struck out both the 6th and 7th answers, they, through their foreman, verbally assented to the summary by the Chief Justice of their findings: "What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car." This was a repetition of what had twice before been said by the foreman in court; and so it should be taken as an answer to the 6th question just as clearly as if written.

The judgment of the learned Chief Justice was the only one to be given on the answers, and I do not see any reason to suppose that the answers did not fairly represent the minds of the jury.

That judgment should, I think, be restored, and the appeal allowed.

Hodgins, J.A.

HODGINS, J.A.:—I am unable to see that there is any real difficulty arising out of the answers of the jury—I agree with Riddell, J., that it is not the tentative but the final answers of the jury that are to be considered; and, consequently, that we must, in this case, look to the answers given after the jury returned the second time. But I would add this, that those final answers must be read in the light of the jury's previous answers, and the discussion which preceded their final deliverance. So treated, the case is narrowed down to this, that both the plaintiff and the motorman were guilty of negligence: the plaintiff "in not seeing he had sufficient time to cross to the north side of the tracks in safety" (Q. 4); and the motorman "by not applying the brakes when he first noticed the plaintiff heading across the tracks" (Q. 2); that the plaintiff could, by the exercise of reasonable care, have avoided the accident (Q. 3). The answers to the other questions were struck out by the jury themselves before delivering their final answers. This was after they had told the trial Judge that, "according to the evidence, he (the motorman) *had not a chance to do anything but what he did.*"

The remark of the foreman to the trial Judge, after handing in the last answers, seems also to me to put it beyond doubt. The trial Judge, after reading the answers, says: "The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, *after he saw the plaintiff was in danger,* could not have stopped the car. That is the effect of it?" And the foreman answered "Yes."

From the above it is clear that there was no negligence at or just before the impact, and that the jury had distinguished between the time when the motorman saw the plaintiff heading across the track, when he could have applied the brakes, and

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the time when, as they say, he had not a chance to do anything but what he did.

The trial Judge had, in his charge, asked them specifically: "Did the motorman see the plaintiff in time to have stopped his car and prevented the accident? Did he delay, and was he negligent, if he did delay, in sounding his gong or in applying his brakes and trying to stop the car the moment he saw the plaintiff about to cross?" And later he said: "Assuming you find the motorman was negligent . . . then, after he saw, or ought to have seen, that the plaintiff was crossing the track, and that there would be a collision unless one or other of them stopped, was the motorman guilty of negligence in not doing what it was in his power to do, if there was anything in his power to do, to have stopped the car and prevented the collision."

To my mind, the effect of the answers of the jury was to hold the motorman guilty of the negligence mentioned in the earlier part of the charge, and to absolve him of that mentioned in the latter part.

Counsel for the plaintiff suggested that the jury should have been asked whether the motorman was negligent when he saw or ought to have seen the plaintiff; and the Divisional Court speak of the possible negligence of the motorman in not applying the brake at an earlier stage, when he might have stopped the car.

I think that both those points are well covered by the charge and by the answers actually given by the jury, and I cannot bring myself to hold that any question of "ultimate negligence" is raised. If it can, it must only be of the kind suggested by Mr. Justice Anglin in *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423, at p. 428: "Assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?"

Upon this point I prefer the views on the subject of ultimate negligence and contributory negligence expressed by Mr. Justice Duff in the *Brenner* case when before the Supreme Court of Canada (1908), 40 S.C.R. 540, at p. 556: "The principle is too firmly settled to admit, in this Court, any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury com-

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plained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred."

This is the same view, as it appears to me, as is expressed in more concrete form in *Sim* v. *City of Port Arthur* (1911), 2 O.W.N. 864, by Mr. Justice Middleton. See also *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 23 O.L.R. 331, 25 O.L.R. 158; *Rice* v. *Toronto R.W. Co.* (1910), 22 O.L.R. 446.

My conclusion is, that the negligence of the motorman as found and that of the plaintiff were "concurrent and simultaneous negligence of similar character by both parties," and that the jury have negatived any new negligent act of the defendants in addition to their first act of negligence.

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

Garrow, J.A.
Maclaren, J.A.

GARROW and MACLAREN, JJ.A., concurred.

Appeal allowed.

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REX v. NESBITT.

Ontario Supreme Court, Middleton, J. February 4, 1913.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II E—25)—DESCRIPTION OF OFFENCE—EXTRADITION.

Where the accused has been brought from a foreign country, under extradition proceedings, to answer an alleged extraditable crime, an indictment against him which does not shew an extraditable crime cannot be sustained until after the accused has been returned to or had the opportunity of returning to the foreign country from which he was extradited (Extradition Act, R.S.C. 1906, ch. 155, sec. 32).

2. INDICTMENT, INFORMATION AND COMPLAINT (§ II E 3—49)—SUFFICIENCY —OFFENCES BY BANK OFFICERS.

A variance in charging the offence of making a wilfully false statement in a bank return as fraudulently making such statement will not be permitted where it is necessary, in order to sustain the indictment under extradition laws, that the offence should be one of fraud, and the statute under which the prosecution is based does not make fraud an essential ingredient of the offence thereunder.

3. EXTRADITION (§ I—6)—INTERNATIONAL — IMMUNITY FROM PROSECUTION FOR DIFFERENT OFFENCE.

The president of a bank, on extradition from the United States under a treaty (convention of July 12, 1889), permitting extradition for "fraud" by a banker, when made criminal by a statute, cannot be held under sec. 153 of the Bank Act, R.S.C. 1906, declaring penal the making of any "wilfully false or deceptive statement" in a bank return required by law to be made to the Minister of Finance of Canada, fraud not being an essential ingredient of such statutory offence.

Statement

MOTION by the defendant to quash several indictments preferred against him at the Toronto Winter Assizes, 1913.

Middleton, J.

January 31. The motion was heard by MIDDLETON, J., at the Assizes.

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H. H. Dewart, K.C., for the accused.
W. G. Thurston, K.C., for the Crown.

February 4. MIDDLETON, J.:—This motion was heard before me on the 31st ult., and, at the conclusion of the argument, I gave judgment quashing the indictments; saying that my reasons for so doing would be given later. Afterwards, on the same day, I was informed that the accused had died. Nevertheless, I think I ought formally to state my reasons for the action taken.

The accused was president of the Farmers Bank of Canada, now in liquidation; and, after having left Canada, he was extradited from the United States upon several charges of having made false returns to the Minister of Finance under the Bank Act, R.S.C. 1906, ch. 29.

The provision of the Bank Act applicable is sec. 153, which renders penal 'the making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank.''

The Extradition Treaty (see R.S.C. 1906, ch. 155) schedules a list of the extraditable crimes. The Crown relied for extradition upon number 9, which is as follows: "Fraud by a bailee, banker, agent, factor, trustee, or by a director or member or officer of any company, which fraud is made criminal by any Act for the time being in force."

It is said by counsel for the accused that the offence of "wilfully making a false return" is not "fraud by a banker," within the Extradition Treaty; and that the Crown cannot improve its position by charging, as is done in these indictments, that the false return was fraudulently made.

With this contention I agree. The Extradition Treaty does not purport to make every offence committed by a banker against the law of the land an extraditable offence, but only fraud which "is made criminal by any Act for the time being in force." This prevents the Crown from resorting to the device of charging an offence of which fraud is not an essential ingredient and adding to that charge the word "fraudulently."

The offence with which the accused might be charged is the statutory offence of *wilfully* making a false return. The Crown has substituted for the word "wilfully" the word "fraudulently;" and so, for the purpose of bringing the matter within the Extradition Treaty, charges the accused with something differing from the statutory offence of which he may or may not have been guilty.

If this were an ordinary case, not complicated by the necessity of bringing the matter within the Extradition Act, the difference between the offence as defined by the Bank Act and that as charged by the Crown might be regarded as immaterial,

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or at all events as subject to an amendment; but where, as here, the use of the words is deliberate and in no way immaterial, the situation is wholly different.

The kind of fraud falling within the Extradition Treaty is that indicated by secs. 412 *et seq.* of the Criminal Code, R.S.C. 1906, ch. 146, which bear a general caption "Fraud and Fraudulent Dealing with Property." These sections, I think, point to the kind of thing which was intended to be made extraditable, *e.g.*, under sec. 413, "a director, manager, public officer," etc., who destroys any record or makes a false entry in a book of account, is guilty of an offence.

In sec. 415, any officer, clerk or servant who makes or concurs in making a false entry in a material particular in a security or document, with intent to defraud, is also guilty of an offence.

Under sec. 425, it is penal for a warehouseman to deliver a receipt for goods without receiving them.

Under sec. 426, it is penal to dispose fraudulently of merchandise upon which money has been advanced or security given by a consignee.

Under sec. 427, it is an offence to make a false statement in a receipt given under the Bank Act, or fraudulently to alienate property upon which such security is given.

These serve as illustration of the kind of fraud which is thus rendered punishable under the law to which the Extradition Treaty applies. It is not everything which is criminal or reprehensible that is intended to be included; for we find separately catalogued, forgery, larceny, embezzlement, obtaining money or securities by false pretences, robbery, threatening with intent to extort, and perjury—all more or less akin to fraud; which it would be unnecessary to catalogue separately if intended to be covered by the same general words.

Therefore, the indictments must be quashed, as they depart from the Bank Act and charge an offence different from that thereby created.

Indictments quashed.

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REX v. McDONALD.

Prince Edward Island Supreme Court. Trial before Fitzgerald, J., in Chambers. February 25, 1913.

1. INTOXICATING LIQUORS (§ III J—91)—TRIAL OF OFFENDER—ABSENT DEFENDANT—PLEA OF GUILTY BY COUNSEL.

As secs. 715 and 720 of the Criminal Code 1906, pertaining to the appearance of counsel at trial before a magistrate are made applicable by sec. 17 of the Prohibition Act, P.E.I., 1907, to prosecutions thereunder, counsel may appear and enter for an absent defendant a plea of guilty for a violation of the latter Act.

[*Rex v. Thompson*, 100 L.T.R. 970, and *Rex* v. *Montgomery*, 102 L.T.R. 325, referred to.]

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Fitzgerald, J.

MOTION for discharge on *habeas corpus*.

The motion was refused.

D. A. McKinnon, K.C., for prisoner.

FITZGERALD, J.:—In this case the prisoner is in jail for a breach of the Prohibition Act. He was convicted on the confession of his counsel, duly authorized, in open Court, he himself not being present. He now seeks for his discharge on the ground that counsel cannot plead guilty to an offence against that Act in the absence of the person charged.

The Prohibition Act, 1907 (P.E.I.), sec. 17, makes all the provisions contained in the Criminal Code, 1906, applicable to prosecutions under it. Sections 715 and 720 of this Code determine the position of counsel at the trial before magistrates of such offences. The first section permits full answer and defence of defendant by his counsel, solicitor, or agent; the second enacts that, on appearance of complainant and defendant

> either personally or by their respective counsel, solicitors, or agents, before the justice who is to hear and determine the complaint, such justice shall proceed to hear and determine the same.

Many authorities were cited before me, in some of which Canadian Judges apparently found a difficulty in coming to a conclusion. I am unable to see wherein lies this difficulty.

The sections of the Criminal Code quoted are taken from the Imperial statute, 11 and 12 Vict. ch. 43, and recent decisions in England have settled their meaning so clearly and intelligently that the point involved here is hardly open to question. I refer to *Rex* v. *Thompson*, 100 L.T.R. 970, and *Rex* v. *Montgomery*, 102 L.T.R. 325. Taken together these cases determine that so full and complete is the power given by these two sections to counsel to represent the person charged, that the presence of counsel in Courts prevents the magistrate from enforcing the appearance of the accused there, and that where there is a proper appearance by counsel, attorney, or agent, the justices are bound to hear and determine the same, and, on a plea of guilty, to convict the offender. This statement of the law appears to me so consonant with reason and justice that I have no hesitation in following it. The rule for *habeas corpus* will be discharged.

Habeas corpus denied.

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THE KING v. ASSESSORS OF FREDERICTON; Ex parte TIMMINS.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry and McKeown, JJ. February 21, 1913.

1. TAXES (§ II—95)—WHERE TAXABLE—RESIDENT — DEPUTY SHERIFF MOVING INTO COUNTY SEAT.

For the purposes of taxation, one becomes a resident of a town where, on appointment as deputy sheriff and gaoler, in order to discharge the duties of the office, he moved to the county seat, taking with him the necessary furniture to furnish the living apartments of the gaol, wherein he and his wife resided.

Statement

APPLICATION on behalf of Deputy Sheriff Timmins of York County to quash his assessment. The application was refused. The following were the grounds relied on by the applicant:—

1. Section 72 of the City of Fredericton Assessment Act, 1907, providing that a statement must be filed otherwise no appeal is allowed from assessment, does not apply to this case. The contention is, not that the applicant is over-assessed, but that he is not liable to any assessment in Fredericton.

2. John F. Timmins, the applicant, is not an inhabitant nor a resident of the city of Fredericton within the meaning of the City of Fredericton Assessment Act, 1907. He is an inhabitant of the parish of Queensbury, and has been such for some thirty years now last past, and has been in each year and is in this present year 1912 assessed in said parish as an inhabitant for parish and county rates, road and district school taxes, and has paid all such taxes.

3. Section 34 of the said Assessment Act does not apply to members of the Executive Government of the province nor to Government nor county officers:—See Exemptions, sec. 3, sub-sec. 11.

4. Deputy Sheriff Timmins being also gaoler of the county is necessarily obliged in the discharge of his duties to occupy the gaol, but this does not, it is submitted, make him an inhabitant of the city within the meaning of the Act:—see sec. 3, sub-sec. 11 of the Act.

J. W. McCready, shewed cause.

F. St. John Bliss, supported the order *nisi*.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is a case of assessment arising out of the City of Fredericton Assessment Act, 1907. The applicant is the deputy sheriff and gaoler of the county of York and in the year 1912 he was assessed as a resident of Fredericton in the sum of $31.35 distributed on personal property valued at $1,000, income at $1,000 less $300 exemption, and a poll tax of $5. It appears that the applicant had been for many years a resident of Queensbury, in the county of York, and in May last (1912) he was appointed deputy sheriff and gaoler. In the discharge of his duties as such it is necessary for him to occupy the living apartments of the county gaol which is situate in Fredericton. This he has done with his wife, who takes care

of the prisoners' rooms, the gaoler's office and the gaol generally. His wife acts as turnkey and in the absence of her husband, discharges his duties as deputy sheriff and attends to his duties as gaoler. In order to occupy the living apartments of the gaol the applicant brought there from the Queensbury home what furniture they required and a horse and carriage which he keeps for his own use.

The same points arise here as in *R.* v. *Assessors of Fredericton, ex parte Howe*, 11 D.L.R. 713, but not on the same facts.

The duties of the office of gaoler necessarily require him to live in the gaol and as he has accepted the office he and his wife have furnished the place with the necessary furniture, brought for the purpose from Queensbury. I do not see what more the man could do in order to establish a residence in Fredericton, and that is the only question involved.

This rule must be discharged with costs (as provided in sec. 80) to be paid by the said John F. Timmins and for the recovery of the same the registrar will deliver the bond filed with him on obtaining the rule to the city treasurer on request.

Order nisi discharged.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. February 21, 1913.

1. TAXES (§ II—95)—WHERE TAXABLE—RESIDENT—SHERIFF WITH HOME IN TOWN OTHER THAN COUNTY SEAT.

For the purposes of taxation, a sheriff became a resident of the county town, where the law required him to reside, and where he kept an office and spent a portion of his time, having a room in the gaol building and boarding with the gaoler during the time he was in the town, and also paying taxes there for two years without objection, notwithstanding the sheriff's family remained in a different town, on property owned by him, and where he spent a considerable portion of his time.

2. TAXES (§ I F 1—75)—EXEMPTION — NON-RESIDENT GOVERNMENT EMPLOYEE—SHERIFF.

For the purposes of taxation, a sheriff is not within the exemption of non-resident members of the executive government when employed within the city of Fredericton, in a government or county office, whose duties are necessarily performed therein, as provided by sec. 3 (11) of the Assessment Act of the city of Fredericton (N.B.) 7 Edw. VII. ch. 84, notwithstanding he retained a home with his family in a different town, where he spent a considerable portion of his time.

Statement

APPLICATION for *certiorari* to remove and quash an assessment by the Board of Assessors against Sheriff Howe of the county of York in the city of Fredericton for the year 1912.

The application was refused.

The following grounds were relied upon by the applicant:—

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Statement

1. Section 72 of the City of Fredericton Assessment Act, 1907, providing that a statement must be filed otherwise, no appeal is allowed from assessment, does not apply in this case. The contention is, not that the applicant is over-assessed, but that he is not liable to any assessment in Fredericton.

2. William T. Howe, the applicant, is not an inhabitant nor a resident of the city of Fredericton, within the meaning of the City of Fredericton Assessment Act, 1907. He is an inhabitant of the parish of Stanley and has been such for some forty years now last past, and has been in each year and is in this present year 1912 assessed for parish and county rates, road tax and district school taxes as an inhabitant of Stanley, and has paid all such taxes.

3. Section 34 of said Assessment Act does not apply to members of the executive government of the province nor to government or county officers. See "Exemptions," sec. 3, sub-sec. 11.

4. Sheriff Howe is a county official whose duties are necessarily performed in Fredericton. His actual residence is in Stanley. The fact that as sheriff he keeps an official office in the County Court House building in Fredericton, does not render him liable to taxation in Fredericton as an inhabitant.

An order for *certiorari* and an order *nisi* to quash the assessment had been granted by Barry, J., October 19, 1912.

J. W. McCready shewed cause.

F. St. John Bliss argued in support of the order *nisi*.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—The applicant is high sheriff of the county of York, having been appointed to that office in 1909. At that time he resided with his family on his farm in the parish of Stanley and his wife and family still reside there as their home. He has been assessed the year 1912 in the city of Fredericton for city taxes amounting to $15.85. Of this $5 is a poll tax and the balance is on an income of $1,000 less $300 exempted under sec. 3 of the Fredericton Assessment Act, to which I shall refer later on. The applicant denies his liability to be taxed in Fredericton on any amount and the assessment has been removed here with a view to its being quashed. The liability depends upon the construction to be placed on 7 Edw. VII. (1907) ch. 84, the City of Fredericton Assessment Act, 1907. The poll tax is assessed by virtue of sec. 28 of the Act which imposes a poll tax of $5 upon all male inhabitants of the city. Section 34 is as follows:—

> For the purposes of assessment, any person carrying on business or having any office or place of business or any occupation, employment or profession within the city of Fredericton, shall be deemed and taken to be and is hereby declared to be an inhabitant and resident of the said city and shall be assessed accordingly, provided that any person whose actual domicile is out of the city shall not be assessed on a poll tax within the city.

And sec. 3, which relates to "exemptions," provides in subsec. 10 as follows:—

> The income of all male inhabitants of the city of Fredericton, including those under the age of 21 years, and the income of females, shall be exempt from taxation, excepting on income exceeding $300 per annum, and in any such case the parties above named shall be taxable on all excess of income over and above $300 per annum. The provisions of this section shall not apply to the incomes of non-residents, persons or corporations doing business in the city, not paying poll tax.

That is to say, if I read those sections correctly, all persons who are actually non-residents, though liable to be assessed on income because of their carrying on business or having an office in the city, do not pay any poll tax, but they do not get the benefit of the exemption clause—sec. 3 (10)—but are assessed on the full income. The present assessment has been made on the basis of actual residence, the poll tax added and the exemption of $300 allowed. It is claimed that if this proved wrong the applicant though a non-resident, is by virtue of his having an office at Fredericton, liable under sec. 34 for the total income but not for the poll tax. As the tax rate is $1.55 on the hundred, this would reduce the applicant's taxes from $15.85 to $15.50, a difference of thirty-five cents. It does not seem necessary for a determination of this case to go into any prolonged discussion as to the precise meaning of the word "inhabitant" as used in this and other similar Acts. Parker, J., devoted some time to the subject in his judgment in *Rex* v. *Board of Assessors of Fredericton, ex parte Gordon* (1864), 11 N.B.R. 1, but seems to have arrived at no more satisfactory conclusion than that the word must be construed with reference to the context and that in itself it has no definite meaning. Ritchie, C.J., in *Ex parte Smith* (1874), 15 N.B.R. 147, also discussed the same question, but did not make it the basis of his judgment. In *Hatheway* v. *Cumming* (1864), 11 N.B.R. 161, the plaintiff who was then a member of the provincial government and chief commissioner of public works, was claiming exemption from taxation in Fredericton on his official salary. This was before members of the executive government were exempt from taxation as they are now. This Court held that he was not an inhabitant of the city and was not liable, as a non-resident carrying on business in Fredericton, to be rated on income. The chief commissioner in that case seems to have divided his time between Fredericton so long as was necessary for the discharge of his public duties there and his residence in St. Mary's in much the same way as the present applicant divides his time between Fredericton and his family residence at Stanley. The question in *Jones* v. *City of Saint John* (1899), 30 Can. S.C.R. 122, involved a question of domicile, and although the two questions of domicile residence are in many respects alike there are

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distinctions. There must be a change of residence to establish a change of domicile but there may be a change of residence without involving any change of domicile. There is no question of domicile involved in this application; it is merely a question of inhabitancy or residence, for I think the true view of the Act is that the two words are used interchangeably. So far as I have examined the Act the word "domicile" only occurs once. In sec. 34 provision is made for taxing persons who carry on business in Fredericton and for the purpose of assessment such persons are deemed to be inhabitants and residents. Then follows this proviso, "that any person whose actual domicile is out of the city shall not be assessed on a poll tax within the city." These words "actual domicile" can have no other meaning than "actual residence" as distinguished from the constructive residence created by the section for the purposes of assessment. Put in simple language the provision is that a non-resident pays no poll tax though he is liable to the general assessment if he carries on business or has an office, etc., within the city. Again by sec. 64 provision is made for correction of errors and omissions in the assessment roll, and among the list is this, "if any person takes up his residence in the said city of Fredericton within three months after filing of the assessment roll." The simple question then is, has the applicant taken up his residence in Fredericton, for if he has, the omission of his name from the assessment roll would be an error which the assessors are authorized to correct. The question is one of fact to be settled by the acts of the sheriff viewed in the light of the attendant circumstances. Were I to act solely on the sheriff's affidavit on which this application is based, the question of residence would be easily disposed of because he has made the following statement, "That I never was at any time and am not now a resident nor inhabitant of the city of Fredericton and that I never was and am not now domiciled within the said city within the meaning of the City of Fredericton Assessment Act, 1907, nor otherwise." Later on I shall refer to this affidavit, but for the present I shall deal with some facts as to which the sheriff was competent to speak. It seems that in April, 1909, he was appointed sheriff of the county of York. He accepted the position and has continued to occupy it ever since, having been reappointed in the years 1910, 1911 and 1912. At the time of his appointment in 1909 he was living with his family on his farm in the parish of Stanley in the county of York. In his affidavit he makes the following statement: "That since my appointment as high sheriff of York county, in the ordinary and regular discharge of my duties as such it is necessary and expedient for me to keep an office in Fredericton, which office is provided by the municipality of the county of York in the County Court House building, and it is necessary for me in the

discharge of my duties as such sheriff to be in Fredericton a considerable portion of the time and while in Fredericton I board at the county jail, paying for such board for such days only as I am actually there, but I have not become and do not intend to become a resident or inhabitant of Fredericton and I never intended to change and have not changed my domicile and residence from the said parish of Stanley, where my home has been for upwards of forty years now last past, and now is, and where my wife and family reside with me. That since my appointment as sheriff I have continued my occupation as farmer as I theretofore had done, spending some days in each week and generally Sundays at my home in Stanley aforesaid."

The sheriff is by law compelled to reside at Fredericton. There seems to be no question that he knew this when he was appointed and that he accepted the office with full knowledge of that fact. It seems that the city authorities acting on the assumption that the sheriff had become a resident of the city, assessed him under this same Act for the years 1910 and 1911 on his income, and these taxes he paid without objection although he is now seeking to have the money returned on the ground that when he paid them he was "ignorant of his legal status in regard thereto."

The question of residence, as distinct from the question of domicile, depends mainly, perhaps altogether, upon the acts of the party. If what the sheriff has done and has been doing for the last three years, and is doing now, constitute a residence in Fredericton so as to render him liable to assessment on his income, any intention to avoid any such result will not exempt him. Actual facts must always win in competition with mere expressed intention. If, however, the question of residence involved a question of intention, I should think we were taking at least a defensible course if we referred the defendant's actions to an intention to discharge the obligation as to residence subject to which he accepted the office, rather than to a deliberate intention on his part to ignore the obligation apparently for the sole purpose of escaping the small tax for which residence would make him liable. What are the facts? In April, 1909, now nearly four years ago, the applicant accepted the important and responsible office of sheriff of York county from the Government. He did so with full knowledge that by law, as such sheriff, unless otherwise permitted by the Government, he was compelled to reside at Fredericton, and to keep an office there for the purposes of his official work. He was re-appointed in 1910, again in 1911 and a third time in 1912 and on each of these occasions by accepting the office, he manifested in an unmistakable manner his preference for the office with residence at Fredericton to a residence at Stanley without the office. He knew in 1909 by information, what he learned by actual experi-

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ence in the following years, that the duties of his office and his work in connection with it must occupy a large portion of his time and might occupy the whole of it. He might have applied to the Government for permission to reside out of Fredericton but nothing of that kind was done. He secured a room and board and lodging with his deputy, the jailer of the county, where he lived and still lives while in Fredericton. So with reference to the voluntary payment of the taxes for 1910 and 1911. What is the applicant's misapprehension of his legal status which he now alleges as the reason for paying them? He knew all the facts then as well as he does now. He knew that he was taxed on income as a resident of Fredericton and he knew then as well as he knows now whether he was actually residing there or not as he had undertaken to do and he knew what his intentions were, whatever they were worth, as well as he does now. And yet with this knowledge he paid the taxes for two years—without objection. He may have been mistaken as to the exact ground of his liability, but that did not alter the fact as to residence. He knew that he was taxed as a resident on income and he must have known then as well as now whether he had done what the law required of him as to residence, for the Assessment Act gives no statutory meaning to the word resident. Acts like this do not of course conclude the question, but when a public officer is under a statutory obligation to reside at Fredericton and is taxed there as a resident on income, and with full knowledge of these facts, voluntarily pays the tax it is a strong reason for saying that he had in fact become a resident of Fredericton and so considered himself.

In *Doucet* v. *Geoghegan* (1878), 9 Ch.D. 441, the question involved was whether the testator, who was a native of France, had acquired an English domicile. Among the facts relied on as supporting the alleged change were these: He was a Roman Catholic but he had married two wives in England, both of whom were Protestants, and the marriages took place in a Protestant church. He did not take any of the steps required by French law to render these marriages legal in France. He made a will describing himself as of St. John's Wood and of Regent street, in which he appointed a testamentary guardian to his children and disposed of his property, notwithstanding he had children, "in a way," to quote Sir George Jessel, "every Frenchman knows is repugnant to French law." James, L.J., in expressing his opinion in favour of the English domicile, says (at p. 457):—

> Both his marriages were acts of unmitigated scoundrelism if he was not a domiciled Englishman;

and (at p. 458):—

> I wish to add that I am disposed to think that when the testator entered the English Church and declared that he knew of no impediment

to his lawful marriage, he must be taken to have made a solemn declaration that he had an English domicile.

I shall refer to one more circumstance. At my request the deputy registrar has made a search of the records of this Court for the years 1910, 1911 and 1912 in order to ascertain the number of writs filed during that period which had been personally served by Sheriff Howe. He had reported to the Court that there are only nine. The small number is due, I suppose, to the fact that such services are generally made by a deputy. These affidavits are dated as follows: September 21, 1910; November 18, 1911; December 5, 1911; May 7, 1912; May 15, 1912; May 25, 1912; May 15, 1912; August 26, 1912, and October 28, 1912. In all of these affidavits the sheriff describes himself as "of the city of Fredericton in the county of York." The last affidavit, sworn to on October 28, 1912, is nine days after Barry, J., made the order for the return of these proceedings based on the sheriff's affidavit sworn to on October 15, 1912, in which he describes himself as of Stanley.

Allusion has very properly been made to the fact that Mrs. Howe, with her family, though there is no evidence as to the extent of the family, continues to live at Stanley. If it were necessary in order for the sheriff to acquire a residence or to take up his residence (to use the words of the statute) in Fredericton, that his wife and family should go with him, it is clear that she has not gone. Under what circumstances she has remained we do not know. Neither do I think it important, for there can be no doubt a man can take up a separate residence and the exigencies of one's business or occupation often render it necessary. The question here is whether the sheriff has done so, so as to render him liable to the taxation. In my opinion he has. I am at a loss to see what additional act or what omission on his part can be suggested as necessary under his circumstances to make him a resident.

If I should be wrong in the view I have expressed, I think the applicant would be liable to be assessed on his entire income as a non-resident under sec. 34 and would be free of a poll tax. The necessity for his keeping an office at Fredericton and the fact that he does keep it are admitted but it is contended that he is within the exemption mentioned in sec. 3 (11), which enacts that "incomes of non-residents, being members of the executive government of the province or non-residents, employed in the city of Fredericton in government or county offices whose duties are necessarily performed in Fredericton, shall be exempt from taxation under this Act." Sheriffs are appointed by the Government, so are the justices of the peace. And in that sense both are Government officers. The office of sheriff is one of the important offices of the Crown connected with the administration of justice. Sheriffs are, however, not working for the Gov-

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ernment in the sense that a clerk in the Crown land office is. Neither are sheriffs county officers, though their jurisdiction is limited as to area. The municipality does not control or direct them in the discharge of their duties, unless they arise out of some contract, nor is it in any way responsible for their acts. They are not doing the work of the county as the county treasurer or auditor does who may properly be classed as county officers. (C.S. 1903, ch. 165, sec. 60.) Neither are the duties of sheriffs necessarily performed in Fredericton. It is very probable that a fair percentage of them are discharged without the city limits. It is, I think, clear that this provision of the Act was intended to meet the cases of members of the Government not residing in Fredericton and non-residents employed in the Government offices there and a similar class of county officials. The sheriff of the county is not, in my opinion, in either class.

This application must, I think, be refused with costs as provided in sec. 80 of the Assessment Act.

Before closing my remarks I deem it my duty to call attention to the careless, or at all events the thoughtless, manner in which the applicant's affidavit has been drawn and for which the solicitor under whose supervision it was prepared must be held responsible although I cannot acquit the applicant himself of all blame. In an affidavit specially prepared for the purposes of this application, involving as will be seen some nice questions as to the construction of a statute and the applicant's liability, he is made to swear without any reservation, and without any necessity so far as I can see, that he never was at any time and was not then a resident or inhabitant of the city of Fredericton and that he never has been and was not then domiciled within that city within the meaning of the City of Fredericton Assessment Act, 1907, or otherwise; that he had not changed his domicile and residence and that he had not become and did not intend to become a resident or inhabitant of Fredericton. This wholesale method of disposing of questions of law or of law and fact in an affidavit is so palpably improper that it carries its condemnation on its face. In addition to this, affidavits prepared and sworn to with so little care or consideration by those who ought to know better, are apt to be subjected to criticisms as to their reliability in reference to mere questions of fact, which under other circumstances no one would think of making.

The motion to quash the assessment will be refused with costs as provided in sec. 80 to be paid by the said William T. Howe and for the recovery of same the registrar will deliver the bond filed with him on obtaining the rule to the city treasurer on request.

Motion denied.

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April 18.

New Brunswick Supreme Court, Landry, McLeod, White and Barry, JJ. April 18, 1913.

1. TRIAL (§ II D—175)—NONSUIT—WHEN TO BE REFUSED.

The trial judge should not nonsuit the plaintiff or withdraw the case from the jury where there is material evidence 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.

[*Dublin Wicklow & Wexford R. C.* v. *Slattery* (1878), 3 App. Cas. 1155; *Wright* v. *Midland R. Co.* (1885), 1 T.L.R. 406 (note); *Ruddy* v. *London & Southwestern R. Co.* (1892), 8 T.L.R. 658, referred to.]

Statement

APPEAL by plaintiff from a nonsuit in the Victoria County Court in an action for damages by the spread of fire.

The appeal was allowed.

T. J. Carter, K.C., for appellant.

J. D. Phinney, K.C., for plaintiff.

Landry, J.
McLeod, J.

LANDRY and MCLEOD, JJ., would allow the appeal.

White, J.

WHITE, J. (oral):—I agree that the nonsuit was wrongly granted in this case. I base my judgment wholly on the ground that in my opinion the evidence before the learned Judge was such as to entitle the plaintiff to a verdict in the absence of any evidence on the part of the defendant to meet and rebut the plaintiff's case. I would be slow to hold that when a Judge of a County Court trying a cause without a jury reaches a conclusion, warranted by the evidence that the defendant is entitled to a verdict even although there may be evidence which would have sufficed to sustain a verdict for the plaintiff and thereupon instead of finding a verdict for the defendant nonsuits the plaintiff, the nonsuit must be set aside upon application of the plaintiff. In such a case the plaintiff would not be in a position to complain because instead of having a verdict rendered against him he by being nonsuited would be placed in a position where he could sue again and therefore in a much better position than if a verdict had passed against him. Where there is a jury the Judge cannot nonsuit if there is evidence upon which the jury may reasonably find for the plaintiff no matter how strongly the Judge may feel that upon the whole case the verdict should go for the defendant, the reason for this being that in such a case the law vests in the jury and not in the Judge the decision as to how the verdict ought to go. To hold that in a case where the Judge might properly find a verdict for the defendant, and would do so if not allowed to nonsuit, he may

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not nonsuit with the consent of, or on application of the defendant, would, I think, serve no good purpose, while, on the other hand, it would debar the Judge from exercising any discretion in giving the plaintiff a chance to sue again, although the plaintiff may have failed for want of some proof which there was every reason to suppose might be supplied in a second trial, and which the justice of the case in the opinion of the Judge required he should have a chance to furnish. The point is not of that sufficient importance, however, now that under the Judicature Act nonsuits are abolished and also in view of the little likelihood of a case arising such as I have supposed, to make it worth while to decide it when, as is the case here, the judgment may rest on other grounds.

Barry, J.

BARRY, J.:—Appeal by plaintiff from the Victoria County Court. The plaintiff and the defendant were the owners and the occupiers of two adjoining lots of land in the parish of Drummond, in the county of Victoria. The action was brought for the recovery of damages alleged to have been sustained by the plaintiff by reason of the defendant's negligence and carelessness in starting, on June 12, 1909, in disregard of his statutory duty and without notice to the plaintiff, a fire upon his, the defendant's lot, which spread and ran into the plaintiff's lot, thereby causing the damage complained of.

The action was partially tried by the Judge of the Court without a jury, and in the plaintiff's case, the evidence of the plaintiff himself and of four other witnesses was taken. The plaintiff says that on June 12, 1909, he and a man named Grenier were picking stones and his brother Charles Cochran was harrowing, upon the plaintiff's lot, and the defendant was harrowing upon his lot, which lies to the south of the plaintiff's, in plain view of those working on the latter's lot. Something over a year before this time, the defendant had cut down close up to the division line the trees and brush upon a portion of his lot, and had the brush and trees piled, in piles thirty or forty feet apart, ready for burning. On the day of the fire the weather was dry with the wind drawing from the south. The plaintiff saw defendant leave his horses and go towards the locality of the brush piles, but a rise in the ground prevented his seeing him beyond it, where the brush piles were. In about twenty minutes after the defendant passed from the plaintiff's sight, at about one o'clock in the afternoon, the plaintiff says he saw a big smoke rising from where the piles of brush were. He, his brother and Grenier immediately proceeded to the scene of the fire, found the defendant there and also found at least fifteen of the brush piles burning. The evidence is that there had been no fire on either of the lots that summer before the time spoken of. When the plaintiff first got to the fire,

it was burning from a point about eighteen rods south on the defendant's lot, extending northward across the division line of the lots and on to the plaintiff's, a distance of thirty feet. The defendant did nothing toward controlling or extinguishing the fire after the plaintiff and his men got there. Evidence of the damage, which it is unnecessary to discuss here, was then entered upon.

The day after the fire, the plaintiff says, he had a conversation with the defendant in which the latter told him he had started the fire with his pipe; tobacco dropped out of his pipe and set it. The evidence of the plaintiff, with the exception of that in regard to the conversation between the parties, is repeated, substantially, by both Grenier and Charles Cochran. And the latter adds this testimony: that on the day of the fire and upon the very spot the defendant told him, "he had some Yankee tobacco; it was awful dry; some of it must have fallen out of his pipe and set fire." Hanford Hatheway swears that some time afterwards, in the preesnce of his wife, the defendant told him that he had set the root pile afire, that he had tried to put it out but could not, and it got into the woods; and Mrs. Hatheway says that she, too, heard this statement of the defendant's; but I must say that after a careful perusal of the evidence of Hatheway and his wife, there remains in my mind a very strong doubt as to whether they were referring to the fire of which the plaintiff complains, or speaking of another and entirely different one.

The plaintiff having closed his case, Mr. Jones moved for a nonsuit upon the ground that there was no proof of the setting of the fire by the defendant and no proof of negligence. The motion was granted and the plaintiff nonsuited; and from the decision of the learned Judge the plaintiff brings this appeal.

The question is, was there at the trial any evidence of negligence which ought to have been left to the jury, had there been a jury? In cases like this where the subject matter of the action is negligence, the principle to be applied in order to define the respective functions of the Judge and jury is—and in a non-jury trial where the Judge is judge of the facts as well as of the law, the same principle would, I apprehend, be applicable—that it is the province of the Judge to decide whether or not there is evidence on which the jury can reasonably find negligence, either by direct proof or by inference, and the province of the jury to say whether or not negligence is in fact established or ought to be inferred. This principle in enunciated and laid down by Lord Cairns in the House of Lords in *Metropolitan R. Co.* v. *Jackson* (1877), 3 App. Cas. 193. The Lord Chancellor there says, at p. 197:—

> The Judge has a certain duty to discharge, and the jurors have an-

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other and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of a jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of jurors, a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.

See 21 Hal. Law Eng. 444, where it is said that a Judge may not withdraw the case from the jury (or which amounts to the same thing, nonsuit the plaintiff) "where there is material evidence 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: *Dublin Wicklow & Wexford R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; or where the material primary facts are undisputed, but two different inferences may be reasonably drawn by different minds from those facts: *Wright* v. *Midland R. Co.* (1885), 1 T.L.R. 406 (note); or whenever some ground exists on which a jury may reasonably find a verdict either way; *Ruddy* v. *London & Southwestern R. Co.* (1892), 8 T.L.R. 658."

At the argument, ch. 94 Con. Stat. 1903, "respecting protection of woods from fire," was relied on in support of the plaintiff's contention that no proof of negligence is required in cases where it is established that the defendant set the fire. The second section of the chapter makes it unlawful for any person to start or kindle a fire near any forest or woodland, between the first of May and the first of December, except for certain specified purposes, amongst them, clearing land; the third section makes it incumbent upon any person who for the purpose of clearing land, starts or kindles a fire, to exercise and observe every reasonable precaution in order to prevent it from spreading, and, before starting the fire, to give notice to adjoining owners; section four enumerates the precautions to be taken by a person starting a fire between the dates mentioned, in the forest or within a distance of eighty rods thereof; section five imposes a penalty upon any person who shall throw or drop any burning match, ashes of a pipe, etc., within any place where there is vegetable matter, if he negligently omits wholly to extinguish, before leaving the spot, the fire of such match, ashes or pipe, etc.; by section six the making of fire on land, with certain exceptions, without the consent of the owner, is forbidden; section eleven relates to locomotive engineers; and the twelfth section provides that:—

In any civil action for damages occasioned by fire, proof that the defendant, or any person by his direction or authority, or with his consent, express or implied, started such fire in violation of sections 2, 3, 4, 5, 6, or 11 of this chapter shall be conclusive evidence of negligence on the part of the defendant in starting such fire.

It was argued that under section 20 read in connection with the other sections—hereinbefore summarized—mentioned in it, the admission of the defendant to the plaintiff and his brother that the fire had started from his (the defendant's) pipe, was, in the words of the Act, conclusive evidence of negligence, and that whether the fire was started intentionally or accidentally, made no difference. But I can scarcely think that that is so. The same question arose incidentally in *Grant* v. *Canadian Pacific R. Co.* (1904), 36 N.B.R. 528, but was not decided because as was said by Barker, J., it was not necessary for the determination of the case to hold that the defendants were liable, though no negligence was shewn at all; and besides, in that case it was shewn that the fire which spread to the plaintiff's land was deliberately started by the defendant's agent.

It seems to me that, if I have correctly interpreted the principles which should guide the trial Judge in an action of this kind, there was evidence of negligence here, which should have been submitted to a jury, had there been one, and that the learned Judge erred in nonsuiting the plaintiff. There can be no doubt whatever that the defendant started the fire, because he himself admitted it; but whether he started it deliberately and intentionally is an entirely different thing. When the plaintiff got to the scene of the fire, he found 15 of the brush piles burning; these, it will be remembered, were thirty or forty feet apart. With some shew of reason it is argued that a fire inadvertently started could not have progressed from 150 to 200 yards in the short space of twenty minutes, and that the fair inference to be drawn from the extent of the burning area within so short a time would be that the separate piles must have been fired, by design. And it was also suggested, and I think properly suggested, that the smoking of a pipe containing "awfully dry" tobacco by a person, even upon his own land, under such circumstances as are in evidence here, amidst inflammable material, upon a dry and windy day in June, with the wind drawing towards his neighbour's woodland, would of itself in a case where a damaging fire originated from the lighted pipe, be evidence proper to be submitted to a jury upon the question of negligence. For if a fire begins on a man's own premises, by which those of his neighbour are injured, the latter, in an action brought for such injury, is not bound in the first instance to shew how the fire began, but the presumption would be that it arose from the neglect of some person on the defend-

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ant's premises: *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, at p. 958.

I think the facts established in evidence were facts proper to be submitted to a jury, and would have been sufficient, had they so concluded, to justify them, in the absence of any explanation from the defendant in regard to the origin of the fire, in inferring negligence. It by no means follows that a jury must necessarily have come to that conclusion, or that the defendant might not have been able to rebut the inference deducible from the facts by shewing that, though appearances were against him, he was not in fact at fault. For there is such a thing known to the law as inevitable accident, i.e., where an accident takes place which could not have been obviated by ordinary care, caution and skill on the part of the party charged: see Beven on Negligence (1908, Can. ed.) 1091, and the cases there collected. But that is a defence to be raised by the defendant. And while the general rule is that the burden of proof of alleged negligence is, in the first instance, on the plaintiff, in a defence of inevitable accident, the burden is shifted, and in order to establish his defence the defendant may shew what really caused the fire and that the result of that cause was inevitable: *The Marpesia* (1872), L.R. 4 P.C. 212; *The Merchant Prince*, [1892] P. 179.

I am of the opinion, therefore, that this appeal should be allowed; the judgment of nonsuit in the County Court to be set aside and a new trial granted; with costs to the appellant here and in the Court below.

Appeal allowed.

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KAY v. CHAPMAN.

Saskatchewan Supreme Court. Trial before Johnstone, J. April 22, 1913.

1. PARTNERSHIP (§ II—7)—RIGHTS AND POWERS OF PARTNERS—CONTRACTS—SCOPE.

The authority given by law to a member of a partnership is authority to do only such things as are necessary for carrying on the partnership.

[*Kirk v. Blurton*, 9 M. & W. 284; *Ex parte Darlington*, 4 DeG. J. & S. 581, referred to.]

2. PARTNERSHIP (§ II—8)—DISPOSAL OF PARTNERSHIP PROPERTY — PURCHASER FROM ONE PARTNER—CONVERSION—INQUIRY.

A purchaser of a partnership business as a going concern, who makes the purchase from one of two partners either with knowledge that the vendor had no authority from the other partner to sell, or without making diligent inquiry as to the existence of such authority, is guilty of conversion of the interest of the other partner.

[*McCombie* v. *Davies*, 7 East 5; *Daniels* v. *Davidson*, 16 Vesey 249, and *Cavander* v. *Bultcel*, 43 L.J. Ch. 370, referred to.]

3. PARTNERSHIP (§ II—8)—RIGHTS AND POWERS OF PARTNERS—DISPOSAL OF PARTNERSHIP PROPERTY—SUFFICIENCY OF PURCHASER'S ENQUIRY.

A representation made to a prospective purchaser by one of two partners that he had a power of attorney from the other partner to sell the entire business of the partnership as a going concern, is not a sufficient enquiry into the authority of the vendor to sell, but the prospective purchaser should insist on the production of the power of attorney before making the purchase.

Statement

ACTION by a partner to recover possession of the partnership property fraudulently sold by his co-partner, the purchaser having notice of the fact that the selling partner had no authority from the plaintiff to sell.

Judgment was given for the plaintiff.

C. E. Armstrong, for the plaintiff.

H. D. Pickett, for the defendant.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff, and one John J. Berry, in or about the month of November, 1910, entered into co-partnership for the purpose of carrying on a mercantile business in the city of Moose Jaw. They acquired the stock in trade of one Gott, consisting of fruits, confectionery, cigars, cigarettes, tobacco and soft drinks, together with certain fixtures.

The co-partnership also bought out a moving picture business, known as the Bijou Theatre, and the fixtures therein consisting of stage fittings, screens, motiograph, and accessories, chairs, furnishings, fittings, carpets, tools, piano, and all other articles usual to or in a moving picture theatre.

Each partner had an equal interest in both the business of the store and theatre, and each was entitled to an equal interest in the profits.

After both the undertakings had been going a short time, Kay went to England leaving his partner Berry in charge to carry on both businesses of the firm. In January following, the partner Berry, in fraud of his partner, the plaintiff, sold out the theatre and fixtures to the defendant Chapman, the express consideration being $3,000, and the defendant entered into possession of the theatre and fixtures and carried on the business until March or April following when he sold to one Cox.

On the 3rd of February following the sale by Berry of the theatre and fixtures to the defendant, he, also in fraud of his partner, concluded a sale of the stock in trade in the store to Chapman for the sum of $800. Chapman also entered into possession of this part of the firm's business and thereafter carried on the same until July, when he sold to one Cooper. Whether these sales were genuine or not, I cannot say. It is not necessary I should find as to this, however, for the reason I find against Chapman on other grounds.

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Berry was left in charge of the business of the firm, to carry it on in the usual way. He had no authority from Kay, his partner, to dispose of either business as a running concern. Of this Chapman was very well aware at the time he made the alleged purchases from Berry.

Bills of sale, under seal in the firm's name, were drawn up covering both properties and signed by Berry for himself and co-partner; that of the theatre and fixtures, dated 3rd of January, 1911, signed "J. J. Berry," "Herbert Kay," "J. J. Berry," Atty. The bill of sale of the stock in trade, also by deed, and dated February 3, 1911, was signed by Berry in the same way as that of the theatre property. Chapman knew at the time both these documents were signed, Kay, one of the parties, was in England. The defendant was present and saw Berry sign the name of Herbert Kay to both.

Chapman claims that he was told by Berry, in answer to an enquiry made in that behalf, that he, Berry, had "power to sell; that he had a power of attorney to sell," but further than this, he seems never to have enquired. He admits he never saw this document, or requested to see it. There was no such power of attorney in existence, and if he had followed up his enquiries, and asked for its production, if he had not already known, he would have learned, as the fact was, Berry had no power of attorney from Kay of any kind whatever. Berry disposed of the whole partnership property intending to defraud Kay during his absence, and Chapman assisted in the carrying out of the fraud through purchasing this partnership interest without having first made due and necessary enquiries for the purpose of ascertaining the interest of the plaintiff in the business. Kay, on his return to Moose Jaw, found Chapman in possession of the store and discovered that he, Kay, had been cheated out of his interest in the partnership property. Demand was made by Kay upon Chapman for return of the property, but the latter would do nothing towards restitution.

In my opinion there can be no question as to the principle of law applicable to this case, and that is, that in case of a partnership, the authority which each partner has is an authority given by law to do such things as are necessary for carrying on the partnership. Alderson, B., *Kirk* v. *Blurton*, 9 M. & W., 284. Lord Westbury in *Ex parte Darlington*, 4 DeG. J. & S. 581, lays down the same principle when he says:—

> Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes . . . . All persons may give credit to his acts unless they have notice, *or reason to believe*, that the thing done in the partnership is done for the private purposes or on the separate account of the person doing it. In that case authority *by virtue* of the partnership contract ceases and the person dealing with the in-

dividual partner is bound to inquire and ascertain the extent of the authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

See also *Ex parte Peel*, 6 Vesey 601.

I think Chapman had ample notice of the rights of the plaintiff, and that he purchased from Berry knowing or having every reason to know he had no authority to sell, and that Chapman was equally guilty with Berry in the wrongful conversion of the several businesses referred to "assuming to one's self the property and right of disposing of another man's goods, is a conversion: and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for, what is that but assisting that other in carrying his wrongful act into effect." Remarks of Lord Ellenborough in *M'Combie* v. *Davies*, 7 East 5. See also *Daniels* v. *Davidson*, 16 Vesey 249; *Cavander* v. *Bulteel*, 43 L.J. Ch. 370.

There will be a reference to the Local Registrar at Moose Jaw to enquire into and ascertain and to report as to the interest of the plaintiff in the partnership of Berry & Kay, at the time or times the same was sold to the defendant, with power for such purpose to take all necessary accounts, make inquiries, etc. Further directions and the question of costs are reserved until the said Local Registrar shall have made his report.

Judgment for the plaintiff.

MacKENZIE v. SCOTIA LUMBER CO.

(Decision No. 2.)

Nova Scotia Supreme Court, Russell, Drysdale and Ritchie, JJ.
April 28, 1913.

1. TROVER (§ I B—10)—CONVERSION — WHAT CONSTITUTES—DEALING AS OWNER WITH GOODS OF ANOTHER.

Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is a conversion, although done under a mistaken but reasonable supposition of being lawfully entitled thereto.

[*MacKenzie* v. *Scotia Lumber Company*, 7 D.L.R. 409, affirmed in part.]

2. DAMAGES (§ III J—203)—MEASURE OF—TROVER AND CONVERSION—GOOD FAITH—DEALING AS OWNER WITH GOODS OF ANOTHER.

Nominal damages only will be awarded for a conversion where one deals as owner with goods of another under a mistaken but honest and reasonable supposition of being lawfully entitled thereto.

[*MacKenzie* v. *Scotia Lumber Company*, 7 D.L.R. 409, reversed in part.]

Statement

APPEAL from the judgment of Graham, E.J., in favour of plaintiff, *MacKenzie* v. *Scotia Lumber Co.*, 7 D.L.R. 409, in an

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action claiming damages for the wrongful taking, carrying away and conversion of a quantity of spruce and pine lumber, the property of plaintiff.

The appeal was allowed.

The facts are fully stated in the judgments.

H. Mellish, K.C., for defendants, appellants.

J. A. Wall, K.C., for plaintiff, respondent.

Russell, J.

RUSSELL, J.:—I base my judgment in this case on the learned Judge's findings, as to the facts. The plaintiff was the owner of a raft which had drifted away from its proper, or perhaps improper, moorings, and had become, without any interference of the defendants, attached to two rafts belonging to the defendants, which had also gone adrift, all three rafts being stranded on a ledge called "Stopper Rock," in St. Mary's river, Guysborough.

The defendants sent their servants for their own rafts, not for the rafts of anybody else. The servants, finding all three rafts together, and supposing that all three belonged to the defendants, brought them all to the defendants' mill. I take it that the defendants did not know that the raft was at their mill. It is certain that they did not know that the plaintiff's raft was at their mill, but the statement in this form would be equivocal, for although they did not know that the plaintiff's raft was at their mill, they may have known that this particular raft, which was in fact the plaintiff's raft, was at their mill. And it is upon this *équivoque* that the plaintiff bases his claim, contending that if the defendants, under the mistaken idea that the raft was their own, detained it for ever so short a period, treating it as their own, and exercising a dominion over it as their own property, they are liable for a conversion of the raft, even though the moment they discovered the mistake, they returned it to the proper owner. I gather from the learned Judge's statement that the defendants did not even know that the raft in question had been brought to their mill until informed of the fact by the plaintiff, who had himself received the information from one Hattie, with whom he had been treating for a sale of the raft. The raft had been brought to the mill on the 15th of June. The learned Judge finds, that on the 17th the plaintiff telephoned to the defendants' mill, and the defendants learned for the first time that it was the plaintiff's raft which had been brought in with theirs. He adds:—

> I believe Alexander A. Gunn, the secretary, when he says he left the telephone and went out to where the rafts were tied up to see about it and found it was the plaintiff's raft with theirs.

So far from them exercising any dominion over the raft, he told the plaintiff they would hold it securely until he came

down, and the plaintiff said he would come down. Two or three days afterwards the plaintiff came down to the mill and saw Adam Gunn, the vice-president. The plaintiff asked him for a boat to take the raft back. He told him he could have a boat, but by the wind it would be impossible to get up the river. Plaintiff was convinced of this and purposed coming down for the raft in the night. Mr. Gunn said he would send it up if he saw a chance and plaintiff said he would come down for it. So far, there was no variance between the parties at all. The defendants' servants had, by mistake, removed the plaintiff's raft. On the discovery of the mistake, the plaintiff's rights were immediately recognized, and the plaintiff and defendants were both anxious that the raft should be placed wherever it belonged. The plaintiff did not come for it before the defendants returned it, and the learned Judge has found that the raft was left by the defendants at a reasonable place for Hattie to get it, in order that he might pull it out, the plaintiff's intention being that the deals should be dried by Hattie.

Notwithstanding all these circumstances, the learned Judge has decided that there was a conversion of the lumber and has given judgment for plaintiff for its full value, adjudging the property in the raft to the defendants, assuming this consequence, I suppose, to follow the judgment for the plaintiff on the claim for conversion.

The only evidence I can find of a conversion in this case is that of a possible conversion by the servants of the defendants, who, acting without authority from the defendants, did certainly exercise acts of ownership on behalf of the defendants over the raft, under the mistaken idea that the raft belonged to the defendants. Although this proceeding on the part of the servants was not authorized or acquiesced in by any responsible official of the defendant company, I assume that it was so far within the scope of the servants' duty that the company must answer for the act of their servants if that act was a tort.

We are, therefore, I think, obliged to answer the question whether one who takes the property of another person, mistaking it for his own, but returns it to the owner immediately upon discovery of the mistake, can be held liable for conversion of the property. The case must have occurred a thousand times, but the reason why counsel, who argued the appeal, were unable to cite any authority directly bearing upon the question, is probably that, until this case arose, there never was anybody wrong-headed enough to make such an accident the subject of an action at law.

I have examined all the cases collected by Ames and also the selection of cases on torts made by Mr. Wigmore, and I can find none to answer the simple question whether one who, by

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mistake, takes up the defendant's umbrella in place of his own, but who discovers his mistake before he has reached the street, and immediately returns it to the owner, is, or is not, liable for a conversion of the umbrella. I suspect that he would, strictly speaking, be legally liable, but if upon tender of the umbrella to the owner, the latter were to accept and resume the ownership, I am quite certain it would be a mistake to give damages for the full value of the umbrella and adjudge the property to the defendant. And that is what has been done in the present case. The defendant returned the raft, in this case, to the plaintiff immediately upon the discovery of the mistake and the plaintiff resumed the ownership, when he asked for the use of a boat to take the raft up the river. From that moment until the action was brought, the plaintiff and defendant were both treating the property as the property of the plaintiff. I suppose that the right of action, having once arisen, the plaintiff must recover nominal damages, but why he should have the full value of the property which was returned to him and which he accepted back from the defendants, I cannot understand, and I think that the judgment of the learned trial Judge is erroneous in this respect.

The question of law is interesting, but there would be no utility in an examination of the authorities. The New Jersey case of *Frome* v. *Dennis*, 45 N.J. 515, 1 Ames' Cases on Torts 294, comes the nearest to the one before us, but it unfortunately does not decide the question because the act of the defendant was not, in that case, such as to be inconsistent with a recognition of the plaintiff's ownership, and there was, therefore, no conversion. He had merely borrowed a plough for temporary use from another, whom he mistakenly supposed to be the owner.

The case of *Nelson* v. *Whetmore*, from South Carolina, 1 Rich. L. 318 (1 Ames' Cases on Torts 349), is also closely in point, but it was decided in favour of the defendant because he did not know that the plaintiff's slave, whom he had engaged as a servant, was property at all, and could not therefore have had the intention of converting the defendant's property: "His treatment of Frank as a servant did not indicate an assertion of property." He did not exercise any act of ownership over the defendant's property, because he did not treat the slave as property at all. In this dearth of authority and absence of any clear answer to the question, I think we must hold that the defendants' servants did convert the plaintiff's property, and as they did it in the course of the employment by the defendant company, the latter must be held liable for the conversion. But the plaintiff cannot have the property and the full damages for its conversion at the same time. Whether the defendants would have been liable for the full value of the property if the plain-

tiff had not accepted it, the defendants being ready and willing and offering to return it, may be an open question, but there can be no such question here, because the property was taken back by the plaintiff when the mistake was discovered.

The appeal should therefore be allowed with costs, and there should be judgment for the plaintiff for nominal damages only.

Drysdale, J., concurred.

Ritchie, J.:—This is an action of the conversion of the plaintiff's raft of lumber. The defendant company, in consequence of a *bonâ fide* mistake, and in the belief that the raft belonged to it, brought the lumber down the St. Mary's river to the company's mills. This was on the 14th of June. The course pursued by the plaintiff in taking advantage of this honest mistake does not meet with my approval, but he is asking for strict law, and is entitled to have it.

The first question involved is as to whether or not such a taking as I have indicated amounts in law to a conversion. I have reluctantly come to the conclusion that this question must be answered in the affirmative.

Every asportation of a chattel does not necessarily amount to a conversion, but to quote Baron Alderson in *Fouldes* v. *Willoughby*, 8 M. & W. 548: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places."

In this case, it is the unauthorized assumption of the powers of the plaintiff, the owner of the raft, which constitutes the conversion, and as pointed out in the quotation from Pollock on Torts, given in the judgment appealed from, it makes no difference that the taking was under the honest, but mistaken, belief that the raft was the property of the defendant company. The essence of the conversion is, that the raft was dealt with by the defendant company in a manner adverse to the plaintiff and inconsistent with his right of dominion, it having been taken by the defendant company to their mills for the use of the company.

The only remaining question is as to the damages, which have been assessed by the learned trial Judge at $142, the value of the lumber. In this I am unable to agree. There has, I think, under the evidence and the findings, been what amounts to a return and acceptance of the raft. As soon as the secretary of the defendant company ascertained that the raft belonged to the plaintiff, he told him the company would hold it securely for him till he came down. To this the plaintiff replied that he would come down, and he did come down. At that time the

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idea of making the defendant company pay for the raft had not suggested itself, or been suggested, to him and he proposed taking it back and asked for a boat for that purpose, but abandoned the idea upon its being pointed out to him that in consequence of the wind, it would be impossible to get up the river. Mr. Gunn, the vice-president of the defendant company, told plaintiff he would send the raft up if he got a chance, to which the plaintiff replied he would come for it. On the 19th of June, the plaintiff wrote requesting that the raft be taken back to where it was taken from. The defendant complied by taking the lumber to a place which the Judge has found to be a reasonable place. The position, under the finding, is that there was a reasonable compliance with the plaintiff's request to return the raft. It is, as I have said, a case of acceptance and return, the request to return having been reasonably complied with.

The only damages to which the plaintiff can, in my opinion, be entitled, is the injury, if any, which he has sustained by the taking of the raft and by its deterioration in value while in the defendant company's possession. The measure of damages would be the difference between the value of the lumber at the time it was taken and the value when it was returned, together with any special damages. No damages, such as I have mentioned, were proved. The judgment must be set aside and judgment entered for nominal damages. I think this must be with costs, as I do not see that the plaintiff has been guilty of misconduct in the sense which, under the authorities, would justify the Court in depriving him of costs. The conversion was not purged by the return, and the plaintiff has the legal right to nominal damages. The plaintiff must pay the costs of the appeal.

Appeal allowed.

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W. E. SANFORD MANUFACTURING CO., Ltd. v. McEWEN.

Prince Edward Island Supreme Court, Haszard, J., in Chambers.
October 3, 1912.

1. COSTS (§ I—14)—SECURITY FOR — NON-RESIDENT — DISCRETION OF JUDGE.

The court may as an exercise of discretion, refuse to require a non-resident plaintiff to furnish security for costs where it is apparent that the defendant has no *bonâ fide* defence to the action.

Statement

MOTION for security for costs.

W. E. Bentley, for plaintiffs.

C. G. Duffy, for defendant.

Haszard, J.

HASZARD, J.:—This is an application for security for costs on the ground of the absence and residence abroad of the plaintiffs.

Defendant supports the application by an affidavit in usual form; with an allegation also that defendant has a good defence to the action as he is advised and believes—also that the goods sold by defendant and which form the subject of the suit were sold to the defendant on a credit which had not expired at the commencement of this action. On examination of the invoices of the goods produced by the plaintiffs, the first lot of goods amounting to $575.88 were sold by the plaintiffs to defendant between May 30, 1910, and November 15, 1911, upon terms net 30 days from the 1st of January, and upon this invoice $293.43 had been paid at various times, leaving due $301.05, which amount has also been paid recently. The second invoice is dated May 9, 1912—$423.85, dated from June 1, 10 per cent., 30 days, and on June 3, a payment was made on account of $100, leaving due $323.85.

The defendant in his affidavit states that the goods were sold on a credit, which had not expired at the commencement of this action. On a careful examination of the invoices and correspondence I am convinced that there were no terms agreed upon other than as stated in the invoices, and that the period of credit had long expired before suit was commenced, and there is no reason why I should exercise a discretion in favour of the defendant and subject the plaintiffs to the trouble and inconvenience in giving security for costs in a cause when it is apparent the defendant has no *bonâ fide* defence: *Doer* v. *Rand*, 10 P.R. (Ont.) 165.

The summons will be dismissed and the order refused. Costs to be costs in the cause.

Security refused.

FOX v. REID.

Manitoba King's Bench. Trial before Prendergast, J. April 14, 1913.

1. TIME (§ I—6)—MONTH—"THIRTY DAYS" — NOT SYNONYMOUS, WHEN.

A cancellation notice purporting to give the vendee of land but thirty days in which to pay an instalment of the purchase price, is inoperative and of no effect with respect to the cancellation of the agreement of sale, where the default and cancellation clause of the agreement requires that one month's notice be given; and this defect is not cured by the fact that the default and cancellation clause as incorporated in the agreement is set out in full in the recitals which were at the beginning of the notice.

[*Le Neveu* v. *McQuarrie*, 21 Man. L.R. 399, followed.]

2. CONTRACTS (§ V A—381)—CHANGE OR EXTINGUISHMENT — ABANDONMENT—LAND SALE.

A vendee of property, under an agreement for the sale thereof, will be held to have abandoned the agreement, where it appears that he never went into actual possession of the land which was purchased on speculation, though the first cash payment was made and a caveat filed by him and the agreement registered, but where default

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was made in the payment of the second instalment of the purchase price, time being expressly of the essence, and where his subsequent conduct for a period of over four years after default clearly indicated that he had relinquished all rights under the agreement, and his letter after suit was of like effect.

[*Hicks* v. *Laidlaw*, 2 D.L.R. 460, 22 Man. L.R. 96, applied.]

Statement

THIS is an action for a declaration that the defendant no longer has any interest in certain lots situate in the town of Selkirk which plaintiff Fox agreed to sell to him and he agreed to purchase from Fox by instrument under seal, and for the discharge of a caveat and vacating of certain registrations against the said property.

Judgment was given for the plaintiffs.

F. Heap, and *R. D. Stratton*, for the plaintiffs.

W. M. Crichton, and *E. A. Cohen*, for the defendant.

Prendergast, J.

PRENDERGAST, J.:—Many admissions were made at the trial apart from those contained in the statement of defence, and the case now rests on two points: first, was the cancellation notice served by the plaintiffs on the defendant valid and effective; and second, was there abandonment by the defendant?

The agreement is dated November 2, 1906, and the consideration therein is $550, payable as follows: $184 down, which was then paid in effect; $183 on November 1, 1907, and $183 on November 1, 1908, with interest at 6%. It provides that time is to be considered of the essence of the agreement, and contains a default and cancellation clause.

About one month after the execution of the agreement, the defendant caused the same to be registered as to such lots as were still under the old system, and had a caveat filed with respect to those brought under the Land Titles Act. The following spring (1907) the defendant went to live at Vancouver, B.C.

On November 8, 1907, that is to say, one week after the first instalment of principal and interest became due, the plaintiff Fox issued, through the Dominion Bank, a sight draft on the defendant for the said amount, directed, as the same reads: "To J. Reid, Esq., Hotel Astor, Vancouver, B.C.," which was returned to him some time after with the words endorsed: "Out of town." Having sent out the draft a second time a few days later, it was again returned to him, this time with the words: "Have settled, return." Whether the draft was presented to the defendant this second time, and whether he wrote or caused to be written thereon the three words stated, there is nothing more than the above to shew, except that a cancellation notice mailed to the defendant at the same address less than two weeks later did reach him on his own admission.

On January 3, 1908, the plaintiff Fox had the defendant

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served with cancellation notice. I must hold, which will dispose of the first question, that this notice is inoperative and of no effect, at all events with respect to cancellation, for several reasons, and amongst others, that it purports to give a thirty days' notice as therein stated, while the default and cancellation clause of the agreement requires that one month's notice be given: *LeNeveu* v. *McQuarrie*, 21 Man. L.R. 399, 5 W.L.R. 248. This defect in the essential part of the notice, being that which contains the notice proper, is not cured, as urged, for the plaintiff, by the fact that the default and cancellation clause as incorporated in the agreement is set out in full in the recitals which are at the beginning of the notice.

In the spring following his giving notice, the plaintiff Fox took possession of the lots by clearing them of scrub, fencing them and working them as a garden. I should here say that the defendant never actually entered into possession of the land. In 1911, Fox sold part of the lots to George Bolton, and part to Frederick Linton, his co-plaintiffs in this action. It would appear that Fox sold to those parties practically for the same price that he had sold to the defendant.

In the beginning of January, 1912, Bolton having tried to register his transfer, found the defendant's caveat filed against the property. Fox says he did not know until then that the defendant had filed this caveat in the Winnipeg land titles office, nor registered his agreement in the registry office at Selkirk. A few days later (January 22nd) the plaintiffs instituted this suit, but were unable to serve the defendant with the statement of claim until April 12th. On the same day that the defendant was so served he wrote Fox the following letter:—

Vancouver, B.C., April 12, 1912.

George H. Fox, Esq.,
Selkirk.

Dear Sir,—I have been served with papers from Heap & Stratton, Winnipeg, in connection with some lots I bought from you some years ago and which I was unable to make my payments owing to some heavy financial losses I had about that time. I then received a notice of cancellation about December, 1907. When I received this notice I thought that put an end to the whole matter. I cannot understand why you should go to any expense or trouble when you could of written me yourself and have me sign any papers required which would place you in possession of the property. I don't want any trouble with anyone: life is too short for that. If I could have made good at the time you certainly would not have had to cancel me out. I thought it was hard of you at the time, as you must of known my position in the losses I sustained not many miles from Selkirk. However, it is all gone and past and cannot be helped now. Forward me any papers you want me to sign that will place you in possession and I will sign and return same. I also received a letter from you on Tuesday, asking about those two lots. I sold them about three months ago for what I paid for them, namely, $150, or $300 for both.

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Since I sold I have had a couple enquiries. Let me know what they are worth and I will get the owner and see what he will take.

Trusting to hear from you by return mail,

(Sgd.) JOS. REID.

Salisbury Court,
Suite 19,
Vancouver, B.C.

P.S.—Could you sell any Coquitlam lots there, if I sent you the blue prints? There is a big boom on there now.

The words of the above letter: "I also received a letter from you on Tuesday asking about those two lots," etc., refer to two lots other than those in question which the defendant had previously owned at Selkirk, and of which Fox wished to have the listing for sale. I should here remark that this was the first communication from the defendant to Fox, ever since the former leaving for British Columbia a few months after his purchase. Fox apparently replied to the above letter shortly after, enclosing a blank form of withdrawal of caveat.

On April 12th the solicitors for Fox received from the defendant's solicitors at New Westminster, B.C., the following telegram:—

Fox versus Reid. Please wire at once, our expense, what amount of money necessary for defendant to remit in order to obtain deed of Selkirk lots free of all encumbrances. What amount will your client pay for quit claim?

It does not appear that answer was made to this telegram.

Then, the defendant writes to Fox this letter, dated by error May 1, 1911, which should read May 1, 1912:—

Dear Sir,—I have decided to pay over the money on those lots and have instructed my solicitors to forward the money to your solicitors in Winnipeg. Kindly have everything fixed up and get your money. I will send you a good listing of Coquitlam in a few days, one that you can make lots of money out of.

Finally, on May 9th, tender was made to Fox of the amount still due under the agreement. I should also state that when purchasing the property the defendant stated that he was doing so for speculative purposes; that he never at any time paid any taxes as called for by the agreement, and that the property in the spring of 1912 had increased somewhat in value, although not much. On the foregoing facts, I find that there was abandonment by the defendant.

I do not see that the fact that the agreement provides for cancellation by notice, and that such notice was not properly given, precludes that finding.

First, the defendant was never in actual possession, and he bought for speculative purposes. Then, he only made the cash payment, never paid taxes, and his registering the agreement and filing a caveat shortly after his purchase, of course, only shew his intention at that time of adhering to the contract.

A year later, when the first payment was due, the plaintiff Fox made a draft on the defendant, which he refused; and shortly after cancellation notice was served on him. Of course the cancellation notice was inoperative as such. Yet, especially coupled as it was with the making of the draft, it was notice to the defendant that Fox was not acquiescing in any delay and was insisting on payment.

Whatever effect the defendant may have thought that the notice had, and whether the effect which he thought that the notice had then partly determined or not, the conclusion that he came to, the fact is that he then made up his mind to abandon, and that this determination persisted until after he was sued. We have his own declaration as to that in his letter of April 12, 1912, to the plaintiff Fox.

This letter, moreover, shews that whatever effect he may have thought that the notice had, he had otherwise a very cogent and peremptory reason for giving up, and that was that during all those four years he was unable to pay. He even complains in that letter of the bringing of the action as unnecessary, saying that he is willing to abandon in writing and that the plaintiff Fox must have known that his financial difficulties did not allow him to meet his payments.

He also failed to pay taxes for four years, that is to say, not only for such a length of time that the land would be sold for taxes, but also that the two years for redemption would have elapsed, although of course he would be entitled to further notice.

In short, he made up his mind to abandon on his own admission; that he was unable to pay was in itself a sufficient reason to abandon, and he remained in that frame of mind and determination for four years, waking up only after he was sued, after Fox had resold to his co-plaintiffs and when the property had increased in value.

In *Cornwall* v. *Henson*, [1900] 2 Ch.D. 298, where it was held that there had not been abandonment, stress is laid in the three judgments on the fact that eleven payments out of twelve had been made. There also had been considerable delays all along, to which the plaintiff had acquiesced, and the agreement moreover contained this clause:—

> I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties.

I am free to say that were it not for the defendant's letter, I would not infer abandonment from the other facts alone; but in this document, the defendant not only states that he has made up his mind to abandon, but sets out his inability to pay, which was the very best of reasons for abandoning.

In *Hicks* v. *Laidlaw*, 2 D.L.R. 460, 22 Man. L.R. 96, which was an action for the same declaration as in this one, and also based on abandonment, both the trial Judge and the Court of

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Appeal, after finding that there was no abandonment, nevertheless made the declaration prayed for, on the ground that, assuming the action to have been brought by the defendant for specific performance, he could not have succeeded on account of having waived all rights to the same by delays and laches. It is true that in that case there was no provision for cancellation by notice in the agreement. That, however, is immaterial in my opinion, and if that view is correct, there seems to me to be nothing to distinguish the one case from the other.

There will be a declaration as prayed for, and an order discharging the caveat and vacating the registration of the agreement.

Judgment for plaintiff.

SASK.

S. C.
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April 16.

HARVEY v. FARNELL.

Saskatchewan Supreme Court. Trial before Johnstone, J. April 16, 1913.

1. TORTS (§ I—1)—NEGLIGENCE — LOSS OF CHATTELS BY BAILEE'S GROSS CARELESSNESS—AGISTER—DETINUE.

An action, in detinue, for damages sustained by an owner of cattle lies against an agister in whose care the cattle were left if they are lost through his gross carelessness.

[*Reeve* v. *Palmer*, 5 C.B. (N.S.) 84, followed.]

Statement

ACTION for the return of cattle lost while in the possession of the defendant, an agister, or for damages.

Judgment was given for the plaintiff.

C. E. Armstrong, for the plaintiff.

J. E. Chisholm, for the defendant.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff, claiming that certain cattle of his, in 1910, left with the defendant, for agistment and to be by him herded, were, whilst in the defendant's care, and possession, lost, brought this action, in detinue, for the return of the "goods and chattels" or their value, $500.

The defendant denied the plaintiff's ownership in the cattle; second, detention; third, no demand; fourth, that if the cattle were lost, it was not through the carelessness of the defendant. The value of the cattle lost was conceded to be $500.

The ownership of the cattle in the plaintiff was proved, also what I consider a sufficient demand, and I find the cattle were lost through the gross carelessness of the defendant, and that alone. I cannot imagine a reasonable man looking after his own cattle in the manner in which the defendant looked after the cattle in question. The defendant could not say whether or not the cattle had strayed away, become mired, or in what manner they became lost to the plaintiff. He left the cattle, as far as I am able to judge, to look after themselves.

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The defendant's counsel raised the objection at the trial that the plaintiff could not recover for the loss in detinue, but that he should have set out the facts and should have alleged carelessness on the part of the defendant. I must confess that this objection raised considerable doubt in my mind as to the plaintiff's right to recover in the action on the present statement of claim, and I reserved judgment. I now find, however, the plaintiff entitled to recover on the authority of *Reeve* v. *Palmer*, 5 C.B. (N.S.) 84. In that case the plaintiff in appeal was held entitled to recover in detinue, for damages sustained through the loss of a deed left with an attorney for safe keeping. The Court held the attorney bound in the keeping of the deed to use ordinary care and that as he did not, he was liable in damages. Of course, here, the bailment was of different sort, but the same law would apply.

There will, therefore, be judgment for the plaintiff for $500 and costs.

Judgment for plaintiff.

ROSS REALTY COMPANY, Ltd. (appellant) v. **LACHINE, JACQUES CARTIER and MAISONNEUVE R. CO.** (respondent), and **BASTIEN** (mis-en-cause).

QUE.

S. C.
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Mar. 20.

Quebec Superior Court, Beaudin, J. March 20, 1913.

1. APPEAL (§ III D—85)—FROM AWARD OF ARBITRATORS UNDER RAILWAY ACT—PROCEDURE.

In Quebec, the proper procedure for appealing from an award of arbitrators, made under ch. 47, of the Railway Act, R.S.C. 1906, is by means of an inscription in appeal as in ordinary cases, and not by a writ and petition.

[*Re Vallières and Ontario and Quebec R. Co.*, 11 Can. Ry. Cas. 18, referred to.]

Statement.

AN award having been rendered by the *mis-en-cause* as arbitrators in a case of expropriation under the Railway Act of Canada, R.S.C. 1906, ch. 37, the proprietors appealed from the award, under art. 209 of said Act, by means of an ordinary writ, to which they attached a petition containing their reasons of appeal. The company was named in the writ as respondent and the arbitrators as *mis-en-cause*. The company filed an appearance on the return day and subsequently a document by which it answered each of the allegations of the petition attached to the writ of the appellant, and paid stamps to an amount of $8 as on a plea.

The appellant now moved to reject this document, on the ground that the appeal must be decided upon the record as made before the arbitrators, and that no further evidence can be adduced and in consequence the so-called contestation is irrelevant.

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ROSS REALTY CO., LTD. v. LACHINE, JACQUES CARTIER AND MAISONNEUVE R. CO.

Beaudin, J.

Section 209 of the Railway Act, R.S.C. 1906, ch. 37, provides for an appeal within one month after receiving notice of the award, if it exceeds $600, and par. 2 that

upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of an inferior Court to the said Superior Court, subject to any general rules or orders from time to time made by the said last-mentioned Court, in respect to such appeals.

Henri Jodoin, attorney for appellant.

Atwater, Duclos & Bond, attorneys for respondent.

Bastien, Bergeron, Cousineau & Jasmin, attorneys for *mis-en-cause*.

BEAUDIN, J.:—There is no doubt that the procedure followed in this case is the procedure followed up to now, in this district, at least. But I am of opinion that the appeal should be brought, by means of an ordinary inscription, the same as a party inscribes in review or in appeal in an ordinary case, simply declaring that he intends to appeal, from the award rendered by the arbitrators, with mention of the date of the rendering of such award. This will appear clearer, when we refer to the recent decision of the Court of Appeal in *Re Vallières and Ontario and Quebec Railway Co.*, 11 Can. Ry. Cas. 18, where it was held that for the purposes of such appeal, the Superior Court and the Court of King's Bench have concurrent jurisdiction.

If this appeal had been made before the Court of King's Bench, it is certain that the appellant should have proceeded by an inscription in appeal, as there is no such procedure as a writ in appeals. The same reasoning may apply to the Superior Court; there is a writ of summons to initiate a proceeding, but there is no writ of appeal, and I come to the conclusion that the appeal should be a simple inscription, the same as for an appeal in Review or in Appeals and an appearance by the respondent, but with no plea. But in this case, the appellant by its own procedure, has invited the respondent to make the answer it made, and it might have become dangerous not to answer, as our Code provides that a party is supposed to admit every allegation made by the other side and not denied by the adversary. It may be a question at the taxation of costs, after judgment is rendered on the merits.

On the whole, I have come to the conclusion to dismiss the motion of appellant, and it is dismissed, but the costs will follow the result of the suit.

Motion dismissed.

Ex parte TEED.

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New Brunswick Supreme Court, Landry, McLeod, White, Barry, and McKeown, JJ. February 21, 1913.

1. INDICTMENT AND INFORMATION (§ II A—7)—VIOLATION OF TEMPERANCE ACT—TIME—STATING ALTERNATIVELY.

A conviction for selling intoxicating liquor in violation of law on one of the days mentioned, is good under an information charging illegal sale on the 24th or 25th days of December inclusively.

Statement

MOTION for a rule absolute for *certiorari* to remove and a rule *nisi* to quash a conviction had before Francis F. Matheson, a police magistrate, in and for the town of Campbellton, in the county of Restigouche, against Herbert Teed, for that "he, the said Herbert Teed, on the twenty-fourth day of December, or the twenty-fifth day of December, both dates inclusive, in the year of our Lord, One Thousand Nine Hundred and Twelve, at the town of Campbellton, in the county of Restigouche, unlawfully did sell liquor without the license therefor by law required."

Phinney, K.C., for the motion:—The first objection is that the conviction is in the alternative and therefore uncertain. It could not be pleaded to a second charge for the same offence.

White, J.

WHITE, J.:—Would not a conviction for selling between the twenty-third and twenty-sixth be good?

Phinney:—Yes.

WHITE, J.:—But does that not mean that offence was on the twenty-fourth or twenty-fifth?

Phinney:—Here the offence was for selling on one day, not for selling on both, and therefore could not be pleaded to a subsequent prosecution. He further urged the following additional objections:—

(2) There is no evidence to support the conviction. (3) There is no evidence that Teed had knowledge that the liquor was sold on the premises. (4) There is no evidence that Teed permitted the consumption of the liquor on his premises.

McLeod, J.

MCLEOD, J.:—These last points are decided by *Ex parte Daley* (1888), 27 N.B.R. 129.

Landry, J.

LANDRY, J. (oral):—The rule in this is refused. We think there was ample evidence to justify the conviction.

White, J.

WHITE, J. (oral):—I agree with what has been said by my brother Barry as to the claim that the offence was charged in the alternative. The fact that it is said to have occurred on one of two days does not make it an offence charged in the al-

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ternative. I am unable to see any difference between charging an offence to have occurred between the 23rd and 26th and stating that it occurred on the 24th or 25th. It is a difference in language, but the meaning and effect are the same.

BARRY, J.:—It is true that the general rule is that an offence cannot be charged disjunctively or in the alternative in a conviction. But it is not the offence, but the time of the commission of the offence that is stated disjunctively here. It is admitted that had the conviction stated the offence to have been committed between the 23rd and 26th days of the month of December, that would have been sufficient. Stating that the offence was committed on one or the other of the days intervening between the two dates mentioned amounts, in our opinion, to practically the same thing. Time is never of the essence of the offence under the Liquor License Act, so long as it appears that the information was laid within the time limited for bringing the prosecution. Anyway, if the conviction were brought here upon *certiorari* this Court has power to amend the date of the commission of the offence so as to make it conform to the evidence.

The rule will be refused.

McLeod, J.
McKeown, J.

McLEOD, and McKEOWN, JJ., agreed.

Rule refused.

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TWIN CITY TRANSFER CO. v. CANADIAN PACIFIC R. CO.

(File No. 20922.)

Board of Railway Commissioners. March 25, 1913.

1. CARRIERS (§ IV B—524)—STATIONS—HACKS, CARRIAGES, ETC., AT—EXCLUSIVE PRIVILEGES—DISCRIMINATION—EFFECT OF CANADA RAILWAY ACT.

The grant by a railway company to one transfer or bus company of the exclusive privilege of soliciting passengers on depot property is not an unjust discrimination against another transfer company within the inhibition of secs. 284, 317 of the Railway Act (R.S.C. 1906, ch. 37), which prevents discrimination between passengers, shippers and consignees of freight, but does not concern the agencies employed for receiving or delivering traffic, at, to, or from railway stations.

[*Purcell* v. *Grand Trunk Pacific R. Co.*, 13 Can. Ry. Cas. 194, distinguished.]

2. CARRIERS (§ IV B—524)—STATIONS—HACKS, CARRIAGES, ETC.—EXCLUSIVE PRIVILEGES—RIGHT TO GRANT.

Since a railway station is private property as between a railway company and the general public excepting persons who have occasion to use it for the purpose of transportation, the company may grant the exclusive privilege to a bus or transfer company of soliciting within its stations the carriage of passengers and baggage.

3. CARRIERS (§ IV B—524)—STATIONS — HACKS, CARRIAGES ETC., AT — RECEIPT AND DISCHARGE OF PASSENGERS AND BAGGAGE AT PLATFORMS—DUTY TO PERMIT—DISCRIMINATIONS—REGULATIONS.

A railway company cannot prohibit the receipt and discharge of passengers and baggage at station platforms by all but one bus or transfer company, although reasonable regulations may be imposed on the privilege; since the railway company's duty to its passengers requires that adequate and suitable accommodations be furnished for the arrival and departure of passengers and their baggage from stations by such means as the latter may desire to employ.

[*Purcell* v. *Grand Trunk Pacific R. Co.*, 13 Can. Ry. Cas. 194; *Donovan* v. *Pennsylvania Co.*, 199 U.S.R. 279; *South Western Produce Distributors* v. *Wabash R. Co.*, 20 Interstate Commerce R. 458; and *Crosby* v. *Richmond Transfer Co.*, 23 Interstate Commerce R. 72, referred to.]

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TWIN CITY TRANSFER CO. v. CANADIAN PACIFIC R. CO.

APPLICATION made by the Twin City Transfer Co. of Edmonton for an order directing the Canadian Pacific Ry. Co. to extend to the applicant company the same privileges as are given to the City Transfer Co. at the company's station at Strathcona, Alta. Statement

THE CHIEF COMMISSIONER:—The application is contested by the Canadian Pacific Ry. Co., which stated, at the hearing, that for the convenient transfer of passengers and their baggage from Strathcona (now South Edmonton), to points in Edmonton proper, at rates which are reasonable and can be controlled by the railway company, a contract has been entered into with the City Transfer Co. to carry passengers and baggage from the station to hotels at certain schedule prices; and that, under the said contract, no payment is made to the railway company, either in the way of tolls by passengers or compensation by the said City Transfer Co. The railway company further alleged that the contract had been entered into entirely in the interest of the travelling public, and that it does not place upon the passengers any obligation either to go themselves or to have their baggage carried by the City Transfer Co. The Chief Commissioner.

Evidence was also given by Mr. Potter of the City Transfer Co. that the former charge of fifty cents per passenger had been reduced to twenty-five cents, as a result of the agreement: and Mr. Price, Superintendent of the Canadian Pacific Ry. Co., stated that some such arrangement had to be made either with Mr. Potter's company or some other responsible concern, in order that the business of the railway company might be done with dispatch and due regard to the convenience of the travelling public; and that, if bus-men were allowed to solicit business on the platform generally, the company could not prevent excessive transfer charges.

It developed during the hearing that Mr. McNeill, of the Twin City Transfer Co., had a similar agreement with the Grand Trunk Pacific R. Co. at Edmonton and made a like charge of

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twenty-five cents, and the record shews that the said Twin City Transfer Co. carries baggage for some fifteen hotels and two theatres; but it was alleged that passengers discharged at the C.P.R. station were prevented from doing business with the Twin City Transfer employee standing on the platform, the railway policeman going so far as to say—"That man is not allowed to do business here. You cannot get on his waggon."

I find, on further consideration, that the *Purcell* case, *Purcell* v. *Grand Trunk Pacific R. Co.*, 13 Can. Ry. Cas. 194, does not deal so broadly with the question as I thought at the hearing, the decision turning largely on special conditions at Saskatoon and not covering generally the right of the railways to make contracts of this character.

The unreported judgment of the Supreme Court discussing the company's appeal, delivered by the Chief Justice, reads as follows:—

> Reading this order as made with respect to the special circumstances which exist at Saskatoon, we dismiss this appeal.
>
> It is not intended by this disposition of the present appeal to cast any doubt upon the right of the company to take such steps as may be necessary to maintain order within the limits of the station grounds.

I find also that the Board has not relied on the *Purcell* case as one of general application, as contracts similar in character to the one considered in that case are still in force at other points, and have not been interfered with.

A consideration of the Act and authorities is therefore necessary.

Under sec. 284 of the Railway Act, companies must—

> (*a*) Furnish at the place of starting . . . and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway; (*b*) furnish adequate and suitable accommodation for the carrying, unloading, and delivering of all such traffic; (*d*) furnish and use all proper appliances, accommodation, and means necessary for such purposes.

See. 317 provides that:—

> All companies shall according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding, and delivering of traffic upon and from their several railways, ... and (sub-section 3) no company shall (*a*) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; (*b*) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company; (*c*) subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

These sub-sections are particularly relied on by Mr. Biggar, who appeared for the complainant. The word "traffic" where used in the Act, means traffic of passengers as well as goods (sec. 2, sub-sec. 3).

The duties of the railway company under these sections, are, in my opinion, confined to matters relating to the receiving of traffic at the railway station, forwarding it over the railway, and delivering it at the destination station or to another railway company, as the case may be.

A railway company is under no obligation, legally or otherwise, to take passengers from their houses or hotels to its stations or *vice versa*; and, there being no duty—no traffic in the railway sense—it cannot properly be said that if such a company allows one transfer company certain privileges, it is guilty of unjust or illegal discrimination because it does not allow the same or similar privileges to all other companies engaged in the transfer business.

If there be discrimination, it lies in the selection of a certain agent for transfer purposes, instead of inviting all those now or from time to time engaged in that business to participate, as much as possible, in it at all the company's stations, an arrangement which would render supervision in the public interest practically impossible.

In some cases a transfer does form part of the railway company's transportation contract, and would fall within section 317; for example, where on a through ticket, including a transfer coupon, passengers are discharged at a station at one part of a city and transferred by a local transfer company, acting under contract, to another station from which the journey is resumed. In such a case as the above, all passengers would be entitled to similar treatment. The company could not, by undue delay or otherwise, give an advantage to one particular person, to the exclusion or neglect of others, either by its own act or the act of its agent, the transfer company. To do so would be an undue preference or discrimination within the meaning of the Railway Act.

On the other hand, the railway company has, if the complaint on this point is well founded, practised undue discrimination in another direction. Instead of supplying equal facilities to all the transfer companies desiring to carry on the business of taking passengers and baggage to and from a railway station, the railway company has, by its contract, excluded all the transfer companies but one. This may be spoken of as discrimination; but, in my view, it is not the discrimination prohibited by the Railway Act, which latter is that worked by the company as between passengers and the shippers and consignees of freight and does not concern in any way the men, agencies or companies that

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may or may not be employed either by the railway company, a passenger, or a shipper for receiving, forwarding, or delivering traffic at, to, or from railway stations. The only exception I know of to this general rule, is made by sec. 317, sub-sec. 6, which provides that if a company grants facilities for the carriage of goods by express to an express company, any other express company on demand shall be granted equal facilities on equal terms and conditions.

Then, if such an agreement is not prohibited by the Act, have railway companies the right to exclude cab or bus drivers from their station properties (subject to the qualifications hereafter made)?

Railway stations, in the same manner as the railway line itself, are of a public nature, subject to duties, obligations, and servitude to the public to the full extent necessary for the proper discharge of the company's statutory and common law obligations as a public carrier. While this is the case, railway stations are private property as between the company and those of the general public who have no occasion to use them for purposes of transportation. In other words, the rights of the company to deal with its property are the same as those of any other owners of real estate in so far as matters or uses unconnected with the operation of its road are concerned. Companies may, therefore, rent space in their stations for newsstands, restaurants, and barber shops; and why should they not, for transfer and cab offices, without having to supply space for all cab-drivers on like terms? As it occurs to me, the company owes no greater duties to cab-drivers than to barbers. It is under no direct obligation to either. Its duties as a railway company commence and end with those arising out of and incidental to the carriage of traffic.

The railway company, however, occupies a different position in so far as a passenger is concerned. It must furnish adequate and suitable accommodation for his arrival at and departure from the station. This entails a station platform or entrance with ready access to the street for carriages. The passenger has the right to choose his conveyance if he wants one. Unless all vehicles have, subject to the reasonable rules and regulations of the railway company, the right to go to the appropriate station platform, the full rights of the passenger in driving to or from the station are curtailed.

In the *Purcell* case, *Purcell* v. *Grand Trunk Pacific R. Co.*, 13 Can. Ry. Cas. 194, it was shewn that the plaintiff went to meet six ladies coming off a train; and that the station agent compelled him to stand his bus at a most inconvenient place for ladies to reach; that the passage where he was compelled to stand had been obstructed; and that the agent, upon complaint

being made, stated that the ladies might reach the bus the best way they could. The late Chief Commissioner held this to be irregular and illegal.

In this case, the railway policeman prevented the plaintiff's representative from doing business, and told the passenger that he could not get on the plaintiff's waggon. This certainly was irregular and illegal. The passenger has a right to take whatever conveyance he desires, subject to the right of ingress and egress by other passengers, and to the proper observance by drivers of the reasonable rules of the railway company regulating traffic and in case of public convenience and safety. The question is one of the facilities that passengers are entitled to—a matter to be determined by the reasonably interpreted requirements of the traffic at the point under consideration.

The mere fact that the plaintiff here has a contract with the theatres for the transfer of baggage, as well as passengers, coupled with the company's refusal to allow him to carry on business, justifies the complaint. McNeill's customers must have the opportunity of availing themselves of his service, and the company must make the arrangements necessary for such purpose.

If any difficulty arise in carrying out the Board's order, precise directions will be given, after inspection by an officer of the Board.

Reference may be had to *Purcell* v. *Grand Trunk Pacific R. Co.*, 13 Can. Ry. Cas. 194; *Donovan* v. *Pennsylvania Co.*, 199 U.S.R. 279; *South Western Produce Distributors* v. *Wabash R. Co.*, 20 I.C.C. Rep. 458; and *Cosby* v. *Richmond Transfer Co.*, 23 I.C.C. Rep. 72.

COMMISSIONER MCLEAN concurred.

Re NOBLE CROUSE.
REX v. CROUSE.
(Decision No. 1.)

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell and Ritchie, JJ. March 27, 1913.

1. HABEAS CORPUS (§ I B—6)—LIBERTY OF THE SUBJECT ACT, R.S.N.S. 1900, ch. 181—POWER UNDER, OF COUNTY JUDGE ACTING AS MASTER OF SUPREME COURT.

Rule 1 and sub-rule (*a*) of order 54*b* (N.S.) does not confer upon a judge of a County Court, when acting as a Master of the Supreme Court, power to discharge from jail, under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, a person confined for the violation of the Nova Scotia Temperance Act.

2. PROHIBITION (§ I—1)—POWER OF SUPREME COURT TO ISSUE TO COUNTY JUDGE WHEN ACTING AS MASTER OF SUPREME COURT (N.S.).

Since a judge of a County Court acting as a Master of the Supreme Court of Nova Scotia, is an officer of the latter court, and not an inferior tribunal, the Supreme Court should not issue a writ of prohibition to restrain his proceeding as such without jurisdiction; an order directed to the Master as an officer of the court is sufficient.

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3. STAY OF PROCEEDINGS (§ I—5)—MASTER OF SUPREME COURT EXCEEDING JURISDICTION—RESTRAINING ON MOTION.

The Supreme Court of Nova Scotia can stay the action of a judge of a County Court, when acting as a Master of the Supreme Court, in releasing without authority a person from custody under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, since a county judge acting as Master of the Supreme Court is an officer thereof, and, under order 54, may be restrained on motion from any unauthorized exercise of power.

Statement

MOTION for a writ of prohibition to restrain the Judge of the County Court for district No. 2 from discharging from jail one Noble Crouse, a prisoner confined in jail under a conviction for a violation of the Nova Scotia Temperance Act.

An order was made on the appeal directing that the proceedings before the Master be stayed.

The application for the discharge of the prisoner was made to the Judge of the County Court, as a Master of the Supreme Court, under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181. The motion for the writ of prohibition was made in the first instance to Ritchie, J., at Chambers, and was referred by him to the full Court.

A. Roberts, and *B. W. Russell*, in support of application.

J. A. McLean, K.C., and *J. J. Power*, K.C., *contra*.

Ritchie, J.

RITCHIE, J.:—Prohibition is applied for in this case on the ground that the Judge of the county for district No. 2, as a Master of the Supreme Court, has no jurisdiction to entertain an application of Crouse for discharge from custody under the Liberty of the Subject Act. Crouse is imprisoned under a warrant issued by a stipendiary magistrate for a violation of the Canada Temperance Act.

In considering the questions involved in this application, which are questions of construction, it must be borne in mind that a distinct and unequivocal statutory enactment is required to give to Masters the jurisdiction claimed for them: *Ross* v. *Blake*, 28 N.S.R. 543.

So far as the construction of rule 1 and sub-rule (*a*) of order 54*b* is concerned (apart from a point which I will deal with later) the argument of Mr. McLean is, to my mind, convincing. The words "other than" create an exception within the exception, but the difficulty in giving effect to his argument arises when rule 2 is considered—that rule is as follows:—

> No Master shall exercise the jurisdiction or powers by this order conferred except in cases or matters belonging to a prothonotary's office in the district for which he is County Court Judge.

The words used in this rule are controlling words, "No Master shall exercise the jurisdiction, etc."

To enable the Court to hold that the Master has jurisdiction

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the cause or matter must belong to the prothonotary's office in his County Court district. It was argued that the Master has power under rule 1, sub-rule (*b*) to allow a writ of *certiorari* and that *certiorari* does not belong to the prothonotary's office in the district any more than *habeas corpus* does, and on first consideration, I was impressed with this argument, but I think the answer to it is, that, under the Crown rules in regard to *certiorari*, a recognizance must be entered into and filed before the notice of the motion for the *certiorari* is served. When the recognizance is entered into and filed, the cause or matter belongs to the office where it is on file. The originating step has been taken in pursuance of the direction contained in the rule, but *habeas corpus* is not so originated. I think the words "belonging to a prothonotary's office mean originating, or having been instituted or begun in, or transferred to that office. In the case of *certiorari*, the entering into and filing the recognizance, is the initial step which makes the proceeding a cause or matter, and when that step has been taken, the proceeding is, as I have said, a cause or matter belonging to the prothonotary's office.

It was contended that the filing of the affidavit to be used on the application for discharge made the proceedings a cause or matter belonging to the prothonotary's office, but I cannot assent to this contention. The mere filing of an affidavit cannot, in my opinion, be held to originate proceedings or make a cause or matter within the meaning of the rule.

Apart from the questions with which I have dealt, there is another objection to the claim for jurisdiction in the matter, and perhaps it is the strongest ground upon which to base this judgment. I am of opinion that rule 1, sub-rule (*a*) only gives a Master jurisdiction in criminal matters when the party applying for discharge is imprisoned for an offence which might be tried by a Judge of the County Court, under the provisions relating to speedy trials. I think that two classes of cases are provided for, namely, civil and criminal.

The civil class is provided for by the words "other than that of a County Court, Municipal Court, stipendiary magistrate, or justice of the peace." Then the sub-rule goes on to provide for the criminal class of case in the following language: "or under any proceeding in a criminal matter other than an offence which may be tried by a Judge of the County Court under the provisions relating to speedy trials."

Under the County Court Act and under the Municipal Court Act there is no criminal jurisdiction and stipendiary magistrates and justices of the peace have both civil and criminal jurisdiction. The two last named judicial officers are put in the same class with the County Court and the Municipal Court, and

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then there is the provision which I have quoted in regard to criminal matters. I therefore think that it is the civil jurisdiction of stipendiaries and justices which is referred to.

If this application for discharge is criminal procedure, then there is a very good reason for reading the rule in the way which I have indicated because procedure in criminal matters is within the jurisdiction of the Parliament of Canada and not within the jurisdiction of the Provincial Legislature. It is procedure on the Crown side, and, in my opinion, it is procedure in a criminal matter, and for this view there is English authority: *Easton's Case*, 12 A. & E. 645, was an application for discharge under *habeas corpus*. At p. 648 Lord Denman said:—

> This must be called a criminal matter. The party is sentenced to imprisonment with hard labour, which puts the matter beyond doubt. That being so, the regular course undoubtedly is for the writ to issue on the Crown side.

In *Taylor's Case*, 3 East 232, the Court held that Taylor being in custody on criminal process ought to have been brought up by a *habeas corpus* on the Crown side of the Court. It is not necessary to cite authority for the proposition that the warrant under which Crouse is imprisoned is criminal process.

I am of opinion that the point raised by Mr. Power that a writ of prohibition cannot go because the Master is not an inferior Court but an officer of this Court, is technically well taken, but in my view it can make no difference in the result.

This Court has inherent power to stay the hand of its officers and I see no objection to moulding the application accordingly. I am of opinion that this should be done, and an order staying proceedings pass.

Russell, J.

RUSSELL, J.:—The County Court Judge for district No. 2 has undertaken to release a prisoner from custody on a criminal charge by virtue of his office as Master of the Supreme Court under order 54*b*. The terms of the order are sufficiently involved and perplexing to furnish a very good excuse for misunderstanding the effect of the language. But when the involutions of the composition with its exceptions within exceptions are all straightened out, it becomes altogether too clear for argument that the only jurisdiction conferred upon the County Court Judges as Masters of the Supreme Court in connection with criminal proceedings is in relation to offences triable under the Speedy Trials Act. If the preceding phrases referring to the Municipal Court, stipendiary magistrate, and justice of the peace had been intended to include criminal as well as civil proceedings, there was no need to break the flow of the sentence with the words "criminal matters." The exception would, in that case, have read as follows:—

All matters relating to the liberty of the subject in which the person is held under any proceeding other than that of a County Court, Municipal Court, stipendiary magistrate, or justice of the peace or County Court Judge acting under the provisions relating to speedy trials.

The only possible necessity for interpreting the words relating to criminal matters was that the draftsman was making a sharp transition to criminal matters from the civil proceedings to which it is obvious, on close inspection, that the rule is restricted until it comes to the closing phrase.

This would be sufficient to end the controversy, but the argument on the effect of the rule took a somewhat wide range, and I have been tempted, perhaps unnecessarily, to follow the history of this rule from its beginning as an Act of the Legislature in 1897. Under that Act, which is ch. 32 of the Acts of 1897, I think it is very clear that a proceeding had to be already in the Supreme Court before a Judge of the County Court, acting as a Master could have anything to do with it. The words are:—

"The Judges of the County Court, as Masters of the Supreme Court, . . . shall . . . hear motions and applications and make orders and transact all such business and exercise all such authority and jurisdiction *in the following proceedings and matters in the Supreme Court* as under the Judicature Act and the rules made in pursuance thereof may be transacted and exercised by a Judge of the Supreme Court at Chambers." *Habeas corpus*, excepting when the imprisonment was under a judgment order or decree of the Supreme Court or in proceedings for criminal offences not triable under the provisions of the Speedy Trials Act or otherwise was included among the subjects as to which the jurisdiction was conferred upon the County Court Judges as Masters.

The words "or otherwise" would destroy any intended limitation of their powers in connection with proceedings for criminal offences, and their insertion is probably the result of careless drafting which was corrected when the rule was framed, by restricting the jurisdiction conferred by this exception to offences triable by a Judge of the County Court.

Confining our attention for the moment to the statute of 1897 I think it is obvious that the jurisdiction intended to be conferred by that Act was dependent upon the matter being in the Supreme Court when the jurisdiction was invoked. Apart from the fact that this is expressly stated in the first section of the Act, I think that if it had been intended to make jurisdiction upon a Master of the Supreme Court to release a prisoner under *habeas corpus* reference would not have been made to the Judicature Act or the rules made thereunder which have nothing specifically to say about *habeas corpus*, but to ch. 18 R.S. of the Liberty of the Subject, and the Crown rules by which the practice in *habeas corpus* is regulated. I have little doubt that there was in fact in the mind of the draftsman some hazy idea that he

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was conferring a jurisdiction to release from imprisonment in some cases, but as a matter of legal intendment and construction I cannot read into this Act the expression of such an intention. The jurisdiction conferred is mainly such as would properly belong to a Master, and, having in mind the provisions of the County Court Act, ch. 156, sec. 35, which are so carefully confined to relief from imprisonment under civil process, I still think, as I did when deciding the case of *Rex* v. *Woodworth*, 12 E.L.R. 70, that if it had been intended to confer jurisdiction to release prisoners in custody under criminal process the legislature would have done it by express terms in the County Court Act, rather than by obscure and debatable inferences from the terms of an Act the obvious and primary purpose of which was merely to confer upon those Judges the powers of Masters of the Supreme Court. This view seems to me to be all the more conclusively established by the second section of the Act providing that "no Master shall exercise the jurisdiction or powers by this Act conferred excepting in causes commenced in the district in which he is County Court Judge." The effect of this provision may, indeed, have been to nullify altogether the section in reference to *habeas corpus*, for I know of no definition of a "cause" in the year 1897 which could, by any possibility, include any proceeding connected with a *habeas corpus*. But this only shews the haziness of the conception which the draftsman was attempting to embody in legislation and cannot be made a reason for attributing to these officials a jurisdiction not clearly conferred.

The terms of the order substituted for the Act of 1897 are, as was to be expected, more carefully drafted and clear and consistent than those of the Act of 1877, but I can see no reason for inferring that they were intended to confer a substantially wider jurisdiction. The Judges of the County Court are made Masters of the Supreme Court, and one would naturally expect the powers conferred by the rule to be similar to those exercised by Masters and not such as belong to the Judges of the Supreme Court as Judges. The powers usually exercised by Masters are such as are auxiliary to proceedings instituted in the Court and accordingly there is a rule in the order which takes the place of the section of the statute providing that no Master should exercise the jurisdiction conferred except in causes commenced in the district in which he is a County Court Judge. It is in terms that no Master shall exercise the jurisdiction or powers by this order conferred except in causes or matters belonging to a prothonotary's office in the district for which he is a County Court Judge. I do not understand how a cause or matter can be said to belong to a prothonotary's office until some proceeding of some kind in connection with it has been filed in

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the office, and it is only in respect to causes and matters so belonging to such prothonotary's office that the jurisdiction is conferred.

I must confess that my faith in this view of the provision last referred to was seriously shaken by the able argument of Mr. McLean, and by the discovery that the allowance of a writ of *certiorari* was among the powers conferred without doubt upon the Judges of the County Court. But on second thoughts, it occurs to me that this is a matter that does belong to the prothonotary's office because *certiorari* proceeding must be begun by security filed in the office of the prothonotary. The applicant is required to file in the office of the clerk of the Crown of the county where the writ is to be made returnable a recognizance with condition to prosecute and pay costs. The case of a *certiorari*, therefore, presents no objection whatever to the argument drawn from the section referred to.

If the question depended entirely upon these considerations based upon the construction of the statute, possibly it might be lacking somewhat in conclusiveness because it might perhaps be fairly contended that *habeas corpus* could also be shewn to belong in the same way to the prothonotary's office or that it would so belong if the applicant chose to file his affidavit in the office of the clerk of the Crown. My learned brother Ritchie has made a distinction between *certiorari* and *habeas corpus* which seems to meet this suggestion. Whether it does so or not, I do not consider very material, although inclined to concur in his reasoning on the point, because I think the case can be put on much higher grounds.

When the powers expressly conferred by the order are examined, other than the one in question, it will, I think, be perceived that they are all of them powers of such a kind as could normally and naturally be exercised by Masters. The allowance of a writ of *certiorari* settles nothing finally as to the rights and interests involved. It merely puts the matter in question in train to be determined by the Supreme Court. The settlement of issues is not entrusted to the officials so constituted Masters except where the parties have consented. The awarding of costs is restricted to proceedings before Masters and those expressly committed to them by the rules of the Court or the order of a Court or Judge. Applications for time to plead and for leave to amend pleadings are merely auxiliary to proceedings in the Supreme Court. The sale of the lands of lunatics and infants is really the only matter of high importance that has been committed to these officials as Masters, if it is indeed committed to them, as to which I express no opinion. If it has been so committed to them it may have been because it was thought to be a matter that a Master of the Supreme Court could properly be

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allowed to deal with. The sale of lands in actions for foreclosure is merely a proceeding in the action. With one possible exception, therefore, the sale of land of lunatics and infants, there is no power conferred by this order that determines any disputed substantive right unless it is the one now under consideration. They all have to do merely with the machinery by which matters are put in train for settlement by the Supreme Court.

In the endeavour to construe the particular provision now under consideration I think we may fairly apply the principle *noscitur a sociis* when we find that all the other provisions of the order are in the nature of machinery, with one exception, and that a matter which might well have been considered a proper subject to be dealt with by a Master. I think it is not improper that we should approach the question with a prepossession against the view that the jurisdiction in question has been conferred. Such a prepossession is not a bias, it is a legitimate attitude justified first by the fact that we are dealing with a series of powers conferred upon these officials merely as Masters of the Supreme Court; secondly, that such a power was clearly not conferred by the statutes for which the rule is a substitute; thirdly, that the County Court Act, by which the substantive jurisdiction of the County Courts is defined, although it has been revised since the enactment of 1897, has carefully limited the jurisdiction to release prisoners under *habeas corpus* to cases of custody under civil process; fourthly, that, apart from the jurisdiction in question, the powers expressly conferred by the order, all of them with one possible exception relate to matters of procedure ancillary to proceedings in the Supreme Court and do not involve the determination of any question of substantive rights; and as to the exceptional case, the sale of infants' and lunaties' lands, the powers are such as might fairly have been considered suitable for the exercise of a Master's functions. The power to release a prisoner seems to me to be a matter of an altogether different kind from any of those referred to. A prisoner in custody has the undoubted right to go in succession to one after another of seven Judges of the Supreme Court for relief. If it was intended to give him, in addition to this, the option of applying to a County Court Judge, the least that should be looked for is that the right should be found in clear and unmistakable terms. Ample scope can be given to the terms of the clause respecting *habeas corpus* by confining it to the proper duties of a Master of the Supreme Court without reading it as conferring a jurisdiction to release. The Crown rules, for instance, allow a return to be amended by leave of the Court or a Judge, and there must be a number of other possible applications of an ancillary nature that a Master could properly dispose of, short of exercising a jurisdiction to

release from imprisonment, and I cannot believe that the Judges of this Court would ever have thought of making use of this power to make rules in such a manner as to confer upon the Judges of the County Court a jurisdiction which the Legislature, in defining their jurisdiction, has so carefully withheld. Nor can I, after reading one by one the sections of the Judicature Act conferring the authority to make rules, discover under any section under which I should feel myself justified as a Judge of the Supreme Court in assuming the authority to make a rule conferring such a jurisdiction. The authority can, by a *tour de force*, be read with sec. 45 (6) designed for no such object, but I should regard the exercise of the rule making power for this purpose as an usurpation of the functions of the Legislature which gave us the power to make rules for regulating the procedure of the Supreme Court, but did not, I think, imagine that in regulating our own procedure we should so radically enlarge the jurisdiction that they have conferred upon another Court, especially when, in the exercise of their proper authority, they have so carefully limited it. I should as soon have thought that in defining the duties of officials of this Court we might legitimately assume authority to give the County Court Judge jurisdiction to try an action of ejectment or issue a writ of *quo warranto*.

The case of *McKay* v. *Campbell*, 36 N.S.R. 522, has been cited to shew that the Court cannot prohibit the learned Judge of the County Court from exercising the jurisdiction in question. In that case a commissioner was proceeding under the Collection Act in a matter in which he had undoubted *primâ facie* jurisdiction conferred by law, the only objection being that he was personally disqualified in the particular case by reason of interest, and it was held that as he was acting as an officer of this Court the writ of prohibition would not lie. I think the principle applied in that case is not applicable here. In this case, if I am right, the Judge had no authority conferred upon him by any statute to exercise the jurisdiction in question and I do not think he is the less amenable to control by means of the writ of prohibition because he professes to have jurisdiction as a Master of this Court. It is the same case as if he were undertaking to try an action of ejectment or issue an injunction. The circumstance that he professed to do so as a Master of the Supreme Court would not, I think, prevent this Court, under the principle referred to in *McKay* v. *Campbell*, *supra*, from prohibiting him from exercising such a jurisdiction. But it is not necessary to decide that prohibition would lie in such a case and on this point I prefer to leave the question open as far as this opinion goes. We have undoubted authority to control the proceedings of our own officers, and as the authority

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is claimed by virtue of its having been conferred upon the County Court Judge as an officer of the Supreme Court, I think we should prevent its exercise if, as I hold, the jurisdiction has not been conferred.

MEAGHER, J., concurred.

TOWNSHEND, C.J.:—While not so thoroughly convinced as my brethren, I think it best to concur in the result of the decision just read. The language of order 54*b* is certainly obscure, and its meaning not well or clearly expressed, and, to say the least, it is doubtful whether power to grant writs of *habeas corpus* has been conferred on County Court Judges acting as Masters of this Court in criminal cases other than in offences triable under the Speedy Trials Act, and before stipendiary magistrates. Such being the case, it seems to me the better and wiser course for the Judge of the County Court acting as Master to decline entertaining such application, at any rate until either the Legislature or the Judges of this Court, by order, distinctly confer such jurisdiction, if it is deemed expedient to do so.

As to the preliminary objection urged by Mr. Power to the propriety of issuing a writ of prohibition to the County Court Judge acting as a Master of this Court, I think it is well taken. Writs of prohibition only go from this Court to inferior Courts, and not to its own officers. When acting in the capacity of Masters they are undoubtedly acting as officers of this Court, and as such the Court inherently, and also by virtue of order 54, has a much more speedy and summary mode of restraining any unauthorized exercise of power by simply restraining them on motion from doing this act complained of, and I see no difficulty in this case of making such an order.

Proceedings stayed.

[A subsequent application in the same matter is reported *post* p. 759, *Re Noble Crouse*, No. 2.]

Re NOBLE CROUSE.
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Nova Scotia Supreme Court, Graham, E.J. April 2, 1913.

1. INTOXICATING LIQUORS (§ III K—94)—SECOND OFFENCES—NOVA SCOTIA TEMPERANCE ACT — SUMMONS—PARTICULARS OF PREVIOUS CONVICTION.

In a criminal prosecution for an alleged second offence under the Nova Scotia Temperance Act, 1910, as amended, incorporating by reference for procedure certain sections of the Criminal Code (Can.) 1906, and the forms of the Canada Temperance Act, a summons is defective which does not specify with any detail the previous conviction either as to (*a*) its date; (*b*) the nature of the offence; (*c*) whether for selling or keeping or which of the other possible offences; (*d*) the place of the offence, or (*e*) otherwise earmark it; although it is alleged therein that the present offence "was and is a second offence against the Nova Scotia Temperance Act, 1910"; such summons is an insufficient basis for a conviction in the absence of the accused for a second offence with the increased penalty.

[*The Queen* v. *Willis*, L.R. 1 C.C. 363; *The Queen* v. *Thomas*, L.R. 2 C.C. 141, referred to.]

2. INTOXICATING LIQUORS (§ III K—94)—SECOND OFFENCE — PARTICULARS OF FIRST OFFENCE IN SUMMONS—REQUIREMENTS.

In a criminal prosecution for an alleged second offence under the Nova Scotia Temperance Act, 1910, as amended, where the summons is defective in not sufficiently earmarking the previous offence and conviction, the defect of such summons cannot be got rid of by merely omitting to carry such defect into the present conviction, and, where the hearing has proceeded in the defendant's absence, a conviction as for a second offence cannot be based upon such defective summons, even though the present conviction and information may in themselves be sufficient in form.

[*Nellacott* v. *Thompson* (1890), W.N. 158; *The Queen* v. *Grant*, 30 N.S.R. 368, specially referred to.]

3. INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—DESCRIPTION OF STATUTORY PROVISIONS—AMENDMENTS, WHEN INCLUDED.

In a proceeding for an alleged second offence under the Nova Scotia Temperance Act, 1910, as amended by the Nova Scotia Temperance Act, 1 Geo. V. (N.S.) ch. 33, sec. 8, the latter alone providing the punishment by imprisonment without option of fine for a second offence; where the information and conviction set out that the alleged second offence is contrary to the provisions of part I. of the Nova Scotia Temperance Act, 1910, and contain no reference to or recital of the amendment of 1911, ch. 33, sec. 8, the omission constitutes, at common law, a misdescription of the statutory provisions and is not cured by the general Interpretation Act for the statutes of Canada, 6 Edw. VII. ch. 21, sec. 6 (now R.S.C. 1906, ch. 1 sec. 39), lacking all amendments, since the latter provision is not incorporated by reference in the Nova Scotia Temperance Act.

[*Patridge* v. *Strange*, 1 Plowden 79; *Birt* v. *Rothwell*, 1 Raym. 210; Craie's Statute Law, 55, referred to.]

Statement

THE defendant was convicted by the stipendiary magistrate of the town of Bridgewater of a second offence against the Nova Scotia Temperance Act, 1910. The defendant was not present at the trial and was not represented by counsel. The

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Statement

conviction was made in his absence imposing the statutory penalty of three months in the county gaol, and a warrant thereon issued followed by the arrest of the defendant. Application was then made before Graham, E.J., at Chambers, for the prisoner's discharge under ch. 181 of R.S.N.S. 1900, "Of securing the liberty of the subject."

One of the grounds of the application was that the summons was defective inasmuch as it did not fully state and was not sufficient notice to the defendant of the offence with which he was charged in the information and of which he was convicted in his absence, and that it did not bring to his notice the fact that the punishment for such offence was by the amendment of ch. 33 of the Acts of 1911, made three months' imprisonment without the alternative of a fine. The prisoner was discharged. The part of the summons describing the offence was in form as follows:—

Whereas information has been laid before me Vincent J. Paton, stipendiary magistrate in and for the said town of Bridgewater, for that you on the 20th day of February, A.D. 1913, at the said town of Bridgewater in the said county of Lunenburg, unlawfully did keep intoxicating liquor for sale, contrary to the provisions of part I of the Nova Scotia Temperance Act, 1910, then in force in the said town of Bridgewater, and that the same was and is a second offence by you against the Nova Scotia Temperance Act, 1910.

J. A. McLean, K.C., for the prisoner.
Arthur Roberts, for the prosecutor.

Graham, E.J.

GRAHAM, E.J.:—This is an application for discharge on return to *habeas corpus* of one Crouse imprisoned under the Acts of 1911, ch. 33, sec. 8, for a second offence. This is imprisonment by way of punishment and not to enforce payment of a money penalty.

The Nova Scotia Temperance Act, 1910, sec. 24, provides as follows: "for a second offence to a penalty of not less than $100 or to imprisonment for two months with or without hard labour."

By N.S. Laws 1911, ch. 33, sec. 8, sec. 24 was repealed and this is substituted after the first conviction "on each subsequent conviction he shall be liable to imprisonment for three months with or without hard labour."

In this Act in addition to its own provision there are incorporated by reference for procedure the provisions of the summary convictions parts of the Criminal Code of Canada and the forms of the Canada Temperance Act are quite sufficient.

In the Canada Temperance Act there is no form for a summons but there is a form for informations, form P.—which refers one to the forms for convictions U. and V. for second

and third offences. Forms U. and V. are forms of convictions for second and third offences. And this is the form of statement therefor:—

> And it appearing to me that X. Y. was previously, to wit: on the day of, A.D. 19 at the of before, etc., duly convicted of having unlawfully sold intoxicating liquor contrary to the provisions of part II. of the Canada Temperance Act then in force in the said on the day of A.D. 19 at the of .

By sec. 44 of the Nova Scotia Temperance Act, 1910, it is provided

> that the magistrate shall in the first instance enquire concerning such subsequent offence only and if accused is found guilty thereof, he shall then and not before enquire concerning such previous conviction.

One of the difficulties in this case is about the summons. The only reference in it to his previous conviction or offence was "And that the same was and is a second offence by you against the Nova Scotia Temperance Act, 1910." There is no allegation of any kind of a previous conviction. There are none of the details contemplated as to the date of the previous conviction, the nature of the offence, whether selling, keeping or which of the many offences was involved or the date or place when and where it was alleged to have been committed, the form of information and conviction points to such details.

Sec. 44 requires two inquiries when the prosecutor is going for a second offence—first in respect to the principal charge, then in respect to the previous conviction. There may be many previous convictions against defendant in this class of cases. And convictions for the principal offence have been quashed because the recital in it of a previous conviction shewed a conviction without jurisdiction in the magistrate making that previous conviction.

In respect to the requirement of a summons it is laid down in Burns' Justice of the Peace, vol. 1, p. 1127: "It should state the substance of the charge laid against the defendant." And in vol. 5, p. 742, under "Summons": "In all legal proceedings the person complained of ought to have notice of the charge laid against him and to have an opportunity of being heard in his own defence."

I notice that, Mr. Daly in his Canadian Criminal Procedure 133, says:—

> The intention of the summons being to afford the person accused the means of making his defence it shou'd contain the substance of the charge and fix a day and place for his appearance.

Now this summons does not contain the substance of the charge. Nor does it give notice of what previous conviction is to be used in evidence against the defendant.

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The defendant did not appear before the magistrate. I suppose he relied upon the insufficient statement of a previous conviction, and took the chances of a first conviction and stayed away.

The magistrate convicted and instead of carrying the defect in the summons into the conviction made a conviction which for the present case I shall consider to be sufficient as well as the information itself.

Even this Court, where a defendant had not appeared, could not enter a judgment good in form where the writ of summons served with a special indorsement was for an insufficient cause of action materially different. There would have to be an amendment and re-service: *Nellacott* v. *Thompson* (1890), W.N. 158.

I think that this case is within the decision in *The Queen* v. *Grant*, 30 N.S.R. 368. There had been an adjournment of the trial. The defendant did not attend on the date to which it had been adjourned. The present Chief Justice says, p. 374:—

> That the magistrate on that date heard a motion by the prosecutor for an amendment of the summons in the case changing the date of the previous conviction set out in the summons and granted the motion, amending the summons and then convicted the defendant of a third offence.

This it was held could not be done, p. 375. I rely on this case to shew that a recital of a previous conviction in a summons is a material thing. And if the amendment by changing a date will not be allowed surely it is not permissible to recite a previous conviction in this wholly informal way. There is no previous conviction ear-marked, no previous offence ear-marked, any one of the many convictions may be used against a defendant at the trial without any notice to him. It is quite a mistake to call that loose expression the substance of the information.

In England there are statutes as to offences committed after previous convictions, but the form of indictment on such cases contains a count setting out with particularity the previous convictions and that has to be submitted to the jury. Archibald, Criminal Pleading, 24th ed., 564, 1066, 1081; *Rex* v. *Allen*, Russ. and Ry. 512; *The Queen* v. *Will's*, L.R. 1 C.C. 363; *The Queen* v. *Thomas*, L.R. 2 C.C. 141; *The Queen* v. *Martin*, 1 C.C. 214.

Of course in our statute, sec. 45, you may have a conviction for a first offence even if some of them have been other offences.

In Wilde, Commonwealth, 2 Met. 410, Shaw, C.J., says:—

> It is, therefore, not necessary to set forth (in the information) the full and entire record of such previous conviction *in extenso;* it is sufficient to set it forth with such particularity as to identify it and indicate the nature and character of the offence charged and to set forth the

sentence or judgment with so much exactness as to shew that it was such a conviction as brings the convict within the law providing for the additional punishment sought for by the information.

And in Bishop, Criminal Law, vol. 1, p. 5963, the learned author says:—

But if it is the second or third (offence) and the sentence is to be heavier by reason of its being such, the fact thus relied on must be averred in the indictment, because by the rules of criminal pleading the indictment must always contain an averment of every fact essential to the punishment to be inflicted."

Further, Bishop says, sec. 962:—

According to New York doctrine, which seems sound, if the conviction for a first offence was before a Court of special or limited jurisdiction, the averment of the conviction on an indictment for the second, must shew the jurisdiction.

In *Commonwealth* v. *Harrington*, 130 Mass. 35, where an attempt was made by statute to dispense with the necessity "of alleging previous conviction for drunkenness," the statute held void because it was contrary to art. 12 of the Declaration of Rights, that no citizen shall be held to answer for any crime or offence "until the same is fully and plainly, substantially and formally described to him." The Court said:—

It follows that the offence which is punishable with the higher penalty is not fully and substantially described to the defendant if the complaints fail to set forth the former convictions which are essential features of it.

In *People* v. *Buck*, 109 Mich. 687, the information against the defendant charged with being a common prostitute contained the following language: "Said offence being and is hereby charged as a third offence." The Court said: "There was no description of the previous alleged offences nor was it averred that there had been any previous conviction." It was held under the statute in question that

It was not only necessary to charge the offence as a second or third offence as the case may be, but it is also essential to charge that there has been a conviction of such previous offence or offences, and properly the information should state at least the date and occasion of such conviction.

I have cited these authorities to shew that the summons in this case neither contained the substance of the charge nor was it legal notice to the defendant of the previous conviction. I am not now questioning the sufficiency of the information or conviction; and I say that, with such want of notice, it was not competent for the magistrate in the defendant's absence to make the conviction which he did make reciting a previous conviction in much more formal terms and with much more detail.

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There is another point. In the information and conviction the charge alleged was set out as contrary to the provisions of part I of the Nova Scotia Temperance Act, 1910, then in force in Bridgewater; also his second offence against the Nova Scotia Temperance Act, 1910. And there is no reference to or recital of the amendment of 1911, ch. 33, sec. 8, which alone provides this punishment by imprisonment for a second offence.

I should think that at Common Law it would be held that there was misdescription of the provisions relied upon: *Patridge* v. *Strange*, 1 Plowden 79; *Birt* v. *Rothwell*, 1 Raym. 210; Craie, Statute Law, 55.

But in the general Interpretation Act for the statutes of Canada there was introduced, 6 Edw. 7, ch. 21, sec. 6 (now R.S.C. ch. 1, sec. 39), this provision: "any such citations of, or reference to any Act (in any Act, instrument or document) shall, unless the contrary intention appears, be deemed to be a citation of or reference to such Act as amended." So far as I can discover we have no such interpretation provision in the Acts of Nova Scotia.

Although those parts of the Criminal Code relating to procedure and the amendments thereto are incorporated by reference into the Nova Scotia Temperance Act, this provision in the general Interpretation Act of Canada is not incorporated also; and it would not be applicable to this conviction, which is really a provincial thing, and does not cure it. However, I depend on the point first dealt with.

The defendant should be discharged from imprisonment, and there will be the usual undertaking by him not to bring any action.

Prisoner discharged.

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May 20.

MURRAY v. PLUMMER.

Saskatchewan Supreme Court, Johnstone, J., in Chambers. May 20, 1913.

1. DEPOSITIONS (§ I—2)—OF PARTY TO ACTION INVOLVING FRAUD—SHEWING SUFFICIENT TO JUSTIFY TAKING.

An order for the examination in the United States, under rule 365, Sask. Rules 1911, of a party to an action involving fraud, will be refused where the court was satisfied that the purposes of justice would very likely be defeated if he were not produced as a witness on the trial so as to be subjected to an effectual cross-examination, and confronted by witnesses fully acquainted with the circumstances of the case.

[*Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137; and *Richard Belicean Co.* v. *Tyerman*, 4 S.L.R. 39, referred to.]

Statement

APPEAL by the plaintiff from an order made by the Local Master at Cannington for the examination of defendant Plummer on behalf of his co-defendant, Lockhart, before a special

examiner at Portland, Oregon, under rule 365 (Sask. Rules, 1911).

W. A. Beynon, for plaintiff.
P. H. Gordon, for defendants.

JOHNSTONE, J.:—The action, an action for specific performance, is founded on an agreement for sale alleged to have been entered into between the plaintiff and Plummer, whereby the latter agreed to sell to the plaintiff certain lots in Saskatchewan for the consideration of $1,600. The plaintiff claims to have paid all the purchase-money and interest, save the sum of $656.24, which, he alleges, he tendered to Plummer with a transfer of the property to himself to be executed. The cause is at issue, but as yet there has been no application to set it down for trial. Both defendants appear to the action by the same solicitor.

The defendant Lockhart made an application before the Local Master for an order for the examination of his co-defendant at Portland, Oregon, and in support of this application filed his own affidavit and that of his co-defendant, Plummer. Lockhart in his affidavit states that he is one of the defendants; that the evidence of his co-defendant, Horace E. Plummer, is necessary and material; that he cannot safely proceed to the trial without his evidence; and that the evidence which Plummer would be called to give is with respect to the following: (*a*) the fact that the plaintiff made default in the performance of certain covenants in the said agreement contained, more particularly with reference to the payments by the plaintiff to the defendant Plummer; (*b*) proof of notice of cancellation; (*c*) the plaintiff did not tender the sum of $656.24, as alleged by him, nor did he tender a transfer. It will be observed that this affidavit does not, nor does that of Plummer, state that this defendant, Lockhart, would be able to prove these facts by Plummer.

The affidavit of Plummer, sworn on March 22, 1913, and used on May 6, 1913, contains the following statements: (*a*) that he is one of the defendants; (*b*) that his permanent residence is in the city of Portland; (*c*) that his occupation is building inspector, and he is in the employ of the city of Portland, and it would be impossible for him to leave his business in that city and attend the trial of the action in the month of May, in the Province of Saskatchewan, as the period is a very busy period in the building business; (*d*) that he has seen a copy of the statement of claim which is produced and marked A.; (*e*) that he can give evidence material to the issue, and that his evidence could be taken effectually in the State of Oregon; (*f*) that he believes that one Mahaffy, an attorney practising in the city of Portland, is a fit and proper person to act as commissioner for the taking of his evidence.

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It is not alleged in either affidavit used before the Local Master that Plummer could not be induced to come to Saskatchewan at any other time, or that he would not come to give evidence on the trial, or circumstances shewn that would satisfy the Local Master that he could not be induced to come here, or that the defendant Lockhart could not reasonably be expected to produce him at the trial. The rule under which the application is made contains the provision that, where it should appear necessary for the purposes of justice, the Court or Judge may make an order for the examination upon oath of any witness or person, etc.

Now, what is there on this application, in the material before the Local Master, which should satisfy him that it is in the interest of justice that the defendant Plummer should be examined at Portland? I think, nothing; moreover, I think the very reverse is shewn by the material. Assuming that the plaintiff's case, as it appears in the statement of claim, is truthfully set forth—I think this must be assumed for the purpose of this application—what is the position? The plaintiff entered into an agreement with the defendant Plummer to purchase land at a certain price on the instalment plan. These instalments and interest thereon were duly paid as and when called for, with the exception of $654.24, which amount was tendered to Plummer on July 19, 1912; that the defendant Lockhart, Plummer's solicitor, knowing the circumstances, took from Plummer a transfer of the property in question in fraud of the plaintiff. This is virtually the plaintiff's case. He asks for specific performance as against Plummer, and that Lockhart, the registered owner, should be declared a trustee for him.

I think it most important that Plummer, a party to the fraud, if any, perpetrated, should be present at the trial; and, besides being subjected to an effective cross-examination, be confronted as well with persons fully acquainted with the circumstances. Not only does it appear not necessary for the purposes of justice that Plummer should be examined in Portland, but it does appear to me that the purposes of justice would very likely be defeated by his being examined abroad.

It strikes me very forcibly that the questions arising on this appeal are covered by the remarks of the learned Judges sitting in appeal in *Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137. The application there was for an order for the examination of a witness in Chicago. Baggallay, L.J., at p. 141 and following pages, draws attention to what must be shewn on an application for an order of this kind. He says:—

> There is no doubt that the Court has jurisdiction to grant the application. But on what principles is that jurisdiction to be exercised? The Court, in considering an application of this nature, will, no doubt, take

into consideration the difference between the expense of the witness being brought over to this country, and of his being examined abroad, and the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that, if an application is made (whether it is made by the plaintiff or by the defendants) for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the Court that it is for the interest of justice that the witness should be examined abroad.

It is stated by Lord Justice Cotton:—

This is not the case of a plaintiff, but of a witness, and undoubtedly a most material witness—a witness who is coming to give evidence on the part of the plaintiff to assist the plaintiff in upsetting for fraud a scheme in which the witness had himself been one of the principal actors. It is most desirable that such a witness be examined in open Court. If, however, it could be shewn that he could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the Court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. But I think that in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad, to shew clearly that he cannot be reasonably expected to come here. On that point the plaintiff has failed. In my opinion, there is not sufficient evidence to satisfy me that this witness cannot be brought here, or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able at comparatively small expense to leave for a time his position there and come over to this country.

See also *Richard Beliveau Co.* v. *Tyerman*, 4 S.L.R. 39, 16 W.L.R. 492.

I am, therefore, of opinion that this appeal must be allowed with costs.

Appeal allowed.

WIDELL CO. & JOHNSON v. FOLEY BROS.

Ontario Supreme Court, Middleton, J., in Chambers. June 11, 1913.

1. PARTNERSHIP (§ VII—30)—ACTION IN PARTNERSHIP NAME AFTER DISSOLUTION—OBJECTION BY ONE PARTNER—ADDITION AS DEFENDANT.

On an objection of a non-resident co-partner his name will be stricken as a party plaintiff from an action instituted by his co-partner without his concurrence after the dissolution of the firm, but he may be added as a party defendant so as to bind him by the litigation.

[*Seal & Edgelow* v. *Kingston*, [1908] 2 K.B. 579, and *Re Mathews*, [1905] 2 Ch. 460, specially referred to; *Widell* v. *Johnson*, 10 D.L.R. 855, varied on appeal.]

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WIDELL CO. & JOHNSON v. FOLEY BROS.

Middleton, J.

APPEAL by the plaintiff Frank W. Johnson from the order of the Master in Chambers, *Widell* v. *Johnson*, 10 D.L.R. 855, 4 O.W.N. 1338.

G. S. Hodgson, for the appellant.

R. McKay, K.C., for the defendants.

MIDDLETON, J.:—It is conceded that the Widell Co. and Frank W. Johnson carried on business together in partnership, so far at least as the transaction in question is concerned, under the firm name of "Widell Co. & Frank W. Johnson."

It is clear law that a partner may sue in the name of his firm; but, if his co-partner objects, the partner suing may be ordered to give the objecting co-partner security against the costs of the action. See Halsbury's Laws of England, vol. 22, p. 41; also *Seal & Edgelow* v. *Kingston*, [1908] 2 K.B. 579.

Widell & Co., the objecting co-partner in this case, is out of the jurisdiction, and has notified the defendants that it is not a party to this litigation; and, fearing to attorn in any way to this jurisdiction, it declines to make the motion necessary for protection.

The true solution of the situation is that indicated in *Re Mathews*, [1905] 2 Ch. 460. The name of Widell Co. should be eliminated from the style of cause, and it should be added as a party defendant. Leave should now be given to serve it out of the jurisdiction and to make all appropriate amendments.

The term imposed in *Re Mathews* that security should be given for the costs of the defendants cannot properly be imposed here. The foundation for it in that case was the fact that the dissenting plaintiff had become liable for costs by assenting to be a plaintiff in the first instance.

The costs before the Master and of this appeal should be to the defendants in the cause.

Order accordingly.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 4, 1913.

1. MASTER AND SERVANT (§ II A 4—70)—DEATH — IMPROPER METHOD OF REPLACING BELT ON PULLEY—NEGLIGENCE OF MASTER.

An employer is properly held liable under the Ontario Fatal Accidents Act, 1 Geo. V. ch. 33, for the death of a servant, where the deceased was absolved from contributory negligence, and it appeared that the accident would not have happened had the defendant's millwright, engaged in repairing a defective belt, not failed in his duty to see that the deceased was not exposed to danger.

Statement

APPEAL by the defendants from the judgment of Middleton, J., based upon the answers of a jury to questions left to them at the trial, finding the defendants and their millwright guilty of negligence which caused the death of the plaintiff's husband, who was working for the defendants in their factory, through the starting of a shaft and pulleys when they ought not to have moved. The action was brought under the Fatal Accidents Act to recover damages for the death, and judgment was given at the trial in favour of the plaintiff for the recovery of $1,650 and costs.

The appeal was dismissed.

H. H. Dewart, K.C., and *B. H. Ardagh*, for the defendants.

J. Jennings, for the plaintiff.

Maclaren, J.A.

The judgment of the Court was delivered by MACLAREN, J. A.:—The defendants say that the accident was caused by the negligence of the deceased in interfering with the belt upon the shaft in question, in disobedience of the orders of the millwright.

The belt conveyed power from the main shaft in the basement of the factory through a small opening in the floor to a counter-shaft, about two feet above the ground-floor, which drove the shaper at which the deceased was working. This counter-shaft and the pulleys upon it were protected by a box-covering, which could be removed when necessary. The belt had loosened and been unlaced, and the deceased appears to have removed the box, taken up the belt, and carried it to the room occupied by the millwright, whose duty it was to repair it. After it was repaired, the latter took it to its proper place, put one end over a loose pulley upon the counter-shaft, and through an instrument called a "shifter," and had the deceased drop one end through the hole in the floor, while he went down and put the belt around the main shaft and up through the hole, and then came up and laced it up. He went down to the basement to put the belt upon the proper pulley, a large one, 36 to 40 inches in diameter, upon the main shaft. He says that, as he was leaving, "I told Falconer (the deceased) to keep away,

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that I am going down to throw the belt on." He went down, and, by means of a stick, threw the belt on this large pulley, which was making three hundred revolutions a minute. This should merely have set the belt and the loose nine-inch pulley on the counter-shaft in motion, without affecting the counter-shaft itself. Instead of this, the jerk down below threw the belt from the loose pulley over on the fixed pulley alongside of it, which was slightly larger, and was bevelled to facilitate the transference when it was desired to set the counter-shaft and the shaper in motion. The millwright came upstairs at once, and found the deceased lying on the floor, not far from the rapidly revolving counter-shaft and pulley, having received a blow which drove his ribs into his heart. There was no eye-witness of the accident.

There were two theories regarding it. One, put forward by the defence and accepted by the trial Judge, was that the deceased, seeing the belt going, tried to keep it in its place with a stick, which was found broken near where he was lying. The other, suggested by the plaintiff's counsel, that a piece of wood from a band-saw not far off had flown against the revolving pulley, which drove it violently against the deceased. This theory was adopted by the jury.

In my opinion, it is quite immaterial which of these two theories is correct, or whether they are both wrong. I believe that the case can be determined without deciding this question at all, it being common ground that the direct cause of the accident was the fact of the counter-shaft and pulley being suddenly put in motion—whatever the instrument or substance which actually struck the fatal blow.

The jury found the defendants negligent in that the "shifter" was insufficiently locked and allowed the belt to travel on the fixed pulley, suddenly putting the counter-shaft in motion at high speed, and that the engine should have been slowed down during the operation; also that the millwright was negligent in putting the belt on the wrong side of the large drive-wheel, and in not slowing down the engine, and in leaving the cover off the counter-shaft while the shafting was in motion. They also found that the deceased was not guilty of contributory negligence or disobedience to orders, and that he did not voluntarily incur the risk of what he did at the time of the accident.

There was evidence on which the jury might properly find that it was an improper thing to throw this belt upon a wheel which was making 300 revolutions a minute; and that there was danger from the smaller wheel, which was making 1,200 revolutions a minute, and the belt travelling more than half a mile a minute, and both of them unprotected.

It was urged on behalf of the defence that the deceased himself removed the box-covering from the counter-shaft; but that would appear to have been necessary in order to remove the injured belt. Once the belt was repaired and was being replaced, the millwright was the person superintending the operation, and the deceased was merely assisting him, and was subject to his orders, and the superintendence of the millwright had not ceased when the accident happened. If the covering had been replaced, it would have been impossible for the accident to happen, whether it was done by the stick in question or by something else.

The fact of the belt having been put on the wrong side of the large wheel or pulley by the millwright, only came out during his evidence, and the statement of claim was amended accordingly. Instead of putting the belt around the main shaft on the same side of the large pulley as the loose pulley above was with regard to the fixed pulley alongside, it was put on the opposite side. This gave the belt a diagonal bearing, instead of a perpendicular direction, and when the millwright with his stick threw the belt over the lower pulley, the jerk threw the belt towards and upon the upper fixed pulley and set the counter-shaft in rapid motion, without which, on either or any theory, the accident would not have happened.

The jury found that the deceased was not guilty of contributory negligence. In support of the defendants' claim that he was so guilty was urged the fact of his removal of the box-covering, which has already been dealt with; also that he had disobeyed the order of the millwright to "keep away." To this there may be several answers. In the first place, the instruction was very vague. How far was he to keep away? Did it necessarily mean any more than that he was not to come near enough to the loose pulley or the belt to be injured by them when the power was turned on? There is no evidence that the deceased heard it, or to shew to what he understood it to refer, and it was for the jury to pass upon its value and effect; and they have done so.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

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June 5.

Re KENNA.

Ontario Supreme Court, Middleton, J., in Chambers. June 5, 1913.

1. PARENT AND CHILD (§ IV—40)—RIGHT OF PARENT TO CUSTODY OF CHILD —EFFECT ON WELFARE OF CHILD.

The Child's Protection Act (Ont.) 7 Edw. VII. ch. 39, sec. 30, directing that a Roman Catholic child shall not be placed in a foster home in a Protestant family does not compel a change of custody of a child of tender years so as to take it from its Protestant foster parent with whom it was placed by the Children's Aid Society under the authority of the Children's Court Commissioner acting on the statement of the child's mother that she was a Protestant where the Commissioner had adjudicated that the mother, who seemingly was in sole control and charge of the child, was unfit to have the child's future custody.

[*Re Faulds*, 12 O.L.R. 245, followed.]

Statement

MOTION by Philip Kenna, the father of Frederick Kenna, an infant of five years of age, upon the return of a habeas corpus, for an order for delivery of the child to the custody of the applicant; the child having been adopted by Albert Breckon and his wife and being in their custody.

The application was heard by MIDDLETON, J., in Chambers, on the 29th May, 1913, upon affidavits and oral evidence.

T. L. Monahan, for the applicant.

H. M. Mowat, K.C., for the foster parents.

Middleton, J.

MIDDLETON, J.:—Philip Kenna, the applicant, is of English origin, and a Roman Catholic. He was married some ten years ago, at Manchester, to Lucinda Dolores de Phillips, a Protestant. In April, 1904, Kenna came to Canada and settled temporarily at Montreal. His wife followed him in the spring of 1906, and they lived there until June, 1909. The infant was born on the 22nd June, 1908; and on the 26th July, 1908, it was baptised in the Roman Catholic Church.

A year later, in June, 1909, Kenna came to Toronto, his wife following some time afterwards. From this time on, the relations of the husband and wife have been most unsatisfactory. The husband charges his wife with infidelity and with living in open adultery with a man at Niagara Falls for some time and with another man in Toronto at other times. The wife charges her husband with various offences and with being a man with whom no woman could live. Into these charges and recriminations I do not think I need go in detail.

On the 16th July, 1910, Kenna executed a document as follows: "I, Philip Kenna, hereby authorise Mrs. M. Jones of 51 Peter street, Toronto, to give up Frederick Kenna to my wife, Lucy Kenna, unconditionally. Yours resp. Philip Kenna. Witness: Joseph Jones."

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The parties differ as to the circumstances under which this document was given. The wife asserts that it was an unconditional abandonment of the child to her. The husband contends that it was for the purpose of enabling her to receive the child from the place where Kenna then had it boarding, for the purpose of founding again a united household. On the face of it, this seems improbable.

In May, 1911, Kenna sought the aid of the St. Vincent de Paul Society; and Mr. Patrick Hynes, its agent, at his instance, laid an information before the Police Magistrate under the statute, charging that the wife was allowing the child "to grow up without salutary parental control and in circumstances exposing him to an idle and dissolute life." The Police Magistrate heard the charge on the 1st June, and, after hearing the husband's evidence, in which he accused the wife of adultery, the magistrate dismissed the charge. As the child was only three years of age, it is probable that the magistrate thought it should not be taken from its mother.

Kenna then went to the United States, and did not return to Canada for nine months, when he went to Montreal, where he has since been employed, earning one dollar and a half per day. In the intervals prior to this there seem to have been repeated quarrels and reconciliations between the husband and wife; followed by charges of adultery and other quarrels.

While the husband was away in New York, the Children's Aid Society of Toronto (Protestant), finding the child in the custody of its mother, who claimed to be a Protestant, and deeming her entirely unfit to have custody of the child, took proceedings before Commissioner Starr, resulting in an order, on the 1st April, 1912, for the delivery of the child to the Children's Aid Society. The mother was apparently concurring in these proceedings, and the Commissioner acted upon her evidence.

She stated that the child had been given into her custody by the order of the Police Court above referred to. In her deposition she states that "the father, Philip Kenna, was a Catholic and wanted the child brought up as a Catholic. This resulted in the matter being brought to Court and decided as above, since which time the father has deserted his wife and child. The mother is now unable to support the child, and desires it to be made a ward of the Children's Aid Society, and adopted in some good home."

This evidence was untrue, as far as the records appear. No notice was given to the father of these proceedings; but, upon the faith of this evidence, the Commissioner determined that the child was a dependent and neglected child within the meaning of the statute, his father having deserted him and his mother being unable to support him, and that he was a Canadian by birth

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and a Protestant by religion. The Commissioner directed the child to be delivered to the Children's Aid Society, to be there kept until placed in an approved foster home, pursuant to the provisions of the statute. Thereafter the Children's Aid Society placed the child with Albert Breckon and his wife Ellen Breckon, under formal articles of adoption dated the 17th April, 1912.

Mr. Breckon and his wife, it is conceded, are ideal foster parents; and, since the child has been in their custody, it has received every kindness and attention. They are well off; Mr. Breckon stating that he is worth between $30,000 and $40,000. They have no children of their own, and are bringing up this child as theirs.

The father now asserts his right to the custody of the child, because he claims that as its father he has the right to determine that it shall be brought up in the Roman Catholic faith; and his desire is to take the child to Montreal and there place it with Honisdos Charlebois and his wife, the godfather and godmother of the child, to whom he has agreed to pay $3.50 a week for its maintenance. These people have a family of their own, and are in very humble circumstances; and it is manifest that they are not in a position to care for the child in a way which would be at all comparable with the ability of the foster parents.

In the alternative, the father desires to take the child from the foster parents and have it placed with the St. Vincent de Paul Children's Aid Society for adoption with Roman Catholic foster parents.

If the case be determined, as I think it must be, upon my idea as to the welfare of the child, the situation is plain, and my duty is to leave the child with its foster parents. With them it has a careful upbringing and training, and its future prosperity is as certain as anything of this kind can be. With the godparents the opposite is the case. The father is only able to earn $9 a week; and, in view of his past history, is very unlikely to continue the payment promised, $3.50 a week. Even if he does, the lot of the child would be unfortunate and precarious in the extreme.

The one point of difficulty in the case is the father's right to determine the child's religion. The Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, sec. 30, provides that no Protestant child shall be committed to the care of a Roman Catholic Children's Aid Society, nor shall a Roman Catholic child be committed to a Protestant society, nor shall any Protestant child be placed in any Roman Catholic family as its foster home, nor shall a Roman Catholic child be placed in any Protestant family as its foster home.

It is said that this child is a Roman Catholic, because its father is a Roman Catholic and desires it to be brought up in

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the Roman Catholic church, and that this is an absolute prohibition against the child being placed with Protestants as its foster parents.

The principle emphasised in *Re Faulds*, 12 O.L.R. 245, of the supremacy of the father's right to determine the religious education of his children, is of great importance; but the father's right, as I read the cases, though not lightly to be interfered with, is not absolute. Indeed, its limitation is affirmed in the case in question. It is there said that the father's wishes may be disregarded if there is strong reason or if the Court is satisfied that there has been an abandonment or abdication of the paternal right.

I do not think that abandonment and abdication are the only grounds upon which the Court may refuse to give effect to the father's wishes; and where, as here, there is not only an abdication of the paternal right, but, I am convinced, the assertion of the father's right is really against the welfare of the child, in the broadest sense of that term—including not only its temporal, but its moral welfare—then I have no hesitation in refusing to give effect to his desires.

It is to be borne in mind that I am not now discussing the propriety of handing the child over in the first instance, but am determining an application to take the child from its present custodians; and, while most anxious to give effect not only to the letter, but to the spirit of the wise provision of the statute which I have quoted, I do not think that I am compelled, either by the letter or the spirit of the statute, to sacrifice this child's future.

The child will, therefore, be remanded to the custody of its foster parents, who are entitled to their costs as against the father if they care to demand them.

Order accordingly.

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Ontario Supreme Court, Lennox, J. June 9, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR SALE OF LAND — PAYMENTS — FAILURE TO MAKE WITHIN STIPULATED TIME—DEFAULT — WAIVER.

Specific performance of a contract to sell land will be ordered after the default of vendee as to time, notwithstanding it was made the essence of the contract, where after such default, the vendor recognized the validity and continued existence of the contract by negotiating with the vendee in relation to the sale.

[*Webb* v. *Hughes*, L.R. 10 Eq. 281; *Foster* v. *Anderson*, 15 O.L.R. 362, 16 O.L.R. 565, referred to.]

2. VENDOR AND PURCHASER (§ I E—25)—CONTRACT FOR SALE OF LAND — BREACH — WAIVER — RESCISSION—NOTICE, SUFFICIENCY OF.

After the waiver by a vendor of a default of the vendee in a contract for the sale of land, the former can terminate the agreement only after reasonable notice to the vendee.

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ACTION by the purchaser for specific performance of a contract for the sale of land.

Judgment was given for the plaintiff, with a reference.

M. K. Cowan, K.C., for the plaintiff.

F. D. Davis, for the defendant.

LENNOX, J.:—The plaintiff is entitled to specific performance of the agreement sued on. Time is, in terms, made of the essence of the contract, but this is not open to the defendant as a defence. After the default now complained of, the defendant continued to negotiate with the plaintiff, and recognised the continued existence and validity of the contract. Having once done this, he cannot afterwards hold the plaintiff to the original stipulation as to time: *Webb* v. *Hughes*, L.R. 10 Eq. 281. Once the time is allowed to pass, the rights of the parties are governed by the general principles of the Court: *Upperton* v. *Nicholson*, L.R. 6 Ch. 436. And the defendant could not, in these circumstances, terminate the contract abruptly, as he attempted to do by the letters of the 20th and 27th January, 1913—he must give a notice fixing a date within which the contract is to be completed, and that date must afford the other party a reasonable time: Malins, V.-C., in *Webb* v. *Hughes*, L.R. 10 Eq. at pp. 286, 287; *McMurray* v. *Spicer*, L.R. 5 Eq. 527.

There are other reasons. A person who is himself in default cannot avail himself of this stipulation as against the other party: *Foster* v. *Anderson*, 15 O.L.R. 362, 16 O.L.R. 565. I am quite satisfied that it was understood that the plaintiff's share of the rent was to be applied upon the October payment, and that this and the state of the mortgage account against the property was the cause of the delay. On the other hand, the moving cause of the defendant's sudden energy was the same as that which caused the dog to grab at the shadow in the stream, the desire to grasp what was not his—the increased value of the property subsequent to the sale. The result is a loss in both instances.

The total contract-price is $3,500. The plaintiff is entitled to be credited for payments on the contract with the following sums amounting to $941, leaving a balance of consideration, exclusive of interest, amounting to $2,559.

It was contemplated that the plaintiff would make payments by the 15th October, 1912, amounting to $1,075. After giving the credits above, he has fallen short of this by the sum of $134; the balance of the $3,500, namely, $2,425, was to be paid when the defendant cleared the property of the mortgage to the Huron and Erie Loan and Savings Company.

But the amount required to release the land covered by

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agreement, on the 1st May, 1912, was $3,177.67, and had increased by the 15th October, so that, at the time of the alleged default, counting only the cash payments of $775, the plaintiff had paid more than he was safe in paying, and more than he could be reasonably called upon to pay until the mortgage was reduced. The plaintiff must pay this $134 shortage, with interest upon it from the 15th October, 1912, as soon as the defendant reduces the mortgage-charge upon the land to the sum of $2,425, and he should not be called upon to pay it until this is done.

There will be the usual judgment for specific performance, with the costs of the action to the plaintiff, and a reference to the Master at Sandwich to adjust the account and interest, and settle the conveyance in case the parties cannot agree.

Judgment for plaintiff.

KNIBB v. McCONVEY.

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June 10.

Ontario Supreme Court, Middleton, J. June 10, 1913.

1. VENDOR AND PURCHASER (§ I E—25)—CONTRACT FOR SALE OF LAND — RESCISSION FOR NON-PAYMENT OF PURCHASE MONEY—VENDOR'S DEFAULT IN TENDERING DEED.

A contract for the sale of land cannot be terminated by the vendor for default in payment of the purchase money when due, although time was declared to be the essence of the agreement, where the vendor, who by the terms of the contract, was to furnish a deed at his own expense, tendered one executed by a third person who held title to the land, without having submitted a draft deed to the vendee's solicitor as had been demanded; the purchaser was entitled to a conveyance containing the vendor's own covenants, and not merely the covenants of such third parties.

[*Foster* v. *Anderson*, 15 O.L.R. 362; *Kilmer* v. *British Columbia Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, and *Boyd* v. *Richards*, 4 O.W.N. 1415, referred to.]

Statement

ACTION by the plaintiff for specific performance of an agreement for the sale of land.

Judgment was given for the plaintiff.

E. F. B. Johnston, K.C., for the plaintiff.

J. M. Ferguson, for the defendant.

Middleton, J.

MIDDLETON, J.:—By agreement dated the 25th February, 1913, the defendant agreed to sell the lands in question to the plaintiff. At this time the title was vested in the Title and Trust Company; the defendant having a contract with them under which he was entitled to call for a conveyance upon payment of his purchase-money.

By the agreement, the price, $6,300, was to be paid as follows: $200 on the execution of the agreement, and the balance

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on the completion of the sale, which was to be on the 10th March, 1913.

Time is said to be of the essence of the agreement, but there is no forfeiture clause. The agreement provides that the deed is to be given at the expense of the vendor.

The $200 was paid; the title was searched and found satisfactory; and the purchaser had every intention of completing his contract. On Saturday the 8th March, no draft deed having yet been prepared or submitted by the vendor, the vendor wrote a letter to the purchaser's solicitors, which reached them on the morning of the 10th March. After referring to the contract and to the provision that time was of its essence, he proceeds: "I, therefore, give you notice that on the 10th day of March, 1913, I will tender the executed deeds for this parcel of land at your offices in the Canada Life Building, King street, Toronto. Therefore, if this sale is not closed on the 10th day of March, 1913, I will cancel this sale."

The purchaser's solicitors communicated with their client and with the vendor, and an appointment was made for 2.30 p.m. to close the matter. Neither the vendor nor the purchaser kept this appointment. The solicitor had not been placed in funds. At 3.30, or a little later, the vendor went to the office, dramatically produced deeds from the Title and Trust Company to the purchaser, and demanded the money and an undertaking from the solicitors that the purchaser would execute the conveyance. The purchaser not being there, the solicitors stated that they would try to reach him by telephone, and asked the vendor to call later. The endeavours of the solicitors to find the purchaser were unsuccessful. At 4.30, the vendor returned; again he produced the deeds; and, the money not being forthcoming, said that he called the transaction off.

On each occasion, the vendor was accompanied by a clerk from the Title and Trust Company, whose instructions did not permit him to part with the conveyances unless the money was paid and the deed signed by the purchaser, or an undertaking received from the solicitor that it would be so signed. The vendor had given his own cheque to the Title and Trust Company, but it was worthless until the purchase-price was deposited to meet it. The next day the balance of the purchase-money was tendered and refused. This action followed on the 13th March.

Foster v. *Anderson*, 15 O.L.R. 362, shews that where the deed is to be given at the expense of the vendor, it is the duty of the vendor to prepare the deed. In this case, the vendor, not having submitted a draft deed, and not having complied with the request made to him in the letter of the 10th March, to hand the deed to the purchaser's solicitors for execution by

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the purchaser, "this being necessary because of certain covenants in the nature of building restrictions," was himself in default. Apart from this, the deed tendered was not in compliance with the contract. It would, no doubt, operate as a good conveyance; but the purchaser was entitled to have the vendor's own covenants, and was only bound to covenant with the vendor and not with the Title and Trust Company. The difference between the deed tendered and the deed to which the purchaser was entitled may or may not be material; but, before the purchaser can be regarded as in default, the vendor must be himself blameless with respect to matters concerning which the onus is upon him.

In *Boyd* v. *Richards*, 4 O.W.N. 1415, I have discussed the effect of the recent decision in *Kilmer* v. *British Columbia Orchard Lands Co.*, 10 D.L.R. 172, [1913] A.C. 319, and need not here repeat what is there said. If necessary, I would in this case relieve from forfeiture.

I should mention the fact that copies of two letters were produced and marked, upon the assumption that they would be proved to have been sent. No such proof was given; and I think that these letters, if sent, did not relate to this transaction, but to a transaction in respect of lands on Rutland avenue.

Judgment will, therefore, go for specific performance. The costs should be deducted from the purchase-money.

Judgment for plaintiff.

PHILLIPS v. MONTEITH.

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Ontario Supreme Court, Middleton, J. June 11, 1913.

1. VENDOR AND PURCHASER (§ I C—13)—SALE OF LAND FREE FROM ENCUMBRANCE—UNPAID TAXES—DISPUTE AS TO VALIDITY—INDEMNITY.

Where the purchaser of land on learning that claim was made by the municipality for a tax returned by the tax collector as paid but subsequently alleged to have been so returned in error notwithstanding the issue of a tax certificate, stopped payment of a cheque given for the purchase price, and it appeared that the seller had assured him that the land was free from taxes, the latter's action to recover the amount of the cheque should be allowed only upon his indemnifying purchaser from liability for the disputed tax or on deducting a sufficient amount from the purchase money to be retained in court for such purpose until the determination of the validity of the tax claim.

Statement

MOTION by the plaintiff for judgment on affidavits, the parties consenting that their substantive rights and the question of costs should be thus dealt with.

Featherston Aylesworth, for the plaintiff.

T. H. Peine, for the defendants.

Middleton, J.

MIDDLETON, J.:—Monteith Brothers, the defendants, purchased certain lands from the plaintiff for $4,000. A declar-

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ation was made by the plaintiff, at the time of the closing of the transaction, that there were no taxes or incumbrances upon the land. Upon the strength of this, a cheque was given for the full balance of the purchase-price.

The defendants stopped payment of the cheque, because they learned, as they say, that $47 arrears of taxes existed against the property. The bank was, however, authorised to pay the cheque if the $47 to meet these taxes was retained. Phillips refused to assent to this, saying that he had searched in the Sheriff's office and ascertained that there were no arrears of taxes against the land.

It appears that a son of Phillips had been in possession of the lands, and was primarily liable for the payment of these taxes. When the roll was placed in the collector's hands, the collector threatened to distrain. The younger Phillips then persuaded the collector to make a false return shewing that the taxes had been paid—promising ultimately to pay the amount to the collector. This payment has never been made; and the township corporation now contend that the false return made by the collector, certifying to a payment which has never in fact been made, does not operate to discharge the land. Phillips senior contends that this land is exonerated, and that the township corporation must look to the collector and his sureties or to the son.

This action is now brought upon the cheque for $3,900. The defendants are ready to carry out the sale and pay the whole price if they are allowed either to deduct the amount in question or if they receive security.

I do not think that Phillips can call upon them to accept the risk of the township corporation being sustained in their contentions. It may be that the certificate which has been issued will serve to protect Phillips from any claim; but this is his concern, and he is quite wrong in seeking to shift to the purchaser the onus of resisting the township corporation.

The proper solution of the matter is to allow the whole price to be paid to Phillips upon his giving the defendants an indemnity; or a sufficient sum adequately to protect them should be deducted from the purchase-money and be retained in Court pending the final adjustment of the dispute.

As, in my view, Phillips has been wrong throughout, the defendants should be allowed to deduct their costs from the purchase-price.

I do not understand that there is any question of interest upon the purchase-money. If there is, I may be spoken to with reference to it.

Order accordingly.

SIMONS v. MULHALL.

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Ontario Supreme Court. Trial before Latchford, J. June 11, 1913.

1. DAMAGES (§ III P 1—334)—LOSS OF PROFITS—EXCLUSION FROM LAND—TENANT HOLDING OVER.

The measure of damages for the refusal of a tenant to surrender possession of a hotel at the end of his term is the profits therefrom during the time of overholding.

2. TROVER (§ I B 1—10)—TRADE FIXTURES—CONVERSION BY LANDLORD.

The refusal of a landlord or of his assignee, to permit a tenant to remove trade fixtures from demised premises according to the term of the lease, amounts to an actionable conversion.

Statement

ACTION by the assignee of a landlord against the tenant of an hotel property for damages for breaches of covenants contained in the lease. Counterclaim for the conversion of certain articles in the hotel, alleged by the plaintiff to be fixtures.

Judgment for plaintiff for breach, and judgment for defendant on his counterclaim.

E. G. Porter, K.C., and *A. A. McDonald*, for the plaintiff.

F. M. Field, K.C., for the defendant.

Latchford, J.

LATCHFORD, J.:—As I intimated upon the argument, the notice which the defendant gave, after the expiration of his term, was not effective to renew the lease. Accordingly, the plaintiff, as purchaser of the reversion and as assignee from the lessor of the lease made by the defendant, became entitled, at the end of the term, to possession of the leased premises and to the benefit of all covenants made by the lessee, including a right to the transfer of the hotel license "without any expense or charge, upon demand."

Mulhall appears to have acted in good faith, though erroneously, in thinking himself entitled to the additional term of two years. By his refusal to give up possession until removed on the 9th July, under an order made pursuant to the Overholding Tenants Act, he caused substantial damage to the plaintiff. The profits which the plaintiff thus lost are, I think, greatly exaggerated in his evidence. He places the net earnings of the dining-room and bed-rooms at $10 a day. The bar receipts averaged about $40 daily from the 30th July to the 14th August, and of this fifty per cent. is sworn to be profit. The stables brought in $1 additional. The defendant says that the receipts from the dining-room, bed-rooms, and stables were about $4 a day, and that the bar produced an average of $30. I am disposed to discount not a little the estimate of the plaintiff as to the net earnings of the hotel at the time of the contest for possession. It is exceedingly difficult, upon the evidence, to say, with any degree of accuracy, what profit the

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plaintiff lost between the 24th June and the 9th July; but, from the best consideration I have been able to give to the point, I estimate his loss at $10 a day. This loss continued after he obtained possession, owing to the refusal of the defendant to sign a transfer of the liquor license or permit. The transfer was, however, signed on the 25th July. For any subsequent delay I do not regard the defendant as answerable, nor do I think that he should be held liable for the expense the plaintiff was at in interviewing the License Commissioners, employing counsel, or enlisting the services of persons assumed to have influence with the Commissioners and others. Between the 24th June and the 25th July there were twenty-six days on which the bar—from which the profits were, I think, wholly derived—might have been open had the defendant conformed to his covenants. The plaintiff's loss at the rate stated is $260; and for this he is to have judgment, with costs on the County Court scale.

The counterclaim of the defendant is for the conversion by the plaintiff of certain fixtures. At the trial, this claim became restricted to the following articles, which the plaintiff claimed as part of the freehold, and refused to deliver to the defendant: a large mirror, a beer cabinet, a beer-pump and a porter-pump, and a bar cabinet.

Quite clearly the defendant is entitled to damages for the conversion of the mirror, which rests upon a mantel, and is suspended from the wall by a wire, and may be removed as readily as a picture hung in the same way.

When the defendant leased the premises from Golding, the plaintiff's predecessor in title, the bar fixtures mentioned were sold to him with the furniture and other movables for $3,500. The lease contained a provision that Mulhall might remove fixtures. As between Mulhall and Golding, the cabinets and pumps were, in fact as well as in the common intention of the landlord and tenant, trade fixtures, which the tenant had the right to remove at the end of the term or within a reasonable time afterward—if such removal could be effected without material damage to the freehold. Whether the articles in question are affixed by screws and bolts, as the defendant contends, or, in the case of the bar cabinet, by nails, as asserted by the plaintiff—though he is not supported in this by his expert witness—they cannot, in circumstances establishing beyond question that they were intended by lessor and lessee to continue chattels, be regarded as part of the freehold—at least as between tenant and landlord. The defendant has amply satisfied the onus which the law casts upon him.

The plaintiff is not, in my opinion, in any higher position than that which Golding would occupy had he not sold the

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hotel. Simons purchased the property subject to the lease, and with knowledge of the right possessed by the defendant to remove the fixtures which he had bought from Golding. He wrongfully withheld these chattels when they were claimed from him by the defendant. The mirror I find to be worth $10; the bar cabinet, $250; the beer cabinet and pumps, $40. There are some other articles of trifling value which were not demanded. These, I understand, the plaintiff is willing to deliver to the defendant. There will be judgment upon the counterclaim for $300 and costs.

Reference to *Argles* v. *McMath* (1895), 26 O.R. 224; *Slack* v. *Eaton* (1902), 4 O.L.R. 335; and *Re Chesterfield's Estates*, [1911] 1 Ch. 237.

Judgment accordingly.

Re EDGERLEY and HOTRUM.

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June 12.

Ontario Supreme Court, Meredith, C.J.C.P. June 12, 1913.

1. WILLS (§ III G 2—125)—CONSTRUCTION — DEVISE — ESTATE CREATED —FOR LIFE OR IN FEE.

Under a devise of land to two sisters and in the event of the death of either without issue, to the survivor or her heirs, on one of the sisters conveying her interest to the other and dying without issue, the words "to the surviving daughter *or* her heirs" do not limit the estate of the survivor, she taking a good title in fee which she could convey.

[*Re Bowman*, 41 Ch.D. 525, referred to.]

Statement

MOTION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title was not a valid one, and that the vendor had shewn a good title.

Shirley Denison, K.C., for the vendor.

D. L. McCarthy, K.C., for the purchaser.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the purchaser's fears of the title have reasonable foundation in fact or law, it ought not to be forced upon him.

The rule is, and always has been, that a doubtful title will not be forced upon an unwilling purchaser.

The saying that a title is either good or bad, and that the Court should determine which it is, leaving no room for a doubtful title, is blind to the facts: (1) that the Courts are fallible; and (2) that in such cases as this their judgments are not binding upon any but those who are parties to the application.

Then are the purchaser's fears well founded; is the title in question a doubtful one?

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But one point is made in the purchaser's behalf: it is said for him that, under the will in question, there is a possibility of issue of the devisees, yet unborn, at some time taking an interest in the land in question, which interest the parent cannot convey or bar. Is that the fact?

If the first clause of the will stood alone, each of the two devisees would take, absolutely, an undivided moiety; and so, obviously and admittedly, any fear such as the purchaser has would be quite unfounded.

But the second clause of the will unquestionably modified the effect of the first. Under it, in the case of the death of either of the devisees without leaving issue, her share is to go to her survivor, or her heirs; putting it in the exact words of the will; "I direct and it is my will that in case any of my said daughters should die without leaving lawful issue the share of the person so dying shall go to the surviving daughter or her heirs."

The word "or" alone, of course, creates the difficulty, such as it is. If the testator meant that which he said, "*surviving*" daughter, then the word "and" must be substituted for the word "or." A devisee surviving must take; her issue could take only through her. If the testator did not mean "surviving," but really meant "other," and had said so, a very different question would have arisen, and there might be no doubt that effect should be given to the purchaser's contention that he ought not to have the title forced upon him before it was quieted, or the possible interests of unborn issue in some way bound by an adjudication in favour of the title.

But the word "surviving" cannot be rejected at the instance of the shorter and more frequently misused word "or". I have no reasonable doubt that, unless one of the devisees, having issue, survives the other devisee, who has died without issue, each holds an undivided moiety under the first clause in the will; so that, the one having conveyed to the other, and the other being the vendor, can, notwithstanding anything contained in the will, convey to the purchaser a good title to the land in question: see *Re Bowman*, 41 Ch.D. 525.

Judgment for vendor.

AYER v. KELLEY.

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Feb. 21.

New Brunswick Supreme Court, Barker, C.J., and Landry, McLeod, White, Barry, and McKeown, JJ. February 21, 1913.

1. PARTIES (§ I V—52)—EXECUTOR — SUING IN REPRESENTATIVE CAPACITY —NOTE TAKEN IN NAME OF TESTATOR FOR DEBT DUE ANOTHER ESTATE OF WHICH HE WAS EXECUTOR.

Where an executor in his lifetime sells property of an estate, taking a note therefor in his own name, his executor after his death may maintain an action thereon in his representative capacity.

[*Abbott* v. *Parfitt*, L.R. 6 Q.B. 346, 349, referred to.]

2. SET-OFF AND COUNTERCLAIM (§ I E—25)—WHAT SUBJECT OF—ACTION ON BEHALF OF ESTATE—PERSONAL DEMAND AGAINST EXECUTOR.

A mere personal demand against an executor is not a proper subject of set-off against an indebtedness due him in his representative capacity.

3. APPEAL (§ VII M 4—580)—REVERSIBLE ERROR—INSTRUCTION — OBJECTION NOT SUSTAINED BY RECORD.

A verdict will not be disturbed where the record on appeal does not sustain an objection that the jury was erroneously instructed on a certain point.

Statement

APPEAL from the Westmoreland County Court and the judgment of Judge Borden, on application to set aside a verdict recovered against defendant and enter a nonsuit or for a new trial.

The appeal was dismissed.

The following were the grounds of appeal:—

1. That the note or agreement in question being in Robert O. Stockton's possession as administrator *de bonis non* of Charles A. Stockton, and not having been received from Robert O. Stockton by the plaintiff *bonâ fide* or for value, the learned Judge was in error in deciding that the plaintiff is the holder in due course.

2. That the giving of the note or agreement did not create a new debt, as the money when received would be assets of the estate of Charles A. Stockton.

3. That the evidence of how the plaintiff and the said Robert O. Stockton treated the note was improperly admitted, because as Jacobina Stockton only had a life estate in Charles A. Stockton's property the note or agreement was part of the assets of his estate.

4. That the evidence of the entries of securities in a book by Jacobina Stockton was improperly admitted, it not being shewn that it was a book of accounts kept by her as defined in the statute, and the learned Judge was in error in deciding that it appeared so to him on view.

5. That the memorandum on the envelope said to enclose certain securities was improperly admitted, and that such evidence did weigh with the jury, and had an effect on the result of the trial.

6. That the learned Judge was in error in deciding that the jury could disregard the evidence of the defendant as to the cheques on the ground that there was no corroboration of the defendant's evidence.

7. That the learned Judge was in error in deciding that the set-off of

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the defendant required to be certified by affidavit under sec. 44, ch. 118, Consolidated Statutes, N.B. 1903.

8. That the learned Judge was in error in ruling that the set-off of the defendant is not an available defence.

9. That the learned Judge was in error in not properly directing the attention of the jury to the whole facts of the case.

10. That the verdict and judgment is against law and evidence and the damages assessed are erroneous.

W. B. Wallace, K.C., for the appellant.

M. G. Teed, K.C., for the respondent.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is an appeal from the Westmoreland County Court by the defendant Kelley against a judgment entered in favour of the plaintiff for the full amount of his claim including interest. It seems that Charles A. Stockton died sometime in the year 1898, leaving a will by which he appointed his wife Jacobina Stockton his sole executrix. Letters testamentary were granted to her on the 10th February, 1899, and she continued in the possession and management of the estate up to her death which took place about February 18, 1910. By Mr. Stockton's will his wife was entitled to a life interest in the whole estate with power, if she required it, to utilize any of the capital. Mrs. Stockton left a will by which she appointed the plaintiff Ayer and Robert O. Stockton executors. Letters testamentary were granted to them on March 10, 1910. Robert O. Stockton died in February, 1911. On November 11, 1910, letters testamentary *de bonis non* of the estate of Charles A. Stockton were granted to Robert O. Stockton. The evidence shews that some time after Charles A. Stockton's death, the defendant purchased from Jacobina Stockton as executrix some law books, and, in settlement of the amount, and some other estate matters, the defendant gave the following agreement:—

St. John, N.B., Dec. 2, 1901.

To Mrs. Charles A. Stockton.

Dear Madam,—All accounts having been settled between us, and there being a balance due you of three hundred and twenty-five dollars ($325), I promise to pay the same within one year from the date hereof with interest at the rate of six per centum, per annum, you agreeing at the same time in case I am unable to pay the whole of the principal sum, to extend the time of payment for say three years; and also agreeing at the same time, to accept the whole or any part of the principal sum with interest then due at any time.

Yours truly,

J. KING KELLEY.

Among other securities which came into the hands of Jacobina Stockton's executors was this agreement and this action was brought by Ayer as her surviving executor to recover the amount

due on it. By way of defence the defendant says that he has a set-off for money lent and professional services rendered Mrs. Stockton, which, with certain cash payments made on account at different times, amount to more than the $325 and interest. Before going into these questions it will be convenient to dispose of some other objections upon which the defendant's counsel seemed to rely as defeating this action. In the first place it is contended that as the property sold—for the price of which this agreement was given—belonged to the estate of Charles A. Stockton, the purchase money would be assets in the hands of Jacobina Stockton as executrix of her husband, although the contract sued on is a liability to her individually, and that in such a case she could not sustain an action in her own name, and her executor could not do so if she could not. I am not disposed to question the right of Jacobina Stockton to have brought an action in her representative capacity as the amount, when recovered, would be assets in her hands as executrix, but that does not take away her right to maintain an action in her individual capacity, on a contract made with herself personally: the right to do otherwise was the exception rather than the rule. In *Abbott* v. *Parfitt* (1871), L.R. 6 Q.B. 346, at 349, Blackburn, J., says:—

> The later cases have—as Parke, B., says in the passage cited from *Heath* v. *Chilton* (1844), 12 M. & W. 632, at 637—conclusively settled that an executor has the option to sue in his representative character on contracts made with himself, where the money, when recovered, would be assets.

In 1 Chitty on Pleading 21, the author says:—

> But executors who contract for the sale of their testator's effects or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right; and in such case it is sufficient to join as plaintiffs such only of the executors as interfered and were actual parties to the contract with the defendant.

In this particular case the defendant by the agreement says, as the result of their accounting, there is a balance "*due you*" of $325, and that balance he promises to pay within a year. There is nothing in this objection.

Coming now to the defence on the merits it will be necessary to separate the payments from the set-off because they depend upon different principles. The Judge ruled that no part of the set-off could be allowed. In the first place all of it except $60 was barred by the Statute of Limitations, and as to the whole of it, including the $60, as it was a liability incurred by Jacobina Stockton personally and now sought to be set off against her claim upon this agreement, it could not be allowed as it had not been sworn to as required by sec. 44, ch. 118, Con. Stat. N.B. 1903, which enacts that

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no debt due by the deceased shall be paid by the executor, or action brought therefor, until the same be certified by affidavit, and such affidavit shall have been delivered to the executor, or one of the executors.

Admittedly this had never been done. In my opinion the Judge was quite right in disallowing the set-off. There are some distinctions between set-off and counterclaim, but as to both, the rule applies, that in order to give effect to them they must be recoverable claims to the same extent as if they were being sued. Sections 117 and 118 of ch. 111, C.S. 1903, are applicable to the County Courts (sec. 78, ch. 116, C.S. 1903). Section 117 provides that a claim, whether it sounds in damages or not may be set off and sec. 118 provides that such set-off shall have the same effect as if relief were sought in a cross-action, and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. The defendant, therefore, who claims by set-off is in the same position as to the recovery of his claim as if he had brought an action himself. Has the sec. 44, ch. 118, created conditions which are applicable to the one case and not to the other? In *Smith* v. *Betty*, [1903] 2 K.B. 317, at p. 323, Stirling, L.J., says:—

> Neither in my judgment can the plaintiff claim any statutory right of set-off; for as was laid down by Wilde, C.J., in *Francis* v. *Dodsworth*, 4 C.B. 202, at p. 220, the judicial construction of the statute of set-off "has been that no debts can be used by way of set-off . . . except such as are recoverable by action."

In *Walker* v. *Clements* (1850), 15 Q.B. 1046, in speaking of the Statute of Limitations as applicable to a set-off, Lord Campbell says (p. 1050):—

> The set-off is substituted for a cross-action. When are we to suppose that cross-action brought? Clearly at the time of the commencement of the plaintiff's action, since a set-off not then existing cannot be insisted upon.

Coleridge, J., said: "A set-off must be available as a cross-action would be." That the debts or claims to be set off are only those debts or claims that are capable of being enforced by action is clear from *Rawley* v. *Rawley* (1876), 1 Q.B.D. 460. This brings me to what seems the most important question—that is the question of payment. The onus of proof of this issue is on the defendant and if he seeks to establish his discharge in whole or in part of an outstanding liability such as is in dispute here, by payment, it is incumbent upon him to do so by evidence sufficiently strong to convince a jury beyond all reasonable doubt. Unless the minds of the jury in this case were directed by the Judge in a wrong direction I should think he was quite right in not disturbing the verdict for any error on their part. It is said, however, that they were misdirected on this point. What the Judge actually told the jury does not appear from

the return. The misdirection as complained of by the appellant's counsel, on the hearing before us, was that the Judge had told the jury that they should not give effect to the defendant's evidence unless it was corroborated. The sixth ground of appeal is this, "That the learned Judge was in error in deciding that the jury could disregard the evidence of the defendant as to the cheques on the ground that there was no corroboration of the defendant's evidence." In the appellant's statement of the case filed in Court is this memorandum. "The Judge kept no memo. of his charge to the jury, and it can only be assumed that it was along the lines of his judgment." The Judge's return contains the following as to his charge, "I found it necessary to charge the jury, immediately upon the close of the address of counsel to the jury, and had not time to make notes of my charge. Having refused the application of the defendant's counsel for a nonsuit I left the case to the jury largely upon the credibility of the witnesses, calling their attention to the evidence of the defendant as to his claim of having made payments as mentioned in the checks and his counterclaim, and also the book of accounts kept by Mrs. Stockton, and put in evidence, in which the amounts of these checks were not credited. Leaving the whole evidence with the papers, book of accounts, checks, etc., put in evidence for their consideration." It seems to me a very far-fetched inference from this account of the Judge's charge, that he even drew the attention of the jury to the question of corroboration, much less told them what the appellant's counsel now assumes, and asks us to assume, for the purpose of this appeal. I am supported in this view by the fact that among the several grounds upon which a motion for a new trial was made to the Judge which has caused this appeal, there is nothing said about misdirection on this point. There is the ground that the evidence of payments by cheque and the loan were uncontradicted, and should therefore have been allowed. The same was claimed as to the charge for $60 for services; and it was contended that, on these grounds that the verdict must be set aside, not because there was any misdirection as to want of corroborative evidence, but because the verdict was contrary to the weight of evidence. It is true that in disposing of the motion the Judge referred to the question of corroborative evidence and cited *Re Finch* (1883), 23 Ch.D. 267, and *Hill* v. *Wilson* (1873), L.R. 8 Ch. 888, as shewing that, in order to sustain a claim against the estate of a deceased person there must be corroborative evidence of some kind to support it. If the Judge had so charged the jury I should think there had been a misdirection. That rule has been modified by *Re Hodgson* (1885), 31 Ch.D. 177, at p. 183, and *Re Dillon* (1890), 44 Ch.D. 76, at

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p. 80. These cases lay down the rule as it is now recognized and acted upon. There is, however, nothing before us to shew that the jury were so directed, or that any question of corroborative evidence arose at the trial at all. The return, to my mind, points to an entirely different conclusion as I have already pointed out. The jury had a right to reject the defendant's evidence as to the payments if they chose to do so in view of the circumstances, some of which, at all events, were calculated to create doubts as to its accuracy. I do not understand that the Judge of the County Court refused to grant a new trial on the ground of the verdict being against the weight of evidence, because it would be useless to do so, in the absence of corroborative testimony. As I read his judgment I infer that, if no question in reference to corroborative testimony had arisen, he would have refused to grant a new trial, though he thought under the authorities he cited, there were two good reasons for doing so instead of one. If, however, the Judge thought the defendant entitled to a new trial on the ground that the verdict was against the weight of evidence, but refused to grant it because he thought there was no corroborative evidence, I should still think this Court bound to do what the Court below should have done (*Miller* v. *Gunter* (1903), 36 N.B.R. 330). It is, I think, clear that the verdict should not have been disturbed. The question was one of fact for the jury—it was left to them without misdirection, and as a matter of law should be accepted. The defendant has not much to complain of. He seems to have had the benefit of a trial freed from restrictions of every kind with regard to the rule as to corroborative testimony in cases like the present.

There is nothing in the other points. Appeal dismissed with costs.

Appeal dismissed.

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April 7.

HALIFAX AND SOUTH-WESTERN R. CO. v. SCHWARTZ.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. RAILWAYS (§ II D—75)—LIABILITY FOR FIRES—FIRE STARTING ON RIGHT-OF-WAY—BREACH OF STATUTORY DUTY TO KEEP FREE FROM COMBUSTIBLES.

Since an absolute duty is imposed on a railway company by R.S.N.S. 1900, ch. 91, to at all times keep its right-of-way where it passes through woods, clear from all combustible material, such as bushes, grass and fern, it is answerable for damages caused an adjoining land owner by fire started in an accumulation of combustible material on its right-of-way, by sparks from a locomotive.

[*Schwartz* v. *Halifax and South Western R. Co.*, 4 D.L.R. 691, 14 Can. Ry. Cas. 85, 46 N.S.R. 20, affirmed.]

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Statement

APPEAL from a decision of the Supreme Court of Nova Scotia, *Schwartz* v. *Halifax and S.W. R. Co.*, 4 D.L.R. 691, 14 Can. Ry. Cas. 85, 46 N.S.R. 20, affirming the verdict at the trial in favour of the plaintiff, suing as administratrix of the estate of Frank Schwartz. The appeal was dismissed.

The action in this case was to recover damages for loss of property of the late Frank Schwartz by fire, alleged to have been caused by sparks from an engine of the defendants. The jury found that the fire so originated and started on defendants' right-of-way; that combustible material on the right-of-way was the cause of the fire and its subsequent spread to the property destroyed; and they assessed the damages at $1,950. The verdict entered for that amount was maintained by the full Court below and the defendants then appealed to the Supreme Court of Canada.

Mellish, K.C., for the appellants.
W. J. O'Hearn, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The only arguable question on this appeal is, can the finding of the jury as to the place of origin of the fire be supported on the evidence? The Court below accepted that finding, and although the evidence is not very satisfactory, I do not think we can say that it so strongly preponderates against the conclusion reached by the jury as to justify us in holding that they did not understand it, or that they wilfully disregarded it. There certainly was an accumulation of brush and dry grass on the track from the previous year in which the fire started almost immediately after the engine passed by.

Whether the fire started on the respondent's property and then spread to the track and came back again to the place of origin, or whether it originated on the right-of-way and then travelled over to the respondent's property is the point in dispute. There is no doubt that the fire was caused by sparks from the company's engine and that it spread and caused the damage because of the accumulation of brush and dry grass on the right-of-way, and, in my opinion, it was negligence, in the circumstances of this case, to have allowed that combustible material to remain on the company's right-of-way from the previous year. The evidence of Dauphinée and Fox may not be very conclusive, but they both say that the locomotive set the fire on the right-of-way, and the jurors were entitled to accept or reject that evidence. They did accept it, and I do not feel justified in refusing to give effect to their conclusion concurred in by the Court of Appeal.

I would dismiss with costs.

Davies, J.

DAVIES, J.:—Two questions were discussed upon the appeal. One was as to the duty of the railway company under the Pro-

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vincial Statute, R.S.N.S., 1900 ch. 91, sec. 9, "Of the Protection of Woods against Fires," and the other was whether there was evidence from which the jury could fairly find that the fire which caused the damages complained of started upon the defendant's right-of-way and was caused by sparks emitted from the company's engine.

The jury found that "the fire started on the right-of-way and inside the fence and was caused by sparks carried from the defendant's engine."

They further found that "inside the right-of-way was an accumulation of dried ferns, grass, bushes and turf."

After reading over the evidence given I am not prepared to say that there was not evidence from which a jury might fairly find as this jury did. The evidence is, of course, not positive. It would be almost impossible to produce such. But I think it quite sufficient.

On the other branch of the case as to the statutory duty of the company, I agree with the Court below that such a duty is an absolute and not a qualified one discharged by an annual clearing up as suggested.

The section says:—

> Where railways pass through woods, the railway company shall clean from off the sides of the roadway the combustible material, by careful burning at a safe time or otherwise.

It is imperative. I cannot read it as meaning that when the company has once obeyed it, then it is absolved from the further duty of keeping the right-of-way clear for some unknown or indefinite time; or that the statute was intended to limit the common law duty of the company. The object of the statute, cleaning from the sides of the railway combustible material, is surely not discharged by doing it once or even by doing it once a year. Such combustible material will accumulate from time to time by the growth of grass, ferns, bushes, etc., and from other causes, and these accumulations must be removed as and when necessary to carry out the evident and plain object of the Act, namely, to prevent fires.

I cannot place any other construction upon the company's duty in this regard than that it is an absolute one and necessary for the protection of the property of persons adjacent to the railway line. Any other construction would, it seems to me, defeat the object and purpose of the Act.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—This appeal seems hardly arguable unless we are to become so astute as to render the statute a subject of mere critical examination regardless of what its obvious purpose was.

The ground taken on the facts seems to so conflict with the unanimous opinion of all the Judges who have heard the case, that it is not open for us to interfere.

DUFF, J. (dissenting):—There is evidence sufficient to support the inference that the fire started from one of the locomotives. Whether it started in the right-of-way or outside the right-of-way is, I think, purely matter of conjecture. The facts proved appear to be equally consistent with both hypotheses, or if the balance incline a little in one direction rather than another it is in so slight a degree as to make it worthless as a foundation for a verdict.

ANGLIN, J.:—I would dismiss this appeal with costs for the reasons given by Graham and Russell, JJ.

BRODEUR, J.:—The question that we have to decide is as to the construction of sec. 9 of ch. 91 of the Revised Statutes of Nova Scotia. That section deals with the protection of woods against fires and the sec. 9 has for its object to prevent railways from setting fire to the adjoining property, and reads as follows:—

Brodeur, J.

9. Where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

In this case it has been found by the jury that there was on the appellants' right-of-way combustible materials and that the fire that destroyed respondent's property started from there.

Under the common law as it was decided in the case of *Grand Trunk R. Co.* v. *Rainville*, 29 Can. S.C.R. 201, at 204, a railway company is required to keep its track free from combustible and inflammable substances which are likely to be ignited by sparks from passing engines and to communicate fire to adjacent property.

The fact of having combustible material on its right-of-way would, in certain circumstances, constitute negligence on the part of the company and would render it liable.

In this case the plaintiffs could have proceeded to recover under the common law and with the evidence that has been adduced would likely have recovered. But the case as it is brought before us rested upon the construction of the statute above quoted.

That statute imposes upon a railway company the obligation of keeping the sides of its right-of-way clean of combustible material and to remove or burn it.

When a statute declares that something shall be done the language is considered imperative and the thing must be done, especially when the thing to be done is for the public benefit. There was then an imperative duty on the part of the appellants to clean from their right-of-way all the combustible material that was there for some months, and I would not be disposed to reverse the decision of the Courts below.

The appeal should be dismissed with costs.

Appeal dismissed.

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REX v. MORGAN.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. May 19, 1913.

1. USURY (§ I A—7)—MONEY LENDERS ACT—MONEY LENDER, WHO IS—IS—SUCCESSIVE LOANS TO SAME PERSON.

One who, at intervals extending over a year makes various loans of money at usurious rates is a "money lender" within the meaning of the Money Lenders Act, R.S.C. 1906, ch. 122, notwithstanding all the loans were made to the same person.

Statement

APPEAL on a case reserved by a Judge of sessions in respect of his acquittal of the accused upon a usury charge brought under the Money Lenders Act, R.S.C. 1906, ch. 122.

The appeal was allowed and the case remitted to the sessions to be proceeded with.

N. K. Laflamme, K.C., for the prosecution.

P. Bercovitch (with *E. Pellisier*, K.C., as counsel), for defendant.

The following written opinion was handed down:—

Cross, J.

CROSS, J.:—The question to be decided is whether or not the Judge of sessions misdirected himself in forming an opinion upon what it is necessary to prove in order to constitute a person a "money-lender" within the meaning of sec. 2 of ch. 122 R.S.C. The Judge of sessions has found as matters of fact that the defendant was a man of no particular calling, but was owner of a number of house properties of which he took charge, that he was having a building erected; that Greenberg & Co. had taken a contract for plumber's work of the building for a price of over $3,000; that Greenberg & Co. were in need of money to carry on the contract work and borrowed money from the defendant at very high rates—about sixty per cent. per year; that there were many such borrowings made at intervals of time extending over a year; that the defendant had not advertised or held himself out as a money-lender and was not publicly reported to be a money-lender and that it was not proved that he had lent money to any one except Greenberg & Co. Upon these facts, the learned Judge of sessions came to the conclusion that it had not been proved that the defendant was a money-lender within the meaning of the Act and he therefore acquitted him.

We are now to decide whether or not the Judge of sessions erred in law in arriving at that conclusion. In the treatise on "Money and Money-lending" in "Laws of England" it is said, in paragraph No. 83:—

It is a question of fact in each case whether a person is carrying on the business of money-lending, and in order to establish that he is carrying

on such a business it is not sufficient to prove that he has occasionally lent money at a remuneration rate of interest, but it is necessary to prove some degree of system and continuity in his money-lending transactions.

A number of decisions are referred to in the notes to that paragraph, and it is added in par. 84 where a list of exceptions is set out that persons are not money-lenders who are

bonâ fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof they lend money.

It is well to observe that these propositions are stated in respect of the Imperial Money-lenders Act, 1900; that the object of that Act is not so much to punish usury as to require money-lenders to be registered and to register the addresses at which they do business—matters not treated in our Act—and that the word "money-lender" is defined in it in terms, unlike those made use of in our Act, so that persons may be money-lenders within the meaning of our Act who would not be money-lenders within the meaning of the Imperial Act, which requires that money-lending must be the money-lender's business, whilst the defining section of our Act reads thus:—

"Money-lender" in this Act includes any person who carries on the business of money-lending, or advertises, or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per centum per annum, but does not comprise registered pawnbrokers as such.

This section makes use of the word "includes," as if there might be other money-lenders than those so included, but, as it is not easy to imagine any other kind of money-lender than those mentioned in the groups enumerated in the first part of the definition, I consider that the word "includes" is to be read as if it were the word "means." Then, it will be observed that the definition of "money-lender" is made up of two parts. The first part is an enumeration of certain things stated disjunctively, one of which a person who is a money-lender does, namely, (*a*) "carries on that business," (*b*) advertises, (*c*) announces or (*d*) holds himself out.

The second part is intended to describe the characteristic made punishable by the Act namely the "practice of lending money at a higher rate than ten per centum per annum."

The two parts are coupled by the conjunctive "and" and I see no ground to justify the argument of the prosecutor that that word "and" is in reality disjunctive and should be read as if it were the word "or."

Two characteristics must therefore be present to constitute a person a money-lender under our Act, namely: First, the doing of one of the four things mentioned in the first part of the definition, and second, the practice of lending at forbidden rates of interest.

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That being so, I gather from the case stated by the Judge of sessions that both of these characteristics are proved to have been present in the case of the defendant, namely, first, the carrying on of the business of money lending, and second, the practice of lending at a higher rate than ten per cent. per annum. I consider that these two characteristics or essential elements none the less co-existed in this defendant's case, notwithstanding that all the loans proved to have been made were made to the same person.

I consider that there has been proved a "sufficient degree of system and continuity" in the money-lending transactions, a test applicable both under the Imperial Act and under our Act, and that there was error in law in the holding that, notwithstanding the large number of loans and the period of time throughout which they were being made, the defendant was not a money-lender within the meaning of that term in the Act, because all the loans were made to one borrower, and because the existence of the plumbing contract was what led to the course of borrowing being embarked upon.

Amongst the papers of record sent up to us, there is a list of the borrowings of Greenberg & Co., representing over one hundred transactions scattered through a period of over a year. I have felt warranted in looking at that list and I consider that the contents of it are such as repel the idea or inference that the money lending can be considered as simply incidental to the carrying out of the plumbing contract. In the multiplicity of the lendings there is proof that the defendant was one who "carries on the business of money lending." That satisfies the first part of the definition and makes it unnecessary to inquire whether there was any advertising, announcing or holding out.

Again the same multiplicity of lendings at the rates shewn in the list, and the repetition of them week by week or oftener for over a year, makes proof that the defendant was one who "makes a practice of lending money at a higher rate than ten per cent. per annum." That satisfies the second part of the definition. The question as to what constitutes "carrying on business" has been the subject of judicial consideration in many cases in the United States and reference may be made to the decisions noted in the American and English Enc. of Law, 2nd ed., in the notes at pp. 73 and 74 of the treatise on "Business" and in those at pp. 724 and 725 of the treatise on "Carry."

My conclusion would be to say that there is error in law in the inference that upon the facts set forth in the stated case the defendant was not a money-lender within the meaning of that word given in the Act. I would therefore set aside the order of acquittal and remit the case to the learned Judge of sessions to the end that the trial be continued and proceeded with in due course of law.

It may be a result of this Act that a transaction which would amount to an indictable offence under sec. 11 can still be so far valid in law that a civil Court would feel bound under sec. 6 to maintain an action for recovery of the money lent. It is unnecessary here to express our opinion on that point but it may be opportune to say that the decision of this appeal is not a pronouncement against the existence of such civil liability.

Appeal allowed and case remitted.

BUTTERFIELD v. CORMACK; LAURENCELLE et al. (third parties).

Alberta Supreme Court. Trial before Scott, J. May 19, 1913.

1. EVIDENCE (§ II E 9—205)—PRESUMPTIONS — WITHHOLDING OF EVIDENCE.

It is matter of comment as regards the credit to be given a plaintiff's testimony that, knowing that his version of the transaction would be contradicted by the opposing party, he failed to produce evidence of parties easily available as witnesses whose connection with the transaction was such that they could corroborate the plaintiff's testimony, if true.

Statement

TRIAL of action to recover from defendant $2,309.90 for moneys received by the defendants for the use of the plaintiff. Judgment was given for the plaintiff for a lesser sum.

C. C. McCaul, K.C., and *G. L. Valens*, for plaintiff.

S. B. Woods, K.C., for third parties.

Scott, J.

SCOTT, J.:—The defendants admit the receipt of the moneys but claim that plaintiff was indebted to the third parties to that amount and that defendants by his authority paid over the amount to them in satisfaction of their claim.

By order dated March 9, 1912, it was directed, *inter alia*, that defendants deliver a statement of claim to the third parties who should plead thereto and be at liberty to appear at the trial and take such part as the Judge should direct and be bound by the result of the trial, that such statement of claim and the statement of defence thereto (if any) by the third parties constitute the pleadings or record of the issues between the defendants and third parties, that such third parties be at liberty to appear by counsel and defend the action as they might be advised as far as regarded the question of the liability of the defendants and the question of the liability of the third parties to them and that they be bound by the finding of the Court or Judge upon that question, subject to appeal.

By order of May 5, 1912, the order referred to was amended by directing that the defendants should not be held liable in any greater sum than the amounts, if any, by which the plaintiff's claim exceeded the just indebtedness (if any) of the plain-

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tiff to the several parties had no amount been paid by the defendants to them, in respect of their several claims against the plaintiff.

The defendants claim that the plaintiff was indebted to the third parties in the amount of his claim and that they paid the moneys to the third parties by his authority.

The third parties Lessard and Bourdreau admit that they are liable to indemnify the defendants against plaintiff's claim and, as against him, they allege that, as to the sum of $575, and the interest claimed thereon, it was paid by them to the plaintiff and one Scriver under certain agreements between them in respect of which there was a failure of consideration on the part of the plaintiff and Scriver and at the trial I held, for the reasons then stated, that there had been a failure of consideration and that those third parties were entitled to recover from the plaintiff $609.75 in respect thereof.

The third party Laurencelle also admits his liability to indemnify the defendants against the plaintiff's claim, but as against him, he alleged in his defence that in March or April, 1910, he with Judge Noel and Dr. Blais entered into an arrangement with the plaintiff whereby, in consideration of his proceeding to locate and acquire certain coal claims west of Edmonton for their benefit jointly with himself, they agreed to assist him in raising the necessary funds to outfit him and for expenses generally for that purpose by pledging their credit with his for that purpose, it being agreed between them that the plaintiff should be primarily liable for the amount so to be raised and should reimburse the others any portion of the sum so raised, which they might have to pay, and that the latter in pursuance of such agreement, pledged their credit with that of plaintiff to the Merchants Bank of Canada for the sum of $900.

Laurencelle also alleged that he with Judge Noel and Dr. Blais also pledged their credit along with the plaintiff in the further sum of $200 to pay a debt due by him to the Bank of Hochelaga upon the same agreement and understanding.

Alternatively Laurencelle alleged that plaintiff representing that he could locate and acquire certain coal lands and upon the understanding and agreement that he would forthwith proceed to locate and acquire them for the joint benefit of himself, the other named parties and Laurencelle, induced them to pledge their credit with him for $900 for that purpose and also for $200 to pay said debt of plaintiff to the Bank of Hochelaga, that the plaintiff did not fulfil his part of the agreement and did not proceed to locate or acquire such coal lands for their joint benefit and that there was therefore a total failure of consideration as to the $900.

Laurencelle also claims that plaintiff was indebted to him

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in the amount of a promissory note for $410.75 dated March 3, 1911, payable one month after date with interest at eight per cent. per annum both before and after maturity. This claim was admitted by plaintiff at the trial. The amount now due upon the note is $483.35.

The evidence shews that on April 2, 1910, the joint note of plaintiff, Laurencelle, Judge Noel and Blais for $1,200 at four months with interest at eight per cent. per annum was discounted with the Merchants Bank, the proceeds being carried to the credit of Laurencelle, who thereupon advanced the plaintiff $900 and paid the Bank of Hochelaga $200 to retire a note for that amount made by him and endorsed by Laurencelle, that the joint note was renewed from time to time by the parties thereto, the balance of the original discount which had not been paid out by Laurencelle being applied in reduction of the bank's claim at the time of the first renewal. The note was continuously renewed by the four parties thereto until August 20, 1911, when the renewal then falling due was retired by a note of Laurencelle, Judge Noel and Blais, the plaintiff not having joined with them in the making thereof, the amount due the bank at that date being $1,161.15. The last renewal made by the three parties was eventually paid by Laurencelle out of the moneys received by him from the defendants.

Laurencelle, in his evidence at the trial, stated that there was no agreement or arrangement between plaintiff and the other parties to the note about prospecting for coal or anything to that effect or any arrangement that they were to share in anything the plaintiff got, though he admits that plaintiff, when going away, told him that he would try to get him a good thing; that the $900 advanced to the plaintiff was advanced merely by way of loan merely to help him along and that plaintiff said he expected to pay the note in two months but that, to make sure, he asked for four months. Laurencelle's counsel thereupon applied to amend his defence that the advance was by way of loan. I allowed the amendment.

The plaintiff states that there was a pool between him, Laurencelle, and Judge Noel to locate coal lands and that the $1,200 note was discounted to raise $900 for him to go west for that purpose and to pay the note in Bank of Hochelaga; that he did not know Dr. Blair was in the deal; that he took the $900, made the trip, came back and reported, but they never took up the locations; that he was to locate the coal lands for the $900, was to do the work for that, and was to get one-third of the lands. In his examination for discovery, however, he admitted that he was liable for a third of the amount, but that, as he afterwards became aware, that Dr. Blais had an interest, he thought he should be only liable for a quarter. As to the note in the Bank

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of Hochelaga, he states that it was to raise money to enable him to go out to locate timber limits for Laurencelle and that he was to do the locating for that amount, that he went out for that purpose and upon his return he applied for four locations, of which one was for Laurencelle. The latter denies that he never went into any speculation with plaintiff respecting the acquiring of timber licenses and that the proceeds of the note were not to be applied in securing them.

The note for $1,200 discounted at the Merchants Bank shews on its face that it was a joint transaction between the four makers, and, in the absence of evidence to the contrary, it would follow that the parties were as between themselves each liable for the payment of one-fourth of the amount due upon it. The evidence as to there being any agreement between them that they should not be so liable is, in my opinion, inconclusive and unsatisfactory. I do not believe the evidence of the plaintiff respecting it, as he has made contradictory statements under oath relating to it. Neither can I accept the statement of Laurencelle respecting it. The allegations in his original statement of defence appear to me to be much more reasonable than the statement made by him at the trial. I cannot understand how the pleader could have pleaded as he did without instructions. He must have had some basis for them other than a vivid imagination. I also think that, knowing that the plaintiff would contradict his version of the transaction, he should have adduced evidence in corroboration of his statement. Such corroborative evidence, viz., the evidence of Judge Noel and Dr. Blais, could, it appears, have been easily procured. It was stated by his counsel that Judge Noel had been subpoenaed but was not in attendance. If application had been made for that purpose the trial might have been adjourned and the necessary steps taken to compel his attendance.

I cannot accept the plaintiff's statement as to the circumstances under which the note for $200 held by the Bank of Hochelaga was given. It appears on its face to have been given for a debt due by him to Laurencelle and I hold that the latter was entitled to pay it and charge plaintiff with the amount. The defendants have failed to establish that they were authorized to pay over to the third parties the amounts now claimed by the plaintiff.

It is admitted that the defendants paid over the moneys in question to the third parties in December, 1911.

I give judgment for plaintiff against the defendants for $1,038, made up as follows:—

Amount received by defendants		$2,309.90
Amount due by plaintiff to Lessard	$609.75	
Amount of note plaintiff to Laurencelle (being $410.75 with interest at 8 per cent. from 3rd March to December, 1911)	435.41	
One-fourth of $1,161.15 with interest from 28th August to December, 1911, at 5 per cent	295.41	
		1,340.57
		$969.33
Interest at 5 per cent. December, 1911, to date		68.67
		$1,038.00

Plaintiff to have his costs of the action.

Judgment for plaintiff.

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Manitoba King's Bench. Trial before Curran, J. June 2, 1913.

1. CONTRACTS (§ V C 2—397)—BREACH — RESTORING BENEFITS.

On the breach of a contract, based on a valuable consideration, to support another for life, the person from whom the consideration flows must be restored to as good a position as he occupied before the contract was made.

2. LIENS (§ I—1)—ON LAND—BREACH OF CONTRACT FOR SUPPORT IN CONSIDERATION OF CONVEYANCE OF LAND—PART PERFORMANCE—ALLOWANCE FOR.

On the failure of the defendant to carry out an agreement to support the plaintiff's son for life, in consideration of the purchase and conveyance by the plaintiff to the defendant of certain real estate, a lien on the land in the nature of that of a vendor, will be given the plaintiff for the value of the property, less whatever sum the defendant may be entitled to for the support and maintenance of the son until the breach of the agreement.

[*Cunningham* v. *Moore*, 1 N.B. Eq. 116; *Paine* v. *Chapman*, 6 Grant 338, followed; *Dawson* v. *Dawson*, 23 O.L.R. 1, referred to; *Zdan* v. *Hruden*, 4 D.L.R. 255, 22 Man. L.R. 387, distinguished.]

3. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS—CONTRACT PERTAINING TO REALTY—AGREEMENT TO SUPPORT FOR LIFE IN CONSIDERATION OF CONVEYANCE OF LAND.

A parol agreement, in consideration of a conveyance of land to the promisor, for the support of another for life, is not within the Statute of Frauds as a contract relating to land.

[*Smith* v. *Ernst*, 3 D.L.R. 736, 22 Man. L.R. 363; *Morgan* v. *Griffith*, L.R. 6 Ex. 70, referred to.]

4. CONTRACTS (§ I E 3—76)—CONTRACT NOT TO BE PERFORMED WITHIN YEAR—PAROL AGREEMENT FOR SUPPORT FOR LIFE.

A parol promise, in consideration of a conveyance of land, to support another for life is not within the Statute of Frauds as an agreement not to be performed within a year, since, by its terms, it might terminate within the year.

[*Slater* v. *Smith*, 10 U.C.Q.B. 630; *McGregor* v. *McGregor*, 21 Q.B.D. 424, referred to.]

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ACTION for the recovery of lands by W. H. Spencer and James Spencer.

The action was maintained as to the plaintiff W. H. Spencer.

W. H. Trueman, for plaintiff.

F. M. Burbidge, for defendant.

CURRAN, J.:—This action arises out of one of those unfortunate family disputes about property, which, in my opinion, had better have been settled out of Court. However, the parties cannot agree to do this, and I must decide the controversy as best I can. The evidence is conflicting, and as the parties are apparently of good reputation I find some difficulty in coming to a conclusion upon the facts.

The plaintiffs are father and son, the former an old man nearly 80 years of age, and the latter a man of some 48 years of age, but mentally deficient and weak, incapable of doing anything for himself, and wholly a charge upon his father's bounty. The defendant is another son, 43 years of age, married and residing in Winnipeg. The father resides at Bracebridge, Ontario, where he has held the position of police magistrate for the district of Muskoka for the past 25 years. He is, I understand, a widower and has living four sons, John, Robert, the plaintiff James, and the defendant, and one daughter Isabella, the wife of William Kirby of Bracebridge. It is necessary that these particulars of the family should be stated in view of the defendant's contentions.

The plaintiffs seek to recover in this action from the defendant a certain house property in Winnipeg on Home street, described as lot 35 and the most northerly 33 feet in width of lot 34 in block 14, sub-division of part of parish lot 66 St. James, according to registered plan of the Winnipeg land titles office, No. 279.

This property the plaintiff William H. Spencer purchased in July, 1911, from a Mrs. Myers, and caused to be conveyed to the defendant, as the plaintiff alleges, in consideration that the defendant would provide the son James with a home and board and lodging and would care for and maintain the said James at the defendant's home during the lifetime of the said James.

The father's evidence is somewhat at variance with the allegations in the second paragraph of the statement of claim, in which the consideration for the support and maintenance of the son James is alleged to be the purchase of the house and lots on Home street, and a devise to the defendant by the father's will of two certain properties, consisting of lands and houses in Bracebridge, Ontario. The father stated positively at the trial that the devise by will, which in fact was subsequently made, was entirely independent of and in no way connected with the agreement for the son's support.

The defendant, on the other hand, denies most positively the father's allegations, and says that the conveyance to him of the Winnipeg property was not made in consideration of, or in any way connected with, the arrangement for the support of his brother James; but was in fact made to him as a gift, and for the purpose of putting him upon a footing of equality with his brothers and sister, inasmuch as the father had theretofore failed to make any provision for him out of his estate which apparently had been done for his brothers John and Robert and his sister Isabella. The defendant alleges that he agreed to take and keep James in consideration of provision to be made for him by his father's will, consisting of a devise of two house properties in Bracebridge, worth about $3,000, a small amount of life insurance, and such other property as the father might die possessed of. Here, again, there is a variance between the defendant's evidence and the allegations in clause 6 of his statement of defence, in which it is alleged that the defendant received and took his brother James from a brotherly feeling and not in pursuance of any agreement between himself and either or both of the plaintiffs.

How these errors in pleading came about I do not know, but I assume that it was in consequence of the solicitors misunderstanding the facts. As there is a variance on both sides of the record, I will treat the pleadings as if they conformed to the evidence in these respects.

It is admitted that the plaintiff James is mentally weak and wholly unable to care or provide for himself and that latterly and up to the month of July, 1911, the father had provided a home for him with his daughter Isabella at Bracebridge. It also appears that Isabella's husband objected to keeping James any longer, and it became necessary for the father to make other arrangements for a home for his unfortunate son. With this object in view the father came to Winnipeg in June or July, 1911, and visited the defendant, and sought to make arrangements with him for the support of his brother James.

To more fully appreciate the defendant's contention, it is necessary to advert to some of the earlier family history. The defendant, prior to coming to Manitoba, had remained at home working with his father on his farm for some 27 years. The father possessed two farms, one known as the homestead comprising about 300 acres, and the other in the vicinity comprising some 200 acres. When the defendant came of age the 200 acre farm was conveyed to him by his father. After holding it for a short time, he says that at his father's request and upon the faith of his father's promise to give him the homestead, he conveyed the 200 acre farm to his brother John, but did not get the homestead as promised. This alleged breach of faith on

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the part of the father engendered a spirit of unfriendliness between the father and the defendant. The defendant left home about 15 years ago and ultimately came to Manitoba. When leaving home he says that his father again promised to leave him the homestead when he was through with it, as he expressed it. About a year after coming to Manitoba he received offers by letter from his father to return to Ontario and live with him on the farm. This he declined to do. At this time his brother Robert was also out in this country. The defendant gives as his reason for not going back to the farm that he could not depend upon his father's promise to leave it to him, and he accordingly wrote a letter to his father offering to take $500 in cash and give up his claim to the homestead, at the same time suggesting that his brother Robert should return to Ontario and take the land. The father replied that he owed the defendant nothing and the matter then dropped. Subsequently Robert returned to Ontario and got a deed of the homestead from his father, for which the father says he paid him $1,000. This included about $1,000 worth of stock and farm implements, and the defendant says the money so paid was for the stock and farm implements and not for the land; but this the father does not admit to be the case.

The daughter Isabella was also provided for by her father giving her a boarding house property in Bracebridge, but coupled with a verbal condition that she was to provide a home for him as long as he lived. Apparently the defendant then had received no assistance from his father except about $150 given him at different times. The father frankly stated in his evidence that he intended the homestead for the defendant from his early days, and told him so, long before he went west, and I think I am justified in inferring that as the defendant refused to return to Ontario and live on the homestead the father felt morally justified in giving the land to his son Robert, who was willing to do so.

In October, 1908, the plaintiff made his will, by which a legacy of $500 was bequeathed to the defendant and the landed property in Bracebridge was devised to his daughter Isabella, subject to the support and maintenance of the son James "during the remainder of his natural life and to his burial after death said maintenance and support being a charge on his said real estate." The will contained a residuary devise in favour of Isabella.

This, then, was the position of matters when the plaintiff W. H. Spencer came to Winnipeg; the son John had been given the 200 acre farm, the son Robert the homestead, stock and implements, for which he paid $1,000, the daughter Isabella the boarding house property in Bracebridge, and the defend-

ant about $150 in money, and there were the testamentary provisions just stated.

Although the defendant and his father were estranged, they appear to have corresponded occasionally, and on November 29, 1908, the father wrote the defendant the letter, ex. 11. The proposition contained in this letter was refused by the defendant. Again on December 21, 1908, the father wrote the defendant the letter, ex. 17, asking him to take charge of James and making proposals to that end. The defendant again declined, and nothing further transpired between them until the plaintiff W. H. Spencer came to Winnipeg as before stated.

When discussing the matter with the defendant in Winnipeg the plaintiff W. H. Spencer admits that the defendant reminded him that he had done more for the other members of the family than for him, and that before he would speak of keeping James he wanted the plaintiff, as he expressed it, to put him equal with the others. Now this is just what the defendant says took place; but the parties differ as to what followed.

The plaintiff says the defendant answered his proposals for keeping James by saying that the other members of the family were better able to keep him than he was, to which the plaintiff replied that he did not propose to put him (James) out as a pauper, but would pay for him, at the same time suggesting an investment in a house or the purchase of a Government annuity. He further says he asked defendant whether he would sooner have the house on Home street or the price of it, to which the defendant replied that he would rather have the house. The plaintiff states he then said to the defendant, "I will give you a clear deed of that house if you will take James for his natural life." To which he says the defendant assented. The next day they completed the purchase of the house on Home street, for which the plaintiff paid $3,250 in cash, $1,000 of which he had previously borrowed from his bankers in Ontario, and the title was vested in the defendant clear of encumbrance.

It appears that before buying the house the plaintiff gave the defendant $500, saying that he had promised him this sum in his will and that he should have it in any event; but he swears positively that this gift of money to the defendant had nothing whatever to do with the arrangement subsequently made for the support of James. This money was given to the defendant while the father was in Winnipeg. It was stipulated, the plaintiff W. H. Spencer says, that the defendant should return with him to Ontario and bring James back to Winnipeg and this was done. The plaintiff W. H. Spencer further says that after the purchase of the house, and before leaving for the east, he told the defendant that he would, in addition to giving him the house, leave him by his will all the property he died possessed of.

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While in Bracebridge the plaintiff W. H. Spencer made an alteration in his will in apparent fulfilment of this promise. Exhibit 1 is a copy of the will and codicil, and has endorsed at the foot a memorandum of the changes to be made. The original will was not produced at the trial, but exhibit 1 is a copy in the plaintiff's handwriting and was made and given to the defendant at Bracebridge and by him produced at the trial. A reference to this document discloses that the bequest of $500 to the defendant is to be revoked, the money having been paid. The other bequests in clause 3 are also to be revoked, as also is the devise to Isabella in clause 4, and a general devise to the defendant is to be added of all the testator's real and personal property, including insurance moneys, subject to the support and maintenance of his son James "during the remainder of his natural life and to his burial after death, said maintenance and support being a charge on said real estate."

There is no date to this memorandum, but it was made some time in August, 1911, and before the defendant returned to Winnipeg with James.

The, to me, peculiar thing about this is that the devise is made subject to the support of James, when, according to the plaintiff's story, this matter had been finally completed and arranged for in Winnipeg by the purchase of the house on Home street, and from what the plaintiff said to the defendant while in Winnipeg about providing for him by will, I would have concluded that such provision was to be for the defendant's own benefit untrammelled by any charge or condition. But the plaintiff says later on in his evidence "the change in my will had nothing to do with the bargain made in Winnipeg for the keep of James: it was purely voluntary on my part and additional." I find difficulty in reconciling these positive statements with the language used in the will, and I am strongly inclined to think that the true consideration for the support of James was the Winnipeg property plus the provisions contained in the will. If not, it was apparently a mistake to encumber the devise to the defendant by conditions for the support of James.

The plaintiff further says that the defendant, while in Bracebridge, wanted a deed of the Bracebridge properties, because he expressed a fear about his father changing his mind and altering his will. This the plaintiff refused to give, and apparently the defendant was contented to accept the provision as made in the altered will, and returned to Winnipeg with James, who continued to live with him until about November 6, 1912, when he refused to keep him any further in his house, or to further support him. The father then arranged that Robert should take the son James to his home, and ultimately he

was sent back to Ontario and is again a charge upon his father's bounty.

The defendant says most positively that he refused to treat with his father at all for the support of James until he had been put upon a footing of equality with his brothers and sister with regard to the benefactions they had previously received from the paternal estate, and that the father acquiesced in this, and that the $500 in money and the Home street house were given to the defendant for this purpose and no other. He swears that when this had been done, and not before, that the arrangements to take James were agreed to, in consideration of the provisions in the father's will before referred to.

I cannot accept the defendant's evidence that this was the agreement with the father. To my mind it is wholly unreasonable and inconsistent with the previous attitude of distrust exhibited by the defendant towards his father. The provision by will, even if unalterable, had been previously offered and refused, and would not take effect in any event until the father's death and would not produce to the defendant any material benefit until that event happened; the defendant was, by the terms of the agreement, as he alleges it, incurring a present and continuing burden and responsibility in taking his brother into his home, caring for him and providing for him. I cannot believe that he agreed to do this upon the father's bare word or promise that he would make provision for the defendant by his will, as the consideration for his presently undertaking the support of his brother. It is entirely inconsistent with the defendant's story of his unjust treatment by his father in the past and with his present attitude of distrust towards his father.

On the whole, I think the father's evidence in the light of past events to be the more credible and I accept it in preference to that of the defendant. Besides which it is corroborated in some material particulars by the son Robert, the daughter Isabella and the solicitor Johnson. It is true the defendant's evidence is also corroborated to some extent by his wife and by the witness Myers. It is only reasonable to assume that the wife would have a natural bias in favour of her husband as well as having a direct interest in retaining the Winnipeg property. The evidence of the witness Myers is not, to my mind, conclusive, and even accepting it as given, would not exclude the possibility of the father having made the arrangement with the defendant which he swears to.

Upon the whole, I think the weight of evidence is in favour of the plaintiff's contention. I think the father was moved to make the sacrifice he did in purchasing the house in Winnipeg solely for the purpose of making an immediate and permanent provision for his helpless son. I am satisfied that he felt his

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own life was drawing to a close and it was worrying him to think what might happen to his son after his demise if he left him unprovided for. He knew that his daughter Isabella, owing to objections of her husband, was no longer willing to afford him a home, and I think these considerations and a sense of his duty as a father moved him to make the arrangements in the way in which he says they were made, and I am satisfied that the defendant was agreeable to accept the property on Home street as the consideration for his engagement to support and maintain his brother for the remainder of his life.

In consequence of the defendant's refusal to keep his brother the father now finds himself in the position of having to provide for his son with less than half the means of doing so which he had when he came to Winnipeg and made the arrangement with the defendant. I am satisfied that such a contingency was never in the contemplation of either of the parties.

It may be that the arrangement was an unfortunate one in the first place, and that Winnipeg was not a suitable place for this unfortunate man to be kept, and I entirely agree with what the defendant says upon this point, and that a farm would be much preferable for him as a home. But both the defendant and his wife were fully aware in advance of the nature of the responsibility they were incurring. They cannot and do not plead ignorance upon this point, and I think they must be held strictly to their bargain. As they cannot be forced to keep the man in their home, they should give up the consideration which they received from the father for this purpose, and thereby place the father in as good a position financially as he was in before the bargain was made.

My findings upon the facts being adverse to the defendant's contention, all the grounds of defence except one must of necessity fail. The defendant has, however, pleaded the Statute of Frauds as a bar to the plaintiff's recovery, and I must decide how far that defence will avail.

The only sections of the statute that can apply are the 4th and 7th. In my opinion neither of these sections affects the plaintiff's position. The defendant's promise to support James was not a contract or sale of lands, etc., or any interest in or concerning them; but was, I think, a collateral agreement only, which might be proved by parol evidence, and which is not within the 4th section of the statute. The defendant agreed that in consideration of the conveyance of the land to him he would support and maintain the plaintiff James Spencer for the remainder of his natural life. This promise was only connected with the land as constituting the consideration for its conveyance to the defendant. It in effect represented the purchase price of the land, and the plaintiff W. H. Spencer is

really in the position of an unpaid vendor who has a lien upon the land for his unpaid purchase money.

As to the promise being collateral, I refer to *Smith* v. *Ernst*, 3 D.L.R. 736, 22 Man. L.R. 363; *Morgan* v. *Griffith*, L.R. 6 Ex. 70. In the latter case there was a lease of grass land executed by the plaintiff (tenant) on the strength of a parol agreement by the defendant (landlord) to destroy the rabbits infesting the land. The defendant failed to fulfil his promise and the plaintiff brought an action for damage done the grass and crops on the land demised, by the rabbits. The Statute of Frauds was pleaded, but the Court held that the parol agreement was collateral to the written lease and that evidence of it was properly received and the plaintiff entitled to recover.

Again, the agreement of the defendant is not, I think, within that part of the 4th section relating to agreements not to be performed within the space of a year, because by its terms it would not necessarily endure beyond a year: *Slater* v. *Smith*, 10 U.C.Q.B. 630. Robinson, C.J., at 633, says:—

> To bring the case within the statute it seems to be held that the very terms of the agreement must carry it beyond the year. It is not sufficient that the agreement may cover or extend to a period beyond the year, depending on some uncertain contingency.

See also *McGregor* v. *McGregor*, 21 Q.B.D. 424.

Even if the promise or agreement of the defendant is within the statute, the consideration for it has been completely executed by the plaintiff W. H. Spencer; and the Court will, under such circumstances, enforce the contract, notwithstanding the statute: *Halleran* v. *Moon*, 28 Grant 319; *Kinsey* v. *National Trust*, 15 Man. L.R. 32.

Again, if it could be held that the transaction between the plaintiff W. H. Spencer and the defendant amounted to the creation of an express trust on which the defendant was to hold the land, the 7th section of the statute could not be invoked to enable the defendant to perpetrate a fraud by keeping the land and refusing to perform the trust: *Re Duke of Marlborough, Davis* v. *Whitehead* (1894), 2 Ch.D. 133; *Smith* v. *Ernst*, 3 D.L.R. 736, 22 Man. L.R. 363; *Gordon* v. *Handford*, 16 Man. L.R. 292. The statute was not made to cover fraud: *Lincoln* v. *Wright*, 4 DeG. & J. 16.

However, I prefer to rest my judgment rather upon the ground of relief afforded by the view I take—that the plaintiff W. H. Spencer has a vendor's lien as for unpaid purchase money. The case of *Cunningham* v. *Moore*, 1 N.B. Eq. 116, is a clear authority for this proposition. In that case a farm was conveyed by an aged couple to their daughter and on the same day she, the daughter, and her husband entered into a written agreement with the vendors to board them on the farm and pay them

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an annuity in consideration of the conveyance of the farm. It was held that the vendors had a lien on the land for the performance of the agreement. Barker, J., says, at p. 118:—

> It is a well-settled principle that the vendor of real estate has a lien on the land for the purchase money unless there is some agreement, express or implied, that he shall not have. The performance of this agreement represents the purchase money, and unless the circumstances negative the intention to preserve the lien, I must hold that it exists.

Paine v. *Chapman*, 6 Grant 338, is another authority to the same effect. Here a conveyance of her estate was made by an aged woman to her grandson for which he was to maintain her. The grandson gave her a bond to secure the consideration and entered into possession of the land. Spragge, V.-C. at 341, in speaking generally of such arrangements, says:—

> I cannot see that such an arrangement affords any indication of an agreement between the parties to it that the aged grantor should trust to the personal engagement in whatever form of the grantee for his support at a time of life when he has become incapable of supporting himself. I think rather that he would be considered, not by lawyers only but popularly, as having a claim upon the land for his support. The grantee must shew the agreement, to be of such a nature that the retention of the lien would be contrary to what appears to have been the agreement of the parties.

I may say here, that I cannot find anything in the verbal arrangement between the father and the defendant inconsistent with the existence of this lien.

I refer also to *Dawson* v. *Dawson*, 23 O.L.R. 1, as a very recent authority for the proposition that the defendant Court will declare a charge upon land for an annuity and a sale of the land in default of payment, upon the principle that where substantially the sole purpose of a covenant was to secure a benefit for the person named therein, although not a party to the agreement, a trust may well be created, although there be an absence of any expression in terms importing confidence.

The defendant cited the case of *Zdan* v. *Hruden*, 4 D.L.R. 255, 22 Man. L.R. 387, as being a direct authority against the plaintiff's right to a lien or charge upon the land in question, and if this is what that case in part really decides I am bound by it notwithstanding the previous authorities which I have referred to. The only part of the judgment of the Court of Appeal dealing with the question of lien is to be found at the end, and is in these words: "In my opinion no lien on the defendant's property can be established," and the trial Judge's finding was reversed upon this point.

I confess I could not altogether understand upon what legal principle this decision was based, and so sought light upon the matter from the Judges of the Court of Appeal. It then trans-

pired that the report of the case did not very correctly set out the facts. I am told by the Judges in appeal that there were practically two transactions involved in this case, one affecting the land only and a subsequent one relating solely to the chattel property. The consideration for the land was the assumption and payment by the grantee of the vendor's debt, which was carried out in full, thereby putting it out of the question that any vendor's lien could exist or arise in that connection. That on a subsequent sale of the chattel property between these parties the agreement to support the plaintiff and his wife was made, and that such agreement had reference solely to the chattels and not to the land. Under these circumstances the Court decided that no lien upon the land, which had been fully paid for, could be established.

It will readily appear, in view of this explanation, that this case is no real authority against a lien being established in the case at bar. I may say that the learned Judges of the Court of Appeal, upon consideration, requested me to make the foregoing explanation regarding the *Zdan* v. *Hruden*, 4 D.L.R. 255, 22 Man. L.R. 387, judgment so that it may not be hereafter misunderstood as an authority upon this question.

I hold, therefore, that the lands in Winnipeg on Home street were purchased and paid for by the plaintiff W. H. Spencer and conveyed to and accepted by the defendant upon the consideration that the defendant would support and maintain the plaintiff James Spencer for and during the remainder of his natural life; that this consideration the defendant has wholly failed to perform and the plaintiff W. H. Spencer is thereby in the position of an unpaid vendor entitled to a lien on the property conveyed.

The plaintiff W. H. Spencer is entitled to judgment, and there will be judgment accordingly, declaring that he has a lien on the land in question on Home street, in the city of Winnipeg, for the amount of the purchase money paid by him for said lands, less such sum as the defendant may be entitled to for the support and maintenance of the plaintiff James Spencer during the time he resided with the defendant.

If the parties cannot agree as to what will be a fair reduction on this account, there will be a reference to the Master to ascertain and fix an amount proper for this purpose.

The defendant will repay to the plaintiff W. H. Spencer the balance of purchase money found to be due after such deduction has been made, and in default of payment within one month from such ascertainment, the lands may be sold under the direction of this Court to satisfy such amount, together with the costs of this action and costs of sale and subsequent costs, if any. The defendant must pay the costs of this suit.

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I think the action had better be dismissed as to the plaintiff James Spencer, but without costs, as it may hereafter embarrass the plaintiff W. H. Spencer in working out his judgment if this party remains upon the record as a party plaintiff. There is no necessity for including him in the benefits of this judgment, and it may cause difficulty hereafter, as apparently he is mentally incapable of transacting business of any kind.

Judgment for plaintiff W. H. Spencer.

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June 9.

MACDONALD v. DOMESTIC UTILITIES MANUFACTURING CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, J.J.A. June 9, 1913.

1. DISCOVERY AND INSPECTION (§ IV—31)—FAILURE OF COMPANY'S OFFICER TO ATTEND EXAMINATION—IRREGULARITY IN PROCESS.

A defendant company cannot be penalised under K.B. rule 398 (Man.) on the ground that one of their officers had failed to attend an examination for discovery, when the officer was not properly subpoenaed.

[*Macdonald* v. *Domestic Utilities Co.*, 10 D.L.R. 429, affirmed.]

Statement

APPEAL from decision of Prendergast, J., *Macdonald* v. *Domestic Utilities Mfg. Co.*, 10 D.L.R. 429.

The appeal was dismissed.

J. Galloway, for plaintiff.

H. V. Hudson, for defendants.

Howell, C.J.M.

HOWELL, C.J.M., concurred with Richards, J.A.

Richards, J.A.

RICHARDS, J.A.:—The defendants are a corporation, licensed under the Extra-Provincial Corporations Act, and have a head office for Manitoba at Winnipeg. Their vice-president, who resides at Los Angeles, in California, was temporarily in Winnipeg when the statement of defence was filed.

The plaintiff's solicitors wished to examine him for discovery, and got an appointment from a special examiner and served him (the vice-president) with that and with a copy of a subpœna to attend before the said examiner at the time and place mentioned in the appointment, paying him at the same time witness fees for one day. He did not attend as required, and the plaintiff's solicitors moved to strike out the statement of defence. The learned Referee, before whom they moved, refused the application. They appealed to Mr. Justice Prendergast, who dismissed the appeal. From that decision they have appealed to this Court.

There was much argument as to whether the plaintiff was entitled to proceed in the way he had done, by appointment

and subpœna, or whether he should not have procured an order for the examination of the vice-president under King's Bench Rule 425. In the view I take it is not necessary to consider that point.

I think the process so served upon the vice-president was so defective in form that the plaintiff is not entitled to ask the Court to treat him as in contempt for not attending or to apply to strike out the statement of defence.

It is not the appointment itself by virtue of which a party so served is bound to attend. The subpœna served upon him is the order and process of the Court. It is by virtue of that process, if properly taken, that he could be compelled to attend. The subpœna required him to attend before the examiner at the time and place named in the appointment, and so far I think was sufficient; but it required him to attend there "from day to day until the above cause is tried, to give evidence on behalf of the . . ."

There was no power whatever to require him either to attend there until the trial of the cause, or to there give evidence on behalf of either party to the cause.

I fail to see why, when served with a subpœna so worded it was necessary for him to attend at all. There is little doubt that he knew from the appointment, what the plaintiff intended to bring him to the examiner's office for; but the appointment itself could not compel his attendance, and that process which, if properly issued, would in law have compelled his attendance, purported to require him to attend for a purpose for which it could not be properly issued.

The above may seem somewhat technical; but I take the rule to be that those who seek such an unusual remedy as striking out the other party's defence for default, must shew that they themselves have in all things been regular in the proceedings leading up to the application. The plaintiff has, I think, failed in this.

I would dismiss the appeal with costs in the cause to the defendants.

Cameron, J.A.

CAMERON, J.A.:—Without dealing with the other matters raised on this appeal, it seems to me that the position taken by the solicitors for the defendant company, as set forth in the affidavit of Mr. Hudson (filed on the application before the Referee), is sufficient to entitle this Court, in dealing with a matter lying within its discretion, to refuse this application. That affidavit is not controverted in any way, and we are informed thereby that Mr. Hudson offered to produce Mr. Crooker for examination either on his return to the city or at Los Angeles, where the company's head office is. As I understand it, that offer still stands. We would not, in any event, make an order striking out the defence. The most that we could be asked to do would be to order Mr. Crooker to attend here for examination at his own expense. In view of Mr. Hudson's offer, and of the refusal of

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the plaintiff to accept that offer, I consider he has placed himself in a position which does not entitle him to succeed on this appeal. It is still open to him to proceed to examine Mr. Crooker in the manner prescribed by the rules.

I think the appeal should be dismissed with costs to the defendants in the cause.

PERDUE, J.A., and HAGGART, J.A., concurred with CAMERON, J.A.

Appeal dismissed.

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EX. C.
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June 2.

SYDNEY, CAPE BRETON AND MONTREAL STEAMSHIP CO., Ltd. v. HARBOUR COMMISSIONERS OF MONTREAL.

Exchequer Court of Canada (Quebec Admiralty District), Dunlop, L.J. June 2, 1913.

1. LIMITATION OF ACTIONS (§ I A 1—2)—ADMIRALTY PROCEEDINGS—NEGLIGENCE OF HARBOUR COMMISSIONERS—PUBLIC AUTHORITIES ACT—APPLICATION.

Under the provisions of sec. 2 (2) of the Colonial Court of Admiralty Act, 1890, 53 and 54 Vict. ch. 27, as well as Exchequer Rule 288, actions against the Harbour Commissioners of Montreal for negligence or default in the performance of a public duty are within the six months' prescription imposed by the Public Authorities Protection Act, 1893, 56 and 57 Vict. (Imp.) ch. 61.

Statement

THIS was a case wherein the plaintiffs claimed $17,000 for loss and damage to the SS. "Batiscan," of which they were owners, the steamer striking a shoal patch of rock in the Windmill Point basin of the Montreal harbour. Defendants pleaded a demurrer that the action was prescribed, inasmuch as suit was not taken within the six months immediately following the mishap. The point was raised, probably for the first time, before a Canadian Court.

The demurrer was maintained.

Sir A. R. Angers, K.C. (*Peers Davidson*, K.C., counsel), for the defendant.

Meredith, Macpherson, Hague, Holden, and Shaughnessy, for plaintiff.

Dunlop, J.

DUNLOP, J.:—There is no question but that the present action was taken more than six months after the accident occurred and the question to be decided is not without difficulty.

The parties, by their counsel, have sent me elaborate factums.

The plaintiff contends, first, that the question of prescription must be decided by the *lex fori*, and that the only prescription applicable is the prescription of two years enacted by art. 2261 of the Civil Code of this province; while, on the other hand, the defendants contend that the Imperial Statute, Public Author-

ities Protection Act, 56-57 Vict. ch. 61, applies and that plaintiff's action is barred and that the six months mentioned in said Act applies and that plaintiff's action was barred and prescribed when it was instituted.

In order to elucidate this question, it will be necessary to refer to the different statutes applicable to the present case. The Admiralty Act of Canada, 54-55 Vict. ch. 29, secs. 3 and 4, are in the following terms:—

Section 3 reads as follows (in part):—

shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act;

Section 4 reads (in part):—

shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890.

Sec. 2, par. 2 of the Colonial Courts of Admiralty Act, 1890, reads:—

The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

It is evident that the rights and remedies referred to in sec. 4 of the Admiralty Act, 1891, as being enforceable in any Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890, according to the terms of this latter Act, can only be enforced in like manner and to as full an extent as the High Court in England.

I am of opinion that any statute which, in England, affects the manner or the extent of the exercise of Admiralty jurisdiction in the High Court must affect the manner and the extent of the exercise of such jurisdiction in any colonial Court of Admiralty.

The Imperial Statute 56 and 57 Vict. ch. 61, entitled the Public Authorities Protection Act, 1893, is such an enactment. This statute (in part) provides as follows:—

Where, after the commencement of this Act, any action, prosecution or other proceedings is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect

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of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect: (*a*) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the Act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

This statute affects the manner and extent of the exercise of Admiralty jurisdiction in England as well as the rights and remedies of persons before the Admiralty Courts. This is evident both from the statute itself and its schedule and from jurisprudence.

For instance, the Act repealed sec. 27 of the Harbours Act, 1814, and sec. 93 of the Passengers Act, 1855 (now forming part of the Merchants Shipping Act), and sec. 24 of the Dockyard Ports Regulation Act, 1865.

Defendants have cited in their factum several decisions applicable to the present case, namely: *Ydun* (1899), L.R. Probate 236; *Williams and Mersey Docks*, [1905] 1 K.B. 804; *The Johannesburg* (1907), L.R. Probate 65.

The fact that sec. 1 of the Public Authorities Protection Act refers to a prosecution or other proceedings commenced in the United Kingdom does not prevent the application of that Act to the jurisdiction of colonial Courts of Admiralty. The fact that it affects the Admiralty jurisdiction in England is sufficient to make it applicable to the jurisdiction of a colonial Court of Admiralty.

The principle to be followed is contained in sub-par. (*a*) of the proviso to section 2 of the Colonial Courts of Admiralty Act, 1890, which declares:—

> Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales.

At this date of the passing of this Act (1890), the Public Authorities Protection Act had not been enacted; but it is quite evident in applying the terms of par. 2 of sec. 2 of the Colonial Courts of Admiralty Act, 1890, determining the jurisdiction of the colonial Court to be exercised in like manner and to as full an extent as the High Court in England, the name of the British possession is to be read for the term "United Kingdom" in the same manner as for the words "England and Wales," on the principle that, in any event, the greater includes the less.

The present question, in my judgment, seems to be absolutely disposed of by rule 288 of this Court, which reads as follows:—

In all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

This case is not provided for by the rules. Therefore, under rule 228, reference must be made to the practice in force in England, and that practice is governed by the Public Authorities Protection Act, which the Judges in the *Ydun* case declared to be an enactment affecting the procedure and practice of the Courts. Inasmuch as they applied it in an Admiralty proceeding it clearly follows that it is to be applied in this Court, under this rule.

The case referred to will be found reported in the Law Reports, Probate Division for 1899, where it was held by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer, L.JJ., page 236), affirming the decision of the president, that the defendants were acting in pursuance of their public duties, so that S.I. of the Public Authorities Protection Act, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.

It has not been established, in my opinion, that art. 2261 of the Civil Code ever applied to a case like the present, even prior to the passing of the Public Authorities Protection Act (1893), and if it ever did apply, the effect of the passing of that statute would alter the law and an act of prescription of six months.

Diligence must be used in proceedings: see McLachlin on Merchants Shipping Act, 5th ed., 72, 785 and 1044, under the word "actions"; Marsden on Collisions, 6th ed., 74.

I do not find that in England, prior to the passing of that Act, there was any limitation of time under which an action, such as the present, should be brought. The author says: "should be brought into reasonable time, taking into consideration the facts and circumstances of the case."

In the case of *Williams* v. *Mersey Docks and Harbour Board*, above referred to and reported in the Law Reports, King's Bench Division, vol. I., p. 804, it was held that the action could not be maintained, inasmuch as the right of action of the deceased, if alive, would have been barred by the Public Authorities Protection Act (1893), sec. 1 (*a*), that is, by six months, by the prescription under the Fatal Accidents Act, 1846, referred to in the report of said case; the prescription would have been much longer.

No precedents applicable to the present case have been cited by the parties, and I do not think that the question has before been raised in Canada.

After a most careful consideration of the present case and of the factums filed by the parties, I have come to the conclusion

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that plaintiff's action is barred and prescribed, more than six months having elapsed between the date of the accident and the institution of the present action.

I am, therefore, of opinion that the demurrer filed by the defendants must be maintained, and the plaintiff's action be dismissed, with costs, and judgment is given accordingly.

Demurrer maintained.

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June 5th

Re MACKENZIE.

Ontario Supreme Court, Middleton, J. June 5, 1913.

1. WILLS (§ III F—115)—PARTIAL INTESTACY—AFTER ACQUIRED PROPERTY.

Land purchased by a testator with money on hand at the time of making his will, cannot be treated on his death as personalty, although the result may be that a fund, out of the income of which an annuity is directed to be paid, may not be sufficient for that purpose.

[*Re Dods* (1901), 1 O.L.R. 7; and *Re Clowes*, [1893] 1 Ch. 215, referred to; see also *Re Campbell*, [1902] 1 K.B. 113.]

2. DESCENT AND DISTRIBUTION (§ I E—20)—WIDOW — ELECTION TO TAKE LAND SUBJECT TO MORTGAGE—EFFECT.

A widow, who, under the Devolution of Estates Act, R.S.O. 1897, ch. 127, as amended by 10 Edw. VII. ch. 56, takes, in lieu of dower, one-third of land encumbered by a mortgage, takes her interest in the land subject to one-third of the mortgage; and will be chargeable with such one-third on an accounting with the estate, on the executor paying off the whole mortgage with estate funds.

3. ANNUITIES (§ I—8)—PAYMENT — INCOME AND REVENUE.

What would otherwise be an absolute gift of an annuity is not necessarily cut down to the lesser income obtainable from certain securities out of which by a subsequent clause the annuity is directed to be paid; the intention of the testator as evidenced by the entire will must control.

[*Kimball* v. *Cooney*, 27 A.R. (Ont.) 453, and *Carmichael* v. *Gee*, 5 App. Cas. 588, referred to.]

4. LIMITATION OF ACTIONS (§ II D—50)—TRUSTS—ARREARS OF ANNUITY—WHEN STATUTE RUNS.

Where a trust is created by will for the payment of an annuity, the right to payment of arrears is not limited to the arrears for six years past.

Statement

MOTION by the executors of Donald Macleod Mackenzie, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will of the deceased in the administration of his estate.

J. W. Elliott, K.C., for the executors.

G. Bell, K.C., for nephews and nieces of the testator.

E. P. Clement, K.C., for the executors of the widow and for adult beneficiaries.

Middleton, J.

MIDDLETON, J.:—Daniel Macleod Mackenzie died on the 30th October, 1889, leaving him surviving a widow, but no children. By the fourth clause of his will, he gave to his wife an annuity

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of $200, payable half-yearly during her life. By the fifth clause, he directs his executors to invest the moneys and securities of which he shall die possessed, and out of the interest to pay the annuity of his wife, and the residue, if any, to his sister; and, if his sister survives his wife, to pay her the whole interest during the term of her life.

By an earlier clause of the will, the wife had been given a life estate in the testator's residence. Subject to this life estate, by the sixth clause it is given to trustees, with power to sell, and, after the death of the wife, the proceeds are to be divided among the testator's nephews and nieces. By the seventh clause, the moneys and securities for money are to be also divided among the nephews and nieces, upon the death of the testator's wife and sister.

The testator, after the date of his will—the 23rd June, 1884—purchased, for $2,200, a property known as the gallery property in Milton. This property was subject to a mortgage for $1,000, the assumption of which formed part of the purchase-price. After the death of the testator his executors paid off this mortgage out of the personal estate. The income derived from the personal estate was insufficient to pay the widow's annuity in full. The executors have paid to the widow the income derived from the gallery property; but even this is not sufficient to give her the $200 a year. There was no residuary clause in the will.

It is argued that, the testator having taken money in the bank and invested it in the gallery property, this ought to be treated as forming part of "the moneys and securities" which are directed to be held.

By the Wills Act, as to property mentioned therein the will is, in the absence of a contrary intention therein expressed, to be taken as speaking from the death of the testator. At the death of this testator this land could not be regarded as money or security. The principle is not unlike that applied in *Re Dods* (1901), 1 O.L.R. 7, and in *Re Clowes*, [1893] 1 Ch. 215. These cases are in one sense the converse of this. The testator there owned land at the date of his will, but sold it before his death, taking back a mortgage to secure a portion of the purchase-money. It was held that the devisee of the land did not take the mortgage, as it was personalty. A fortiori, after-acquired land cannot pass under a gift of personalty. There is, therefore, no escape from holding that there was an intestacy as to this land.

The next question is as to the widow's rights. As she elected, under the Devolution of Estates Act, to take her third in this land, in lieu of dower, the remaining two-thirds would form part of the assets of the estate. As the land was subject to the

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mortgage, her one-third would be subject to one-third of the mortgage.

The mortgage having been paid out of the testator's personalty, it must be treated as being an investment of so much of the personal estate, and as a subsisting charge upon the land, for the purpose of accounting.

The next question relates to the rights of the widow as an annuitant. Is her right limited to the income? I think that *Kimball* v. *Cooney*, 27 A.R. 453, is in point, shewing that here there is a gift of the annuity, and that the subsequent clause is a mere direction to the executors, and does not cut down the annuitant's right by reason of the failure of the income. See also *Carmichael* v. *Gee*, 5 App. Cas. 588.

The widow is, therefore, entitled to receive the balance of her annuity; and, if it is material, resort should first be had to the proceeds of the land descended.

As there is a trust, I do not think that the arrears of annuity should be limited to six years, as suggested upon the argument.

The questions submitted may be answered in accordance with this opinion; and costs will come out of the estate.

Declaration accordingly.

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May 21.

CANADIAN EQUIPMENT AND SUPPLY CO., Ltd. v. BELL AND SCHIESEL.

Alberta Supreme Court. Trial before Scott, J. May 21, 1913.

1. MECHANICS' LIENS (§ VI—51)—RIGHT TO—BUILDING CONTRACT TAKEN OVER BY PROPERTY OWNER—PAYMENTS TO CONTRACTOR AND COST OF COMPLETION EXCEEDING CONTRACT PRICE.

Under sec. 32 of the Alberta Mechanics' Lien Act, as amended 8 Edw. VII. ch. 20, no fund exists to which can attach a mechanic's lien for material furnished a contractor, where, on the construction of the building being taken over by the owner in accordance with the terms of a contract, the money already paid the contractor and that subsequently expended in completing the work, exceeded the contract price.

2. MECHANICS' LIENS (§ VII—59)—WAIVER—TAKING SECURITY — GUARANTY OF PAYMENT.

One who furnishes a defaulting contractor with building materials under a guaranty of payment from the property owner, is not entitled to a mechanic's lien against the property, under the Alberta Mechanics' Lien Act, 6 Edw. VII. ch. 21, unless there is a balance payable by the owner to the contractor; his remedy is by a personal judgment against the property owner.

3. EVIDENCE (§ IX—678)—ADMISSION IN PLEADINGS OF LIABILITY—WHAT AMOUNTS TO.

A statement of defence by an administrator of a deceased contractor, in an action to enforce a mechanic's lien for materials furnished in his lifetime, that the books and records of the deceased shewed that the plaintiff furnished materials to a certain amount, which was the true balance due by the deceased, and that the administrator had no

knowledge of the rights and liabilities of the parties, and that he submitted himself to the court for direction, does not amount to an admission of liability on the part of the estate, but only to a contention that it should not be held for a greater amount.

4. MECHANICS' LIENS (§ VIII—29)—ENFORCEMENT — MATERIALS FURNISHED DECEASED CONTRACTOR—FAILURE OF LIEN—DECLARATORY JUDGMENT AGAINST ADMINISTRATOR.

Where, in an action to enforce a mechanic's lien against a building, by reason of the owner of the property not being indebted to the contractor, the claimant cannot have a lien under the Alberta Mechanics' Lien Act, he is entitled to a declaratory judgment that the administrator of the contractor's estate is, in the due course of administration, liable therefor.

[*J. I. Case Threshing Co.* v. *Bolton*, 2 A.L.R. 174, followed.]

5. MECHANICS' LIENS (§ IV—15)—RIGHT TO—MATERIALS WORKED INTO BUILDING—ALBERTA MECHANICS' LIEN ACT.

One who delivers materials for use in a building under course of construction by a contractor, is not, after the latter's default and the taking over of the work by the property owner, entitled to a mechanic's lien for such of the materials as were subsequently worked into the building by the latter; the right to a lien under such circumstances being denied by sec. 5 of the Alberta Mechanics' Lien Act, 6 Edw. VII. ch. 21.

6. MECHANICS' LIENS (§ IV—15)—RIGHT TO—DELIVERY OF MATERIALS — SUFFICIENCY.

Building materials are sufficiently delivered as regards a building in course of erection, so as to satisfy the Alberta Mechanics' Lien Act, 6 Edw. VII. ch. 21, where, because of lack of storage room on the land, they were delivered in its immediate vicinity.

Statement

THESE actions were brought to realize upon mechanics' liens. A personal judgment for the plaintiff was rendered on the report of the Referee.

T. M. Tweedie, for defendant.
H. P. O. Savary, for plaintiff.

Scott, J.

SCOTT, J.:—The consolidated actions which are actions to realize mechanics' liens were heard before me at the Calgary sittings in November, 1911. I later gave judgment upon some of the questions involved and directed a reference to take certain accounts and make certain inquiries, reserving further directions and the question of costs. The referees have made their report and the hearing on further directions came on before me at Calgary on April 23 last.

One Garson entered into a contract with defendants Bell & Schiesel to erect the hotel in question for them. He died before the completion of the work and they thereupon, or a short time before his death, took over the work under the terms of the contract and completed the hotel. The amount expended by them in completing it, together with the sums already paid him under the contract, exceeded the contract price and it was admitted by all the parties on the hearing that there was nothing due by them to him or his estate and it therefore follows that

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there is no fund upon which the liens claimed by the several plaintiffs can attach.

In my judgment delivered after the trial of the action I held that the Canadian Equipment and Supply Co. were entitled to a personal judgment against Bell & Schiesel under a guarantee given by their agent Macdonald for the amount due those plaintiffs for all materials delivered by them for the work up to January 4, 1911. The referees have found that there is due to them for materials so delivered the sum of $9,773.65 to which should be added $40 for materials delivered by them after Bell & Schiesel had taken over the work. I therefore hold that they are entitled to judgment against Bell & Schiesel for $9,813.65 with interest from February 1, 1911, and costs of suit. Such costs to be taxed as if the action had been one on the guarantee only.

The referees have also found that the estate of Garson, the contractor, is indebted to those plaintiffs in the sum of $14,227.47 for materials delivered by them for the work. The defendant the Trusts and Guarantee Co., Ltd., the administrator of the deceased, in their statement of defence allege that the books and records of the deceased shew that those plaintiffs furnished materials to the amount of only $14,292.69, which was the true balance due by him to them, and that the company has no knowledge of the rights and liabilities of the parties and it submits itself to this Court for directions. Counsel for the company upon the hearing contended that the company had by its statement of defence admitted the claim of those plaintiffs and that the company should therefore have its costs of the action.

I do not construe the pleading of the company as an admission that the estate is liable to those plaintiffs for the amount referred to, or anything more than a contention that they should not be found entitled to more than that amount. I, therefore, think they are entitled to costs against the company as administrator of deceased. I therefore hold, following the *J. I. Case Threshing Co.* v. *Bolton*, 2 A.L.R. 174, that those plaintiffs are entitled to a declaratory judgment that the company as such administrator is liable to pay them $14,327.77 and costs of suit in the due course of the administration of the estate of deceased.

In this action as well as in the other actions consolidated with it I make no order for the payment by the administrator of deceased of interest upon the amounts found due to the respective plaintiffs, thus leaving them upon an equal basis in so far as relates to their claims against the estate.

I also held in my former judgment that the plaintiffs the Shelly Quarry Company and Metals (Limited) were entitled to judgment against Bell & Schiesel for the amounts due them

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respectively in respect of all materials delivered by them for the work. The referees have found that the amount due therefor to the Shelly Quarry Co. is $701.45 and to Metals (Limited) $7,419.75. Each of those companies is therefore entitled to judgment against that firm for the amount found due to it with interest from February 1, 1911, and costs of suit to be taxed as if the action had been upon the guarantees alone. They are also entitled to a declaratory judgment against the administrator company similar to that directed in the case of the Canadian Equipment and Supply Co., including costs of suit.

In the other actions included in the consolidation the referees have found that the following sums are due by the estate of deceased for materials supplied by them, viz.:—

The Manitoba Bridge & Iron Works Co.	$8,146.33
Western Planing Mills Co.	5,703.21
The Turner Hicks Hardware Co.	152.97
A. B. Ormsby (Limited)	2,332.40
York & Company	2,927.15
J. H. Ashdown Hardware Co.	235.66
Bone & Leblanc	157.33
Union Iron Works	34.21
Gorman, Clancey & Grindley	413.67

These plaintiffs also are entitled to declaratory judgments against the administrator company similar to that directed in the other cases I have mentioned for the amounts so found due to them with costs of suit.

It was contended on behalf of those plaintiffs who I held were entitled to judgment against Bell & Schiesel upon their guarantees that, by reason of such guarantees, they are entitled to liens upon the property for the amount guaranteed irrespective of whether anything is due by the owner to the contractor. I cannot understand upon what principle I should so hold. The claims upon the guarantees are claims entirely distinct from those for mechanics' liens and there is nothing in the Act which authorizes these being treated as such. To hold that they should be so treated would in my view tend to defeat the object of the Act, as the owner would be placed in a position to defeat those entitled to liens by entitling others who were not entitled to liens to share in the fund available for distribution among lien holders.

It was also contended on behalf of the Canadian Equipment and Supply Co. that certain materials which had been delivered by it at the work, but not worked into the building before Bell & Schiesel took it over from the contractor, was subject to the lien of the company. Sec. 5 of the Act provides that when material is brought upon the land to be used in the building it shall be subject to liens until worked into the building. As the materials so delivered are shewn to have been afterwards worked

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into the building by Bell & Schiesel, I think it must follow that the lien upon them no longer exists. Some of the materials delivered for the work and used in the building were not delivered on the lands on which the hotel was erected, the reason being that there was no room thereon for storing them. They were deposited on ground in the immediate vicinity thereof and I am of opinion that that was in effect a delivery upon the land on which the hotel was erected.

In my opinion Bell & Schiesel are entitled to their costs of defending the several actions against them to realize liens. Those defendants were bound to defend the actions in order to escape liability, and having succeeded in their defences, I see no reason why they should not have their costs. I have already held that the parties who succeeded against them upon their guaranties should have their costs against them as of actions upon the guaranties alone, but I hold that they are entitled to set-off against these costs any costs that may have been occasioned to them solely by reason of claims for liens being included in those actions.

Judgment accordingly.

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June 9.

KELLY v. McKENZIE.

Ontario Supreme Court, Lennox, J., in Chambers. June 9, 1913.

1. JURY (§ I B—15)—RIGHT TO—IN ACTION OF EQUITABLE NATURE—DISCRETION OF TRIAL JUDGE.

Whether a jury may be had for the trial of a case of an equitable nature, rests in the discretion of the judge hearing an application to strike out the jury notice.

[*Bryans* v. *Moffat*, 15 O.L.R. 220, 223, and *Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, followed.]

Statement

MOTION by the plaintiff to strike out the defendant's jury notice.

W. Proudfoot, K.C., for the plaintiff.

H. S. White, for the defendant.

Lennox, J

LENNOX, J.:—This is an action in which the remedy sought by the plaintiff could have been obtained only in the Court of Chancery prior to the Judicature Act. The defence, in effect, is simply a denial of the plaintiff's right to any part, or at all events the whole, of the relief claimed. The defendant claims to have the issues tried by a jury, and the plaintiff moves to have the jury notice struck out. The propriety of leaving the determination of this question for the trial Judge in an action of a common law character has been declared on many occasions, and the cases are collected and reviewed by the Chancellor in

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Stavert v. *McNaught* (1909), 18 O.L.R. 370. In *Montgomery* v. *Ryan* (1906), 13 O.L.R. 297, the Chief Justice of the Common Pleas based his order striking out the jury notice upon the double ground that it was a case that "plainly ought to be tried without a jury"—one of investigation of accounts—and a case to be tried in Toronto where non-jury sittings are practically continuous throughout the year; and, delivering the judgment of a Divisional Court in *Bryans* v. *Moffat* (1907), 15 O.L.R. 220, at p. 223, the same learned Chief Justice said: "Speaking for myself, I think, the rule of practice laid down in *Montgomery* v. *Ryan*, 13 O.L.R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury." It was held that the Chancellor exercised a proper discretion in striking out the jury notice.

On the issues that case is not distinguishable from this action. I think then that the order should go.

This is not a common law action, like *Stavert* v. *McNaught*, but is clearly governed by *Bryans* v. *Moffatt*, being a case which, in my opinion, ought to be tried without a jury. I do not know that it can be said with absolute certainty that "no Judge would try the issues with a jury:" but the judgment in *Clisdell* v. *Lovell* (1907), 15 O.L.R. 379, was pronounced before the promulgation of Rule 1322. I agree in the decision of Mr. Justice Riddell in *Bissett* v. *Knights of the Maccabees*, 3 D.L.R. 714, 3 O.W.N. 1280, as to the meaning and effect of the Rule. Whilst it enlarges the powers of a Judge in Chambers, it prevents embarrassment, by vesting the ultimate decision in the trial Judge. I direct that the action be tried without a jury.

Costs will be costs in the cause.

Order accordingly.

Re PATERSON.

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June 14.

Ontario Supreme Court, Lennox, J. June 14, 1913.

1. WILLS (§ III A—75)—CONSTRUCTION — DIRECTION TO CONTINUE INTEREST IN PARTNERSHIP—VALUATION—INCREASE IN LAND VALUES.

Where a testator declared that at his death his interest in a partnership should be valued and remain in the business for five years, the surviving partner paying interest on such valuation, appreciations in value of partnership real estate belong to the estate on the distribution after the five year term.

Statement

APPLICATION by the widow of James L. Paterson, deceased, for an order, under Con. Rule 938, determining questions arising in the administration of the estate as to the proper construction of the will of the deceased.

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RE PATERSON.

G. H. Shaver, for the applicant.

A. F. Lobb, K.C., for the executors and for Robert Paterson (one of the executors) individually.

F. W. Harcourt, K.C., Official Guardian, for the infant daughter of the testator.

LENNOX, J.

LENNOX, J.:—Mr. Lobb, in appearing for Robert Paterson, states that matters subsequently arising may affect the ultimate division of the property, so far at all events as the widow is concerned, and he waives no rights lying outside of the question of the proper construction of the will, as to this client.

The following clauses occur in the will in question:—

I give devise and bequeath to my said executors and trustees all my property upon trust: (1) to pay my just debts; (2) to determine the value of my interest in the business carried on at the city of Toronto by Paterson Brothers and allow the amount to remain in said business for five years, interest to be paid thereon at per cent. per annum, half-yearly: (3) to divide all my property in equal shares between my wife Bertha Davidson Paterson and my daughter Jessie P. Davidson.

The surviving partner, the said Robert Paterson, is one of the executors and trustees, and a testamentary guardian of the infant beneficiary. It is not contended, as I understand it, that anything has taken place since the death of the testator to affect the rights of the infant. Certain real estate which belonged to the partnership has appreciated in value since the valuation was made, at the death of the testator.

I am asked whether the widow and daughter, the legatees and devisees, are entitled to share in this rise in value. Subject to anything the widow, a person sui juris, may have done to debar herself, they certainly are. The testator did not mean by clause 2 that his trustees were to sell out to the surviving partner when they determined the value, and there was no obligation on the surviving partner to accept the valuation, or carry on the business, or pay interest. The testator merely meant that the surviving partner should have the right, if he desired it, to have the use of the testator's share of the assets for five years, at a rental, and this rental was to be measured by interest upon a valuation to be made. Practically speaking, there is no reason that this valuation should not be treated as final so far as the stock in trade, and perhaps the other chattel property, is concerned. As to the real estate, the infant daughter is clearly entitled to one-fourth share of what it is worth or what it can be sold for now (at the end of the five years); and, subject to any contract or estoppel which Robert Paterson may be allowed to set up against his *cestui que trust*, the widow is entitled to an equal share.

Costs of all parties out of the estate.

Order accordingly.

Re HUTCHINSON.
(Decision No. 2.)

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. February 10, 1913.

1. INFANTS (§ I C—11)—CUSTODY—PARENTS RIGHT TO.

Notwithstanding a widowed father's *primâ facie* right to the custody of his child, it will be permitted to remain with its maternal grandparents, until the age of six years, where its welfare will thereby be best secured, the father in the meantime having reasonable access to the child at all times.

[*Re Hutchinson*, 5 D.L.R. 791, 26 O.L.R. 601, reversed; *Re Hutchinson*, 26 O.L.R. 113, reinstated.]

Statement

APPEAL by Robert Burvill and Adah Burvill, grandparents of the infant Adah May Hutchinson, from the order of a Divisional Court, 5 D.L.R. 791, 26 O.L.R. 601, reversing the order of Boyd, C., 26 O.L.R. 113, and awarding the custody of the infant to her father, William H. Hutchinson. The order of a Divisional Court, 26 O.L.R. 601, was reversed by the Court of Appeal (Meredith, J.A., dissenting), and the order of Boyd, C., 26 O.L.R. 113, allowing the grandparents to retain the custody of the child in question, restored, with the addition of a reservation to the father of leave to apply again for the custody upon the child attaining the age of six years and the right to reasonable access in the meantime, it appearing that, though the father was entitled *primâ facie* to the custody of the child, the welfare of the child would, upon the evidence, be best secured by leaving her for the present with her grandparents.

The appeal was allowed.

Argument

V. A. Sinclair, for the appellants. The agreement of the 4th December, 1911, entered into between the respondent and the appellants was valid and binding, under the provisions of the Infants Act, 1 Geo. V. ch. 35, secs. 3 and 4, if the Act be properly interpreted. See Beale's Cardinal Rules of Legal Interpretation, 2nd ed., pp. 261 and 302. In a number of cases it has been held that such agreements are not illegal, and that the guardianship of a father may be so modified by agreement or contract that the Court will not assist him in recovering possession of his child, but will interfere against him: *Roberts* v. *Hall* (1882), 1 O.R. 388, at pp. 404 and 405; *Chisholm* v. *Chisholm* (1908), 40 S.C.R. 115; *Re Ferguson* (1881), 8 P.R. 556; *Lyons* v. *Blenk[illegible]* (1821), Jac. 245; Eversley on Domestic Relations, 3rd ed., p. 513; Am. & Eng. Encyc. of Law, 2nd ed., vol. 15, p. 183. The Divisional Court erred in not holding that, where the respondent allowed his child to be supported and cared for by the appellants, the onus of establishing that it is in the interests of the infant that the custody should be changed

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back to the respondent, lies upon the respondent: The Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, sec. 13, sub-sec. 3. A great many decisions in our Courts, as well as in the English Courts, shew that the welfare of an infant is the supreme interest of the Court and the chief question to be considered; and there can be no doubt that the infant's interests will be best served by leaving her in the custody of the appellants; she has always lived with them, and a change would be detrimental to a nervous child, as she is: *Re Argles* (1907), 10 O.W.R. 801; *Re Longaker* (1908), 12 O.W.R. 1193; *Re Keys* (1908), 12 O.W.R. 160; *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232; Am. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 1037. The mother having made her will, by which she appoints the appellants guardians of the infant, under the provisions of the Infants Act, sec. 31, sub-secs. 3, 4, and 5, they are at least jointly entitled to the custody of the infant with the father; and such right should be given effect to, and the custody of the child left with them, upon such terms as the Court may consider just.

W. N. Tilley, for the respondent. As shewn by the last recital in the agreement, it was not to come into effect except "in the event of her" (Mrs. Hutchinson's) "death." Before that event happened, the father discovered that he had been misled as to the contents of the document, and he repudiated it on the 5th December, again on the 6th December, and again on the 7th December, being the date of his wife's death. He has ever since maintained that position. It is not a case where the parties have acted under an adoption agreement, and the status has been changed pursuant to the agreement. The child did not remain with the Burvills by any act of Hutchinson's under the agreement. It was forcibly detained against his protest. It is clear that such an agreement is of no effect at common law. It is contended that the Ontario statute 1 Geo. V. ch. 35, sec. 3, validates it; but the cases in Ontario and in England under a similar statute shew that the statute has no application to this agreement during the lifetime of the father; and that, even if the statute does apply, the agreement does not exclude the father from asserting his right to the custody of his child: *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305; *Humphrys* v. *Polak*, [1901] 2 K.B. 385; *Re Davis* (1909), 18 O.L.R. 384; *Fidelity Trust Co.* v. *Buchner* (1912), 26 O.L.R. 367; Eversley on Domestic Relations, 3rd ed., pp. 95, 105, 111, 113, 183, 184, 186, 188, and 288. The detention of the infant by the grandparents was, therefore, entirely wrongful; and, in the absence of any other circumstances, the father is entitled to have the custody restored to him. The case is a simple one of a father residing with his wife and child in the home of his father-in-law until his wife dies. He then desires to leave that home and establish a separate

home for himself and his child, with his sister as housekeeper. The grandparents forcibly detain the child. It is not material in such a case as this to consider whether the grandparents' home is better than the father can provide. The right of the father to the custody and control of his child is one of the most sacred of rights. This right is not to be interfered with on a mere balancing of probabilities as to where the most comfortable home for the child may be: *In re McGrath (Infants)*, [1893] 1 Ch. 143.

Argument

Sinclair, in reply.

Hodgins, J.A.

February 10, 1913. HODGINS, J.A.:—I thought during the argument that the provisions of the statute 1 Geo. V. ch. 35, sec. 3, made the agreement a present bar to the success of the father's application; but, upon reflection, I doubt if this be so. The Act differs from the revised statute upon which it is founded in some respects, and in the omission of the words "at the time of his death." Owing to the method adopted of revising the various statutes, we have not any enactment which forms a guide to the interpretation of this newly expressed section. The learned Chancellor has not found, as he says, any decided case to the effect that sub-sec. 2 includes the father. But he expresses the opinion that the agreement is valid in law under the statute 1 Geo. V. ch. 35, sec. 3. The Divisional Court holds that no such change in the law has been made as would disable the father from revoking or annulling his agreement.

It would, I think, require very clear and explicit words to enable the Court to construe the statute in question as entirely reversing the law flowing from 12 Car. II. ch. 24, secs. 8 and 9, on which this enactment is based (see *Leach* v. *The King*, [1912] A.C. 305), and as enabling a father to renounce the rights and duties of a parent during his lifetime, and to make an agreement which, prior to this recent statute, was regarded as illegal and contrary to public policy: *Roberts* v. *Hall*, 1 O.R. 388, at p. 404.

The agreement in question did not, in terms, alter the expectations or fortunes of the child; and, even if justified by 1 Geo. V. ch. 35, sec. 3, as to which I express no decided opinion, it was immediately revoked or repudiated.

I do not see how this Court can order or require the grandparents to implement their promise, if promise there were, to make the child their heir. They offer so to do; but it must, I think, be left to the father to say whether he is willing to pay the price they require. If there had been a will or settlement made in pursuance of the agreement, the question of revocation by the father would have occasioned more difficulty, and, I think, must have been the subject of an action.

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The agreement is dated the 4th December, 1911; the writ of summons commencing the action for its cancellation was issued on the 28th December, 1911; and this application was begun on or about the 16th February, 1912. It has been contested, and for a year the infant has remained in the grandparents' custody. She is now three and a half years old. The father has filed an affidavit, as directed by the Divisional Court, sworn on the 25th February, 1912, stating that he had rented for six months and furnished a house, and was ready to receive the child, his sister having come to reside with and keep house for him. What the situation is just at present is not apparent. No serious fault has been found with either the father or the grandparents, and the father is entitled *primâ facie* to the custody of the child. Were it not for the affidavit of Dr. Reid, I should agree with the Divisional Court that the custody should be changed; but, in view of his statement as to the temperament of the child and the effect upon her health,* I am unable to come to the conclusion reached by the Divisional Court, and prefer the views expressed by the learned Chancellor, so far as they related to the welfare of the child. See *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232.

I think the proper disposition to make of the matter would be to allow the appeal without costs, and restore the judgment of the Chancellor, reserving leave for the father to apply when the child attains the age of six years for her transfer to his care. In the meantime the father should have the right to all reasonable access to the child when he so desires; this right of access to be settled by the Local Master if the parties cannot agree.

Garrow, J.A.
Maclaren, J.A.
Magee, J.A.
Meredith, J.A. (dissenting)

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—Doubtless, a father's common law rights respecting the custody and bringing up of his children are in these days much modified by legislation, and in-

*Extract from affidavit of Dr. John B. Reid: "That I also know the infant Adah May Hutchinson, and have had occasion to attend her, and know that the said child is of a nervous, excitable temperament, and that anything which would tend to excite said child, who is of tender years, would be injurious to her; that, considering the age of the said infant, the fact that she has always been brought up with her grandparents, that they have a good, comfortable home, and are strongly attached to the said infant, and that she is strongly attached to them, I would consider it to the best interests and to the best welfare of said infant that she should be left with her grandparents until she is older and stronger and better able to stand being deprived of the love and care which they have always given her, and would consider it unwise that she should be taken away from them and placed with her father, the said William H. Hutchinson."

deed by adjudication; but doubtless, too, those rights are yet *primâ facie* paramount to the rights of others, speaking generally; though doubtless, too, the welfare of the children is having more and more weight, as time goes on.

These generalities do not, of course, decide this, or any other, case; but they afford a good starting-point from which to aim at a right conclusion.

In this case, it cannot be very seriously urged that the father is not entitled to the custody and bringing up of his now motherless child; unless, indeed, the agreement in question, or the child's welfare, prevent.

In regard to the agreement, whether it could, or could not, under any circumstances, be binding and irrevocable, it is not such an one as should be held to have deprived him of all such parental rights. As the evidence now stands, it must be held to have been made under circumstances which entitle him to say that it is not binding upon him in fact. It was made within a few days of his wife's death; and, according to his testimony, was signed by him entirely upon the misrepresentation of the respondents as to the nature and effect of it, and it was, very soon after his wife's death, very emphatically repudiated by him, whilst it was yet only executory, without any consideration having been given for it; and even the appellants admit that they represented to him that the agreement made the child their "full heir," which was a very material misstatement, the effect of which cannot be got rid of by now offering to be bound to do so.

In regard to the child's welfare, two things stand in the respondent's way, and in respect of each of these the judgment of the Divisional Court should, in my opinion, be varied.

The child is in a suitable and comfortable home: the respondent had no home to which to take her; an undertaking to procure, or an affidavit by him only that he had procured, a suitable house, with his sister in charge of it, is not enough: the order ought not to go until he has satisfied a Judge of the High Court, at Chambers, that he has done so.

Nor should any order go until he has also satisfied such a Judge that the removal of the child would not be fraught with any real danger to her health. As the evidence now stands, it would, in the opinion of the family physician; and, as far as I have been able to find, there is nothing to the contrary in the evidence. One of the learned Judges, it is true, expressed the opinion that no harm was likely to come; but my mind would be better satisfied with the opinion of practising physicians after seeing the child. This point does not seem to have attracted attention in the Courts below; the somewhat indefinitely expressed opinion of the family physician may have been over-

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looked in the mass of affidavits filed. There should be more light thrown on the subject; though we may all agree with Lord Justice Holmes that generally young children quickly adapt themselves to changed circumstances.

With these variations in the judgment appealed against, I would dismiss this appeal without costs; the costs of any further proceedings in the High Court would, of course, be in the discretion of that Court.

Appeal allowed; MEREDITH, J.A., *dissenting.*

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June 18.

SALTER v. EVERSON.

Ontario Supreme Court. Trial before Middleton, J. June 18, 1913.

1. EASEMENTS (§ II B—15)—WAYS — WAYS NOT APPURTENANT TO DOMINANT ESTATE—PRESCRIPTION.

An easement by prescription in a way not appurtenant nor essential to the beneficial enjoyment of a dominant tenement, can be acquired only by an uninterrupted use for the full period of twenty years.

Statement

ACTION for an injunction restraining the defendant from closing a lane and to establish a prescriptive right of way over the defendant's lands in the town of Oshawa.

The action was dismissed, and damages were assessed under the undertaking on the injunction motion.

H. H. Dewart, K.C., and *J. F. Grierson*, for the plaintiff.

A. R. Clute, for the defendant.

Middleton, J.

MIDDLETON, J.:—Malachi Quigley, who died on the 24th August, 1890, in his lifetime owned the whole block, and by his will devised to his son Samuel Quigley 30 feet of land on Bond street, marked on the plan exhibit 1 as A, and to Michael Quigley the parcel marked as B and C on Simcoe street, and also gave parcels D and E to other children.

The testator also devised the central part of the block or yard and a lane running to Bond street to his four children as tenants in common, "subject to the mutual rights of user of the same in common hereinbefore mentioned." This refers to the fact that the gift of each parcel was followed by a further devise of a right to use the lane and yard "in common with the owners and occupants from time to time of all and every other portion of the said lot which adjoin the said lane and yard or either of them together with a right of way over the said lane."

During the life of the testator he had built stores and cottages round this central yard, and used the parcel marked C as a means of access to it. That portion of the "lane" east of

parcel A was enclosed by fences, and had never been used as a means of access to the yard.

The testator contemplated by his will a change in the mode of user—the "lane" being opened to Bond street—and the parcel C, being included in the land given to Michael absolutely, would then cease to be used as a way.

After the testator's death, matters were allowed to remain as they were for some years, but finally the lane was opened to Bond street; and, since then, it has been and still is used as a means of access to the yard.

Michael did not close the entrance from Simcoe street, and it was freely used as a mode of access to the rear of stores which he owned upon parcel B, and upon parcel D, to which he had acquired title.

The defendant, having acquired title from Michael Quigley, contemplated erecting a block of buildings on Simcoe street, covering, inter alia, parcel C, and so closing it as a means of access to the yard. The plaintiff, claiming title under Samuel Quigley, now brings this action for an injunction, claiming to have acquired a title by prescription to a right of way from the lane and yard across the strip of land in question.

Samuel Quigley, on the 11th April, 1901, conveyed the 30-foot parcel (lot A) to one Hincks, "together with the rights of way and user in the will of Malachi Quigley . . . described, and thereby devised to the party of the first part and his assigns." This conveyance does not grant to Hincks the title of Quigley to the yard and lane as tenant in common—but only his right as owner of one of the dominant tenements to the easements appurtenant to the 30-foot parcel, as defined by the will.

The right of way now claimed by the plaintiff is not appurtenant to the parcel of which he is the owner, i.e., the 30-foot lot. Quigley may have been enjoying the use of the land in question as a means of access to the yard, and it may be that the title he was acquiring under the statute would have passed to his grantee of the yard; but he is still owner, as one of several tenants in common, of the yard and lane—subject to the various rights and easements created by the will.

Further, the right, if any, which Quigley was acquiring, was a right of way to and from the yard and lane, and of which he was a tenant in common, and not a right of access to the 30-foot parcel. The way is in no sense appurtenant to it.

The evidence as to user is most unsatisfactory. No doubt, a great deal of traffic went over this land—most, if not all, being to the rear of the stores—occasionally teams and passengers may have gone to the rear of the cottages on the 30 feet.

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No one who had any real knowledge of the facts was called to shew any such user during the last few years. The occupants of the cottages were not called—those who used the way were not called—and Allen, a most estimable man, who seemed to devote much time to watching the traffic, on cross-examination had to admit that all he knew was, that teams drove into the yard, and that he had no knowledge whether this was on the business of the plaintiff's tenants or on the business of any of the other tenants whose premises backed on this common yard.

On the evidence, I cannot find that the alleged easement "has been . . . enjoyed by any person claiming right thereto without interruption for the full period of twenty years" next before this action—as I must find before I can declare that there is an easement by prescription.

The easement claimed is by no means essential to the beneficial enjoyment of the plaintiff's premises. The lane to Bond street affords an easy access to the yard at the rear of his houses.

For these several reasons, the action fails, and must be dismissed with costs.

I am asked to assess damages under the undertaking on the injunction motion. Why any interim injunction was sought, I cannot understand. There was no real inconvenience in using the Bond street lane pending the trial, and no object in preventing the erection of the buildings. The defendant would have gone on pending the action at his own risk. The delay has made the erection of the buildings more expensive, and has resulted in loss of rent. While anxious not to award too much, I cannot see how to cut the amount claimed down to less than $300.

Action dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges. Masters and Referees.

ROBINSON v. GRAND TRUNK PACIFIC R. CO. MAN.

(Decision No. 2.)

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 14, 1913.

[*Robinson v. Grand Trunk Pacific R. Co.*, 11 D.L.R. 67, affirmed.]

JURY (§ I B 1—10)—*Statutory Right — Joinder of Several Causes of Action.*]—Appeal from decision of Curran, J.

B. L. Deacon, for plaintiff.

R. M. Dennistoun, K.C., and *A. Hutcheon*, for defendants.

THE COURT dismissed the appeal without calling on respondent's counsel.

NICHOLAS v. CREIGHTON. N. S.

S. C. 1913

Nova Scotia Supreme Court. Trial before Russell, J. May 29, 1913.

SHERIFF (§ I—1)—*Liability for Taking Excessive Fees — Penalty.*]

C. W. Lane, for plaintiff.

D. F. Matheson, K.C., for defendant.

RUSSELL, J.:—This is an action for a penalty of $40 against the sheriff for taking excessive fees. The plaintiff had been arrested under an order out of the County Court for his arrest for a debt due another party. The sheriff was informed by the solicitor in the cause what the amount of the costs would be and this amount was paid by the plaintiff to the sheriff, whereupon plaintiff was released. It seems that the amount demanded and so paid for costs was excessive, although the bill of costs has been taxed by the County Court Judge. The sheriff has received, on his own account, $3.80 in all, when, as the defendant contends, he should have received forty cents less than this amount. The excess consists of a charge for an affidavit (40 cents) which was not made, or, if made, was not required.

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I am of opinion that the sheriff cannot be held liable in a penal action for any excess in the amount of fees collected for the solicitor in the cause or for other officials which he collected in good faith and under the instructions of the solicitor. As to the 40 cents of excess in his own fees I do not think I should hold him liable for the penalty when the claim is so arguable, to say the least, that it has been allowed by the County Court Judge. In other words, if the amount was received by him in the *bonâ fide* and not wholly unreasonable belief that he was entitled to it I do not think it was intended that the penalty would be imposed.

The claim sued for apart from the penalty is below the jurisdiction of the Court and must therefore be dismissed, but inasmuch as the amount collected was in excess of the amounts properly chargeable and this has been admitted by the defendant to the extent of five dollars or more and also for the reason that I think the amount actually received by the sheriff to his own use although taxed by the learned Judge of the County Court was not legally chargeable and was in excess of the fees to which he was legally entitled to the amount of 40 cents, I dismiss the claim without costs.

Action dismissed.

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LAYCOCK v. SPEERS.

Saskatchewan Supreme Court, Parker, Master in Chambers. June 26, 1913.

CONTINUANCE AND ADJOURNMENT (§ II—5)—*Motion to Postpone Trial.*]—Motion by defendant for an order to postpone the trial, in an action for libel.

E. B. Jonah, for defendant.

W. M. Gaetz, for plaintiff.

PARKER, M.C.:—This is an action for libel which was set down by the plaintiff for the non-jury sittings of the Court at Saskatoon on May 16, 1913, which in fact did not commence until June 10th. The defendant served a notice of motion, returnable on June 10th, the day of the opening of the sittings, for an order adjourning the case to the jury sittings of the Court on September 23rd. The sittings opening June 10th terminated June 20th without this case having been reached, and this case, together with all others not reached, were adjourned to the next non-jury sittings. The defendant now moves to have the trial postponed to the next jury sittings on September 23rd.

Section 50 of the Judicature Act provides that in actions for libel the issues of fact shall be tried, heard and determined by a Judge with a jury,

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if either party to the action demands a jury and files with the local registrar and leaves with the other party or his solicitor at least fifteen days before the trial a notice to that effect.

Rule 239 is to the same effect. The day fixed for trial was June 10th, but no jury notice was filed or served until June 19th, the defendant giving as his reason for delay the fact that a settlement of the action was pending.

In the case of *Tonsley* v. *Heffer*, 19 Q.B.D. 153, the majority of the Court held that the application for a jury must be made within the time limited by the rules, even where the notice of trial was in effect "countermanded by consent for the purpose of an attempt at settlement." This motion must therefore be dismissed with costs in the cause to the plaintiff. The defendant will have to avail himself of sec. 51 of the Judicature Act, which provides that notwithstanding sec. 50 the presiding Judge at the trial may, in his discretion direct that the issues of fact shall be tried by a jury.

NATIONAL TRUST CO. v. BRANTFORD STREET R. CO.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. May 28, 1913.

[*National Trust Co.* v. *Brantford Street R. Co.*, 4 D.L.R. 301, reversed without opinion.]

MORTGAGE (§ VI B—76)—*Remedy for Breach of Covenant—Receivership.*] — Appeal by the plaintiffs from the judgment of Kelly, J., *National Trust Co.* v. *Brantford Street R. Co.*, 4 D.L.R. 301, 3 O.W.N. 1615.

J. A. Paterson, K.C., for the plaintiffs.

S. C. Smoke, K.C., for the defendants.

THE COURT set aside the judgment dismissing the action, and directed a new trial. Costs of the former trial and of this appeal to be in the discretion of the Judge at the new trial.

McCONNELL v. WINNIPEG ELECTRIC R. CO.

MAN.

K. B.
1913

Manitoba King's Bench, Patterson, K.C., Referee. February 10, 1913.

JURY (§ I C—25)—*Loss or Waiver of Right—Placing Case on Non-jury Trial List.*]—Motion by plaintiff under the King's Bench Act, R.S.M. 1902, ch. 40, sec. 59, sub-sec. (*b*), for an order for a jury trial. That sub-section enacts in effect that all actions, etc., as to which no other provision is made shall be tried by a Judge without a jury "unless otherwise ordered by a Judge."

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Prior to the application, the applicant had set the case down for trial without a jury, but not being ready to proceed when the case was called it had been struck off the non-jury trial list.

J. F. Davidson, for plaintiff.

R. D. Guy, for defendants.

PATTERSON, Referee:—I am of opinion that the plaintiff has chosen his forum and cannot now succeed in his application for a jury trial. The motion is dismissed with costs.

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GRAHAM ISLAND COLLIERIES CO. v. McLEOD.

British Columbia Supreme Court, Trial before Clement, J. June 6, 1913.

CORPORATIONS AND COMPANIES (§ V B 1—176)—*Capital Stock —Subscription—Allotment.*]—Trial of action brought by an incorporated company upon an agreement to purchase ten shares in same and to pay the balance over and above the cash payment in two instalments, to mature six and twelve months after allotment. The company had passed a resolution, following defendant's application for the shares, that he be allotted the number applied for, but no certificate of stock had been issued in his name.

J. W. DeB. Farris, for plaintiff.

J. A. MacInnes, for defendant.

CLEMENT, J.:—Notwithstanding Mr. MacInnes' very clear argument put before me in writing, I am still of opinion that the "allotment" from which the defendant's liability is fixed is the resolution of October 12, 1910. That is the completion of the contract; the *ad idem* stage; the "complete allotment" referred to in the cases is the company's performance of the contract and their obligation in that regard has never been repudiated so that the contract is still existing and enforceable. Upon the company issuing and delivering to the defendant $10,000 of shares in the company, the defendant must pay the balance unpaid with interest at 5 per cent. from the due date or dates. The defendant must also pay the costs of the action and counterclaim.

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HOLT v. BROOKS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 23, 1913.

ESTOPPEL (§ III K—135)—*By Receiving Benefits.*]—Appeal by defendant from judgment at the trial in the plaintiff's favour.

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The appeal was dismissed.

W. P. Grant, and *W. P. Dockerill*, for appellant (defendant).

J. H. Senkler, K.C., for respondent (plaintiff).

MACDONALD, C.J.A.:—Unfortunately the defendant precluded himself from taking the course which he is now taking in this action. If he had refused to take the horses back and allowed the plaintiff to pursue whatever legal remedy was open to him, in all probability the Judge below would have refused to give the relief he did give; but probably would have given damages for breach of the warranty, if there was a breach. I think the appeal must be dismissed.

IRVING, and GALLIHER, JJ.A., agreed.

MARTIN, J.A.:—I agree, on the law of the cases as referred to by learned counsel it is impossible for him to maintain this appeal.

Appeal dismissed.

HERBERT v. VIVIAN.

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(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 16, 1913.

[*Herbert v. Vivian*, 8 D.L.R. 340, affirmed.]

BROKERS (§ II B 1—12)—*Compensation—What Constitutes "Ready, Willing and Able"—Failure by Lessee to Consummate Sale of Unexpired Lease.*]—Appeal from decision of Metcalfe, J., reported, 8 D.L.R. 340, 22 W.L.R. 676.

H. M. Hannesson, for defendant.

C. P. Wilson, K.C., and *W. C. Hamilton*, for plaintiffs.

THE COURT dismissed the appeal without calling on respondent's counsel.

ERICCSON v. MARLATT.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. May 12, 1913.

APPEAL (§ VII M 3—575)—*As to Evidence—Findings on Trial Without a Jury.*]—Appeal by the plaintiff from the trial Judge's findings of fact in the defendant's favour on a trial without a jury.

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The appeal was dismissed.

S. S. Taylor, K.C., for appellant (plaintiff).

R. W. Hannington, for respondent (defendant).

MACDONALD, C.J.A.:—I would dismiss the appeal. The learned trial Judge had the witnesses before him, heard the positive evidence of the defendant and his witnesses, which led him to the conclusion that the defendant's story was true. As against that he had certain coincidences, certain matters which were calculated perhaps to raise a suspicion of the *bonâ fides* of the sale. It seems to me a perfectly clear case so far as this Court is concerned. We ought not to interfere with the learned trial Judge's findings.

IRVING, J.A.:—In the view I take, the appeal must be dismissed. In reaching that conclusion I have before me this idea of the duty of the Court of Appeal; in considering appeals on questions of fact from the finding of a Judge, it is our duty to rehear the case, reconsidering the materials before the Judge with such other materials, if any, as this Court may decide to admit. In considering those appeals this Court must make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if, after a full consideration, we come to the conclusion the Court was wrong.

So far as this case has proceeded before us I am satisfied the Court below was right. The evidence of Marlatt, so far as it has been recited to us, is, in my opinion, the evidence of an honest man, I see no reason to doubt from anything we have heard, the correctness of the judgment appealed from.

GALLIHER, J.A.:—I agree in dismissing the appeal.

Appeal dismissed.

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C. A.

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DOOL v. ROBINSON.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. June 9, 1913.

[*Dool* v. *Robinson*, 7 D.L.R. 337, affirmed.]

VENDOR AND PURCHASER (§ I E—28)—*Purchaser's Default—Crop Payment Plan—Sale by Mortgagee on Default of Vendor.*]—Appeal from decision of Macdonald, J., reported, 7 D.L.R. 337, 22 W.L.R. 246.

J. B. Coyne, for defendant (appellant).

H. F. Maulson, for plaintiff (respondent).

THE COURT dismissed the appeal without calling on respondent's counsel.

PICKELS v. LANE.

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Nova Scotia Supreme Court. Trial before Russell, J. June 18, 1913.

LIBEL AND SLANDER (§ II B—20)—*Charging Theft or Misappropriation.*]

D. F. Matheson, K.C., for plaintiff.

C. W. Lane, for defendant.

RUSSELL, J.:—The defendant is sued for a libel contained in a friendly letter written with reference to her father in which she used the following expression:—

When father had his eyes and ears open William stole from him right and left.

William is the plaintiff. He was not proved to have stolen from his father right and left, but it was proved that he had received money for which he should have accounted at once to his father, and he retained it for his own purposes until his father discovered that he had received it and was on the point of issuing process for the plaintiff's arrest.

The defendant has therefore well nigh proved her plea of justification, and, although it was not contended that the occasion was privileged, the facts of the case come quite near to the conditions which would have justified such a plea. The case is very like that of *Harnett* v. *Vyse*, 5 Ex.D. 307, save that there was no jury in this case to muddle the matter with an improper verdict.

There will be judgment for the plaintiff for five dollars and there will be no costs for the reason that the libel has been justified in part and on the grounds which led to this result in *Harnett* v. *Vyse, supra.*

SCOBIE v. WALLACE.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. May 29, 1913.

FRAUD AND DECEIT (§ IV—16)—*Knowledge of Falsity—Sale of Land.*]—Appeal by the defendant from the judgment of Lennox, J., *Scobie* v. *Wallace*, 4 O.W.N. 881.

G. F. Henderson, K.C., for the appellant.

A. E. Fripp, K.C., for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The action is brought to cancel an agreement dated the 24th July, 1912, between the defendant, a real estate agent of Ottawa, and the plaintiff, a farmer, whereby the plaintiff agreed to purchase certain lots near the city of Regina, Saskatchewan, for

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$3,675, upon which was paid, at the time of signing the agreement, $1,225; the balance payable in six and twelve months.

The trial Judge finds that the plaintiff was induced to sign the agreement in question by representations and statements made to him by the defendant's agent, Michael Bergin: (a) that the lots he was purchasing were "inside lots in the city of Regina;" (b) that they were within one mile and a half of the city post-office; (c) that the city was actually built up as far out as these lots; (d) that Bergin had recently visited Regina, and could be depended upon to give reliable information; (e) that the plaintiff entered into this agreement relying upon the truth of these representations, as the agent knew; and (f) that they were false and were knowingly and fraudulently made.

The question at issue is purely one of fact. A perusal of the evidence satisfies me that it amply supports the findings of the trial Judge; and there is no reason, so far as I can see, for this Court to interfere.

The appeal should be dismissed with costs.

Appeal dismissed.

BRUCE v. NATIONAL TRUST CO.

Ontario Supreme Court, J. S. Cartwright, M.C. May 31, 1913.

MECHANICS' LIENS (§ VIII—62)—*Enforcement—Statement of Claim Filed without Affidavit—Setting aside—Vacating Register of Lien and Certificate of Lis Pendens.*]—In a proceeding under the Mechanics' Lien Act, the statement of claim was filed on the 1st February, but without any affidavit attached. The defendant moved to set aside the statement of claim. It appeared that the statement of claim was filed on the very last day permissible. It was said on the argument that the plaintiff was out of reach of his solicitor at the time, and it was suggested that sec. 19 of the present Act, 10 Edw. VII. ch. 69, might be applied. The Master said that this was confined in its terms to secs. 17 and 18; and, while it was held in *Crerar* v. *Canadian Pacific R. Co.* (1903), 5 O.L.R. 383, that the necessary affidavit might be made by the solicitor as agent (as might well have been done in this case), it would be judicial legislation to say that no affidavit was necessary. The nature of the procedure under this Act was considered in *Canada Sand Lime Brick Co.* v. *Ottaway* (1907), 10 O.W.R. 686, 788, and *Canada Sand Lime and Brick Co.* v. *Poole* (1907), 10 O.W.R. 1041. The statement of claim must be set aside and the registry of the lien and certificate of lis pendens vacated with costs. Happily in this case there was no danger of the plaintiff failing to recover in another proceeding anything he might be found entitled to from the defendants. *S. G. Crowell*, for the defendants. *C. M. Garvey*, for the plaintiff.

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SEGUIN v. TOWN OF HAWKESBURY.

Ontario Supreme Court, Britton, J. June 7, 1913.

HIGHWAYS (§ V C—263)—*Closing of Street — Work Done by Railway Company — Powers of Dominion Railway Board — Illegal Act — Injury to Neighbouring Landowners—Damages—Costs.*]—Four actions brought respectively by Arséne Seguin, Raoul Seguin, Joseph Seguin, and Albert Treaud, against the Corporation of the Town of Hawkesbury, tried together at L'Orignal, without a jury. The plaintiffs were land-owners in the town, their lands being on or near St. David street, and not far from the right of way of the Canadian Northern Quebec Railway Company. The defendants' council, on the 27th September, 1911, passed a by-law for closing a portion of St. David street. That by-law was quashed by the order of a Divisional Court: Re Seguin and Village of Hawkesbury (1912), ante 521. The order gave the defendants the option of providing for compensation to the applicant, the now plaintiff, Arséne Seguin, or of having the by-law quashed; but the defendants did nothing. After the passing of the by-law, and before it was quashed, the railway company closed the street for its whole width at the place of crossing. These actions were commenced on the 8th March, 1913, and were brought under secs. 468 and 629 of the Consolidated Municipal Act, 1903, to recover damages for the injury to the plaintiffs by the closing of the street. BRITTON, J., found that all that was done was with the consent and aid of the defendants; and the defendants were liable to the plaintiffs for anything in connection with the closing of the street by the railway company with the consent of the defendants. In the learned Judge's opinion, the Dominion Railway Board has no authority to close any street within a municipality. Closing must be by the municipality, and in the manner prescribed by the Municipal Act. The learned Judge also found as a fact that the case was not one of a "deviation," as contended for by the defendants, which might bring it within the jurisdiction of the Board. Accordingly, the plaintiffs were held entitled to recover damages by reason of the defendants being wrong-doers, the work being an unauthorised and illegal work, and also to damages for any injury caused by the work which would have been caused had the work been authorised. The plaintiff Arséne's damages were assessed at $250; the plaintiff Joseph's, at $100; the plaintiff Raoul's, at $75; and the plaintiff Treaud's, at $75. Judgment accordingly with County Court costs and without any set-off of costs; costs of the trial to be as of one action. A. Lemieux, K.C., for the plaintiffs. H. W. Lawlor and George Macdonald, for the defendants.

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MOODY v. KETTLE.

First Division Court, Middlesex, Ontario, Judge Macbeth. May 30, 1913.

BROKERS (§ II B—12)—*Agent's Commission on Sale of Land —Introduction of Purchaser by Agent—Purchase from Principal of a Different Property from that which Agent Employed to Sell.*]—Action by an estate agent for commission.

G. S. Gibbons, for the plaintiff.

T. H. Luscombe, for the defendant, cited *Cronk* v. *Carman* (1911), 2 O.W.N. 1027 (D.C.), as to the necessity for a contractual relationship.

JUDGE MACBETH:—The defendant agreed to pay a commission to the plaintiff (who is a real estate broker) if the plaintiff sold for the defendant a coal-yard on Maitland street owned and occupied by the defendant.

The plaintiff introduced one Mathews as a prospective purchaser of this coal-yard; but, after examining the property in the defendant's company, Mathews declined to buy it. The defendant then offered to sell a smaller yard on Hill street, which had been leased to a tenant, but was then vacant. I have already found as a fact that the defendant did not at any time engage the plaintiff to sell the Hill street yard.

About six weeks afterwards, Mathews, in partnership with the former tenant of the defendant, took from the defendant a lease of the Hill street yard, with an option of purchase, and in January, 1913, bought the property for $1,925.

The plaintiff sues for a commission on the purchase-money of the Hill street yard.

It seems to be a complete answer to his claim to shew that he was not at any time employed to sell the Hill street yard.

Starr Son & Co. v. *Royal Electric Co.*, 30 S.C.R. 384, is somewhat like the present case. There the plaintiffs, who were agents for the sale of electrical machinery, having in view a prospective customer for an electric light plant, were authorised by the defendants to offer a certain specifically described plant for $4,500; the customer refused to buy this plant, but subsequently purchased from the defendant a much smaller plant for $1,800. It was held that the plaintiffs were not entitled to a commission on the sale of the smaller plant. Mr. Justice Sedgewick, at p. 386, says: "The right of the appellant company to a commission depended solely upon whether they had sold the specific machine described in the telegram," i.e., the plant priced at $4,500.

RUNDLE v. TRUSTS AND GUARANTEE CO.

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Ontario Supreme Court, J. S. Cartwright, K.C., Master in Chambers. June 10, 1913.

DISCOVERY AND INSPECTION (§ I—2)—*Documents — Better Affidavit — Identification — Issue as to Release — Account — Relevancy of Documents.*]—This action was brought to set aside a release given by the plaintiff, C. A. Rundle, to the defendants, as administrators of his mother's estate, and to reopen the accounts, which on the 22nd December, 1909, were passed in the Surrogate Court, in his absence, on the strength of a letter which he was induced to sign after it had been prepared by the defendants. In this he was made to say that he had carefully examined the accounts, and was quite satisfied with them, and did not desire the defendants to produce vouchers on the audit. The plaintiff objected to the affidavit on production made by an officer of the defendants, and moved for a further and better affidavit, on the ground, first, that the mention of the documents in the second part of the first schedule was too vague and indefinite, and in no way complied with the principle affirmed in *Swaisland* v. *Grand Trunk R. Co.*, 5 D.L.R. 750, 3 O.W.N. 960, at p. 962.

In the affidavit these documents were said to be: "statements, estate vouchers, receipts for pass-books, cheques, submitted to C. A. Rundle through the Waterbury National Bank, when release executed by him; letters, vouchers, books, documents referring to and connected with the administration of the estate of Lily Rundle." The Master said that this was clearly insufficient, as it did not identify the documents in any way. As set out in paragraph 5 of the affidavit on production, the refusal to produce these documents was based on the fact that they all related to the administration of the estate of the plaintiff's mother and of his own, and that the defendants had passed their accounts before the Surrogate Court, and secured their discharge as administrators, and had duly accounted to the plaintiff for the balance found to be in the hands of the defendants by the orders of the Surrogate Court, and had received from him the full release set out in the pleadings. The Master said that this was substantially an assertion that these documents were not relevant to the issue to be tried, and were to be produced only after the plaintiff had established his right to have the release set aside, and to be allowed to attack the orders of the Surrogate Court, assuming that he could do so in this action. In cases such as *Adams* v. *Fisher*, 3 M. & C. 526, where the plaintiff has to establish his right to an account, only what is relevant to that issue will be ordered to be produced. See, too, *Sheppard Publishing Co.* v. *Harkins*, 8 O.L.R.

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632. But, where the existence of a fiduciary relationship is admitted, and "where it does not clearly appear that the documents mentioned are immaterial to the question to be decided at the trial, production will be ordered:" Bray on Discovery, p. 32. So far as appeared in the present case, no examination of the accounts had been made by the cestui que trust or any one on his behalf. Two reasons for full discovery at once given by Bray, p. 28, might be found applicable to the present action. By the 7th paragraph of the statement of claim the plaintiff alleged negligence of the defendants in respect of the personal belongings and household goods of the deceased: as to this issue, production would certainly be relevant, as well as to the negligence and improvidence in management of the estate alleged in paragraphs 10 and 12 especially. A further affidavit should be filed in accordance with the above. Costs of the motion to be costs to the plaintiff in the cause. *W. E. Raney*, K.C., for the plaintiff. *Casey Wood*, for the defendants.

FINLAYSON v. O'BRIEN.

Ontario Supreme Court, Britton, J. June 10, 1913.

ACTION (§ I B—5)—*Premature—Sub-contract for Railway Construction Work—Terms of Contract—Inclusion of Terms of Principal Contract—Partnership—Authority of Partner—Acquiescence—Withholding of Percentage of Price—Premature Action—Costs.*]—Action for money alleged to be due to the plaintiff upon a contract between the plaintiff and the defendants for work on the construction of the National Transcontinental Railway. In the year 1908, the defendants had a contract with the Transcontinental Railway Commission for the construction of a large section of the railway east of Superior Junction; and the plaintiff entered into a sub-contract with the defendants for the doing of a part of the work. The amount sued for was $18,216.44 with interest from the 1st August, 1911. There was no contract in writing between the plaintiff and defendants. A written contract, dated the 1st October, 1908, purporting to be between the defendants and Finlayson and Barry, was signed by Barry as the plaintiff's partner; and the defendants said that this contract was, in its terms, the contract verbally made with them by the plaintiff; and was finally accepted by the plaintiff; and, even if not, was binding upon him, having been signed by his partner. BRITTON, J., upon conflicting evidence, concludes that the real contract between the plaintiff and defendants was, except as to

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prices and some minor matters not in dispute, the same as the contract between the defendants and the Transcontinental Railway Commission; that the contract signed by Barry was binding on the plaintiff; apart from acquiescence, that contract was practically, and in all respects material in this action, the same as the verbal contract entered into; by the terms of that contract, the plaintiff was bound by the terms of the contract between the defendants and the Commission; and, by the latter, the time for payment of the amount claimed in this action, the ten per cent. drawback of the sum payable to the plaintiff for his work, had not arrived when this action was begun. Action dismissed as premature, but without prejudice to any future action, if necessary, upon the defendants being paid or settled with by the Commission, or upon new or other facts and circumstances. Dismissal of action to be without costs. *J. A. Ritchie*, for the plaintiff. *J. H. Moss*, K.C., and *J. Lorn McDougall*, for the defendants.

Re EMPIRE ACCIDENT AND SURETY CO. FAILL'S CASE.

Ontario Supreme Court (Appellate Division), Clute, Riddell, Sutherland, and Leitch, JJ. June 11, 1913.

[*Re Empire Accident and Surety Co., Faill's case*, 10 D.L.R. 782, affirmed on terms.]

CORPORATIONS AND COMPANIES (§ V F 1—236)—*Liability of shareholders—Exemption—Onus.*]

Appeal by Alexander Faill from the order of Meredith, C.J. C.P., in *Re Empire Accident and Surety Co., Faill's case*, 10 D.L.R. 782, 4 O.W.N. 926.

R. E. H. Cassels, for the appellant.

J. O. Dromgole, for the liquidator, the respondent.

THE COURT dismissed the appeal with costs; adding, however, a clause to the order to the effect that the appellant should be at liberty to apply to the liquidator to have the dividends on the appellant's shares credited on the shares in respect of which he was held liable, and that in that regard the order was not to prejudice the appellant.

PARSONS v. FRANCIS.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A., April 17, 1913.

WITNESSES (§ V—65)—*Fees—Conduct money—Non-payment, effect of.*]

E. M. N. Woods, for appellant (defendant).

Sir Chas. H. Tupper, for respondent (plaintiff).

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MACDONALD, C.J.A.:—We are all of opinion that the proper conduct money was not paid or tendered. Of course that being so, the judgment must be set aside, and the defendant is entitled to have it set aside as of right.

That, of course, affects the question of costs; and it seems to me it is a case where, if we had jurisdiction to deal with the costs against the event, in view of what took place between the solicitors, I should be disposed to give no costs, but it seems to me the costs must by statute follow the event.

The rule as to good cause has been restored. I should be disposed if we could do it to refuse costs under the circumstances, but I am only speaking for myself.

IRVING, J.A.:—I agree.

MARTIN, J.A., took no part.

GALLIHER, J.A.:—I agree, and have only one word to add in case it may be misunderstood—that in view of my question as to the manner in which par. 8 is drawn there didn't seem to me to be direct evidence as to residence; but as that is not materially contradicted, I have come to the conclusion that the proper conduct money was not paid.

MACDONALD, C.J.A.:—The judgment will be set aside and the appeal allowed with costs.

Appeal allowed.

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BERLIN LION BREWERY CO. v. LAWLESS.

Ontario Supreme Court, J. S. Cartwright, K.C., Master in Chambers. June 11, 1913.

JUDGMENT (§ I F 1—46)—*Summary Liquidated Demand—Rule 603—Balance on Promissory Notes—Suggested Defence—Unconditional Leave.*]—On the 15th November, 1912, the defendants gave the plaintiffs a mortgage on lands in the city of Ottawa for $6,000, payable two years after date. At the same time they gave two promissory notes for $3,000 each, payable three months after date. The real indebtedness had not at that time been ascertained. These notes had admittedly not been paid. The plaintiffs sued upon the notes, and moved for summary judgment, under Rule 603, for an alleged balance of not quite $5,000. The defendant J. A. Lawless made an affidavit that, when he and his wife, the co-defendant, gave the mortgage and notes, it was agreed that the notes were given at the plaintiffs' request so that they could be used with the bank; but that they were only for the plaintiffs' accommodation, and were to be

renewed during the currency of the mortgage. It did not appear whether these notes were given at or after the execution of the mortgage. The defendant J. A. Lawless was not cross-examined on his affidavit. The president of the plaintiff company was cross-examined on his affidavit in support of the motion. He refused to admit the defendants' contention that the mortgage was the real security. He said, however, that he went to Ottawa, where the defendants were apparently residing at the time, and threatened action. He went to Ottawa specially for the purpose of getting "the matter straightened out." When the defendant suggested a mortgage, the president said that it was "quite satisfactory," and that "we took the notes and made use of them." The Master said that, in view of these admissions and the affidavit of the defendant J. A. Lawless, the motion could not succeed. The doctrine of merger might apply—as the defendants were joint mortgagors, and the notes apparently were several only; the case might be ruled by Wegg *Prosser* v. *Evans*, [1895] 1 Q.B. 108. See Bromm's Common Law, 10th ed. (Odgers), p. 669, and cases there cited. However this might be decided, it seemed clear that this was not a case for summary judgment. Motion dismissed; costs in the cause. See *Smyth* v. *Bandel*, 4 O.W.N. 425, 498. The second decision was affirmed on appeal on the 20th December, 1912, by Middleton, J. *W. H. Gregory*, for the plaintiffs. *H. J. Macdonald*, for the defendants.

SMYTH v. McCLELLAN.

Ontario Supreme Court, Britton, J. June 12, 1913.

TROVER (§ II—25)—*Liability—Effect of Recovery—Conversion—Damages—Lien.*]—Action for the recovery of a sawmill and machinery and appurtenances belonging to the plaintiff, which the defendants took and retained possession of, against the will of the plaintiff, during negotiations for a sale to the defendants at the price of $1,400, The learned Judge finds that the defendants had no authority for taking posesssion. Judgment for the plaintiff for $1,400 and interest from the 18th December, 1911, and a declaration that the existing lien upon the property is valid until payment in full, and that the plaintiff is entitled to the property until the judgment is fully satisfied. The money in Court is to be paid out to the plaintiff in part satisfaction of the judgment. The defendants to pay the plaintiff's costs on the High Court scale. *R. McKay*, K.C., for the plaintiff. *J. W. Mahon*, for the defendants.

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GOOD v. NEPISIQUIT LUMBER CO.

New Brunswick Supreme Court, Barker, C.J., Landry, White, Barry, and McKeown, JJ. September 22, 1912.

CORPORATIONS AND COMPANIES (§ VI D—337)—*Winding-up Order—Effect on Lien Claim of a Non-creditor.*]—Appeal by Herman Good and others from the judgment of McLeod, J., disallowing a claim for work and labour as a lien under the Woodmen's Lien Act, N.B., on the winding-up of the lumber company, *Good* v. *Nepisiquit Lumber Co.*, 10 E.L.R. 252.

W. B. Wallace, K.C., and *J. P. Byrne*, for appellants.

M. G. Teed, K.C., for the liquidator.

F. R. Taylor, for the Bank of Montreal, a creditor in the winding-up.

THE COURT held that persons entitled to liens for work and labour performed for contractors with the timber owners in cutting and getting out logs in lumbering operations, and who are therefore not "creditors" of the company which owns the timber, are not barred from filing liens against the timber and taking proceedings for the enforcement of such liens under the Woodmen's Lien Act, C.S.N.B. 1903, ch. 148, by the making of a winding-up order in respect of the owning company under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, although the winding-up order precedes the filing of the lien: *Re Lundy Granite Co.*, L.R. 6 Ch. 462; *Re Regent United Service Stores*, 8 Ch.D. 616, referred to.

ROCKWELL v. PARSONS.

New Brunswick Supreme Court, Landry, J., at the Carleton Circuit. October 17, 1912.

EXECUTORS AND ADMINISTRATORS (§ I—6)—*Statutory Notice to Executor to Apply for Probate—Penalty on Default.*]—Trial at the Carleton Circuit sitting of an action brought against an executor to recover the penalty of $20 per month for failure to apply for probate within thirty days after written notice from a creditor, by virtue of the statute, C.S.N.B. 1903, ch. 118, sec. 26.

L. E. Young, for plaintiff.

F. B. Carvell, for defendants.

LANDRY, J.:—If the action is barred by the two years' limitation, the recoverable portion of the forfeiture would start from October 1, 1908, two years previous to the commencing of the action, and run till October 20, 1909, the day of the filing of the will. I do not think I can apportion the forfeiture for a period less than a month; hence, I will find just one year at

$20 a month, namely, $240. Though I do not find, as I do not believe it necessary, the exact amount due the plaintiff as a creditor to the estate, I, exercising the equitable jurisdiction as given by sub-sec. 2 of sec. 18 of the Judicature Act (N.B.) allow her $25 verdict. I relieve defendants against all penalties and forfeitures, on the terms that a verdict of twenty-five dollars be entered for the plaintiff with her costs to be taxed according to County Court costs, and that such amount of twenty-five dollars and costs be paid her by defendants, as compensation, expenses and damages.

Judgment for plaintiff.

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THOMSON v. NELSON.

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British Columbia Supreme Court, Trial before Murphy, J. April 1, 1913.

SALE (§ IV—91)—*Bulk sales of goods by trader — Statutory requirements.*]—Trial of an action against one Nelson for the price of goods sold and delivered and against him and his co-defendant the Nelson Tent and Awning Manufacturing Co., Limited, to which his business had been transferred to declare such transfer void against his creditors for non-compliance with the Sale of Goods in Bulk Act, R.S.B.C. 1911, ch. 204.

M. A. Macdonald, for plaintiff.

L. St. J. Steadman, for defendants.

MURPHY, J.:—There will be judgment against Nelson for the amount claimed, and on the other hand there is a declaration that the sale is fraudulent and void and an injunction granted in the terms of the Bulk Sales Act. The question of damages is reserved for further argument and leave to speak to the order. General cost of the action to the plaintiff and set-off against that any cost incurred owing to the raising of the novation claim.

Judgment for plaintiff.

L'EVENEMENT PUBLISHING CO. (defendant, appellant) **v. LETOURNEAU** (plaintiff, respondent).

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Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Gervais, and Tessier (ad hoc), JJ. December 23, 1912.

LIBEL AND SLANDER (§ II E 1—50)—*Liability — Qualified Privilege to the Press—Condition Necessary to Invoke.*]—Appeal from the judgment of McCorkill, J., in the Superior Court.

The majority of the Court held that a journalist sued in libel by reason of articles or writings published by him, seeking

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to escape liability on the plea of the qualified privilege enjoyed by the press under English law (defence of justification and fair comment), can only do so by establishing the truth of the imputations, the good faith and honesty of his comments, and the seasonableness of the publication in the public interest.

Appellate Courts will reduce the amount of an assessment for damages, resulting from a quasi-offence, only when it is so excessive as to be repugnant to the understanding of a reasonable person.

The judgment below in favour of plaintiff was affirmed.

LAVERGNE, J., dissented as to the facts.

CROSS, J., dissented as to the amount of damages, favouring a reduction of same.

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GREIG v. CITY OF MERRITT.

Yale County Court, British Columbia, Judge Swanson. May 15, 1913.

AUTOMOBILES (§ II—100)—*Operating without license—Defect in highway.*]—Trial of action for damages for injuries to a motor car alleged to have been caused by the car striking an obstruction, a water-pipe, lying in Nicola road in the city of Merritt on December 26, 1912.

A. D. Macintyre, for the plaintiff.

M. L. Grimmett and *J. A. Maughan*, for defendant.

JUDGE SWANSON:—The plaintiff, who is an experienced motorist, was driving his motor car, a new six-cylinder, high-power De Winton No. 6, along the trunk road leading from Merritt to Coutlee. The road was in good condition, being slightly rutted and with a little mud on it. The plaintiff's car was lighted with powerful electric headlights, throwing a wide band of light across the road, and some 75 or 80 feet ahead of the car. The plaintiff is a resident of Merritt, and familiar with its roads. The municipal corporation had been laying iron pipes along Nicola road preparatory to installing a water supply system for the city. The water-pipes were unloaded a few days previously by a teamster, being thrown off his rig in the usual way to the side of the road, some of them to a distance of three feet from the travelled or metalled portion of the road. The water-pipe in question, which the plaintiff says his left hind wheel struck, was 18 to 22 inches from the metalled portion of the roadway, which was some nine feet in width and in good condition. The plaintiff says that after crossing the Nicola bridge he threw out his clutch and put on his brake, as there is a drop going down the approach to the bridge, and that he

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was going at only 7, 8 or 9 miles an hour when he struck the water-pipe, which lay diagonally to the roadway as shewn on sketch exhibit 1. The tire, a very large firestone non-skid tire, costing $119.50, he claims was gashed by the impact with the pipe, cutting through the inner tube, the metal rim of the left hind wheel striking the end of the pipe, and making a dint in it about one-half inch deep running back about four inches, leaving a bright shiny surface on pipe the size of a twenty-five-cent piece, and upending the pipe as the car passed over it. The pipe in question is twenty feet long, diameter six inches, about one-eighth of an inch in thickness, weighing about 180 pounds. The plaintiff's car was not registered and licensed as required by the Motor Vehicles Act, R.S.B.C. 1911, ch. 169, sec. 9. He says he did apply for a license for this car for 1912, a circumstance which is not borne out by the superintendent's letter, exhibit 2, and which I do not think is reasonable as he had only received the car on December 24, just seven days before the license would expire, even if it were possible to obtain the license at once. As the application in writing for a license has to be forwarded to the superintendent of police at Victoria, who has to issue the license, it would be just about possible to have the license issued at the same time as it would by effluxion of time expire. At any rate plaintiff had no license for the car at the time of the accident, nor do I believe his statement that he endeavoured to procure a license for the year 1912.

Section 9 of the Motor Vehicles Act says:—

> No person shall have, drive or use a motor on or along any highway, unless such motor has been registered and licensed pursuant to this Act, etc.

It is claimed by the counsel for the municipality that as the plaintiff had no license for the car at the time of the accident the plaintiff was running his car in contravention of the statute, in other words that he was making an unlawful use of the highway, and that he cannot recover for any injury to his car arising from any defect in the highway. At the trial I was inclined to think that this did not disentitle the plaintiff to recover, as the statute should be very explicit to take away a person's common law right of passing and repassing along the King's highway. But on further consideration I must hold that the objection is fatal to the plaintiff's action.

Does this section make the use of the highway under the circumstances an unlawful one?

It is to be noted that the prohibition is against the use of the motor which is not registered and licensed. The object of the statute is to place motors on a different footing from that of ordinary vehicles. The point is a new one as far as I have been able to investigate the matter. "The Court is bound in the administration of the law to consider every act to be unlawful,

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which the law has prohibited to be done": *Cannan* v. *Brice*, 3 B. & Ald. 179, Best, J.; *Bensley* v. *Bignold*, 5 B. & Ald. 335. It is true that a statute may impose a penalty for a special and limited purpose only as for the protection of the revenue without intending any further prohibition. I do not think, however, that the sole or indeed the principal reason in the statute for requiring registration and licensing of motors is to secure revenue. There is, I think, a peculiar significance in the fact that the motor must be registered. To secure registration under sec. 11 the applicant must sign an application form which contains full particulars as to the make of the car, and as to the garage or place where the car is kept, with the name in full of the owner, the applicant. When a license is issued, sec. 25 of the Act requires that the motor shall have attached at the back the number of the license, the figures being four inches in height and displayed in a conspicuous place at the back. And now by a more stringent provision of the amending Act of 1913 a specially designed number plate must be displayed on the front and one at the back of the car. The object of such provisions is clearly for the benefit of the public. In the event of the law being violated the offender can be readily identified by the number on his car and brought to justice. The motor car whilst not an outlaw on the highway is yet without doubt a very dangerous machine unless under very careful control. The statute, containing as it does some drastic provisions affecting one's common law rights and especially so in the matter of the burden of proof, is clearly framed with an eye to the protection of the public, and the question of revenue is I think merely incidental in the Act. Such a provision as sec. 9 is therefore on a very different footing from such a provision as sec. 8 of the Trades Licenses Act, which prohibits one from engaging in certain trades or occupations without having taken out a license under penalty for such an offence. To succeed in such an action as this for damages against a municipality the person using the highway must be lawfully using it. See Biggar's Municipal Manual (1900), p. 833. Sir Wm. Ritchie, C.J., in *Town of Portland* v. *Griffith* (a case in which the plaintiff failed), 11 Can. S.C.R. 333 at 338, says: "It is quite clear from this that the plaintiff was not walking or passing along the street nor in the language of the second count travelling thereon, nor in the language of the third count lawfully using the street in the way streets are provided to be kept in repair, namely, for the passing to and fro of citizens and subjects." It has been held that if cattle are not allowed by law to run at large upon the highway the owner cannot recover damages for injuries to them caused by a defect in the road, for the reason that the cattle are not lawfully upon the highway. See Judge Denton's treatise on "Municipal Negligence respecting Highways," p. 45.

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Falconbridge, J., held in *Ricketts* v. *Village of Markdale*, 31 O.R. 180, that a child using a highway merely for the purpose of play is putting it to an improper use, and cannot recover for injuries while so using it due to obstructions on the highway. This decision was reversed by the Divisional Court, 31 O.R. 610. Chancellor Boyd at p. 615 says:—

> In the matters foregoing there may be regulations or there may be restrictions according to local requirements, but the permission to be on the streets is assumed unless the particular by-law prohibits. So as to children: a child who is found begging or wandering about at late hours in any street may be taken in charge by the constable: ch. 259, sec. 7. And children are not to be in the streets at night-fall if the municipality enacts the curfew-bell by-law. So it is recognized that children are in the habit of riding behind waggons, etc., and that they amuse themselves by coasting or tobogganning on the streets. I deduce the conclusion that children may play on the highways when there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user of the street for traffic and passage.

The inference from the learned Chancellor's words is that if there were a curfew-bell by-law in force in the municipality in question, and if the child was playing on the highway during the prohibited hours when it was injured there would have been no cause of action against the municipality, as under such circumstances the child would be making an unlawful use of the highway. I think this is the principle which I must apply in dealing with sec. 9 in question. See also *Harrison* v. *Duke of Rutland*, 62 L.J.Q.B. 117, where the Court of Appeal held the plaintiff a trespasser on the highway and accordingly disentitled to recover from the defendant. Similarly there is no right to race on the highway, and one doing so is making an unlawful use of the highway and cannot recover for injuries incurred through defects in the highway. See Halsbury's Laws of England, vol. 16, par. 16, and foot-notes; *Dovaston* v. *Payne*, Smith's Leading Cases (11th ed.), vol. 2, p. 160.

The question of non-feasance does not I think arise here. If the municipality is liable at all it is for misfeasance in placing the water-pipe in the position it was in at the time of the accident. But under the circumstances I am unable to say that the municipality is guilty of misfeasance. The obstruction was not on the metalled or travelled portion of the road, but from 18 to 22 inches away from it. In *Tait* v. *New Westminster*, 18 W.L.R. 470, Judge Howay held the municipality liable for injuries to the plaintiff's car through collision with a water-pipe which projected a foot at least into the travelled portion of the highway. In the case at bar the travelled portion of the highway was in good repair and there was no occasion for the plaintiff to leave it. The evidence shews that the plaintiff after

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crossing the bridge "straddled the ruts," as it was put, having his left hand wheels some 18 or 20 inches off the travelled way, and went in a straight line from the bridge, and hit the pipe. The curve in the road I find to be 15 or more feet beyond the place of accident. However, I do not think the plaintiff was obliged by law to keep strictly on the travelled way, the ordinary route of travel, as the "public right extends over the whole width of the highway and not merely over the *via trita*": Smith's Leading Cases, vol. 2, p. 166. Crompton, J., in *R.* v. *U. K. Electric Telegraph Co.* (1862), 31 L.J.M.C. 166, approves of the direction to the jury of the trial Judge, Martin, B.:—

> The public are entitled to the use of the entire of it as a highway (between fences) and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers: Beven on Negligence, 3rd ed., pp. 356-7.

The plaintiff had powerful electric headlights which he says threw a band of light 75 or 80 feet in front of his car. I must draw the inference from the evidence that he saw the pipes strewn along the side of the highway, or should have seen them, including the pipe in question, if he had been keeping a proper lookout. The defendant municipality in placing the pipes along the roadway was doing a lawful thing, and doing it, I think, in a reasonably careful manner. I do not find as a fact any negligence in the municipality. In determining whether a highway is in repair it is necessary to take into account the nature of the country, the character of its roads, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and extent of travel, the place of the accident and the manner and nature of the accident: Harrison, C.J., in *Castor* v. *Tp. of Uxbridge* (1876), 39 U.C.R. 113 at 122. See also similar observations by Armour, C.J., in *Foley* v. *Tp. of East Flamborough* (1898), 29 O.R. 139 at 141. The road in question is practically a country road running between Merritt and Coutlee. It is in an outlying portion of Merritt and only a fair amount of travel passes over it, being in quite a different category from that of a road in a populous city. Under the circumstances I think the road in question was kept in a proper and reasonable state of repair. The municipality is not an insurer against accidents upon its highways. Its duty is discharged by making its streets reasonably safe.

> Traffic on the highway cannot be conducted without exposing those whose persons and property are near it to some inevitable risk, and those who go upon the highway may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger: Blackburn, J., in *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265 at 286.

As to obstructions on highways some of which have been held to make municipalities responsible and others not, see Denton, Municipal Negligence, pp. 76 to 82.

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I find as a fact (which I think is a reasonable and proper inference from the evidence) that the plaintiff was guilty of contributory negligence in driving his car at an excessive rate of speed. There was no one present at the time of the accident except the plaintiff. He says he was going at from seven to nine miles an hour. I am unable to accept that testimony as conclusive of the rate of speed as I am fully of the opinion that if he were going at that slow speed, with his powerful lights he must have seen the pipe in due time, and would be easily able to avoid it if he were exercising reasonable care. The extraordinary nature of the accident, especially the injury to the pipe, seems to me entirely incompatible with such evidence. I do not think that such a serious dint in the water-pipe, which was described by one of the witnesses, Mr. Gordon, as if it had been hit with a sledge, could have been made by the car hitting it and passing over it at such a slow speed as alleged by the plaintiff. I think the nature of the injury to the tire and to the water-pipe, and the fact that the pipe was upended and went down with a ringing sound, as described by the plaintiff, are only compatible with the inference, which I draw from these facts, that the car was being driven at an excessive rate of speed. The speed at which a vehicle is being driven is material to the question of liability: Halsbury, vol. 21, p. 413. Apart therefore from the consideration of the effect of the non-compliance with sec. 9 of the Motor Vehicles Act in my opinion the plaintiff has contributed to his own injury and has accordingly lost his right of action.

There will be judgment for the defendant municipality, dismissing the plaintiff's action with costs.

Judgment for defendants.

IMPETT v. IVES.

Yale County Court, British Columbia, Judge Swanson. May 17, 1913.

BROKERS (§ II B—12)—*Real estate agents—Sufficiency of services.*]—Action to recover $325 commission on the sale of a fruit farm at Penticton by plaintiff for defendant.

Clayton, for plaintiff.

Tunbridge, for defendant.

JUDGE SWANSON:—I find that it was in consequence of the efforts put forth by the plaintiff through himself and his go-between Docker that Ferrier was brought into the relationship with defendant of purchaser and vendor. In the view I take of it the plaintiff succeeded in finding a purchaser for the

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defendant's orchard at substantially the price defendant set upon it, a price or valuation at any rate which he finally accepted. It can make no difference, it seems to me, as far as the plaintiff's position is concerned whether the defendant got money or money's worth for his orchard. If defendant accepted in lieu of cash for his orchard, horses or cattle or an automobile or a conveyance of some of Ferrier's real property, it would make no difference to the plaintiff. The defendant would be getting what he at least considered money's worth. The plaintiff in the view I take of the matter found a purchaser for the orchard, defendant took advantage of the undoubtedly valuable services of the plaintiff, the plaintiff through Docker was the effective cause (causa causans) of bringing about the relationship of vendor and purchaser between defendant and Ferrier, and the plaintiff is in all fairness entitled to his commission. The many cases on the subject are dealt with exhaustively in the reports of *Haffner* v. *Grundy*, 4 D.L.R. 529, and annotations; *Singer* v. *Russell*, 1 D.L.R. 646; *Travis* v. *Coates*, 5 D.L.R. 807, 27 O.L.R. 63; *Smith* v. *Barff*, 8 D.L.R. 996, 27 O.L.R. 276.

The expression "find a purchaser" is not, I think, to be construed in the very technical language of real property law, but in the plain ordinary colloquial sense as understood by ordinary men of affairs.

Bramwell, L.J., in *Wilkinson* v. *Alston*, 48 L.J.Q.B. 733 at 734, in dealing with the expression "if you can find me a purchaser" says the expression may be explained as meaning "if you can introduce a purchaser to myself or can introduce a purchaser to the premises or call the premises to the notice of a purchaser."

The agent will be entitled to his commission provided the transaction in respect of which he claims is, in its nature and terms, substantially that which he was employed to bring about.

In *Rimmer* v. *Knowles* (1874), 30 L.T. 496, the defendant had instructed the plaintiff to sell an estate and agreed to give him £50 if he obtained a purchaser at £2,000. Afterwards the defendant raised his price to £3,000, and the plaintiff introduced to him a builder who in his evidence said, referring to himself and the defendant, "We agreed then that I purchased the lands." In the result the builder took a lease for 999 years at a rent of £150 a year with an option to purchase the land for £3,000 at any time during twenty years from date of lease. On appeal the plaintiff was entitled to his commission. Cockburn, C.J., said:—

> I proceed on this ground that the facts of this case practically constituted a purchase. . . . Although the plaintiff did not get a purchaser for the defendant in the strict legal sense, he did so, I think, in what may be called the ordinary acceptation of the word. I think the arrangement was equivalent to a purchase.

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Similarly Mr. Justice Quain said, "The plaintiff to my mind substantially found a purchaser for the defendant," and Mr. Justice Archibald said, "No doubt the plaintiff was bound to find substantially a purchaser, and I think that he did substantially perform his agreement."

I think that the plaintiff has substantially performed his agreement in the case at bar. Ferrier in his evidence says that as a result of his being shown over the place by Docker he effected the exchange of his property with defendant. A real estate agent, Mr. Kay, who had been employed by the defendant in the previous year, shewed Ferrier over the orchard in the summer of 1911, but no deal was made in consequence of that. In delivering the opinion of the Court in *Robins* v. *Hees*, 19 O.W.R. 277, Mr. Justice Middleton says, "A fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another."

The defendant's counsel claims that the plaintiff, not having taken out a trades license to carry on business as a real estate agent pursuant to the local by-law, cannot recover at law for his service even although otherwise entitled. I cannot give effect to such a contention. The provisions in the by-law are identical with sec. 8 of the Trades Licenses Act under which no one can carry on certain trades or occupations without having first taken out a license subject to a penalty for non-compliance. The object of such a statute or of such a local by-law looking at it as a whole is clearly I think for the collection of local revenue. Indeed if it were not so it would probably contravene sub-sec. 2 of sec. 91 of the British North America Act, "the regulation of trade and commerce" being exclusively assigned to the Federal Parliament. The only result I think of non-compliance with such a provision is to subject the offender to the penalty set forth in the section. I have dealt with this subject in a judgment I have just given in *Greig* v. *City of Merritt*, 11 D.L.R. 852, and wish also to refer to the judgment of Mr. Justice Buckley in *Victorian Daylesford Syndicate* v. *Dott* (1905), 74 L.J.Ch. 673. The Court of Appeal in *Bonnard* v. *Dott* (1906), 75 L.J. Ch. 446, approved of Mr. Justice Buckley's ruling in the above case. I refer also to the case of *Sadler* v. *Whiteman* (1910), 79 L.J.K.B. 786. A similar ruling was given by Chief Justice Hunter in *Fleishman* v. *Cameron* (Revelstoke Spring Assizes, 1902), a case in which I was counsel for the defendant.

In my opinion the plaintiff should have judgment for the usual commission, which is five per cent.

I will accept the valuation placed on the property taken by defendant in exchange from Ferrier at $6,000 and give judgment for the plaintiff for $300 and costs.

There will be a stay of execution for thirty days.

Judgment for plaintiff.

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WOODHOUSE et al. v. FOXWELL.

Victoria County Court, British Columbia, Judge P. J. Lampman.
March 28, 1913.

CONTRACTS (§ I E 5—106)—*Statute of Frauds—Sufficiency of memorandum—Name of purchaser not indicated in deposit receipt.*]—On October 2, 1912, the defendant accepted a deposit of $50 upon the sale of a lot from the Imperial Realty Co. as agents for a purchaser not named, and gave the following deposit receipt:—

Good until October 16th. October 2nd, 1912.
"C. H. F."
Received from Imperial Realty Co. Fifty Dollars.

C. B. S. Phelan, for defendant, submitted that the memorandum was insufficient within the Statute of Frauds in that the purchaser was not named and inference could not be drawn. He cited *Rathom* v. *Calwell*, 16 B.C.R. 201. In *Andrews* v. *Catori*, 38 Can. S.C.R. 588, the contract was made complete by subsequent correspondence.

E. L. Tait, for plaintiffs, submitted the purchaser's name was not necessary: *Filby* v. *Hounsell*, 65 L.J.Ch. 852.

JUDGE LAMPMAN:—I think it is settled in British Columbia that the memorandum sued on is not a sufficient memorandum within the Statute of Frauds. See *Rathom* v. *Calwell*, 16 B.C.R. 201. The action is dismissed.

MAN.

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ATLAS ELEVATOR CO. v. MANITOBA COMMISSION CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Cameron, JJ.A.
April 23, 1913.

TRIAL (§ I D—15)—*Assessment of damages only—Right to appear by counsel—Judgment pro confesso.*]—Appeal by defendant from a judgment of the County Court of Winnipeg upon the assessment of damages in which the defendant company were refused the right to appear and participate in the enquiry on the ground that it had not filed a dispute note under the County Court Act (Man.).

THE COURT OF APPEAL held that the defendant company was entitled to appear on the assessment of damages although it had not taken any proceedings to dispute the plaintiff's claim and had not filed a "dispute note." The judgment fixing the damages at a hearing at which defendant company appeared but was not allowed to take part was set aside.

GRAY v. GRAND TRUNK PACIFIC BRANCH LINES COMPANY.

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Saskatchewan Supreme Court. Trial before Johnstone, J. April 16, 1913.

DAMAGES (§ III L—230)—*Eminent domain — Railways — Right of way through farm—Measure of damages—Tests.*]—Trial of an action for damages for the taking possession of lands belonging to the plaintiff, for railway purposes.

G. E. Taylor, for the plaintiff.

A. Benson, for the defendant.

JOHNSTONE, J.:—The plaintiff is the owner, subject to a mortgage, of the south-west quarter of section fifteen, township twenty, range two, west of the third meridian, in the Province of Saskatchewan.

In the month of August of the year 1911, or thereabouts, the defendants, requiring a strip of land for right-of-way through the plaintiff's lands for the line of railway then under construction by the defendants, entered upon the plaintiff's said lands and constructed their railway through said lands, under, and in accordance with the provisions of the Railway Act.

The defendants, for the purposes of such line of railway, took possession of six acres and eighteen-hundredths of an acre of the said quarter section. The plaintiff and the defendants having been unable to agree upon the amount of compensation to which the plaintiff was entitled, the plaintiff sued, claiming from the defendants as follows: To severance of farm by the line of railway, $2,000: To seven acres of land at $50 per acre, $350; and to a crop of flax destroyed in the taking of the said acres and in the construction of the line, $400.

The plaintiff, at the trial, abandoned the last item, namely, $400 for crop of flax, and the only questions in dispute were as to the damage of the remainder of the lands over and above that portion taken by the company and the price of the land per acre taken by the company.

The company paid into Court with their defence, $293.25, which sum they alleged was sufficient to satisfy the plaintiff's claim.

The result of the evidence given on behalf of both parties to this cause is to satisfy me that forty-five dollars per acre for the right-of-way would be a reasonable sum to award the plaintiff for his land. The preponderance of evidence was in favour of the plaintiff, that the plaintiff should be awarded remuneration by way of damages through the depreciation of the farm for farming purposes, because of the running of the said right-of-way through the quarter section, considering the manner in which the line ran through the quarter. This compensation was placed by farmers, practical men, at from five to ten dollars

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per acre. One Burdon, a witness called by the defence, a very fair witness it appeared to me, and a witness whose lands had been also taken by the company for their right-of-way and for which he was compensated $45 an acre, thought that five dollars an acre should be allowed the plaintiff on the whole quarter in addition to $45 an acre for right-of-way as compensation for depreciation in value of his quarter other than that land taken by the company and these sums I award the plaintiff, that is: $45 an acre for six and eighteen-hundredths acres, $278.10; To depreciation in value at five dollars an acre on one hundred and fifty-three and eighty-two one-hundredths acres, $796.10; in all, $1,074.20.

There will, therefore be judgment for the plaintiff for $1,074.20 with costs. Both sums to be paid into Court after taxation of the costs, and to remain there pending the transfer of the right-of-way by the plaintiff to the defendants, clear of all incumbrances. Either party to be at liberty to move for further order on notice should it become necessary.

Judgment for the plaintiff.

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ST. CLAIR v. STAIR.

Ontario Supreme Court, J. S. Cartwright, K.C., Master in Chambers. June 9, 1913.

DISCOVERY AND INSPECTION (§ I—1)—*Better Affidavit on Production — Claim of Privilege for Certain Reports — Necessity for Identification — Documents Obtained for Information of Solicitor — "Solely."*]—Motion by the plaintiff for a better affidavit on production from the defendants the "Jack Canuck" Company. For the facts of this case, see 4 O.W.N. 645. The affidavit attacked claimed privilege for "a quantity of reports fastened together, numbered 1 to 77 inclusive, initialled by the defendant." These were said to be privileged as "being reports and communications obtained for the information of solicitors and counsel and for the purpose of obtaining advice thereon with a view to litigation between the plaintiff and the said defendants." It was objected: (1) that the dates of these reports and the names of the authors should be given; and (2) that the claim of privilege was defective, because it did not state that these reports were obtained solely for the purposes of the pending action. The cases relied on in support of the motion were *Swaisland* v. *Grand Trunk R.W. Co.*, 3 O.W.N. 960, 5 D.L.R. 750, on both branches, and *Jones* v. *Great Central R.W. Co.*, [1910] A.C. 4, on the second. The Master said that in cases such as *Collins* v. *London General Omnibus*

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Co. (1893), 68 L.T.R. 831, no doubt, the word "solely" was necessary, in view of the previous judgment in the similar case of *Cook* v. *North Metropolitan R.W. Co.*, 6 Times L.R. 22. But this qualification was not of universal application, though it might be as well to use it in every case as a matter of precaution and for greater security. As at present advised, the Master did not deem it necessary to express any opinion on this point, because the motion seemed entitled to prevail on the first ground. The affidavit should comply with what was said in *Swaisland* v. *Grand Trunk R. Co.*, 5 D.L.R. 750, at 753: "Moreover, it is essential that the documents should be so clearly identified that, if it turns out that the affidavit on production is untrue, there will be no difficulty in securing a conviction for perjury." It would seem necessary, therefore, to give the date of each report and the name of the person making it; for, "where the name is a material fact, it must be disclosed, and it is no answer that in giving the information the party may disclose the names of his witnesses:" Bray's Digest of Discovery (1910), 2nd ed., 35, citing *Marriott* v. *Chamberlain*, 17 Q.B.D. 154. So, too, Odgers on Pleading, 7th ed. 184, citing in addition (with other cases) *Milbank* v. *Milbank*, [1900] 1 Ch. 376. A further and better affidavit must, therefore, be made, within a week, as above directed. In this the claim of privilege could also be amended by adding "solely," if the deponent thought it wise to do so, and could so declare, in view of what might appear when the reports were dated. The affidavit on production of the Holland Detective Bureau, made a defendant in this action, mentioned: "Reports made at various times between the 20th November and the 27th December, 1912, by the Bureau to James R. Rogers." These were probably the reports mentioned in the affidavit made by Mr. Rogers, as an officer of the defendant company. This action was begun only on the 27th December, 1912, though the libel action was begun earlier. The plaintiff was entitled to the costs of this motion in any event. W. E. Raney, K.C., for the plaintiff. A. R. Hassard, for the defendant company.

SHEARDOWN v. GOOD.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 14, 1913.

[*Sheardown* v. *Good*, 11 D.L.R. 318, considered.]

JUDGMENT (§ VII—270)—*Relief against — Re-hearing — Motion to vary, denied, when.*]—Motion by the plaintiff to vary

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the judgment of the Court, *Sheardown* v. *Good*, 11 D.L.R. 318, 4 O.W.N. 1344.

The motion was denied.

C. W. Plaxton, for the plaintiff.
L. V. McBrady, K.C., for the defendant.

THE COURT referred the motion to SUTHERLAND, J., in Chambers.

SUTHERLAND, J. (after hearing counsel):—Upon a careful consideration of the matter, I am unable to see that the judgment should contain any direction to the effect that the $100 paid to the real estate agent, by the purchaser, should be repaid by the defendant to the plaintiff. I have spoken to the other members of the Court, who agree also in this disposition of the matter, and of the costs as already made.

Motion refused.

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