Dominion Law Reports

CITED "D.L.R."

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

ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. 1-60 D.L.R., See Pages vii-xxii

VOL. 60

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT and

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES.

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1922

CASES REPORTED

IN THIS VOLUME

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 60 INCLUSIVE.

McCOLL v. C.P.R. CO.

Manitoba King's Bench, Prendergast, J. September 20, 1921.

Statutes (§II.A—96)—Workmen's Compensation Act, Man. Stats. 1916 ch. 125—Sections 13 (1) and 61 (4)—Construction—Railway Act, 9 & 10 Geo. V. ch. 68 — Construction — Person Injured within the Meaning of sec. 385.

Sections 13 (1) and 61 (4) of the Workmen's Compensation Act, 1916 Man. Stats. ch. 125, read together mean that where in any case there are the two elements of (1) employment and (2) injury (or accident in the sense of accidental injury) arising during the employment then every right of action which the plaintiff or his dependents might otherwise have under sec. 13 (1) of the Act is taken away by the order of the Workmen's Compensation Board under sec. 61 (4) determining that the only right of the workingman or dependent is to compensation under the Act. The element of tort is not a factor and may or may not be present in the case.

The words "to any person injured" in sec. 385 of the Railway Act, 1919 (Can.) ch. 68, are used in the sense of "any person having received an injury recognised by law," and the death of a human being, though clearly involving pecuniary loss, not being at common law a ground of action for damages, the above section does not give a right of action, in case of death, to the widow and administratrix of the person killed.

ACTION by the widow and executrix of a workman killed in the course of his employment with and as a consequence of the negligence of the defendant company. Dismissed.

D. Campbell and O. Campbell, for the plaintiff.

L. J. Reycraft, K.C., for defendant.

John Allen, K.C., for Attorney-General of Manitoba.

Prendergast, J.:—The plaintiff, whose action is for damages, sets forth in her statement of claim that she is the widow and administratrix of William McColl, deceased; that he was killed in the course of his employment with and as a consequence of the negligence of the defendant company, and that she sues on behalf of herself and her infant daughter Grace McColl, at common law, under and by virtue of R.S.M. 1913 ch. 36, being an Act respecting compensation to Families of Persons Killed by Accident, and under R.S.C. 1906, ch. 37 now 1919 (Can.) ch. 68, being the Railway Act, and amendments thereto.

The statement of defence contains the following:—"11. The defendant denies that the plaintiff has any right of action against the defendant at common law either on behalf of herself or of the said Grace McColl. 12. The defendant denies that the plaintiff has any right of action against the defendant either under or by virtue of ch. 36 of

Man.

K.B.

McColl v. C.P.R. Co.

the Revised Statutes of Manitoba 1913 or ch. 37 of the Revised Statutes of Canada 1906 and amendments thereto or ch. 68 of the Statutes of Canada 9 & 10 George V, or under or by virtue of any other statute or statutes whatsoever. 13. The defendant says that the said deceased William McColl was a workman within the meaning of ch. 125 of the Statutes of Manitoba, 6 George V., and amendments thereto. 14. The defendant says that by the said ch. 125 of the Statutes of Manitoba 6 George V, Part 1, and amendments thereto, the plaintiff has a right to claim compensation under said Act, and that by sec. 13 thereof it is provided that the right to compensation provided by the said Act shall be in lieu of all right and rights or actions statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer and no action in any Court of law in respect thereof shall lie. The defendant says that by the provisions of the said statute any right or rights of actions which the plaintiff might otherwise have had against the defendant have been taken away and that no action now lies against the defendant in respect of the matters alleged in the plaintiff's statement of claim. 15. The defendant says that the plaintiff's statement of claim disclosed no cause of action against the defendant and the defendant demurs thereto."

After filing their defence, the defendants at once made application to the Compensation Board under sec. 13 (2) and sec. 61 (4) of the Workmen's Compensation Act 1916 Man. ch. 125, for adjudication of the plaintiff's right of compensation, and to have it determined whether the action is one the right to bring which is taken away by Part 1 of the Act.

Before the date fixed for the hearing of the application, however, the plaintiff obtained from my brother Galt an interim injunction restraining the defendants from applying to the Board, which he made permanent a few days later on the ground set forth in his judgment reported in (1920), 51 D.L.R. 480. But in the Court of Appeal (1920), 53 D.L.R. 722, 30 Man. L.R. 534, where the matter was carried, the injunction was dissolved on the ground that it was premature.

Then upon the plaintiff's application being taken up and

heard, the Compensation Board finally made an order declaring that "the accident sustained by the said William McColl deceased is one with respect to which the dependents of the said deceased have a right to compensation under Part I. of the Workmen's Compensation Act," and that, "this matter is one in which the right to bring action for or by reason of such accident is taken away by Part I. of the Workmen's Compensation Act."

Having so obtained this order, the plaintiff's next step was to apply to the Referee under R. 466 of the King's Bench, to have the question of law raised in the defence as herein above set forth, determined at once; upon which the Referee ordered that the same be set down for hearing in the Wednesday Court which was done accordingly, and the matter so came before me and was duly heard.

The question seems to be in brief whether each and every right to bring action which the plaintiff might otherwise have is taken away by virtue of the Workmen's Compensation Act and the Board's order made thereunder, and if such be the case the action should be permanently stayed.

The plaintiff sets forth three causes of action in her statement of claim, being:—at common law, under our Lord Campbell's Act, and under the Railway Act of Canada. Counsel on her behalf having, however, stated on argument that he would not urge that she had any claim at common law, we have now only two of the statutes to deal with.

1. As to our Lord Campbell's Act.

The Act thus commonly referred to in this Province is ch. 36 R.S.M. 1913, being an Act respecting Compensation to Families of Persons Killed by Accident; and it is substantially a reproduction of Lord Campbell's Act being 1846, (Imp.) ch. 93.

The defendants' contention is that the plaintiff's right of action under this enactment has been taken away by virtue of the Workmen's Compensation Act 1916 (Man.) ch. 125.

With respect to the validity of this last Act generally, and the power of the Legislature to provide for such a scheme of compensation and create such a body as the Compensation Board, I would refer to the case of Kowhanko v. Tremblay (1920), 50 D.L.R. 578, 30 Man. L.R. 198, for the judgment of this Court, and (1920), 51 D.L.R. 174, 30 Man. L.R. 198 at p. 213 for the judgment in appeal.

As to the finality of the decisions of the Board, there is sec. 13 (2) which reads as follows:—

Man.

K.B.

McColl v. C.P.R. Co.

"13 (2). Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive."

We have, it is true, in the judgments of our own Court of Appeal in the case of Can. Northern R. Co. v. Wilson (1918), 43 D.L.R. 412, 29 Man. L.R. 193, and Kowhanko v. Tremblay, already cited, what was referred to by Mr. Allen for the Attorney-General as two schools of thought, represented on the one hand by Cameron, J., who holds that all orders and decisions of the Board in establishing its jurisdiction are absolutely unassailable and unimpeachable, and on the other hand by Perdue, C.J.M., who was of opinion that the Court can interfere where the powers given by the Act have been exceeded or where a fundamental principle inherent in the Act has been disregarded so that a want of jurisdiction in its officers supervenes.

But, whichever view should prevail the present case could not be affected thereby in my opinion, inasmuch as the Board's order, as I find, was justified.

This order of the Board, following sec. 13 (2), contains two decisions. One is on "the question of the plaintiff's right to compensation," the propriety of which is not disputed as I understand. The other is "as to whether the action is one the right to bring which is taken away," the propriety of which is disputed and so becomes part of the main issue.

The difficulty in construing the Act, if there be any, is very much lessened by the fact that, in order to ascertain which causes of action are laid at rest or taken away, we are not driven to have recourse to inferences from the definition as found in sec. 3, of the claims which the Board may properly entertain; for we have secs. 13 (1) and 61 (4) which specifically state what causes of action shall be so taken away and when the action shall be stayed.

Section 13 (1) states that the rights which are so taken away are "all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer." And sec. 61 (4) provides that "where an action in respect of an injury is

brought against an employer by a workman or a dependent," then, upon the Board's order being made, "the action shall be forever stayed."

Mr. Campbell, however, urges that under Lord Campbell's Act, in case of death of the workman, a right of action by the dependents only lies where the injury has been caused by such neglect or default as would have entitled the workman to damages if death had not ensued; that the right of action in such a case is based on tort, and that consequently it is not one to which the party is entitled "for or by reason of the accident" as set forth in the Workmen's Compensation Act.

It is plain from the reading of our Lord Campbell's Act, and there is an abundance of decisions to shew, that an action thereunder is founded on tort; whilst Viscount Haldane in giving the judgment of the Privy Council in C.P.R. v. Workmen's Compensation Board, known as the "Sophia Case," 48 D.L.R. 218, [1920] A.C. 184, said that under the Workmen's Compensation Act the right arises not out of tort but out of the workmen's statutory contract. But I do not think that this distinction, real as it is, affects the question we are now dealing with.

I consider that if sec. 13 (1) instead of using the words "for or by reason of an accident which happens to him" had simply used the words "when an accident happens to him," the same thing would be substantially conveyed; and I take secs. 13 (1) and 61 (4) read together to simply mean that where, in any case, there are these two elements present,—(1) employment, and (2) injury (or accident in the sense of an accidental injury) arising during the employment, then any right of action which may exist is taken away by the Board's order.

To put the matter in another form, the rights declared to be taken away are all those rights of action where employment and injury in the course of employment are the ingredients or some of the ingredients, not necessarily all the ingredients. The element of tort may be present in the case and it may not be; it is simply ignored in the section as not being a factor.

Of course, in all rights of action under Lord Campbell's Act as well as in the present case, we have these two ingredients or conditions, even if the element of torts be also present; and for that reason in my opinion they all come under the purview of the Workmen's Compensation Act.

Man.

K.B.

McColl v. C.P.R. Co.

2. With respect of the Railway Act, 1919, (Can.) ch. 68. The section which the plaintiff particularly relies on, is sec. 385, which reads as follows:—

"385. Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act."

This section as it is plain is not meant to afford redress only to servants and employees but as expressed "to any person injured" by any of the wrongful acts or omissions therein referred to.

The question is, when a person is killed as a consequence of any of these wrongful acts or omissions, can his dependents claim to be persons injured by such acts or omissions and may they maintain an action? Or more broadly: Does an action for damages for death of a human being such as the one in this case, come within the wording of this section?

The first thing to be noted is that the section uses neither the word "death" nor any of its derivatives, and that it contains no definition of an injury neither directly nor indirectly by stating in what manner the person must be injured.

If we take the word "injured" in its broad and general sense there are indeed a great many ways in which a person may be injured by the death of another; a business man whose partner is killed in consequence of any of the acts or omissions stated; a private teacher whose pupil so comes to an end, and even a friend whose health is broken up through grief over the death of a friend occurring in similar circumstances, are all persons who are "injured" according to the definition found in the dictionaries; and moreover, it can just as truly be said of each of them as of the plaintiff herein that he is injured by the act or omission which caused the

death. In all of the four cases, the wrongful act or omission bears exactly the same relation to the death of the person killed, and to the injury of the person claiming to be injured.

Now we know that neither of the three supposed parties, although injured as stated, could maintain an action. But why not, and where does the distinction lie?

The distinction cannot be as to the nature of the acts or omissions which caused the injury, for we have assumed that they are all wrongful and that is all that is required in this respect. Neither can it be as to any class of persons injured, for the section says "any person." There is only one other element or factor left, which is the injury inflicted on the "person injured," and it is with respect to the injury that the distinction must be drawn.

What is then this distinction? I can find only one, and that is the distinction between injuries that are recognised by law and those that are not.

I conceive that Parliament meant to adopt the law as it stood without interfering with it, and so used the words "any person injured" in the sense of "any person having received an injury recognised by law," or "an injury of such a nature that it is actionable."

In LeMay v. C.P.R. (1890), 17 A.R. (Ont.) 293, Osler, J.A., said, at p. 301: "I admit the force of the argument against giving the extended meaning to the words 'any person' as used in sec. 289 of the Railway Act [now 385], where the statute gives a right of action to 'any person' injured by the act or omission of the company. I agree that it is not to be construed in derogation of the common law rule as to the non-liability of the master for an injury sustained by one servant through the negligence of a fellow servant, unless in the case of the particular act or omission provided against such extended construction is plainly required."

There is also the principle formulated by Best, C.J., in The King v. Carlile (1819), 3 B. & Ald. 161, 106 E.R. 621, that the common law is not repealed except by specific legislation.

But, is an injury which results from the death of a person actionable at common law?

Mr. Campbell declared on the argument as already stated that he would not so urge.

There is at all events an abundance of cases to the effect that it is not actionable, among which I would refer to

Man.

K.B.

McColl v. C.P.R. Co.

Admiralty Commissioners v. S.S. Amerika, [1917] A.C. 38, where the law is fully discussed in two lengthy judgments; and to Monaghan v. Horn (1882), 7 Can. S.C.R. 409, where Ritchie, C.J., said, at pp. 429, 421:—

"No civil action can be maintained at common law for any injury which results in death. The death of a human being though clearly involving pecuniary loss is not at common law the ground of an action for damages and therefore until the passing of Lord Campbell's Act, 9 and 10 Vict. ch. 93, there was in England no right of action for the recovery of damages in respect of an injury causing death, nor until R. Stats. c. 128 in Ontario."

But it may be asked: If Parliament, when enacting sec. 385, took the law as it stood as to what injuries are actionable or not, did not this include our Lord Campbell's Act?

This was virtually answered in the negative in B.C. Electric v. Gentile, 18 D.L.R. 264 at p. 267, [1914] A.C. 1034, 18 C.R.C. 217, where the Judicial Committee of the Privy Council, after setting out the note of an action under Lord Campbell's Act, said: It follows that in their opinion a suit brought under the provisions of that Act [Lord Campbell's Act of B.C.] is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants."

If sec. 385 contemplates the recovery of damages in case of death, it is also remarkable, as observed by Mr. Reycraft, that no principle for assessing the same is therein provided; and the more so as it is recognised to be so particularly difficult to put an estimate on the value of human life, as observed by Parke, B., in Armsworth v. S.E. Railway Co. (1847), 11 Jur. (O.S.) 758, referred to in Admiralty Com. v. S.S. Amerika, hereinabove cited.

The plaintiff also relies, for an interpretation of the word "person" in sec. 385, upon sec. 34, sub-sec. 20, of the Interpretation Act, being R.S.C. 1906, ch. 1, which is as follows: " 'Person' includes any body corporate and politic and the heirs, executors, administrators, or other legal representatives of such person, according to the law of that part of Canada to which the context extends."

When making permanent the interim injunction he had already granted my brother Galt, in the judgment already referred to, 51 D.L.R. 480, held that by virtue of this provision of the Interpretation Act, the plaintiff, being the ad-

ministratrix, is entitled to maintain the action. With great deference I must dissent from this view.

The construction that I put upon this subsection is that we should take the words "heirs, executors, administrators, and other legal representatives of such person," as meaning, "those who are the heirs, executors, administrators, or legal representatives of such person with respect to the subject matter dealt with in the particular enactment where the said word (person) occurs."

Now the plaintiff, although the heir, administratrix, and legal representative of George McColl generally is not so with respect to any right of action contemplated in sec. 385 for the reason that George McColl never had any such right of action and that there never was anything in this respect to be inherited by the plaintiff as heir, nor administered by her as administratrix, as being part of the estate. It is to be noted that this sub-section 20 does not use such words as "wife" or "child" but only the words "heirs," "administrators," and "legal representatives," all necessarily implying that something passes or descends, while there is in this case nothing whatsoever of that kind.

But, even if the words "wife" or "child" were included in the subsection, it is repugnant to reason and repugnant to our sense of the importance of such matters, to conceive that a new action, one of a peculiar nature, resembling the one under Lord Campbell's Act which required the special enactment to be brought into being, should be created by this subtle and circuitous process. The statement of Best, C.J., in The King v. Carlile, already referred to, applies also here; as does that of 27 Hals. p. 157, to the effect that statutes which limit or extend common law rights must be expressed in clear and unambiguous language.

It seems also significant, as pointed out by Mr. Allen, that in the 30 years since which this sec. 385 has been in force, there has been no action in which it was contended that it gave a cause of action in case of death. In United States v. De Goer (1889), 38 Fed. Rep. 80, at p. 83, we read the following:—

"No precedent has been shewn for reviving actions upon forfeitures that are mainly penal, though to some extent remedial. The instances of the death of defendants in such cases must have been numerous, and the absence of any precedent for revival of such actions is of no small weight

Man.

K.B.

McColl v. C.P.R. Co.

as evidence that no such right in this class of cases has ever been supposed to exist."

From a careful summary prepared by Mr. Allen of the legislation of the different Provinces on this subject it appears that when section 385 was first enacted there were in every Province of Canada, Acts similar to Lord Campbell's, besides other compensation Acts in other forms, giving a cause of action to beneficiaries in case of death. Surely, it does not seem possible that Parliament in enacting sec. 385 in that state of the law in the Provinces, should have intended to subject Federal Railways for the one and same death to a further cause of action and even to several further causes of action.

Another feature in the history of this enactment, is that from the beginning (Stat. of Can. 1856, ch. 11) down to 1888 (Can.) ch. 29, this sec. 385, or more correctly the sections of which it is a development, did not give a right of action to anyone for the injuries resulting from the wrongful acts or omissions referred to, but merely provided for punishment of the same by fine and imprisonment. The point is that, in the words "injury to any property or to any person" used down to 1888, the word "person" could there refer only to the person primarily injured, as only imprisonment and fine were therein provided for.

I am of the opinion then that the plaintiff does not have and never had any right of action in any aspect, either at common law or under the Railway Act; and that the only right of action she could have had being under our Lord Campbell's Act is taken away by the Board's order.

The action will be permanently stayed.

But the matter being one of considerable general importance, and raising difficult questions as to the effect of several statutes on each other which it is in the public interest to set at rest, there will be no costs.

Action dismissed.

SAXE & ARCHIBALD v. THE KING.

Can.

Ex.

Exchequer Court of Canada, Audette, J. June 2, 1921.

SAXE & ARCHIBALD v. THE KING.

Public Works (§II.—10).—Contract—Construction—Public Buildings—Plans—Competition of Architects—Order in Council authorising same—Board of Assessors—Power of same to alter conditions.

The Dominion Government, having need of additional departmental buildings in Ottawa, by Order in Council proposed a competition for architects involving the submission of preliminary designs for certain of such buildings, "the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the Minister of Public Works may prescribe, for which they would be paid each $3,000. Of these latter, the architect submitting the best working plans would be employed to carry out this work at a commission to be arranged." The Order in Council also provided for the appointment of three assessors to judge the preliminary designs and select the five prize-winners to prepare the working plans as above mentioned, and to ask the most successful of such competitors to prepare the working plans. The award of the assessors in both cases was to be subject to the approval of the Minister under the Order in Council. Advertisements were then published inviting architects to enter such competition and, assessors having been appointed, conditions were published by them for the guidance of architects in preparing their competitive designs. By these conditions the number of competitors was increased to 6 instead of 5, as provided by the Order in Council, and each of the five unsuccessful competitors who submitted plans was to receive an honorarium of $3,000. Plans were submitted by the suppliants, which were among the 6 sets selected. There was no approval of these plans by the Minister, and there was no competition as to final plans. The buildings were not proceeded with by the Government, owing to the breaking out of war and other reasons. Suppliants claim 1% on an estimated cost of $10,000,000 for buildings constructed on their plans.

HELD: That the Crown was justified under the circumstances in not proceeding with the erection of the buildings; and that even if a contractual relationship existed the delay in proceeding did not constitute a breach thereof.

2. That the approval of the Minister of the plans was a condition precedent to the right of the suppliants to recover even the honorarium of $3,000; and that all the circumstances negatived the existence of a contract between the suppliants and the Crown to pay the percentage claimed.

3. That no action would lie against the Crown on account of the failure of the Minister to approve of the suppliants' plans, the matter being one of executive discretion.

4. As between a reasonable construction of the intention of the parties to a contract and an absurd one, the Court should be zealous to find reasons to adopt the former.

5. That the portion of the conditions prepared by the assessors which purported to change the conditions embodied in the Order in Council were ultra vires and void.

Can.

Ex.

SAXE & ARCHIBALD v. THE KING.

PETITION OF RIGHT seeking to recover $1,200 damages by reason of an alleged breach of contract between suppliants and the Crown.

The facts are stated in the reasons for judgment.

Eugene Lafleur, K.C., T. Rinfret, K.C., and G. Barclay, for suppliants.

F. H. Chrysler, K.C., and P. Chrysler for the Crown.

Audette, J.:—The suppliants, by their petition of right, seek to recover the sum of $100,200 as damages resulting from an alleged breach of contract between themselves and the Crown, under the circumstances hereinafter set forth.

The Crown having realised the desirability and urgent need of additional departmental buildings, in the City of Ottawa, decided, as mentioned in the Order in Council of February 27th, 1912 (Ex. 1), to expropriate on Wellington street for such purposes.

After having obtained the report and plans of landscape architects with respect to laying out the grounds and indicating the position and size of the various buildings, it was decided to call, under the provisions of the Order in Council of April 14, 1913 (Ex. 2), a preliminary competition open to "architects of Great Britain and of her colonies for preliminary designs of the proposed buildings, the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the Minister may prescribe, for which they would be paid each $3,000. Of these latter, the architect submitting the best working plan would be employed to carry out the work as a commission to be arranged."

The Order in Council further proceeds to provide for three assessors to judge the preliminary designs and select the 5 prize winners, who will be asked to prepare working plans from which the most meritorious would be chosen.

The award of the assessors, in both cases, is subject to the approval of the Minister of Public Works, as provided by the latter Order in Council and the conditions hereinafter mentioned.

Advertisements, under the signature of the Secretary of the Department of Public Works, were then issued and published inviting architects to submit sketch designs in a preliminary competition for the erection of departmental and courts buildings. Copies of these advertisements are filed as Exs. 3, 4 and 5, whereby, by the latter, the time for

the reception of the designs in the first competition in question is extended to April 2, 1914.

The assessors then published the "General conditions for the guidance of architects in preparing competition designs," and a copy thereof is filed as Ex. 6, to which reference will be made in respect of several of its provisions.

It is well to lay down as a guiding principle that the assessors had in no case the right to formulate conditions beyond the scope of, or varying, the Order in Council of April 14, 1913, appointing them and defining their powers.

It may be well to state here that whilst the Order in Council provides for the selection of five of the most successful competitors, the conditions (item 6 Ex. 6) provides for six.

Counsel at Bar for the Crown admitted that the figure 6 had been mentioned in the conditions and that he did not intend taking any objection to it. However that may be that admission cannot have reference to any change in the Order in Council, which must be held to be the foundation and only source from which the assessors derived their power and authority. This is to be said with more force, at this juncture, with respect to sec. 6 of the conditions, which is in direct conflict with the Order in Council in respect to the payment to be made to the architects.

Indeed, the Order in Council provides that the five most successful competitors would prepare their preliminary designs and would be entitled to be paid $3,000 each only after completing the working plans prepared after the second competition. Then after this second competition, the best out of the five would be employed to carry out the work at a commission to be arranged. This is clearly stated and yet under clause 6 of the conditions a very material departure from the provisions of the Order in Council is readily found. This clause 6 proceeds by saying that the Government has appointed the assessors "to draw up conditions etc. ..... and to select from the preliminary sketches, six designs, the authors of which are to be invited to submit final designs and each of the five unsuccessful architects submitting a design in accordance with these conditions shall receive an honorarium of $3,000."

This part of the conditions is obviously different from the Order in Council which specifically provides that all the successful competitors should receive a payment of $3,000 for their preliminary designs after supplying the working

Can.

Ex.

SAXE & ARCHIBALD v. THE KING.

plans, and furthermore that the best of them, of the five, would receive his commission over and above the $3,000, thereby creating a liability of $3,000 which did not exist under the Order in Council.

That part which purports to change the terms of the Order in Council is obviously ultra vires, null and void, because the terms of the Order in Council must prevail. The provisions of the conditions varying and changing the remuneration of the successful competitor is void and inoperative, being beyond the power of both the Minister and his assessors. The British American Fish Corp., Ltd., v. The King (1918), 44 D.L.R. 750, 18 Can. Ex. 230; (1919), 52 D.L.R. 689, 59 Can. S.C.R. 651; The King v. Vancouver Lumber Company (1914), 41 D.L.R. 617, 17 Can. Ex. 329; (1919), 50 D.L.R. 6; and Belanger v. The King (1916), 34 D.L.R. 221, 54 Can. S.C.R. 265, 20 Can. Ry. Cas 343.

The extended time within which the sketches might be received expired on April 2, 1914. The 59 preliminary designs were submitted within the allotted time.

As testified to, on April 16, 1914, the Minister of Public Works announced in the House of Commons that the assessors had given their decision in the first competition, while notice thereof was never given to the 6 successful competitors. See also Ex. 11 in that respect.

On April 18, 1914, Archibald, one of the suppliants, saw all of the 59 designs exhibited in the "East Block" at Ottawa. He, at the same time saw the designs of his own firm therein exhibited, notwithstanding that clause 11 of the conditions provided that the designs of the first competitor would "be seen only by the assessors and the Honourable the Minister of Public Works and his Deputy."

While mentioning this inhibition, it might be said I am unable to realise that these successful competitors could be hurt or damaged by this publicity, because what they were to do in the final competition was to submit working plans—more matured plans—from which contractors could work, and that could be done only from the first designs respectively filed by the successful competitors. There is no satisfactory evidence that this public exhibition would work out a disadvantage to the competitors and there is further no evidence of any protest to that step having been taken. I only mention this point casually, because I cannot see that much turns upon it, to indicate that it should not

have been done, since the assessors had undertaken not to do it.

Proceeding chronologically we next find that on July 4, 1914, the Deputy Minister of Public Works informs the assessor, Colcutt, in answer to inquiry, that he "understands the reason instructions were given to hold the matter of the new Departmental buildings competition for the present is that further progress may be made by the Federal Plan Commission.....covering Ottawa and Hull." Then on the 20th July, 1914, Russell, one of the assessors, wrote to the Deputy, and among other things said that some of the "selected designs came from the Old Country, and that might have some bearing on the time for receiving the drawings for the final competition." In reply to that letter, the Deputy wrote, on August 6, 1914, stating that the designs of the 6 successful competitors were never returned for further development by the authors, as instructions were received to hold the matter for the present. Up to that time nothing had been done or said from which it could appear that the Crown did not intend to proceed within reasonable time with the erection of the buildings in question.

The war had then been declared.

Up to date nothing has been done in respect of the second competition, the enormous expenditure occasioned by the war having, for an indefinite time, stayed the execution of these buildings, involving the spending of several millions of dollars.

For want of proceeding with the second competition within reasonable time, the suppliants allege a breach of contract on behalf of the Crown, and claim, under the architect's tariff for the Province of Quebec, where they reside, for preparing and furnishing preliminary plans 1% on the estimated cost of the buildings at $10,000,000—the sum of $100,200.

If the suppliants are entitled to so recover, the other 5 competitors, who are in the same position, would also be entitled to recover upon the same basis. That is to say (see Ex. 11) if the 6 competitors have similar right of action, and that the cost of the building would equally be $10,000,000 and no more, that the total amount the Crown would be called upon to pay, under the advertisement calling for preliminary sketches, is the sum of $601,200 and would not at that have working plans to start the erection

of the buildings in question. Can that be said to be the meaning, the spirit of the contract which resulted from such advertisement? Did that contention ever enter the head of the several contracting parties—if I may call them thus —at the time these 6 competitors accepted the Crown's invitation to compete?

A very large proposition indeed and a very extraordinary contention under the circumstances, which would operate harshly and unfairly.

When there is an offer of reward for the supply of a specific piece of information, the offerer clearly does not mean to pay many times over for the same thing. Anson on Contract, 15th ed., at p. 53, says:—"The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

"To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world."

"While it is true there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends, not so much upon the words used, as upon the nature of the right or thing excepted. In each case the equities of all parties must be considered in arriving at the intent of the deed." Delano v. Luedinghaus (1912), 127 Pac. Rep. 197 at p. 198.

If in the light of the evidence an absurd result would be arrived at by adopting a certain construction, the Court must be zealous to reach another conclusion by a reasonable and sensible construction of the intentions of the parties to the instrument. Yates v. The Queen (1885), 14 Q.B.D., 648.

Under such circumstances the Court is entitled and indeed bound, to look at the whole matter from this point of view that, if there is a reasonable and sensible construction of this alleged contract, and also an absurd one, the Court should lean to the reasonable and sensible construction apart from anything else.

I am glad to say that the solution of the controversy can be readily arrived at from a legal standpoint.

Under the Order in Council, April 14, 1913 (and its provisions must prevail against the conditions prepared by the assessors who derived their power and authority thereunder), all the 5 successful competitors are entitled to recover, as a prize, is $3,000, for their successful preliminary designs, after they have been completed, under the second competition, by working plans.

As a condition precedent to any one of the 5 (or 6—liability be admitted to that extent) successful competitors for the preliminary designs, to become entitled to these $3,000, the award of the assessors "is subject to the approval of the Minister of Public Works," and under the case of Vautelet v. The King (1908), Audett's Ex. C. Prac. 115, it would be a bar to the action, and there is no evidence upon the record that the Minister has ever approved of the award or was ever even asked to do so by the suppliants. Only one of the 5 architects, however, could in the result be selected, and the suppliants cannot succeed because the assessors are not bound to accept their plans. Walbank v. Protestant Hospital for the Insane (1891), M.L.R. 7 Q.B., 166.

As a further condition precedent to any enforceable obligation arising in favour of the architect who submits the best preliminary plans (a matter which still remains undetermined) there must take place a final competition, which has never taken place, and the final plans must also have received the approval of the Minister of Public Works. No one of these two events has as yet happened.

There is still a third condition precedent in the way of the suppliants before they can recover and that is there are now 6 successful competitors; but if in the final competition the suppliants were ranked last, or 6th, they would be out of Court entirely, because the Order in Council only provided for the first five competitors and not six, and the Order in Council must prevail over the conditions, and yet the rank of the suppliants among the candidates has never been determined and there is nothing to shew where the suppliants stand. The assessors have no power to vary the Order in Council.

The conditions under which a right of action might arise do not seem to have so far been fulfilled.

All of these conditions are precedent to the existence to any legal obligation. The Court will not make any agree-

Can.

Ex.

SAXE & ARCHIBALD v. THE KING.

ment for the parties but will ascertain what the agreement was.

The question now remaining to be decided is whether or not under the circumstances, there were reasonable grounds for not proceeding more expeditiously with the matter of the second competition and the erection of the buildings.

The Court has a right to take judicial notice of the great war which has created such an upheaval the world over, coupled with the Deputy Minister's evidence attributing that "all considerable works in Canada at present have been prevented on account of the war."

The rights of the parties upon the terms of the Order in Council and the conditions are not ambiguous. By these terms it is stipulated that such compensation as is sought here is not to be paid until, inter alia, the second competition has taken place and that one of the five is given first rank. It establishes a moment, a time before the arrival of which he cannot ask for compensation and there is no evidence on the record establishing or indicating that the respondent, through any volition of its responsible Minister or officers, has failed to carry out the contract, if any.

The Order in Council and the conditions in question supersede the ordinary rule that the architect has earned his commission when he has prepared the preliminary sketches called for by the said advertisements. Moreover, by clause 12 of the conditions the final designs become the property of the Government, without any further compensation than the $3,000 above referred to.

Coming to the question of impossibility of performance we must first distinguish the question of possibility of performance of a thing promised as a condition precedent to the duty of the promisor. When such performance is legally or physically impossible at the time the promise is made, no duty arises, not even a liability to a duty. In such case the acceptance is an inoperative fact and we should say that no contract is formed. But when the impossibility arises subsequently to the acceptance, the existing liability (or conditional duty) is discharged. Anson, on Contract 427, 428. Pollock on Contracts, 8th ed. 437, 439, 442.

It may be said, en passant, that there can be no order for specific performance against the Crown. Clarke v. The Queen (1886), 1 Can. Ex. 182. And further, as decided in the case of Lake Champlain, etc. v. The King (1916), 16 Can. Ex. 125, affirmed (1916), 35 D.L.R. 670, 54 Can. S.C.R.

461, no action will lie to compel the Crown to approve plans which had, by Parliament been made subject to such approval before works would be started, the matter being discretionary.

Counsel at Bar, on behalf of the Crown, contended in effect that the suppliants had a right, after a reasonable delay of inaction, to free themselves of the obligation resulting from the conditions of the competition, and that the Crown had the right in respect thereto, when the suppliants had done so, to consider the contract, if any enforceable, at an end. The contract would cease and be at an end without any breach and the parties would therefore be discharged from any further performance in respect thereto. He cited Thomas v. The Queen (1874), L.R. 10 Q.B. 31; The Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127 at p. 133; Windsor & Annapolis Ry. Co. v. The Queen (1886), 11 App. Cas. 607; Krell v. Henry, [1903] 2 K.B. 740; Chandler v. Webster, [1904] 1 K.B. 493, at pp. 497, 499, 500; Churchward v. The Queen (1865), L.R. 1 Q.B. 173 at p. 201 et seq; Kelly v. Sherlock (1866), L.R. 1 Q.B. 686 at p. 695; Metropolitan Water Board v. Dick et al, [1917] 2 K.B. 1, 3, 22; [1918] A.C. 119.

All of this contention would seem to be borne by the obvious jurisprudence applicable under the circumstances of this case. The law comes to the rescue of the facts.

Furthermore the Crown sets up the defence that under the Public Works Act and the facts of the case, the Minister has not inter alia, so far the power to proceed with the erection of the buildings. No such authority had ever been given him and that therefore the time for the payment of a commission, as claimed, has never arisen.

While the principles of the English law of contract, which had become so clearly settled during the last century as the result of enlightened judicial decision and scholarly research on the part of text-writers—bringing, may I say, those principles more and more in harmony with the civil law—have been necessarily strained by the extraordinary economic and industrial conditions growing out of the great war of 1914-18, yet it is a matter of gratification to those who have an abiding faith in the stability of the law as a means of safe-guarding the State to recognise that there has been no real unsettlement of or departure from fundamental legal principles in matters of contract.

It has been argued on behalf of the suppliants that an

Can.

Ex.

SAXE & ARCHIBALD v. THE KING.

implied contract on behalf of the Crown must be read, in the documents in question whereby the Crown had to erect these buildings within reasonable time and has failed to do so. Is there not, on the contrary, an implied contract introducing within these documents, some tacit condition in cases when the impossibility of performances arises. The respective ability to perform is a tacit condition which must be read into the contract; because the law implies exceptions and conditions that are not necessarily expressed. A contract like the present for personal services which can only be performed during the lifetime of the party is obviously subject to the implied condition that he shall be alive to perform and his heirs and assigns would not be responsible in damages for the non-performance resulting therefrom. Ergo, logically reasoning in respect of the Crown, under the present contract, circumstances unforeseen to both parties, have arisen that makes it unexpectedly burdensome and even impossible to perform on account of the war and from the delay in performance, justifiable under the circumstances a breach of contract does not arise. The suppliants have a right, after reasonable delay, to be discharged from their obligation of performance, and that the contract be declared at an end and to be taken as having ceased to be operative as between the parties thereto with respect to further steps thereunder—if they see fit. And neither the suppliants nor the Crown can force the execution of their respective obligations under the present conditions and circumstances. The contract ceases to exist as between them.

I find that the Crown was and is absolutely justified in not proceeding to the erection of the buildings in question, a construction which would involve an expenditure of several millions of dollars when our Canadian Exchequer is now overburdened with the debts occasioned by the late iniquitous war. These circumstances operate as an impossibility of performance and I so find under the numerous authorities cited herein and that the suppliants are only entitled to recover the sum of $3,000 offered them by the Crown's statement in defence.

The conditions of trade and finance have been so much altered by the war and its results that it must be found that the Crown did not act unreasonably in delaying the erection of the buildings in question—it is an urgent national necessity to delay such work. North Metropolitan

Electric Power Supply Co. v. Stoke Newington Corp., [1921] 1 Ch. 455; Crown of Leon v. Lords Commissioners of the Admiralty, [1921] 1 K.B. 595; See Metropolitan Water Board v. Dick, etc., [1918] A.C. 119; Bank Line, Ltd. v. Arthur Capel & Co., [1919] A.C. 435; Smith, etc. v. Becker et al, [1916] 2 Ch. 86; Blackburn Bobbins Co., Ltd. v. Allan & Sons, [1918] 2 K.B. 467, and cases above cited.

Under articles 1071 and 1072 C.C.P. (Que.) (Dorais & Dorais) a debtor is excused of liability when the inexecution of an obligation proceeds from a cause which cannot be imputed to him or which is the result of a fortuitous event or by irresistible force without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract. The non-fulfilment of the conditions and Order in Council has not been caused by the act of the Crown.

The plea of prescription has been waived by the Crown, as will appear by the Order in Council of April 2, 1919, filed herein as Ex. C; however, it also appears from Ex. 14, that the petition of right was lodged with the Secretary of State, as provided by sec. 4 of the Petition of Right Act, R.S.C. 1906, ch. 142, during the month of May, 1916. It was time and again held by this Court that the lodging of the petition of right, pursuant to the requirement of the Petition of Right Act interrupted prescription from that date.

The suppliants are not entitled to any portion of the relief sought by their petition of right; but through the benevolence of the Crown expressing its willingness to pay them $3,000, there will be judgment accordingly. The Crown obviously succeeds on the issue whereby the petition of right claims $100,200 and the suppliants recover these $3,000, which are almost equal to a solatium under the circumstances.

The offer to pay $3,000, which is the amount the successful competitors in the first competition are all entitled to receive after they have supplied working plans under the second competition—is made by the statement in defence and it should carry costs to the suppliants up to that stage of the case.

Therefore, there will be judgment adjudging that the suppliants are entitled to recover the said sum of $3,000,

Alta.

S.C.

NORTH AMERICAN LIFE ASSURANCE CO. v. SILVERS LTD.

with costs up to the stage of filing defence. All other claims set up by the suppliants are dismissed without costs to either party.

Judgment accordingly.

NORTH AMERICAN LIFE ASSURANCE CO. v. SILVER'S LIMITED.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 15, 1921.

Bills and Notes (§VB.—138).—Trading Company—Note for Personal Benefit Signed by Director Without Authority—Liability of Company—Bills of Exchange Act R.S.C. 1906, ch. 119, sec. 51—Notice of Putting on Enquiry—Validity.

Where it is not the business of a company to issue promissory notes the issue of which is merely one of its powers in connection with the carrying on of its business, the company is not, under sec. 51 of the Bills of Exchange Act R.S.C. 1906, ch. 119, bound by a promissory note signed by one of its directors by procuration without actual authority and given for his own personal benefit and a claim filed in liquidation proceedings by an insurance company, the holder in due course will be disallowed, the signature operating as notice of the limited authority of the person signing.

[Bryant v. Quebec Bank, [1893] A.C. 179, distinguished.]

APPEAL by liquidator from an order of a Judge in Chambers allowing a claim filed in the liquidation proceedings, which had been disallowed by the Master in Chambers. Reversed.

W. C. Fisher, for appellant; G. Ross, K.C. for respondent.

The judgment of the Court was delivered by

Stuart, J.:—This is an appeal by the liquidator of Silver's Limited from an order of a Judge in Chambers allowing a claim filed in the liquidation proceedings by the North American Life Assce. Co., but which claim had been disallowed by the Master in Chambers.

The claim was upon a promissory note dated April 12th, 1920, for $505.55, payable to the order of B. Friedman and endorsed to the claimant. The note was signed thus, "Silver's Limited, per H. Silver," and after the usual words "for value received" there was written on the note the words "for life insurance for H. Silver."

The company was incorporated under the Companies' Ordinance in January, 1919. From the Memorandum of Association it appears that the company had very wide objects, including the conduct of many different kinds of business. Clause 22 of the Memorandum of Association gave as one object this: "To establish and support or aid in

the establishment and support of associations, institutions or conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons and to grant pensions and allowances and to make payment for insurance and to" (the rest of the clause is not material). It was stated in argument and not questioned that the only business the company had ever really entered upon was that of retail dealers in ladies' wear, but there was no evidence given at all as to how many of the varied objects of the company were in fact pursued. There were only four shareholders, viz., Morris Rosen and his wife Annie Rosen, and Harry Silver and his wife Rebecca Silver. M. Rosen and his wife A. Rosen and H. Silver were the three directors.

Friedman was an agent for the North American Life Co. and was engaged in soliciting insurance for that company. He had canvassed Harry Silver frequently for insurance and finally secured an application from him for a policy for $10,000 upon which the first premium was $505.55. Friedman stated that Silver had promised to pay cash but that after a while he came and asked if he would be satisfied if he gave him a note, to which he, Friedman, had replied that "a confirmed note would be all right." He stated that Silver had told him that he had to consult the partners or shareholders or as he put it at another place, that he "had to ask the secretary or treasurer or some shareholder," in connection with it, and at last he said it was O.K. and that he asked the girl or stenographer working in the office of Silver's Limited to make out the note, which she did and he signed it. He stated that he, Friedman, paid the company the cash for the premium himself and, therefore, took the note in his own name but that some time afterwards he discounted the note with the company and got an advance of cash from the company upon it.

Robinson, the local manager of the insurance company, stated that Friedman always paid cash for the policies issued to his applicants within 30 days of the issue of the policy, that the branch office had to report to head office in Toronto the receipt of cash for the first premium on every policy issued through his branch office within 30 days, and that it was within a week before May 29 that Friedman had made the payment. The form in which the money was received was not stated but in view of the positive statement of the witness as to which he was not cross-examined

Alta.

S.C.

NORTH AMERICAN LIFE ASSURANCE CO. v. SILVERS LTD.

in detail, it would appear to be probably improper to entertain any suspicion that there was nothing more than a mere charge of the amount against Friedman in the latter's account on the company's books. Robinson also stated, and the cheque shews, that it was on May 12 that the company made the advance of $500 by cheque to Friedman, that is, just 30 days after the note was received by Friedman from Silver. But he stated that it was an actual loan made because Friedman wanted to buy a car and the money went into the car. The cheque bears the endorsements "B. Friedman" and "Bank of Hamilton," so that it furnishes no evidence as to how it was applied and Friedman himself made no reference to the actual purchase of a car. Robinson denied that the transaction was a mere means of advancing Friedman the money with which to pay the premium. He stated also that this was the first time the company had ever made any advance to Friedman in this way, but that from that time forward they had advanced him considerable sums in the same way on the collateral security of premium notes. He denied any knowledge of any illegality in the note when he took it but said that he noticed both how it was signed and that it bore the words "for life insurance for H. Silver."

The directors of the company had on February 6, 1919, passed a resolution providing that "Harry Silver, manager, be and are (sic) hereby authorised for and in the name of company to draw, accept, sign, make and agree to pay all or any bills of exchange, promissory notes, cheques and orders for the payment of money, to pay and receive all monies, to give acquittances for the same, to give special or general waivers of presentment, protest and notice of dishonor."

M. Rosen, one of the other two directors, testified that he had never seen the note until it was shewn him in Court, that there was never any meeting of the directors in which the note was referred to, that Silver never consulted him about the giving of the note, that he never knew of its existence until shortly before Silver went to Europe and that the company had never in fact given any note at all in connection with its business. Mrs. Rosen, the other director, was not called, but M. Rosen, her husband, stated that she had never been at any meeting of directors with Silver alone, which statement may be taken for what it is worth. In any case the minute book of the company, which

was put in, shews no reference to any decision or even discussion of the note in question.

In my opinion it is not necessary to question or enquire into the bona fides of the assurance company with respect to the matter of the loan. I think the case may be properly decided without regard to that and in any case there seems no substantial ground as the evidence stands for questioning the assurance company's good faith.

Section 51 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, says:—"A signature by procuration operates as notice that the agent has but a limited authority to sign and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority."

The important question therefore is whether Silver had power to sign the note on behalf of the company. In such a case there is the possibility of several antecedent questions. There is no doubt that the company had power to issue promissory notes. This is given (or taken) in the Memorandum of Association, art. 30. Next comes the question as to how this power is to be exercised by the company. The company filed special articles of association which expressly excluded a number of the provisions of Table A of the first schedule to the companies' ordinances, adopted the remainder and added some special articles thereto.

Article 55 of the articles retained in Table A says "The business of the company shall be managed by the directors who x x x may exercise all such powers of the company as are not by the foregoing ordinance or by these articles required to be exercised in general meeting x x x".

Article 68 says "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit."

In my opinion it was not the "business" of the company to issue promissory notes and bills of exchange, that is, it was not one of its "objects" but rather merely one of its "powers" in the carrying out of its "objects". The distinction between "objects" and "powers" is well recognised. See Stiebel's Company Law, 2nd ed. p. 61. The passage referred to shews that the power to issue promissory notes being obviously consistent with and reasonably conducive to the furtherance of the main objects of the company, and being expressly given in the memorandum would

Alta.

S.C.

NORTH AMERICAN LIFE ASSURANCE CO. v. SILVERS LTD.

be valid and might possibly be so clearly necessary as to be implied, even if not expressly given. The latter would depend upon a detailed examination of the main objects. In any case the power is expressly mentioned in the memorandum. But it seems to me to be clear that it is a mere power and not an "object" or the "business" of the company and that, therefore, under art. 55, it was only in conducting the business of the company that even the whole three directors-together, had power to sign or to delegate the power to sign a promissory note on behalf or in the name of the company.

Then the question arises, was the signature of the note, even if it had been signed by all the directors, and particularly when it was signed by one under the authority of the resolution of February 6, 1919, above quoted, within the scope of the business or objects of the company which the directors were authorised to carry on? Certainly the resolution could give Silver no greater authority than the directors themselves possessed as a body.

Even clause 22 of the memorandum relating to associations of employees should not in my opinion be considered as one of the "objects" of the company. It is, strictly speaking, merely one of its powers. Like the clause giving power to sign negotiable instruments, it simply gives power to the company when pursuing its main objects, that is the business out of which it expects to make profits (it being a trading concern) to do things which may be essential or beneficial or conducive to the success of the enterprise. The clause fairly read quite obviously was intended to give the company power to embark on a scheme of employees' benefits in the way of encouraging benevolent associations among them or in carrying life insurance for them in some way. But doing this would undoubtedly not be the ordinary business of the company.

There is not the slightest indication in the oral testimony that the company ever considered or thought of any such scheme as a practical reality. The minutes of the directors' meetings contain no reference to any such scheme having been undertaken. The company was in actuality a small one, although its objects as expressed in the memorandum were rather grandiose. I think it quite proper to assume as a fact therefore, that no such project was ever undertaken. And it would clearly be only a general plan or scheme applicable to employees generally that

the company was empowered to carry out and not an isolated case of one policy of insurance upon the life of one director, even though he was in the circumstances an employee within the meaning of clause 22. In my opinion, therefore, the signing of the promissory note to pay the premium on the policy on the life of Silver for Silver's own personal benefit, without any benefit, or interest of the company in it, was, on the facts of this case, beyond the powers of even the directors themselves. A fortiori it was signed by Silver without authority. Certainly the power delegated to him should be confined to matters occurring in the conduct of the ordinary business of the company as the scope of that business had been fixed at least by the directors if not perhaps by the shareholders in general meeting.

The company was, therefore, under sec. 51 of the Bills of Exchange Act, not bound by the note unless some special interpretation is to be placed upon the words "actual authority" as used therein.

In the case of Bryan, Powis and Bryant v. Quebec Bank, [1893] A.C. 170 at p. 180, the Judicial Committee referring to a power of attorney there in question said "That instrument in terms authorizes the attorney to indorse bills of exchange. Their Lordships agree with Andrews, J., that the fact that Davies abused the authority and betrayed his trust cannot affect bona fide holders for value of negotiable instruments indorsed by him apparently in accordance with his authority." They quoted with approval a passage from an American case which reads as follows:— "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to enquire into facts aliunde. The apparent authority is the real authority."

Section 51 is discussed by Russel, J., in his work on the Bills of Exchange Act. At p. 185 he says:. "If the agent is acting within the scope of his apparent authority the fact that he has exceeded his actual authority does not prejudice the party who deals with him. This is contrary to the literal terms of the section because it says that the principal is bound only if the agent is acting within the actual limits of his authority; but we must understand

Alta.

S.C.

NORTH AMERICAN LIFE ASSURANCE CO. v. SILVERS LTD.

that this phrase means the actual limits of the authority apparently conferred. The principal cannot hold out the agent as having authority to do an act and bind those who deal with the agent by secret instructions contrary to the apparent authority. In one sense the secret instructions constitute the actual authority of the agent but that is not the sense in which the words are used." And he quotes Bryant v. Quebec Bank, supra, as affirming this view. That case is chiefly relied upon by the respondent in support of its contention that the company is liable.

But it seems to me that there is a clear distinction to be made. In Bryant v. Quebec Bank the bank dealt directly with the agent Davies. In the passage from the American case which the Judicial Committee adopted as its own, the expression is used "all persons dealing in good faith with the agent". And Russel, J. in interpreting the decision on the passage quoted from his book uses practically the same language. In the present case, however, the North American Life Assce. Co. had no dealings whatever with the agent Silver except, as I have said, through their own agent Friedman, when the policy was obtained. In regard to their discounting of the note they had no dealings with Silver at all. When it is said that "the apparent authority is the real authority" the enquiry naturally arises as to what is meant by the term "apparent". Apparent to whom? Are we not bound to ask here the question what was "apparent" to the assurance company? Was there anything apparent to them which misled them? If so, what was it?

In Bryant v. Quebec Bank the bank had been the bankers of the company of which Davies was the agent, although they were not such at the time the bills were discounted. But it seems to me to be clear from the report of the case and from the language of the Court that it was assumed that the bank acted on the faith of the terms of a power of attorney whose terms were known to them. But what is the position in the present case? The assurance company were not Silver's Limited's bankers. There is no evidence that they or their endorser Friedman had ever had any reason to examine the directors' resolution of February 6, 1919, or of the Memorandum of Association, or that they or he ever in fact did so. How then can it be said that they acted upon the faith of the terms of those documents or were misled by them? Those terms were never in fact in any sense "apparent" to them. Moreover, this is not a

case of secret instructions cutting down the power appearing on the face of a power of attorney as suggested by Russel, J., It is the case of a power given to be exercised obviously in the course of and for the purposes of the business of the company and yet used for a purpose extraneous altogether.

And not only was there nothing "apparent" to the assurance company which could mislead them but there are two important circumstances which should have had a contrary effect and should have been a warning to them. First their own agent Friedman had been told that the directors had to be consulted and actually took Silver's own word for it that they had approved. I think it was his duty to communicate this to his principals and that, therefore, they must be held to have had notice of the facts that consultation with the directors was necessary and that the only evidence of their approval was Silver's mere word. Secondly the note itself informed them that here was a limited company giving a note to pay the premium on a policy on the life of an individual. This was a grave warning which they disregarded. It clearly puts them upon enquiry and they made none whatever.

It is true that the assurance company were holders for value but sec. 51 makes no exception in favor of holders for value. Indeed that section may have a more stringent effect in practice against holders for value than against payees, for the former are less likely to have any dealings with the agent signing the instrument who may be held out as having "apparent" authority. I am here however not considering a case where the payee, the endorser, had some authority made apparent to him.

In Bank of Bengal v. MacLeod (1849), 5 Moo. P.C. 1, 18 E.R. 795, the bank actually examined the power of attorney and acted on the faith of it and it was, I think, for this reason that, being defendants in an action of detinue, the Judicial Committee dismissed the action against them.

In Re Contract Corporation (1869), L.R. 8 Eq. 14, the case was one of a sale and purchase of goods and the provisions of the Bills of Exchange Act had no application.

For these reasons I think the appeal should be allowed with costs, and the order of the Master restored. The appellants should have also all costs below.

Appeal allowed.

Man.

POPLE v. DAUPHIN.

POPLE v. DAUPHIN.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. May 10, 1921.

Duress (§I.—1)—Money Paid Under Protest—Threat of Seizure of Chattels if Not Paid—Finding of Court That Money Not Collectable—Recovery Back.

A tax paid under protest to a town municipality by an importer of mules, as a result of a notice served on him by the bailiff of the town, and a threat to seize the animals if the tax is not paid, the arrangements for the sale having been completed at the time the notice was served, is not paid voluntarily and may be recovered back upon the Court deciding that the by-law under which it was collected did not apply to mules but only to horses.

[North v. Walthamstow (1898), 67 L.J. (Q.B.) 972, 62 J.P. 836; Haedick v. Friern-Barnet, [1904] 2 K.B. 807 applied; Ellis v. Bromley (1899), 81 L.T. 224, 63 J.P. 711; Cushen v. The City of Hamilton (1902), 4 O.L.R., distinguished.]

APPEAL by plaintiff from the trial judgment in an action brought to recover back money paid to a town municipality as a result of a threat by the bailiff to seize certain mules brought into the town for sale if such money were not paid. Reversed. Money ordered to be refunded.

C. D. Bates, for appellant.

F. M. Burbidge, K.C., for respondent.

Perdue, C.J.M., concurs in allowing the appeal.

Cameron, J.A.:—In the written admissions put in at the trial we find the following:—

1. That on or about the first day of May, A.D. 1920, the plaintiff brought into the Town of Dauphin, in the Province of Manitoba, for the purpose of sale therein, twenty mules, the property of the plaintiff.

2. That on the first day of May, A.D. 1920, the defendant, by its agent or bailiff, one John Tidsbury, served on the plaintiff the following notice in writing:—

"Dauphin, Man., 1st May, 1920.

To Thomas Pople,
and Daniel Hamilton, his agents.

You are hereby required to pay forthwith to the Town of Dauphin a tax of $5.00 per head for all horses brought by you, the said Thomas Pople, into the Town of Dauphin for the purpose of sale, trade or barter (not exceeding in all the sum of $100.00), and you will take notice that in default of payment forthwith of the said tax, I will proceed to distrain the said horses for the said tax, and will sell the said horses under the provisions of the Distress Act so as to

realise the said tax and the costs of the said distress and sale.

(Sgd.) John Tidsbury,
Bailiff of the Town of Dauphin."

And that at the time of such service the said Tidsbury, acting as such agent or bailiff of the defendant, informed the plaintiff that he would seize the said mules, which he asserted were covered by the word "horse," as set out in the said notice, and in by-law No. 576 of the defendant, and would make a distress of the same for the purpose of collecting for the defendant the alleged tax of five dollars ($5.00) on each of the said mules, or one hundred dollars ($100.00) in all, and the costs of the said distress, unless the plaintiff paid to the said Tidsbury, as such agent, or bailiff, the sum of one hundred dollars ($100.00), being the amount of the tax.

4. That the plaintiff, to avoid such distress, threatened to be levied as above mentioned, paid to the said John Tidsbury, as such agent or bailiff, the sum of one hundred dollars ($100.00), and that the said John Tidsbury as such agent or bailiff, gave to the plaintiff receipt for the payment of the said sum of one hundred dollars ($100.00) in the following words and figures:—

"1 May, 1920.

Received from Thos. Pople the sum of one hundred dollars, being $5.00 per head tax on twenty mules brought to Dauphin for sale and under protest.

(Sgd.) John Tidsbury,
Bailiff for the Town of Dauphin."

And that the said payment of one hundred dollars ($100.00) so made by the plaintiff was made under protest, and in order that an auction sale of the said mules, which the plaintiff had arranged to be held on the first day of May, A.D. 1920, could be had.

On the argument it was contended that the payment of $100 made in this state of facts was voluntary, and that the same cannot be recovered.

The rule of law on the subject is thus set forth in 7 Hals. 477-8, para. 973:—

"A person who voluntarily pays a sum of money on another person's demand cannot claim a return thereof from the person to whom payment was made as money had and received to his use, for, since he might have resisted the demand, the payment must be taken to have been voluntary;

Man.

C.A.

POPLE
v.
DAUPHIN.

but, if the payment is made under duress or some other form of compulsion other than legal compulsion, it is not deemed to be a voluntary payment, and the amount may be recovered back in this form of action.

"A payment is not considered voluntary when made under threat of a penal action, or of an execution, even though no execution could lawfully issue, nor when illegally demanded and paid under colour of an Act of Parliament or of an office, or under an arbitrator's award which is ultra vires, nor when one party is in a position to dictate terms to the other; nor is a payment considered voluntary merely because the person making it has not waited to be sued or has been allowed time for payment. There may be 'practical' as well as 'actual legal' compulsion."

The above observation that there may be "practical" as well as "actual legal compulsion" is based on the judgment of Channell, J., in North v. Walthamstow, etc. (1898), 67 L.J. (Q.B.) 972, at p. 974, 62 J.P. 836, where he points out that where there is the necessity of a party acting at once, "less must be considered to amount to such compulsion as to prevent a man from being a mere volunteer than would be considered so to do in other cases." He deals with the subject at some length, and says further at pp. 975, 976: "So that it is not actual, or complete, or irresistible compulsion, as I may call it, which is necessary to bring the case within the doctrine." In Ellis v. Bromley, etc. (1899), 81 L.T. 224, 63 J.P. 711, Ridley, J., distinguished the case before him from that before Channell, J., but he accepted as a correct view of the law the statement that where there was a necessity of acting at once, less must be considered to amount to such compulsion to prevent a man being a mere volunteer than in other cases. In Haedick v. Friern Barnet, etc., [1904] 2 K.B. 807, Channell, J., followed his decision in the Walthamstow case. His judgment was overruled in appeal, [1905] 1 K.B. 110, but not this point. It is to be noted that in the Walthamstow case non-compliance with the notice in question would not have entailed a penalty.

In Cushen v. The City of Hamilton (1902), 4 O.L.R. 265, the plaintiff, a butcher, after paying a fee for a license under a by-law for two years, refused to take out his license the third year, and in the proceedings that followed the by-law was declared invalid, and he brought an action to recover the fees paid by him and others. It was held that the fees having been paid by him with full knowledge of the facts,

under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers or compulsion exercised upon them, could not be recovered back. Osler, J.A., in the Court of Appeal at pp. 266, 267 cites from Pollock on Contracts, 6th ed., p. 579: "The common principle is that if a man chooses to give away his money, or take his chance whether he is doing so or not, he cannot afterwards change his mind. But it is open to him to shew that he supposed the facts to be otherwise or that he really had no choice." He cites numerous authorities, including Radich v. Hutchins (1877), 95 U.S. Rep. 210. He reaches his conclusion in these words, at p. 269:—

"The right of the municipality to receive the license fee and the obligation of the plaintiff and others to take out the license depended upon the validity of the by-law, and were enforceable by means only of a legal proceeding. There was no power to enforce the by-law by distress or other interference with the plaintiff's business. The only consequence of his refusal to take out a license and pay the fee, was that a summary prosecution before a magistrate might have been instituted in which the validity of the by-law might have been tested. The fact that the payments were made in compliance with the supposed obligation of the by-law seems to me to make no difference, because it was open to the plaintiff to have questioned its validity on the occasion of the first demand, as he successfully did on the last. Nor can it alter the case that the proceedings against him were of a quasi criminal instead of a civil nature. The point is that the defendants had no power to enforce the by-law except by resorting to judicial proceedings of some kind, in which it was open to the plaintiff to resist his liability as effectually as if he were being sued for a debt. His right to succeed in this action does not depend upon his having successfully resisted the defendants' last demand, for if he has the right to sue at all he might have done so on the very day he made any of the payments he now seeks to recover."

Plainly this case differs from the above, as there was held out here a power to enforce the by-law by distress. There was also a threat of serious interference with the plaintiff's business, and as the notice was given him on the very day his sale was to take place, that interference was imminent and demanded immediate action on his part. If he had been merely threatened with summary prosecution before a

Man.

C.A.

POPLE
v.
DAUPHIN.

magistrate the situation would have been different. The plaintiff could then have disputed his liability, but the threat of distress, with the serious inconvenience and loss that would be caused him by a seizure of the mules and by the disarrangement of his plans for the sale and otherwise really left him no option except to pay the amount demanded, reserving his rights to recover same. In my opinion this was not a voluntary payment but a payment made under compulsion. There was certainly such compulsion as to prevent considering him a mere volunteer.

I refer also to 30 Cyc., p. 1308.

In reference to the other matters raised on this appeal I agree with Fullerton, J.A., and would allow the appeal.

Fullerton, J.A.:—The formal admissions filed at the trial shew that the plaintiff on or about May 1, 1920, brought into the town of Dauphin for the purpose of sale therein 20 mules, that on said date the defendant demanded from the plaintiff the payment of a tax of $5 per head, and in default of payment notified the plaintiff that it would distrain and sell the same, "that the plaintiff to avoid such distress, threatened to be levied as above-mentioned paid" the sum of $100, and the said payment "was made under protest and in order that an auction sale of the said mules, which the plaintiff had arranged to be held on the first day of May, 1920, could be had." The action is brought to recover the said sum of $100.

The demand was made under sec. 4 of by-law No. 576, which provides that every transient trader shall pay to the secretary-treasurer a tax of 5 dollars per head on all horses brought into the town of Dauphin for the purpose of sale, trade or barter. Section 5 makes the tax payable forthwith as soon as the horses are brought into the said town of Dauphin, and provides that in default of payment the amount may be realised by distress and sale of the horses.

The County Court Judge gave judgment for the defendant, taking the view that the word "horses" as used in sec. 4 of the by-law includes "mules." I cannot so construe the word. It would hardly be contended that a contract to deliver a number of horses could be satisfied by a delivery of that number of mules. The same canons of construction are applicable alike to contracts and statutes.

Mr. Burbidge, on behalf of the defendant, pointed out that under sec. 8 of the by-law a transient trader who offers goods or merchandise of any description for sale by auction

is obliged, before commencing to trade, sell or offer to sell, to obtain a license to do business as a transient trader. He urged that if the appellant was not liable under sec. 4, he clearly was obliged to take a license under sec. 8, for which he would have had to pay $200.

That may be perfectly true, but I fail to see how it can help the defendant here. The only remedy provided for failure to take out such a license is a prosecution for a breach of the by-law, in which a conviction may be made for a penalty not exceeding $50.

It was further contended that the payment made by the plaintiff was voluntary, and for that reason could not be recovered. It is true that the power to distrain and sell contained in the by-law is unauthorised by any statute, and consequently is ineffective. Nevertheless I think under the facts in this case the payment was made under duress or unlawful compulsion.

I would allow the appeal with costs and enter judgment for the plaintiff for $100 and costs of the trial.

Dennistoun, J.A., concurs.

Appeal allowed.

DALY v. BRENNAND ET AL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 18, 1921.

Action (§I.B—5)—In Damages or Tort—Removal of Building on Land Purchased Under Agreement—Sale of Injured Party's Interest in the Land Before Action.

The assignment by a plaintiff of his interest in land which he had purchased under an agreement does not preclude him from bringing an action for damages or tort for the wrongful removal of a building from the land, the building having been removed at the time of the assignment and value of the interest assigned having been reduced by the value of the building.

Assignment (§III.—32)—Purchase of Land by Husband and Wife Jointly—Resale—Assignment of Wife's Interest to Husband—Wrongful Removal of Buildings by Purchaser—Validity of—Chose in Action.

The act of a purchaser of land under an agreement in removing the buildings therefrom which he has covenanted in his agreement not to remove is a tort, with respect to the property interest, but it is also a breach of the contract and raises an implied contract to pay the value of the property taken, and although in its aspect as tort an assignment from the wife of the owner from whom he bought to her husband of her interest in the land, she being a joint owner with him might be questionable, in its aspect as a contract, it is valid.

[See Annotation, Equitable Assignments of Choses in Action, 10 D.L.R. 277.]

Alta.

S.C.

DALY
v.
BRENNAND.

Moratorium (§I.—2)—Soldiers' Relief Act 1916 Alta. Stats., ch. 6 (Amended ch. 25 of 1918)—Application—Sale of Land—Purchaser Within Act—Breach of Covenant not to Remove Buildings.

A cause of action based on an implied contract by a purchaser not to remove buildings on the land purchased under an agreement, is within sec. 3 (1) of the Soldiers' Relief Act 1916, Alta. Stats., ch. 6 (amended ch. 25 of 1918), the purchaser being a person for whose benefit the Act was passed.

[Review of Act and Authorities.]

APPEAL by plaintiff from a judgment of Scott, J., dismissing an action for the wrongful removal of a building from land sold to the defendant. New trial ordered.

A. Stuart, K.C., for plaintiff;

F. C. Jamieson, K.C. for defendants, Busineus and Bloden.

S. W. Field for defendant, Edmonton Portland Cement Co.

W. A. Wells for Brennand.

Harvey, C.J.:—This is an appeal by the plaintiff from a judgment of Scott, J., dismissing his action at the close of his case.

The plaintiff and his wife were the purchasers under agreement of sale of a quarter section of land which they sold under agreement to the defendant Brennand.

Under both agreements the purchaser was entitled to possession. There were certain buildings on the land, one of these the defendant moved to an adjoining quarter section which he occupied and the others he tore down and removed. Before November, 1913, the plaintiff learned of this but made no objection, his counsel stating that he considered it unimportant as he then thought defendant was a man of large means, which has subsequently proved not to be the case. Some time subsequently the plaintiff's wife assigned to him her interest in the land but not in the buildings theretofore removed. Later the plaintiff assigned all his interest in the land to one Logan.

The statement of claim alleges that defendant Brennand sold the quarter section to which the buildings were removed to one Busineus, who in turn sold one of the buildings to a brother who was about to remove it.

The statement of claim asks for: 1. Payment by Brennand of $3,000, the value of the buildings removed. 2. A lien on the quarter section to which the buildings were removed. 3. An injunction restraining the second Busineus from removing the building. 4. An order attaching the balance of the money owing by the two Busineus's on account of the purchase of the quarter section, costs, &c.

The action was begun in March, 1920. The defendants

set up the Statute of Limitations Ord. Alta., 1911, ch. 31, and waiver or estoppel. The reply to the defence of the Statute of Limitations sets up that the defendant was a soldier in the Canadian Expeditionary Force in military service overseas from August, 1914, until the close of the war and that the Statute of Limitations did not run against the plaintiff.

In my opinion the defendants are entitled to succeed on the defence of the Statute of Limitations. It is not questioned by plaintiff's counsel that if the Soldiers' Relief Act, 6 Geo. V. 1916 (Alta), ch. 6, does not protect him the statute would be a bar and I therefore do not consider it further than to say that I consider he is quite right, for the statement of claim shews distinctly that the claim is expressly for damages for the waste and for recovery of the buildings removed, and not even for money had and received. Even if the action were for breach of the agreement not to remove the buildings it would still have the same limitation of 6 years, for it would not be an action to enforce a covenant but one for damages for breach of a negative covenant.

The Soldiers' Relief Act, which is recited as being passed "for the protection of the property and interests of such persons as are by the Act declared to be volunteers and reservists," prohibits certain actions being brought against soldiers in service and sec. 6 provides that "The running of all statutes of limitations of actions or proceedings in favour of all persons for whose benefit this Act is passed is hereby suspended during such period as any such person is entitled to the protection afforded by this Act."

Plaintiff's counsel says he was prohibited by the Act from bringing the ordinary action on the agreement but that this action is not within the prohibition of the Act. The defendant's counsel do not question the correctness of this view. If it were not so, of course, the action could not be maintained at all because when it was begun the defendant Brennand was a soldier within the protection of the Act. None of the other defendants are affected one way or the other by the Act.

Quite clearly, as the recital shews, the Act is to protect soldiers and it would be a complete subversal of the purpose of the Act to make it extend the period of limitation so as to make him liable for a longer period than if there had been no such Act. Persons to whom he is liable, however, are not to lose their rights by reason of the protection

Alta.

S.C.

DALY
v.
BRENNAND.

against action given to him, and to meet both cases the right of action against him is suspended and while so suspended the running of the time under the statutes of limitation is suspended.

In my opinion the section goes no further.

If the defendant was not entitled to protection against this action by the Act as the plaintiff contends he was not, then there was no period during which he was entitled to protection as far as this action is concerned and therefore no suspension of the running of the statute of limitations, for the Act declares the suspension to be only "during such period as any such person is entitled to the protection afforded by this Act."

It is contended that because the plaintiff was also a soldier for a year that time is to be excluded. The section, however, has nothing to do with the running of time against plaintiffs but only with its running against defendants. It is a little difficult to see, moreover, why the plaintiff needs any such protection. He was not away when the cause of action accrued nor for some time before the period of limitation expired. The reason for not bringing the action apparently was because he thought he was amply protected by the defendant's personal liability. I feel the less regret at reaching this conclusion from the fact that the plaintiff with a full knowledge of his rights, allowed all the defendants to deal with the buildings for years as if he claimed no interest in them and accepted payments on the agreement without objection to their removal. This itself might be a sufficient defence even without the statute.

The other grounds of defence also I do not consider.

I would dismiss the appeal with costs.

Stuart, J.:—I agree in the main with the views of my brother Beck. The action is, I think, in essence an action for tort, as the defendants claim, but I think sec. 6 of the Soldiers' Relief Act prevents the Statute of Limitations running against the plaintiff. There is no legal ground for refusing to give the section its ordinary grammatical meaning. I do not think it can be said that the Act was passed for the relief and protection merely of soldiers who had the actions referred to in sec. 3 actually commenced against them because the latter section forbids such actions altogether and upon that interpretation, if the statute were obeyed, as we must presume it would be, there would be no person in the suggested category. Nor can we speak of soldiers who were liable to have such actions brought

against them as the means of describing the person intended by sec. 6 because any one is liable in one sense to have any action brought against him, and if sound legal liability to an action were intended then we should have to try the hypothetical action to find out whether the liability existed. Clearly the ordinary grammatical construction is the only one possible. The simple fact is that the statute was passed as the preamble says for the benefit of "soldiers" as defined in sec. 3 as amended in 1918. And when sec. 6 says that "The running of all statutes of limitations of actions or proceedings in favour of ["soldiers," as so defined] is suspended," I am unable to see what right the Court has to cut down the plain English of that language and amend it so as to make it say all statutes of limitations of such actions as are referred to in sec. 3 hereof. It is the old distinction between what the Legislature probably meant to say and what it meant by what it actually said. The latter, not the former, is what the Court must ascertain.

There seems indeed, as my brother Beck suggests, to be very reasonable grounds even for the possibility of the wider intention in the Legislature. As to the adoption of the grammatical construction, see Abel v. Lee (1871), L.R. 6 C.P. 365 at p. 371; The Queen v. Mansel Jones (1889), 23 Q.B.D. 29 at p. 32, per Lord Coleridge; Nuth v. Tamplin (1881), 8 Q.B.D. 247 at p. 253, per Jessel, M.R.; Crawford v. Spooner (1846), 6 Moo. P.C. 9, 13 E.R. 582; Gwynne v. Burnell (1840), 7 Cl. & Fin. 572 at p. 696, 7 E.R. 1188; and Craies' Statutory Law, 2nd sd. pp. 72-101.

I am unable to see how the legal right of action was ever lost by mere acquiescence. The contrary view seems to me to insist on a man starting his quarrel promptly. In an action of tort, laches is only a bar by virtue of statute law, which I think is here nonexistent. And I see no cause to criticise the plaintiff in the circumstances for waiting for payment under the covenant, hoping that he would get it, or when that hope failed and he cannot yet sue on the covenant owing to a statutory protection, for resolving to lay his hands, if possible, upon the proceeds of the buildings, i.e., of property that had apparently been wrongfully taken away from him by the specially protected defendant.

I think the appeal should be allowed with costs and a new trial ordered, but as the plaintiff was possibly wrong in not joining his wife, I would let the trial Judge deal with the costs of the first trial as ordinary costs in the cause.

Alta.

S.C.

DALY v. BRENNAND.

Beck, J.:—Sagert owned N.E. ¼ section 34-51-R.24 W. 4 M.

He sold this land to the plaintiff Daly and his wife for $10,000 under an agreement. $3,000 was paid down. They afterwards paid a further sum of $2,455.

The Dalys went into possession and put in a crop and on the 24th June, 1912, agreed to sell the land with the crop to Brennand for $20,000, receiving as a down payment the sum of $4,000. Brennand afterwards paid the further sum of $7,290.

At the time the Dalys bought, there were some buildings on the land—a dwelling-house, barn, stables, granary, etc. Sometime in 1913 Brennand removed the granary to the adjoining quarter section—the N.E.¼; and tore down the other buildings and removed the material and used a portion of it at least in construction of new buildings on the latter place.

The Dalys had put in a crop in 1913. Brennand also took this and cropped the land in 1914 and 1915. He went to the war in 1915; returned in 1918 and was demobilised on March 23, 1919.

He leased the land and received the rents during his absence and until December, 1919.

By instrument dated March, 1914, Mrs. Daly conveyed to her husband, the plaintiff, all her interest in the land. The plaintiff went to the war on September 12, 1916, and was demobilised on September 15, 1917.

The plaintiff's protection under the Soldiers' Relief Act having expired on September 15, 1919, Sagert took proceedings to enforce his agreement. But Brennand being protected until March 21, 1921, the plaintiff could not take similar proceedings against him. The plaintiff, being in this difficulty, procured one Logan to intervene and Logan by paying $1,000 obtained an assignment from Sagert of the moneys owing by the Dalys under the agreement and a transfer of the land from Sagert to himself, and as part of the arrangement with Logan the plaintiff, having already acquired his wife's interest, conveyed all his interest in the land to Logan. This was done by instrument dated February 13, 1920. In January, 1920, Brennand made an agreement with the defendant, Philip Busineus, to sell him the N.E.¼ of the section—the land to which the granary and much of the materials of the other buildings on the N.W.¼ had been removed. Busineus paid Brennand the whole of the purchase price of the land, except $1,400. This

sale from Brennand to Philip Busineus did not include the granary. It was sold by Brennand to Ferdinand Busineus for $1,500, and was removed by Ferdinand to nearby land.

This action was commenced on March 13, 1920. On the same day an interim order was made declaring a lien in favour of the plaintiff on the N.E.¼ and the buildings thereon and on the balance of the purchase money owing Brennand to secure the value of the buildings wrongfully removed to the N.E.¼ from the N.E.[W?]¼ by Brennand and charging the moneys owing by Philip Busineus and Ferdinand Busineus to answer the plaintiff's claim against Brennand for the value of the buildings removed.

Subsequently on motion the foregoing order was set aside and it was ordered that the balance, about $1,400 of purchase price on the sale of N.W.¼ by Brennand to Philip Busineus be held by the firm of Rutherford, Jamieson, Grant & Steer, pending the determination of this action; and that Brennand should not negotiate a certain note delivered to him by Richard Wark on behalf of Ferdinand Busineus—representing the purchase price of the granary sold by Brennand to Ferdinand Busineus; and that whatever rights the plaintiff might be found to have in or to the lands and buildings in question should attach to the $1,400 and to the note.

At the conclusion of the plaintiff's case the trial Judge dismissed the action on the ground that there was no right of action on the plaintiff for two reasons: (1) because the plaintiff had assigned his interest in the property to Logan and (2) because his wife had not assigned her right of action to him.

It seems to me that neither of these grounds is sound.

The assignment by the plaintiff to Logan did not purport to assign anything but the plaintiff's interest in the land; the building had at the time of the assignment been already removed and the value of the interest assigned reduced by the value of the building removed.

In Brookfield v. Brown (1893), 22 Can. S.C.R. 398 at p. 401, it is said:

"It is no answer to his action to say that he has conveyed away the estate. Presumably the estate was sold for so much less by reason of the removal of these fixtures and the consequent injury to the freehold. The quotation from Rolle's Ab. ..... clearly establishes the proposition that the owner of land upon which trespass has been committed may recover for the injury after having conveyed away his

Alta.

S.C.

DALY v. BRENNAND.

estate. All principle and reason point to a like conclusion."

As to the second ground it seems to me not to be founded on fact. The assignment from the plaintiff's wife to him is not merely a conveyance of his interest in the land but, having recited the agreement from Sagert to the plaintiff and his wife, and the agreement from them to Brennand, it proceeds to assign also "all her right title and interest in the hereinbefore firstly and secondly recited agreements and all benefits thereunder."

Furthermore, Brennand had covenanted in his agreement with Sagert not to remove buildings.

The act of Brennand in removing the buildings doubtless was a tort; and it may be questioned whether a right of action for a mere tort is assignable although I incline to the opinion that a tort with respect to a property interest is assignable. But the act was not merely a tort, it was also a breach of contract—a breach of the express contract already mentioned.

Furthermore, it was not merely a breach of contract but it was the taking by Brennand of a thing which was the property of Daly and his wife. They could treat the fact of taking either as a tort or, waiving the tort, as raising an implied contract to pay the value of the property so taken. Clerk & Lindsell on Torts, 6th ed. pp. 175, 198, 304, 381; 4 Cyc. tit "Assumpsit," p. 317 et sec.

If in its aspect as a tort the assignment from Mrs. Daly to her husband might be questionable, I think in its aspect as a contract the assignment was valid.

Torkington v. Magee, [1902] 2 K.B. 427 at p. 434; [1903] 1 K.B. 644; Weinburg v. Ogdens, Ltd. (1905), 93 L.T. 729; (1906), 95 L.T. 567; Ellis v. Torrington, [1920] 1 K.B. 399.

If the assignment were invalid even then, inasmuch as Daly himself had a right to sue in respect of his interest, the action ought not to have been dismissed. Our Rule—28—says:—"No cause or matter shall be defeated by reason of the x x nonjoinder of parties but the Court, &c."

It would seem a nugatory thing to have the wife added when the assignment might well be looked upon as an assignment of the fruits of the litigation. See Glegg v. Bromley, [1912] 3 K.B. 474.

It is urged that the Statute of Limitations bars the plaintiff's claim because the act of Brennand complained of was done more than 6 years before the commencement of the action.

The Soldiers' Relief Act, 6 Geo. V., 1916 (Alta.) (amended

8 Geo. V. 1918, ch. 25), expressly recites that "it is expedient to provide for the protection of the property and interests of such persons as are by this Act declared to be soldiers."

Section 6 says:—"The running of all statutes of limitations of actions or proceedings in favour of all persons for whose benefit this Act is passed is hereby suspended during such period as any such person is entitled to the protection afforded by this Act."

Taken in its literal meaning this provision would suspend the Statute of Limitations, 21 Jas. 1., ch. 16, which would otherwise apply to the plaintiff's claim treating it as an action of tort or implied simple contract. The defendant Brennand is a person for whose benefit the Act was passed. He was entitled to the protection of the Act during the period commencing with the date of his becoming a soldier and ending two years after the termination of the state of war or two years after his discharge. It is said that sec. 6 ought to be construed as if it limited the suspension only to such causes of action as the soldier is by the Act protected against. But to do so would be to add words of restriction to the section on a supposition that such was the intention of the Legislature. On the other hand, however, any such intention is far from clear. The purpose of the Act was general—to protect the soldier from being importuned or inconvenienced by proceedings being commenced against him while he was serving his country as a soldier and while in the greater number of cases he would be so situated as to make it extremely difficult, if not impossible, for him properly to defend the proceedings, if he desired to do so.

It is true that the Act does not protect the soldier against every kind of action or proceeding; but the Legislature may well have had the intention of suspending any statute of limitation applicable to any cause of action in respect of which the Act did not protect the soldier so that the person claiming to have the cause of action might safely refrain, as in many cases he would feel constrained to do, from even inconveniencing a soldier who at the moment might be said to be fighting for the one having the claim against him.

In my opinion the plaintiff's claim, looked upon as a mere tort, is not a cause of action within the prohibition of sec. 3 of the Act. The prohibition extends to three things:—(1) The enforcement of payment of any debt, liability or

Alta.

S.C.

DALY v. BRENNAND.

obligation previously incurred; (2) the enforcement of any security previously created or arising; (3) the recovery of possession of goods or lands in the possession of the soldier or a dependant.

But in the aspect of an implied contract to pay the value of the buildings and materials taken away, I think the cause of action comes within the first prohibition; and therefore it may be that the plaintiff having a right of election may rely upon his having a right of action on contract and it being suspended the statute applicable to it is also suspended although it would seem that American cases suggest the other view. 4 Cyc. p. 337.

The plaintiff's right of action was, however, really founded upon a breach of the covenant not to remove the buildings—that is, a speciality, in which case the limitation is 20 or probably 12 years. Though the covenant is not expressly referred to in the statement of claim, the agreement in which it is contained is expressly referred to and was proved at the trial and consequently was before the trial Judge. Had the point been adverted to undoubtedly the plaintiff's counsel would have asked for an amendment and I think, if he had done so, he would have been entitled to it without condition, as obviously it would have made no difference in the defendant's evidence. I think the plaintiff should be allowed to amend now, expressly setting up the covenant. Such an amendment makes any statute of limitation of no consequence and leaves the interpretation of sec. 6 of no consequence. To make such an amendment is not allowing a plaintiff to set up a cause of action which would be gone if the amendment were not allowed. Here the plaintiff, if refused an amendment, could bring a new action.

Then it is said that it ought to be held that the plaintiff has waived his right to any remedy, which he might at one time have had, by his long delay, acquiescence, and omission to take exception to the defendant's wrongful act.

It seems to me, however, that there can be no waiver unless by contract under seal or for consideration or by conduct amounting to estoppel, of which prejudice to the defendant owing to the conduct of the plaintiff would be an essential element. Ency. Laws of Eng. 2nd ed. vol. 14, tit "Waiver," p. 537, and I do not see how the defendant appears to have been prejudiced.

I would, therefore, direct a new trial, the costs of the former trial to be in the discretion of the Judge at the next

trial and the appellant to have the costs of the appeal against the several respondents.

New trial ordered.

WYNNE v. WYNNE.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Wills (§I.D—36)—Capacity—Narcotics Given to Testator to Relieve Pain—Evidence as to Knowledge of What he was Doing—Reasonableness and Simplicity of Will.

A testator is not incapacitated from making a simple will leaving all his possessions to his wife, because he is in a weakened condition and suffering from an incurable disease, to relieve the pain of which he is given a narcotic twice a day the will being signed by him at a time when he could not have been under the influence of the drug and the evidence being that he recognised the witnesses and knew what he was doing, the formalities of the will complying with art. 851 of the Civil Code (Quebec), in which Province it was executed.

[Craig v. Lamoureux, 50 D.L.R. 10, [1920] A.C. 349, applied.]

Wills (§I.B—21)—Execution—Attestation—Requirements of Art. 851 Civil Code (Quebec).

The requirements of art. 851 of the Civil Code (Quebec) are complied with, if the witnesses are asked in the presence of the testator if they will witness the will, and the will is then placed before the testator who signs it in their presence and they immediately sign as witnesses in his presence and in that of each other, the signature of the testator thus made implies both knowledge by him that he is executing his will and a request to the witnesses to act as such.

APPEAL from the judgment of the Appellate Court of Quebec (1920), 27 Rev. Leg. 1, reversing the judgment of the Superior Court which affirmed the validity of the will in question. Reversed and judgment of Superior Court restored.

W. F. Ritchie, K.C., for appellant.

L. P. Crepeau, K.C., for respondent.

Davies, C.J.:—Under the circumstances of the case, the disposition of all his property to his wife was not unreasonable, but on the contrary was such a disposition as the testator without any injustice to any one might fairly have made.

I am inclined to think the Chief Justice of the Court of King's Bench placed a much broader construction upon Dr. Anderson's evidence than its language warranted. I think the doctor, in giving the evidence he did, intended to limit his opinion as to the mental condition of the testator to the time that he was under the effect of the injection of morphia

Can.
S.C.
WYNNE
v.
WYNNE.

and not to extend it to the time when this effect had worn off.

Accepting the evidence of the wife as I do, though she was the sole beneficiary, and also that of the two witnesses to the testator's signature, I cannot entertain a reasonable doubt of the capacity of the testator, when he signed the will, to do so or that the will embodied his real wishes and intentions.

I think this evidence shews the requirements of art. 851 of the Civil Code to have been complied with. See Faulkner v. Faulkner (1920), 54 D.L.R. 145, 60 Can. S.C.R. 386.

I would allow this appeal and restore the judgment of the trial Judge upholding the will.

Idington, J.:—This is an appeal from the judgment of the majority of the Appellate Court of Quebec (1920), 27 Rev. Leg. 1, reversing the judgment of the Superior Court which affirmed the validity of the will in a suit which was first launched to set aside the probate as irregularly obtained, but by amendment of the pleadings involved the validity of the will itself, on the ground that the testator was non compos mentis at the time when he is alleged by respondent to have executed the said will.

The deceased signed a will of which the following is a true copy:—

Montreal, P.Q.,
November 2nd, 1918.

I this day will my entire estate and all other effects to my wife Alice Wynne.

Witness.

That was attested to by two witnesses, called in for the purpose, on an occasion when the deceased was suffering from a severe illness. To ameliorate the said suffering the doctor in attendance had been in the habit of administering narcotics twice a day, at 11 o'clock in the forenoon and 8 o'clock in the evening.

It is urged that the pain and suffering thus alleviated rendered the deceased non compos mentis although the document was signed between 2 and 3 o'clock in the afternoon, and the doctor admits the acute effects of the narcotics would only induce from 2 to 3 hours sleep.

The deceased was sitting up and signed the document on a pad handed him by the appellant when in that position, which with his frail state of health amply accounts for the shaky appearance of his signature.

If the appellant's story is true, it was drafted by a pencil

in the hand of an intimate friend of the deceased, the previous day, copied by her and shewn to her deceased husband the same day about 5 p.m., when he assented to it, at an hour when the influence of the narcotic injected at 11 a.m. must have almost entirely passed.

The trial Judge accepted her entire story as true, and that of the witnesses who had attested her signature as true.

To hold such a will invalid for the technical reasons assigned by the Judges of the Court of Appeal, disregarding all the attendant circumstances, as evidence of an effectual compliance with the requirements of the law, would, as Martin, J., suggests, render invalid many apparently good wills.

In many of the essential features of the case, necessary to consider herein, it has a remarkable resemblance to the Lamoureux v. Craig case (1914), 17 D.L.R. 422, 49 Can. S.C.R. 305, save that in my own view and that of others considering the facts in that case there was much to give rise to a suspicion that the will was neither what the testatrix had previously intended or might have been expected to have intended, and that the signature of the testatrix was thought by some of us to be illegible. In this case there was nothing but what one would expect to find, and what was consistent with the duty of the testator.

Moreover, there was such a simplicity in the words used in question herein that all that which needed to be understood by him signing, was so susceptible of comprehension at the slightest glance, that, if any consciousness at all were left, they must have been understood by anyone capable of executing the document as undoubtedly the deceased was.

In the Lamoureux case the deceased had rejected one will submitted to her for reasons she assigned and, when her vitality had been reduced below what the alleged testator here in question possessed, she had presented to her a will which needed the possession of very acute faculties to comprehend whether or not her wishes had been observed.

I quite agree with Surveyor, J., that if the will in that case, as the Court above held, overruling us, was maintainable, certainly this is much more so.

I need not enlarge; for the dissenting Judges in the Appellate Court below have so fully and carefully covered the ground with more extended notes in all of which I concur, as to render it needless for me to repeat same herein.

Can.

S.C.

WYNNE v. WYNNE.

The appeal should be allowed with costs here and in appeal below and the judgment of the trial Judge restored.

Duff, J. (dissenting):—This appeal, in my opinion, should be dismissed. The onus rests upon those who propound a will of establishing that it was the will of a competent testator.

After fully examining the evidence I cannot resist the conclusion that the medical evidence points clearly to incompetency and I can find nothing in the other evidence relied upon to counterbalance the effect of this evidence.

The appeal therefore, in my opinion, fails not merely because I am not satisfied that the conclusion reached by the majority of the Court below is wrong but because as a result of an independent examination of the evidence I think the weight of evidence supports that conclusion.

Anglin, J.:—Two distinct issues are presented on this appeal—one as to the testamentary capacity of the testator, the other as to compliance with the requirements of art. 851 C.C. (Que.) in the execution of his will. The trial Judge determined both in favour of the appellant, the sole beneficiary. The Court of King's Bench, 27 Rev. Leg. 1. decided both against her by a majority of three Judges to two.

The evidence of the doctor who attended him is relied on to establish the testator's incapacity. But, with great respect, I think it far from conclusive. It is not clear that he refers to incapacity other than that caused by the administration of narcotics. As to that he says it would not last more than 2 or 3 hours after the injection had been given. Three and a half hours appear to have elapsed between the last previous injection and the execution of the will. The appellant who was present at the execution says her husband was "perfectly all right; he knew what he was signing." Robert Mellor, one of the witnesses to the will, says the testator recognised him and the other witness, James, and that he did not seem to be in a dazed condition but on the contrary "seemed to know what he was doing." In answer to an inquiry as to his health by Mellor he replied "not well; not well." James did not address him but thought the testator knew who he was. The appellant tells us that her husband sat on the side of his bed, that she gave him a writing pad which he put on his lap and then signed the will without other assistance. This statement is not contradicted. In fact it is corroborated by Mellor except that he thinks a table was used and not a

writing pad. The signature itself, while somewhat shaky, is remarkably good for a man who died the next day from Bright's Disease. The trial Judge evidently believed, both the appellant and the witness Mellor and, so far as one can judge by reading their testimony in print, it seems to be perfectly candid and entirely credible.

The will itself is reasonable, having regard to the testator's circumstances. It consists of only 16 words—a simple devise to the widow of the entire estate and effects, which are said to amount to about $12,000. The appellant tells us it was drafted in pencil the day before its execution by Mr. Tuck, an intimate friend of the testator, with his approval if not by his express instructions, that she copied this draft and shewed the copy so made to her husband the same afternoon and again the next morning, and that he approved of it as expressing what he wished on both occasions.

Taking all these circumstances into account, while, had the will been lengthy or the dispositions at all complicated, I should have doubted the testator's capacity to appreciate it, I am satisfied that the evidence of the appellant and the witness Mellor sufficiently proves that he had capacity on the afternoon of its execution to make a will such as that propounded.

The only objections to the sufficiency of the execution under 851 C.C. (Que.) which calls for attention are that the testator did not refer to the document propounded as his will or acknowledge his signature to it in the presence of the witnesses and did not request them to attest the will. Compliance with all other formalities prescribed by that article is fully established.

Mellor tells us that when he and James came to her husband's bedside Mrs. Wynne "asked if we would be witness and put our signatures on his will; she said it aloud to both of us." The will was then placed before the testator and he signed it, as already described, in the presence of Mellor, James and Mrs. Wynne, and Mellor and James "immediately" signed as witnesses in his presence and in that of each other. The signature by the testator thus made requires no other acknowledgment as Lamothe, C.J., points out, 27 Rev. Leg. 1 at p. 2; and, with great respect, it implies in my opinion both knowledge by him of the fact that he was executing his will and a request to the witnesses to act as such. This implicit recognition of the document as a will and request that the witnesses should

Can.

S.C.

WYNNE v. WYNNE.

attest the signature of the testator are, I think, a sufficient compliance in these particulars with art. 851 C.C. (Que.).

I would for these reasons allow the appeal and restore the judgment of the trial Judge. The respondent should pay the appellant's costs in this Court and in the Court of King's Bench.

Brodeur, J.:—The present action was originally taken for the purpose of setting aside a judgment rendered by the Prothonotary of the Superior Court, declaring that the will of John Francis Wynne was duly probated. In this action to annul the judgment of probate, it was alleged that the formalities required by law had not been complied with, and that the evidence on which the judgment was based was false.

In fact, it appears from the evidence in the present action that Tuck's affidavit, on which the Prothonotary based his decision, contained some absolutely incorrect statements. For instance, he swore that he was present when the will was signed by the testator, while the proof establishes beyond doubt that his statement is not correct. The defendant, who maintains the validity of the will, is obliged to admit in her defence that this portion of Tuck's affidavit is untrue, but she pleads that this error was due to the attorney who prepared the affidavit and who did not thoroughly understand the facts laid before him.

The probate would certainly have been set aside had it not been for the additional evidence offered in the present case. This evidence was that the will was prepared by Tuck himself on the testator's instructions, that Tuck's pencilled draft was transcribed in ink by the testator's wife, that it was then signed in the presence of the witnesses Mellor and James, whose names appear on the will, and that on the following day Tuck also affixed his signature as witness. It cannot be denied that Tuck's signature was valueless. But if the will were otherwise valid, could it have the effect of making it void? Of course not. The Court could therefore declare, under the circumstances, that in view of the additional evidence adduced the will must be held duly probated.

The plaintiff then understood the weakness of his position and asked for leave to amend his declaration by alleging that the testator was not compos mentis when he signed the will.

The Superior Court dismissed plaintiff's action and this judgment was reversed in appeal. In view of the evidence

the probate of the will was not the real matter in issue, but the argument turned on the capacity of the testator and on the formalities required by law for the validity of a will.

The testator was evidently in an extremely weakened condition. In fact he died the next day.

The evidence of the attendant physician is not very favourable to those who claim that Mr. Wynne had sufficient capacity. He had given up the patient and was treating him with drugs administered in the morning and evening for the purpose of relieving pain. After taking the drugs the patient was asleep or unconscious for a couple of hours. When he expressed his last wishes to his friend Tuck and to his wife, he seemed to have a perfect grasp of what he was doing. The witnesses to the will swear that he seemed to understand what he was doing when he signed in their presence. At that time he only spoke two or three words dealing with his state of health; but it cannot be pretended that he was unconcious of the purport of his signature. He might still have been somewhat under the influence of the drugs administered about two hours previously, but his general bearing and his answer to the question put to him by one of the witnesses indicate a state of mind which seems to me incompatible with incapacity.

If we had before us only the evidence of the witnesses to the will, there might be some difficulty in deciding if the testator knew that the document presented for his signature contained the expression of his last wishes, as it is possible that the testator did not hear his wife request the witnesses to sign the will. But the wife's evidence, although contradicted in some respects, was accepted by the trial Judge, and amply establishes that the testator knew that he was signing a will.

Besides the circumstances are strongly in favour of this will as an expression of the last wishes of the deceased. The testator and his wife, the universal legatee, had been married for more than 25 years and they had no children. It was quite natural that the husband should leave his few possessions to his widow, who was almost 60 years of age, and thus allow her to live comfortably for the rest of her days.

This case is in many respects similar to that of Craig v. Lamoureux, 50 D.L.R. 10, [1920] A.C. 349, decided by the Privy Council. In the present case the facts seem more favourable to the validity of the will. I readily acknowledge that it is dangerous to maintain wills on the

Can.

S.C.

WYNNE v. WYNNE.

evidence of the legatee. But the decision of the Privy Council in the case of Craig v. Lamoureux favours the validity of wills in such cases as this.

As to the formalities I think they were observed, particularly if we accept the evidence of the universal legatee. The will expressed the testator's wishes. It was signed by him in the presence of two witnesses who also signed in his presence. It is true that there was no express and formal request on the part of the testator for the signature of these witnesses, but as they signed immediately after him and in his presence, it seems to me that this circumstance constitutes a request sufficient for the validity of the will.

The appeal should therefore be allowed with costs in this Court and in the Court of King's Bench and the judgment of the Superior Court affirmed.

Mignault, J.:—The plaintiff, respondent in this Court, complains of the will, in the form derived from the laws of England, of his brother, the late John Francis Wynne, bequeathing his entire estate to his wife, the present appellant.

As originally drafted, the respondent's action aimed at having the probate of this will set aside, and most of the 15 paragraphs of the declaration were of the nature of an attack on the judgment of probate, while the conclusions asked merely that this judgment be set aside. By an amendment permitted at the trial, the respondent further alleged as para. 14a, that at the time he signed the will, John Francis Wynne was not compos mentis, and was unable to make a will and to acknowledge his signature or a will previously made. And by the same amendment he added to his conclusions the prayer that at all events the said will be anulled, resiliated and cancelled.

It is not unimportant to point out that up to the time of this amendment the respondent had apparently completely misconceived what was his remedy against the will in question. The judgment of probate has, in Quebec, a purely relative and prima facie effect, not going beyond identifying and proving the document presented as a will, so that authentic copies of the same (the will itself not being in notarial form never becomes authentic) may be delivered to interested parties. But, as stated by art. 858 of the Civil Code (Que.) "the probate of wills does not prevent their contestation by persons interested." And as far back as 1872, in the case of Migneault v. Malo, etc.

(1872), L.R. 4 P.C. 123, the Judicial Committee of the Privy Council held that a judgment of probate in the Province of Quebec was not conclusive, and that the heir-at-law of the deceased, although he had been cited and opposed the grant of probate, could nevertheless impugn the will. It is therefore evident that the judgment of probate is not res judicata, even as to a party who appeared and objected to the probate, and consequently the respondent's allegations concerning this probate are entirely unnecessary, not to say irrelevant, in an action attacking the will.

Irrespective of these allegations, the respondent's declaration attacks Wynne's will on four grounds:—1. The will does not satisfy the requirements of art. 851 C.C. 2. The appellant handed the said John Francis Wynne a document all written out, which Wynne signed but did not read to the witnesses, and when he signed it J. C. James was the only witness present, Robert Mellor was called in as a witness after the document was signed, and Fred Tuck was not present at all. 3. Wynne never spoke anything about the paper he signed nor referred to it as being his will, and did not in any way acknowledge his signature to the said document as having been subscribed by him to his last will and testament. 4. On the 2nd of November, 1918, when Wynne signed the said document he was not compos mentis, and was unable to make a will and to acknowledge his signature on a will previously made.

It is noticeable that the will is not attacked for undue influence or fraudulent manoeuvres (suggestion et captation) by the appellant. What Mrs. Wynne did is material only when taken in connection with the alleged grounds of nullity, and I must express the opinion that if Mrs. Wynne's testimony be believed—and it was believed by the trial Judge—she did nothing improper to obtain the signing of the will. It is very unfortunate that Tuck died shortly before the trial—and inasmuch as he died of a lingering illness the parties should have obtained his testimony, or at least they should have shewn that he was incapable of giving it—but Mrs. Wynne says that her husband was under the impression, and so stated, that she would get everything without a will. She adds that Tuck told Wynne that he had better make a will and he agreed to do so, and as Wynne expressed the intention to leave everything to his wife, Tuck wrote out a very short form from which the appellant copied and which eventually became the will attacked in this case. Like many persons, Wynne dis-

Can.

S.C.

WYNNE
v.
WYNNE.

liked the idea of making a will, but this certainly does not shew that the will in question was forced on him, and I cannot see anything in the evidence that could support a charge of undue influence, if such a charge had been made.

Discussing now the grounds of nullity alleged by the respondent, and dealing first with the fourth ground, the trial Judge found on the facts that the will was signed by Wynne when of a free and disposing mind, and of sound intellect. What gives great weight to this finding is that it necessarily reposed on the credibility of the witnesses, especially of Mrs. Wynne. Moreover the physician called, Dr. Anderson, did not prove a general state of incapacity of the testator. He said that Wynne, who was dying of Bright's disease, was suffering very great pain; that twice a day, at 11 in the morning and at 8 in the evening, he administered morphine to quiet him, and that the effect of the narcotic would last 2 or 3 hours. This will was signed after 2 p.m. and in view of the testimony of the witnesses to the will, James and Mellor, it seems impossible to conclude that the finding of testamentary capacity by the trial Judge should be set aside.

I will now consider together the three first grounds of nullity which relate to the execution of the will itself. It is true that Mrs. Wynne handed her husband a document all written out, and that Wynne signed it but did not read it to the witnesses, nor was it necessary that he should do so. Then Wynne signed the will, both James and Mellor were present and signed as witnesses in presence of the testator. No formal attestation clause was required and their signatures as witnesses sufficed. Tuck was not present at the execution of the will and signed it afterwards. But he cannot be considered as a witness to the will which however does not matter because two witnesses are sufficient. Wynne did not speak to the witnesses about the will and did not acknowledge his signature to them as having been subscribed by him to his will. However as Wynne signed in the presence of the witnesses, it is immaterial whether he acknowledged this signature which they saw him make. It was entirely unnecessary that he should do so.

So far the will stands the test of article 851 of the Civil Code (Que.), which is as follows:—

"851.—Wills made in the form derived from the laws of England [whether they affect moveable or immovable property] must be in writing and signed at the end with the signature or mark of the testator, made by himself or by

another person for him in his presence and under his express direction [which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request]

[Females may serve as attesting witnesses and the rules concerning the competency of witnesses are the same in all other respects as for wills in authentic forms.]

But it is said that the witnesses, who undoubtedly signed the will in the testator's presence, did not do so "at his request." Mellor testified as follows:—

"Q.—Who was present when you signed that will as a witness? A.—Mr. James, Mrs. Wynne, myself and the deceased, the late Mr. Wynne. Q.—Who received you at the door? A.—I think it was Mrs. Wynne, I am not sure, I walked right in. Q.—Did Mrs. Wynne talk to you about the will, then when she opened the door for you. A.—No, only when we walked right up to the bed. Q.—What did she say then? A.—She asked me if we would be witnesses and put our signatures on his will, she said it aloud to both of us."

Mellor also says that when he entered he asked Wynne how he was, and the latter answered "not well; not well." Both James and Mellor say that testator recognised them.

As to the signatures of the witnesses at the request of the testator, undoubtedly this is a requirement of art. 851 C.C. (Que.), although it is not mentioned in the English Wills Act, 7 Wm. IV.—1 Vict. 1837 (Imp.), ch. 26, from which art. 851 is derived. But it is to be remarked that when the will is signed or marked by another person than the testator, art. 851 requires the "express direction" of the testator, while with regard to the signature of the witnesses at the request of the testator, nothing is said as to the form of this request. In my opinion, inasmuch as the Legislature, in speaking of the direction or request of the testator, requires it to be expressed in one case and not in the other, it follows that this request can, in the latter case, be implied by reason of the circumstances surrounding the execution of the will. Here Mellor testified that Mrs. Wynne, when the witnesses and she had walked right up to the bed, asked them if they would be witnesses and put their signatures on the will, and that she said this aloud to both of them. The request she thus made to James and Mellor must have been heard by Wynne, who then signed the will and

B.C.

C.A.

CANADA PERMANENT MORTGAGE v. NATHA SINGH.

saw or could see the witnesses sign in his presence. In my opinion, but I say this with every deference for the majority of the Judges of the Court of King's Bench who thought otherwise, it would be pushing formalism too far to reject this will for the lack of an expressed request of the testator to the witnesses, and the more so as this is an essentially simple and popular form of will, which undoubtedly the Legislature desired to render as easy as possible to the least educated of the population.

If it be contended that Mrs. Wynne who went for the witnesses and asked them to attest the will, had no mandate from Wynne to do so, I would answer that evidently no express mandate was required. And the question really is whether Wynne intended to make a will and dispose in favour of his wife, and unless Mrs. Wynne's testimony be discredited, I must find that he did. The obtaining of witnesses, although essential, was not, under the circumstances disclosed by the evidence, a matter requiring any kind of mandate from the testator, for if we must take it as established that he wished to make a will, getting the witnesses necessary for the validity of the will was merely carrying out his desire.

It may be that this will is quite near to the danger point, but after full consideration I find myself unable to set it aside and nullify the very natural and reasonable disposition which Wynne made of his property, for he and his wife had been long married and had no children. Of course, Tuck's affidavit in support of the probate was untrue, as he did not see Wynne sign the will, although he probably could identify his signature. But nothing would now be gained by annulling the probate, for the testimony of James and Mellor shews that Wynne really signed the will, and, in my opinion, the attack on the will itself fails.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the trial Judge.

Appeal allowed.

CANADA PERMANENT MORTGAGE v. NATHA SINGH.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 1, 1921.

Mortgage (§VI.G—105)—Foreclosure—Proof of Service of Writ—Mistake—Final Judgment—Registration—Registration in Land Titles Office—Certificate of Indefeasible Title—Judgment Contrary to Law—Setting Aside.

Where what purported to be proof of service of a writ, under which a final judgment for foreclosure was obtained is admitted to

have been furnished under a mistake, the judgment is obtained contrary to law and will be set aside upon proper proceedings being taken, notwithstanding that the final order has been registered in the land titles office and a certificate of indefeasible title obtained, the reservations to which the title is subject not including mistake.

APPEAL by the plaintiff from the judgment or order of Hunter, C.J., B.C., of October 21, 1920. Affirmed.

G. E. Harrison, for appellant.

R. Cassidy, K.C., for respondent.

Macdonald, C.J.A.:—It is admitted that the writ was not served upon the defendant, nevertheless, final judgment for foreclosure of defendant's equity was obtained under it. What purported to be proof of service of the writ is now admitted to have been furnished under a mistake.

The defendant upon learning of the proceedings applied to have the same set aside. The final order of foreclosure was registered in the Land Registry Office and a certificate of indefeasible title was obtained by the mortgagee, pursuant to sec. 14a of the Land Registry Act, R.S.B.C. 1911, ch. 127, as amended in 1917 by ch. 33, sec. 2, sub-sec. 5. Under the same amending Act, it is enacted that such a certificate shall extinguish the mortgagee's rights in respect of the personal covenants in the mortgage, and by sec. 22 of the original Act, the certificate is declared to be conclusive evidence in all Courts that the holder of it is seised of an estate in fee-simple, subject only to reservations mentioned in the sub-sections to that section, none of which appear to me to cover mistake.

Now, clearly the judgment was without foundation and therefore it and all the proceedings between it and the testing of the writ, should ex debito justitiae be set aside. The appeal against the order setting it aside is founded solely upon arguments based upon the said sections, the submission of the appellant's counsel being, that in view of the said sections, it would be idle for the Court to interfere. That this is so is not apparent to me, since one cannot foresee the result upon the fortunes of the defendant of allowing the said judgment to stand. I am not willing to speculate about it, and moreover, one thing is quite clear and that is, that the judgment was obtained contrary to law and defendant comes to the Court, with, I think, a clear right to have it set aside.

I would therefore dismiss the appeal.

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

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

Galliher, J.A.:—I agree in the reasons for judgment of the Chief Justice.

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

Appeal dismissed.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 20, 1921.

Damages (§III.K—222) — Injury to Property — Construction of Ditches and Drains for Waterworks—Legislative Authority—No Negligence—Right to Compensation for Injury.

No action will lie for doing that which the Legislature has authorised if it is done without negligence, although it does occasion damages to any one, unless there is a legislative enactment granting him compensation when his remedy is confined to recovering such compensation as the Legislature has thought fit to give him.

[Geddis v. Proprietors of The Bann Reservoir (1878), 3 App. Cas. 430; Caledonian R. Co. v. Walker's Trustees (1882), 7 App. Cas. 259; Mersey Docks, etc. v. Gibbs (1864), L.R. 1 H.L. 93, followed.]

Arbitration (§I.—7)— Corporation Appropriating Water Rights—Act of Incorporation Containing Arbitration Clause to Fix Damages—Failure of Corporation to Act—Right of Injured Party to Bring Action.

Where a corporation desires to appropriate a person's water rights or to acquire some easement over his property, and arbitration clauses to fix the amount of damages are inserted in the company's Act of Incorporation and such arbitration clauses only come into operation on disagreement as to the value of damages, it is the duty of the corporation or company to institute an arbitration upon receiving complaint of damage and if it does not proceed in accordance with the directions of its Act, the plaintiff is not debarred from his right of action.

[Saunby v. The Water Commissioners of the City of London, [1906] A.C. 110, followed.]

APPEAL by defendant from the judgment of Galt, J. in an action to recover damages for injury to plaintiff's land alleged to be caused by the construction by the defendants of certain works for the purpose of supplying water to the City of Winnipeg. The Court of Appeal held reversing the judgment of Galt, J., that the works were not in fact the cause of the damage and dismissed the plaintiff's action.

The judgment appealed from is as follows:—

Galt, J.:—The plaintiffs are farmers, residing in the Birch River District, on the banks of the river, where they took up their homesteads in or about the year 1907.

The defendants are a corporation, created by a statute of Manitoba, 1913, 3 Geo. V., ch. 22, for the purpose of supplying water to the City of Winnipeg.

The works are constructed from Shoal Lake, an offshoot of the Lake of the Woods, to the city of Winnipeg, a distance of about 80 miles.

Reading from the statement of claim in Romanica's case, the plaintiff says, in para. 3, as follows:—

(3) "The said lands are bounded on the east and west by, and are in actual contact with, the Birch River, which flows northerly into the Whitemouth River, and which last-named river empties into the southerly end of Lac du Bonnet."

In para. 6 it is stated:—"During the year 1913 to 1919, both inclusive, the defendant constructed, or caused to be constructed, on the said lands or right-of-way, a steam railway and aqueduct, or line of pipes and conduits running from Shoal Lake to the City of Winnipeg, for the purpose of conveying and supplying water to the inhabitants of a certain district located in and about the City of Winnipeg, and has ever since kept and continued the said works so constructed, and intends to continue the same."

Paragraph 10 of the statement of claim sets out:—"By reason of the ditches, drains and spillways aforesaid, the defendant has diverted, or caused to be diverted into the said Birch River, and its tributary, the Boggy River, a greatly increased volume of water, and still continues such diversion, and intends to continue the same."

In para. 12 it is stated:—"As a result of such floods, and the probable annual repetition of the same, the land of the plaintiff has been rendered worthless for farming, and the value thereof much diminished."

The defendants, in para. 7 of their statement of defence, state:—"The defendant denies the allegations contained in the seventh paragraph of the plaintiffs' statement of claim, as therein set forth, but the defendant admits that for the purpose of carrying away water from the said right-of-way and of draining same, and for the purpose of protecting its railway, and its pipe-line, the defendant constructed and caused to be constructed certain ditches and drains along and upon said right-of-way, and caused the said ditches, or drains, to empty into said Birch, Boggy and Whitemouth Rivers, and has ever since kept and continued the said ditches and drains, and intends to continue the same, for the purpose aforesaid."

In para. 15 the defendants plead that they are riparian

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

owners of the banks of the said river, and, as such, have a right to get rid of the water coming upon them.

The plaintiffs say, in their evidence, that from the time they took up their homesteads, in 1907, until about the year 1917, the waters of the Birch River ran almost dry during the summer, but that after the defendants constructed their aqueduct and ditches the water, during the summer, became considerably augmented, and that to-day the stream is about 3 ft. deep in front of the plaintiffs' land.

The particular damage claimed for in this action arose in July, 1919. At that time the defendants had constructed ditches all along their right-of-way for the aqueduct, and also for the adjoining railway, which runs along the south side of the aqueduct. It also appears that there is a large territory to the east of this particular district, consisting of boggy land, from which water oozes continuously, but very slowly. The slope from Shoal Lake to the Boggy River is very slight indeed, and it is stated to be some thing like 1/10 of a foot in 10,000 ft., so that any natural flow of water in that district would, necessarily, be slow.

The ditches are so constructed that the water sometimes flows easterly, and sometimes westerly, according to the local situation, but in each case it is drained off and empties into either the Boggy or the Birch River, according to the slope of the particular locality. The evidence of the expert witnesses on both sides satisfied me that the flow of water, which is on either side, is greatly accelerated by flowing over the comparatively smooth surface of the drain, rather than over the wide expanse of almost level and boggy ground, covered, no doubt, with a certain amount of vegetation.

In July, 1918, a heavy rainstorm occurred in the district. Of course the limits of this storm could not be ascertained by any particular individual, and its extent is left a conjecture. But it was shewn, by one or more witnesses called by the defendants, that it was a very heavy downpour of rain in the place on the aqueduct line at which these witnesses happened to be. About that time the plaintiffs say that the water rose very rapidly in the Birch River, much more rapidly than it had ever done in previous years, when similar heavy rainstorms had prevailed, and with the result that the water overflowed from the Birch River, and practically destroyed the plaintiffs' crops. I think Romanica said that

it rose to about 6 inches high on the floor of his house, on the banks.

The question which I have to decide is, no doubt, a very serious one for both sides, because not only are these 3 plaintiffs claiming damages for injury to both their crops and land, but I am told that several other settlers are waiting the result of this action before making similar claims.

Several cases were referred to by the counsel who appeared at the trial, but none of them is exactly in point. Cases have arisen in England where the parties have complained of the loss of water appropriated by their neighbors; others complained of being flooded under varying circumstances. But here we have a corporation authorised by law to construct these particular ditches, and it has been admitted by counsel for the plaintiffs that the construction was carried out without negligence. Notwithstanding this, however, Mr. Hoskin, on behalf of the plaintiffs, argues that the defendants are liable. The principal case he relies upon was Geddis v. Proprietors of The Bann Reservoir (1878), 3 App. Cas. 430. But that case, while it contains several dicta much in the plaintiffs' favour, was based largely upon a statute imposing responsibility on the defendant, which is wanting in the present case, viz., a duty to scour and clear out the bed on one of the streams in question.

The defendants, on the other hand, rely, most strongly upon the case of The Directors, etc., of the Hammersmith, etc., R. Co. v. Brand (1868), L.R. 4 H.L. 171. The Judges were summoned to give their opinions to the House, and the opinion of Blackburn, J., was accepted to that of 5 other Judges. Blackburn, J., said, at p. 196:

"It is agreed on all hands that if the Legislature authorises the doing of an act (which, if authorised, would be a wrong, and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorised, and, consequently, the person who has sustained a loss by the doing of that act, is without remedy, unless, in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

A good deal of assistance is to be obtained in ascertaining the law applicable to the circumstances here, from the case

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

of Hurdman v. The North-Eastern R. Co. (1878), 3 C.P.D. 168. There, the statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage, and it was held, upon demurrer, "that the statement of claim disclosed a good cause of action."

Cotton, L.J., delivering the judgment of the Court, says, at p. 173:

"For the purpose of our decision, we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that the rain-water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of. The question is, are the defendants, admitting this statement to be true, liable to the plaintiff? and we are of the opinion that they are. The heap, or mound, on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned (in respect to mines), if anyone, by artificial erection on his own land causes water, even though arising from natural rain-fall only, to pass into his neighbor's land and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case of Broder v. Saillard (1876), 2 Ch. D. 692.

At the conclusion of his judgment his Lordship says at p. 175.

"We are of opinion that the maxim 'sic utere tuo ut alienum non laedas' applies to and governs the present case, and that as the plaintiff, by his statement of claim, alleges that the defendants have, by artificial erections on their land caused water to flow into the plaintiff's land, in a man-

ner in which it would not, but for such erections, have done, the defendants are answerable for the injury caused thereby to the plaintiff."

In the Geddis case, at p. 438, Lord Hatherly says:

"The case which seems to have most affected the minds of the learned Judges in the Court below is the case of Cracknell v. The Corporation of Thetford (1869), L.R. 4, C.P. 629.

If a company in the position of the defendants there, has done nothing but which the Act authorized....nay, may in a sense be said to have directed....and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of these powers."

In the present case the Legislature certainly authorised the construction of the works and ditches in question, the result of which is complained of by the plaintiffs. Is there, then, in the defendants' Act of incorporation, anything which gives the plaintiffs compensation for the loss they have suffered?

In 1915, 5 Geo. V. (Man.) ch. 30 sec. 3 the Legislature amended the defendants' Act by repealing sec. 24, and substituting a section from which I quote the following:—

"24: It also shall and may be lawful for the corporation to construct, erect and maintain upon any lands taken or acquired by it, all such reservoirs, dams, conduits, waterworks and machinery and plant and equipment of every kind requisite for the said undertaking * * * and, for better effecting the purposes aforesaid, the corporation, its agents, servants and employers, are hereby empowered to enter and pass upon and over the said grounds and lands intermediate as aforesaid, and the same to repair, cut or dig up, if necessary, and to lay down the said pipes * * * and to set out, ascertain, use and occupy such part or parts thereof as the corporation shall think necessary and proper for the making, draining and maintaining of the said works, plant and equipment, or for the protection of the said works" &c. * * * "doing as little damage as may be in

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

the execution of the powers hereby granted to them, and making reasonable and adequate satisfaction to the proprietors, to be ascertained, in the case of disagreement, by arbitration as aforesaid."

The provision as to arbitration is contained in the company's original Act, 3 Geo. V 1913, (Man.) ch. 22 sec. 22, from which I extract the following:—

"It shall be lawful for the corporation, its agents, servants and workmen, from time to time, and at such times hereafter as it shall see fit, and they are hereby authorised and empowered to enter into and upon the lands of any person, or persons, bodies politic, or corporate, and to survey, set out and ascertain such parts thereof as they may require for the purposes of waterworks, or for the purpose of conveying electric motive force or other power for the operation of same, and also to divert and appropriate any spring, stream or body of water thereon, as they shall judge suitable and proper; the corporation shall pay to the owners or occupiers of the said lands, and those having an interest or right in said water, reasonable compensation for any land or any privilege that may be required for the purposes of the said waterworks, or for the conveying of electric motive force or power; and in case of any disagreement between the corporation and the owners or occupiers of such lands, or any persons having an interest in the said water, or the natural flow thereof, or any such privilege aforesaid, respecting the value thereof or as to the damages such appropriation shall cause to them or otherwise, the same shall be decided by three arbitrators as hereinafter mentioned, namely, the corporation shall appoint one, the owner shall appoint another, and such two arbitrators shall, within ten days after their appointment, appoint a third arbitrator, but, in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, the Court of King's Bench, or a judge thereof shall, on application by either party, appoint such third arbitrator * * * The arbitrators to be appointed as hereinafter mentioned shall award, determine, adjudge and order the respective sums of money which the corporation shall pay to the respective persons entitled to receive the same and the award of the majority of the said arbitrators shall be final. And the said arbitrators shall be, and they are hereby required, to attend at some convenient place at or in the vicinity of Winnipeg to be appointed by the corporation, after eight days' notice given for that

purpose by the corporation, then and there to arbitrate and award, adjudge and determine such matters and things as shall be submitted to their consideration by the parties interested, and each arbitrator shall be sworn before someone of His Majesty's justices of the peace, or other office authorised thereunto, well and truly to assess the value or damages between the parties to the best of his judgment."

This provision for arbitration is not expressly raised as a defence to the action by the defendants, but they do mention the section in a general reference. No argument was advanced that the plaintiff should have gone to arbitration, rather than have brought an action, as has been done.

The effect of such a provision was explained in Saunby v. The Water Commissioners of the City of London, etc, [1906] A.C. 110. That was an action for trespass on the appellants land and interference with his water rights. The respondents pleaded that they were authorised thereunto by their incorporating Act, 36 Vict. 1873, (Ont.), ch. 102, and that the appellants' remedy (if any) was to proceed by arbitration under the Act.

Held: "That according to the true construction of sec. 5 the arbitration clauses only come into operation on disagreement as to the amount of purchase money, value, or damage arising after definite notice of expropriation and treaty or tender relative thereto: and that as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action."

In giving judgment Lord Davey says at p. 115:—

"Their Lordships are of opinion that, before the Commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their Lordships therefore, are of opinion that the Commissioners have not put themselves into a position to compel the appellant to go

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the Legislature, and in the mode prescribed by the Legislature. In this instance the Commissioners have not proceeded in accordance with the directions of their Act, and, consequently, the appellant has not lost his ordinary right of action for the trespass on his property. In coming to this conclusion their Lordships follow the principles laid down by this Board in the Corporation of Parkdale v. West (1887), 12 App. Cas. 602, and North Shore R. Co. v. Pion (1889), 14 App. Cas. 612, though the provisions of the Acts in question in those cases were somewhat different."

Now it appears to me that the defendants in the present case are in the same position as the defendants in the case I have just quoted. The plaintiff complained of damage. It thereupon became the duty of the defendants to institute an arbitration under the Act; otherwise the plaintiff would not be debarred from his right of action.

I find, upon the facts, that the damages to the lands of each of these 3 plaintiffs was caused by the waters diverted into the Boggy and Birch Rivers from the defendants' ditches. But for that diversion the water would not, in my opinion, have risen higher than the top of the bank, or even that high. It is impossible to estimate the exact height to which the waters rose, owing to the waters from the defendants' ditches. It may be that by enlarging or straightening out the bed of the Birch River all danger for the future can be averted. In the meantime I am of the opinion that the plaintiffs are entitled to damages for their losses sustained in July of 1919. Those losses were of two separate kinds, firstly, to the crops, and, secondly, to the lands themselves for the future. With regard to the first item I accept the evidence of the plaintiffs as to the loss of their crops and the value thereof.

For the reasons aforesaid I give judgment for the plaintiff, and, in accordance with counsel's suggestion at the trial, the question of damages will be referred to the Master.

The plaintiffs are entitled to their costs, and I think, considering the importance and difficulty of this case, the statutory bar ought to be removed, which I accordingly direct.

I do not think it a case for injunction but only for damages.

J. G. Harvey, K.C., for appellant.

A. E. Hoskin, K.C., and P.J. Montague, for respondent.

Perdue, C.J.M.:—This is one of 3 actions brought by farmers residing on Birch River in this Province, claiming damages against defendant for causing as it is alleged, a flood in that river by the construction of drains which brought into it an unusual quantity of water. The river overflowed and injured the plaintiff's crops. The farmers who bring the actions reside in the same neighborhood and all of them suffered by the flood in question.

The Greater Winnipeg Water District was incorporated under that name by an Act of the Legislature of this Province, being ch. 22 of the statutes of 1913. It declares the inhabitants of the area defined to be a body politic and corporate under the above name. The area in question, termed "the district," includes the territorial limits of the city of Winnipeg, the city of St. Boniface, the town of Transcona, the rural municipality of St. Vital and parts of the rural municipalities of Fort Garry, Assiniboia and Kildonan. The object of the corporation is the supplying of good water for the use of the inhabitants of the district for all purposes. The powers and functions of the corporation are to be exercised by an administrative Board constituted as provided in the Act, and, subject to its authority, the undertaking of the corporation shall be under the management of a Board of Commissioners consisting of 3 persons (sec. 6, 12). The corporation is given power to design, construct, build, purchase, improve, hold and generally to manage and conduct waterworks and all buildings, matters, machinery and appliances therewith connected or necessary thereto, including all plant and equipment deemed necessary for furnishing power for the operation of waterworks (sec. 21). The corporation, its agents, servants &c., are authorised and empowered to enter upon the lands of any person, &c., and survey, set out and ascertain such parts thereof as they may require for the purposes of waterworks or conveying electric power for the operation of same, "and also to divert and appropriate any spring, stream or body of water thereon, as they shall deem suitable and proper" (sec. 22). Provision is made for compensation to the persons whose land is taken or who have an interest in the water diverted or appropriated.

By ch. 47, sec. 1, of 4 Geo. V. 1914 (Man.) power was given to the corporation to construct and operate a railway in connection with, and as part of, the undertaking. This

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

railway was constructed and was used in conveying workmen, materials and supplies during the construction of the work. The length of the pipe line from Winnipeg to Shoal Lake, from which the supply of water is drawn, is about 90 miles. The surface of the country to be traversed was, as to the eastern part, covered with swamps and muskeg, and without roads. The railway was an important adjunct of the work.

The plaintiff, Romanica, is a farmer and is the owner under patent from the Crown of Lot 59 in township nine and range twelve east of the principal meridian in Manitoba, excepting thereout all that portion which is covered by the waters of Birch River. He has resided upon and farmed the land for 12 or 13 years. His land fronts upon the Birch River, which there runs northerly, and a few miles further on joins the Whitemouth River, which flows northerly and empties into Lac du Bonnet, which is connected with the Winnipeg River. The plaintiff alleges that for the purpose of carrying water from the defendant's right of way of their railway and aqueduct and of draining certain swamps and low places, situated on the right of way or adjacent thereto or affecting same, the defendant constructed or caused to be constructed during the years 1913 to 1919 certain ditches and drains along or near the right of way or from swamps or low places affecting the same, and caused the said ditches or drains to empty into the Birch, Boggy and Whitemouth Rivers, and has ever since kept and continued the said ditches and drains and intends to continue the same. He further alleges that for the purpose of allowing water to escape from its pipe line, and of controlling and regulating the flow of water through the same, the defendant constructed overflow structures or spillways, so constructed that the water so spilled through them would enter into the aforesaid rivers; that in February, 1919, the conveyance of water through the pipe line and the spilling of a portion of it through the spillways commenced and has continued.

The plaintiff claims that: "By reason of the ditches, drains and spillways aforesaid, the defendant had diverted or caused to be diverted into the Birch River and its tributary, the Boggy River, a greatly increased body of water, and still continues such diversion and intends to continue the same." He further alleges that by reason of the ditches, &c., the defendant has diverted a greatly increased volume of water into the Whitemouth River, that this river is unable to carry away such increased volume and dams

back the waters of the Birch River flowing into it; that as a result the land of the plaintiff has been rendered worthless for farming and the value thereof much diminished. He makes claim for an injunction restraining the defendant from diverting into the said rivers by ditches, drains or spillways any increased volume of water, which will result in flooding the plaintiff's lands. He claims damages for loss of crop and injury to his land.

There is no charge in the statement of claim that the works, or any part of them, performed by the defendant were done negligently.

The plaintiff [defendant?] in his statement of defence besides denying certain allegations of the plaintiff pleads to the whole statement of claim that if the plaintiff's lands were flooded and the plaintiff suffered damage thereby, and if such flooding and damage were caused either directly or indirectly by water flowing or emptied into the Boggy, Birch or Whitemouth Rivers from or by any drains, ditches or spillways of the defendants (which is denied), then the defendant submits that it is a riparian owner of land bounded by and in actual contact with such rivers, and that in the construction and use of the said drains, ditches and spillways, in the manner and to the extent in and to which the defendant has constructed and used them, the defendant acted within its rights as a riparian owner of lands in actual contact with said rivers, above the lands owned or occupied by the plaintiff, and that he is not liable at law or in equity to the plaintiff for the damages claimed by the plaintiff or any part thereof.

The defendant in further answer to the statement of claim sets up its Act of incorporation and the amendments thereto and justifies all that it has done in respect of the matters complained of as having been done under the powers, rights, authorities and privileges conferred by the Act and amendments thereto.

Upon the case disclosed in the pleadings, there being no allegation or suggestion of negligence on the part of the defendant, but on the contrary an admission by counsel for the plaintiff that the construction was carried out without negligence, the defendant was entitled to have the action dismissed. No actionable wrong was disclosed. The works were constructed under the authority of a statute and without negligence. The principle of law governing such a case has often been discussed. I would adopt the words of Pollock on the Law of Torts: 8th ed., p. 130:

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

"Parliament has constantly thought fit to direct or authorise the doings of things which but for that direction and authority might be actionable wrongs. Now a man cannot be held a wrong-doer in a Court of law for acting in conformity with the direction or allowance of the supreme legal power in the State. In other words, 'no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to any one' . . Subject thereto, 'the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him.'" He cites the following authorities: Lord Blackburn in Geddis v. Proprietors of Bann Reservoir, 3 App. Cas. at p. 455; Caledonian R. Co. v. Walker's Trustees (1882) 7 App. Cas. at p. 293; Mersey Docks, etc., Trustees v. Gibbs (1866), L.R. 1 H.L. 93 at p. 112.

I cite from the same treatise, p. 132:

"But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution (Vaughan v. The Taff Vale R. Co. (1860), 5 H. & N. 679, 157 E.R. 1351; C.P.R. Co. v. Roy, [1902] A.C. 220). . . . For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorised to exercise the power, there is no right of action. But they must not do needless harm; and if they do, it is a wrong against which the ordinary remedies are available."

The same author mentions that in some cases a party who has suffered material loss is left without either ordinary or special remedy: See The Directors, etc., Hammersmith, etc., R. Co. v. Brand, L.R. 4 H.L. 171; Att'y Gen'l v. Metropolitan R. Co., [1894] 1 Q.B. 384; Mayor, etc., of East Fremantle v. Annois, [1902] A.C. 213.

The trial Judge made a finding that the damage to the plaintiff's lands "was caused by the waters diverted into the Boggy and Birch Rivers from the defendant's ditches." But it being admitted that there was no negligence on the part of the defendants, the plaintiff must seek his compensaion, if any, under the provisions of the Act. If these provisions do not cover his case, he is without remedy. Section 22 of the original Act of incorporation, ch. 22 of 1913, contains a provision for the arbitration of claims for compensation in certain cases. Whether this provision applies to the claims of the plaintiffs, or does not, is a question that is not

before the Court. If the provision does not apply to the plaintiff's case, he is left without relief.

With great respect, I must disagree with the trial Judge's finding of fact above set forth. There was no evidence to support it. On the other hand, there is trustworthy evidence that the flood in July, 1919, which caused the damage was due to an extraordinary rainfall which occurred early in that month. Clemens, an engineer in the employ of the defendant, states that during this storm 7 inches of rain fell in 48 hours in the vicinity of the land in question and to the south of it, that in consequence of this rainfall the Boggy and Birch Rivers overflowed their banks and that washouts were caused by the excessive rainfall along defendant's railway from Mile 56 to Mile 83. As shewn by the maps and plans put in, this portion of the railway lay some miles south of plaintiff's land. The defendant's right of way is in contact with the Boggy and Birch Rivers at several places and crosses the Whitemouth at Mile 65. If the excessive rainfall caused an overflow of the Birch River at defendant's right of way, the same result might be expected further down-stream at the plaintiff's land.

The fact of this immense rainfall in July, 1919, is established beyond doubt by evidence of an official character put in by the plaintiff. Atwood, the chief engineer for Manitoba of the Hydrometric Survey Service of Canada, was called as a witness for the plaintiff, and he produced the annual records of the run off for the Whitemouth River at the village of Whitemouth, a few miles north of the junction of the Whitemouth and Birch Rivers. All the water of the three rivers would flow down the Whitemouth past this place. These records for the years 1912-1919 inclusive were put in as part of the plaintiff's case. They shew that the volume of water passing down the Whitemouth River at Whitemouth increased from 275 cubic ft. per second on June 30, 1919, to 5,310 on July 4, 1919, that is to say, the river increased almost 20 times in volume in the space of 4 days. From July 4, 1919, it gradually decreased, so that it stood 3,210 on the 10th of that month, 1,075 on the 20th, and was down to 461 on the last day of the month. The volume for July 4, 1919, was the greatest shewn in the reports for the 8 years, 1912-1919. This sudden flood occurring in midsummer could only be caused by an exceptional rainfall, such as actually took place at that time according to Clemens' evidence. The records shew that with the exception of the July freshet caused by the storm, the volume of water pass-

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

ing through the Whitemouth River in the year 1919 does not appreciably exceed the average for the other years shewn.

The conclusion to be drawn is that the flood of July, 1919, which injured the plaintiff's crop was caused by an exceptional rainstorm. There is no evidence to shew that the defendant's works or any part of them caused or contributed to the calamity.

McColl, a civil engineer and one of the plaintiff's chief witnesses, referred to the fact that this flood of 1919 followed a very heavy rainfall. He then said: "It is impossible to say whether any flooding would have occurred had no construction work been done at all. It is very evident that the drainage work is a factor in the flooding. How great a factor, it is difficult to determine. Observations extending over long periods of years would be necessary to determine accurately how great a factor this drainage work is in the flooding damage to this property. It is certainly a factor."

It is incumbent on the plaintiff to prove that his loss, or any part of it, was caused by the defendant's works. That it is impossible on the information available to establish that fact is stated by his own witness.

The rivers mentioned were the natural watercourses by which surface water would be carried off from the tract of country in question. A system of drainage was necessary for the construction and maintenance of the works. The evidence shews that where it was necessary to dig ditches and divert the flow of water for the protection of the works, care was taken to conduct the water again into natural drainage channels. These channels would eventually convey the water to one of the 3 rivers. The plaintiff's contention really comes to this: the defendant's work with its drains, ditches, &c., was completed before the flood of July, 1919, therefore the work caused the flood—Post hoc, ergo propter hoc. But apart from the fallacy of such reasoning, the official records shew that there was no noticeable increase in the volume of the Whitemouth River after its confluence with the waters of the other two rivers until the great storm of July, 1919. If the drains and ditches complained of materially increased the ordinary flow of waters in the rivers, the official gauge at Whitemouth would have shewn it.

With great respect, I think the trial Judge in considering the facts overlooked the importance of the evidence afforded by the hydrometric records, shewing as they do that the flood in question was due to an exceptional precipitation of rain.

I would allow the appeal, set aside the judgment entered for the plaintiffs in each suit and enter verdicts for the defendant. The plaintiff in each suit must pay the costs in the Court of King's Bench and also the costs in this Court.

Since writing the above, the very late decision of the Privy Council in Gerrard v. Crowe has come to my attention. That case is briefly noticed in [1920] W.N. 371. The case decides that a riparian owner may by artificial works on his own land protect his land from a flood, and as long as he does not obstruct a natural flood channel or interfere with the alveus of the stream, even though the effect of the works is to increase the volume of water flowing over the land of another person on the same stream, the last mentioned person has no cause of action against him.

Cameron, J.A., would allow the appeal.

Fullerton, J.A.:—The plaintiff is the riparian owner of land on the Birch River. The defendant is a body corporate, incorporated by ch. 22, statutes of Manitoba 1913.

For the purpose of supplying water to the City of Winnipeg, the defendant acquired a right of way from Shoal Lake to the city of Winnipeg and constructed thereon an aqueduct and a railway.

Paragraph 7 of the statement of claim alleges that "For the purpose of carrying water from the said right of way and of draining certain swamps and low places situated on the said right of way or adjacent thereto or affecting the same, the defendant constructed or caused to be constructed during the period aforesaid (1913-1919) certain ditches and drains along or near such right of way or from swamps or low places affecting the same, and caused the said ditches or drains to empty into the said Birch, Boggy and Whitemouth Rivers, and has ever since kept and continued the said ditches and drains and intends to continue the same."

Plaintiff further alleges that the said ditches and drains have diverted into the said Birch River and its tributary, the Boggy River, a greatly increased volume of water, and claims that as a result of such floods and the probable annual repetition of the same, the land of the plaintiff, situate on the Birch River, has been rendered worthless for farming and the value thereof much diminished. On the trial judgment was given in favour of the plaintiff.

The defendant contests its liability on three grounds:—
(1) Because it has not been proved that the construction of the drains and ditches caused the damage complained of.
(2) Because the defendant had at common law the right to

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT

construct them. (3) Because in any event the statute authorised their construction, and the same was done without negligence.

The trial Judge has found as a fact that the damage to the lands of the plaintiff "was caused by the waters diverted into the Boggy and Birch Rivers from the defendant's ditches." He says: "But for the diversion the water would not, in my opinion, have risen higher than the top of the bank, or even that high." I am unable to find in the record any evidence which will justify such a finding.

From Mile 94 on the defendant's right of way westerly the slope of the land is westerly. At Mile 84 the right of way first touches the Boggy River and speaking generally follows the line of the Boggy River to about Mile 77, where the Boggy River runs into the Birch River. The right of way from Mile 77 follows the line of the Birch River westerly to Mile 74, where the Birch River turns towards the north-west. Along the portion of the right of way near the Birch and Boggy Rivers the land was very wet and for the most part muskeg. In order to protect the aqueduct it was necessary to drain, and for that purpose catch water ditches were constructed along the right of way from Mile 94 to Mile 74, and at points where there were depressions off-take ditches were made leading into the Boggy and Birch Rivers. The land of the plaintiff is situate on the Birch River some miles to the north-west of Mile 74 and it was said in argument 30 miles from Mile 88.

The evidence of the plaintiff and his witnesses go to shew that after the construction of the ditches in question the flow of the water in the Birch River was considerably greater than before. These ditches were completed in 1914, and the flooding complained of occurred in July, 1919. The Birch River flows into the Whitemouth River. At the trial the plaintiff put in evidence Government records shewing the daily discharge of the Whitemouth River at Whitemouth covering the years 1912-1919, which certainly do not bear out the evidence of the plaintiff and his witnesses. These records shew little change in the flow of water before and after 1914 in the Whitemouth River except in July, 1919, when the largest flow in any of these years is recorded, due, as the evidence shews, to a very heavy rainfall. McColl, the expert called by the plaintiff, says: "The effect of drainage work is two-fold: It removes water which was stagnant, and it enables water which having found its way into the stream to flow fast. Consequently, when drains have been con-

structed, there will be an increased run-off, in flood periods, if any additional water supply has been tapped. There would be, necessarily, a decreased run-off in dry periods." On the crucial question he says: "It is impossible to say whether any flooding would have occurred had no construction work been done at all. It is also very evident that the drainage work is a factor in the flooding. How great a factor it is difficult to determine. Observations, extending over long periods of years, would be necessary to determine accurately how great a factor this drainage work is in the flooding damage to this property. It certainly is a factor."

In the face of this evidence it seems to me impossible to uphold the finding of the trial Judge that the damage to the lands of the plaintiff was caused by the waters diverted into the Boggy and Birch Rivers from the defendant's ditches.

If I am right in this view, that disposes of the case. As, however, there are some fifty other similar actions depending on the result of this case, it may be advisable to deal with the other points raised on the argument, either of which in my opinion afford a complete answer to this action.

The first point is that the defendant was justified at common law in doing what it did. No case was cited in argument and I have been unable to find any which holds that the owner of land who by means of ditches carries the surface water from his land into a public river, which is the natural and only outlet for such water, is liable in damages to the riparian owners below him whose land may be thereby at certain periods flooded.

In 30 Am. & Eng. Encyc. of Law, at p. 343, the law is stated thus:

"Watercourses are the means which nature has provided for the drainage of the country through which they pass, and from the natural servitude of lands upon a watercourse to receive the waters flowing therein from the land above, springs the right of the owner of upper lands to have the surface water from his lands, of which the watercourse is the natural outlet, drained into and carried off thereby. . . Hence it is well settled that the owner of lands drained by a watercourse may change and control the natural flow of the surface water thereunto and by ditches and other artificial means accelerate the flow or increase the volume of surface water which reaches the stream; if he does this in reasonable use of his own premises."

Coulson & Forbes on Waters, p. 155: "A riparian owner is not only entitled to have the waters of a stream passing

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

through his lands flow to him in its natural state so far as it is a benefit to him, but he is also bound to submit to receive it so far as it is a nuisance to him by its tendency to flood his lands. Unless, therefore, the flow of the stream is increased or diverted to his prejudice by some unauthorised act, either of proprietors above or below him, he has no remedy, but must submit to what is the result of natural causes."

While I think the defendant had at common law the right to construct the drains in question, it is unnecessary to decide the point in this case because the statute specifically authorises their construction and it is admitted that the construction was carried out without negligence. On cross-examination McColl was asked:

"Q. Has the district in its scheme of drainage followed a reasonable scheme, in your opinion? A. Certainly. I believe the purpose was to drain your right of way, and they have certainly followed out a reasonable scheme all the way through. I am not finding any fault in any way with the engineering on the work. Q. Does the work appear to you, from your study of the exhibits, and your knowledge and experience in being over the line, that they have endeavoured to run the water into its natural channels? A. You have turned the water into the most satisfactory outlet that could be utilised for the drainage of the railway, into the channels of the Boggy and the Birch. Q. And into the channels of the Boggy and the Birch were the natural channels for the drainage of that district to get away? A. The rivers were the natural outlet of the drainage for that district."

In Geddis v. Proprietors of Bann Reservoir, 3 App. Cas. 430, Lord Blackburn at pp. 455, 456, lays down the law as follows:—"For I take it, without citing cases that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

The only thing suggested that might have been done here to prevent the damage, was the dredging of the rivers. This would be impracticable from the point of view of expense alone, and moreover the defendant had no power to interfere with the bed of the rivers the title to which is in the Crown. I would allow the appeal and dismiss the action.

Dennistoun, J. A.:— I agree that the appeal should be allowed and will add a brief note to what has been said by other members of the Court.

The plaintiff, a farmer, claims damages for flooding his riparian lands by reason of an increased volume of water brought down the Birch River in July, 1919, for which the defendant's drainage ditches are said to be responsible.

The ditches are many miles from the plaintiff's land and discharge into the Birch and Boggy Rivers at different points, the nearest of which is about 8 miles above the plaintiff's farm.

The defendants are a statutory corporation authorised to build an aqueduct and railway and to construct necessary drains for the protection of such works. It is admitted the drains have been constructed without negligence, and it is a fact that they discharge into the channel of a river which rises in south eastern Manitoba and flows northerly upwards of 30 miles until it reaches the plaintiff's land, at which point it is about 60 ft. wide and frequently flows with a stream from 3 to 4 feet deep.

This case differs from many which were referred to upon the argument of the appeal in that there is no negligence, no direct discharge of water upon the plaintiff's land, and no trespass to land suggested.

If instead of being occupied by the defendant's works this property had been occupied in the ordinary course of settlement by a number of persons who proceeded to drain their respective holdings in the usual and ordinary methods adopted by the defendants and which are recognised as reasonable and proper, the situation as it now exists would have developed, and the surface water from the areas drained would reach the rivers more rapidly than it did before the drains were constructed. Even if in such case the flow of the river at flood periods should be accelerated I would decline to hold that the common law rights of parties many miles down the river had been injuriously affected by the exercise of the common law rights of the settlers above to protect themselves from surface water by conduct-

Man.

C.A.

ROMANICA v. GREATER WINNIPEG WATER DISTRICT.

ing it as speedily as possible to the natural channel towards which it was making its way.

Many cases were referred to upon the argument but I recall none on all fours with the case at Bar.

In cases like Smith v. Ontario and Minnesota Power Co. (1918), 45 D. L. R. 266, 44 O.L.R. 43; and C. P. R. v. Parke, [1899] A.C. 535, there was in the one case the building of a dam, and in the other the collection of foreign water (both authorised by statute) which worked injury to the plaintiff, and the Courts held that the plaintiff was entitled to damages for the invasion of his common law rights.

In the present case the defendants have done nothing more than conduct the surface water which comes to the boundaries of their property to its natural channels, and there is no complaint as to their manner of doing so from adjoining proprietors.

I am of opinion that the defendants have done no act which imposes upon them any obligation to widen or deepen the Birch River for 30 or 40 miles from the outlets of their surface water drains. Moreover they have no power to undertake such a work without legislative authority.

The case of Northwood v. The Corp. of the Township of Raleigh (1882), 3 O. R. 347, is not in point.

In that case the municipal authorities collected surface water over a wide area and endeavored to discharge it through the plaintiff's land into a stream which was too narrow at the point of discharge to permit the water to escape without flooding the plaintiff's land, and the Court imposed the duty upon them of enlarging the channel, under their statutory powers, and so remove the cause of complaint.

The Greater Winnipeg Water District does not collect water, it merely defends its railway embankment and aqueduct from invading surface water which is a common law right of all owners of property, and it does no damage to neighbouring proprietors in so doing.

But there is another ground upon which the plaintiff's action fails. He complains of flooding only in July, 1919, for about 2 weeks. This flood was caused by unusually heavy rains. The Birch and Boggy Rivers overflowed their banks from above the defendant's drains to below the plaintiff's land, a distance of over 30 miles. A great extent of country was under water, and I can find no evidence that

the drains dug by the defendants were responsible for the overflow.

McColl, a civil engineer, was the witness for the plaintiff whose evidence was most relied on. He says it is impossible to say whether any flooding would have occurred had no construction work been done at all. Further he says that while drainage work is a factor in the flooding, how great a factor it is difficult to determine, and that observations extending over long periods of years would be necessary to determine accurately how great a factor this drainage work is in the flooding damage to this property.

The drains in question have been in operation since 1914 and no claim is made that at any period other than the few days in July 1919 did they cause injury to the plaintiff. I cannot find any evidence that they caused damage to the plaintiff. He suffered in common with some 50 other farmers from an unusual and violent rainfall which submerged the whole country side in the vicinity of these sluggish rivers, a misfortune by no means uncommon in a prairie Province.

I would like to emphasise the point that the defendants are not charged with releasing a body of water which had been previously stored in their neighbourhood, nor are they charged with collecting water upon their own land to the detriment of the plaintiff, the case turns solely upon the method adopted of dealing with surface water after an unusual downpour of rain.

Pollock on Torts 8th ed. p. 132, referring to the immunity of statutory corporations from the doing of authorised acts says:—

"But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution. For damage could not have been avoided by any reasonably practicable care on the part of those who are authorized to exercise the power, there is no right of action. But they must not do needless harm; and if they do it is a wrong against which the ordinary remedies are available."

There is no evidence that these defendants could by the exercise of judgment and caution have designed and constructed their drains to better advantage for all concerned. That being the case they are entitled to claim the immunity referred to by Pollock and the plaintiffs have no right

Can.

S.C.

OTTAWA ELECTRIC R. CO. v. BOOTH.

to compensation unless they can find it in the Act which authorises the defendants to construct their works.

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

Appeal allowed.

OTTAWA ELECTRIC R. CO. v. BOOTH.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

New Trial (§II.—8)—Negligence—Street Railway Crossing—Duty of Pedestrian to Look and Listen Before Crossing—Failure to Instruct by Trial Judge—Misdirection.

There is no authority for the proposition that a duty to look and listen before crossing a railway or tramway track exists under all circumstances. A person is bound to exercise reasonable care having regard to all the circumstances of the case, and a refusal on the part of the trial Judge to instruct the jury that it was negligence not to have looked and listened before crossing a street car track is not misdirection for which a new trial will be granted.

[Dublin Wicklow and Wexford R. Co. v. Slattery (1878), 3 App. Cas. 1155; Grand Trunk R.Co. v. McAlpine 13 D.L.R. 618, 16 C.R.C. 186, [1913] A.C. 838; Wabash R. Co. v. Misener (1906), 38 Can. S.C.R. 94 referred to. See Annotation, Negligence, 39 D.L.R. 615.]

APPEAL from the judgment of the first Appellate Division of Ontario dismissing an appeal from the judgment of Mulock, C.J. Ex., entered on the findings of the jury, awarding damages to the amount of $11,600 to the widow and children of Werner L. Booth for his death which the jury found to have been caused by the negligence of the defendants.

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

A. E. Fripp, K.C., for respondent.

Davies, C.J. (dissenting):—We have not the advantage of having any reasons given by the Appeal Court for the judgment appealed from, though the amount of $11,600 found by the jury and for which judgment was entered by the trial Judge was reduced to $10,000.

I understood from Mr. McCarthy, counsel for the appellants, that the same points in support of the appeal were taken and argued by him in the Appeal Court as were taken and argued before us.

There is a double track of the defendant's railway on Elgin St., Ottawa, on which the cars of the defendant ran north and south, but no tracks on Slater St. which crosses it.

The facts and circumstances of the accident, as I gathered them from the statements of counsel and from the trial Judge's charge and the evidence are substantially these:

The deceased was a clerk in the Militia Department which then occupied a building on the south side of Slater St., about 150 ft. east of Elgin St., and, on the morning of the day in question for the purpose of reaching his office, two blocks distant, he, in company with two fellow clerks, Peary and Deblois, boarded a south bound Elgin St. car at the corner of Queen St., all three having transferred from a Queen St. car.

It was then 8.12 or 8.13 a.m. and Booth and his fellow clerks were due at their office at 8.15 a.m., and there was a penalty attached to their being late. Consequently all three were "hurrying."

Street cars in Ottawa stop at the opposite or far side of the street intersections and as the car approached Slater St. one of them signalled for it to stop and as it was slowing up preparatory to stopping but before it had been brought to a stop, that is while it was still moving, Booth and his companions alighted. Booth left the car a second or two before the others and had proceeded about three ft. when the other two alighted. After leaving the car Booth "ran," according to some witnesses, "trotted" according to another witness, or "walked briskly" according to another witness, but whether he "ran," "trotted" or "walked briskly" he certainly, according to all, went rapidly with his head down or bent forward round the rear end of the car which he had left, towards the east and almost immediately came in contact with a north bound car on the east track, his head striking the car and sustaining the injuries from which he subsequently died.

When Booth alighted from the south bound car, it and the north bound car were "practically," that is, almost overlapping, and both cars were moving. Both cars are of the same type, being 30 ft. in length with vestibules at either end and crosswise seats, and the bodies of both overhang the rail twenty inches, so that when both cars are overlapping, the devil-strip being 4 ft. 8 inches wide, there is a space of only 16 inches between them. When, therefore, after leaving the south bound car, Booth moved rapidly around the rear end of it with his head down or bent forward, he came almost immediately in contact with the north bound car, that is to say, he had to travel only some 7 or

Can.
S.C.
OTTAWA ELECTRIC R. Co. v. BOOTH.

8 or, at the most, 9 ft., that is the width of the western track (4 ft. 8 inches) plus the width of the devil-strip less the overhang of the north bound car (20 inches) and of this distance he had travelled some 3 ft. before his companions left the car.

There was no congestion of traffic at the street intersection at the time of the accident. There was neither vehicle nor pedestrian on the crossing. No one got on the south bound car and no one left it but Booth and his two companions and as these alighted while the car was in motion it went on over the crossing without stopping. No one got off the north bound car, and as there was no one awaiting at the crossing to get on, it also passed over the crossing without stopping. As the morning was fine, there was nothing, therefore, in the condition of the weather, the traffic, the street, the tracks or the cars in any way contributing to the accident.

By R. 5 of the Schedule to ch. 76, 1894, (Ont.) by which statute the operations of the defendants are governed, each car is required to be supplied with a gong which is to be sounded when the car approaches to within 50 ft. of a crossing, but there is no requirement that the gong shall be sounded continuously until the crossing is passed. By R. 99, however, of the Company's Rules and Regulations, for the government of its employees given in evidence on behalf of the plaintiffs, the motorman is directed to sound the gong on approaching a street crossing at least 25 yards therefrom, and to continue such sounding until the crossing is passed as a warning to the public who may be walking or driving on, or dangerously close to, the company's tracks.

The jury found the defendants guilty of negligence causing the accident, and that such negligence consisted in "Omittance of sounding gong and car travelling at excessive speed at crossing," and no negligence on the part of deceased causing or contributing to the accident.

The findings of the jury as to the negligence of the defendants which caused the accident are not and could not be called in question on this appeal.

What is contended for, and it seems to me the only contention that can be successfully advanced here, is that the trial Judge misdirected the jury on the point of the deceased's duty (when crossing around the rear end of the car he had left and before attempting to cross the devil-strip, as it is called, between the two tracks), to look and see

whether any north bound car was coming along that track.

The trial Judge on this point charged the jury as follows:—

"Then you come to question number three, as to the deceased man's conduct. If a man is walking along the street and he sees a street car coming in a way that is negligent, it is his duty to avoid, if he can, the consequence of that negligence. The duty of the deceased was to exercise care when seeking to cross the easterly track; he should be reasonably on the lookout but the law has never said, and it is not the law, that you are bound to stop, look and listen before crossing a track upon which there may be a train or a car. You must exercise reasonable care, and what would be 'care' under one set of conditions, might not be 'care' under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence?

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing, was that circumstance sufficient to tell him that he might with safety cross those tracks; there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimation he might safely cross, then what negligence would the man be guilty of if, under those circumstances he chooses to step across the tracks?

I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances, what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?"

At the close of the Judge's charge, the defendants' counsel took exception to that part of it relating to the deceased's negligence, saying:—"I submit your Lordship told the jury that if the gong was ringing and the man attempted to pass across the east track he was acting imprudently. I submit your Lordship should have told the jury, whether the gong was ringing or not, if he attempted to cross the

Can.
S.C.
OTTAWA ELECTRIC R. Co. v. BOOTH.

east track at that point without care, without looking or listening, he was acting imprudently."

The answer of the Judge was:—

"Gentlemen of the jury: Mr. McVeity wishes me to tell you that whether the gong was ringing or not, it was the duty of the deceased to have exercised care in crossing the east bound track. The question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did. It is not a question of law whether he acted reasonably, it is a question of fact, and for you to determine. I cannot set up a standard, and the Court cannot set up a standard of facts which become so rigid as to determine the law; it remains a question of fact always whether the party exercised reasonable care or did not."

I respectfully submit that, under the circumstances, the general charge that, assuming the gong was not rung, the jury must find whether the deceased was acting reasonably in doing what he did without directing them specifically on the question of his duty to look and see whether there was a car approaching from the south along the eastern track was misleading, and the more especially as he had already told them "that the law has never said and it is not the law that you are bound to stop, look and listen before crossing a track on which there may be a train or car."It is true the American rule, adopted in several of the States of the Union, requiring a person about to cross a railroad or car track to stop, look and listen, has not, to my knowledge, been directly formulated or adopted by our Courts, but that part of it requiring a person so situated to look and see whether a train or car is approaching has been adopted.

Now in view of the deceased's knowledge that the cars of the company ran up the line he was about to cross every few minutes, I submit that the Judge should have told the jury it was the duty of the deceased, after crossing around the rear end of the south bound car, not to attempt crossing the track of the north bound cars without looking to see if a car was approaching.

If there were any facts or circumstances which might excuse the deceased from discharging that duty, they might possibly be left to the jury under proper direction to determine. Here there were no such facts suggested.

I respectfully submit that this Court has already decided the very point in the case of the Wabash R. Co. v.

Misener (1906), 38 Can. S.C.R. 94. In that case, in delivering the opinion of the majority of the Court, I stated what we thought the law was, as follows, at p. 100:—

"I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose blindly, recklessly or foolishly to run into danger, they must surely take the consequences."

I would not, of course, have quoted and relied upon an opinion of my own unless it had the approval of my colleagues, and in that case my opinion was expressly concurred in by my colleagues Idington and Duff, JJ., constituting a majority of the Court, which is my only reason for quoting it.

If that is a correct statement of the law respecting the duty of persons travelling a highway while passing or attempting to pass over a level railway crossing, how much stronger is the reason for applying the law to such a case as we have before us here where there are double tracks of a street railway, only a few feet apart, with cars passing each other north and south every few minutes and a passenger, with full knowledge of these facts, alighting from one car and passing around its rear either "ran" or "trotted" or "walked briskly" across the devil-strip, whichever pace the jury accepted as his, in the attempt to cross the adjoining track without looking to see if a car was approaching.

It has been suggested that the often cited Slattery case decided by the House of Lords (1878), 3 App. Cas. 1155, is in point and governs this case. I respectfully submit it does nothing of the kind. As Lord Cairns, the Lord Chancellor, who voted with the majority in dismissing the railway company's appeal, so clearly pointed out in his judgment at p. 1162 and again at p. 1165 of the Report, the only question before their Lordships in that appeal was (at p. 1162) "whether the verdict should be entered for the appellants, the defendants, in the action." There was no question before their Lordships as to whether the verdict was against the evidence or the weight of evidence or of

Can.

S.C.

OTTAWA ELECTRIC R. CO. v. BOOTH.

misdirection by the trial Judge, or of a new trial being granted. His Lordship at p. 1166 of his speech says:—

"If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and 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. This would be an example of what was spoken of in this House in the case of Jackson v. The Metropolitan Railway Company, 3 App. Cas. 193, an incuria but not an incuria dans locum injuriae. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction."

That statement of his Lordship appears to me peculiarly applicable to the case now before us, and I think it clear from what he says on p. 1165 of the Report that, if the question of whether the verdict was against the evidence or the weight of evidence was open in the House of Lords, he would "without hesitation be of opinion that a verdict more directly against evidence I have seldom seem."

I do not think this Slattery case at all adverse to the appellants in the appeal at Bar, but rather the contrary, as if it had been open to their Lordships to grant a new trial the Lord Chancellor would have indisputably voted for granting it.

If I am right, as I think I am, in my statement of the law as to the duty of a person attempting to cross one of the double track of car lines of the defendants appellants, under the circumstances in which the deceased attempted to do, to look before crossing whether a car was approaching, then the defendants' right to have the jury specifically instructed on the point is clear, and the appeal should be allowed and a new trial granted.

Idington, J.:—I think the trial Judge's charge was quite sufficient to enable the jury to understand their duties in regard to the question of contributory negligence, as well as all else in the case, even before counsel for the defence took the exception he did.

And then the trial Judge repeated concisely all that need, as matter of law, he said on such a subject. I do not think

that there is any reasonable ground for complaint or any need for a new trial.

I would, therefore, dismiss the appeal with costs.

Duff, J.:—This appeal should be dismissed with costs. No doubt there is evidence pointing with little uncertainty to the conclusion that the unfortunate victim of the accident out of which the litigation arose did pass behind the car from which he alighted and went towards the parallel track where the car was advancing by which he was struck without looking ahead of him or taking any precaution to meet the risk of collision with vehicles on that side. It was a question for the jury whether that was or was not negligence which was the causa causans of the accident; on the other hand it was for the jury in passing upon that question to consider whether or not the gong was rung and whether or not the north bound car was, having regard to the circumstances and the locality, moving at an excessive speed. I am inclined to think that the concrete question on which the jury ought to have been asked to concentrate their attention was whether if they found the issue of reckless want of precaution on the part of the victim in favour of the company, and the issues touching the ringing of the gong and the speed of the car in favour of the plaintiff, the real cause of the plaintiff's injury was the recklessness of the victim, or the negligence of the company in respect of speed and failure to give warning. Whether or not, in other words, notwithstanding the recklessness of the victim he would probably have been roused to attention if the motorman had exercised proper prudence in respect of speed and given due warning by sounding the gong. The trial Judge seems rather to have directed the attention of the jury to a somewhat different question, namely, whether the victim was misled by the fact that the gong was not sounded into thinking that the line on that side was clear. That was no doubt a proper point for the jury to consider but I am inclined to think, having regard to the evidence as a whole, it was not the precise point of fact on which the jury ought to have considered the case to turn. That question was, I think, to adopt the language of Lord Cairns in Slattery's case, 3 App. Cas. at p. 1167, whether the failure to sound the gong coupled with the excessive speed of the car on the one hand or, on the other hand, the want of reasonable care on the part of the deceased, was the causa causans of the accident.

Can.

S.C.

OTTAWA ELECTRIC R. Co. v. BOOTH.

These considerations, however, do not afford a sufficient ground for allowing the appeal. There was no misdirection, that is to say, there was no mis-statement of the law; on the contrary the trial Judge's statement of law was accurate, and the trial Judge was not asked to suggest to the jury that they should consider the case from the point of view of the above observations. The counsel for the company evidently preferred to have the jury consider the case from the point of view suggested in the charge of the trial Judge.

Anglin, J.:—W. L. Booth, the husband of the adult, and father of the infant plaintiffs, died as the result of injuries sustained by his being struck by a tramcar of the appellant company. At a second trial of this action, brought under the Fatal Accidents Act (R.S.O. ch. 151) the plaintiffs recovered a verdict for $10,000 for the damages resulting to them and $1,600 to cover costs of nursing, medical attendance and hospital expenses. By an unanimous judgment a divisional Court of the Appellate Division upheld this verdict as to the award of $10,000, but disallowed the item of $1,600 because not covered by the statute.

The defendants now appeal from this judgment. Mr. McCarthy, representing them, very frankly conceded that he could not hope successfully to attack the findings of negligence against his clients,—excessive speed of a tramcar and omission to sound its gong when approaching a crossing—but he contended that the proximate cause of the injuries to the late Booth which resulted in his death was not any fault of theirs but his own recklessness and he also strongly urged that there had been misdirection on the issue of contributory negligence raised by the defence.

On alighting from a south bound car at the corner of Elgin and Slater Sts., in the city of Ottawa, Booth crossed immediately behind it and was struck by a north bound car, which the jury found was travelling at an excessive speed and without sounding the gong as prescribed by the company's rules. Failure to take reasonable precautions before stepping on to the eastern or north bound track after passing behind the street car was the negligence charged by the defendants against the deceased.

The misdirection alleged by counsel for the appellant consists in the omission of the Chief Justice of the Exchequer Division, who presided at the trial, to instruct the jury that if the deceased failed to look and listen before at-

tempting to cross the eastern track he was negligent.

The Judge had told the jury that "it is not the law that you are bound to stop, look and listen before crossing a track on which there may be a train or car."

Counsel for the plaintiffs suggests that this observation was elicited by some statement to the contrary made by counsel for the defendants in addressing the jury—and that was not improbably the case. The Judge immediately added:—

"You must exercise reasonable care, and what would be care under one set of conditions, might not be care under another; so the test always is, where damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that particular case, was reasonably careful, was he acting as a man of ordinary prudence."

Afterwards he practically told the jury that if the gong of the north bound car was ringing and, presumably was heard by him, there would be no excuse for the deceased doing what he did, but added that they should ask themselves whether the omission to ring the gong, if they should find it had not been sounded, might be regarded by the deceased as an intimation that he might safely cross; and he concluded this part of his charge with these words:—

"I mention these matters for your consideration. You must determine questions of fact, and you have to ask yourselves, what would a reasonable man do under the circumstances; what interpretation would he place upon the fact that a warning was not given—if that was the case? I am not saying there was not a warning given; but if there was no warning, what interpretation would a reasonable man place upon that circumstance?"

Counsel for the defendant took the following exception to the charge:—"I submit your Lordship should have told the jury, whether the gong was ringing or not if he attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently."

The Chief Justice thereupon added this observation:—

[See judgment of Davies, C.J., ante p. 84]

Counsel for the appellants urges that the refusal to state explicitly that it was the duty of the deceased to look and listen as the standard of care which the circumstances imposed upon him was misdirection in view of the explicit

Can.
S.C.
OTTAWA ELECTRIC R. Co. v. BOOTH.

statement that it was not the law that a person about to cross a track on which there may be a train or car is bound to stop, look and listen and the distinction which was drawn between the case where the gong is sounded and that where it is not rung.

There is no authority for the proposition that a duty to look and listen before crossing a railway or tramway track exists under all circumstances. No doubt ordinary prudence would dictate such a precaution unless there was something exceptional to warrant a belief that it was unnecessary or to excuse its not being taken. But the direction of the Chief Justice was strictly in accord with the law. The only standard is "reasonable care, having regard to all the circumstances." If under the circumstances the duty of taking reasonable care involved looking and listening before attempting to cross, the existence of that obligation was necessarily implied in the direction given. For aught that we know the jury may have found that the deceased did in fact both look and listen so far as reasonable care required him to do so and that he nevertheless was not negligent in attempting to cross possibly because he failed to realise the excessive speed at which the north bound car was approaching. Toronto R. Co. v. King, [1908] A.C. 260, at p. 269. We should not assume the contrary. Neither should it be taken for granted that he did not in fact both look and listen.

The whole duty of the deceased was involved in the statement that he was bound to exercise reasonable care having regard to all the circumstances. There was, in my opinion, no misdirection—and certainly none of which it can be predicted that "some substantial wrong or miscarriage has been thereby occasioned," the condition of granting a new trial for misdirection imposed by sec. 28 (1) of the Ontario Judicature Act 1915.

Whether the deceased was or was not negligent under the circumstances is eminently a question for the jury. While, if trying the case upon the printed evidence now before us, I should strongly incline to think that contributory negligence had been established and should probably on that ground have dismissed the action, I am not prepared to hold that on the undisputed facts contributory negligence of the deceased is so clear that no reasonable jury could refuse to find it proven—that the verdict negativing it unanimously accepted by the Judges of the Appellate

Divisional Court is so perverse and contributory negligence so indisputably shewn that the trial Judge erred in failing to take the case from the jury and dismiss the action. That conclusion would be involved in directing judgment for the defendants non obstante veredicto either on the ground of contributory negligence or on the ground that the only possible conclusion from the evidence as a whole is that the sole proximate cause of the injuries sustained by Booth which resulted in his death was his own recklessness.

Brodeur, J.:—The only ground of appeal which was argued is that there was misdirection by the trial Judge in his charge. It is claimed that he has not properly expressed the law and the obligations of a person crossing a street car line to stop, look and listen.

On that point the trial Judge in his charge stated in most emphatic terms that this rule—stop, look and listen—was not the law of the country, but that the true rule was that a person must exercise reasonable care, and what would be care under one set of conditions might not be care under another; so the test always is when damage is sought to be recovered because of negligence in a railway accident, whether the plaintiff, under the circumstances of that case, was acting as a man of ordinary prudence.

In the present case the plaintiff was alighting from a south bound car on Elgin St. in Ottawa, and passed behind this car and tried to cross over the other track on which a car was running by which he was struck.

It is claimed on the part of the company that the man was negligent because he should have looked and listened.

On the other hand, it was stated that the failure to sound the gong on the part of the railway company was the real cause of the accident.

After the jury was charged, objection was made and it was stated that the jury should have been told that whether the gong was rung or not if the victim attempted to cross the track at that point without care, without looking or listening, he was negligent. His Lordship, the trial Judge, in view of this objection, took up the question again and stated to the jury "the question of exercising care is a question of fact and you must say, assuming the gong was not rung, whether the deceased was acting reasonably in doing what he did."

Can.
S.C.
OTTAWA ELECTRIC R. Co v. BOOTH.

It seems to me that after such a charge it cannot be contended that there was misdirection.

The appeal having failed on the point raised, it should be dismissed with costs.

Mignault, J.:—The argument of Mr. McCarthy for the appellant was chiefly directed to shew that there had been misdirection by the trial Judge in his charge to the jury, but he also argued that the verdict that the deceased was not guilty of contributory negligence was one which the jury could not reasonably find and should be disregarded and the plaintiff's action dismissed.

The alleged misdirection was in reference to the duty of reasonable care incumbent upon the deceased when, after alighting from the south bound tramcar on the west side of Elgin St., Ottawa, at its intersection with Slater St., he attempted to cross the tracks on the east side of the street in order to continue east on Slater St. to the building occupied by the Militia Department, and was struck by a car of the appellant going north. The jury found as a fact that the gong of the north bound car had not been sounded as the car approached Slater St. and that it was travelling at an excessive speed at the crossing. The trial Judge gave in his charge the following instruction to the jury as to the duty of the deceased to exercise reasonable care: [See judgment of Davies, C.J., ante p. 83]

And further on the Judge said:—

"Now as to the alleged negligence of the deceased man. Was it negligence on his part to have stepped into a point of possible danger, under the circumstances of this case? What would a reasonable man have done under the circumstances that you may find to have existed at that time? Suppose that the bell was ringing; was Booth exercising reasonable care, under the circumstances, in stepping in front of that car, or running against it, or however it happened? It would seem to have been a highly dangerous and imprudent act, if the gong was ringing, and if he heard it, or ought to have heard it; it would be running a terrible risk on his part with the sound of the gong so near at hand for him to go beyond the protection of the car that was moving away and step across the devil-strip in front of the approaching north-bound car. If that gong was ringing what excuse had he for putting himself in that place of danger; doing what led to his

death?

If the gong was not ringing, then what negligence was the deceased guilty of? If the gong was not ringing, was that circumstance sufficient to tell him he might with safety cross those tracks, there was no car coming? Is that the meaning to be attached to the non-ringing of the gong at a place where it ought to be rung? If the non-ringing of the gong, when it ought to be rung, is an invitation to cross, an intimation he might safely cross, then what negligence would the man be guilty of if, under those circumstances, he chooses to step across the tracks?"

Counsel for the defendant, after the charge, objected that the Judge should have told the jury that whether the gong was ringing or not, if the deceased attempted to cross the east track at that point without care, without looking or listening, he was acting imprudently, and the trial Judge again addressed the jury as follows: [See judgment of Davies, C.J., ante p. 84]

Taking all these passages of the trial Judge's charge, together with the one I will quote further on, I am of opinion that the jury was not misdirected. The trial Judge told them that the deceased was bound to exercise reasonable care, that what would be care under one set of conditions might not be care under another, that the question was whether the deceased, under the circumstances of this particular case, was reasonably careful, or was acting as a man of ordinary prudence would have done.

In Toronto R. Co. v. King, [1908] A.C. 260, a case where a man driving across a street in front of an approaching tramcar was struck and killed, their Lordships of the Judicial Committee were of the opinion that the deceased was not clearly guilty of that "folly and recklessness" causing his death to which Lord Cairns referred in Dublin, Wicklow and Wexford R. Co. v. Slattery, 3 App. Cas. 1155, at p. 1166, and they add (p. 269) the following observations which are very pertinent to the present case:—

"It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of

Can.

S.C.

OTTAWA ELECTRIC R. CO. v. BOOTH.

each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in Slattery's case (3 App. Cas. 1155, at p. 1166), is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction to these two streets, is quite another thing."

Mr. McCarthy referred us to the decision of the Judicial Committee in G.T.R. Co. v. McAlpine, 13 D.L.R. 618, [1913] A.C. 838, 16 C.R.C. 186, where their Lordships found that the trial Judge had misdirected the jury as to the duty to exercise care incumbent on persons crossing a railway track, and their Lordships (speaking by Lord Atkinson as in the case of Toronto R. Co. v. King) observed that the trial Judge had not pointed out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident, and they add, at p. 624:—

"For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary."

Here the trial Judge, after his charge, acceding to an objection made by counsel on behalf of the defendant that if the jury found the defendant guilty of negligence they should consider whether that negligence has caused the accident, stated to the jury as follows:—

"Gentlemen of the jury: Mr. McVeity is quite right in the point he has taken. I thought I made it pretty clear, but no doubt omitted to do so. Speaking of acts of negligence, I have all along had it in my mind, and referred to acts of negligence which caused this accident. The defendants are only liable for such negligent acts as caused the accident; so when I say if you find that the defendants omitted to ring the gong, or the north-bound car was going at too high a speed, you will only answer 'Yes' to question

number one if you think that either of those acts of negligence caused the accident."

I must therefore conclude that the trial Judge's charge to the jury, measured by the test laid down by the Judicial Committee in both these cases, was a proper one and in effect left to the jury to decide, and it was eminently a question for them to determine, whether it was the negligence of the defendant or the folly and recklessness of the deceased which brought about the accident.

On the question whether the jury could reasonably find that the deceased was not guilty of any negligence which caused or contributed to the accident, while if I had to decide that question on my view of the evidence I would experience very great difficulty in arriving at the same conclusions as the jury, still this was a question for the jury to decide, and having held that they were properly directed by the trial Judge, I cannot say that their finding is so perverse and unreasonable that it should be disregarded and judgment entered for the defendant.

I think therefore that the appeal should be dismissed with costs.

Appeal dismissed.

McCRAE v. LYONS and THOMPSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Animals (§I.D—35)—Stray Animals Act, 6 Geo. V. 1915 (Sask.) ch. 32 [R.S.S. 1920, ch. 124]—Lawfully at Large—Damage to Grain Not Enclosed by Lawful Fence—Damages—Liability of Owner.

It is lawful under the Stray Animals Act, 6 Geo. V. 1915 (Sask.), ch. 32, [R.S.S. 1920, ch. 124] to allow animals to run at large, and where a rural municipality passes a by-law restraining them from running at large during certain hours of the day, they are lawfully at large except during those hours, and the owner is not liable for damage which it is the nature of cattle ordinarily to do unless the damage is done on land enclosed by a lawful fence.

[McKay v. Loucks (1920), 53 D.L.R. 394, followed. See Annotation, Animals at Large, 32 D.L.R. 397.]

Tender (§I.—7)—Animals Impounded—Stray Animals Act, 6 Geo. V. 1915 (Sask.), ch. 32, [R.S.S. 1920, ch. 124]—Action for Wrongful Seisure and Detention—Claim Exorbitant—Relief from Tendering Amount.

Where animals have been impounded under the Stray Animals Act, 6 Geo. V. 1915 (Sask.), ch. 32, [R.S.S. 1920, ch. 124] and the damages claimed are exorbitant, and a tender of the proper amount would have been refused, a tender is unnecessary, and is no defence to an action for wrongful seizure and detention

Sask.

C.A.

McCRAE v. LYONS AND THOMPSON.

of such cattle. The only damage for which animals can be impounded is the damage done on the occasion on which they are distrained.

[Campbell v. Halverson (1919), 49 D.L.R. 463, 12 S.L.R. 420, judgment of Newlands, J.A., referred to; Graham v. Spettigue (1885), 12 A.R. (Ont.) 261, referred to.]

APPEAL by plaintiff from the trial judgment in an action for damages for wrongful seizure and detention of cattle. Reversed.

P. H. Gordon, for appellant.

L. McK. Robinson, for respondent Lyons.

H. E. Sampson, K. C., for respondents Thompson.

The judgment of the Court was delivered by

Lamont, J. A.:— The material facts in this case are: That on the night of November 12, 1919, the plaintiff's cattle (some 26 head) were in the unthreshed crop of the defendant Lyons; that around 10 o'clock p.m. the defendant caused the herd to be driven from his place to the farm occupied by the defendant Louis Thompson, being the N/W¼-27-44-16-W2nd. This farm had, until November 9, been occupied by Edward Thompson, who had been duly appointed poundkeeper for that district, and a pound had been located on the said farm by the council of the municipality. Next day, November 13, the plaintiff saw his animals at Louis Thompson's farm and was informed that there was something like $400 damages against the animals. On November 15 the plaintiff demanded from Louis Thompson the immediate delivery to him of his cattle. This demand was refused. The plaintiff then brought this action for damages against the defendant Lyons and Louis Thompson, claiming that his cattle had been wrongfully seized and that he had been unlawfuly deprived of them.

In his statement of defence the defendant Lyons alleged that on November 12, 1919, the plaintiff's cattle were unlawfully at large and were trespassing upon his premises; that at 10 o'clock at night, while they were so trespassing, he caused them to be seized and lawfully impounded, and he counter claimed for $435.75 for damage done to his crop by the said cattle on November 12 and divers other occasions.

In his defence Louis Thompson set up that he was employed by Edward Thompson, the duly appointed poundkeeper for that district. He admitted having the custody of the cattle, also the demand of the plaintiff for their

delivery to him and his refusal of same. He counterclaimed for a return of the cattle.

The statement of claim alleges, and it is nowhere denied, that the defendant Edward Thompson was added as a defendant to the action by order of the Local Master in Chambers of his own motion. In his defence Edward Thompson set up that he was the duly appointed poundkeeper under the Stray Animals Act 6 Geo. V, 1915, (Sask.) ch. 32, [R. S. S. 1920, ch. 124.] and he counterclaimed for a return of the cattle and payment by the plaintiff of $435.75 damages, and $267.62 expenses.

At the trial it was established that the municipality had passed a by-law purporting to restrain animals from running at large, the material portion of which is:

"2. The following animals shall not be permitted to run at large within the areas herein described during the periods named respectively:— (a) Horses and cattle other than stallions over one year old, bulls over eight months old, within the limits of the municipality, between the hours of 8 o'clock and 6 o'clock a.m."

It was also established that, when Edward Thompson left the farm on November 9, he left there the defendant Louis Thompson with express instructions to look after the pound.

The trial Judge held that the cattle were wrongfully running at large and trespassing on Lyons' property at the time they were distrained, and that such distress was legal; that, as no amount had been tendered for fees or damages after the distress, the detention of the animals was proper, and he dismissed the plaintiff's action. On the counterclaim he allowed the defendant Lyons $226.94, for damage done by the cattle on the occasion in question as well as damage done on previous occasions, although he found as a fact that the property of the defendant Lyons was not enclosed by a lawful fence. From this judgment the plaintiff now appeals.

I agree with the trial Judge that the by-law was within the power of the municipality to enact, and was, therefore, valid. I am also of opinion that the removal of Edward Thompson from the farm on which the pound was located, three days prior to the impounding, did not affect the validity of the proceedings. The fact that a man is duly appointed poundkeeper does not impose upon him the obligation of being personally present at the pound all the time. He may absent himself from it from time to time, prov-

Sask.

C.A.

McCRAE v. LYONS AND THOMPSON.

ided he leaves a man in charge who can properly fulfil the duties of poundkeeper; but he will be responsible for the due performance of the duties.

I also agree that the plaintiff's animals were running at large at 10 o'clock at night when distrained. Section 13 [14, as amended by 7 Geo. V., 1917, ch. 34, sec. 45, and by 9 Geo. V., 1918-19, ch. 53, sec. 5] of the Act provides:—

"14. Any proprietor may distrain any animal that is: (a) Running at large in any municipality contrary to the provisions of this Act, of any by-law of such municipality passed under the provisions of this Act:"

The plaintiff's cattle being unlawfully at large after 8 o'clock in the evening of November 12, the defendant Lyons was entitled to distrain them at any time between that hour and 6 o'clock the following morning. The distraint and the impounding were, therefore, lawful.

The next question is, were they lawfully detained. The defendant Lyons claimed the sum of $435.75 for the damage done by the cattle, and the cattle were detained to enforce payment of this amount. The only damage for which animals can be impounded is, the damage done on the occasion on which they are distrained.

In Graham v. Spettigue (1885), 12 A.R. (Ont.), 261, Hagarty, C. J. O., in giving the judgment of the Court of Appeal, at p. 263, said:

"In addition, the authorities shew that the right to distrain 'damage feasant' requires, as the words imply, actual damage, and the cattle having done actual damage, and then being driven out and entering again, they cannot be seized for the former damage, but only for the damage then being done."

In sec. 15, sub-sec. (3), it is provided that, where there is a temporary impounding by the distrainer himself not at the pound, such distrainer may make a charge for feeding and maintaining the distrained animals, "but shall only be entitled to compensation for damage done prior to the temporary impounding." In my opinion this section does not make any alteration in the law, but means that the compensation must be for damage done immediately prior to the temporary impounding. If the Legislature had meant to allow compensation for damage done at any time prior to the impounding, there would have been no necessity for employing the word "prior," as it is obvious there could be no claim for damage subsequent to the impounding.

Section 16 sub-sec. (2), reads as follows:

"(2) It shall be the duty of the distrainer to leave with the poundkeeper a written statement containing a description of the animal distrained, the name of the owner, if known, the place where such distraint was made, the nature and extent of the damage, if any, the amount claimed, and such fees as are provided in sec. 38 for driving such animal and delivering same to the poundkeeper."

These sections contemplate the impounding of animals not only when they are doing damage but also when they are unlawfully running at large. I cannot, however, find anything in the Act which would justify the distrainer in making a claim for damage done at a time other than the occasion on which they are distrained. The only damage, therefore, for which Lyons was entitled to impound and detain the cattle was that done on the night of November 12.

By sec. 4 of the Act, it is lawful to allow animals to run at large. Section 5 provides that the council of the municipality may by by-law restrain animals from running at large. Under the by-law in question in this action, the only time animals were restrained from running at large was from 8 p.m. to 6 a.m.; during all other hours, therefore, the plaintiff's cattle were lawfully running at large. Being lawfully at large, the plaintiff was not liable for damage done by them which it was the nature of cattle ordinarily to do, unless that damage was done on land enclosed by a lawful fence. McKay v. Loucks, (1920), 53 D. L. R. 394, 13 S. L. R. 338; Jack v. Stevenson (1910), 19 Man. L. R. 717.

The defendant Lyons did not have his crop enclosed by a lawful fence. He cannot therefore recover for any damage done by the plaintiff's cattle at any time between the hours of 6 a.m. and 8 p.m. The evidence shews that the great bulk of the damage was done by the cattle in the daytime. On two occasions only was it shewn that the cattle had been on the crop after 8 p.m.,— the night they were distrained and one night some two or three weeks before. The trial Judge found that the total damage to the crop amounted to $226.94. This included the damage done by the cattle when they were lawfully at large, which damage, as I have pointed out, is not recoverable. The judgment awarding $226.94 damages, therefore, cannot be upheld. Had there been evidence shewing the damage done by the cattle on the occasions on which they were unlawfully

Sask.

C.A.

McCRAE v. LYONS AND THOMPSON.

at large, the plaintiff would have been entitled on his counterclaim to judgment for such damage, although the cattle could only have been detained for the damage done by them on the night of November 12. The evidence shews that the cattle were in the grain from the middle of the forenoon of the 12th until they were distrained at 10 o'clock that night. As they had fed all day on the unthreshed grain, the damage they did between 8 p.m. and 10 p.m. would not likely be great. At any rate there is no evidence as to what it was, if it amounted to anything. As no damage was shewn to have been done on that occasion, the cattle could only be lawfully detained for the expenses of impounding, the poundkeeper's fees, and nominal damages for trespass.

The trial Judge held that, as the plaintiff had not made a tender of the damages and expenses incurred, the plaintiff's action could not be maintained. In so holding the Judge, in my opinion, erred.

In Campbell v. Halverson (1919), 49 D. L. R. 463 at p. 466, 12 S.L.R. 420, Newlands, J.A., held that, where the damages claimed were exorbitant and a tender of the proper amount would have been refused, a tender was unnecessary. He said:

"The law therefore required the defendant in this case to state the nature and extent of the damage and the amount claimed, and it would, therefore, bring this case within that class of cases referred to by Tindal, C. J., where, when the amount claimed was exorbitant, as it was in this case, where $1,000 was claimed and only $50 damages done as found by the trial Judge, a tender was unnecessary."

In the present case, although no actual damage for which the cattle could have been detained was shewn to have been done, the damages claimed were $435.75. This claim was exorbitant. The defendant Louis Thompson admitted in evidence that if any amount short of the $435.75 and lawful charges had been offered, he would have refused it; and, indeed, it would have been his duty to refuse it, as he is bound to take the distrainer's statement as to the damages and detain the animals impounded until the same are paid or reduced: Section 23. A tender of the lawful fees and charges, therefore, would have been useless. Under these circumstances, I agree with Newlands, J. A., 49 D. L. R. 463, that a tender was unnecessary.

The appeal should therefore be allowed with costs against

the defendant Lyons, the judgment below set aside and judgment entered for the plaintiff for a return to him of his cattle upon his paying into Court the lawful fees and charges for which the animals could be held on November 15. There should be a reference to the local Registrar at Melfort to ascertain the amount of these charges, unless the parties can agree upon the amount.

As to costs: Edward Thompson was made a party by the Local Master on his own motion.

Rule 41 provides that:

"The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order.....that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

In my opinion Edward Thompson was not a necessary party to the action. His presence before the Court was not necessary to completely determine whether or not the defendant Lyons and Louis Thompson had unlawfully seized or detained the plaintiff's cattle. The plaintiff did not allege any wrongful action on his part or claim any relief against him. His evidence was available without making him a party. In my opinion the local Master was wrong in directing him to be added. As none of the original parties to the action were responsible for his being added, I do not see how they can be made liable for his costs. Under the circumstances I cannot see how any costs can be given either for or against him.

The action against Louis Thompson was for unlawfully detaining the cattle. As the representative of the pound-keeper, he could not give them up without first being paid the damages demanded. He should, therefore, have his costs as against the plaintiff. But as the whole cause of litigation was the exorbitant claim for damages made by the defendant Lyons, the plaintiff is entitled to his costs as against Lyons, including the costs which he will have to pay the defendant Louis Thompson.

Appeal allowed.

Alta.

S.C.

THE FRANCO-BELGIAN INVESTMENT CO. v. IMPERIAL BANK OF CANADA AND SUPPLE.

THE FRANCO-BELGIAN INVESTMENT CO. v. IMPERIAL BANK OF CANADA AND SUPPLE.

Alberta Supreme Court, Scott, J. June 11, 1921.

Execution (§I.—12)—Praecipe for Writ of—Necessity for—Praecipe to Sheriff of One District—Seizure by Sheriff of Another District—No Other Praecipe Issued—Validity of Seizure—Rule 600 (Alta.).

A praecipe filed in the Supreme Court of Alberta Judicial District of Edmonton about September 24, 1915, requiring the sheriff of that district to issue a writ of execution against the lands and goods of a judgment debtor in an action in that district is not sufficient to validate a seizure made by the sheriff of the Judicial District of Calgary on August 28, 1916, on a writ of execution received by him on September 27, 1915, no other praecipe for a writ of execution having been issued.

ACTION for a declaration that an execution is good and that the plaintiff is entitled to an order for the sale of certain shares seized by the sheriff under an execution Action dismissed.

S. W. Field, for plaintiff;

Frank Ford, K. C. for defendant.

Scott, J.:— The following facts are stated by the parties for the opinion of the Court.

On September 11, 1915 the plaintiff obtained judgment in a mortgage action against one James J. Brewster for the sum of $13,907.80 which directed that upon default in payment within the time therein limited the mortgaged premises should be sold and the proceeds of the sale paid into Court and applied in payment of the plaintiff's claim.

About September 24, 1915, the plaintiff filed in the office of the clerk of this Court for the Judicial District of Edmonton a praecipe bearing that date requiring him to issue a writ of execution directed to the sheriff of the Judicial District of Edmonton against the goods and lands of the judgment debtor under the judgment referred to. No other praecipe for a writ of execution was ever filed.

On September 27, 1915 the sheriff of the Judicial District of Calgary received a writ of execution upon the judgment referred to which execution was directed to him and required that of the goods, chattels, lands and tenements of the judgment debtor he should cause to be made the amount of the judgment and interest.

On August 28, 1916, the sheriff wrote to the Brewster Hotel Co. Ltd, at Banff, Alberta, informing him that he held an execution against James J. Brewster and stating that he was informed that Brewster had several shares in that company and stated that all of his shares and other

interests in the company were thereby seized under that execution. He also forbade the transfer or disposal of the shares to any person.

On or about September 5, 1916 the sheriff served a certified copy of the execution upon the manager of that company at its registered office at Banff. The secretary of the company was then F. S. Selwood of Calgary in whose office there the transfer books of the company were then kept.

On May 23, 1920, the execution debtor executed an assignment of his shares in the company to the defendant, Supple, the manager of the branch of defendant bank at Calgary, in trust for the latter and as security for the judgment debtor's indebtedness to it.

On January 27, 1920, the Master in Chambers at Edmonton made an order which, after reciting that the mortgaged lands had been sold to the plaintiff for $7,000, confirmed such sale, vesting the property in the plaintiff and directed that the judgment obtained by the plaintiff should remain in full force and effect to the extent of the difference between the amount then ascertained as $24,532.80 owing to the plaintiff under its mortgage as of January 27, 1920, together with the taxed costs subsequent to the order nisi, and the sum of $7,000 being the sale price of the lands, less the sum of $4,367.94 being the arrears of taxes due on the lands up to December 31, 1919, and further directed that the clerk should ascertain and certify the amount, tax the costs and amend the payment accordingly.

The plaintiff subsequently applied to the Master for an order for the sale of the shares in question. He dismissed the application at the instance of the defendant in this action. The plaintiff thereupon commenced this action.

On December 17, 1920, Brewster made an authorised assignment under the provisions of the Bankruptcy Act 9-10 Geo. V. 1919 (Can.) ch. 36 to the Credit Mens Association.

The trustee in bankruptcy did not refuse or neglect to take proceedings and was not asked or required to do so under sec. 35 of the Act.

In the statement of claim in this action the plaintiff alleges that under the execution referred to the sheriff of the Judicial District of Calgary seized 1895 shares belonging to said Brewster in the capital stock of the Brewster Trading Co. Ltd; 124 shares belonging to him in the capital stock of the Brewster Transport Co. and 285 shares in the cap-

Alta.

S.C.

THE FRANCO-BELGIAN INVESTMENT CO. v. IMPERIAL BANK OF CANADA AND SUPPLE.

ital stock of the Brewster Hotel Co. Ltd., and that subsequent to such seizing Brewster purported to assign and transfer said shares to defendant Supple in trust for his co-defendant. After reciting the Master's order of January 27, 1920, the plaintiff further alleges that subsequent thereto it applied to the Master for an order to sell the said shares of stock and that at the instance of the defendant he refused the order on the ground that the writ of execution had been issued by the clerk without a praecipe therefor and that it was therefore invalid.

The claim of the plaintiff in the action is for a declaration that the execution is good and valid and that the plaintiff is entitled to an order for the sale of the shares referred to.

The questions submitted for the opinon of the Court are:—

1. Is the plaintiff now entitled to maintain this action and is he entitled to a declaratory judgment as asked?

2. Has the plaintiff a valid seizure of the shares and, if so, as of what date?

3. Is there a valid judgment on which to maintain the execution?

4. Is the question raised by the statement of claim res judicata, or is the plaintiff bound by the judgment of the Master?

5. Has the plaintiff a valid writ of execution?

The parties agree that judgment shall be entered in accordance with the findings of the Court.

As to the second and the fifth questions submitted I am of opinion that, as there was no praecipe filed for the issue of the execution under which the sheriff seized the property in question, the execution was invalid and that the seizure made under it was therefore, also invalid.

Rule 600 which was in force when the seizure was made provides that a writ of execution shall be issued only upon praecipe. It supersedes former Rule 344 which provided that no writ of execution should be issued without the person issuing it or his advocate filing a praecipe for that purpose, that it should contain the title to the action and contain other prescribed particulars and should be signed by the person issuing it or his advocates.

It is difficult to ascertain the object of the change in the rule. Its effect cannot be, as was contended by counsel for the plaintiff, that it is no longer necessary that the praecipe

shall be in writing. The word praecipe is defined by Webster as "a paper containing the particulars of a writ lodged in the office from which the writ issues." By Wharton as "a slip of paper on which the particulars of a writ are written and lodged in the office out of which the required writ is to issue," and by Bouvier as "a written order to the Clerk of the Court to issue a writ."

Apart from the provisions of R. 600 or any rule or practice respecting it the clerk would not have any authority to issue a writ of execution unless directed to do so by the person entitled to its issue or his solicitor. See Hooper v. Lane (1847), 10 Q.B. 546, 116 E.R. 208.

I answer the second and fifth questions in the negative and, in view of my answer thereto, it is unnecessary for me to answer the other questions submitted.

The action will be dismissed with costs.

The plaintiff seeks a declaration that he is entitled to an order for the sale of the judgment debtor's shares in three separate and distinct companies. I think I should call attention to the fact that the statement of facts submitted shews that the sheriff attempted to seize the shares in only one of the three companies.

Action dismissed.

PARE v. CUSSON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 4, 1921.

Wills (§I.D—37)—Testamentary Capacity—Insane Delusions—Testator Not Influenced by in Making—Undue Influence—Proof—Mode of Life of Testator—Interest in Institutions Benefited—Care in Preparing Will.

Where it is shewn that neither insane delusions nor hallucinations held by a testator had or could have had any influence on him in the disposition of his property, the Court will uphold the will. The fact that the testator was at the time of making his will mistaken as to the amount of advances made to one of the beneficiaries is not sufficient ground for setting aside the will.

In considering whether a testator has been unduly influenced in making bequests to a religious institution, the Court should consider his mode of life and the deep interest he had always taken in the affairs of the institution which benefited by the will, and the care taken in preparing the will.

APPEAL from a judgment of Curran, J., admitting a will to probate. Affirmed.

H. J. Symington, K.C., and H. E. Swift for adult appellants.

Man.

C.A.

PARE v. CUSSON.

R. W. Craig, K.C., for official guardian, representing infant appellants.

H. P. Blackwood, K.C., and Noel Bernier for the beneficiaries.

D. H. Laird, K.C., and S. R. Laidlaw for plaintiff respondent.

Perdue, C.J.M.:—The plaintiff, who is named as executor in the will of the late Joseph Azarie Senecal, brings this action to establish the will and the codicils thereto, and for a grant of probate of the same. The defendants are the beneficiaries under the will. The defendants Antoinette S. Cusson and Georges Senecal are the children and heirs at law of the testator. The validity of the will is disputed by both of the heirs at law upon the ground that the testator at the time of making the alleged will and codicils was not of sound disposing mind, memory and understanding. Georges Senecal takes the further ground that the execution of the will and codicils was obtained by the undue influence of the plaintiff and other persons named.

In so far as the second ground, that of undue influence, is concerned there was no evidence adduced which would justify the Court in declaring against the validity of the will and codicils.

The main contest in the case arises upon the first ground —the mental capacity of the testator. The testator was 76 years of age when he made the will in question. For several years he had been in ill health. He had Bright's disease of the kidneys, hardening of the arteries and his heart and liver were affected. For several years prior to his death he had been addicted to the use of morphine, latterly taking it several times each day.

The trial Judge, Curran, J., and my brother Dennistoun have dealt with the evidence very fully. The two medical men who attended the testator during his final illness and when he was in St. Boniface Hospital differ in their opinion as to his mental capacity during that period. Dr. Lambert who had attended the deceased from May to July, 1916, and at the end of September in the same year, was of opinion that he was not during those periods in a fit mental condition to make a will. Dr. Lambert based his opinion on the fact that the deceased was addicted to the use of morphine and was intoxicated with the drug. He saw deceased twice at St. Boniface Hospital during his last illness but did not examine him. On the other hand, Dr. Benoit who

attended Senecal during the last days of his life, was of opinion that the testator's mind was quite clear during the first 4 or 5 days that he was in the hospital, but not afterwards. The trial Judge considered that the evidence of Dr. Benoit was not very satisfactory "as he could not remember much in detail about the testator's condition during this period."

The evidence of Senecal's agent Papineau and of Mr. Betournay, the solicitor who prepared the will and codicils in question, strongly point to the clearness of mind and testamentary capacity of the testator at the time these instruments were prepared and executed. Neither of these witnesses had any doubt on the subject and the circumstances as they relate them strongly support their opinion.

Although the will in question shews a marked change of mind in the testator since the making of his previous will, which he had confirmed in the December preceding his death, he may have had reasons for the change which appealed to him, without doubts being raised as to his sanity. His last will may be considered capricious and unfair to a devoted daughter, but that is not a ground for setting it aside.

The defendants who attack the will urge that the testator was affected by two mental delusions: (1) that he had already paid or expended upon his daughter's family $25,000; (2) that he had broken with his family and could not live with them again. The doctrine of insane delusion was considered by the House of Lords in the recent case of Sivewright v. Sivewright's Trustees (1919), 2 Sc. L.T. 261. Sir James Sivewright died on September 10, 1916, leaving a trust disposition and settlement dated August 5, 1916. After his death his widow brought an action against the trustees appointed and acting under the trust disposition and settlement and against the beneficiaries, attacking the trust disposition and settlement on the ground of the insanity of the maker at the date of its execution. Lord Haldane expressed the opinion that even if the maker of the instrument suffered from occasional delusions, and assuming them to have been delusions which no man who reasoned normally could have entertained, the law requires that the temporary delusion should be shewn to have brought about the disposition impeached. He referred to the case of Jenkins v. Morris (1880), 14 Ch. D. 674, in which it was held by the Court of Appeal that the jury had been rightly directed that the mere existence of a delusion

Man.

C.A.

PARE v. CUSSON.

was not sufficient to avoid a deed, even though the delusion was connected with the subject matter; that the delusion was not conclusive against capacity although the fact of its existence might well be evidence bearing on this question.

Lord Atkinson pointed out that the presence of insane delusion was a question of degree in most cases, and in all a question of fact. He refers to the definition given by Lord Lushington in Dew v. Clark (1826), 3 Add. 79, 162 E.R. 410: "It is only the belief of facts which no rational person would have believed that is insane delusion." This definition was approved in Boughton, etc. v. Knight (1873), L.R. 3 P. & D. 64, at p. 68.

After a careful consideration of the evidence I think that if, at and prior to the execution of the will and codicils attacked, there were beliefs entertained by the testator that were not rational, not implying that there were such, they were not shewn to have affected the disposition he made of his property. Although much less generous towards his family than the will he made in 1915, the will in question contains provisions for them. The delusions or disorders in the testator's mind, if any such existed, are not shewn to have poisoned his affection for his children and grandchildren. The case, however, is by no means without difficulty. The behaviour of the testator shortly before his death was strange and there are suspicious circumstances. But the Court has to act on the facts as presented to it. The trial Judge has drawn his conclusions upon these facts and there is no sufficient reason shewn why this Court should interfere with the disposition he has made of the case.

The appeal should be dismissed. The costs of the appeal should be borne by the estate in the same manner as the trial Judge provided for the payment of the costs of the suit.

Cameron, J.A.:—In this action brought by the plaintiff to establish the last will and codicils thereto of Joseph Azarie Senecal of St. Boniface, who died March 20, 1917, and for judgment ordering probate thereof, Curran J., before whom it was tried, gave judgment for the plaintiff. The will and codicils are attacked by Antoinette S. Cusson, the daughter of the testator, Georges Senecal, his son, Anna Cusson, daughter of Antoinette S. Cusson and by the infant defendants on the ground of want of testamentary capacity on the part of the testator at the time he made the same. The defendants Anna Cusson and Georges Senecal further

allege that the will and codicils were obtained by the undue influence of the Rev. Joseph Victor Joubert, the Rev. Leonide Primeau, the Right Rev. Francois Dugas and others then unknown and join with the previously named defendants in the relief asked by them. The other defendants affirm the validity of the will and codicils, and ask for the judgment of the Court establishing the same.

This appeal is brought by Antoinette S. Cusson, her daughter Anna Cusson and Georges Senecal. All the other defendants were represented on the argument.

The issues raised, therefore, are the testamentary capacity of the testator and, granted that he had testamentary capacity, the undue influence in obtaining the will exercised on the testator by the parties named. It is well established that the onus of proof of testamentary capacity is on the parties propounding the will. And when once it has been proved that a will has been duly executed by a person of competent understanding and apparently a free agent the burden of proving it was executed under undue influence is on the party alleging it. "Undue influence cannot be presumed." Boyse v. Rossborough (1857), 6 H.L. Cas. 2, at p. 49, 10 E.R. 1192. And it must be shewn that the power was exercised and the execution of the will thereby obtained. Craig v. Lamoureux, 50 D.L.R. 10, [1920] A.C. 349, 89 L.J. (P.C.) 22, 26 Rev. Leg. 306.

"It is essential to the exercise of the testamentary power that a testator should understand the nature of the act and its effect, and that no insane delusions should dominate his mind so as to overmaster his judgment to such an extent as to render him incapable of making a reasonable and proper disposition of his property or of taking a rational view of the matters to be considered in making a will," 19 Halsbury, pp. 403-4, para. 829.

The all-important and difficult question at once arises: What constitutes the insane delusions that deprive an individual of his testamentary capacity? This has been a matter of much discussion and it is impossible to deal with all the authorities upon it.

It was said by Sir John Nicholl in Dew v. Clark, 3 Add. 79, at pp. 90, 91, that:

"The true criterion—the true test—of the absence or presence of insanity I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, delusion. Wherever the patient once con-

Man.

C.A.

PARE v. CUSSON.

ceives something extravagant to exist which has still no existence whatever but in his own heated imagination and wherever, at the same time, having so conceived, he is incapable of being, or at least, of being permanently, reasoned out of that conception; such a patient is said to be under a delusion, in a peculiar half-technical sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity."

In short, he regarded delusion and insanity as convertible terms. In Smith v. Tebbitt (1867), L.R. 1 P. & D. 398, 36 L.J.(P.) 97, Sir J. P. Wilde discusses the question, "What is a mental delusion?" at p. 401. A man may be said to be under a "delusion" when he only labours under a mistake. To say that a "morbid" or "insane delusion" is meant is only to beg the question for the "delusion" to be sought is to be the test of insanity, and he criticises the definitions given by Sir John Nicholl in Dew v. Clark, supra, and Lord Brougham in Waring v. Waring (1848), 6 Moo. P.C. 341, 13 E.R. 715. His conclusion appears to be that a "delusion" as a positive test of insanity, is to be defined in the form of words comprised in "insane delusions" or others of like import, which carry with them the whole breadth of the general inquiry. No man knows aught of the condition of another's mind except by comparison with his own. It is with reference to our own standard and to the common standard as we recognise it by experience that we gauge the words and deeds of others and at times suspect them to be the subjects of disorder or disease. If the divergence is marked we pronounce disease without hesitation. In doubtful cases the assistance of those skilled in such matters is called in. The question is a mixed one—partly within the range of common observation and partly within that of special experience.

It was formerly laid down in such cases as Waring v. Waring, supra, and Smith v. Tebbitt, supra, that any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of the testator. The question whether this view was well founded came squarely up for decision in Banks v. Goodfellow (1870), L.R. 5 Q.B. 549, and the judgment of Lord Cockburn, C.J., is now the leading authority on the subject. He declined to follow the cases mentioned on the ground that the general doctrine

laid down was not necessary for the decisions and definitely held that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

The testator in the last-mentioned case had been subject to insane delusions, but neither of the delusions had or could have had any influence upon him in disposing of his property, and the verdict of the jury upholding the will was sustained by the Court. The degree of mental power in a testator which must be insisted on is set forth by Cockburn, C.J., in passages which are authoritative on the subject, at pp. 565 et seq.

What then, were the delusions, insane delusions or hallucinations held by the testator in this case before us which influenced him in the disposition of his property by his will? The evidence on the subject is fully examined by Curran, J., and I have little to add to his observations. It is impossible to resist the weight and importance of the testimony given by Betournay and Papineau, the witnesses to the will. As to the medical testimony there is a conflict between that of Dr. Benoit and Dr. Lambert to which the trial Judge refers. I wish to refer to that of Dr. Lambert who was called as a witness by the present appellants. He had known Senecal for 20 years and was called in to see him in March, 1916, and in May went more particularly into his condition when, as he says, he found that he was taking morphine, had heart lesion and albumen in his urine. He was in attendance on him from May until July and again at the end of September or beginning of October after Senecal had fainted on the street. On the Saturday before Senecal's death he saw him when passing the door of his room in the hospital and was called in to see him the next day by Dr. Benoit, when he found the patient delirious and unable to stand examination.

Dr. Lambert gives his opinion that in the period from May to July, 1916, and in September and October, 1916, Senecal was not in a fit mental condition to make a will. He says further that when he and Dr. Benoit were present in the offices of Hudson, Ormond & Co. a few months after Senecal's death they were asked as to the soundness of mind of Senecal in reference to his will and that Dr. Benoit said

Man.

C.A.

PARE v. CUSSON.

he did not think Senecal had any testamentary capacity and that Senecal was in that position for about 6 months before his death.

Dr. Lambert was asked:—

"Q. Did you discover anything in the way of delusion or anything of that kind in Mr. Senecal? (Mr. Laird objects to this question.) A. Yes. Q. You might just illustrate your answer if you can. A. He seemed to be always careful whenever I went into his room so that no one would be around to hear us what we were talking about. He told me several times not to speak too loud, there might be someone listening. Q. Anything more. A. I don't remember anything more just now; several small things that I forget now. Q. But that was your opinion then gathered from these circumstances and small things that you have referred to, that he was a victim of delusions? A. Yes."

So that it is to be seen that Dr. Lambert's evidence on the subject of Senecal's delusions really comes to nothing. Senecal may have wished not to be overheard for some reason, real or fancied, that he did not disclose. But that cannot be said to constitute an "insane delusion" in the sense in which it is used in testamentary matters.

Nowhere else in the record is there a specific attempt to establish by positive testimony the existence of delusions in the testator's mind. It was admitted on the argument by counsel for the appellants that there was no violent hallucination on Senecal's part. Indeed anything of the kind was so alien to his character, history and habits that its manifestation would at once have been conspicuous. But it was urged that there was mental aberation due to the effects of disease and the use of morphine on the mind of the testator, in the idea or notion held by him (1) that he had broken with his family, and (2) that he had given or advanced his daughter $25,000. With reference to the allegation of an aberration as to the family, the comment naturally arises that it is at least doubtful whether it could have been made had not the contents of the previous will been disclosed. Apart from that consideration the allegation merely amounts to a statement that the testator's regard for the members of his family had at some period during the last months or weeks of his life experienced a change. Granting that that took place, it is not possible to regard the change as having had the character of an in-

sane delusion. There is no evidence of any such delusion of which his family or any member of it was the object to which importance can be attached. It cannot be maintained that because he altered the benefits derived by the members of his family from what they had been under his previous will that he must, therefore, have been suffering under an insane delusion in regard to them. Without further evidence that would be to assume what must be proved. To give effect to the contention there must be evidence of the existence on the testator's mind of an insane delusion which influenced the dispositions made by him by his will, and I can see nothing of the kind in the record.

There is the other contention that he was under a delusion that he had advanced his daughter and her family $25,000. There was unquestionably a very considerable sum involved in the advances directly made by Senecal, in the amount represented by the rent of the house occupied by Mrs. Cusson and in other items. There were also apparently advances made on account of Mr. Cusson of which he admits $800. Rev. Leonide Primeau in his evidence says Senecal told him of further amounts. In any event the $25,000 was at most an exaggerated estimate. It is unreasonable to speak of it as an insane delusion, and such a mistake of that kind does not invalidate a will; Box v. Barrett (1866), L.R. 3 Eq. 249. It is to be noted also that the amount is used in the will merely as a basis on which to adjust the respective bequests to Mrs. Cusson and his son Georges.

On examination of the evidence, therefore, I think the allegations that the testator was the victim of insane delusions which affected the dispositions made by him of his property, wholly fail. There is, then, really little left in the case. I agree with the trial Judge that there is no evidence to support the charges of undue influence.

There were no such suspicious circumstances attendant on the obtaining and execution of this will as were found in Tyrrell v. Painton, [1895] 1 Q.B. 202, and the cases there referred to. In point of fact it was here affirmatively proved that the testator knew and approved of the contents of the document. To hold otherwise would be to cast aside the evidence of Betournay and Papineau as worthless and to ignore the facts and details of Senecal's life history, his character and inclinations, and the events of those last days in the hospital up to and inclusive of the day the second codicil was signed. I cannot help regarding the

Man.

C.A.

PARE v. CUSSON.

carefully planned provisions of the will itself and of the codicils as strong evidence of the testator's knowledge and approval of them. There is no evidence whatever that any provision in the will was made at the dictation or suggestion of anyone but the testator himself.

There has been a good deal of adverse criticism of the terms of the will. Indeed much of the argument was based upon it. But it is a dangerous thing for the Court to interfere with a man's will because its provisions or some of them may seem to it inadequate, inequitable or unfair. It is not given to us to know how the reasons that enter into a testator's mind when he makes his decisions in these matters unless he makes them known himself. And it is always to be borne in mind "that the absolute and uncontrolled power of testamentary disposition conceded by law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself" as was said by Cockburn, C.J., in Banks v. Goodfellow, at p. 565: "No person is required to make a will such as others may think reasonable or proper. Everyone capable of making a will can be as unreasonable as he or she pleases." per Meredith, C.J.C.P., in Lloyd v. Robertson (1916), 27 D.L.R. 745, at p. 756, 35 O.L.R. 264.* The Court is not in possession of material on which to question the terms of this will with certainty. The evidence given at the trial necessarily sets forth fragmentarily and imperfectly the history of the closing years and months and days only of a long and busy life. There was much that happened and much that was in the mind of the testator before and at the time he was contemplating his last will and giving attention to its preparation to which we cannot get access. With him duty was apparently his leading motive rather than the affections.

All the Court has to ascertain is whether the will expresses truly the testamentary mind of the deceased. It seems to me that a close study of the events that took place in the hospital from March 10 to 15, in the light of what had before taken place, leaves no room for any other conclusion than that the will and codicils as propounded express the testator's mind at a time when he undoubtedly had testamentary capacity. In those crucial days there is no trace in the evidence of any insane delusion, nor indeed of any want of intelligence. In fact a perusal of the will leads to the conclusion that it was the production of a devout, prudent, thoughtful and far-seeing man, who had clear ideas

*This decision was reversed (1916), 28 D.L.R. 192, 37 O.L.R. 498.

as to the objects he had in view. Nor is there any trace whatever in those last days of the exercise of any undue influence.

I shall not attempt to review the evidence at greater length or to discuss the various further considerations and numerous other decisions referred to on the argument. Each case of this kind differs from every other, and the facts in each case are really decisive, and in this case they appear to me clearly to point to the validity of the will. I have perused the judgment prepared by Dennistoun, J.A., who has gone thoroughly into the evidence and I agree with it and his disposition of the case.

Fullerton, J. A., concurs.

Dennistoun, J.A.:—This is an appeal from a judgment of Curran, J., who directed that the will and codicils of Joseph Azarie Senecal propounded by the plaintiff as executor should be admitted to probate.

The defence is want of testamentary capacity and undue influence.

I fully concur with the reasons for judgment of the trial Judge and what I have written hereafter should be read as supplementary to his findings upon both the law and the facts.

I agree that there is no evidence whatsoever of undue influence in its legal sense to be found in the case, indeed it was but faintly pressed upon the argument before this Court, but it was very strenuously urged by Mr. Symington that the testator was not mentally capable of making a legal will.

The appellants' case was based largely upon medical testimony as to what may, in course of time, become the mental condition of a person suffering from drugs and disease which poison the system and pervert the reasoning faculties. Upon this foundation it was attempted to shew that the testator had suddenly without warning changed from an affectionate parent to a rancorous old man, that his ideas had become morbid; that he was full of distrust; that he became, contrary to his nature, deceptive and secretive; that he had fads and fancies which shewed a weakening of his mental faculties; that he became defective in volitionary power and had lost his powers of initiation; that he had delusions and hallucinations, was given to talking to himself, to sudden changes in the thread of conversation, and to

Man.

C.A.

PARE
v.
CUSSON.

falling asleep unexpectedly at inopportune moments, and so forth.

A will made more than a year before the one in question gave most of his fortune to his immediate relatives with but small legacies to religious and charitable institutions. The will in question makes very much reduced provision for his relatives and gives large benefactions to charity.

It is urged that the first will represents the real intention of the testator and that the second will is the production of a mind so impaired and distorted as to be wanting in legal testamentary capacity.

Curran, J., has dealt at length and satisfactorily with the medical testimony and the documents filed as exhibits, and I will not attempt to restate what he has said on these points, but will rest content with a review of the evidence which is uncontradicted, and which appears to shew that the testator after a long contest with himself, finally evolved the very will which he considered it his "christian duty" to make, and which is consistent with his history and his life-long affiliations.

Testamentary capacity can best be determined by an examination of the acts and words of the testator. I propose therefore to outline briefly his history in order to lay a foundation upon which inferences can be based as to his habit of mind and mental characteristics, and then proceed to a detailed examination of the closing days of the testator's life, with particular reference to his conduct and conversation immediately prior to, and during the week in which the will and codicils were executed.

Senecal was a French-Canadian and a devout member of the Roman Catholic Church. His whole life was spent in close association with the clergy and the institutions of the church, and he was deeply interested in the religious orders which were concerned with teaching, hospital, and charitable work.

He was an architect by profession and designed and erected many of the large buildings occupied as hospitals and religious institutions in Winnipeg, St. Boniface, and throughout the diocese of St. Boniface; he erected buildings of a like character in Edmonton and the United States. He was the contractor who built the present cathedral in St. Boniface. His last work—completed in 1916—was the addition of a wing to the Hospital of St. Boniface.

His wife died in 1903 leaving two children, one of whom

is Mme. Cusson, the other a son, Georges, who is mentally somewhat defective. Senecal lived in his own house with his son Georges and the family Cusson from 1904 to 1906, when he was taken ill and went to the Misericordia Hospital in Winnipeg. He remained there 10 years, his son Georges living with him. He attended his office in St. Boniface daily, taking his mid-day meal with the Cusson family who continued to occupy his house.

In 1915 at the age of 73 he retired from business and dissolved his partnership with one Papineau, retaining an interest in the St. Boniface Hospital contract which was nearly completed.

On November 11, 1915, he gave Papineau a general power of attorney and the same day he made a will. Papineau thereafter collected his rents and accounted for the moneys received by depositing them at Senecal's credit in a bank account. Senecal kept control of the bank account and paid all accounts, drawing and signing cheques for the purpose until the account was closed by his death. The will of 1915 divided the income of his estate between his son and daughter and directed the distribution of the corpus among his grandchildren 20 years after the death of his last surviving child. There were some small bequests to charity.

In May, 1916, the testator moved from the Misericordia Hospital to the house occupied by the family Cusson which was his own property. He designed and erected under his personal supervision a garage, and an addition to the house, to afford accommodation for himself and his son Georges. In August, 1916, he took a trip to Montreal taking his daughter with him, to see a granddaughter take the veil as a nun. He spent his time in Montreal in the Misericordia Hospital from August 3 until about the 23rd, when he returned to St. Boniface with some of the sisters who were journeying by train to Winnipeg, his daughter having preceded him by way of the Great Lakes.

While in the hospital in Montreal he received medical treatment for his ailments, but his staying at the hospital seems to have been in accordance with his usual practice when travelling. His association with institutions of the kind seems to have been close and he took a professional and personal interest in them wherever he might happen to be. His friends were chiefly to be found among the clergy and religious orders of his church.

In October, 1916, Senecal prepared a document (Ex. 49)

Man.

C.A.

PARE v. CUSSON.

which set forth in detail the terms upon which he and Georges would occupy the house in common with the family Cusson. It fixes the payments to be made by him for the board of himself and Georges, for the common use of the house with the exception of certain rooms and balcony reserved for himself, and other rooms assigned to the Cusson family. It provides for heating, caretaking, and other details in an exact and careful manner. There is a provision that: "this bargain may be changed or annulled by the interested parties by thirty days' notice." This is important in view of the notice to terminate the agreement which he subsequently gave to his son-in-law and which is much relied on as evidencing a sudden and capricious change in his attitude toward the Cusson family.

Senecal went to St. Boniface Hospital on November 5, and remained there until December 3, 1916. He was tired, he wanted a change, he knew the sisters there and was friendly with them. His daughter says it was a change in his life because there was not much variety in his life at home. He went back to the hospital at Christmas time and attended the midnight mass returning to the Cusson home on Christmas day. At this time his last will was evidently on his mind. There is a note in his memorandum book dated Dec. 16, 1916 (Ex. 19): "Voir testament Georges."

On December 28 he procured his will and codicil, the latter drawn in the previous February, to be brought to him by Papineau. He discovered that this codicil made reference to the will by an incorrect date. He had for several months from time to time, spoken to Papineau about making a new will, and wanted him to draw it. Papineau refused to do so. Le Bel, a solicitor who had drawn the will and codicil was communicated with and a further codicil was drawn. It corrected the error in the date, made certain minor changes and confirmed the will. It was then returned to the bank for safe-keeping. Papineau says that when he and the testator were coming back from Le Bel's office after signing the codicil, Senecal said "That is not entirely the way I would like things to be, and it will have to be gone over."

About this time he had a conversation with Father Dugas, one of his clerical friends, about making a new will. Father Dugas was not called as a witness at the trial, being absent from the Province, but there is evidence that when Father Dugas subsequently read the disputed will he said: "That

is about what he said to me." I refer to this only for the purpose of shewing that the making of a new will was in the mind of the testator from and after the time he had confirmed the old will in December.

In January and February, 1917, he set about preparing plans and specifications for a tomb which he wished to have erected in the cemetery. His memo. book (Ex. 19), between the dates February 6 and February 19 shews entries of prices of materials to be used. There is evidence that with some slight assistance from his grandson, he did all the work upon the plans, specifications and estimates himself, and so far as the evidence is concerned, there is nothing to shew they were not accurately prepared. His Order Book (Ex. 20), shews entries in his own hand from 1905 to March 5, 1917, 15 days before his death. The entries are lucid and are in a clear steady hand which shews no physical weakness.

There are indications in the evidence that about this time things were not running quite smoothly between Senecal and the Cusson family. He had a complication of ailments. He was suffering from arterio-sclerosis, his heart, kidneys and liver were affected. He had uraemia said to be in an advanced stage of Bright's disease, he was addicted to the use of morphine, and had been for 10 years. He spent much of his time in his own rooms but came down to his meals which were served to him apart from the family. He had a motor car in which he went out frequently, his son Georges acting as chauffeur. He was declining physically, as might be expected of a man of his years, and the progressive nature of the disease which afflicted him.

About this time he made an application to the Archbishop of St. Boniface for permission to name Father Joubert, procurator or bursar of the Diocese as his executor, and obtained his consent. The witness Papineau speaks of this, but does not know how the application was made. Senecal also spoke to Father Joubert about the matter. As Father Joubert was at the time named as executor in the existing will which he contemplated changing, this step does not indicate that any new influence was at work, but that his intention to make a new will was formed.

His daughter says that at this time he was irritable and somewhat morbid. He feared he might die any night. He was in the habit of talking to himself, and frequently fell into a doze when in conversation. He was worried about

MAR.
C.A.
PARE
v.
CUSSON.

small things such as the manner in which his bed was made, his table set, his clothes pressed or his medicine administered.

He received a weekly visit from Father Primeau who was his spiritual adviser. On the Tuesday, Wednesday, Thursday and Friday preceding Saturday, March 10, on which day he went to the hospital for the last time, Father Primeau saw him and had a long conversation, during which his will was not referred to. The witness testifies to the soundness of mind of the testator at this time. Some of their conversations lasted nearly 2 hours and Senecal had no difficulty in grasping the subjects under discussion. He complained about his relations with the Cusson family. There had been some words with the son-in-law about the telephone. It had been cut off for non-payment of rates by Cusson, and Senecal was insisting that it should be transferred to his name in the telephone directory. He had never consented to his daughter's marriage with Cusson, he thought they were extravagant, and the conversation of the children did not please him. He needed a great deal of personal attention which Mme. Cusson gave him in a very devoted way, but there are indications that he did not find his family life as pleasant as he had expected it to be. No doubt he missed the care and attention combined with the variety and movement which he had become accustomed to during his 10 years residence in the hospital.

On March 9, 1917, he handed his son-in-law a typewritten notice of his intention to terminate the agreement made the previous October. He gave careful instructions to Papineau about the preparation of this notice, and detecting a mistake in date he returned it to be typed afresh. Then he signed it and delivered it himself. He spent several days getting the notice in the form which he desired. He was very deliberate about it, and it indicated no sudden or capricious change of affection for his family but a premeditated determination on his part once more to change his manner of life.

The following morning, March 10, he went to St. Boniface Hospital apparently in his usual health, making an excuse to his daughter that he was going on business to inspect a ventilating plant. He never returned but died in the hospital on March 20.

Though he had kept secret from his family his reason for going to the hospital, he had disclosed it to Papineau.

It was his intention to make a new will. He had asked Papineau about a suitable place for making the will and had contemplated making it in Papineau's office but was dissuaded on the ground that it was too cold there. Papineau accordingly reserved a room for him at the hospital for Saturday, March 10, and met him there by appointment, accompanied by a solicitor, Mr. Betournay, who was informed that he was to draw a will.

The selection of Mr. Betournay was deilberately made by the testator from a number of names of French-speaking lawyers which were submitted to him by Papineau at his request. He rejected the name of Le Bel, the solicitor who had drawn his former will and codicils. He had discovered a mistake in the documents prepared by Mr. Le Bel and this or some other reason which he did not disclose, may have influenced him in making a change.

For two hours on Saturday morning he dictated the terms of his will reading from notes which he had provided for the purpose. There is no evidence as to the handwriting in which the notes were written. He discussed the creation of perpetuities by will and quoted the opinion of his former solicitor that was illegal to do so. He gave the names of the members of his family to be benefited and their addresses. He gave clear instructions as to the charitable bequests and named the institutions to receive them. There is no evidence of any suggestions being offered by either Papineau or Betournay. He had a knowledge of the property which he possessed and was under no misapprehension in respect to it. He made some provision for all the members of his family who were closely related to him and added legatees from among their number who were not named in the former will. Papineau, who had been associated with him for years and in close touch with his affairs, is an independent witness whose testimony as to the mental capacity of the testator is of the highest character. He says his mind was functioning normally, that there had been no change in his mental capacity, and that he clearly remembered the members of his family and the property with which he was dealing.

Betournay the solicitor, says that the testator spoke like an ordinary man and had no difficulty in understanding what he was doing. He gave the whole directions for the will himself. Betournay says further that he considered the testator a man of absolutely sound mind and never for one moment doubted that he was not that. That was the

Man.
C.A.
PARE
v.
CUSSON.

only impression left upon him by the testator's acts and his way of speaking and dictating. This first interview lasted about two hours during which undivided attention was fixed on the business in hand.

An examination of the will which was evolved at this interview affords strong evidence of the testamentary capacity of the testator. If it had not been for the discovery of a copy of his former will which made disposition of his estate among his family with small bequests for charity, there would have been scanty grounds upon which to base a case for refusing probate of the will under consideration.

By this will provision of sorts is made for all who are closely related to him but there are large, very large bequests to religious and charitable institutions. Relying mainly upon this difference the defendants who contest the will allege a sudden, capricious revulsion against his nearest relatives, with a change from warm affection to unreasonable aversion, which can only be accounted for by the theory, that his mind had become unbalanced through the poisonous influences of morphine and disease.

I will continue the narrative of the testator's conduct and conversation until the final codicil to the will was drawn as it seems to indicate that he was able to plan, to recollect, to revise, to reconsider, and to elucidate what he wanted to do, what he was doing, and what he had already done in the past.

On the Saturday morning, March 10, he instructed Papineau to prepare a promissory note for $1,000 in favour of The Reverend Sisters of the Holy Name of Jesus and Mary as he had promised them this sum as dowry for his granddaughter who had in the previous summer become a nun. He gave Papineau a memorandum in his own handwriting of what the note was to contain.

He then directed his solicitor to have the instructions for his will engrossed and brought to him for signature at the hospital, if ready before 3 o'clock, and at his house if after that hour.

He changed his mind about leaving the hospital and Betournay and Papineau when they brought the will to his house for signature in the evening found that he had not returned but was still at the hospital. They went there accordingly.

Betournay says he read over the will to Senecal and made a few changes in it which he does not remember and was instructed to re-engross it. The testator and the witnesses

then signed the will as it stood, Senecal saying, "One does not know what may happen and I would sooner sign it the way it is now, and I will sign that now, and you can re-write the other one tomorrow and I will sign that too."

On this same day he told Papineau that he was making arrangements with the hospital authorities to board and employ his son Georges and a day or two later he said the arrangements had been completed.

On Sunday morning the will which had been executed the night before was on the testator's mind, and he sent a note to Betournay to see him before he re-engrossed the will. About ten o'clock in the morning Betournay and Papineau went to the hospital, and Senecal gave instructions for certain changes to be made. The witnesses cannot now recall what these changes were.

Betournay re-engrossed the will and he and Papineau returned to the hospital with it on Sunday evening. It is important that at this time the testator made yet another change in the will. He directed Betournay to strike out the legacy of $5,000 to l'Hospice Tache in para. 23 of the will, and the erasure was duly attested by the initials of the testator and the witnesses. No reason was given for this change but as by each of paras. 7 and 11 this institution received $1,000, the inference is that he considered it was sufficiently provided for without the third legacy which he accordingly struck out. The will was then formally executed by the proper parties and Papineau and Betournay retired. He asked Betournay to send his account for preparing the will. Before leaving Papineau handed Senecal the note for $1,000 for the grand-daughter's dowry which he had been instructed to prepare. Senecal signed it and handed it to one of the sisters of the religious order in whose name it was made, who had come to visit him, probably by appointment to receive it.

On the following morning, Monday March 12, Papineau saw him alone and took a message to Betournay that he wanted to add a codicil to the will.

He also signed an order which Papineau had drawn to enable his old will to be taken from the Bank of Hochelaga where it had been placed for safe-keeping.

On Monday afternoon the first codicil to the will was drawn by Betournay, on instructions from the testator, who duly executed it. It corrects an oversight in the will which was silent as to the disposition of the income of the residuary estate, pending the final distribution. In the

Man.

C.A.

PARE v. CUSSON.

absence of any evidence to the contrary it may be assumed that the testator made this discovery himself. He certainly took the steps on his own initiative to have the matter put right, and gave clear instructions uninfluenced by the presence of any other party to Betournay and Papineau, that the income was to be paid to the Petit Seminaire de Saint Boniface. This is a college for the education of young men for the priesthood, it is named in the will as the residuary legatee, but received nothing until the final distribution. There is coupled with the bequest of the income a shrewd directions as to the recuperation of the estate from possible losses in investments.

On this day he gave a collector, George Betournay, a cheque for $6.00 presumably for an educational institution which he favoured. There is no evidence as to this except the cheque and a receipt. The following morning, Tuesday, he gave Papineau a cheque for $20 which he had drawn the previous day as compensation for his trouble in connection with the will. This was a voluntary act. Papineau had not asked for anything. It is illuminating as to his mental capacity, and his powers of initiation and volition which have been seriously questioned.

At this time he signed an application for a renewal of his motor license and for a permit for Georges to act as his chauffeur. He had given instructions to Betournay on the previous Saturday to procure the proper forms from the department.

He had a long interview with Father Primeau probably on this day, possibly on Monday. He explained to the priest the will which he had made going into all the details of his various bequests. He then asked:—"According to my Christian duty do you think that is fair?" The reply was given: "I don't see any reason why you should do it any other way, because you seem to have provided for the future of the children; you have some reason, according to what you have told me to act in such a way." He told the priest at this interview of the "difficulties" between himself and his son-in-law, about the telephone incident, that he had paid out between $8,000 and $10,000 for Cusson. This is denied by Cusson. Senecal said further that he had never consented to Cusson's marriage with his daughter and speaking in French said "I have broken the ice" meaning he had decided not to live longer with them, "because it would be too hard to live there."

It is abundantly clear from the evidence that Mme. Cusson was a devoted daughter and did all in her power to nurse and tend her father and soothe his ailments, but having lived so long in the Misericordia Hospital where he had the care and attention of the Sisters, it seems reasonable that he wished to be back under professional care. He no doubt magnified the petty quarrels which he assigned as his reason for breaking up the family partnership. The real reason was deeper than that, and his notice to quit and his removal to the hospital were in my judgment part of a deliberately formed plan to revert to his old way of life apart from the Cusson family.

On this day, Tuesday, the old will was brought from the bank to the hospital on an order signed by Senecal and delivered to Papineau. On instructions from Senecal, Papineau tore up the old will in presence of both of them. Papineau says the testator's mental condition was "all right" at this time and that he understood everything that was done or said.

On Wednesday, March 14, Papineau and Dr. Benoit visited the testator but nothing worthy of note appears in the evidence in respect to this day. Dr. Benoit says "the first four or five days he was in the hospital his mind was quite clear."

On Thursday, March 15, the final codicil was drawn. On this morning his daughter and his grandson Joseph came to see him at his request. The visit was short and the testator asked his daughter to take his soiled linen with her for washing, saying she would find the parcel in the dresser drawers. She did not remark any change in his condition. He said he was tired and not to stay long. She remained only five or ten minutes.

Testator at this interview gave her a cheque for $12 which he had ready, this appears to be for Georges' board, and $2 for his own washing. He did not pay for his own board. This shewed his close, hard, economical spirit. Having been away from the Cusson home for more than 3 days he was absolved from payment for board, by the terms of the written agreement previously referred to. This petty act would indicate that he had all his faculties about him and knew exactly what was within the letter of his contract.

Later in the day the second codicil was drawn and executed after instructions given to Betournay. Afterwards

Man.
C.A.
PARE
v.
CUSSON.

Senecal talked "politics." He complained of his lips being dry but was an "absolutely sane man" according to Betournay.

He had previously asked Betournay for his account for drawing the will and at this interview gave him a cheque for $25. The signature is sharp, firm, and clear. This completes the history of the testator down to the date on which the last codicil was executed.

The following day, Friday the 16th, he gave a cheque to Georges for $20. He was worse and Dr. Benoit began from this day to visit him twice instead of once as formerly.

A slight incident happened this day, which carries a good deal of weight. Tupin, a coal merchant, was passing along the corridor and looking in at the door saw the testator sitting on his bed. He entered the room and shook hands. After some remarks about his health to the effect that he thought he was going to die, Senecal said, "I am talking to you about the last coal I got from you, you need not be afraid, you go down to Mr. Papineau and he will pay your account." It was in the month of February previous that the coal had been purchased by Senecal himself, and he distinctly recollected that he had not paid for it, and upon the chance meeting with Tupin recalled the matter and gave instructions as to how the debt would be paid.

Saturday, March 17, was the last day on which his mind was clear. When Cusson and his wife came to see him he asked Cusson if he had the notice to quit which he had delivered to Cusson before he went to the hospital. Cusson gave it to him and Senecal tore it up saying: "Think no more about it." Later in the day he became delirious, and lapsed into coma from which he never recovered and he died on Tuesday March 20.

On this evidence there can be no reasonable doubt as to the testamentary capacity of the deceased. The witnesses Papineau and Betournay are not only independent but qualified to speak with authority as to his mentality. Their evidence is satisfactory and apparently given without any reservation. The trial Judge says that he gives entire credence to their testimony. The one as the close business associate of the testator for years and the other as a solicitor of the Court of King's Bench may be relied upon when they give direct and positive evidence as to the mental capacity of the testator. They were both present when the will and codicils were drawn and executed involving

at least four interviews with the testator and a number of important changes in the documents. Added to their positive testimony, the inferences to be drawn from the acts and words of the testator, as set forth above, are to my mind convincing that he had a full knowledge of his family and his affairs, that he was pursuing a policy which he had planned in leaving large bequests to charity. That he considered all those who were in any way bound to him by ties of kindred and made reasonable provision for them. This Court cannot be influenced by the terms of the will which are no doubt a great disappointment to his closest relatives. A person who has testamentary capacity is at liberty to dispose of his property as he sees fit. He may be as unreasonable, as unjust or as capricious as he pleases in the absence of undue influence or fraud: Clark v. Loftus, (1912), 4 D.L.R. 39, 26 O.L.R. 204.

The reference in the disputed will to work done and expenses paid equaling a gift from the testator to Mme. Cusson of $25,000 was the subject of a good deal of discussion on the argument before this Court. It is said that this was an hallucination and that no such sum of money or anything approaching it was ever given to Mme. Cusson. There is undisputed evidence that a large sum of money represented by the use of the testator's house for many years and sums paid for the education of the Cusson children were in the testators mind. He may have considerably over-estimated them when he mentioned $25,000. On the other hand, he had knowledge which the Court has not and there may have been considerable payments made of which evidence is not forthcoming. Even if a mistake has been made, and the amount mis-stated, that is not a ground for invalidating a will made by a competent testator: Box v. Barrett (1866), L.R. 3 Eq. 244 at p. 249.

The sum mentioned appears to have been used as a measure of the provision which was being made for Georges and not necessarily as the basis upon which the provision for Mme. Cusson was determined.

Mr. Symington strongly pressed upon us the case of Banks v. Goodfellow, L.R. 5 Q.B. 549. The language of Cockburn, C.J. at p. 565 is quoted by the trial Judge and I repeat it as setting forth in well-chosen language what testamentary capacity involves:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its

B.C.

C.A.

MAUNSELL v. CAMPBELL.

effects; shall understand the extent of the property which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound would not have been made."

Measured by this standard it is my opinion that the testator was capable of making a valid will and that the judgment of the trial Judge should be sustained.

There is no evidence upon which to find undue influence. That there were the powerful influences of the church and its associated orders and charities always working upon this testator's mind there can be no doubt. The will is a concrete expression of those influences, but that is not "undue influence" as the law defines it. Lord Haldane says in Craig v. Lamoureux, 50 D.L.R. 10 at p. 15: "Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean."

The cumulative effect of the evidence quoted at such length seems to me to establish this as the very will which this testator long desired to make, and that considering his history, his habits, his life-long associations, and the care and pains which he took in the preparations for and leading up to the making of this will that it represents his true intention and desire.

I would dismiss this appeal and for the reasons given by the trial Judge would dispose of the costs of the appeal in the same way that he has disposed of the costs of the trial.

Appeal dismissed.

MAUNSELL v. CAMPBELL.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 1, 1921.

Warehousemen (§II.—5)—Goods Stored in Warehouse—Contract for Storage—No Valuation Declared—Goods Given Out to Wrong Party and Lost—Liability for Value of Goods.

A warehouse company accepted goods for storage in its warehouse, a clause of the contract for storage being as follows: "The

responsibility of the above company for the contents of any piece or package is limited to the sum of $50 unless the value thereof is made known at the time of storage and receipted for in the schedule—an additional charge will be made for higher valuation." No value was declared on certain of the goods which were inadvertently by mistake sent to a wrong party and lost. The Court held that the company was protected by the clause, and was only liable to the amount of $50 on each package lost, it not being guilty of wilful misconduct in the transaction.

[Ronan v. The Midland R. Co. (1884), 14 L.R. Ir. 157; Roche v. Cork Blackrock and Passage R. Co. (1889), 24 L.R. Ir. 250; Lyons & Co. v. Caledonian R. Co., [1909] S.C. 1185, referred to; Van Toll v. S.E.R. Co. (1862), 12 C.B. (N.S.) 75, 142 E.R. 1071; Pepper v. S.E.R. Co. (1868), 17 L.T. 469; Skipwith v. G.W.R. Co. (1888), 59 L.T. 520; Pratt v. S.E.R. Co., [1897] 1 Q.B. 718; Hinton v. Dibbin (1842), 2 Q.B. 646, 114 E.R. 253, distinguished.]

APPEAL by defendant from the judgment at the trial in an action to recover the value of certain goods stored in a warehouse and delivered out to the wrong person and lost. Reversed.

W. S. Buell for appellant.

E. P. Davis, K.C. for respondent.

Macdonald, C.J.A.:—The question involved in this appeal is one which has received the careful attention of the Courts in the several cases to which we were referred by appellant's counsel. The crucial point is—Does the contract rightly construed absolve the warehouse company, (appellant) from liability beyond $50 per package arising from the negligence of its servants, and resulting in loss to the owner of the goods? Realising no doubt the difficulties in his way of distinguishing in principle this case from such cases as Van Toll v. S. E. R. Co. (1862), 12 C.B. (N.S.) 75, 142 E.R. 1071; Pepper v. S. E. R. Co. (1868), 17 L.T. 469; Skipwith v. The G. W. R. Co. (1888), 59 L.T. 520; Pratt v. S. E. R. Co., [1897] 1 Q.B. 718; Hinton v. Dibbin (1842), 2 Q.B. 646, 114 E.R. 253 and the analogous cases under the Carriers' Act, 11 Geo. IV., 1 Will. IV. 1830 (Imp.), ch. 68, as for example, Morritt v. The N. E. R. Co. (1876), 1 Q.B. D. 302, Mr. Davis sought to do so by submitting that the sending away of the articles in question to another customer in England, was a breach by defendants of the contract of storage and therefore not within the protection of the clause of the contract which reads: "The responsibility of the above company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is made known at the time of storage

B.C.

C.A.

MAUNSELL v. CAMPBELL.

and receipted for in the schedule; an additional charge will be made for higher valuation."

I am unable to see any distinction in principle between what was done here and the handing out of a bag to a person at a parcel office; if done wilfully in either case it would amount to conversion; if done negligently by the warehouser's servants, the warehouser would be liable to damages for loss of the article, if not protected by a contract such as above set out. In the case at Bar, the goods were negligently, not wilfully, parted with, the defendant's servants by mistake having put them with goods of another defendant's customers and sent them away to him in England. Some were lost and some were returned in a damaged condition, hence this action.

If they had disappeared without discovery of what had become of them, the plaintiff, on the authorities above referred to, would have no claim beyond the $50 for each article, then, to quote Grantham, J., at p. 522 in Skipwith v. G. W. R. Co., supra, "What difference can it make that in the present case they have been able to discover exactly how it came about."

The cases to which Mr. Davis referred us, being cases of deviation of ships from their agreed courses are, in my opinion, inapplicable to a case like the present one, since such deviations are wilful not negligent. Now, it is conceded that if the defendants had wilfully sent away the goods to their other customer, they could not claim the protection which they are now insisting on.

I would allow the appeal.

Martin, J.A., (dissenting), would dismiss the appeal.

Galliher, J.A.:—This case calls for a decision on a nice point as to the liability of a warehouseman.

Certain goods were stored for hire by the plaintiff in the defendant's warehouse at Vancouver. The contract for storage is set out at p. 60 of the Appeal Book, and the defendant relies on clause 3 of the contract as protecting it to the extent of limiting its liability to $50 on each article stored and which cannot be restored or restored only in a damaged condition. Clause 3 reads as follows: "The responsibility of the above company for the contents of any piece or package is limited to the sum of $50 unless the value thereof is made known at the time of storage and receipted for in the schedule—an additional charge will be made for higher valuation."

It is admitted that the goods were stored in the ordinary way without the value being made known or any higher valuation charged for. What occurred here is, that the defendant having also stored in their warehouse, certain other goods belonging to a customer in England, had, on request, shipped his goods to him and inadvertently, by mistake of some one in the defendant's employ, certain of the plaintiff's goods were included and shipped with these, and certain of plaintiff's goods have been lost and certain others returned in a damaged condition.

The trial Judge held that defendant under the circumstances was not entitled to the protection of clause 3 of the agreement on the ground that there had been wilful misconduct in connection with the subject of the bailment during the term of the bailment, and on the further ground that the bailment had been put an end to by the wrongful act of the defendant; or even if during the existence of the bailment, what had happened was wilful or amounted to misconduct. And the trial Judge goes on to say that if it were otherwise all the warehousemen would have to do, if he wanted the Victrola (one of the packages) would be to ship it away and tell the customer, "your Victrola has gone astray, I owe you $50 and the Victrola is now mine."

The illustration seems to me hardly apt. The bailee could not by his wrongful act, confer any title upon himself —the $50 is paid because the article cannot be returned or can only be returned in a damaged condition. But aside from that, there is still open for decision a very nice question.

During the argument I put this question to Mr. Davis: "Supposing instead of the goods being shipped away they had, through the negligence of some one in the defendant's employ, been handed to a wrong party at the door of the warehouse and lost, what would the liability under such circumstances be?"

It seems to me this is an apt position to start from. Under such circumstances the bailment would have been put an end to by the wrongful act of the defendant in the sense that the delivery was made to the wrong person.

I do not think we would be justified in importing the words "wilful misconduct" into this transaction. The goods were sent out of the warehouse by mistake and that mistake was negligent. On the above supposition I would think defendant would be entitled to the protection of

B.C.

C.A.

MAUNSELL v. CAMPBELL.

clause 3. Now, do the circumstances in this case differentiate it? Mr. Davis' submission is—that assuming the case I postulated—if my view was correct, (which he did not admit) this was a very different case, that the defendant had started these goods on a voyage around the world as it were, with all the risks that might be attendant thereon, and such could never have been in the contemplation of the parties. I think it may be assumed that such a condition as pertains here, was not present to the minds of either party when the goods were stored, neither would it be present to the mind of either party that the goods would be delivered to a wrong party. Then can it be said that the mistake in the case I postulated can be said to be one that could reasonably be held to be in the contemplation of the parties and if so, are the circumstances in the case before us so different that a different rule should apply? To the first I would answer, yes. The second requires perhaps more careful consideration, at all events I find it more difficult to determine.

The business carried on is that of general warehousing, including not only the storing of goods for delivery in Vancouver, but of goods which later may have to be shipped elsewhere. We have the particular instance of goods which had to be shipped to the customer in England. Other instances might be of persons breaking up their home in Vancouver and going to say, Victoria, Calgary or Winnipeg, or elsewhere, in which case the goods would have to be forwarded later. This might or might not be disclosed to the bailee at the time of storage, but in most cases probably would. I cite these instances as evidencing the fact that the business carried on by the defendant included the two classes of cases and a mistake resulting in loss or damage to the goods might occur in either, with perhaps an additional risk in case of shipment.

Now, if as I think the possibility that a mistake might occur by delivery to a wrong person at the warehouse, could be said to be something that could reasonably be taken to be in the contemplation of the parties, is the fact that the delivery to the wrong person by rail or boat with its added risk sufficient to warrant us in excluding the protection afforded by clause 3.

Of the cases cited, I will only refer to Van Toll v. S. E. R. Co., 12 C.B. (N.S.) 75—Skipwith v. G. W. R. Co., 59 L.T. 520 and Hinton v. Dibbin, 2 Q.B. 646.

From a perusal of these cases and the authorities therein referred to and other cases cited to us by Mr. Buell at the hearing, I think defendants cannot be held liable beyond the amount provided for unless we can say that their negligence amounted to wilful misconduct or misfeasance and I am not prepared to go that far. Moreover, as put by Grantham, J., in one of the authorities cited, can the fact that the means by which the goods were lost had been discovered bring about any different result than where the goods were lost and the means of loss cannot be traced. I think not.

The deviation cases cited to us by Mr. Davis do not seem to me to be in point and I say so with deference to Mr. Davis' able argument.

The deviation must always (except in cases of stress of weather or other like circumstance) be a deliberate wilful act and not negligence or inadvertence.

I would allow the appeal.

McPhillips, J.A.:—This appeal calls for the consideration of the extent of the liability in the case of bailment for reward. The articles were left for storage with no value declared. According to the terms of the warehouse contract the responsibility of the appellant is limited to $50 for any piece of package. The counsel for the respondent very ably supported the judgment of Hunter, C.J., B.C. and strenuously contended that the contract and the limited responsibility, as set forth therein, afforded no answer when the facts disclosed that the damages allowed in the Court below were in consequence of no loss occurring in the place of storage but by reason of the misplacing of some of the articles with the goods of another and later negligently shipping them to England. When being returned two of the packages were wholly lost, the contents of the third rendered useless and the Victrola also rendered useless. The question now is, does the contract control and determine the quantum of liability or is the matter at large and do the facts disclose such negligence as renders the appellant responsible for the loss and damage? The counsel for the appellant, in a very careful argument, dealt with the case upon the analogy of the liability of common carriers and demonstrated, in my opinion, successfully that the contract we have here to consider and construe brings the appellant into the same category as common carriers are under the law governing them i.e., the contract embodies the same general terms as govern common carriers, and the submission was that if com-

B.C.
C.A.
MAUNSELL v. CAMPBELL.

mon carriers upon the like facts would not be liable above the limited amount set forth in the contract, likewise the appellant would not and that the judgment of the Court below, allowing damages in excess of $50 for each package, was erroneous. I, with great respect, am of the view that there is error in the judgment and that it cannot be affirmed. It is to be observed that the Chief Justice, in his reasons for judgment, stated that "it is a very close point." At the outset, it may be conceded that the contract would not excuse the appellant's liability for acts of wilful misconduct on the part of themselves or their employees. It is to be observed that the pleadings do not cover wilful misconduct; the allegation is only that of breach of contract and conversion. Now what did occur, whilst it may be somewhat unusual, is understandable, and it may be said to be just that kind of a happening that the contract could be said to reasonably cover. It was in fact the case of misdelivery, a risk that the appellant would be desirous of covering and ensuring against, and it was simple enough for the respondent, when having valuable articles in storage, to have declared the value, and the responsibility, if accepted, would then extend beyond the $50 for each piece, i.e., the declared and accepted value, and as in the contract is set forth "an additional charge will be made for higher valuation." Here the charge was only $1.50 per month, and the judgment is for $1,630. Ronan v. The Midland R. Co. (1884), 14 L.R. Ir. 157, is an instructive case, and would refer to what Morris, C.J. (afterwards Lord Morris) said at pp. 173-174:

"This is rather a peculiar case, and one of importance. It is the first action, so far as I am aware, brought against a company for wilful misconduct. That is the substantial cause of action. The defence relied upon purports to answer the action for wilful misconduct. Two questions arise for consideration: First, does the defence, alleging a contract such as is pleaded in this case, within its terms include exemption from wilful acts? Secondly, if it does, would it be unjust or unreasonable, or contrary to the policy of the law? I take the second question first, viz., if it was entered into in express terms, would it be reasonable and within the policy of the law. I am clear it would not. My brother Murphy has referred to the judgments of Lord Bramwell in several cases. For the most part they must be taken as extrajudicial, and as the peculiar views of a very learned and eminent Judge. In the case of Brown v. The Manches-

ter Railway Co. (1883), 8 App. Cas. 703, he begins his judgment by announcing that all the decisions acquiesced in for the last twenty years are contrary to his opinion, and that, if he had the power, he would reverse them all. I am of opinion that if such an exemption were included in express terms, it would be unjust and unreasonable to allow any person to contract that he could commit a wrongful act, and which might amount to a crime. But in this case, it does not become necessary to decide that question, for in my opinion an exemption from wilful misconduct is not comprised within the contract as agreed upon between the parties. The first thing in any important contract is, what was the intention of both parties? It is impossible to imagine that either party, when entering into this contract, had before their minds, much less expressed in sufficient words any intention that such an exemption was to be included in it. Such an idea never entered into the mind of either. During the argument I asked what part of the contract was relied upon as including wilful misconduct. It does not contain it in its terms. It does not say that the conditions were to be that the defendants are free from all loss or liability whatever. Even if it did, I would be of opinion that that would not contain within its terms exemption from wilful misconduct. For these reasons, I am of opinion that the defendants' demurrer to the plaintiff's replication should be overruled."

Also see Roche v. Cork Blackrock and Passage R. Co. (1889), 24 L.R. Ir. 250, at p. 257.

Now the present case is not analogous to the case above cited, nor has it been brought for wilful misconduct; in any case the facts do not disclose wilful misconduct. Then apart from wilful misconduct is there responsibility beyond the amount set forth in the contract? I consider that the analogy is complete when the pleadings are looked at, admitting of the language of Gwynne, J., in The Lake Erie and Detroit River R. Co. v. Sales & Halliday (1896), 26 Can. S.C.R. 663, at p. 677, being applied to the present case, as here the action was one for breach of contract and negligence. Gwynne, J., said:

"If then the statement of claim can be construed as the statement of a cause of action arising ex delicto apart from any contract, the plaintiffs must fail as to those goods, for the evidence shews that the defendants received them for carriage under the terms and provisions of a special contract; if the statement of claim is to be construed as a state-

B.C.

C.A.

MAUNSELL v. CAMPBELL.

ment of cause of action founded upon contract, the contract so alleged being an absolute contract unqualified by any conditions, then as to the above goods the plaintiffs still must fail for the contract proved is a special contract creating only a limited liability, in which case there was no occasion for the defendants to plead specially the terms which showed the contract to be of a limited character and not the absolute unconditional one stated in the statement of claim. The authorities upon this point are numerous."

Lyons & Co. v. The Caledonian R. Co., [1909] S.C. 1185, was a case of leaving a hamper of goods of the value of £84 at the defendants' luggage office and a ticket was received, which had a condition thereon that the company would not be responsible for the loss of any article exceeding £5 unless at the time of delivery the true value was declared and a special rate paid. The hamper was left on the platform and was lost. The Court held, that the article being over £5, that the company was not liable for any loss whatever. In the present case the appellant has admitted liability to the extent of $50 per package, and payment into Court was made of $200, being for 3 packages at $50 each and $50 for the Victrola, together with $30 for costs. I would refer in particular to what Lord Kinnear said at p. 1194 (Lyons & Co. v. The Caledonian R. Co.):

"But then, when they come to make a specific stipulation with reference to particular goods of a particular value, they say they will not be responsible for the loss of such goods, and will not be liable in any sum whatever for loss or damage to them, except upon the condition that the owner of the goods who deposits them shall declare that their value exceeds £5, and shall make the stipulated payment. That is a very clear stipulation for the limitation of their responsibility. Well, then, what is the responsibility which they undertook in this way? The condition must be supposed to be intended to qualify the liability which would otherwise attach to them, and as to that there is no dispute. I therefore take this to be a condition that the company will accept the custody of goods at their station, that they undertake without limit to take due and sufficient care of such goods as do not exceed £5 in value; but they undertake no responsibility for goods which exceed that amount, unless the person depositing them gives them notice by declaration of their value and makes a certain payment. If that is the meaning of the condition, and if, as I think, it is binding, there is an end of the case, and I think there is a direct

decision of great authority to this effect in the case of Harris v. The Great Western Railway Company (1876), L.R. 1 Q.B.D. 515, to which I have already referred. I refer especially to the judgment of Mr. Justice Blackburn, afterwards Lord Blackburn, not only because of his eminent authority, but because it is a reasoned judgment in which the grounds and limits of responsibility are fully explained."

And Lord Kinnear further said at pp. 1195, 1196:

"The pursuers bring their action. They sue upon this contract for damages in respect of nonperformance of the contract obligation to redeliver the goods. That is their whole case, and it seems to be a perfectly relevant answer to say—'The contract was not absolute, it was qualified and you did not fulfil the condition upon which alone our obligation to redeliver the goods arises.' The learned Sheriffs say —and the observation is correct—that in the case of Handon (1880), 7 R. 966, Lord Shand expressed some doubt as to the soundness of Lord Blackburn's judgment. But then Lord Shand takes care, in the first place, to distinguish between the two cases and to point out that the judgment in Harris, L.R. 1 Q.B.D. 515, was inapplicable to the case he was considering, and it follows that his Lordship's criticism of the judgment is a mere obiter dictum. And I confess, with all the respect I have for anything that fell from him, I do not find myself justified in rejecting the authority of a formal decision, and particularly of so eminent an authority as Lord Blackburn, upon a point in which the Laws of England and Scotland are the same. I observe also that the decision in the case of Harris, L.R. 1 Q.B.D. 515, was expressly approved by Lord Justice Mellish, another very eminent authority, in the case of Parker v. The South-Eastern Railway Company (1877), L.R. 2 C.P.D. 416. I am therefore prepared to follow the judgment in the case of Harris, L.R. 1 Q.B.D. 515, and I may only add that, apart from previous decision, I cannot myself see that it would be consistent with legal principle to arrive at any other conclusion."

In considering the principle of law which comes up for consideration in the present case, it is most instructive to read what Viscount Haldane, L.C., said in Grand Trunk R. Co. v. Robinson, 22 D.L.R. 1, [1915] A.C. 740, 113 L.T. 350, which was the case of a person travelling with a horse upon a train under a contract relieving the railway company from liability for death or injury when caused by negligence—a half fare only being paid. The conditions of the

B.C.

C.A.

MAUNSELL v. CAMPBELL.

contract were not read. At p. 6 we find the Lord Chancellor saying:—

"Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the company, be bound, and his principal will be bound through him. To hold otherwise, would be to depart from the general principles of necessity recognised in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and in convenience to those who deal with them.

In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

Here the situation in principle is exactly the same and adopting the language of the Lord Chancellor "for the only footing (the goods were warehoused) is simply that which the contract has defined."

The language of Viscount Haldane, L.-C., in Grand Trunk R. Co. v. Robinson, supra, that I have above quoted was also quoted by Lord Parmoor in Hood v. Anchor Line, [1918] A.C. 837 at pp. 849, 850. That was an action for personal injuries alleged to have been sustained through the negligence of the company's servants in the course of a voyage from New York to Glasgow, and at pp. 843-846, Viscount Haldane said:—

"In cases where the question is whether there is alleged to have been negligence, such as entitles the party injured by it to a remedy from a Court of justice, we are familiar with this procedure, and I think that it is really embodied in the practice adopted by our jurisprudence in the other

kind of case that is now before us. Where there is a jury the question is really one of fact for the jury, and the function of the judge is simply to see that the proper question is considered by them, a question which must, up to the point at which it is put, to some extent depend on certain general principles which belong to jurisprudence.

My Lords, I agree that the appellant here was entitled to ask that all that was reasonably necessary as matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to convey him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties. On this question even your Lordships sitting here are a tribunal of fact more than of law, and what we have to do as lawyers is no more than to see that we have shaped for ourselves the question of fact to which I have referred. If this is borne in mind I think that it explains decisions which are not really divergent. In Henderson v. Stevenson (1875), L.R. 2 H.L. Sc. 470, what this House seems to me to have considered was only the particular question of fact which arose in the circumstances of that appeal. In Parker v. The South Eastern Ry. Co. (1877), 2 C.P.D. 416, the only question was whether the question had been properly put to the jury. Mellish and Baggallay, L.JJ, thought that it had not. Bramwell, L.J., dissenting, thought that the facts were such that the jury ought to have been at once directed to find a verdict for the defendants. In Grand Trunk Ry. Co. of Canada v. Robinson, 22 D.L.R. 1, [1915] A.C. 740, the Judicial Committee obviously thought that the question was in substance one of fact, of the nature which I have indicated, and that no difficulty as to the law applicable arose.....The question is not whether the appellant actually knew of the condition. I have no doubt that he did not. The real question is whether he deliberately took the risk of there being conditions in the face of a warning sufficiently conveyed that some conditions were made and would bind him. If he had signed the contract, he certainly could not have been heard to say that he was not bound to look. The common sense of mankind which the law expresses here would

B.C.
C.A.
MAUNSELL
v.
CAMPBELL.

not permit him to maintain such a position. And when he accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make a long journey across the Atlantic on board the steamer, and then proceeded on that journey, I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances and be held as bound by the document as clearly as if he had signed it. I am of the opinion that the appeal must fail."

In the present case, we have the contract signed by the respondent, Katherine R. Maunsell, and no question arises about the non-disclosure of the terms of the contract or that the terms were not fully understood. I cannot see, in the face of the contract we have here—clearly limiting responsibility—any principle upon which any further responsibility may be imposed. It is regrettable that the damages would appear to be greatly in excess of that provided for in the contract, but who is to blame for this result? The contract is plain in its terms and there was a way to have covered the true value, but that value was not declared and, if declared, there would have been an additional charge. The Court does not make the contract between the parties; it remains only for the Court to construe the contract and impose liability in accordance with its terms in the result. In the present case, the terms of the contract clearly limit responsibility as the words read, "limited to the sum of $50 unless the value thereof is made known at the time of storage and receipted for in the schedule an additional charge will be made for higher valuation."

This not being the case of any wilful misconduct, or wilful negligence, what happened can be said to be an eventuality that in the ordinary course of business might happen and it is reasonable to conclude that it was an eventuality that, according to sound business methods, should be provided against otherwise for a very small pecuniary remuneration—here $1.50 per month only—very heavy damages might be imposed notably—the judgment now under appeal fixes the damages at $1630.

In my opinion the judgment should be reversed and the appeal allowed.

Eberts, J.A., would allow the appeal.

Appeal allowed.

EMERSON v. CLARK.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. February 18, 1921.

Costs (§I.—2C)—Appeal—Security—Delay in Making Application.

The Court will not order security for the costs of an appeal if the application is delayed until after the party appealing has prepared and served his factum, it being considered unreasonable to make such an order when the application is delayed until the expenses of the appeal have been incurred although had it not been for the delay the order would have been granted as of course.

[In re Indian, Kingston, etc., Mining Co. (1882), 22 Ch. D. 83; In re Clough (1887), 35 Ch. D. 7; Pooley's Trustees v. Whetham (1886), 33 Ch. D. 76.]

APPLICATION by plaintiff, respondent, for security for costs of an appeal, taken by defendant, appellant. Application refused.

P. J. Hughes supports application.

C. F. Inches, contra.

The judgment of the Court was delivered by

Grimmer, J. (oral):—It is clearly laid down by the authorities that the Court under conditions similar to those existing in this case would or might order security for the costs of appeal, as save and except for the question of delay there would be little doubt that the security would be as of course, the appellant being out of the jurisdiction and there being no property in dispute to which the respondents could look for their costs. In view, however, of the decision in the case of The King v. Gerow (1915), 24 D.L.R. 664, 43 N.B.R. 352, and the cases which it followed, the application must be made promptly, and promptness will be strictly enforced. In this case the notice of appeal was dated December 14, and was served the same day upon the plaintiff's solicitor. On December 23 the defendant's solicitor was served with a demand of security for the costs of the appeal, to which a reply was made the same day to the plaintiffs' solicitor that no security would be given as demanded, unless an order there was made by the Court. No further step was taken in this respect by the plaintiffs' solicitor until the first day of February instant, when he caused a notice of motion for security for costs, that one now under consideration, to be served upon the defendant's solicitor. In the meantime, however, the defendant's solicitor had prepared and filed his factum and had duly served it upon the plaintiffs' solicitor on January 28 last, or three days before the notice of motion was served. While it is true the application for an order for security for costs

Can.

Ex.

THE KING v. THE GLOBE INDEMNITY CO. ET AL.

could only be made to this Court, and was so made at the first opportunity, yet the notice of the application should have been given promptly after the notice of the appeal was served, the general rule being that the Court will not order security for costs if the application comes on when the appeal is in the paper or very nearly in the paper, it being considered unreasonable to order it when the application is delayed until the expenses of the appeal have been incurred. See in re Indian, Kingston and Sandhurst Mining Co. (1882), 22 Ch. D. 83; In re Clough: Bradford Commercial Banking Co. v. Cure (1887), 35 Ch. D. 7; Pooley's Trustees v. Whetham (1886), 33 Ch. D. 76.

In view, therefore, of the general rule, and following the decision in The King v. Gerow, 24 D.L.R. 664, 43 N.B.R. 352, this Court is of the opinion the present application should be refused with costs.

Application refused.

THE KING v. THE GLOBE INDEMNITY CO. and HINCHLIFFE, AND BARBER ET AL, THIRD PARTIES.

Exchequer Court of Canada, Audette, J. May 12, 1921.

Conversion (§II.—29)—Canada Grain Act—Collateral Bonds—Third Party Notice.

In compliance with the provisions of the Canada Grain Act, H. filed with the Board of Grain Commission a bond of the defendant company to obtain a license to operate a country elevator for the crop year of 1915-16. Various persons stored their grain in his elevator, to whom he issued receipts therefor pursuant to the Act. Subsequently without instructions from the owners and without obtaining the return of the storage certificates, he disposed of the grain, keeping the proceeds thereof.

Held: On the facts that H. had failed to comply with the provisions of the Act, and that the defendant company was liable to plaintiff under its bond.

2. That the fact of the owners, on discovering their grain gone, making a demand for payment thereof from H. could not be construed into a waiver of the old or the making of a new contract between them and H. so as to relieve him of his statutory duties, or to exonerate the company from liability under their bond.

3. That where there is conversion as aforesaid, the damages should be measured by the actual loss, depending upon the price prevailing at that time.

4. At the time it gave its said bond, the company required H. to furnish collateral bonds securing them; and the third parties herein gave these bonds.

Held: That, as the company's right to indemnity as against the third parties was an independent right not depending upon the bonds themselves, but upon other and separate agreements than those forming the basis of the information herein, and

that the third parties were admittedly liable upon the shewing of vouchers or other evidence of payment by the company under the bonds—the rule of third-party notice, the object of which is to give them an opportunity of contesting plaintiff's right and that he may be bound by the judgment obtained by the plaintiff, was not applicable, and therefore this Court had no jurisdiction to decide this issue as between subject and subject, which is entirely foreign to the main issue.

INFORMATION exhibited by the Attorney-General for Canada seeking to recover against the Indemnity company for the bonds furnished in connection with the operating of country elevator and of track buyer's operations.

The facts are stated in the reasons for judgment.

E. L. Taylor, K.C., and Sweatman, K.C., for the Crown;

Coyne, K. C. for The Globe Indemnity Co;

L. A. Seller for Thomas Ashton, third party;

J. F. Frame, K. C. for the other third parties;

No one appearing for defendant Hinchliffe.

Audette, J.:— This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover against each of the said defendants, the sum of $6,600, being the full amount of a country elevator bond, together with the further sum of $6,000, or such portion thereof as may be considered just,—being the amount of a track-buyer's bond, both bonds being given, under the provisions of the Canada Grain Act, 2 Geo. V. 1912, (Can.) ch. 27.

The defendant Hinchliffe although duly served with notice of trial after having filed a statement of defence, did not appear at trial, the other defendant The Globe Indemnity Company of Canada and the third parties, being, however, duly represented by counsel.

The following admissions, subscribed to by all parties hereto, excepting the defendant Hinchliffe, were duly filed at the opening, and read as follows, viz:—

"Admissions:— For the purposes of this case it is agreed between his Majesty and the defendants:

"1. That on the 28th and 29th June, 1916, the Board of Grain Commissioners held sessions at Strassburg, in the Province of Saskatchewan, pursuant to the statute, for the purpose of fully investigating all matters in connection with the alleged default of the said Hinchliffe in operating the said country elevator and also as to his alleged default as a track buyer, subject to the question of relevancy. 2. The Board wrote to the defendant company giving the date of the hearing and requesting that the comp-

Can.

Ex.

THE KING v. THE GLOBE INDEMNITY CO. ET AL.

any have a representative present. The defendant company were represented by counsel at said investigation who cross-examined persons called before the Board: subject to the question of relevancy. 3. The said elevator was closed by the 1st of January, 1916, all grain having been shipped out. 4. Early in January 1916, the Board received complaints that Hinchliffe was not complying with the Act and asking for an investigation. A representative of the Board interviewed him in Regina. This is admitted subject to the question of relevancy. 5. The first declarations of claim, making claims against Hinchliffe to the Grain Commission were made on the 22nd February, 1916, and twelve of them were taken before the end of the month of February. This is admitted subject to the question of relevancy. 6. The prices of grain during the period from September 1st, 1915, to August 31st, 1916, are correctly set out for the various days in the closing prices shewn in Report of the Winnipeg Grain Exchange for the year 1916, pages 70 to 81 inclusive, which are made part of these admissions, except grain commandeered; and the value of the grain of the said claimants at the above prices is subject to deductions for freight 11.4c. per bushel on wheat and 6½c. per bushel on oats, storage 1¾c. per bushel and 1/30c. per bushel per day after the first 15 days, and 1c per bushel commission on sale, together with dockage and also to interest on advances made in respect of the grain of the various claimants. 7. The grain prices for the contract grades for the various days in the years succeeding 1916 are correctly shewn in the Winnipeg Grain Exchange Reports, which prices as well as the orders of the Wheat Board are admitted. It is also admitted that the highest price for No. 2. Feed Oats, on the Winnipeg Grain Exchange since September 1st, 1915, was $1.36½ on June 15, and June 16, 1920. It is also admitted that all grain from said elevator went to the Regina Grain Company and was sold by them, with the exception of the 1976 bushels 40 pounds of wheat and the oats mentioned in paragraph 1 of the Particulars. 8. During the grain year 1915-16, it is the price of No. 1 Northern Wheat which is shewn by the Winnipeg Grain Exchange prices above. During the same period it is the price of No. 2 C. W. Oats which is shewn by the Winnipeg Grain Exchange prices above. 9. The claim in para. 8 of the Particulars is withdrawn. 10. The amount of the claim in para. 10. of the Particulars is fixed

at $110. This claim is the only one under the track bond. 11. The only cars commandeered by the Government on November 28, 1915, are Nos. 209390, 146660, 208878, 102930, all No. 1 Northern."

(This admission is signed by counsel on behalf of plaintiff, defendant company and third parties.)

The defendant, The Globe Indemnity Co. of Canada, by counsel, at the opening of the trial admitted liability to the extent of $110 under the $6,000 bond above referred to, in respect of the track buyer's license, and the Crown's counsel declared himself satisfied, limiting his claim to that amount in respect to the track-buyer bond.

That leaves me to deal with the bond of $6,600 in respect of the country elevator license.

Counsel for the Crown, upon application, was also allowed to amend his particulars of claim to the effect that the price or prices or value at which the various classes of grain should be estimated in this action for the purposes of fixing damages should be the highest market price (according to the reports of the Winnipeg Grain Exchange) prevailing between the date of storing the grain in each case and the date of the trial. This question will be hereinafter referred to.

The statement of defence by The Globe Indemnity Co. of Canada was also amended, upon leave granted at trial by striking out thereof the whole of paras. 7 and 8 and subparas. (b), (c), (d), (e), and (f) of para. 9.

The defendant Hinchliffe, as averred by the pleading, in compliance with the Canada Grain Act, filed with the Board of Grain Commission the bond in question for $6,600 to obtain a country elevator license for operating the crop year of 1915-16.

Evidence was adduced on behalf of the Crown in respect of some of the claims set out in the particulars and those set out in the statement of defence by The Globe Indemnity Co. of Canada, namely: The claim of G. Dueringer, W. Schwandt, F. Staffen, W. Hinchliffe, J. Flavelle, E. Shepherd, A. Revoy, Fentwick & Rowe, A. Kerr, G. F. Sculpholm, One Fenwick for Mrs. Moeller, and G. Staffen.

The defence offered no viva voce evidence at trial.

The details of the several transactions of these claimants with the Country Elevator operated by defendant Hinchliffe are set forth both in the particulars and in the evidence; but in the view I take of the case I find it unnecess-

Can.

EX.

THE KING v. THE GLOBE INDEMNITY CO. ET AL.

ary to undertake any minute analysis of the same, because I have come to the conclusion that the defendant Hinchliffe has made default in the operation of his country elevator and that he has transgressed the law or rules for operating such an elevator as laid down in the statute.

Having received from the farmers their grain for storage in the elevator, Hinchliffe, pursuant to sec. 157 of the Grain Act, at the time of delivery of such grain, issued, in the form prescribed by the Act, to the person delivering the grain, warehouse storage receipts and under secs. 159 and 166, became liable to account for the same.

The claim made herein, under the bond, is for the wheat so stored by the farmers and which Hinchliffe disposed of without instructions from them, with the result that when the farmers came to ship their wheat or grain, they found the elevator empty and closed, and Hinchliffe gone. The farmers thereby suffered heavy losses for which it is sought to compensate them out of the proceeds of the bond.

Hinchliffe had no right, of his own volition and without an order, to dispose of and sell the grain stored in his country elevator, except under the special circumstances mentioned in the statute, which are not in issue herein. Hinchliffe having given storage certificates, the grain could not leave the elevator without the return of these certificates, as required by the statute; and he was moreover under contract with the farmer to keep his grain in the elevator.

It is true Hinchliffe made advances in money to several of the farmers storing grain in his elevator,- but that did not change the nature of the statutory contract he was working under. He was quite free, at common law, to make these advances, but he had no legal lien upon the stored grain especially as against a third party holding the storage certificates. He took his chance, and he had the advantage of having in his hands grain representing more than the amount advanced and that was all.

Moreover, the conversion, with regard to all these claims, of the farmer's grain cannot now be sought to be construed into a new contract as between the farmers and Hinchliffe from the manner and the language used when the farmer, seeing his grain gone, asked for his money, and the demand for money or payment, under the circumstances, cannot be made referable to a new contract as between the warehouseman and the farmer, with the object

or view of avoiding the statutory duties cast upon the elevator man.

It is not, indeed, what the swindled farmers said or had to say when they realised their grain had gone, that is now under consideration in the present controversy; but the consideration is what the farmers have a right to exact from Hinchliffe under the circumstances which form the gravamen of the case. Hinchliffe having violated his statutory duties and converted the grain to his own use, is estopped from setting up afterward, thereby invoking his own turpitude,- what the farmers said when they found their grain gone and endeavour to construe it into a new contract which would release him of any liability. It is not in the mouth of Hinchliffe to say—as was said at Bar—the farmers ratified the sale I made of their grain by asking for their money, the proceeds of the sale of such grain. He who seeks equity must come into Court with clean hands.

When some of the farmers realised their loss and went to Hinchliffe and asked for their money, the elevator being closed and the wheat gone, they were trying to make the best of a bad job, if I may use that expression. And, indeed, whatever they did say to get the proceeds of their disappeared grain cannot now be sought to be made referable to a new class of contract which would let out Hinchliffe from his statutory duties.

The farmers were shamefully swindled. They dealt in the regular manner, - as provided by the statute, with the person operating the elevator who proved himself false and the damages flowing from his violating the statute and his being obviously derelict in his conduct would appear to be only partially guaranteed by the bond of The Globe Indemnity Co. of Canada, and I find the company are liable under their bond and must pay.

The farmers are not parties to the bond, but they have a claim for damages and compensation against the defendant Hinchliffe, whose action in respect of the administration of his country elevator is bonded and guaranteed. The compensation for damages in a case of conversion should be complete and the converter must not be allowed to take or make any profit out of his wrongful act. The damages should be measured by the actual loss and the claimants would have sold their grain during that season and they would have been paid the price prevailing at that time.

The damages therefore should be ascertained upon the

Can.

Ex.

THE KING v. THE GLOBE INDEMNITY CO. ET AL.

basis of the price of wheat, oats or grain prevailing between Christmas 1915 and February 1, 1916, and making the usual and proper deduction or allowance for freight, transportation, storage, warehouse charge etc. The elevator as admitted, was closed by January 1, 1916. But in no case should a farmer receive a higher price at [than] which he testified he was holding for sale.

The plaintiff having omitted to ask for interest by the information moved at trial to amend accordingly and the pronouncement upon that application had been reserved to the merits. Interest should be allowed in a matter like the present one, and moreover, in view of the long delay since the institution of the action, the greater part of which resulting from an adjournment which was granted at the request of The Globe Indemnity Co; I think the plaintiff is undoubtedly entitled thereto. I have no hesitation in allowing the amendment and direct that interest should run upon the amount of damages duly ascertained from March 1, 1916. The whole in full accord with the basic consideration that the farmer should be compensated by the converter to the full amount of his loss.

The costs of the adjournment above referred to having been reserved. I hereby adjudge the plaintiff is entitled to recover the same against the said The Globe Indemnity Co. of Canada in any event.

Dealing now with the amount of damages or the amount which should be paid to the respective claimants mentioned herein, I will accept the suggestion at trial and I will direct counsel to adjust the same upon the basis above mentioned. Failing, however, counsel to be able to arrive at a satisfactory adjustment, leave is hereby given to apply for further direction in respect of the same.

The claimants will be entitled to the value of their lost grain, at the prices prevailing between Christmas 1915 and February 1, 1916, with interest thereon from March 1, 1916—they being entitled to full compensation in a case of conversion. All due deduction to be duly made respecting advances, costs of transportation, storage, etc., all such charges being familiar to counsel herein, as clearly appeared at Bar.

There will be judgment as follows, on the main issue, viz:

10. The plaintiff is ordered and adjudged to recover against the said defendants, in respect of the operation

under the track-buyer bond for $6,000, the sum of $110 as admitted and agreed upon at Bar.

20. The plaintiff is further ordered and adjudged to recover against the defendants all such damages and compensation as may be arrived under adjustment by counsel aforesaid, allowing for each of the said farmers his claim under the prices prevailing between Christmas 1915 and February 1, 1916, with interest thereon, from March 1, 1916, the whole, however, only up to the total amount of the bond of $6,600 if the added sums representing the damage amount to that, and less if the deficiency amounts to less. If the several amounts of the individual loss of the farmers, ascertained in the manner above set forth, and if the condemnation becomes to be for $6,600, - the total amount of the bond - against The Globe Indemnity Co., interest upon that sum should only run against that company from the date of demand upon them which may be taken to be the date of the investigation by the Board of Grain Commissioners, which is to be found in the information as June 28, 1916.

30. The plaintiff is further ordered and adjudged to recover against the said defendants the costs of this action, together with and including the costs of the adjournment, in any event, and which stood under reserve up to date.

40. Failing the parties to adjust the claim, as mentioned above, leave is hereby reserved to apply for further direction.

One of the defendants, The Globe Indemnity Company of Canada, having claimed to be entitled to indemnity over against the third parties above mentioned, obtained leave to serve third-party notice upon them and after the pleadings had been respectively filed and delivered, the matter came up for hearing at the same time as the hearing upon the issue as between the plaintiff and the defendants.

I have heard both issues at Regina, on February 3, 1921 and following days, and allowed counsel for the defendant company, on account of his having taken ill at trial, to offer his argument in writing by February 14, 1921. A further extension was also allowed; but as the written argument is not at this late date forthcoming, about 3 months after the argument, I now proceed to render judgment.

The Globe Indemnity Co. gave the two bonds above mentioned and required the defendant Hinchliffe to procure

Can.

Ex.

THE KING v. THE GLOBE INDEMNITY CO. ET AL.

collateral in the nature of exhibits A 12 and A. 26. The third parties who signed these documents contend, among other things, that they signed the same upon misrepresentation on the part of Hinchliffe who told them it was a recommendation touching his capacity to run an elevator, under the provisions of the Grain Act; to some of them he even said it was a bond or security but that they would never be asked to pay out any money. In one case there was no seal affixed upon the document and in the other the seals appeared to have been affixed after the parties had signed.

However, in the view I take of the case it becomes unnecessary for me to decide whether or not the third-parties not being blind or illiterate, were or were not so grossly negligent in signing these documents without reading them or ascertaining their purport, that the plea of misrepresentation can let them out or whether the plea is non est factum. Howatson v. Webb, [1908] 1 Ch. 1, 4 Br. Rg. Cases 642.

It is furthermore unnecessary for me to decide whether or not the case comes under sec. 4 of the Statute of Frauds and whether in such cases seals are required upon this class of documents. Brown on Statute of Frauds pp. 440, 441 et seq & 582.

Indeed, after going over the whole case and giving this matter careful consideration, I have come to the conclusion that this is not a proper third-party issue, and further that I have no jurisdiction to entertain the claim.

This is not a claim to indemnify the defendant company over against the plaintiff's claim in the action resting on the bonds recited in the information; but the defendant company claims under an independent right, not depending upon the bond themselves, but upon other and separate deeds or agreements entirely distinct and separate from the bonds in question. The transaction between the plaintiff and the defendants in respect of the two bonds in question is complete and distinct and cannot be linked with the other collateral bond or security to be used as a right to third-party notice. Where the defendant's right against a third-party in an independent right, not depending on the defendant's own liability in the action, the rule of third-party notice is not applicable. Wynne v. Tempest, [1897] 1 ch. 110, Greville v. Hayes, [1894] 2 Ir. R. 20 at p. 23.

The object of a third-party notice is to bring in a third

party in the suit to give him an opportunity of contesting the plaintiff's right and furthermore that he may be bound by the judgment obtained by the plaintiff. In the present case, there would be no object in and nothing gained by bringing in the third parties in question, because by the very terms of their bonds or collateral securities (Exs. 12 and 26) they are bound by the judgment upon the original bond. By the terms of these collateral bonds the third parties are liable to the company for all loss, damage and costs, etc., admitting beforehand, that the vouchers or other evidence of payment made by the company, etc., shall be conclusive evidence as against them of the fact and extent of their liability to the company, whether such payments were made to discharge a penalty under the bond, or were incurred in the investigation of a claim therein or in adjusting a loss or claim and whether voluntarily made or paid after suit and judgment against the company.

The matter is very clear, this is not a case of third-party notice, it necessarily follows that I have no jurisdiction to decide this issue as between subject and subject.

I am moreover bound by the decision of this Court upon a closely analogous case, In re The Queen v. Finlayson et al (1897), 5 Can. Ex. 387.

Therefore the claim made by The Globe Indemnity Co. of Canada as against the third parties is hereby dismissed with costs. The third parties are dismissed from this action, which of course, will not deprive the defendant company of such right of indemnity as may exist.

The very able written argument of counsel for the defendant company was delayed in its transmission to me for reasons which I need not state. I had arrived at my conclusion in the case, as above stated, before I had an opportunity of perusing it; but I have since done so. However, after duly considering it, I see no reason to change the conclusion of my judgment in any way.

Judgment accordingly.

NORTH COWICHAN v. GORE-LANGTON.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. April 29, 1921.

Arbitration (§III.—17)—Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52—Expropriation—Arbitrators Properly Appointed and Having Jurisdiction—No Error Shown on Face of Award—Conclusiveness — Effect of Land Changing Hands During Course of.

B.C.

C.A.

NORTH COWICHAN v. GORE-LANGTON.

Where a municipality has taken the required statutory steps to determine the compensation for the taking of land for highway purposes, the arbitrators appointed having jurisdiction to determine the matters submitted to them, and having exercised that jurisdiction, and no error being shown upon the face of the award, the award is incontestable. Once the expropriation proceedings are commenced they will proceed upon the basis of the then existent title, and if it should later develop that there has been a change of ownership pending the making of the award, it does not affect the validity of the award, but the person entitled to the land becomes entitled to the money awarded the municipality being able to fully protect itself under the Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52.

[Re Beaver Wood Fibre Co. Ltd. and American Forest Products Corp'n (1920), 54 D.L.R. 672, followed, and see Annotation: Arbitration—Conclusiveness of Award, 39 D.L.R. 218.]

APPEAL by plaintiff from the judgment of Gregory, J. in an action to set aside an award. Affirmed.

F. A. McDiarmid, for appellant;

H. A. Maclean, K. C. for respondent.

Martin, J. A. would dismiss the appeal.

Galliher, J. A.:— I am agreeing in the judgment of my brother McPhillips, and would dismiss the appeal.

McPhillips, J. A.:— In my opinion, this appeal must fail. Here we have an award made following the taking of the required statutory steps by the municipality to determine compensation for the taking of land for the purposes of the municipality, viz: for highway purposes. Gore-Langton was the registered owner of the land at the time of the making of the award and he was served with the notice under sec. 362 of the Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52, which deals with the expropriation of land and claims therefor. Gore-Langton later filed his claim in amount $11,000—made up as follows:—

Value of land $1,000, and for damages by reason of work $10,000.

Now the award was made on October 15, 1920, and read as follows:—

"In the matter of the Municipal [Act?] and Amendments thereto and In the matter of the Arbitration between Richard Gerald Gore-Langton and the Corporation of the District of North Cowichan in connection with the expropriation of a road through Swallowfield Farm under By-law No. 95 of the said Corporation.

"We, the undersigned two of the arbitrators appointed herein, hereby arbitrate and award, adjudge and determine, that the sum of $4,015.00 is the amount to be paid to the claimant herein, Richard Gerald Gore-Langton, as

compensation for the damages caused by the aforesaid expropriation.

Dated at the City of Duncan in the Province of British Columbia this 15th day of October, 1920.

A. R. Wolfenden.
James Maitland-Dougall."

One of the arbitrators, T. A. Wood, did not concur in the award and refused to sign same. Now the objection is that the arbitrators have awarded compensation on a wrong principle, and that they have awarded damages upon a claim based upon ownership and occupancy of the land adjoining the public highway expropriated by the by-law under consideration to a person who was neither owner or occupant, nor otherwise interested in the "real property so expropriated by by-law as aforesaid;and in the alternative on the further wrong principle that they have allowed no sum whatever to the Corporation for the advantage resulting from the operation of the said by-law."

It would appear that the point was taken before the arbitrators before the making of the award that Gore-Langton had sold the lands through which the highway was to be carried to one Hutchison. Nevertheless it was apparent that Gore-Langton was still the registered owner and sec. 104 of the Land Registry Act, 2 Geo. V., R. S. B. C. 1911, ch. 127 reads as follows:—

"104. No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments, 1906, c. 23, s. 74; 1908, c. 29, s. 6" (Amends. s. 104, subsec. (3) 1915, ch. 33, sec. 15, sub-sec (3) added s. 104, 1913, ch. 36, sec. 51, re-enacts sec. 104 sub-sec. (3) 1914, ch. 43, sec. 62, (2) added 1912 ch. 15, sec. 28.)

It is true that at the time of the award an application had

B.C.

C.A.

NORTH COWICHAN v. GORE-LANGTON.

been made for registration of the conveyance from Gore-Langton to Hutchison but it was not completed by registration. There could be no certainty of procedure unless there be some time at which the arbitration proceedings could commence and be determined as of that time that is reasonably the time when the notice of expropriation was given, otherwise there would be chaos. The point taken is without merit and in the highest sense technical as upon the evidence it is clear that an absolute title can be obtained by the municipality to the land in question and all proper releases for all claims for damages—in truth there can be no contention to the contrary. It is highly inequitable that all the proceedings initiated by the municipality should, at the instance of the municipality, be held to be abortive. It is well to bear in mind what the legal result is, when an arbitration is entered upon and an award made and unquestionably here the course of conduct before the arbitrators was to have an award made in pursuance of the provisions of the Municipal Act. In this connection, I would refer to the judgment of Meredith, C.J.O., in Re Beaver Wood Fibre Co. Ltd., and American Forest Products Corpn; (1920,) 54 D. L. R. 672 at pp. 673, 674, 47 O. L. R. 590.

"On the question of setting aside the award, it is elementary that where the parties have chosen to constitute a court for themselves that court is a court to determine both the law and the facts, and if there is no misconduct on the part of the arbitrators, however much they may have erred either as to the law or the facts, the Court has no jurisdiction to interfere. The only exception to that rule that I know of is where the error appears on the face of the award or is shewn by some document incorporated with it."

Now the award in the present case is without error upon the face, and is determinative of both the law and the facts. I cannot see what jurisdiction exists in this Court or the Court below to review the award in the present case. (Crosfield v. Manchester Ship Canal Co. (1905), A.C. 421, 73 L. J. (Ch.) 345; Hodgkinson v. Fernie, (1857,) 3 C. B. (N.S.) 189, 140 E.R. 712. Here we have a lump sum awarded and there is no error on the face of the award and it cannot be assumed that the advantage if any, from the operation of the by-law was not considered—it may well have been considered. It is pertinent to the question under consideration in the present case to note what Lord Davey

said in Falkingham v. Victorian Railways Commissioner, (1900), A.C. 452 at pp. 463-464:

"Their Lordships agree that if a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad. In the present case the submission is to be found in the contract between the parties and the respective appointments made by them of arbitrators, and the reference was only of those claims made by the appellants which were within the terms of the submission. In Beckett v. Midland Ry. Co. (1866), L.R. 1 C.P. 241, and the other case of Fisher v. Pimbley (1809), 11 East, 188 (103 E.R. 976), the excess appeared on the face of the award, and, not being severable, the award was held bad. Mr. Haldane contended that this award was bad because it did not in terms state that the arbitrators had rejected from their consideration those claims of the appellants which were not properly referable, and it was therefore consistent with the award that those claims had in fact been considered by the arbitrators and had been taken into account by them in arriving at the lump sum awarded. Their Lordships are not aware of any authority for this position, and they think it would be contrary to principle to hold an award bad because of the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the award. It is true that in inferior courts the maxim "Omnia praesumuntur rite esse acta" does not apply to give jurisdiction as was laid down by the Court of Queen's Bench in Rex v. All Saints, Southampton (1828), 7 B. & C. 785 [108 E.R. 916] and by Willes, J., in Mayor of London v. Cox (1867), L.R. 2 H.L. 239 at p. 262.

That rule is applicable to the award of an arbitrator where no jurisdiction is shewn to make the award, but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application. In such a case the award can only be impeached by shewing that the arbitrator did in fact exceed his jurisdiction. Their Lordships therefore, think that this award of the lump sum is not bad on the face of it.

The arbitrators, in the present case, unquestionably had

B.C.
C.A.
NORTH COWICHAN v. GORE-LANGTON.

jurisdiction to determine the matter submitted to them and exercising that jurisdiction, and no error being shewn upon the face of the award, it is incontestable. In Re An Arbitration between Hohenzollern Actien Gesellschaft fur Locomotivfan and The City of London Contract Corporation and the Common Law Procedure Act, 1854 (1886), 54 L.T. 596, Lord Esher in the Court of Appeal at p. 597, said:—

"The question is, whether the arbitrator had jurisdiction to try the matters submitted to him. If he had jurisdiction to try these matters, his decision cannot be disputed .....The questions in this case are, first, what is the true construction of the submission to arbitration, and, secondly, what is the dispute between the parties?"

In the same case Lopes, L.J., said:—"We have not to consider whether the arbitrator has decided rightly, but whether he has acted within his jurisdiction. However, he may have decided, if his decision is intra vires, we cannot interfere."

It is not contended nor is there any evidence that Hutchison the purchaser from Gore-Langton is disagreeing with the award even if that could be a question to be inquired into. It cannot be overlooked that the Municipal Act in its provisions absolutely protects the municipality in that the compensation awarded stands in place of the land—this is a reasonable and proper provision and in the intention of the Legislature is clearly demonstrated that once expropriation proceedings are commenced they will proceed upon the basis of the then existent title and if it should later develop that there has been a change of ownership pending the making of the award or thereafter—and the municipality has reason to fear any claims or encumbrances—ample provision is made to meet any possible situation, i.e., the person entitled to the land becomes entitled to the money awarded—that the municipality may fully protect itself is manifest when the following sections of the Act are read:—

"370. The compensation or damages which may be agreed upon or awarded for any land taken or injuriously affected by any municipal corporation, in the exercise of its corporate powers, shall stand in the stead of such land and shall be subject to the limitations and charges (if any) to which the said lands were subject, and any claim to or encumbrance upon the said land, or to or upon any portion thereof, shall, as against the said corporation, be converted

into a claim for the money so paid, or to a like proportion thereof. R. S. 1911, c. 170, s. 406. 1915 (B. C.) ch. 46.

"371. If, in the opinion of the Supreme Court or any Judge thereof:—

(1) There is reason to fear any claims or encumbrances; or

(2) Any person to whom the compensation or damage, or any part thereof, is payable, or, in the event of no claim for compensation having been made in due time, any person who would or might have been entitled to make claim for compensation, or whose concurrence or removal from the register in necessary in order to show a clear title in the municipality:—

(a) Refuses to execute the proper conveyance or guarantee; or

(b) Cannot be found; or

(c) Is unknown to the Council—

the Council may, with leave of the said Court or Judge, expressed in an order duly entered, pay such compensation into the district registry of the Supreme Court for the district in which the municipality is situated, with interest thereon for six months at the rate of four per centum per annum, or may obtain in such order a declaration that no compensation is payable, and shall deliver to the Registrar-General of Titles or District Registrar of Titles, as the case may be, an office copy of such order, accompanied by the conveyance or agreement or award, as the case may be, with an application of the municipality for the registration of the title acquired under such conveyance, agreement, or award, or under the expropriation proceedings, coupled with the non-claim of compensation, with the usual fees, and the Registrar shall register the title so acquired under such by-law," 1915, ch. 46. sec. 54.

"372. Upon such payment into Court, a notice in such form and for such time as any Judge of the Supreme Court may direct shall be inserted in a newspaper published in the municipality in which the lands are situated (if any) or if there is no newspaper published in the municipality, then in the Gazette, and also in a newspaper published in the nearest municipality thereto in which any newspaper is published. Such notice shall state that the title of the municipality under such agreement, award, or conveyance is under this Act, and shall call upon all persons entitled to the lands, or to any part thereof, so taken or injuriously

B.C.

C.A.

NORTH COWICHAN v. GORE-LANGTON.

affected to file their claims to the said compensation money or any part thereof; and all such claims shall be received and adjudicated upon by the Supreme Court or by any Judge thereof. R. S. 1911, c. 170, s. 408."

"373. The cost of the proceedings, including proper allowances to witnesses, shall be paid either by the municipality or by such other person as the said Court or any Judge thereof may order; and if the order for distribution is obtained in less than three months from the payment into Court of the said compensation moneys the Court or any Judge thereof may direct any proportionate part of such interest to be returned to the said municipality. R. S. 1911, c. 170, s. 409."

"374. The judgment in such proceedings shall for ever bar all claims to the lands or any part thereof, as well as any mortgage or encumbrance upon the same; and the Court or Judge shall make such order for distribution, payment, or investment of the said compensation money and for securing the rights of all persons interested therein as may be necessary. R. S. 1911, c. 170, s. 410."

Upon full consideration of these statutory provisions, it is idle to contend that consequent upon the change of ownership subsequent to the arbitration proceedings, although really non-effective in law by reason of sec. 104 of the Land Registry Act, pending registration that the whole proceedings are abortive—such is plainly not the expressed intent of the Legislature—on the contrary, every precaution has been taken to give full effect to the expropriation and the award and the machinery is ample to complete and work out substantial justice to who ever may be entitled to the compensation as the compensation "shall stand in the stead of such land,." So that the municipality, in the present case, is at liberty to pay the compensation into Court and obtain absolute statutory immunity, from any further claim in respect of the "land taken" and "injuriously affected."

Therefore, upon the whole case, I am of the opinion that Gregory, J., arrived at the right conclusion in refusing to set aside the award and that the appeal should be dismissed.

Eberts, J. A. would dismiss the appeal.

Appeal dismissed.

TURNER v. DAVISON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. May 10, 1921.

Partnership (§II.—7)—Contract for Purchase of Interest In—Promissory Note Given—Chose in Action—Patent Right—Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 14—Necessity of Complying With—Validity of Note.

A promissory note given in pursuance of a contract for the purchase of an interest in a partnership, which includes amongst its assets a patent right is not given for an interest in a patent right within the meaning of sec. 14 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

[Lavin v. Geffen (1920), 51 D.L.R. 203, 15 Alta. L.R. 556; affirmed (1921), 56 D.L.R. 693, followed.]

APPEAL by plaintiff from the trial judgment dismissing an action to recover on two promissory notes because they did not comply with the requirements of sec. 14 of the Bills of Exchange Act, R. S. C. 1906, ch. 119 reversed.

F. M. Burbidge, K. C. and J. R. Higgins for plaintiff.

A. E. Hoskin K. C. and H. V. Hudson for defendant.

Perdue, C.J.M., and **Cameron, J.A.**, concur.

Fullerton, J. A:— The plaintiff, the defendant Davison and others had, prior to May 30, 1918, been doing business as partners under the name of The Auto Sheaf Cart Loader. The defendant Davison had patented a sheaf loader and the company had been building loaders and putting them on the market.

The patent, although standing in Davison's name, was a partnership asset. The other assets of the company consisted of certain promissory notes made by purchasers of loaders, machines, machinery and material for the manufacture of loaders. Plaintiff had a one-quarter interest which he had acquired from the defendant Davison.

Sometime prior to May 30, plaintiff offered to buy defendant Davison's interest or to sell to the latter his own interest. Defendant Davison preferred to buy and thereupon plaintiff gave to defendants an option to purchase his interest. This option, although proved at the trial, was not put in evidence. On May 30, 1918, the plaintiff and the two defendants met at the Vendome Hotel where the following document was executed by all three.

Winnipeg, May 30th, 1918.

"This is to certify that I have received from C. W. Davison and J. W. St. John settlement in cash and notes for all my interest in the Auto Sheaf Cart Patent Rights. All notes which were given for Auto Sheaf Carts sold; all mach-

Man.

C.A.

TURNER v. DAVISON.

ines and machinery. Also all material in connection with said Auto Sheaf Cart subject to notes given.

"It is further understood and agreed that the vendor J. L. Turner will retain his shares in the Auto Sheaf Cart Patent Rights until all notes are fully paid.

"It is further understood and agreed that the purchasers may pay off and take up notes at any time before maturity by paying interest to date.

J. W. St. John. J. L. Turner.
O. S. Murray. C. W. Davison."

The defendants at the same time gave the plaintiff two promissory notes for $1,000 each, both dated May 30, 1918, payable with interest at 8% per annum until due and until paid, respectively 1 and 2 years after date.

This action, which was begun on March 16, 1920, was to recover the amount of the promissory note due June 2, 1919, and interest, and also "for the annual payment of interest referred to in the second note above mentioned in the sum of eighty dollars." In their defences both defendants raise the defence "that the consideration for said notes consists in part of the purchase money of a patent right and that the said notes did not have written or printed prominently and legibly across the face thereof before the same were issued 'given for patent right' and the requirements of sec. 14 of the Bills of Exchange Act, ch. 119, R. S. C. 1906, in respect of such notes were not complied with, and the said notes are therefore void."

The statement of claim, para. 3 d. alleges in the alternative that:— "On or about the 30th day of May, 1918, the plaintiff agreed with the defendants to retire from the said partnership, and the defendants agreed to purchase the plaintiff's interest in the said partnership at or for the price or sum of $2,000, which sum was to include all the interest of the plaintiff in the said partnership and the assets of said partnership. The above arrangement was duly carried out, the plaintiff retired from the said partnership and the defendants took over the plaintiff's interest in the said partnership and agreed to pay the plaintiff the sum of $2,000, as is evidenced by the defendants' notes referred to in paragraph 2 of the plaintiff's statement of claim." The plaintiff claims judgment for $2,000 together with interest.

I think it unnecessary to consider the effect of sec. 14 of the Bills of Exchange Act on the right of the plaintiff to

recover on the promissory notes because in my view the plaintiff is entitled to recover on the contract of May 30, 1918, set out above. While para. 3 does not declare on the agreement in the exact terms of the agreement the evidence shews that the only assets of the partnership were those mentioned in the agreement. The defendant Davison admits that the plaintiff has carried out in every respect the terms of the contract of May 30, 1918, on his part. Reading the contract and the promissory notes referred to in the contract together it provides for the payment by the defendants to the plaintiff of $1,000 on June 2, 1919, with interest at 8% and $1,000 on June 2, 1920 with interest at 8%. The first payment only was past due when the action was begun.

I would allow the appeal with costs and direct that judgment be entered in favour of the plaintiff for $1,000 and interest at 8%.

Dennistoun, J.A.:—The plaintiff (appellant) brings action to recover upon two promissory notes or, in the alternative, upon the original consideration for which said notes were given the sale of an interest in a partnership of which the plaintiff and the defendants were members, and in the further alternative for an interest in goods and chattels acquired by the defendants from the plaintiff.

The trial Judge refused to give judgment on the notes upon the ground that being given in part payment for goods and chattels together with an interest in a patent right they were void under sec. 14 of the Bills of Exchange Act, R. S. C. 1906, ch. 119, in the absence of the statutory words of warning upon their face and he dismissed the action.

The plaintiff claims that the notes were not given for an interest in a patent right, but for an interest in a partnership which included among its assets a patent right. He urges that an interest in such a partnership is a chose in action which may be transferred by assignment and paid for by promissory notes, without regard to the provisions of the statute, and that there is in this case no transference of title to specific individual assets, but merely of a right to participate as a partner in assets generally in conjunction with other members of the firm, in the administration of the partnership affairs. In re Bainbridge (1878), 3 Ch. D. 218 at p. 223.

Stuart, J. delivering the judgment of the Appellate Division in Alberta in the case of Lavin v. Geffen (1920), 51

Man.

C.A.

TURNER v. DAVISON.

D. L. R. 203, 15 Alta. L. R. 556. affirmed by the Supreme Court of Canada, (1920,) 56 D. L. R. 693, 60 Can. S. C. R. 660, says it is well settled that the interest of a partner in the assets of a partnership is a mere chose in action to which the Sale of Goods Act 59 Vict. 1896, Man. ch. 25 does not apply.

It would introduce a serious element of uncertainty into commercial transactions to hold that notes given in settlement of the purchase price of a partnership interest may be declared void, because it afterwards appears, that included in the partnership assets, was a patent right, possibly of small value, which never was a determining factor in the transaction.

I doubt that sec. 14 of the Bills of Exchange Act was not intended to apply to such a case.

The Supreme Court of Canada in Craig v. Samuel Benjamin & Co. (1894), 24 Can. S.C.R. 278, indicate the length to which the operation of the section may be carried, but make it clear that the notes in that case were given to purchase an interest in a patent right and for no other consideration.

While the oral evidence in the case at Bar shews that the parties were buying and selling an interest in a partnership, the written receipt which was put in evidence would indicate that the defendant was purchasing a share in the assets of the firm which included notes, machines, materials, and an interest in a patent right.

What is referred to as the "receipt" is more than a receipt, it is in itself in the form of a contract, and is the final contract which was entered into by the parties. It is signed by all of them, and supersedes what went before.

Mr. Hoskin seeks to uphold the nonsuit on the ground that there was evidence of a prior contract in writing which was not produced. I think the documents which were produced when read with the oral testimony are sufficient to prove the agreement arrived at, and to support the plaintiff's case, and that proof of what the earlier agreement contained was unnecessary.

The inference may be drawn from the whole case that this receipt does not accurately represent the arrangement which was made, but owing to the confused presentation of the plaintiff's case at the trial, and the documentary evidence which induced the trial Judge to regard this as a sale of assets including an interest in a patent right, I prefer not to interfere with his judgment in so far as it concerns

the cause of action upon the notes, but with great respect think he should have given judgment on the other branch of the case.

There is the alternative claim upon the original consideration for which the notes were given and there does not appear to be any reason why the plaintiff should not have judgment upon the facts found by the trial Judge in support of that contract.

The action is between the original parties to the transaction, no defences or equities prevent the plaintiff from having what the defendant agreed to give him, as evidenced by the receipt and the notes, that is to say $1,000 with interest at 8% payable on May 30, 1919, and $1,000 on May 30, 1920, with interest at 8% in exchange for the plaintiff's right in the goods, chattels, notes, and patent right referred to therein.

The amount due when this action was brought on March 16, 1920, was $1,000 and interest on that sum, and I would allow the appeal and enter judgment for the plaintiff with costs of the trial and appeal.

Appeal allowed.

REX v. McKENZIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 9, 1921.

Intoxicating Liquors (§IIIA.-55).—Sale of—Honest and Reasonable Belief that Liquor not more than 2½ per cent—Prohibition Act 3 Geo. V. 1916 (B.C.), Ch. 49—Defence of Mens Rea Taken Away by Statute.

It is no defence to a charge that the accused was guilty of an infraction of sec. 1006 of the Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, in selling liquor of the strength of 5.20 per cent. proof spirits, that he had been supplied with liquor for sale which he honestly and reasonably believed contained not more than 2½ per cent. proof spirits, for the sale of which he held a license. The statute takes away the common law defence of mens rea.

APPEAL by accused by way of stated case from conviction for selling liquor of more alcoholic strength than allowed by the Prohibition Act, 6 Geo. V. 1916 (B.C.) ch. 49, sec. 10. Affirmed.

W. W. B. McInnes and R. L. Maitland for appellant; Geo. E. Martin for Crown.

Macdonald, C.J.A.:—I would dismiss the appeal for the reasons to be handed down by my brother Galliher.

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

B.C.
C.A.
REX
v.
MCKENZIE.

Galliher, J.A.:—This comes before us by way of a case stated by Howay, Co. Ct. J. The accused was convicted for selling liquor of the strength of 5.20 per cent proof spirits and while the Judge found that the accused had been supplied with liquor for sale which he honestly and reasonably believed contained not more than 2½% proof spirits (and for which sale he held a license), he nevertheless held that such belief afforded no defence to the charge and that he was guilty of an infraction of sec. 10 of the Prohibition Act, 6 Geo V, 1916, (B. C.) ch. 49.

The question submitted for our consideration is, "Was I right in so holding?"

In The Queen v. Tolson (1889), 23 Q.B.D. 168 at p. 181, Cave, J., lays down this proposition:—

"At common law an honest and reasonable belief in the existence of circumstances which if true would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. - - - - -
- - - So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

And Stephen, J., in the same case at p. 190, citing Reg. v. Prince (1875), L.R. 2 C.C.R. 154, states the decision of the Court there to be as follows:—

"All the Judges therefore in Reg. v. Prince agreed on the general principle" (enunciated by Lord Esher, then Brett, J.) "that a mistake of facts on reasonable grounds to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no offence at all, is an excuse and that such an excuse is implied in every criminal charge and every criminal enactment in England") "though they all except Lord Esher, considered that the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights (the abduction of a girl under 16),— it was to be supposed that they intended that the wrongdoer should act at his peril," and the belief that the girl was over 16 years was no defence.

In the Tolson case, supra, the dissenting Judges, Manisty, Denman and Field, JJ., and Pollock and Huddleston, BB., were unable to distinguish the case of Reg. v. Prince, supra, while Lord Coleridge, C.J., who was in accord with the majority decision of the Court stated, that as he understood it none of the Judges intended to differ from the judgment

in Reg. v. Prince. The majority Judges in dealing with the Prince case thus expressed themselves:—

"Stephen, J., at p. 191:—"It appears to me that every argument which shewed in the opinion of the judges in Reg. v. Prince that the legislature meant seducers and abductors to act at their peril shews that the legislature did not mean to hamper what is not only intended but naturally supposed by the parties to be a valid and honourable marriage with a liability to seven years' penal servitude."

Hawkins, J., at p. 194:—"They (the Judges) differed however in the application of the law to the facts of the particular case, Brett, J., thinking that there was in the prisoner no such mens rea as was necessary to constitute a crime; the rest of the Court thinking that the act of abduction of which the prisoner was guilty being a morally wrong act, afforded abundant proof of his criminal mind."

Cave, J., at p. 181:—"As I understand the judgments in that case the difference of opinion was as to the exact extent of the exception, Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which if true would have made his act not criminal, while the majority of the judges seem to have held that in order to make the offence available in that case the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which if they had really existed would have made his act not only not criminal but also not immoral."

Wills, J., at p. 180:—"This judgment contains an emphatic recognition of the doctrine of the 'guilty mind' as an element in general of a criminal act and supports the conviction upon the ground that the defendant who believed the girl to be eighteen and not sixteen, even then in taking her out of the possession of the father against his will, was doing an act wrong in itself."

I think it may be taken that Lord Coleridge, C.J., truly expressed the views of the majority of the Court when he said they did not differ from the judgment of Reg. v. Prince, but in the view they took of that decision the cases were distinguishable.

There is an interesting article by Silas Alward in (1918), 38 C.L.T., p. 646, on the doctrine of mens rea where the above cases and others are referred to. I do not think I can better express my own views of the conflicting judg-

B.C.
C.A.
REX
v.
MCKENZIE.

ments in these cases than by adopting the words of the writer with, perhaps the elimination of the word "unlawful." At p. 657 he says:—

"The conflicting judgments in the two great cases of Regina v. Prince and Regina v. Tolson arose largely from the fact that in the former case the prisoner, apart from the question of the age of the girl, was in the pursuit of a wrongful and immoral act in taking her from the protection and guardianship of her father; while in the latter case there was nothing wrongful or immoral in the remarriage of the prisoner who supposed herself to be a widow."

In Reg. v. Woodrow (1846), 15 M. & W. 404, 153 E.R. 907, an appeal to the Court of Exchequer, Pollock, C.B., and Parke, B., held that the plea of mens rea did not prevail in the case of a retailer of tobacco on information for having adulterated tobacco in his possession contrary to the statute even although he had purchased it as genuine and had no knowledge or cause to suspect that it was not so.

I quote from the judgment of Pollock, C.B., at pp. 415, 416:—"If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not; they are bound to take care.....It may be said that in this particular instance it works a great hardship, because it is expressly found, I may take it, that the magistrates who in the first instance dismissed the information, and the Court of Quarter Sessions, and who decided in favour of the defendant, were of opinion that he personally had no knowledge of this violation of the law. If the law in a particular case works any hardship, it is either for the legislature to alter the law, or for the executive department of this branch of the revenue law to abstain from calling for the enforcement of the statute. But if we are called upon to put our construction upon it, I believe we are all of opinion that the due construction of the 3rd and 4th section is, that this tobacco was forfeited, and that the party is liable to the penalty, whether he is or is not aware that the commodity has been adulterated in the manner in which this turns out to be. In reality, a prudent man who conducts his business will take care to guard against the injury he complains of, and which Mr. Crompton says he has a right to complain

of, and he would not be exposed to it. If he examines the article, he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guarantee that shall render the person with whom he is dealing responsible for all the consequences of a prosecution."

And from Baron Parke, at p. 417:—

"With respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is a true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received and not taking a warranty; but the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article, as defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved. If there is any hardship in the case, it does not rest with those who have only to carry the law into effect to remedy it."

In Sherras v. De Rutzen, [1895] 1 Q.B. 918, Wright, J., at p. 921 says:—

"There are many cases on the subject and it is not very easy to reconcile them. There is a presumption that mens rea an evil intention or a knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered."

And after referring to Lolleys case, R. & R. 237, and the Prince case, supra, goes on to say, at pp. 921, 922:—

"Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps, be reduced to three. One is a class of acts which in the language of Lush, J., in Davies v. Harvey (1874), L.R. 9 Q.B. 433, are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty."

And cites Reg. v. Woodrow, supra, as an exception. Both Wright, J., and Day, J., held, however, that in the case before them where a licensed victualler was convicted for an offence of supplying liquor to a police constable while on duty that the Licensing Act did not apply where the licensed

B.C.
C.A.
REX
v.
MCKENZIE.

victualler bona fide believes that the police constable is off duty.

Other decisions more or less conflicting were cited to us.

It is hard, in view of the many conflicting decisions, to come to a satisfactory conclusion, especially as the distinction in some of them seems finely drawn, but I think this much can be deduced that where an act is not in itself immoral or illegal, but is made penal by statute, it becomes a question of construction whether the common law doctrine of mens rea is intended to apply to it or not. If the statute says so in plain language, there is of course no difficulty, but where the statute is silent it becomes a question whether the Legislature intended to take away the common law defence of mens rea.

Generally speaking, the authorities seem to point to this, that if such was the intention, it should have been expressed in clear and explicit terms, but that again is subject to this, that in interpreting any statutes of the nature of the one in question here, you must look at the object and scope of the statutes and the purposes for which it was enacted and if you can gather from these that the intention of the legislature was to deprive the accused of the common law right, it may be so construed though express language is not used.

Now looking at the Act in question, I think it is clear that the scope and object of the Act was to absolutely prohibit (except as provided in the Act), the sale or disposal of liquor above a certain percentage of proof spirits within the Province of British Columbia. That being so, there should not have been on the premises of the accused any such liquor for sale or disposal and the fact that by accident or otherwise, it was there, seems to me something that the accused had to guard against and if he chooses to engage in the sale of liquor of a proper percentage of proof spirits and for which he was licensed, he does so at the peril of such an accident occurring as apparently occurred here, and that the legislature so intended.

Mr. McInnes refers us to sec. 41 of the Prohibition Act, and the case of Rex v. Lee Duck (1919), 27 B.C.R. 482, a decision dealing with the effect of said section. It seems to me that sec. 41 does not assist the accused. He was charged with selling liquor of the strength of 5.20% proof spirits. Section 41 reads as follows:—

"If in the prosecution of any person charged with committing an offence against any of the provisions of

this Act in selling.....liquor prima facie proof is given, that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, then unless such person prove that he did not commit the offence with which he is so charged he may be convicted accordingly."

Assuming the prima facie proof to have been given what is the accused called upon to do here? Prove that he did not commit the offence charged.

It is not denied that the liquor was in his possession or that he sold it, but it is said he did not know it was over strength, and the County Court Judge held he reasonably believed that, but the question is still open. Is that a defence?

While I admit it is a case of no little difficulty, in view of conflicting decisions, and that others might well take a different view, I am on the whole impelled to answer the question submitted to us in the affirmative.

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

Appeal dismissed.

THE ROYAL BANK OF CANADA v. RICE & WHALEY, LTD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 4, 1921.

Contracts (§IID.-145).—Agreement to Pay Sum Advanced to Representative by Bank—Telegram—Particular Words—Meaning of.

A telegram sent to the manager of a bank where defendants had a representative buying cattle for them was in the following words: "We will honour Thos. Beddome draft up to net amount two cars stock to be shipped to us." The Court held that the bank manager was justified in taking the words "net amount" to mean actual price paid and not the balance of the proceeds of the sale of the cattle after deducting freight and other expenses.

APPEAL by plaintiff from the judgment at the trial in an action to recover the difference between the amount received and the amount paid by the plaintiff, on a telegram sent by the defendants authorising the plaintiff to advance an amount to the defendant's representative for the purpose of buying cattle. Reversed.

W. P. Fillmore, for appellant.

F. J. Sutton, for respondent.

Perdue, C.J.M.:—One Beddome came to the plaintiff's manager at Saltcoats, Sask., and stated that he was buying two carloads of cattle for the defendants, who are livestock

Man.

C.A.

THE ROYAL BANK OF CANADA v. RICE AND WHALEY LTD.

brokers doing business at St. Boniface, Man. He asked the manager to honour his cheques to be given in payment for the cattle. The bank manager told him he would have to 'phone or wire defendants to wire him, Beddome, the money required. Beddome telephoned to the defendants asking them to arrange funds for him at the Royal Bank. Shortly after this the bank manager received from defendant the following telegram:—

"Winnipeg, Man., August 4.

"Royal Bank of Canada,
Saltcoats.

We will honour Thos. Beddome draft up to net amount two cars stock to be shipped to us.

(Signed) Rice & Whaley, Ltd."

Beddome then furnished the bank manager with a list of the farmers from whom he had bought the cattle and the amount to be paid to each. The manager figured out the total sum with exchange added, the whole amounting to $3,880.80. Beddome made a sight draft on defendants for that amount payable to the bank. The bank then paid Beddome's cheques given in payment for the cattle amounting to $3,730.80. The defendants paid on the draft $3,456.89, stating that this was the balance coming to Beddome as proceeds of the sale of the cattle after deducting freight and other expenses. This action is brought to recover the difference between the amount received and the amount paid out. The question turns upon the meaning to be taken from the above telegram. If the words "net proceeds" had been used, the bank manager would have been informed that defendants only intended to pay the amount derived by them from the sale of the cattle after deducting expenses. They knew that the bank was advancing money to Beddome to pay for the cattle. This sum was ascertainable by the bank while the net proceeds of the transaction could not be ascertained until the sale had been made. A draft might be made for the amount advanced but not for the unknown amount to be realised from a sale. I think the bank manager was justified in taking the words "net amount," as used in the telegram, to mean "actual price paid," and in acting accordingly. The bank refused payment of one cheque of $150 which was not presented until after the bank manager had heard that the draft would not be paid in full. This leaves a balance of $273.91 paid

by the bank in excess of the amount received from defendants.

The appeal will be allowed with costs and judgment entered in the County Court for $273.91 with costs including the usual counsel fee.

Cameron, J.A., concurs.

Fullerton, J.A.:—One Thomas Beddome had for some 3 years been engaged in buying cattle and shipping them to the defendants for sale. The defendant carries on the business of commission brokers at the Union Stockyards at St Boniface. On August 4, 1920, Beddome saw T. H. Vanwijck, the manager of the plaintiff bank at Saltcoats, stated that he was buying two carloads of cattle for defendant and wanted to know if he would honour his personal cheque (meaning probably draft). Vanwijck told him that he would have to 'phone or wire defendant and ask them to wire the money to pay for the cattle. Beddome then 'phoned defendant and asked them to arrange funds for him at the Royal Bank for 2 cars of cattle. Defendant agreed to do so and thereupon sent the following telegram to the plaintiff: [See ante p. 170.]

Vanwijck understood the telegram to mean the price of the cattle at Saltcoats. Beddome then made a draft on defendant for $3,880.80, and the proceeds of this draft, less $9.70 exchange, was placed to his credit by the plaintiff, and the money used to purchase the two cars of cattle. The defendant paid on account of the draft the net proceeds realised from the sale of the cattle which fell short of the amount advanced by the plaintiff the sum of $273.91, for which the plaintiff brings this action. The defendant says that it is only responsible to the plaintiff for the net proceeds of the sale of the cattle.

One thing is clear beyond all question, that Vanwijck understood the telegram as a promise to honour a draft for the purchase price of the cattle. One can hardly conceive of a bank manager, possessing the smallest degree of common sense, making an advance of upwards of $3,700 upon no other security than a promise to honour a draft for the net proceeds of such a shipment, and all for the sake of earning $9.70, the charges on the draft.

If the telegram had said "up to net amount proceeds" the meaning would be clear. The words, however, are "up to net amount two cars of stock to be shipped to us." If the word "net" had not been used I think it would be perfectly

Man.

C.A.

THE ROYAL BANK OF CANADA v. RICE AND WHALEY LTD.

clear that the telegram meant the price at Saltcoats. The Century Dictionary defines "net" as meaning "with all deductions (such as charges, expenses, discounts, commissions, taxes, etc."). It may well be that the word "net" was used by the defendant not perhaps in its strict sense but rather to ensure that their responsibility was to be confined to the exact amount of the price of the cattle and that nothing was to be added for commission, etc.

That the defendants intended by the words in the telegram to make themselves liable for the price of the cattle is shewn by the following consideration:—

1. Beddome had been buying cattle and selling them through the defendants for some years and in each case a draft was made for the price of the cattle and if there was a profit on the sale it was paid to him by the defendants. 2. Defendants must have known from past transactions that the only way Beddome could purchase was by being put in funds by them, and certainly they knew in this case because that is the very request he made which was acceded to by the telegram. 3. Defendants must have known that no bank manager would advance a dollar to Beddome on a guarantee of the proceeds of the sale by them. 4. A draft for a definite amount was contemplated and when drawn defendants undertook to honour it.

If the telegram meant what the defendant now says it means, no such draft could possibly have been made as the amount could not have been ascertained.

For these reasons I think the telegram means exactly what the plaintiff's manager took it to mean and if the defendant intended any other, which I gravely doubt, they are estopped from setting up any such meaning.

The appeal should be allowed with costs and judgment entered for the plaintiff for the amount claimed together with costs.

Dennistoun, J.A., concurs.

Appeal allowed.

BURNS v. CHRISTIANSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 27, 1921.

Exemptions (§IIB—29).—Exemptions Act R.S.S. 1920, Ch. 51, sec. 2 (7)—Tools and Necessary Implements—Chauffeur's Automobile.

The words "tools and necessary implements" as used in sec. 2 (7) of the Exemptions Act, R.S.S. 1920, ch. 51, and which are declared exempt from seizure under the Act do not include an automobile owned by a professional chauffeur and by means of which he makes his living.

THE PLAINTIFF brought an action against the defendant which was dismissed with costs. The defendant under his execution for costs caused an automobile of the plaintiff's to be seized. The plaintiff claimed it to be exempt from seizure and on interpleader proceedings His Honour, Judge Lees, held that it was exempt. This is an appeal from his decision. Appeal allowed.

G. H. Van Allen, for appellant.

H. S. Coulter, for respondent.

Harvey, C.J.:—The claim for exemption is under para. 7 of sec. 2 of the Exemption Ordinance, R.S.S. 1920, ch. 51, which declares exempt from seizure "the tools and necessary implements to the extent of two hundred dollars used by the execution debtor in the practice of his trade or profession." The plaintiff swears that he is a licensed chauffeur and that he makes his income and living "solely and exclusively from the operations of the motor car seized herein or a professional chauffeur in the Town of Leduc and surrounding district." This is not controverted.

A "chauffeur" under the Motor Vehicles Act, 2-3 Geo. V. 1911-12 (Alta.), ch. 6, under which the license is granted, is defined to be "any person operating a motor vehicle as mechanic, paid employee or for hire."

The Judge considered that the case of Lavell v. Richings, [1906] 1 K.B. 480, 75 L.J. (K.B.) 287, was in point and that he ought to follow it.

In that case a cab was seized under a distress for rent due by the cab driver. The cab was owned by the plaintiff, who was not the tenant, and only rented and he claimed it. The Act to amend the Law of Distress for Rent, ch. 21 of 51-52 Vict. 1888 (Imp.), by sec. 4 made exempt from distress for rent "any goods or chattels of the tenant or his family which would be protected from seizure in execution under section ninety-six of the County Courts Act 1846."

The last-mentioned section provides that under an execution in the County Court against the goods and chattels of any person the bailiff may seize "any of the Goods and Chattels of such Person or his Family (excepting the Wearing Apparel and Bedding of Such Person or his Family, and the Tools and Implements of his Trade to the Value of Five Pounds, which shall to that Extent be protected from such Seizure)."

It is to be observed that both of these sections are dealing expressly with the goods of the debtor (tenant debtor or judgment debtor) but neither on the argument of counsel nor in the reasons for judgment does it appear in either report above cited that any reference was made to the fact that the cab in question was not the property of the debtor. The Court unanimously held that it was an implement of the cab driver's trade and therefore exempt and that such implements of trade were protected only to the extent of £5 in value, yet it was wholly exempt because it was impossible to leave a value of £5 without leaving the whole.

With all respect, the reasoning of the judgment does not appeal to me as satisfying but in any event I am of opinion that it is not quite on all fours with the present case.

What was exempt there was "the tools and implements" of the debtor's trade. What is exempt with us is the tools and necessary implements used by the debtor in his trade or profession. The word "trade" has a variety of meanings. It is quite commonly used as synonymous with "occupation," and not being governed or modified by any accompanying words in the English statute the Court might very well interpret it as in the cited case it presumably did as having such a meaning. It is quite clear however that in our ordinance it cannot be so construed. Two classes of occupations are mentioned, trades and professions. In the preceding paragraphs of the sections are provisions in respect to farmers who quite clearly are not included in this paragraph for the particular tools and implements applicable to their occupation are definitely specified. There are also other provisions having a general application regardless of occupation. The New International Dictionary defines trade in the specific sense as "The business which a person has learned and which he engages in for procuring subsistence or profit: occupation esp. mechanical employment as distinguished from the liberal arts, the learned pro-

fessions and agriculture. In Freeman on Executions, 3rd ed. at para. 226, pp. 1206, 1207, it is said: "Where the statute provides for the exemption of the tools of a debtor used in his trade two questions must be presented for consideration. (1) What is a trade within the meaning of the statute; and (2) What is a tool. The word "trade" is not as employed in these statutes synonymous with business, occupation or employment. It includes only the occupation of one who is a mechanic, and works at manual labour with the aid of his tools and not one who conducts the business of contractor, manufacturer or merchant."

In the Revised Ordinance N.W.T. 1888, ch. 45, the exemption was: "The tools and necessaries used by the defendant in the practice of his trade or profession." In 1892 by Ordinance No. 14 this was amended by substituting for the word "necessaries" the words "necessary instruments to the extent of two hundred dollars." The word "tools" is the common and appropriate word to describe the instruments used by the carpenter, the mason, the blacksmith, etc., in the exercise of his trade while "instruments" is the more common and appropriate term when referring to professional men such as physicians, architects, surveyors, etc. The limitation to $200 in value also suggests the contemplation by the Legislature of instruments of no great value.

The substitution of "implement" for "instruments" and of "judgment debtor" for "defendant" was made by the Consolidation Commission in 1898 and not by any formal legislative amendment. It is not necessary to define with exactness what is a "trade" within the meaning of the Ordinance, or what is a "tool" or "implement" but it is sufficient to say that in my opinion for the reasons given the occupation of the debtor in this case is not such a trade any more than would be that of the owner of a passenger vessel operated for carrying passengers on one of our rivers or a steel manufacturer using an expensive machine for his work nor would a valuable automobile or a steam or other power driven vessel or expensive machine worth perhaps many thousand dollars be a tool or implement within the meaning of the section. I would therefore allow the appeal with costs and direct judgment below in favour of the defendant, with costs.

Stuart, J.:—I agree with the opinion of Harvey, C.J. Taking the section in its ordinary meaning, I cannot think

Alta.

App. Div.

BURNS v. CHRISTIANSON.

that the Legislature, when using the two words "tools" and "implements" in the plural and placing a limitation in value obviously upon a number of articles taken together, intended to include a single but very valuable article in the nature of a conveyance which the debtor uses as a carrier of passengers. Even if the carriage of passengers for hire came within the meaning of the word "trade" which I think it does not, I do not think a single valuable chattel like an automobile is within the meaning of the expression "tools and implements." When the Legislature said to a debtor in substance, "You may possess and enjoy the tools and implements (in the plural) of your trade up to the value in all of $200 and you cannot be disturbed in their possession by execution," I cannot believe that it means to say "You may acquire a single chattel of three or four, five or ten times that value, use it as your means of livelihood in conveying passengers and you shall not be disturbed." This would exempt steamboats and aeroplanes when so used.

The point seems to have been so decided in South Carolina in Eastern Mfg. Co. v. Thomas (1909), 64 S.E. Rep. 401, 82 S.C. 509, noted in "Words and Phrases," vol. 4, 2nd series, p. 936.

In any case if I had been of another opinion I should have only allowed the debtor to retain $200 out of the proceeds of the sale. In the present case he will in fact get that benefit anyway though of course this consideration is not relevant.

Beck, J.:—I concur in the result.

Appeal allowed.

ROUSE & HALL v. MOOSE JAW ELECTRIC R. CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Street Railways (§III.B—33)—Vehicle Crossing Track—Duty of Motorman on Seeing—Car Capable of Being Stopped by Emergency Brake—Use of Hand Brake—Collision—Negligence—Liability of Company.

A motor man who upon seeing a wagon on the car track ahead has plenty of time to avoid a collision by applying the emergency brake but who takes the risk of stopping the car by using the hand brake and only applies the emergency brake when it becomes evident that a collision is unavoidable is guilty of negligence and the railway company is responsible for the resultant damage.

APPEAL by plaintiffs from the judgment at the trial, dismissing an action for damages to a popcorn and peanut wagon through being struck and overturned by defendants' street car. Reversed.

C. E. Gregory, K.C., for appellants.

W. M. Rose, for respondent.

Haultain, C.J.S., concurs with **Turgeon, J.A.**

Lamont, J.A.:—The plaintiffs in this action claim for damages done to their popcorn and peanut wagon through being struck and overturned by the defendants' street car, and the plaintiff Hall claims for personal injuries received by him in the same collision. On the night of September 15, 1919, the plaintiff Hall was driving the wagon home. He drove north on the right hand side of Main street until he came to Stadacona street, he then turned his horse to the left to cross the street car tracks. He says that, as he turned his horse, he looked south along Main street and saw the defendants' street car opposite Ominica street, a distance of nearly 300 ft. away. Being satisfied that the car could not reach him before he got across the railway tracks, he did not look again. Before he got across, however, the street car hit him and upset his wagon. The trial Judge found that there was no negligence on part of the defendants; that the street car was being driven at a reasonable rate of speed; that the brakes were in proper order, and that the motorman did all he could to avoid the accident. He accordingly gave judgment for the defendants. The plaintiffs now appeal.

In my opinion the evidence of the motorman himself establishes that the finding of an absence of negligence on part of the defendants cannot be upheld. In one place the motorman testified that he was at Cordova street, a distance

Sask.

C.A.

ROUSE & HALL v. MOOSE JAW ELECTRIC R. CO.

of 129 ft. from the scene of the accident, when he first saw the plaintiffs' wagon. In another place he stated that he was within 60 ft. of the wagon when he first observed it. To my mind it does not make any difference which of these statements we accept, for he also admits that he could have stopped his car in less than 60 ft. had he applied the emergency brake at once. The defendants' inspector testified that, at the rate of speed the motorman said he was going, the car could easily have been stopped in 45 ft. The motorman did not apply the emergency brake when he first saw the plaintiffs' wagon on his track. He says he applied the hand brake first, and only applied the emergency brake when he saw he could not stop without hitting the wagon. The conductor of the street car testified that the emergency brake was not applied until the street car was within 25 ft. of the wagon. This evidence, in my opinion, makes quite clear what happened. The defendant Hall was crossing the street car tracks to go along Stadacona street. The defendants' motorman saw him when he was sufficiently far away to have stopped his car and have avoided the accident had he applied the emergency brake. He however thought he could stop the car by using the hand brake alone, and took the risk of doing so. In my opinion no prudent motorman, going at 9 miles an hour, seeing a wagon crossing the tracks only 60 ft. away, would risk approaching within 25 ft. of the wagon before applying his emergency brake. He should have applied it sooner, and his failure to do so constitutes negligence for which the defendants are responsible. Furthermore, I cannot conceive how a motorman, who is keeping a proper look-out, could approach within 60 ft. of a wagon crossing his track at a very slow rate without seeing it.

The appeal, in my opinion, should be allowed with costs, the judgment below set aside and judgment entered for the plaintiffs, with costs, for damages which I would assess at $109.40, the amount of special damages claimed. The damages to the plaintiff Hall for personal injuries, I would assess at $25.

Turgeon, J.A.:—In this case the plaintiffs sue the defendant company for damages arising out of an accident which occurred in the city of Moose Jaw on September 5, 1919, when one of the defendant's cars ran into a peanut and popcorn wagon being driven by the plaintiff Hall across the company's line of railway. The trial Judge finds the following facts:

"On the evidence I find the following facts: On the night of the 5th September, A.D. 1919, at the hour of 11.30 p.m. the plaintiffs' wagon was proceeding north along Main street; that the night was fairly dark, and that the street lights were dim, that is, that of the three lights which are on each electric light standard on Main street only the top one was burning. That the plaintiff Hall, before he crossed the track, looked down Main street and saw the street car (as he alleges, although in this he in my opinion was mistaken and the street car was much nearer than he thought) about the corner of Ominica street; that he proceeded north, and his evidence is—although it is not very conclusive and his manner in giving this part of his evidence led me to believe that he was not very well satisfied (even in his own mind) that he turned on the defendant company's track and attempted to cross Main street to get to Stadacona street going west just about the middle of the Methodist church, which is situated on the east side of Main street. If he turned to go west along Stadacona street about the middle of the Methodist church he might have crossed to the north, and therefore to the right, of the centre line of intersection of Main street and Stadacona street. The evidence of the defence, however, is, and I find this to be the fact, that he really did turn on to the street railway track some distance to the south of the intersection of Main and Stadacona streets, which would be some distance to the left of the intersection of the centre lines of Main and Stadacona streets, and would also be in violation of the provisions of section 38, ch. 42 of the Statutes of Saskatchewan for 1917, on which defendant relies. I further find that the plaintiffs' light wagon had no light of any kind on it, and nothing to indicate that it could be distinguished by a motorman approaching it from the south. The evidence further shows that the driver's view is obscured by reason of the fact that he is somewhat enclosed when he is sitting driving the wagon by the fact that the side of the wagon projects on his left, and in order to look behind he is forced to bend forward and turn to the left. After having turned on the track, the plaintiff Hall proceeded to cross the track, but before he had completely cleared the same he was struck by defendant's car and the wagon was considerably damaged and the plaintiff Hall sustained certain injuries for which the action is brought."

The trial Judge then proceeded to find that the accident

Sask.

C.A.

ROUSE & HALL v. MOOSE JAW ELECTRIC R. CO.

was caused by the plaintiffs' own negligence, that the brakes on the car were in order, and that the motorman in charge of the car did all he could to avoid the accident. He dismissed the plaintiffs' claim with costs.

With all deference, I think that this judgment must be reversed. Even if the plaintiff Hall himself was guilty of the initial negligence, I am convinced that the motorman might have avoided the collision by using proper care after he saw the plaintiffs' wagon on the track ahead of him and had the possibility of danger brought home to him. Instead of making use of the best means at his disposal—an application of the emergency brake which I believe from the evidence would have stopped the car in good time, he first applied the hand brake, and he says that he did not make use of the emergency brake until he saw that the hand brake was not likely to prove effectual. When he did apply the emergency brake, it was too late, and the car struck the wagon. He says that the accident would not have occurred if the car had stopped a foot short of the point where it did stop, and that in fact the blow struck by the car was "more of a push than a hit," which I presume means that the speed of the car had become very low at the moment of the impact. I am convinced that, under these circumstances, an immediate application of the emergency brake would have avoided the accident and that the motorman was negligent in not applying it.

I think the District Court Judge bases his conclusions very largely upon the finding which he makes in his judgment at p. 95 of the appeal book, where he says that "the motorman did not see the plaintiffs' wagon until he was within about 30 ft. of it." If he was in fact at so short a distance from the wagon when he first saw it, then of course the case would be very different, because the use of the emergency brake might not have been sufficient to avoid the collision. But I cannot see how the trial Judge can find any evidence to support his finding regarding the distance of 30 ft. The only witness who could give positive evidence as to this is, of course, the motorman himself. In his examination for discovery, part of which was put in evidence at the trial, the motorman first says that he saw the wagon from a distance of about two car lengths, which he thinks would be about 60 ft. Later he says that the car was at Cordova street when he first saw the wagon half-way across the track. According to the plan filed, Cordova street is

at the very least 100 ft. from the scene of the accident, even if we assume that the plaintiff turned on to the track at a point south of the proper crossing-place as alleged by the defendant. There seems to be no evidence at all to shew that the street car was less than two car lengths, or about 60 feet, from the wagon when the motorman saw the wagon. In that case I think there can be no doubt that, if the emergency brake had been applied at once, the accident would not have occurred. The motorman himself says that the car can be stopped in less than two car lengths. Conductor Broadbent, who was on the car at the time, says that the car might have been stopped in about 50 feet. He also says that the emergency brake was not applied until the car was within less than 25 ft. of the wagon. According to Inspector Wright, another official of the company, the car might have been stopped within about 45 ft.

It seems to me clear from the evidence that this is a case where the negligence without which the accident would not have occurred was the negligence of the defendant's motorman, and that the defendant is liable to the plaintiffs for the damage caused.

The appeal should be allowed, with costs, the judgment in the Court below set aside and judgment entered for the plaintiffs with costs.

I think the plaintiffs are entitled to damages in the sum of $36.40 for repairs to their wagon, and for $40 for the loss sustained by reason of the fact that they were unable to use their wagon for their business for several days; $8 for loss of their stock of butter, etc., $25 for the injury done to the wagon in addition to the amount paid for repairs, and I would allow the plaintiff Hall the sum of $25 on account of whatever physical suffering he had.

Appeal allowed.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Wills (§III.A—75)—Bequest—Conditional Revocation—Condition Not Entirely Fulfilled—Validity of—Legacies Payable More Than One Year After Testator's Death Without Interest—Construction—Residuary Bequest Limited to Personalty—Real Estate Specifically Dealt With—Intestacy as to Balance.

The testator bequeathed to five children of his sister $800 each. In a codicil he directed that "In the event of it being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in the Independent Order of Foresters Number 57437 and under the policy of insurance in

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

the Ancient Order of United Workmen, dated August 1st, A.D. 1892, should be and become part of my estate directed to be distributed under the terms of my said will, the said bequests to the said nephews and nieces, the children of my said sister, be and are hereby revoked." The testator had by his will directed that the proceeds of both these policies should be and become part of his estate, his order as to the Forester's policy was effectual, but the like order as to the Workmen's policy was ineffectual. The Court held that there was no revocation of the bequests, the condition being that both policies should become part of the estate, and this condition had not been fulfilled.

Held also under the following residuary clause, "I bequeath all the residue of my personal estate and effects share and share alike to the following children (naming them) of my nephew . . . . to be paid to them without interest when they reach the full age of twenty-one years," that the interest which the legatees were deprived of remained part of the estate and passed under the residuary bequest of personalty, the words "without interest" were senseless and should be ignored.

Held also that the residuary bequest expressly limited to personal estate could not be extended to include the proceeds of the conversion of the real estate and hence if anything thereof remained after applying as specifically directed, there would be an intestacy pro tanto.

APPEAL from the judgment of the Saskatchewan Court of Appeal on a submission made for the construction of a will. Varied.

The judgment of the Court appealed from was given by Haultain, C.J.S., and was as follows:—

The matters in question in this appeal turn on the construction of the will and codicil of the late William Walsh.

The provisions of the will and codicil which it is necessary to consider are as follows:—

"I revoke all former wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my last will and testament. I direct all my just debts, funeral and testamentary expenses to be paid by my executors hereinafter named, as soon as conveniently may be after my decease. I bequeath to my brother Thomas Walsh, the sum of One thousand ($1000) dollars to be paid to him without interest four years after my death. I bequeath to my niece Margaret Ethel McCarthy wife of William R. McCarthy the sum of one thousand ($1000) dollars to be paid to her without interest four years after my death. I bequeath to my sister Mary Berry, wife of Robert E. Berry of Portage la Prairie, in the Province of Manitoba, the sum of one thousand ($1000) dollars to be paid to her without interest four years after my death

I bequeath to my nephews William Milburn, Robert Milburn, Walter Milburn, and to my nieces, Mary Milburn, Ida Milburn, the sum of eight hundred ($800) dollars each, to be paid to them without interest four years after my death. I bequeath to my nephew Robert George Walsh the sum of one thousand ($1000) dollars to be paid to him without interest four years after my death. I bequeath to my nephew Thomas Alexander Walsh the sum of one thousand ($1000) dollars to be paid to him without interest four years after my death. I bequeath to Mary Catherine Walsh wife of my nephew Frederick J. Walsh the sum of three thousand ($3000) dollars to be paid to her ten years after my death. My executors are directed to invest the said sum of three thousand ($3000) dollars during the said ten years in first mortgages and pay to her during the said ten years the interest therefrom yearly. I bequeath to my nephew Frederick J. Walsh, provided he shall discharge all obligations upon which I am jointly liable with him, either in the Bank of Montreal, John Deere Plow Company or anyone whatsoever arising out of any business carried on by the said Frederick J. Walsh, the sum of five thousand ($5000) dollars to be paid to him, subject as aforesaid, in five years without interest after my decease. Failing such discharge by the said Frederick J. Walsh, the said bequest is revoked absolutely. The intention being that my estate shall not be called upon to discharge the said obligation, and pay the said Frederick J. Walsh.

"In the event of death without issue of any of the aforesaid legatees before the time named for payment as aforesaid, the said legacy shall form part of the residue of my estate and be distributed as hereinafter set out. I hereby direct that the proceeds of my policy of insurance in the Independent Order of Foresters to the best of my recollection number 57437 for two thousand ($2000) dollars, dated January 18th, 1893, and that the proceeds of my policy of insurance in the Ancient Order of United Workmen for two thousand ($2000) dollars, dated July 21st, 1892, notwithstanding any designation of beneficiary or beneficiaries herein shall be and become part of my estate directed to be distributed in this my will. I bequeath all the residue of my personal estate and effects share and share alike to the following children of my nephew Frederick J. Walsh, Jean Mary Walsh, Kathleen Lillian Walsh, Marie Margaret Walsh, Thomas Robert Walsh, Frederick Michael Walsh,

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

to be paid to them without interest, when they reach the full age of twenty-one years. I devise and bequeath all my real estate of every kind and all my personal estate and effects, unto my executors and the survivor of them, and his successor, their and his heirs, executors and administrators respectively, according to the nature thereof upon trust, that my trustees shall and will call in and convert into money, and such thereof as shall not consist of money within four years from the date of my death, and shall call in and add to the monies produced on such sale call in and convert and call in and add to my said moneys: 1. Pay my funeral and testamentary expenses and debts. 2. The legacies bequeathed by this my will.

"I authorise the executors of this my will to invest the monies of my estate in good investments, which they deem reasonably secure.

I direct that in case of deficiency of assets for the payment of all pecuniary legacies hereinbefore bequeathed that all the legacies hereinbefore bequeathed to my said legatees respectively shall abate rateably; in other words each legatee shall bear his proportion of the rebate. I nominate and appoint William Grayson of Moose Jaw, Saskatchewan, solicitor, and Peter A. Reilly, of Moose Jaw, Saskatchewan, agent, my executors and trustees of this my will."

Codicil.

"In order that there may not be any possible misapprehension in respect to my bequests in my said will to my nephews and nieces the children of my sister Margaret A. Milburn. I hereby declare that in the event of it being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in the Independant Order of Foresters 57437 and under the policy of insurance in the Ancient Order of United Workmen, dated August 1st A.D. 1892, should be and become part of my estate directed to be distributed under the terms of my said will the said bequests to the said nephews and nieces the children of my said sister be and are hereby revoked."

In an action brought by the executors against the Ancient Order of United Workmen in the Supreme Court of Saskatchewan in 1915, it was decided that the money due under the policy in that Order was not disposed of by the will, so that it did not become part of the estate of the deceased to be distributed under the will.

The executors applied by originating summons for the determination of the following questions arising in the ad-

ministration of the estate:— 1. Whether William Milburn, Robert Milburn, Walter Milburn, Mary Milburn and Ida Lewis or any of them are entitled to any portion, and, if so, to what portion of the sum of $800 directed to be paid to each of them under the will and codicil. 2. Whether the entire residue of both real and personal estate, including accrued interest or other income (if any) is payable to the children of Frederick J. Walsh, mentioned in the will.

The application was heard by Bigelow, J., in Chambers, who decided:—

"1. That the testator did not effectually provide that the two policies should become part of his estate, although he did effectually provide that one of the policies should become part of his estate. I am of opinion that the intention of the testator was that the bequest to the five children should be revoked only so far as one or both of these policies should not be available to the estate. I hold that the $800.00 bequest to each of the five children is revoked as to $400.00 to each.

"2. That the "residue", including the real estate which was directed to be converted into money and any accumulated interest, goes to the children of Frederick J. Walsh when they reach the full age of twenty-one years."

I notice that the formal order in the matter provides with regard to the first point that, "the said legacies will be fully satisfied by the plaintiffs paying to the said legatees pro rata the moneys received by the plaintiffs as the proceeds of the policy carried by the testator in the Independent Order of Foresters."

The legacies in question were not specific legacies of the insurance money, because, even if both policies had come under the will and had increased the estate by $4000, these legacies were liable to abatement pro rata under the clause of the will referred to as clause (f) above; while, on the other hand, if both policies had realised less than $4,000 to the estate, the legacies would not have been liable to abatement for that reason alone.

If this view is correct, it completely meets the argument in support of the formal order that the intention of the testator was to make these legacies effective to the extent to which the estate benefited by the insurance money. If the legacies are not completely revoked by the codicil, they are not revoked at all. The language of the codicil is plain and unambiguous, and it says, in so many words, that, if the

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

testator has not effectually provided by his will, that the moneys (that is, all the moneys) due under both policies shall become part of his estate directed to be distributed under the terms of his will, the bequests to the children of his sister should be revoked.

The appeal of the official guardian is therefore allowed, that portion of the order appealed from is set aside, and the executors will be advised that the legacy of $800 each to the children of Margaret A. Milburn are not payable under the terms of the will and codicil of the deceased.

There are two points involved in the second question, the first concerning the real estate, the second concerning the accrued interest or income arising from investments made by the trustees under the terms of the will.

So far as the real estate is concerned, I agree with the trial Judge that by the terms of the will there was a conversion. There is a clearly expressed intention on the part of the testator to deal with the proceeds of the real estate as personalty and as a part of his general personal estate. Consequently, any balance that remains after payment of funeral and testamentary expenses, debts and legacies will go to the residuary legatees. Taylor v. Taylor (1853), 3 De G. M. & G. 190 at p. 194, 64 E.R. 76.

As to the accrued interest or income:

The argument on behalf of the appellants on this point, in my opinion was founded on a confusion between the interest which is allowed on legacies after the end of one year from the testator's death or after the time fixed for their payment and the interest or income resulting from investments of the moneys of the estate by the trustees. General legacies, where no time has been fixed by the testator for payment, carry interest after the expiration of the time above mentioned. Where a time is fixed by the will, generally speaking legacies do not carry interest before that time has arrived. Lloyd v. Williams (1740), 2 Atk. 108, 26 E.R. 468; Heath v. Perry (1744), 3 Atk. 101, 26 E.R. 861; Tyrrell v. Tyrrell (1798), 4 Ves. 1, 31 E.R. 1; Earle v. Bellingham (1857), 24 Beav. 448, 53 E.R. 430; Knight v. Knight (1826), 2 Sim. & St. 490, 57 E.R. 433.

All of the legacies in this case, except the one to Mary Catherine Walsh, are payable 4 years after the death of the testator, and are contingent as well. A contingent legacy also does not generally carry interest while it is in sus-

pense. From this it would seem that the use of the words "without interest" in relation to these legacies was unnecessary.

Any income which may accrue from the investment of these funds will, in my opinion, pass under the residuary bequest. It is not "interest" according to the usual construction of that word, and, in any event, it is not interest on the corpus of the residuary estate. In the case of a contingent or future specific bequest where the legatee is not given the income by the will, it goes to the residuary legatee. Wyndham v. Wyndham (1789), 3 Bro. C. C. 58, 29 E.R. 407; In re Judkin's Trusts (1884), 25 Ch. D. 743.

It has also been decided that when payment of a residuary bequest is deferred by the will, it carries the income which accrues before it vests in possession. Trevanion v. Vivian (1752), 2 Ves. Sen. 430, 28 E.R. 274; In re Drakeley's Estate (1854), 19 Beav. 395, 52 E.R. 403; Re Lindo (1888), 59 L.T. 462. See also In re Taylor, [1901] 2 Ch. 134.

I am therefore of the opinion, that while under the will as well as under the general law the residuary legatees are not entitled to interest before the arrival of the appointed period of payment, they are entitled to all the income which accrues before their bequests vest in possession, as well as to any income arising from the investment of any of the rest of the moneys belonging to the estate.

The appeal on these points will be, therefore, dismissed. The costs of all parties to this appeal, except the executors, should be paid out of the estate. The executors applied to the Court for advice and received it. They had no further interest in the matter, except to await the result of the appeal.

C. C. Robinson, for appellant.

J. A. Ritchie, and M. G. Powell, for respondent.

Idington, J.:—This appeal arises out of the submission made to a Court below for a construction of the last will and testament of William Walsh, dated April 26, 1912, and a codicil thereto dated May 6, 1912.

The second question thus submitted was stated as follows:— "(b) Whether William Milburn, Robert Milburn, Walter Milburn, Mary Milburn and Ida Lewis, formerly Ida Milburn, or any of them are entitled to any portion, and if so what portion of the sum of $800 directed to be paid to each of them under the following clauses in the said will and codicil thereto, namely:— I bequeath to my nephews, William Milburn, Robert Milburn, Walter Milburn, and to

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

hundred ($800) dollars each, to be paid to them without interest four years after my death. 'I hereby direct that the proceeds of my policy of insurance in the Independent Order of Foresters to the best of my recollection Number 57437 for two thousand ($2,000) dollars dated January 18, 1893, and that the proceeds of my policy of insurance in the Ancient Order of United Workmen for two thousand ($2,000) dollars, dated July 31st, 1892, notwithstanding any designation of beneficiary or beneficiaries herein, shall be and become part of my estate directed to be distributed in this my will.

"In order that there may not be any possible misapprehension in respect to my bequests in my said will to my nephews and nieces the children of my sister Margaret A. Milburn I hereby declare that in the event of its being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in the Independent Order of Foresters Number 57437 and under the policy of insurance of the Ancient Order of United Workmen dated August 1st., 1892, should be and become part of my estate directed to be distributed under the terms of my said will the said bequests to the said nephews and nieces the children of my said sister be and are hereby revoked,' in view of the fact that no moneys under the policy of insurance in the Ancient Order of United Workmen were paid or became payable to the estate of the said deceased."

Bigelow, J., before whom the application was first heard construed the said will and codicil as giving to the Milburn legatees each a share of the moneys due under the policy of the Independent Order of Foresters, which undoubtedly became part of the estate of the testator.

He seems to have observed the fact that the total amount of the two policies on their nominal face value of $2,000 each, would, when added together, amount to the sum of $4,000, which would produce to each of the Milburn legatees, the sum of $800, and that the intention of the testator, when illuminated by what appears in the codicil, was probably, when read in light thereof, to have the said legacies paid out of that fund.

The testator had not, whatever may have been in his mind, clearly expressed by his will any such intention. It may be highly probable that in light of what is now presented to us that it was from the fund these policies would produce that he desired to pay the said legacies.

my nieces Mary Milburn, Ida Milburn the sum of eight

The bequests are made in the most absolute form and hence payable out of his estate; unless he has in some way pro tanto revoked his will.

Upon appeal to the Court of Appeal for Saskatchewan that Court reversed the said judgment. See ante p. 182.

Curiously enough that judgment of reversal proceeded upon the assumption that the language of the codicil is plain and unambiguous and therefore held the said legacies to each of the Milburns had been revoked thereby.

They now appeal from that judgment to this Court and their counsel points out (what is fairly arguable in my opinion) that so far from the said language of the codicil being "clear and unambiguous" it is capable of other meanings than that given it by the Court of Appeal below.

If the disjunctive "or" had been used instead of the conjunction "and," of course there would have been a clear revocation on account of one of the policies having, by its terms, been given to others designated in same, and hence did not fall into the testator's estate.

But the implied, if not the express, condition precedent upon which the alleged or intended anticipative revocation of the codicil was to take place, never came into existence, and the legacies stand unrevoked. In any event, unless and until a clear intention to revoke appears we should not hold the bequests revoked.

The bequests to appellants and the direction that the proceeds of the policies should become part of testator's estate, were in the will separated by five paragraphs, each distinctly dealing with other matters.

Yet they were, I submit, improperly presented in the question submitted relative to them, as if the bequests and directions had been so placed or connected in the will, suggesting a possibly close relation of these subject matters, and tending thereby to confuse.

No one could suspect any such relationship of subject matters from a mere reading of the will.

And the codicil is in the same question placed next after two independent clauses.

Whether all this has in fact confused I know not. But such a condition of things leads me to repeat that there never was in fact room for so blending, as it were, subject matters absolutely independent of each other, and each to be given only its own express force and effect by strict ob-

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

servance of the language used in each expression of thought so presented.

It is fairly arguable that the testator having disclosed by the codicil what he had in mind relative to the source from which these legacies were to be paid, we may, without resorting to mere speculative opinion of possible intention having any sphere in which to operate clearly find that unless and until there was a failure to bring both policies into his estate, no revocation was intended.

The appeal should, therefore, be allowed with costs throughout, to appellants out of testator's estate.

I agree that if such view as that of Bigelow, J., had been suggested to the testator framing this codicil, he possibly would have assented thereto but more probably would have considered who had in fact been designated, and seen that they, or some of them, did not get the duplicate shares they were seeking, and getting, if the judgment appealed from stands.

Two other questions are raised by the same appellants in regard to which it occurs to me as quite possible that the nature of the estate and the relative parts thereof to bear its burden, may be such as to leave the appellants without any direct, or even indirect, interest in having same determined.

If they get paid the legacies bequeathed to them or cannot claim as heirs at law, they need not concern themselves with the determination of these questions. No objection of that kind having been taken by counsel for respondents, I presume it is deemed necessary to have same determined even if my view, or the alternative one of Bigelow, J., is adopted in regard to the above question, No. 2. of the submission, with which I have dealt.

The first of these questions is thus stated in said appellant's factum:—

"In holding that the legatees of the residuary personalty are entitled to the interest or income accruing thereon between the date of the testator's death and their attaining the age of twenty-one years: and"

And in another form the question is, in same factum, presented thus:—

"The next question is whether the residuary legatees are entitled to the interest or income accruing from investments of the residuary personalty between the date of the testator's death and their attaining the age of

twenty-one years, notwithstanding the express direction of the will that the residuary personalty is to be then divided among them 'without interest.'"

The disposition thereof turns upon the interpretation and construction of the residuary bequest, which reads as follows:—

"I bequeath all the residue of my personal estate and effects share and share alike to the following children of my nephew Frederick J. Walsh, Jean Mary Walsh, Kathleen Lillian Walsh, Marie Margaret Walsh, Thomas Robert Walsh, Frederick Michael Walsh, to be paid to them without interest, when they reach the full age of twenty-one years."

The question raised thereon is whether or not the words "without interest" therein can be given any effect and if so what?

I have tried to give these words some effect but failed to find anything rational to which direct effect can be given unless we extend the primary meaning of the bequest which is expressly confined to "the residue of" the "personal estate and effects" which certainly does not comprehend real estate. Surely that residue must comprehend all interest earned from investments of purely personal estate.

It might be surmised that if we attribute all intention on the part of the testator to exclude interest from the investments of proceeds of sales of real estate after the conversion of the latter, we might catch a glimpse of something possibly existent in his mind which the words would express. The decisions cited in the factums of counsel do not carry us very far.

The unfortunate expression may help by virtue of said decisions to maintain the position taken by appellants in their third contention, which is that the residuary bequest expressly limited to personal estate cannot be extended to include the proceeds of the conversion of the real estate and hence if anything thereof remains after applying same as specifically directed there should be no intestacy pro tanto. There is much to be said for that contention.

The will provides, next after the above quoted residuary bequest as follows:—

"I devise and bequeath all my real estate of every kind and all my personal estate and effects, unto my executors and the survivor of them, and his successor, their and his heirs, executors and administrators respectively, according to the nature thereof upon trust, that my trustees shall and

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

will call in and convert into money, and such thereof as shall not consist of money within four years from the date of my death, and shall call in and add to the monies produced on such sale, call in and convert and call in and add to my said moneys."

It was stoutly contended by counsel for the official guardian that the case of Singleton v. Tomlinson (1878), 3 App. Cas. 404, is decisive of the question raised, and it certainly would be if the provisions in the will there in question were either identical or quite analogous.

The will in that case started out with a direction to convert the estate, real and personal, and then proceeded to dispose of "the proceeds" of such conversion in manifold ways with one exception specifically dealt with, and subject thereto ended by constituting a party named, the testator's legatee.

How could he be supposed to be residuary legatee of anything save the balance of the fund thus produced?

Here the provision for conversion comes last and after the residuary bequest above quoted which restricts its operation to the personal estate.

With great respect, I fail to see much resemblance between the Singleton case relied upon and this, especially in light of the stress laid by Lord Cairns and others on the words "the proceeds."

Then to cover the ground of the effect of a direction to convert real and personal estate, there are numerous decisions shewing that such a direction, even when acted upon and the conversion completed, is in itself by no means decisive of the ultimate character and destiny of the fund so created, if there is open the question of intestacy as there is here if the restricted nature of the residuary bequest is had in view.

Of the numerous authorities cited on either side and duly considered by me perhaps the case of Amphlett v. Parke (1831), 2 Russ. & M. 221, 39 E.R. 379, is the strongest in appellant's favour.

There the will not only directed a conversion of the real estate which was to be considered as personal estate with a gift as here of the residue of the general estate.

The review of the decisions in the opinion judgment of that case is in itself valuable as well as the judgment, and though those affected thereby were proceeding to the House of Lords, they prudently settled the matter by dividing evenly.

The net result of the authorities seems to me to be that the provisions of the will itself and the language used in making same must be kept in view in deciding whether or not there has been clearly intended a conversion of realty into personalty with interest, to determine the scope of the residuary bequest.

The best opinion I can form, keeping that in view, is that the restricted nature of the residuary bequest given by above quoted provision is such as to render it impossible to say that the testator really intended by his later creation of a trust to finally determine all the proceeds to become thereby personal property within the meaning of the residuary bequest.

The direction to pay thereout debts and legacies does not seem to be a satisfactory basis upon which to so decide. To pay legacies I should read as to pay specific legacies, and all the more so as payment in all cases involved, except when otherwise specified, was to be "without interest," which might reasonably be referable to interest on the real estate proceeds, and thus be made intelligible and effective.

I am of opinion that as to any proceeds of real estate so converted, if not eaten up by debts and specific legacies, the testator died intestate.

There is a cross-appeal by the executors against the ruling of the Court below refusing them costs.

That was a matter entirely in the discretion of the Court below and, by the settled jurisprudence of this Court, we, even when we have jurisdiction, refuse to entertain any appeal merely as to costs.

Moreover I agree in the opinion of the Court below that an executor's duty ends when he gets what he has asked and he is not supposed to take a partisan part.

Hence I think the cross-appeal must be dismissed with costs.

Duff, J.:—The only question requiring examination is the question whether the residue affected by the testator's bequest of "all the residue of my personal estate and effects includes the real estate directed to be converted. In my opinion the meaning of the will is plain. The bequest of the residue is a bequest dealing with the subject matter which is described as "the residue of my personal estate and effects." The devise of the real estate is clearly, I think, a devise and the direction to convert is clearly, I think, a direction for the purposes of administration only and in

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

consequence the bequest of the residue affects only property which was personal estate independently of the legal operation of the devise.

There is a cross-appeal as to costs. I can entertain no doubt that the executors and trustees were acting properly in the exercise of the statutory authority to submit questions arising upon the construction of the will for the opinion of the Court; and having commenced an action by way of originating summons with that object, it was not only their right but their duty as well to be represented in the Court of first instance and on any appeal that might be taken from the judgment of the Court of first instance for the purpose of seeing that the Court was correctly informed with regard to the considerations bearing upon the subjects brought before the Court for examination. That being so, they are by law entitled to their costs by statutory right and the order of the Court of Appeal refusing them their costs was an order prejudicing them in a substantive right and one consequently of which they are entitled to complain by way of appeal.

Anglin, J.:—To five children of his sister, William Walsh by his will bequeathed a sum of $800 each. In a codicil he directed that:—

"In the event of it being found that I have not effectually by the said will ordered that the monies due under the policy of insurance in the Independent Order of Foresters, Number 57437, and under the policy of insurance in the Ancient Order of United Workmen, dated August 1st, A.D. 1892, should be and become part of my estate directed to be distributed under the terms of my said will and the said bequests to the said nephews and nieces the children of my said sister be and are hereby revoked."

The testator had by his will directed that the proceeds of both these policies "should be and become part of (his) estate."

It is common ground that his order as to the moneys payable under the Foresters' policy was effectual, but that the like order as to the workmen's policy was ineffectual. It was held by Bigelow, J., that, under these circumstances, the five legacies must abate to the extent to which the estate was augmented by the receipt of the insurance moneys; and by the Court of Appeal, ante p. 182, that the five legacies were wholly revoked. With great respect, I am unable to accept either view.

The testator provided for revocation of the legacies upon the happening of a single condition—that the proceeds of both policies should become part of his estate. It is quite probable that the judgment of Bigelow, J., would carry out what the testator actually had in mind. But, if that were his intention, he did not express it.

In the judgment of the Court of Appeal, on the other hand, the word "and" of the codicil seems to have been unconsciously converted into "or." For that construction I cannot find justification and I have little doubt that it would defeat the testator's purpose. The only safe course—the only course open to us—is to adhere strictly to the intention expressed and that is that revocation should ensue if, but only if, the condition prescribed has been entirely fulfilled.

The second question arises out of provisions making certain legacies payable more than one year after the testator's death without interest. I entirely agree with the Judges of the Provincial Courts that the interest of which the legatees were thus deprived remained part of the estate and passed under the residuary bequest of personalty. The words "without interest" in the residuary bequest are senseless and were no doubt introduced per incuriam. They should be ignored.

The remaining question is whether the testator's real estate was converted into personalty so that so much of it, or of its proceeds, as was not required to meet his pecuniary legacies passed under the residuary bequest couched in these terms:—"I bequeath all the residue of my personal estate and effects share and share alike to the following children of my nephew Frederick J. Walsh (naming them), to be paid to them without interest when they reach the full age of twenty-one years."

The only disposition of the real estate, made after all the legacies, including the residuary bequest, had been stated in these terms:—

"I devise and bequeath all my real estate of every kind and all my personal estate and effects, unto my executors and the survivor of them, and his successor, their and his heirs, executors and administrators respectively, according to the nature thereof upon trust, that my trustees shall and will call in and convert into money, and such thereof as shall not consist of money within four years from the date of my death, and shall call in and add to the moneys pro-

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

duced on such sale call in and convert and call in and add to my said moneys: 1. Pay my funeral and testamentary expenses and debts. 2. The legacies bequeathed by this my will."

Grammatically the word "personal" in the residuary bequest qualifies the word "effects" as well as the word "estate." Under this bequest, apart from the effect of the direction for conversion of the real estate, it would be abundantly clear that nothing except what was personalty at the testator's death would pass. "Effects" is no doubt a comprehensive term. The meaning to be attached to it depends on the context. It may carry real estate: Kirby-Smith v. Parnell, [1903] 1 Ch. 483; Smyth v. Smyth (1878), 8 Ch. D. 561; Att'y.-Gen'l. of British Honduras v. Bristowe (1880), 6 App. Cas. 143, 50 L.J. (P.C.) 15; Hammill v. Hammill (1885), 9 O.R. 530. Alone it will not (Doe v. Dring (1814), 2 M. & S. 448, 105 E.R. 447); and I know of no case where used in such context as "my personal estate and effects," it has been held to embrace realty. Such a context in my opinion excludes realty from its purview.

Did the testator intend by the direction for conversion to make the proceeds of his real estate personalty for all purposes so that it should, as such, fall within his residuary bequest? Such would be the effect of an absolute direction to sell not limited to any particular purpose. Singleton v. Tomlinson, 3 App. Cas. 404, was such a case. There the person constituted "my residuary legatee" was held entitled to the surplus proceeds of realty not required to satisfy the dispositions made by the will. The same result follows where the residue, though designated personal estate, is clearly intended to comprise what remains of a blended fund arising in part from proceeds of converted realty.

But here the testator has declared the purpose of a conversion to be the payment of his funeral and testamentary expenses, debts and legacies. In such a case surplus proceeds of converted realty will not pass under a bequest of residuary personalty. Maugham v. Mason (1813), 1 Ves. & B. 410, at p. 416, 35 E.R. 159; and Collis v. Robins (1847), DeG. & Sm. 131, at p. 136, 63 E.R. 1002, are authorities in point. Amphlett v. Parke, 2 Russ. & M. 220; Fitch v. Weber (1848), 6 Hare 145, 67 E.R. 1117; Taylor v. Taylor (1853), 3 De G. M. & G. 190, 43 E.R. 76; and Collins v. Wakeman (1795), 2 Ves. 683, 30 E.R. 841 (although the last-

mentioned case is questioned in Theobald on Wills, 7 ed. 256), may also be referred to.

I do not find in the will before us any expression or implication of intention that, notwithstanding the indication of certain purposes of the conversion it is to be "out and out" and for all purposes. The leaning against intestacy will not supply the omission of words expressive of the intention that the residuary legacy of personalty should include undisposed of realty or its proceeds.

"The avoiding of intestacy is to be regarded in construing doubtful expressions, but is not enough to induce the Court to give an unnatural meaning to a word." In re Benn (1885), 29 Ch. D. 839, at p. 847.

"In cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will." In re Edwards, [1906] 1 Ch. 570, at p. 574.

I would therefore, with respect, answer question (c) of the summons in the negative as to realty or proceeds thereof not required to pay funeral expenses and legacies. Such residuary realty or proceeds thereof passed as on an intestacy.

There remains to be dealt with the executors' cross-appeal against the order of the Court of Appeal depriving them of their costs in that Court. No doubt it is most unusual that an appeal should be entertained in this Court on a mere question of costs. Here however the executors have been deprived of their costs not as a matter of discretion but on an erroneous view of the law, namely that, having received the advice of the Court of first instance, although served with notice of the appeal they had no interest in it and should merely have awaited its result. They maintain on the contrary, that it was their duty and their right to attend the hearing, to watch the proceedings and, if necessary, to assist the Court in the disposition of a matter which they had originally brought before it. That right seems well established in practice. Carroll v. Graham, [1905] 1 Ch. 478, 74 L.J. (Ch.) 398; Catterson v. Clark (1906), 95 L.T. 42; Fulton v. Mercantile Trusts Co. (1917),

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

41 O.L.R. 192, at p. 194. The executors in my opinion should have been allowed their costs in the Court of Appeal and should also have them here—on such moderate scale however, as is indicated in the cases cited. I do not regard this question as really the subject of a substantive appeal involving costs only but rather as an incident of the main appeal in which the merits of the litigation are before the Court and the disposition of them by the Provincial Courts will be substantially varied. Delta v. Vancouver R. Co., Cam. S.C. Practice, 1913, at p. 90.

All parties should have their costs of these proceedings throughout, out of the estate. The questions involved are important. They concern the administration of the estate and arise out of dispositions made by the testator which are by no means free from difficulty.

Brodeur, J.:—This appeal arises out of an originating summons to construe the will and codicil of William Walsh. Three questions had been submitted to the Court below, but we have only to deal with two.

The first is whether the appellants are entitled to any portion of the legacy of $800 under the following clauses in the will and in the codicil:—"I bequeath to my nephews, William Milburn, Robert Milburn, Walter Milburn, and to my niece, Mary Milburn, Ida Milburn, the sum of eight hundred ($800) dollars each, to be paid to them without interest four years after my death.

"I hereby direct that the proceeds of my policy of insurance in the Independent Order of Foresters to the best of my recollection, Number 57437, for two thousand ($2000) dollars, dated January 18th, 1893, and that the proceeds of my policy of insurance in the Ancient Order of United Workmen for two thousand ($2000) dollars, dated July 31st, 1892, notwithstanding any designation of beneficiary or beneficiaries herein shall be and become part of my estate directed to be distributed in this my will."

In order that there may not be any possible misapprehension in respect to my bequests in my said will to my nephew and nieces the children of my sister, Margaret A. Milburn, I hereby declare that in the event of it being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in the Independent Order of Foresters, Number 57437, and under the policy of insurance in the Independent Order of Workmen, dated August 1st, A.D. 1892, should be and become part of

my estate directed to be distributed under the terms of my said will the said bequests to the said nephews and nieces the children of my said sister be and are hereby revoked."

It is in evidence that no money under the insurance policy of the Ancient Order of United Workmen was paid or became payable to the Walsh estate. It is in evidence also that the insurance policy in the Independent Order of Foresters was paid to the estate.

The Judge of original jurisdiction decided that the legacies to the appellants would be discharged by paying them the proceeds of the Independent Order of Foresters' policy. The Court of Appeal reversed this decision and came to the conclusion that the legacies of $800 made to each of the appellants had been revoked by the codicil.

The codicil, it seems to me, is very explicit. It provides that if the two policies of insurance were not part of the estate, then the legacies in favour of the appellants would be revoked. It is true that only one of the policies was paid to the estate, but the condition of the codicil was that if it was found that the declaration of the testator was ineffectual as to both the policies then that would deprive the appellants of the bequest stipulated in the will in their favour. It may be that the testator did not express correctly what he intended. It may be that he did not intend to give his nephews a portion of their legacies if only one of the policies would form part of his estate, but the words are so plain and so explicit that we have not to look for an intention which otherwise is so clearly expressed.

The appeal is well founded as to the first question and I would answer it in the affirmative.

The other question which has also been submitted to the consideration of the Court is whether the entire residue of both real and personal estate, including accrued interest or other income, is payable to the children of the testator's nephew, Frederick J. Walsh.

In the will the following clause is to be found:—"I bequeath all the residue of my personal estate and effects, share and share alike, to the following children of my nephew, Frederick J. Walsh ..... to be paid to them without interest when they reach the full age of twenty-one years."

There is no provision for the residue of the real estate, except that the executors are empowered to convert the whole estate into money for the purpose of paying funeral

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

and testamentary expenses and of paying the legacies. The words "personal estate and effects" could perhaps be construed as meaning in some case personal and real property. The intention of the testator could in some cases be determined so as to cover both personal and real property. Kirby-Smith v. Parnell, [1903] 1 Ch. 483. But in this will no such intention can be found; for, in another part of his will, the testator puts personal estate and effects in juxtaposition with real estate.

The only possible conclusion then is that the testator has failed to dispose of his real estate; and if there is to be found some real estate after the conversion ordered by the will, then this real estate should go to the heirs of the de cujus.

Collins v. Robins, 1 De G. & Sm. 131, at p. 138; Ackroyd v. Smithson (1780), 1 Bro. C.C. 503, 28 E.R. 1262; Curleis v. Wormald (1878), 10 Ch. D. 172, at pp. 174, 175.

The point as to interest raised on this second question could not be of any benefit to the appellants, since this interest forms part of the residuary personalty and would not belong to them, even if their construction of the words "without interest" were correct.

I would then answer the second question in the negative as to the real estate and would state that the children of Frederick J. Walsh are not entitled to the real estate but they could receive the interest on their legacy.

The costs of the appeal should be paid out of the estate.

There is a cross-appeal on the part of the executors of the will who were condemned personally in the Court below to pay their costs.

It is a question of discretion about which we should not interfere. The costs should not be large, if the executors simply appeared and held a watching brief. Of course they should be larger if they took an active part in the proceedings below. We have no way to ascertain the circumstances which brought this condemnation and we should not then interfere with the exercise of a discretion which might have been equitably exercised. If the executors had found it advisable to take a part in a contestation which was argued by the two interested parties, viz., the Milburns and the Walsh's, it was certainly on their part a useless intervention which the Court below could very well dispose of in the way it has done.

The cross-appeal should be dismissed with costs.

Mignault, J.:—I propose to reply in the following order to the questions submitted with a brief statement of my reasons for each answer.

First question: Is the bequest of $800 by the late William Walsh to each of his nephews and nieces, to wit to William Milburn, Robert Milburn, Walter Milburn, Mary Milburn, and Ida Milburn, all of them being children of his sister Margaret A. Milburn, revoked by reason of the codicil added to his will by the said William Walsh?

The will contained the following directions as to two policies of life insurance held by the testator:—

"I hereby direct that the proceeds of my policy of insurance in the Independent Order of Foresters to the best of my recollection Number 57437, for two thousand ($2000) dollars, dated January 18th, 1893, and that the proceeds of my policy of insurance in the Ancient Order of United Workmen for two thousand ($2000) dollars dated July 21st, 1892, notwithstanding any designation of beneficiary or beneficiaries herein shall be and become part of my estate directed to be distributed in this my said will."

In the codicil made a few days after the will the testator said:—

"In order that there may not be any possible misapprehension in respect to my bequests in my said will to my nephews and nieces, the children of my sister, Margaret A. Milburn, I hereby declare that in the event of it being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in the Independent Order of Foresters, Number 57437, and under the policy of insurance in the Ancient Order of United Workmen, dated August 1st, 1892, should be and become part of my estate directed to be distributed under the terms of my said will, the said bequests to the said nephews and nieces, the children of my said sister, be and are hereby revoked."

Of course, the testator's declaration in his codicil must be read with the directions given by him in his will as to the two insurance policies, and I construe the codicil as meaning that if the testator has not succeeded, by his will, in making the moneys due under these two policies a part of his estate to be distributed under the terms of his will then the legacies to the nephews and nieces, the children of his sister Margaret A. Milburn, are revoked.

The testator did not succeed in making the moneys due under one of the policies a part of his estate, and therefore

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

in my opinion the legacies to his nephews and nieces are revoked.

It is contended that the revocation takes place only if the testator's directions fail as to both policies, and that if they succeed as to one of them and fail as to the other, the condition is not entirely fulfilled, and therefore there is no revocation.

I am unable so to read the condition. It deals with "the moneys due" under the policy of insurance in the Independent Order of Foresters and under the policy of insurance of the Ancient Order of United Workmen, as one fund, and if this fund does not become a part of the testator's estate by virtue of the directions of the will, the bequests to Margaret A. Milburn's children are revoked.

A failure with respect to one of the policies prevents the moneys due under both policies from becoming a part of the testator's estate, and therefore the revocation takes place.

If I could resort to conjecture to determine the probable intention of the testator, I would unhesitatingly concur in the opinion of the trial Judge that the revocation took place only pro tanto, or in proportion to the amount of the policy which did not form part of the estate. But conjecture as to the probable but unexpressed intention of the testator is entirely out of the question. If the testator desired the revocation to operate partially in the event which has happened, he has not stated his desire in the will. Therefore the answer must be either revocation or no revocation. My answer is that the legacies in question are revoked, and in that I agree with the Court of Appeal.

Second question: Does the interest on the bequests payable more than a year after the testator's death, and which is not to be paid to the legatees, form part of the residuary bequest?

There is no difficulty here. The interest which was not to be paid to the legatees on the bequests made payable more than a year after the testator's death, in my opinion, forms part of the residuary bequest, notwithstanding the words "without interest" in the latter bequest, which words should be disregarded. Any other construction would leave this interest entirely outside of the operation of the will. I may add that the residuary legatees do not take these moneys as interest on the residuary bequest, but as moneys forming part of the residue

and which have never left the estate. Here again I agree with the Court of Appeal.

Third question: Does the surplus of the conversion of the real estate, if there be any such surplus after payment of the funeral and testamentary expenses and debts and the bequests made by the will, form part of the residuary bequest of the personal estate and effects?

I will cite both the residuary bequest and the clause ordering the conversion of the real estate, the latter being very badly drafted:—

"I bequeath all the residue of my personal estate and effects share and share alike to the following children of my nephew, Frederick J. Walsh, Jean Mary Walsh, Kathleen Lillian Walsh, Marie Margaret Walsh, Thomas Robert Walsh, Frederick Michael Walsh, to be paid to them without interest when they reach the full age of twenty-one years.

"I devise and bequeath all my real estate of every kind and all my personal estate and effects, unto my executors and the survivor of them, and his successor, their and his heirs, executors and administrators respectively, according to the nature thereof upon trust, that my trustees shall and will call in and convert into money, and such thereof as shall not consist of money within four years from the date of my death, and shall call in and add to the moneys produced on such sale, call in and convert and call in and add to my said moneys: 1. Pay my funeral and testamentary expenses and debts. 2. The legacies bequeathed by this my will."

This is by far the most difficult question, and it appears to me that my answer will be more intelligible if it is briefly expressed.

In my opinion the residuary bequest is of the residue of the testator's personal estate and effects (and the word "personal" qualifies both the words "estate" and "effects") as it stood at the death of the testator.

I am also of opinion that when the conversion of real into personal estate is ordered by a will for certain specific purposes, any residue remaining after these purposes are satisfied, is not to be regarded as personal but as real estate in so far as the interests of those who upon an intestacy would take the real estate are concerned.

Now what are the purposes for which this conversion is ordered? They are:—

1. The payment of funeral and testamentary expenses and debts. 2. The legacies bequeathed by the will.

Can.

S.C.

MILBURN v. GRAYSON; IN RE WALSH ESTATE.

It would be idle to say that the residuary bequest is one of the legacies bequeathed by the will, because we would still have to determine what was the object of the bequest, and this object was the residue of the personal estate and effects of the testator, that is to say of what was personal estate and effects at the death of the latter. The surplus of the converted real estate would not be comprised therein. I find therefore that if there be a surplus from the conversion of real estate, after providing for the payment of funeral and testamentary expenses and debts as well as of the legacies bequeathed by the will, it does not form a part of the residuary bequest and does not pass under the will. Naturally one shrinks from coming to the conclusion that there is a partial intestacy, but I can see no help for it.

I have not cited any authorities on this branch of the case and am content to rely on those contained in the judgment of my brother Anglin, whose opinion I share.

My answer to this question is therefore no, and consequently, with respect, I differ from the Court of Appeal on this point.

The main appeal should therefore be allowed to the extent of answering this question in the negative. I would direct that the costs of the appellants and of the respondents be paid out of the estate. I would not give costs to the executors on the main appeal.

As to the cross-appeal, nothing more is involved than the question of costs in the Court of Appeal which the executors claim should have been granted them. The costs were refused because the executors applied to the Court for advice and received it, and had no further interest in the matter, except to await the result of the appeal. I am not ready to say that this was an error on the part of the Court of Appeal. The practice may be different in England and perhaps in Ontario, but it is a matter of practice and I am not disposed to interfere with what has been done here. I would dismiss the cross-appeal with costs.

Appeal allowed as to revocation of legacies to children (Mignault, J., dissenting); appeal dismissed as to interest; appeal allowed as to surplus of estate (Brodeur and Mignault, JJ., dissenting); cross-appeal dismissed (Duff and Anglin, JJ., dissenting).

McCARTHY v. CITY OF REGINA.

Saskatchewan King's Bench, Bigelow, J. June 7, 1921.

Libel and Slander (§II.E—50).—Confidential Reports Furnished by Police at Request of Mayor—Privileged Communication—Public Interest.

The confidential reports furnished by the subordinates to the chief of police, and by him passed on to the mayor and aldermen at the request of the mayor as to the fitness of an applicant to be granted a rooming house license are protected from disclosure on the ground that production would be injurious to the public interest, but in an action for libel against a mayor and aldermen for authorising the report of the chief of police to be published in the local paper, the minutes of the meeting or proceedings of the special standing committee should be produced for the plaintiff's inspection as being material to the issue.

[Humphrey v. Archibald (1891), 21 O.R. 553, applied.]

APPEAL by plaintiff from an order of a Master in Chambers dismissing an application for discovery of documents in an action for libel. Varied.

B. Thompson, for plaintiff.

G. F. Blair, K.C., for defendant City of Regina.

Bigelow, J.:—The plaintiff applied to the defendant City of Regina for a license to operate a rooming house known as the old Waverley Hotel. Under a by-law of the City of Regina, the license inspector, the defendant Lyne, requested the chief of police to furnish for the guidance of the council a private report on the applicant. The chief of police, as it was his duty to do, made inquiries through his subordinates and reported to the license inspector that the plaintiff was not a fit person to operate a hotel in the city, and that he would strongly recommend that the license be not granted. This report was passed on by Lyne to the mayor and councillors sitting as a special committee, who refused to approve the license. It is alleged that this communication from the chief of police to the license inspector is a libel, and further that the mayor and councillors printed and published the libel and authorised, sanctioned, or permitted and connived at its being published in The Morning Leader newspaper.

The plaintiff now seeks to obtain discovery of certain documents, namely the reports from the subordinates of the chief of police to him, and the minutes of the special committee when the license was refused. The Master in Chambers dismissed plaintiff's application, and the plaintiff has appealed from that order.

In my opinion such documents should be protected from disclosure, on the ground that such production would be

Sask.

K.B.

McCarthy v. City of Regina.

injurious to the public interest. As Meredith, J., says, in Humphrey v. Archibald (1891), 21 O.R. 553, at p. 559:—

"It is in no sense a privilege of the police officer nor enforced for his protection or benefit. Public interests and public interests alone are sought to be furthered by it."

In Clerk & Lindsell's Law of Torts, 7th ed., at p. 580, the author states:—

"Moreover all writers of confidential official communications are protected by a privilege of a different kind, which does not indeed in terms cover their liability, but makes it practically impossible to prove a case against them. The production of such documents will not be permitted in Courts of justice both because state secrets may be thereby disclosed, and because it is desirable that public servants should be able to write freely on matters affecting the public service without exposing themselves to the fear of actions."

In the Annual Practice, 1920, p. 504, it is stated:—"This protection is not limited to public official documents, it covers any documents the production of which would be injurious to the public interest."

But the plaintiff contends there is another principle which should entitle him to discovery of those documents, which is referred to in the judgment of Meredith, J., in Humphrey v. Archibald, supra. At pp. 559, 560, he states:—

"After the best consideration I have been able to give the question and all the cases within my reach bearing upon it, I am of the opinion that the disclosure of the source of such information given to any peace officer entitled as such to receive it, should not and cannot be—at least without the consent of the informer—compelled or admitted in the administration of justice, civil or criminal, in any action, matter or proceeding, unless it be material to the issue, necessary for its fair trial and for the discovery of the truth of the matter in controversy, but that in all such cases higher public interests require it, and therefore it should be admitted and enforced."

Humphrey v. Archibald was an action for malicious prosecution, brought against two police officers. It was vital to the plaintiff's success to shew a want of reasonable cause for the prosecution by the defendants. One main element upon which that depended was the information upon which the defendants acted, and so the defendants were ordered to disclose the name of the person from whom the information was obtained on which the plaintiff was arrested.

I cannot see how that principle applies to the case at Bar. I do not see how it is material to the issue what reports Bruton received from his subordinates. The defendants Bruton and Lyne have pleaded privilege as a defence. I am of the opinion that Bruton's report to Lyne and Lyne's report to the council were absolutely privileged. In Clerk & Lindsell's Law of Torts, at p. 579, the author states:—

"It must frequently be the duty of public servants, both civil and military, to publish matter of a defamatory nature, especially in the confidential reports which in the ordinary course of affairs it is necessary to furnish to the heads of departments and other superior officers. The privilege attaching to such communications is absolute."

It was the duty of Bruton and Lyne to furnish confidential reports to their superior officers, and I think that is a complete defence to any charge of libel against them.

Now as regards the mayor and aldermen: is it material to the issue between them and the plaintiff what reports Bruton received from his subordinates? I think not. It is alleged that they published a libel by authorising the report to be published in The Morning Leader. The material issues here would be. Is it a libel, and did these defendants publish it? On the question of libel there would be the further question whether it was true or not. What Bruton's information from his subordinates was cannot, to my mind, make any difference on this issue. As far as the mayor and aldermen are concerned, I am also of opinion that discovery of those reports from Bruton's subordinates to him would be disclosing the evidence in their case, which a party is not bound to do.

I do think, however, that the minutes of the meeting, or proceedings of the special or standing committee of the defendant City of Regina held on August 26, 1920, should be produced for the plaintiff's inspection. Such minutes are material on the issue whether the defendant City of Regina and mayor and aldermen published the alleged libel or authorised publication. It may be that they passed a resolution at that meeting authorising publication, and if they did, the plaintiff is entitled to know it. The Master's order is varied in this respect, but otherwise the appeal is dismissed with costs to the defendant in the cause in any event.

As practically the whole of the argument on the appeal was devoted to the question of reports of subordinate off-

Alta.

App. Div.

BOARD v. BAUER.

icers to their superior officer, on which I find the plaintiff cannot succeed, I think the plaintiff should pay the costs of this appeal.

At the argument, Mr. Blair, for the defendants, offered to let plaintiff's counsel peruse the reports made by Bruton's subordinates to him and the minutes in question, still claiming however that they were privileged. The defendants will have leave to remove these reports from the file.

Second Motion.

The defendants moved for an order striking out or amending the plaintiff's statement of claim, on the ground that it discloses no reasonable cause of action, or that any cause of action that is shewn is frivolous and vexatious; and for an order that the joining of the defendants as they are in said statement of claim has the effect of embarrassing and delaying the fair trial of the action.

On this application, the Master struck out the defendants Bruton, Lyne, the mayor and councillors; and from this order the plaintiff has appealed.

This is not an application to strike out parties; it is an application to strike out a pleading. I have perused the statement of claim, and I think a good cause of action is alleged against all defendants. Whether it can succeed or not is another question which is not to be decided now. The only question before me is whether a good cause of action is alleged in the pleadings. The principle and agent can both be sued for a tort.

The appeal from the Master's order is allowed, and the motion by the defendant is dismissed, with costs to the plaintiff in the cause in any event.

Judgment varied.

BOARD v. BAUER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 22, 1921.

Vendor and Purchaser (§I.D—20)—Land Listed for Sale—Representations by Owner—Part of Land Sold to Railway—Reduction in Purchase-price—Misrepresentation as to Number of Acres Broken—Damages—Right of Purchaser to Rely on Covenants in Agreement for Sale.

The owner gave a real estate firm an authority in writing to sell a certain four quarter-sections of land. After the legal description of the land the document contained these words, "which is owned by me and more particularly described below and in diagram herewith." The diagram contained no evidence of any reservations or encumbrances or any indication of the existence of a railway line which was then in fact constructed across the

land although the registered title was still all in the plaintiff. Under the heading, "description of the property above referred to," there was among other items the statement, "number of acres cultivated 200," at the top of the document was written in ink the words, "acreage off fr. Rrd. 11-1/25." Through the efforts of the real estate agents a purchaser was secured and an agreement was entered into between the parties, whereby the purchaser agreed to purchase the land on certain terms. This agreement contained a covenant by the vendor to give good title upon payment to the quarter-sections which were stated in the recital to the agreement to contain 640 acres more or less "save and excepting thereout the reservations contained in the existing certificate of title, while in the clause containing the covenant to convey upon payment the agreement is to convey 'the said parcel of land by deed of transfer subject to the conditions and reservations in the original grant from the Crown." The Court held that the fact that memoranda of four caveats shewing the dates, and dates of registration, the railway company's name as caveator and the number of acres affected appeared on the certificate of title, and the further fact that the purchaser had visited the land and had seen a railway running through it did not preclude him from insisting upon his rights under the covenant, and in an action by the vendor, the purchaser was entitled to claim proportionate compensation for the 11.26 acres which the railway had acquired. The evidence shewed that there were only 150 acres under cultivation instead of 200 acres, and the Court also held that the purchaser was entitled to damages for this misrepresentation, the measure of damage being the difference in value of the whole 640 acres with 150 acres under cultivation and its value if there had been 200 acres broken.

APPEAL by defendant from the judgment in an action by a vendor to recover the amount of the purchase-price under an agreement for the sale and purchase of land. Reversed.

A. M. MacDonald, for appellant.

A. H. Russel, K.C., for respondent.

Harvey, C. J. concurs with Stuart, J.

Stuart J:— On October 7, 1918, the plaintiff gave a real estate firm, called the J. Fraser Agency, an authority in writing to sell a certain four quarter sections of land. After the legal description of the land the document contained these words "which is owned by me and more particularly described below and in diagram herewith." The diagram contained no evidence of any reservations or encumbrances or any indication of the existence of a railway line which was then in fact constructed across the land although the registered title was still all in the plaintiff. Under the heading "description of the property above referred to" there was among other items the statement "number of acres cultivated 200." At the top of the docu-

Alta.

App. Div.

BOARD v. BAUER

ment was written in ink the words "Acreage off fr. Rrd. 11-1/25."

Through the efforts of the Fraser Agency the defendant was secured as a purchaser. An agreement in writing was entered into between the parties on January 6, 1919, whereby the defendant agreed to purchase the land for $25,200 payable $1,000 down and the rest deferred. The agreement contained a covenant by the vendor to give good title, upon payment, to the quarter sections which were stated to contain 640 acres more or less, subject to certain reservations hereinafter referred to.

Certain sums were paid by the purchaser, the amount of which is not material and on Sept. 8, 1920, the plaintiff began this action for the balance of the purchase-price.

The substantial defences were (1) absence of title to all the land agreed to be conveyed and fraudulent misrepresentation as to the acreage under cultivation. The defendant also counterclaimed for damages upon the same grounds.

The amount of land taken by the railway appeared to be 11.26 acres. The railway company had filed caveats against the titles of the four quarters on August 27, 1917, and these still appeared on the certificates of title when the agreement was entered into. The plaintiff had been paid by the railway company but no transfer had been put through.

It was agreed by the counsel that there were in fact only 150 acres cultivated. The defendant saw the land in the winter with snow on the ground before purchasing but he could not by reason of the snow tell how much was cultivated. In cross examination he admitted that he had seen the railroad also but just at this point in his examination he fainted in the box and was not recalled and nothing more was brought out at least from him about his knowledge of the railway right of way.

The defendant does not now seek rescission either for the deficiency or the misrepresentation but he asks with respect to the first an abatement of the price and with respect to the latter a judgment for damages.

The trial Judge gave the plaintiff judgment for the full purchase-price and dismissed the counterclaim and the defendant appeals.

In his oral judgment at the close of the hearing, the trial Judge dealt only with the question of the deficiency of the

acreage under cultivation and made no reference to the defect of title to the 11·26 acres.

The description of the land contained in the recital to the agreement ends thus "containing six hundred [six hundred and forty?] acres more or less save and excepting thereout the reservations contained in the existing certificate of "title,"while in the clause containing the covenant to convey upon payment the agreement is to convey "the said parcel of land by deed of transfer subject to the conditions and reservations in the original grant from the Crown."

The Judge held that there was no wilful misrepresentation but that there had only been an honest mistake and it was for this reason and also apparently because the defendant's son was said to have examined the land before the agreement was made, although there was really no admissible evidence of this that he dismissed the defendant's claim for damages.

He had, during the taking of the evidence, decided that there was no ground for compensation for the deficiency of 11.26 acres. He had said "It seems to me there is what is claimed by the plaintiff to be a reservation that would cover this on the agreement of sale. My view is if nothing else than that happened it could not cover it but it is brought out that the purchaser knew of the right of way and he knew that the agreement for sale provided for the reservation on the title and the evidence is that it was on the title then * * * The right of way was visible and observed and therefore known of and was on the certificate and the agreement was that he purchase the land with the reservations on the certificate so that will put that pretty well out of Court."

Now first with regard to this 11.26 acres. The first question is whether the four caveats, memoranda only of which not shewing their full contents but merely their dates and dates of registration, the railway company's name as caveator, and the number of acres affected, appear on the certificates of titles, come properly within the meaning of the expression "the reservations contained in the existing certificates of title" as used in the agreement.

An examination of the certificates of title shews that three of them read after the words "containing by admeasurement 160 acres more or less" as follows:—"reserving unto His Majesty his successors and assigns all mines

Alta.

App. Div.

BOARD v. BAUER.

and minerals" while the fourth reads "reserving unto the Canadian Pacific Railway Co. all coal on or under the said lands." These words of reservation are written in ink and thereafter follow in print in all four certificates the words "subject to the encumbrances liens and interests notified by memorandum underwritten or endorsed hereon or which may hereafter appear on the register."

In my opinion where, as here, the certificate referred to in the agreement contains a reservation in specific terms an exception in the agreement of reservations shewn on the certificate can be properly applied only to that reservation so specified and to nothing more. The caveat was endorsed below the Registrar's signature and is undoubtedly to be included in the category of "encumbrances, liens and interests" referred to in the printed part of the certificate. Leaving aside for the moment the point of the defendant's actual observation of a railway line on the ground, could it be said that if the certificate has shewn a memorandum of a mortgage for a sum of money that the purchaser would have been bound by reason of the wording of the agreement to take the title subject to the mortgage? I think certainly not. The fallacy in the contrary view lies in treating a memorandum of a caveat by a railway company as something shewing a reservation by the Registrar, out of the 160 acres covered by the certificate, of a certain area as not being covered by his certificate that the vendor had a title in fee simple.

I think it would be extremely dangerous to lay down the rule that such an expression as that now under consideration should, whenever used in a description of the land inserted in an agreement of sale, be interpreted as covering mere memoranda endorsed on the certificate under the head of "encumbrances, liens and interests." Such a rule would cut down very seriously the effect of the usual covenant for clear title. As a matter of fact not having the caveat itself before us we do not really know upon what it was based. It is very common to file a caveat to protect an unregistrable mortgage, although, of course, we may perhaps feel fairly certain in this case as to the interest intended to be protected by the caveat.

In my opinion, therefore, the situation is simply this, that the defendant has an agreement containing a covenant to give him a clear title to the whole 640 acres or at any rate the whole four quarter sections, with a reservation of min-

eral rights and the question to be determined is to what extent he can be precluded from insisting upon his rights under that covenant by the fact that before entering into the agreement he inspected the land and actually saw a railway running through it.

There is no doubt that the evidence, assuming it to be admissible, establishes that the defendant both saw and was told of the existence of the railway. Macdonald, the plaintiff's agent, stated that he told the defendant about the existence of a railway right of way through the land before the contract was made. His counsel told the Court "We cannot deny and I am not seeking to deny but he knew for he was on the place and he saw the railroad himself, he saw the railroad going through." Whether he brought clearly to the defendant's notice the notation on the document of listing, i.e. the words "acreage off fr. Rrd. 11-1/25" may be not quite so clear although Macdonald did swear that he "gave him the full particulars according to this listing."

But the law seems to me to be clear that where there is an express covenant for title, knowledge of defects on the part of the purchaser does not preclude him from insisting on the full benefit of the covenant. Greig v. Franco-Canadian Mortgage Co., (1916), 29 D. L. R. 260, 10 Alta. L.R. 44, affirmed in (1917), 38 D.L.R. 109, 55 Can. S.C.R. 395, and cases there cited. Indeed Cato v. Thompson, (1882), 9 Q.B.D. 616, decided that evidence of such knowledge should not have been received. It is true those were actions by the purchaser for rescission. If the purchaser here had sued for specific performance it might be a question whether he could have insisted on performance with compensation when he bought with at least a grave warning as to a defect in title, although even then it would be a question as to how far his real knowledge went. The plaintiff indeed insisted that he was bound to search the title. But if he had done so all he would have found would have been a caveat by the railway company and he might very well have thought that as the transfer had not passed he would be entitled to the payment from the railway company. He was not told that the right of way had been paid for. But he was not bound to search the title and he certainly should not be in a worse position than if he had done so.

Furthermore, the plaintiff in answer to the defendant's

Alta.

App. Div.

BOARD v. BAUER.

plea that the plaintiff could not give him title to the full four quarters (and when quarter sections are mentioned the statement of acreage as "640 acres more or less" cannot make any difference) merely alleged that he never covenanted to convey the whole of the four quarters and rested his whole case upon that. The plaintiff made no reference in his pleadings to either waiver or knowledge with respect to the 11.26 acres but only as to the area under cultivation. There was no application to amend either at the trial or on the appeal. And it is to be observed that just as the defendant was about to be cross-examined by plaintiff's counsel in order to prove knowledge, he fainted in the box and no attempt or request seems to have been made to complete his examination. So that notwithstanding the statements by his counsel and by the plaintiff's agent Macdonald, as to his knowledge, I think a different light might have been put upon the matter if his full examination had taken place. Those statements are obviously capable of being qualified in a way that would suggest that the defendant understood he was to succeed to some right of the plaintiff as against the railway company.

In these circumstances when the purchaser is not suing, but being sued, I think it is clear that he is legally entitled to claim proportionate compensation for the 11.26 acres, which would amount to $443 and that this should be deducted from the original purchase price and the calculations of interest made upon that basis, and the judgment varied accordingly.

With regard to the deficiency in the acreage under cultivation I do not think we would, upon the evidence in this case, be justified in finding actual wilful fraud in the plaintiff in the face of the finding of the trial Judge, who saw the parties, that he had not been guilty of fraud. Nocton v. Lord Ashburton, [1914] A.C. 932 at p. 945.

The trial Judge evidently went upon the assumption that the misrepresentation being innocent and the defendant, having affirmed the contract by continuing in possession and making payments after he had learned of the misstatement could not have had rescission even if he had asked for it, which he did not, and that not being entitled to rescission he was not entitled to compensation, by way of a reduction of the purchase-price by the amount by which the value was lessened by the deficiency in cultivated acreage. It is possible the trial Judge was right about

this, although there are two or three cases that might point the other way, viz., Powell v. Elliott (1875), L.R. 10 Ch. 424; Grant v. Munt (1815), G. Coop. 173, 35 E.R. 520, and Dyer v. Hargrave (1805), 10 Ves. Jun. 505, 32 E.R. 941. But the first case was probably one of wilful misrepresentation and was so interpreted by Farwell, J. in Rudd v. Lascelles, [1900] 1 Ch. 815 at pp. 820, 821; in the second case it is not clear that the purchaser had lost his right to rescind by affirmance after discovery while the Master of the Rolls seems to have treated the case rather as a breach of warranty; and in the third case it was an open contract made on a sale by auction and the situation otherwise was much the same as in Grant v. Munt.

Without, however, clearly approving or disapproving of the ground apparently taken by the trial Judge there seems to me to be another ground upon which the defendant ought to succeed. It is clear that there may be a collateral verbal warranty even in a dealing with land which can, if not inconsistent with anything in the written contract and referring to a subject not dealt with therein, may be proved by parol evidence and recovered upon if there is a breach. De Lassalle v. Guildford, [1901] 2 K.B. 215, is an example of this. There a person who took a written lease upon the assurance that the premises were in good order was allowed damages for a breach of warranty although fraud was not charged. And in principle there can be no difference between a lease and a sale. The case indeed is cited in both Dart on Vendors and Purchasers, 7th ed. pp. 1012, 1013, and in Williams' work on the same subject, 2nd ed. p. 611.

The plaintiff explicitly authorised his agent to state to intending purchasers that there were 200 acres in cultivation and his agent made that definite representation to the defendant. The defendant did indeed personally look at the land but admittedly this was when the ground was covered with snow and it was difficult to judge of the matter. The evidence as to examination by the son was not admissible evidence because he was not a witness and all there was in the way of evidence of the fact was the agent's statement that the son had told him that he had examined it. With much respect, I think the trial Judge was in error when he rested anything (and he seems to have rested much) upon this testimony. In the circumstances I think the representation should be treated as a warranty. The only argument against this would be in the circumstance

Alta.

App. Div.

BOARD v. BAUER.

that a warranty is an agreement and it may be said that the plaintiff never intended to agree or to give a warranty or to authorise his agent to do so. I doubt very much if the plaintiff ought to be heard to allege such an absence of intention when he so deliberately signed a listing with his agent containing facts intended to be communicated to intending purchasers. But in any case the plaintiff is in an obvious dilemma. For if he never intended to give a warranty this simply means that he made the statement carelessly and recklessly, without himself being confident or assured of its truth. There was nothing to shew that he was merely giving an opinion. And this leads him at once, upon the authorities, into the field of deceit. This aspect of the case occurred to the trial Judge and after mentioning it he said "Now if it had not been for the evidence of the defendant's witness Macdonald, I think there might be a good deal to say on that ground." And he then refers to the merely hearsay evidence that the son had examined the place. This very strongly suggests that if the trial Judge had not regarded the hearsay testimony he might very probably have come to a different conclusion in spite of his finding that the plaintiff was not actually, wilfully deceitful. For this reason, while as I said before, we ought not to interfere with his finding as to wilful dishonesty, I see no ground for hesitating to impute to the plaintiff reckless and careless statements not supported by the actual knowledge and contrary to the fact.

I do not think, therefore, that the plaintiff can escape liability whether it be placed upon the ground of a breach of warranty or of careless and reckless misrepresentation of the fact. A perusal of the evidence shews, I think clearly, that he had no reasonable ground whatever for making anything more than a rough estimate of the acreage under cultivation. In giving evidence he said "Well I supposed there was (200 acres) in a way. It was hard to guess the amount * * * I supposed there was all of 200 acres." And yet he authorised his agent to tell intending purchasers in order to induce them to buy, that there were 200 acres. What other purpose could his inserting of those figures in the listing have been intended to serve? As was said both in Grant v. Munt and in Dyer v. Hargrave, the plaintiff is bound, I think, to make good his representation.

As to the measure of damages, I doubt very much if the defendant can properly be allowed, as the evidence stands

in this case, more than the difference in value. I know nothing so uncertain as the damages a person may have suffered from not being able to put in a crop of grain. Inferences from what happened on other land are a rather risky ground to fix damages upon. No one can be very certain as to even the existence of damage at all. The defendant was asked about his probable expenditure on the land he did put in crop and did not appear to be able to give any definite idea as to whether he made much of a profit or not. While, therefore, I do not say that there might not be cases where such damages could be given, I would, in the present case, direct a reference to ascertain merely the difference in the value of the whole 640 acres with 150 acres under cultivation, that is, I assume, with the original sod or turf broken, and its value if there had been 200 acres broken and the defendant should have judgment on his counterclaim for the amount of this difference.

The appellant should have his costs of the appeal but in view of the fact that the plaintiff was clearly entitled to sue for a very large sum of money and the defendant actually defended in toto, I think there should be no costs of the action or the counterclaim.

Beck, J., (dissenting in part):—I think that in view of the circumstances of knowledge on the part of the purchaser of the actual existence of the railway line on the property, the registration of the caveat at the instance of the railway company, the notation on the listing of the exception of the acreage taken by the railway, the word "reservations" ought to be taken in a non-technical sense and as wide enough in its significance to mean that the railway right of way was excluded from the sale.

As to compensation in respect of the shortage of 50 acres of cultivated land I concur with my brother Stuart but would have preferred that the referee were not so restricted as he is in the matters open for consideration in fixing the amount of the compensation.

Appeal allowed.

THE KING v. WESTERN CANADA LIQUOR CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 9, 1921.

Constitutional Law (§II.B—369a)—Prohibition Act B.C.—Amendment Prohibiting Taking Orders or Advertising—Validity of.

Sections 52a of the British Columbia Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, as amended by 9 Geo. V. 1919, ch. 69, and which prohibits taking orders or canvassing for liquor orders,

B.C.
C.A.
THE KING v. WESTERN CANADA LIQUOR CO.

and sec. 52b, which prohibits advertising of any description referring to intoxicating liquor, are intra vires the Provincial Legislature.

[Rex v. Shaw (1917), 29 Can. Cr. Cas. 130; Gold Seal Ltd. v. Dominion Express Co. (1917), 37 D.L.R. 769; Hudson Bay v. Heffernan (1917), 39 D.L.R. 39, referred to; Citizens Ins. Co. v. Parsons (1881), 7 App. Cas. 96; Att'y-Gen'l. of Canada v. Att'y-Gen'l of Alberta, 26 D.L.R. 288, [1916] 1 A.C. 588; Att'y-Gen'l of Manitoba v. Manitoba License Holders' Assn., [1902] A.C. 73; Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348, applied.]

APPEAL by the Crown from a judgment of Gregory, J. who upon case stated quashed two convictions by a Police Magistrate under secs. 52a and 52b of the Prohibition Act. Reversed.

H. S. Tobin, and W. M. McKay, for appellant.

E. P. Davis, K.C., for accused.

Macdonald, C.J.A. (dissenting), would dismiss the appeal.

Martin, J. A. would allow the appeal.

Galliher, J. A.:—This is an appeal from Gregory, J., who upon case stated quashed two convictions made by Police Magistrate Shaw of the city of Vancouver, against the respondents. The Crown is appealing.

The convictions were under secs. 52a and 52b of the Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49, as amended by ch. 69 of 9 Geo. V. 1919. These amendments are as follows:

"52a. No person shall cavass for, receive, take, or solicit orders for the purchase or sale of any liquor, or act as agent for the purchase or sale of liquor.

"52a. No person shall canvass for, receive, take, or soladvertisement, sign, circular, letter, poster, handbill, card, or price-list naming, representing, describing, or referring to any liquor or to the quality or quantities thereof, or giving the name or address of any person manufacturing or dealing in liquors, or stating where liquor may be obtained; but nothing in this section contained shall apply to the receipt or transmission of a telegram or letter by any telegraph agent or operator or post-office employee in the ordinary course of his employment as such agent, operator, or employee."

Prior to the passing of these amendments it is not contended that any offence would have been committed and it seems to me none could have been, in view of the provisions of sec. 57 of the main Act. It is the exceptions in that section which are directly affected by the amendments. The effect of these amendments is that while you are permitted

to purchase direct from a source outside the Province you cannot do so by agent.

I do not think it can be doubted that the aim of the Legislature was to prohibit transactions by an agent and the real question to be decided is—Are these amendments intra vires of the Provincial Legislature?

Among the cases cited to us are:—Rex v. Shaw (1917), 29 Can. Cr. Cas. 130, 28 Man. L.R. 325 (a Manitoba case); Gold Seal Ltd. v. Dominion Express Co. (1917), 37 D.L.R. 769 (an Alberta case); Hudson Bay Co. v. Heffernan, (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322. (a Saskatchewan case); and Graham & Strang v. Dominion Express Co. (1920), 55 D.L.R. 39, 48 O.L.R. 83, (an Ontario case).

With the decision in the Alberta case by Ives, J. I have no quarrel—that was decided under a section similar to our sec. 57, as it stood before the amendments of 1919, and it is the effect of these amendments which we have to consider.

In the Saskatchewan case it was unanimously held by the Full Court (Haultain, C.J.S., Newlands, Lamont, Brown and Mackay, JJ.A.) that an act of that Legislature which declared it illegal for any person to expose or keep liquor in Saskatchewan for export to other Provinces or to foreign countries was ultra vires of the Legislature as an interference with trade and commerce.

The Act there was intituled "An Act to prevent Sales of Liquor for Export."

Had our Act been to absolutely prohibit the purchase of liquor from outside Provinces, this case would have been in point, but we have still to consider whether the amendments to our Act are of such a nature as to constitute the interference to trade and commerce which would render the Act ultra vires, and for this we will have to turn to the Privy Council decisions which were cited to us and to which I will refer later.

The Ontario case does not assist us much.

The Manitoba case is not altogether satisfactory. They have a section in the Manitoba Temperance Act (sec. 119), 6 Geo. V. 1916, ch. 112, in all respects similar to our sec. 57, except that we have a sub-section 2 to 57 not to be found in the Manitoba Act but I do not see that that subsection affects the real question to be decided in this case.

B.C.

C.A.

THE KING v. WESTERN CANADA LIQUOR CO.

By sec. 1 of 7 Geo. V. 1917 (Man.) ch. 50 the following was enacted:—

(1) "No person shall within the Province of Manitoba, by himself, his clerk, servant or agent, directly or indirectly, or upon or by any pretence, or upon or by any device or subterfuge whatsoever, canvass for or solicit or take or receive or hold out himself as an agent or intermediary for taking or receiving from any person within the Province of Manitoba any order or instruction for the purchasing or supplying of liquor for beverage purposes within this Province."

The prosecution was had under this section.

Haggart, J.A. pointed out in his dissenting judgment that this Act was an independent statute and was not expressed to be an amendment of the Manitoba Temperance Act, but the Court of Appeal (Howell, C.J.M., Perdue, Cameron and Fullerton, JJ.A., Haggart, J.A.(dissenting) held the Act to be intra vires of the Provincial Legislature.

When I say this decision is not altogether satisfactory, I mean in the sense in which it may be applied to the circumstances of this case. Perdue, J.A., and Cameron, J.A., seem to have thought that the legislation there in question must be taken to intend only to apply to transactions having their beginning and end within the Province and such they considered the transaction in question. Perdue, J.A., 29 Can. Cr. Cas. 130, at p. 132, says:—

"If the authorities charged with the enforcement of the aforesaid chapter 50, should attempt to apply its provisions so as to obstruct or prohibit a transaction in liquor beyond the legislative jurisdiction of the Province or infringe upon the rights of persons outside the Province, it might then become necessary for the Court, on the matter being properly brought before it, to examine and ascertain the intention of the Act and its application to the transaction then in question. It might in such a case be necessary to consider the constitutional validity of parts of the Act. Such considerations do not in my opinion, arise in the present case."

Haggart, J.A., dissented and Howell, C.J.M., agreed with the majority of the Court but gave no reasons. Fullerton, J.A. dealt with the constitutional aspect of the case but decided only in so far as it affected residents of the Province of Manitoba.

At p. 141 the Judge sums up in these words:—

"In my opinion the Act in question, to the extent at least of prohibiting residents of the Province taking orders for the purchasing or supply of liquor for beverage purposes within the Province, is intra vires of the Legislature of Manitoba."

The net result of the cases I have just been discussing, seems to me to afford us little assistance in grappling with the circumstances of the case before us. We will assume, and there is no contention to the contrary, that as the British Columbia Act stood before the amendment of 1919, no offence would have been committed and that sec. 57 as it then stood was intra vires of the Province. Then are these amendments which create an offence ultra vires? They made it an offence to canvass, solicit or act as agent for the sale or purchase of liquor or to publish, distribute or display signs, circulars, advertisements, etc., referring to liquor or where it may be obtained or giving addresses of persons engaged in manufacturing or dealing in liquors, etc.

In substance as affecting this case under 52a, no person can act as agent in procuring liquor for you from a point either within or without the Province, but it is still open to you personally to purchase from outside by means of the telegraph or letter by post under the reservations in clause 52b.

If this is an interference affecting civil rights only within sub-sec. 13 of sec. 92 of the B.N.A. Act, the Legislature has power but to the extent which it applies to the rights of parties outside the Province (and that is involved here), I think we have to determine whether it falls within sub-sec. 16 "matters of a merely local or private nature in the Province;" or can it be said to be an interference with trade and commerce so as to be wholly within the Dominion jurisdiction?

Our guide in this must be the decisions of the Privy Council. In that connection the following cases were cited:-

Citizens Insurance Co. of Canada v. Parsons (1881), 7 App. Cas. 96; Att'y-Gen'l of Canada v. Att'y-Gen'l of Alberta, 26 D.L.R. 288, [1916] 1 A.C. 588, 25 Que. K.B. 187; Att'y-Gen'l of Manitoba v. Manitoba License-Holders' Ass'n, [1902] A.C. 73, and Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348.

In reading these authorities it seems difficult to know just where to draw the line and each case must largely be determined on its own facts, but this much can, I think, be deduced—that if upon looking at the whole Act and consid-

Sask.

K.B.

MOSIMAN v. CARVETH.

ering the purpose and intent as indicated by the language used, it can be concluded that although to some extent it may trench upon the provision as to trade and commerce, yet, if its true effect is a dealing with matters of a merely local or private nature, it is within the jurisdiction of the Province to pass. The amendments here do not prevent the purchase by a person in British Columbia of liquor from a firm outside the Province for private consumption, but you are obliged to act direct—no agent can act for you. In other words, you are not prohibited from procuring the liquor but the method of procuring it is curtailed.

It is true the cutting down of the facilities of procuring may lessen the sales of the outside dealers, but looking at the whole intent and purpose of the Act it is not such an interference with trade and commerce as would deprive the Province of jurisdiction.

Mr. Davis raised the point that the mere taking of the order and the forwarding it with the necessary money would not constitute the offence arrived at, as the order might not be filled. The words are:—"No person shall.... receive orders for the purchase or sale of any liquor or act as agent for the purchase or sale of liquor."

I think the offence is committed if the order is never filled.

I would allow the appeal and restore the convictions.

McPhillips, J.A. would allow the appeal.

Eberts, J. A. (dissenting) would dismiss the appeal.

Appeal allowed.

MOSIMAN v. CARVETH.

Saskatchewan King's Bench, Taylor, J. May 21, 1921.

Vendor and Purchaser (§I.E—25)—Agreement for Sale of Land—Limitations on Right to Resell—Conditions Not Complied With—Right to Require Payment from Sub-purchaser—Rescission for Want of Title.

When a purchaser of land under an agreement resells the land, the sub-purchaser agreeing to assume the payments under the original agreement, as part payment, the purchaser agreeing to furnish the sub-purchaser with duplicate originals of the agreements to him, the inference is that he undertakes to establish title to the lands by means of these agreements, and where these documents disclose a limitation on the right to sell, which is a valid and effective limitation, such as requiring the consent of the vendor to any assignment or resale, such condition must be complied with before he can require payment from the sub-purchaser.

A person claiming rescission of an agreement for the purchase of land on the ground of misrepresentation must be in a position

to make restitution, and this obligation may excuse the purchaser from immediately going out of possession when great damage may ensue if the land is not cropped and cultivated.

[Smith v. Crawford (1918), 40 D.L.R. 224, followed; McKillop & Benjafield v. Alexander (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551; Atlantic Realty Co. v. Jackson (1913), 14 D.L.R. 552, 18 B.C.R. 657; Re Green (1912), 9 D.L.R. 301, 6 S.L.R. 6, referred to.

See Annotations, Sale by vendor without title, 3 D.L.R. 795; Purchaser's right to return of purchase-money, 14 D.L.R. 351.]

VENDOR'S action against a purchaser upon an agreement for sale, and also for rent and accounting under a lease. Action dismissed.

G. T. Killam, for plaintiffs.

P. E. MacKenzie, K.C. for defendant.

Taylor J:— By an agreement dated December 31, 1918, the plaintiffs agreed to sell and the defendant agreed to purchase sect. 27-33-23, west of the 2nd meridian, in Saskatchewan, for $25,994.00. $5000 was paid in cash. The purchaser was to pay a further $6000 by assuming a balance due to Mike Rowan and Margaret Rowan upon the north half under the plaintiffs' agreement to purchase from them made on March 1, 1918; a further sum of $4000 by assuming and paying a balance due to one Shantz against the south half under the plaintiffs' agreement to purchase this half from Shantz under an agreement dated February 25, 1911, and the balance of the purchase money was to be paid in instalments of $1000 a year on December 1, in each year, with interest at 6% also payable on the same day.

The lease was made on March 24, 1918, of a near-by quarter-section for a term of 5 years. It contains the usual provisions as to cultivation, and the rental is a full one-third share or portion of the crops of grain, to be delivered at Guernsey, Sask. to the lessor.

The defendant has not made any payments or delivered any crop under any of these agreements or the lease. The Rowan agreement is a cash payment agreement, and it is proved that on account of the defendant's default the plaintiffs paid $1360 to Rowan on February 10, 1920, being $1000 principal due December 1, 1919, and $360 interest due thereunder to Rowans.

The Shantz agreement is a half-crop payment agreement and was made originally with the plaintiff John R. Mosiman. It contains a covenant "that no sale, transfer or pledge of this contract or any interest therein or of all or any of the premises herein described shall be in any manner binding

Sask.

K.B.

MOSIMAN v. CARVETH.

on the vendor unless said vendor shall consent thereto in writing hereon."

An assignment, Ex. "P3", was filed from J. R. Mosiman to himself and William Mosiman, the plaintiffs, to which Shantz is not a party, and there is no endorsement of any consent or any other document shewing a consent by Shantz to this assignment or to the agreement with the defendant.

The Rowan agreement provides that:

"No assignment of this agreement shall be valid unless it be for the entire interest of the purchasers and be approved and countersigned by the vendors or their agent, and no agreement or conditions or relations between the purchasers and assignees, or any other person acquiring title or interest from or through the purchasers, shall preclude the vendors from the right to convey the premises to the purchasers on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder unless the assignment hereof be approved and countersigned as aforesaid." No attempt was made on the trial to shew that the plaintiffs had secured Shantz or Rowans' consent to the agreement with the defendant. The defendant was not furnished with copies of particulars of either the Shantz or the Rowan agreements prior to action brought; although at the time he bought the plaintiffs had undertaken to forward the duplicate originals of these agreements in their possession to him.

The plaintiffs claim the whole of the balance of the purchase price under an acceleration clause contained in the agreement, an accounting for and one-third share of the crop produced on the leased quarter, and, under certain covenants for cultivation and to leave the land in a state ready for next year's crop, damages for failure to perform these covenants. The defendant gave up the leased quarter after the first season and it is not disputed that the plaintiffs accepted his verbal repudiation and themselves went into possession in 1920.

The defence raises the question of title, and as to this I intimated I would order and direct a reference, and this reference would include any question as to whether the plaintiffs had obtained any consents necessary under the Rowan and Shantz agreements prior to action brought, and any question whatsoever relating to the title.

The other defence raised is that the defendant was in-

duced to purchase the land and make the lease by the fraudulent misrepresentations of the plaintiffs; and the defendant counterclaims for damages occasioned by such fraudulent misrepresentations. Counsel for the defendant does not now contend that he can ask for rescission on this ground, but asks to have the damages occasioned to him by the fraudulent misrepresentations assessed, and judgment therefor.

As I intimated at the conclusion of the trial, I am of the opinion and find that the defendant was induced to purchase the section of land described in the agreement of December 31, 1918, and to make the said agreement by fraudulent misrepresentation; that is to say, the representation that the said land was good, level, medium chocolate loam and was all under cultivation. I find that this land could not truly be described as good medium chocolate loam, and the plaintiffs knew that it could not be so described. The soil is not all alike, but most of it, as the plaintiffs knew, is a light sandy loam; it is dark in color but it is a fine sand. The many farmers called as witnesses who resided in the district in which the land is situated all described the land as sandy loam. A medium loam would be one where the clay and the sand would be about equal in the soil; but in the soil on the plaintiff's farm, as the plaintiffs well knew, the sand much predominated, constituting, according to the analysis of the soil, over 70% thereof on an average of the whole farm, whilst as I have said portions were much lighter than others. Soils, according to the farmers and the experts called, are divided into clay loam, loam, and sandy loam. In the clay loam the clay predominates; in loam or medium loam the clay and sand are about equal; in sandy loam there is a preponderance of sand. I am quite satisfied that the plaintiffs knew that the description in the advertisement which they published was a false description, misleading and intended to mislead; and the defendant was induced by such description and by their subsequent representations when he visited the farm to make the agreement to purchase the land at what turns out to be a price much beyond that which would be paid or has ever been paid for any land in the locality.

The plaintiffs say that whilst the defendant was inspecting the farm the plaintiff J. R. Mosiman kicked up a piece of the earth out of the frozen field, handed it to the defendant and said "That is what we advertised as medium

Sask.

K.B.

MOSIMAN v. CARVETH.

chocolate loam." This was not mentioned by either of the plaintiffs on examination for discovery. It appears to me to contradict inferentially the testimony given by both of them on these examinations and I accept the defendant's testimony that the alleged occurrence did not happen.

The statement that the land was all under cultivation is not wholly true. There are a number of sloughs on the land, the existence of which when the snow was on the ground at the time the defendant called on the plaintiffs at their farm would not be observed, and no attempt was made to correct the wrong impression that would be made by the statement that the land was all under cultivation. I do not agree with the contention of counsel for the plaintiff that such a description is true when it appears that the sloughs can be cut for hay.

The result of the misrepresentations was that the defendant was induced to agree to purchase that which he would never have purchased, I am satisfied, at any price, much less at the price which he agreed to pay, and although no representation is shewn to have been made as to the leased quarter, it is clear that he agreed to rent it without any inspection, relying entirely on the plaintiffs and for the reason that he was buying the section. It was separated from the section by an intervening quarter, and the reasonable inference would be that it would be similar to the section, and I think the proper inference is that the representations as to the soil in the section were understood to apply to the leased quarter, and the whole transaction is tainted with the misrepresentations. The leased quarter is also sandy loam, and the crop produced in 1919, it is apparent, did not repay the cost of production.

The defendant took possession early in April 1919. He immediately discovered that he had been deceived, and almost immediately told one of the plaintiffs thereof and complained that he had been defrauded. His position was such that at that time he could hardly have given up possession. He had moved to Guernsey with his stock and implements and made all the necessary preparations for putting in the crop on the purchased farm in 1919, and had leased his own farm in another portion of Saskatchewan. It was at a time when great damage would have been done and a still greater loss incurred had he not gone on and put in the 1919 crop, and had he done nothing further than put in that crop I would have doubted if, acting in that way as a

reasonable man should have done, rescission of the contract would have been refused. A person claiming rescission on the ground of misrepresentation must be in a position to make restitution, and this obligation may well excuse the purchaser from immediately going out of possession when great damage may ensue if the land is not cropped and cultivated.

But apparently the plaintiff [defendant?] was advised in the fall of 1919 that his retention of possession debarred him from claiming rescission, and under advice of counsel remained in possession during the winter of 1919 and in 1920 as well, and is still in possession, and his present counsel intimated that he would not argue that there had not been a ratification and an election to affirm the contract, compelling the defendant to rely on his claim for damages and his right to set off these as against the plaintiffs' claim. That is, so far as he claims rescission for fraud.

The land contains a little less than 640 acres, and the agreed price was $41 an acre. The evidence satisfies me that at the time of purchase the selling value would not exceed $30 an acre, including the buildings. The Rowan half had been purchased in the spring of 1918, without the buildings, at about $22 an acre. The other half is better land. The selling value, therefore, would be $19,020.

In fixing the selling value at the above figure, $19,020, I am considering also the terms on which the land was sold. If put on a cash basis, (if it can be considered that land of this quality can be sold for cash,) this figure would be considerably reduced. The above conclusions and findings of fact were made and extended shortly after the trial of the action whilst the evidence was then more fixed in my mind, and I intimated that I would withhold the delivery of judgment until the completion of the reference to the Local Registrar on the question of title. For some reason this has been much delayed and was not completed until May 6, 1921, although the trial was completed in December last.

In his report the Local Registrar finds that the title to the south half of the above land stands registered in Samuel E. Shantz clear of encumbrances; that the plaintiffs are in a position to make title thereto under an agreement for the purchase thereof dated February 25, 1911, from Shantz.

The title to the north half stands in the name of Michael

Sask.

K.B.

MOSIMAN v. CARVETH.

Rowan and Margaret Rowan clear of encumbrances; that the plaintiffs are in a position to make title to this half under agreement of purchase dated March 21, 1918, between Michael and Margaret Rowan as vendors, and the plaintiffs as purchasers. These are the agreements to which I have previously referred, containing the covenants limiting the right of resale.

The Local Registrar finds as to the south half (the Shantz half) that the sale of that half was consented to in writing by the said Samuel E. Shantz under date of February 18, 1921; and as to the north half, (the Rowan half) the sale of that half-section was consented to in writing by Michael Rowan and Margaret Rowan, by writing dated December 23, 1920. A note is also made of the objection made by counsel for the defendant that these written consents were of a date subsequent to the date of the trial.

I have already quoted the provisos of the agreements requiring the vendors' consent to assignment or resale. The Shantz agreement requires the consent to be endorsed on the agreement itself; the proviso being that no sale, etc., "shall be in any manner binding on the vendor unless such vendor shall consent thereto in writing hereon." Under the Rowans' agreement the assignment has to be approved and countersigned by the vendors.

It does not appear from the Local Registrar's report that the consent in the Shantz agreement was endorsed in accordance with the proviso of that agreement, or that the Rowans have approved and countersigned the agreement made between the plaintiffs and defendant in this action. An examination of the duplicate filed shews no such endorsations. The consents obtained and referred to in the certificate are both subsequent to the trial, subsequent even to the date upon which the reference was directed, and long subsequent to action brought.

I have already found that at the time the agreement was made between the plaintiffs and defendant the defendant was not furnished with copies or particulars of the plaintiffs' agreements, and that the plaintiffs had undertaken to forward duplicate originals of these agreements to him. Under these circumstances, in my opinion, on this ground alone, the plaintiffs action was premature, and could not be maintained. The inference I would draw from the plaintiffs' undertaking to forward the duplicate originals of the Shantz and Rowan agreements to the defendant is

that they were in that way undertaking to establish title to the lands in question, and their right to sell. The production of these documents discloses a limitation in each agreement on the right to sell; a limitation which has been held to be a valid and effective limitation. Atlantic Realty Co. v. Jackson (1913), 14 D.L.R. 552, 18 B.C.R. 657, following McKillop & Benjafield v. Alexander (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551.

These consents in the terms of the agreements are in my opinion, necessary before the plaintiffs can require payment from the purchaser. I need only refer to Landes v. Kusch, (1915), 24 D.L.R. 136, 8 S.L.R. 32.

The consents produced now, so far as the Local Registrar's report goes, would not appear to go as far as is required by the provisos in the two agreements. Each vendor in these two agreements has, for the purpose of avoiding any issue being raised as to that to which he is actually consenting, provided for the manner of his assent; in the one case that the consent is to be made on the agreement, and in the other case that the assignment or sale be approved and countersigned by the vendors or their agent. No person should be asked to accept less than is required in these provisos, for the reason that these vendors are not parties to this action. The purchaser is entitled to a marketable title (save as may be limited in his agreement of purchase); and the consents reported by the Local Registrar leave the defendant still to meet a possible outstanding issue with the plaintiffs' vendors. Duff, J., in McKillop & Benjafield v. Alexander, (supra), (in the language quoted with approval in the Appellate Court in British Columbia in Atlantic Realty Co. v. Jackson, supra) pointed out the very different position of a purchaser under an agreement where resale or assignment is restricted from that in an open agreement. The practical effect of the restriction is to prohibit the creation by the purchaser of equitable claims on the part of the sub-purchaser until privity between the original vendor and the sub-purchaser is established, and it would seem to follow that the original vendor may impose terms and conditions for and upon his assent. In an open agreement the right of the purchaser to resell in whole or in part, and to create "sub-equities," is absolute, and the element of an express agreement between the original vendor and the sub-purchaser is lacking. In the British Columbia decision to which I have referred it was held that an

Sask.

K.B.

MOSIMAN v. CARVETH.

agreement for sale between the purchaser and sub-purchaser did not confer on the sub-purchaser such an interest in the land as entitled the sub-purchaser to maintain a caveat filed thereon. This decision and other subsequent cases have adopted the view that an assignee or sub-purchaser who has not obtained the requisite approval has not acquired any right which he could compel the registered owner to recognise, and, therefore, he never had a right which in any lawyerly use of the words could be described as an interest in the land. The decision of Brown, J., in Re Green (1912), 9 D.L.R. 301, 6 S.L.R. 6, is to the same effect.

The plaintiffs' agreement is to sell the land to the defendant, and in the agreement he agreed to assume as part payment therefor the plaintiffs' liability to the Rowans and Shantz. Without the requisite approval of those vendors the plaintiffs' agreement lacked force to confer on the defendant an interest in the land, and the plaintiffs were debarred from conferring upon the defendant a right to compel the original vendors to accept from him payment of the liability which he had agreed to assume. The plaintiffs had neither a legal nor an equitable right to require the original vendors to assent to the resale, and it might well be argued that under such circumstances the Court should not compel a purchaser to complete. (Fry on Specific Performance, 5th ed. at p. 431.) It is unnecessary for me to consider that phase of the question.

Here, as in Smith v. Crawford No. 2, (1918), 40 D.L.R. 224, 11 S.L.R. 170, there is a plea setting up a want of title, and in the opinion of Lamont, J.A., in delivering the majority judgment, at pp. 226, 227 this allegation is in itself a repudiation of the contract; is express notice that the defendant considered the contract at an end, and it was therefore incumbent upon the plaintiffs to shew that they had a title, or were in a position to compel title to themselves at the time the defendant repudiated the contract. This decision may be open to reconsideration in the Court of Appeal, but it is binding on me. I do not think that the defendant has precluded himself from taking advantage of the defect in the plaintiffs' title. Possession was taken under a special term of the agreement, and under the promise of the plaintiffs to furnish their agreements to him, a promise never implemented; and it appeared that production thereof was obtained by the defendant only through the procedure of the Court after action brought, and the

attitude of the plaintiffs and their counsel, no doubt upon instructions, throughout the action, was that upon the reference title could be shewn. The delay in completing the reference has probably occasioned the sowing of another crop by the defendant. There is not that I can see, however, any evidence of a waiver by the defendant of his rights or his plea to title.

The plaintiffs were not, therefore, when action was launched, entitled to personal judgment against the defendant. This is the remedy which their counsel has specifically elected to claim. After I had intimated my finding of fact on the issue as to fraud I asked plaintiffs' counsel to definitely state what relief he was seeking, whether as the defendant desired to rescind the plaintiffs also desired cancellation. Subsequently counsel stated that he was instructed to ask for personal judgment, from which indefinite language I infer he means to drop his claim to cancellation or to realise from the land. The plaintiffs' action upon the agreement dated December 31, 1918, between the plaintiffs and the defendant, must therefore be dismissed.

As to the action upon the lease, I have already held that the defendant's claim that he was induced to make this lease by the fraud of the plaintiffs is well-founded, and that (from the rather indefinite evidence) the crop produced did not repay the cost of production. The defendant did not make the summer fallow required on this quarter section, but his repudiation of the lease was accepted. It was made on the ground that he had been defrauded, and for these reasons I think the plaintiffs' claim upon the lease fails also.

The plaintiffs having failed to make title the defendant is entitled to judgment for a return of the cash payment of $5000 with interest thereon, which should, I think, be computed with yearly rests at the rate of 6% per annum from December 31, 1918, and an enquiry as to what sum of money ought to be allowed and paid by the plaintiffs to the defendant by way of damages for the plaintiffs' non-performance of the agreement of December 31, 1918, between the parties; and it is referred to the Local Registrar at Saskatoon to make such enquiry and assess the said damages, the defendant to have judgment against the plaintiffs for the amount certified in the report thereon. The defendant is entitled to the costs of action (including the counterclaim) and of the reference. Either party may

Ont.

Cy. Ct.

HARBOUR v. NASH.

apply in Chambers from time to time for directions as he may be advised.

On this disposition of the action the damages which I was prepared to assess for fraud on the basis of the difference in values, as sustained by the defendant, will not in fact be sustained by him; and on the enquiry directed he will be entitled to be compensated for the damage, if any, sustained by taking possession, and allowed for cultivating done as it now turns out for the benefit of the plaintiffs, less any profit made therefrom. The defendant must also deliver up possession to the plaintiffs.

The entry of judgment will be stayed for 30 days, and should an appeal be commenced within that time proceedings on the judgment will be stayed pending the disposition of the appeal.

Judgment accordingly.

HARBOUR v. NASH.

Ontario County Court, County of York, Widdifield, J.
June 10, 1921.

Automobiles (§III.B—180)—Driver of Motor Vehicle—Duty to Look Ahead—Duty to See What is Plainly Visible—Negligence.

It is the duty of the driver of a motor vehicle to continue on the alert for pedestrians and others using the streets, and must anticipate their presence, and this duty implies the duty to see a pedestrian who is in plain view, and failure to do so is negligence on the part of such driver.

[See Annotation, Law of Motor Vehicles, 39 D.L.R. 4].

ACTION for damages for injuries received as a result of being knocked down by the defendant's automobile.

T. H. Lennox, K.C., for plaintiff.

A. R. Hassard, for defendant.

Widdifield, J.:—About 9 o'clock on the evening of September 30, 1920, the plaintiff, Ethel Harbour, left 53 Oxford St. and walked a short distance to Spadina Ave. where she intended to take a Belt Line car. There is no stop at the intersection of Oxford and Spadina, the nearest stop being between Oxford and Nassau streets. When she reached Spadina the plaintiff looked north to see if a car was in sight and none being in sight she proceeded southerly

Editorial Note:—In view of the many automobile cases, where the duty of the driver to keep a proper lookout has come up, this case in which the learned Judge has carefully and thoroughly examined the American decisions, on which for the present the Canadian Courts must rely, should be of value to the profession.

on Spadina Ave., and when she had nearly reached the stopping post she again looked north and then saw a car leaving College St. about one and one-half blocks away. She then started across the highway to board the car and says she had reached a point 8 or 10 feet from the nearest rail of the street railway when without any warning she was knocked down by an automobile.

Spadina avenue is a wide street and it is said that the distance from the curb to the nearest rail is about 30 feet. The night was fairly dark and it was raining. I do not think it was raining as heavily as defendant's witnesses say, and it is not pretended that the rain was sufficient to obscure the vision of the driver of the automobile.

The plaintiff says that before she started across the street she did not notice any automobile coming from the north. The probability is that after she left the curb she went across in a south-easterly direction, the stopping post being south-east.

There is no doubt that it was the defendant's automobile that hit the plaintiff. His story is that he did not see the plaintiff at all, that he did not know he had hit her. He says he felt a slight bump as though the automobile had run over a small piece of wood and it was not until his wife threw up her hands and exclaimed that somebody or something had hit the car he was aware of the collision.

The curtains were on the car on the right hand side and the defendant's wife says that she saw something like a "black shadow" approach the car from the west and then heard a bump against the back of the car.

The defendant says his windshield was up and he had a clear view of the highway ahead of him. He says he was looking straight ahead but his line of vision would take in the breadth of the highway between the railway track and the curb on the right. He says he did not see the plaintiff on the highway and the only suggestion he makes for not seeing her is that she must have come from behind a standing automobile. The excuse is not of much avail when there is no suggestion, much less evidence, that there was any other automobile in the neighbourhood.

I think the law is clear that failure to see a pedestrian on the highway is no excuse where the driver should have seen him if he had been using due care.

The duty to look implied the duty to see what was in plain view unless some reasonable explanation is presented for

Ont.

Cy. Ct.

HARBOUR v. NASH.

failure to do so. The reasonableness of such explanation is clearly a question for the jury. Holderman v. Witmer (1914), 166 Iowa 406. "Where there is nothing to obstruct the vision it is negligence not to see what is clearly visible," Koenig v. Semrau, (1916), 197 Ill. App. 624, at p. 625.

In Kelly v. Schmidt, etc. (1917), 142 La. 91, it is said that the driver of an automobile "will be presumed, in case of accident, to have seen what he should have seen in the performance of his duties."

"It is the duty of one in charge of an automobile, driving upon a public street or highway, to look ahead and see all persons and horses in his line of vision, and in case of accident, he will be conclusively presumed to have seen what he should and could have seen in the proper performance of such duty," McDonald v. Yoder (1909), 80 Kan. 25.

The driver of an automobile must continue on the alert for pedestrians and others using the streets, and must anticipate their presence . . . It has been held that failure to see a pedestrian in the street amounted to negligence. See also Shields v. Fairchild (1912), 130 La. 648.

The plaintiff was walking upon a sidewalk when she came to a barrier. Just opposite the barrier on the edge of the highway, was a dray and she walked out on the highway and was going around the dray when she heard the horn of the defendant's automobile. She stood still against the wheel of the dray thinking the automobile would pass her all right and the hind wheel of the automobile hit her. The only persons in the automobile were the defendant's wife and his chauffeur, neither of whom saw the plaintiff. It was held this warranted a finding of negligence. Gray v. Batchelder (1911), 208 Mass. 441.

Thomas v. Burdick (1917), 100 Atl. 398 is a judgment of the Supreme Court of Rhode Island, and the facts were very similar to these. "The side curtains were on and the only outward view of the defendant was through the windshield in front. The defendant sounded no horn, and it does not appear that he made any effort to ascertain whether any one was approaching him from some angle outside of his restricted vision. The line of the plaintiff's travel was approximately at right angles with that of the defendant and the defendant did not see the plaintiff until the moment of striking her . . . The jury has found a verdict for the plaintiff . . . and we cannot say that such verdict is not supported by the evidence" (p. 399.)

In Booth v. Meagher (1916), 224 Mass. 472, the plaintiff, a woman, was walking from her home to church on a misty rainy evening on her left hand side of the road because the sidewalk was muddy. She crossed the street diagonally to the right hand side but the walk on that side being also muddy, she continued walking on the street for five or six steps, when she was struck from behind by an automobile. It was held that whether the defendant was negligent, in not sooner seeing the plaintiff and in so operating his automobile with reference to the concurrent right of the plaintiff and himself, was for the jury.

The defendant's wife says if she had been looking towards the front she could have seen the plaintiff on the road, and I am utterly at a loss to understand why the defendant did not see her. To say the least, the defendant has not satisfied the onus placed upon him by sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

The plaintiff W. Harbour is entitled to recover:

1½ weeks lost time @ $37	$45.50
Paid Dr. Weston $17, and for lotions....	19.50
	65.00

The plaintiff Ethel Harbour is entitled to recover:

For loss of coat	$15.00
For pain, suffering, etc.	150.00
	165.00

On the evidence of Dr. Weston, I cannot say that her miscarriage was the result of the accident.

There will be judgment accordingly.

THE KETTLE RIVER CO. v. THE CITY OF WINNIPEG.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. May 10, 1921.

Contracts (§IID—145)—To Supply Electrical Energy—Formal Contract—Construction—Notice—Delay in Supplying—Damages.

In the formal contract between a city municipality and a manufacturer, the city agreed to furnish electrical energy for the purpose of the manufacturer's business "for a period of one year beginning on the date when the consumer begins sawing, on which date the consumer will give the city at least ten days' notice, but the city is not bound to supply current hereunder before July 15, 1912." The Court held that the notice called for by the formal contract was not necessarily a notice in writing and what took place between the parties was sufficient to indicate that July 15 was agreed upon as the date upon which the mill would be ready to commence sawing and the power be re-

Man.

C.A.

THE KETTLE RIVER CO. v. THE CITY OF WINNIPEG.

quired and that although the time was extended to July 20, no other notice was necessary. The consumers not having installed the machinery and completed their plant before July 28, they were entitled to damages for breach of contract to supply the electrical energy from that date until the electrical energy was actually supplied.

APPEAL by the defendants, the City of Winnipeg, from the judgment at the trial in an action for breach of contract to supply electrical energy for the development of mechanical power by a fixed date. Affirmed.

J. Preud'homme, for appellant.

F. M. Burbidge, K.C., for respondent.

Perdue, C.J.M., and **Cameron, J.A.**, concur.

Fullerton, J.A.:—This action was brought to recover damages for failure to deliver electrical energy by a certain date.

The plaintiffs had for some years prior to 1912 been manufacturing wood paving blocks at Sandstone, Minnesota and had secured a market for some of their output in Western Canada.

Early in 1912 plaintiff leased a property at Transcona with a view to erecting thereon a plant for the manufacture of wood paving blocks. In April 1912, plaintiff began negotiations with the defendant for a supply of electrical energy which eventuated in the contract sued on herein. The contract is dated June 17, 1912. The relevant part of the contract is art. 1, which reads as follows:—

"Article 1. So long as the Consumer shall faithfully observe the terms and conditions of this agreement, the City will, for the purpose and within the limits herein stated, keep available for use and deliver to the consumer's premises, electrical energy, to the amount of One Hundred and Fifty (150) K.W., to be used solely for the operation of saws, planers, and such equipment as Consumer may hereafter install upon the property leased by him at North Transcona from the Dominion Tar and Chemical Company; which energy the Consumer will receive, take and pay for in accordance with the terms and conditions of this agreement for a period of one (1) year, beginning on the date when the Consumer begins sawing, of which date Consumer will give the City at least ten (10) days notice, but the City is not bound to supply current hereunder before July 15th, 1912."

The plaintiffs in their statement of claim allege that more than ten days before July 15, 1912, they notified the

defendant of their intention to begin operation on July 15 1912, but that defendant failed to supply the said electrical energy until August 22, 1912. The trial Judge found the defendant liable for breach of contract.

The main contention of the defendant on this appeal is that the 10 days' notice required by the contract was never given.

On June 25, 1912, the defendant wrote the following letter to the plaintiff:—

"Winnipeg, Canada, June 25, 1912.

Messrs. Kettle River Co.,
Minneapolis, Minn.

Gentlemen:—

Attention of Mr. Henry B. Ames.

Many thanks for your favour of the 22nd instant enclosing contract for power at North Transcona.

We are making every preparation to carry out our end of the agreement, and in consultation with your Mr. Larkin today, have assured him that power will be delivered at the date specified.

Yours very truly,
City Light & Power Department. R. A. Sara."

Mr. Sara was called by the defendant and on cross-examination the last paragraph of the above quoted letter was read to him and he was asked:—"What date was specified? A. The date specified in our conversation, July 15. Q. And that was the date specified by Mr. Larkin to you? A. Yes. Q. As being the date when the plaintiffs wanted the power delivered at North Transcona? A. Yes."

The letter and the evidence just quoted is a complete answer to the contention of the defendant as to want of notice.

The defendant further contended that the delay in starting operations was not due to the defendant's failure to supply power as the mill itself was not completed and ready for operation before August 22 when the power was turned on.

The trial Judge finds as a fact that the plaintiff's motor arrived only on July 24 and was set up on July 28 and he allows damages only for the delay between July 28 and August 22.

The evidence as to the completion of the plant on July 28 in other respects was conflicting.

Man.

C.A.

THE KETTLE RIVER CO. v. THE CITY OF WINNIPEG.

The plaintiff's witnesses said it was complete and ready to begin work. The defendant called a number of its employees, who gave evidence of a very general and indefinite character as to the condition of the plant. The Judge deals with this evidence and makes the following finding: "I think the evidence of Mr. Larkin and Mr. Harris shews that the construction and finishing work going on in the factory after July 15 was as to parts not essential to the sawing, such as the exhauster and conveyor, and the latter does not appear to have been used at all that year." There is nothing in the evidence which would justify us in interfering with this finding of fact.

Counsel for the defendant did not mention the question of damages in his argument and I therefore assume that he has no quarrel with the amount of damages given by the judgment.

Notice of cross-appeal in respect of damages was filed by the plaintiff, but was only faintly pressed in the argument. I do not think that we should interfere with the judgment of the trial Judge in respect of damages.

I would dismiss the appeal with costs, and the cross-appeal without costs.

Dennistoun, J.A.:—This is an appeal by the defendants, the City of Winnipeg against a judgment of the Court of King's Bench whereby damages were assessed in favour of the plaintiffs in the sum of $2,422 for breach of contract to supply electrical energy for the development of mechanical power by a fixed date.

The plaintiffs are manufacturers of creosoted pavement blocks. On June 17, 1912, they entered into a contract with the defendants for the delivery of a specified amount of electrical energy at their factory in North Transcona at a stated price.

The plaintiffs agreed to take and pay for such electrical energy upon the terms stated in a written contract, "for a period of one year beginning on the date when consumer begins sawing, of which date Consumer will give the City at least ten days notice, but the City is not bound to supply current hereunder before July 15th, 1912."

The saw-mill to which the current was to be supplied was in course of erection when the contract was made. The defendants had at that time no power transmission line from the city of Winnipeg to the town of North Transcona where the mill was situate. They forthwith commenced

the construction of the line but delays occurred while completing it, and as a result the current was not supplied until August 22. The trial Judge finds this to be a default and has allowed damages from July 28, which he fixes as the date when electrical current should have been delivered, until August 22, when it was delivered, being 25 days in all. His computation of damages is not seriously challenged, the appellants being content to rest their case on two principal grounds:—First,—Was the ten day notice called for by the contract given by the plaintiffs to the defendants? Second,—Was the plaintiffs' plant ready for the reception and utilisation of electrical energy on July 28 when the damages began to run according to the judgment appealed from?

The judgment of Prendergast, J., sets forth the correspondence which shews clearly that the urgency of the situation was fully understood by the city authorities both before and after the making of the contract. They knew the plaintiffs had paving contracts with the Cities of Calgary and Moosejaw for the fulfillment of which they required a supply of paving blocks, and that it was of vital importance to the plaintiffs that they should have power to operate their saw-mill at North Transcona where these blocks were made at the earliest possible moment.

Mr. Preud'homme for the City urges that although the correspondence written before the execution of the contract fixed July 15 as the date by which electrical energy was to be delivered, nevertheless the draft contract submitted by the defendants to the plaintiffs was re-written by the latter with numerous alterations which were accepted by the defendants, the result being the substitution of a new contract which must speak for itself, the terms settled by the prior correspondence being eliminated except in so far as they were embodied in the formal contract.

He says further that the formal contract substituted for July 15, a date to be fixed by the giving of ten days' notice indicating when the plaintiffs would be ready to commence work, and demanding the energy required for power purposes, and that such notice was never given.

Giving effect to the contention that the earlier correspondence should be excluded and examining the correspondence after the date of the contract, it appears that on June 18 the defendants wrote the plaintiffs:—

"We have accepted the changes which you suggest as

Man.

C.A.

THE KETTLE RIVER CO. v. THE CITY OF WINNIPEG.

being satisfactory and have executed the contract in duplicate under date June 17th. Although we have had this under advisement for over a week, we assure you that there has been no delay in the construction of the line to reach your factory, and I have written assurance that we will make delivery on July 15th."

On June 25 Mr. Sara, for the defendants, acknowledges receipt of a revised duplicate copy of the contract duly signed by the plaintiffs and adds:—

"We are making every preparation to carry out our end of the agreement and in consultation with your Mr. Larkin today have assured him that power will be delivered at the date specified."

At the trial Mr. Sara was cross-examined in respect to this letter and was asked:—Q. What date was specified? A. The date specified in our conversation, July 15th. Q. And that was the date specified by Mr. Larkin to you? A. Yes.

The notice called for by the formal contract was not necessarily a notice in writing, and what took place between Mr. Sara and Mr. Larkin is sufficient to indicate that July 15 was agreed upon as the date upon which the mill would be ready to commence sawing and the power required. No further or other notice was necessary.

The plaintiffs admit that they extended the time for the delivery of electrical energy from July 15 to July 20. This appears in the plaintiffs' letter of August 6, written by Mr. Armess, their attorney. They state repeatedly that they could have been ready to commence sawing on July 15 but as they realised the defendants were building their transmission line so slowly that it could not be available by that date, the plaintiffs likewise took their time in installing their machinery and completing their plant. One reaches the conclusion without difficulty that July 15, postponed by consent to July 20, was the date fixed by agreement of parties for the delivery of electrical energy under the terms of the contract.

The plaintiffs did not install their motor until July 28, though they say they could have done so earlier if the current had been available. The trial Judge finds that the plaintiffs' motor did not arrive at their mill until July 24 and that it was set up on July 28. He disregards the plaintiffs' contention that they could have been ready on July 20 and that they should be awarded damages from

that date, and his decision to award damages only from the date on which the plaintiffs were actually ready to run their machinery is readily concurred in.

The defendants' second ground of appeal is that the plaintiffs were not ready to operate their mill when the motor was set up on July 28, and several witnesses were called to say that they saw men working at a confused litter of machinery which was scattered about the mill as late as August 6. The trial Judge has disposed of this by his finding and it should not be disturbed. A perusal of the letters written on behalf of the defendants on August 7 and 8 discloses that:—

"Our whole delay has been caused by non-delivery of line materials which have been on order months past. You have had experience yourself in the delivery of your motor which will be some indication of the extreme difficulty in securing delivery from the East. We were prepared to carry out our part of the agreement in specified time, but the material shipments have been tied up on the railroad for from two to five weeks."

There is no suggestion in these letters that the plaintiffs' mill was not ready to operate. The whole burden of the excuses is placed upon the delay by the railways, and there is ample evidence upon which the finding of the trial Judge that the plaintiffs were ready and the defendants were not, can be supported.

I would dismiss the appeal with costs and the cross-appeal without costs.

Appeal dismissed.

THE KING v. LIMERICK; EX PARTE KELLY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D. and Grimmer J. April 22, 1921.

Justice of the Peace (§III.—12)—Illegal Arrest—Magistrate Having Jurisdiction—Jurisdiction of Magistrate to Try Accused Notwithstanding Illegal Arrest.

If an accused is brought before a Magistrate, and the Magistrate has jurisdiction over the person and the offence he may lawfully proceed with the hearing and convict the accused although the arrest may have been illegal.

[The King v. Flavin (1921), 56 D.L.R. 666, followed.]

P. J. Hughes shews cause against an order nisi (granted by Crocket, J.) to quash a conviction under the Intoxicating Liquor Act, 1916.

G. T. Feeney supports order.

N.B.

App. Div.

THE KING v. LIMERICK; EX PARTE KELLY.

Hazen, C.J.:—In view of the judgments in The Queen v. Hughes (1879), 4 Q.B.D. 614 at p. 622, Dixon v. Wells (1890), 25 Q.B.D. 249, and Ex parte Giberson (1898), 4 Can. Cr. Cas. 537, 34 N.B.R. 538, I am of opinion that the rule should be discharged, and the Judge who referred the matter to the Court should be so advised.

Judgment in a case wherein a similar point was raised was given by the Supreme Court of Nova Scotia in January of the present year. It had not been reported at the time this case was argued, and was not then referred to. After discussing the various authorities, The Queen v. Hughes, supra, was followed, and it was decided that although an arrest is illegal, when the person arrested is once before the Magistrate all that is necessary to give the Magistrate jurisdiction is to shew that the crime with which the accused is charged is within the jurisdiction of the Magistrate. [See The King v. Flavin (1921), 56 D.L.R. 666, 35 Can. Cr. Cas. 38, 54 N.S.R. 188.]

This conclusion is the same as was arrived at by Van Wart J. in Ex parte Giberson.

McKeown, C.J.K.B.D., concurs.

Grimmer, J.:—In this case Crocket, J., issued an order for certiorari with a view to quashing a conviction made before the Police Magistrate of Fredericton against the defendant Kelly for violation of the Intoxicating Liquor Act of 1916, 6 Geo. V., (N.B.) ch. 20, and afterwards referred the matter to this Court for advice as to the manner in which he should deal with the application before him.

The information charges that the defendant Kelly did at the city of Fredericton, in the county of York, on December 24, 1920, have intoxicating liquor in his possession elsewhere than in his private dwelling house, he not having a license so to do, contrary to the statute in such case made and provided. This was dated December 27, and the same day the hearing was had in the matter. The return of the Magistrate shews that the informant and the defendant were present in person, the defendant also being represented by counsel. The information was thereupon read to defendant, who pleaded not guilty. The evidence discloses that the information was laid by the chief of police of the City of Fredericton, who was also a sub-inspector under the Intoxicating Liquor Act, and that on the afternoon of December 24, between the hours of 5 and 6 o'clock, he was at the C. N. R. station where there

was a large number of people. He went into the waiting room, and hearing some noise found several persons who appeared to have been drinking, among them Kelly, the defendant. Kelly, when he saw the chief of police, tried to pass by him, when he discovered that he had in his pocket what proved to be a so-called square face bottle of gin. He thereupon asked him where he got the same, whereupon Kelly replied that he got it at the drug store. He was then told by the chief of police that there was no label on the bottle and he would have to go with him and shew him where he got it. They went out of the station together, and when going along the street Kelly stated that he would go to jail before he would tell where he got the bottle. He then struggled with the policeman, attempting to get away, but was finally handcuffed and taken to the police station. The bottle of gin was produced and placed in evidence. The complainant was thereupon cross-examined by counsel for the defendant, and stated that the defendant was arrested for having liquor in his possession elsewhere than in a private dwelling, and that was all the charge there was against him. The defendant's counsel thereupon moved for a dismissal of the complaint on the ground that the Court had no jurisdiction over the person of the defendant, and the officer had no authority to arrest him without a warrant. The Court upon taking time to consider met on December 30, according to adjournment, and delivered the following judgment:—

"I have looked into the cases cited by Mr. Feeney, and while I believe that the arrest and detention of Kelly was not in accordance with the Act, and was therefore illegal, nevertheless, under the authority of The Queen v. Hughes I think the defendant may be properly convicted. He may have and I think he has his remedy for illegal arrest and imprisonment. I do find the defendant guilty of a first offence against the Intoxicating Liquor Act, 1916, and for his said offence I do adjudge that he pay a penalty of $50, and costs, or be imprisoned in the York County jail for a period of three months."

The writ of certiorari was granted upon the following ground. The applicant was arrested illegally and was illegally before the Magistrate, and his counsel objected to the jurisdiction of the Magistrate on the ground that the arrest was illegal (and without warrant) and therefore

N.B.

App. Div.

THE KING v. LIMERICK; EX PARTE KELLY.

the Magistrate had no jurisdiction to hear, determine and convict the applicant.

In my opinion nothing whatever turns upon the question of the legality or illegality of the arrest of the defendant in this case, so far as the conviction is concerned. Section 170 of the Intoxicating Liquor Act, 1916, provides that it shall be the duty of every policeman, constable or local inspector who sees any person in a state of intoxication or apparently under the influence of liquor, or with liquor in his possession which is not labelled under the provisions of sec. 30 of this Act, on any street, lane, etc., or in any railway station or public building, etc., to cause such person to go before a Magistrate, Justice or Justices, any town clerk or before any person authorised to administer oaths in any Court in this Province, and to disclose on oath or affirm whether or not such person had drunk any liquor on that day, and if such person admits to have drunk any liquor on such day to disclose the nature or description of such liquor and where and when and from whom such liquor was obtained by such person, and whether purchased by such person or how otherwise obtained, and if not purchased by such person by whom the said liquor was purchased, if known. Section 171 provides that if any person in a state of intoxication or apparently under the influence of liquor or with liquor in his possession in any of the places above mentioned, is requested by a proper officer to make an affirmation or affidavit as stated, refuses or neglects to go immediately with such proper officer and make affidavit or declaration as aforesaid, it shall be the duty of such named officer to cause such person to be forthwith brought before a Justice, who may on being satisfied that such person is in a state of intoxication or had liquor illegally in his possession as aforesaid, order such person to be arrested and imprisoned until such person make such affidavit or declaration to the satisfaction of the person taking the same, but such imprisonment shall not continue for a longer period than 24 hours from the time of making such arrest.

In this case, so far as appears from the evidence, there can be no doubt that the chief of police and inspector under the Liquor Act found the defendant under circumstances which constituted a violation of the Liquor Act, and it was therefore his duty to cause him to go before a Magistrate or other official to disclose on oath whether he had been

drinking any liquor, and if so the nature of the liquor and when and from whom he obtained it, and if he refused to do this it was then his duty to cause him to be taken forthwith before a Justice, who had power to place him under arrest and imprison him for 24 hours. This, however, from the evidence does not appear to have been done, and while it was argued before us on the hearing that the arrest was illegal because the defendant had been taken without any warrant, there is nothing in the evidence to disclose this further than what the chief of police says, that he arrested the man for having liquor in his possession elsewhere than in a private dwelling. But whether or not the arrest as I have said was legal or illegal, in my opinion is of no importance so far as the conviction is concerned. Under decisions of our own Court which follow well known principles of law which have been laid down in very many cases, I am of the opinion that the defendant being before the Magistrate under the information which was laid against him, the Magistrate had jurisdiction over the person and the offence stated, and therefore had proper jurisdiction to make the conviction. One of the latest cases to this effect in the case of Ex parte Giberson (1898), 4 Can. Cr. Cas. 537, 34 N.B.R. 538, in which the headnote states that — "The fact that the defendant was arrested and brought before the magistrate, who made the conviction, by a constable who was not qualified as required by Con. Stat., c. 99, s. 69, is no ground for a certiorari under the Liquor License Act, 1896. The improper arrest does not go to the jurisdiction of the convicting magistrate."

The judgment of five Judges of the Appeal Court was delivered by VanWart, J., who among other things said as follows, as pp. 538, 539, (4 Can. Cr. Cas.):—It matters not by what means the defendant is brought before the magistrate. If in fact he is present, and the magistrate has jurisdiction over the person and offence, he may lawfully proceed with the hearing. The improper arrest does not go to the jurisdiction of the magistrate. The grounds for the decision in Regina v. Hughes are applicable to this case. I think that the rule should be refused."

This case is directly in point with the present case, and also the case of Ex parte Sonier (1896), 2 Can. Cr. Cas. 121, 34 N.B.R. 84, and the well-known case of The Queen v. Hughes (1879), 4 Q.B.D. 614, at p. 622. In my opinion there is no doubt that in this case the Magistrate had

N.B.

App. Div.

THE KING v. LIMERICK; EX PARTE KELLY.

full and complete jurisdiction over the person and of the offence, and therefore under the decision which I have quoted it matters not how he got before the Court, the Magistrate had jurisdiction. Several cases were cited as against this proposition, and particularly the case of Rex v. Pollard (1917), 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157, which was a judgment of the Appellate Court of the Province of Alberta. There is a very marked distinction, however, between the present case and the Pollard case in that the decision of the Court was based upon the fact that when the hearing of the charge began the defendant's counsel objected that the defendant was not properly before the Magistrate, and protested against the jurisdiction of the Court. In this case nothing of the kind occurred. From the evidence it appears that upon the information being read the defendant without any objection or any protest pleaded to the charge, and I am of opinion that when this is done it is too late for him to get any benefit from any objection which may be urged to either the form of the information or process by which the defendant is before the Court, or the arrest or detention of the defendant. It is certainly clearly laid down in Paley on Convictions that if the defendant appears, any irregularity in the summons or even the want of a summons altogether becomes immaterial, except where a special form of summons is required by the Act, which has not been complied with. In this particular case no special form of summons is required and no special time other than 3 months is provided within which the offence can be charged, and under the authority of Turner, etc. v. The Postmaster General (1864), 10 Cox C. C. 15, 34 L.J. (M. C.) 10, and many other cases of a later date, it is very apparent that if a defendant wishes to get any advantage from any objection or protest that he must take the objection and make his application at the earliest opportunity upon the hearing of the case, and that if he allows the hearing to proceed, and cross-examines the witnesses and takes the chances of getting a decision in his favour, it is too late to raise any objection that there has been any irregularity and so in this case the defendant by his counsel having allowed the hearing to proceed, having cross-examined the witnesses, I am of opinion that it was then too late for him to take any objection that he was irregularly in custody and was improperly before the Court.

In my opinion Crocket, J., should be advised that the conviction should be sustained and the rule nisi for certiorari discharged.

Conviction affirmed.

HAYWOOD v. BURKE.

Prince Edward Island County Court, Stewart, Co. Ct. J. June 21, 1921.

Constitutional Law (§II.B—369a)—Intoxicating Liquor—Provincial Statute—Prohibition of Consumption of Liquor Illegally Possessed—Validity of Section.

The language of sec. 56 of the Prince Edward Island Prohibition Act is plain and distinct, and the penalty which it provides falls upon all persons owning houses or premises who knowingly permit consumption of liquor illegally possessed to take place thereon. It is the consumption of liquor illegally possessed which the section prohibits and penalises, and the section is not ultra vires the Provincial Legislature.

[Russel v. The Queen (1832), 7 App. Cas. 829; Citizens Ins. Co. v. Parsons (1881), 7 App. Cas. 96; Hodge v. The Queen (1883), 9 App. Cas. 117; Att'y Gen'l for Manitoba v. The Manitoba License Holders' Ass'n, [1902] A.C. 73 applied.]

APPEAL from the judgment of a Stipendiary Magistrate dismissing an information preferred against the accused for that he unlawfully did knowingly permit illegal consumption of liquor on premises of which he was then the occupant, contrary to the provisions of the Prohibition Act of Prince Edward Island 1918, ch. 1. Reversed.

W. E. Bentley, K.C., for appellant.

G. S. Inman, K.C., for respondent.

Stewart, Co. Ct. J.:—This is an appeal from the judgment of Kenneth John Martin, Stipendiary Magistrate in and for the City of Charlottetown, dismissing the information of the above-named appellant, preferred against the above-named respondent Charles E. Burke, for that he, the said Charles E. Burke, between March 1, 1921, and May 3, 1921, in the city of Charlottetown, unlawfully did knowingly permit illegal consumption of liquor on the premises of which he was then the occupant, situated on the east side of Great George St., between Grafton and Kent Sts., in the said city, contrary to the provisions of the Prohibition Act. The hearing of the appeal took place on June 1.

It was proved in evidence that the shop occupied by Burke is composed of two apartments—a front and a back one. It was also proved by a witness—Shaw—that on April 25 last, he entered the front shop and while there, he was invited into the back shop, by respondent Burke. On

P.E.I.

Co. Ct.

HAYWOOD v. BURKE.

going in, he found there, another person with Burke, whom he did not know, and whose name he did not learn. This person invited him to have a drink out of a bottle on the table in the room. On taking the drink he found it was rum. The witness Burke and the stranger finished the contents of the bottle, which at the beginning was about full. There was no vendor's label on the bottle, and no evidence was given as to where or when the bottle or its contents, had been purchased or obtained—nor did Burke offer any evidence. On a search of the premises being afterwards made by the appellant, he discovered several bottles, each containing a small portion of rum, concealed in the space between the sheathing and the wall of this back room. He also found a dozen 12 oz. bottles in a cupboard in the same room, with traces of rum therein.

The charge against the respondent is based upon sec. 56 of the Prohibition Act, which reads as follows:—"No person shall knowingly permit illegal consumption of liquor to take place in the house or on the premises of which he is the owner or tenant or occupant."

The Prohibition Act, 8 Geo. V. 1918, (P.E.I.) ch. 1 in effect prohibits the sale of intoxicating liquors within the Province, except for certain specified purposes, such as sacramental, medicinal, or mechanical manufacturing or scientific purposes. Due provision is made for regulating the traffic in the excepted cases.

Section 50 provides that no vendor shall allow any liquor to be consumed or drunk within or upon the licensed premises. All liquor purchased from a vendor must, until actually used, be kept in a bottle or container, on which the vendor's label has been attached.

Section 52 of the Act provides that no person shall keep or have in his possession, any liquor unless such liquor has been purchased from a vendor, in accordance with the provisions of the Act.

Section 53 aims to prevent liquor prescribed by a physician, being consumed or drunk by the patient for whom prescribed, or by any other person, as a beverage.

Section 54 provides that no person shall let or knowingly suffer any other person to use any premises, which he owns or controls, for the illegal storing, sale, keeping for sale, or other unlawful disposition of liquor, and sec. 55 prohibits

the use, by any tenant, of any of his premises for such illegal purposes.

A violation of any of the above provisions is made an offence against the Act, punishable by fine, and in default of payment, imprisonment.

It was contended on behalf of the respondent Burke, (a) That the Prohibition Act being penal, should be strictly construed. (b) There is no definition in the Act of illegal consumption, and the only actionable illegal consumption is the illegal consumption, legislated against in secs. 50 and 53. (c) Secs. 52 to 56, are ultra vires of the Provincial Legislature, as dealing with matters coming under the head of criminal law.

When the words used in an Act are clear and intelligible, they should receive their plain and ordinary meaning.

Maxwell on Statutes, 3rd ed., p. 74, says,—"The words of a statute are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature had in view."

The same author, at pp. 368, 369, dealing with the topic of strict construction, says:—"The rule of strict construction does not indeed . . . allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested for the purpose of withdrawing from the operation of the statute, a case which falls both within its scope and the fair sense of its language. This would be to defeat not to promote the object of the Legislature; to misread the statute and misunderstand its purpose. A Court is not at liberty to put limitations on general words which are not called for by the sense or the objects or the mischiefs of the enactment and no construction is admissible which would sanction an evasion of an Act."

The character and course of temperance legislation in Canada, has been to a great extent evolutionary. While the earlier enactments, such as the license acts, had for their object, the curtailment of the drink traffic and thereby the furtherance of temperance, the Canada Temperance Act and the subsequent Provincial Prohibition Acts, aimed at entirely suppressing that traffic, in so far at least as it permitted the use of liquor as a beverage. The preamble of the Canada Temperance Act 41 Vic. 1878, ch. 16 which is the model of all subsequent Provincial prohibition legislation, states that it is very desirable to promote temperance in the Dominion of Canada. That was sought for,

P.E.I.

Co. Ct.

HAYWOOD v. BURKE.

by rendering illegal, except for certain specified purposes, the sale of intoxicating liquor, in all places in which that Act had been brought into force. The evil which Parliament sought to eradicate, was the vice of intemperance, nurtured and promoted by the immoderate use and consumption of intoxicants. The aim and purpose of all such legislation—both Dominion and Provincial—was the hope and expectation that, thereby "peace would be promoted, morals improved, and drunkenness and disorderly conduct suppressed in the community." The conviction that "drunkenness works a serious injury to the character, health and efficiency of the people," has been the force that influenced legislators to pass into law, Prohibition Acts.

The traffic in liquor, apart however from its consumption by the individual, is manifestly harmless. It is only from its immoderate consumption that the vice of intemperance is begotten.

Sections 52 to 56 inclusive, in the Prohibition Act, seem to me to be merely another forward step and additions to those previously taken to so hedge about and control the possession of intoxicants, as to render it more easy to cut short and destroy the drinking habit.

Counsel contended that inasmuch as the Act gives us no general definition of the words "illegal consumption" the only illegal consumption arrived at by the Act, is that forbidden by secs. 50 and 53. These are specific prohibitions, aimed to control the conduct of vendors and those purchasing liquor from them. The language of sec. 56 is plain and distinct. It does not seem to require definition. Some meaning must be given to it. It seems clear to me, that the penalty which it provides, falls upon all persons owning houses or premises, who knowingly permit consumption of liquor illegally possessed to take place thereon. If the section does not apply to this case, it has no application at all. I am of opinion that apart from the cases provided for in secs. 50 and 53, there can be no illegal consumption of liquor without illegal possession. Consumption of liquor illegally possessed, is the illegal consumption, which sec. 56 prohibits and penalises.

Do secs. 52 and 56 trench upon the exclusive jurisdiction of the Dominion, in respect of criminal law?

The Judicial Committee of the Privy Council attempted in several cases to define the respective Dominion and Provincial jurisdictions in respect to prohibitive legislation.

Their earlier decisions appeared to be somewhat ambiguous, but as the decisions increased in number, the principles determined by them, became more clear and intelligible.

The principle which Russel v. The Queen (1882), 7 App. Cas. 829, and the Citizens Insurance Co. v. Parsons etc. (1881), 7 App. Cas. 96, illustrate is—that subjects which in one aspect and for one purpose fall within sec. 92 may in another aspect and for another purpose fall within sec. 91 of the B.N.A. Act.

Russel v. The Queen, held the Canada Temperance Act to be intra vires of the Dominion, on the ground that it was a law designed for the promotion of public order, safety, and morals, and belonged to the subject of public wrongs rather than to those of civil rights; that it fell within the general authority of Parliament to make laws for the peace, order and good government of Canada. The Act applied to the whole of Canada, and not to any particular Province or part thereof.

Hodge v. The Queen (1883), 9 App. Cas. 117, Att'y Gen'l for Ontario v. Att'y Gen'l for the Dominion, [1896] A.C. 348, Att'y Gen'l of Manitoba v. The Manitoba License Holders' Assn., [1902] A.C. 73, have established the right of the Provinces to entirely prohibit retail transactions and restrict the comsumption of liquor within a Province under Nos. 13 and 16 of sec. 92, which assign to the exclusive jurisdiction of the Province "property and civil rights in the province" and "generally all matters of a merely local or private nature in the province."

Although the earlier cases did not determine under which of the above heads the legislation questioned in those appeals came, the tendency of recent decisions is to attribute it to No. 16, rather than to No. 13. Lord Macnaghten in the Manitoba case, at p. 78 says:—

> "In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province.'"

According to Russel v. The Queen, it is competent for the Dominion Parliament to pass an Act for the prohibition of the liquor traffic, applicable to all parts of the Dominion, and that such an Act falls within the general authority of Parliament to make laws for the peace, order

Alta.

App. Div.

PATTERSON, McKINNON AND BELL v. LANE.

and good government of Canada, which laws have a direct relation to criminal law. But according to Att'y General for Ontario v. Att'y General for the Dominion and the Manitoba Case, it is permissible for a Province to pass a law, for the total abolition of the liquor traffic, within the Province, provided the subject is dealt with as "a matter of a merely local or private nature, in the Province," and the Act itself is not repugnant to any Act of the Parliament of Canada.

Lord Watson, in the Ontario case states as a matter conceded, that the Parliament of Canada could not imperatively enact a prohibitive law, adapted and confined to the requirements of localities within the Province where prohibition was urgently needed, nor would such Parliament have power to pass a prohibitory law for the Province of Ontario. Lord Watson, at p. 362 of the same case said that it would be within the authority of the Provincial Legislature to pass an "Act restricting the right to carry weapons of offence or their sale to young persons within the province."

The principles I have referred to and the language used by the law Lords of the Privy Council, in my opinion, justify me in holding that the sections in question, are not ultra vires of the Provincial Legislature.

I allow the appeal and I find the respondent Burke, guilty of the offence charged, and I fine him the sum of $200, and in default of immediate payment, to imprisonment in the common jail of Queens County, for a period of 3 months, unless the said penalty, and all costs and charges—both in this Court and the Court appealed from—and all costs of the commitment and carrying him to the said jail, be sooner paid.

Appeal allowed.

PATTERSON, McKINNON AND BELL v. LANE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 4, 1921.

Sale (§I.D—20)—Verbal Terms—Letter Placing Order—Construction—Goods of Inferior Quality—Retention by Purchaser—Deduction in Price—Sale of Goods Ordinance—Right to Treat as Warranty Under.

On November 7, 1918, the defendant wrote to one of the plaintiffs a letter the material parts of which are as follows: "Confirming conversation of this day. The following order is placed with you upon the guarantee and representations which you made to me viz. that you would deliver at points which I will name No. 1 Upland Prairie hay, cut green in August in swet

condition, baled, in whatever car lot quantities I require at the rate of seventeen dollars per ton. . . . I reserve the right to reject any cars or car that do not come up to this standard of which I alone shall be judge without incurring any expense in connection with any car or cars rejected by me." Held under the circumstances that there was a contract between the parties the plaintiff binding himself to deliver the hay mentioned in the letter, and that it was not merely an offer to sell on the terms of "sale or return." The fact that the defendant did not exercise his arbitrary right of rejection of the hay, but received and used it, did not debar him from making a claim for defects. The use of the phrase "of which I alone shall be judge" did not deprive the defendant of the right given by sec. 13 of the Sale of Goods Ordinance C.O., 1915, ch. 39 to waive the condition and treat it as a mere warranty.

[See Annotations, Acceptance and retention of goods sold, 43 D.L.R. 165; Representations, Conditions, Warranties, 58 D.L.R. 188.]

APPEAL by plaintiffs from a claim for the balance of an account alleged to be due and owing for goods sold and delivered. Affirmed.

R. A. Smith, for appellant.

A. L. Smith, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J.:—This is an appeal by the plaintiffs from a judgment upon a claim for the balance of an account alleged to be owing to them for goods sold and delivered. The goods in question were a number of car loads of hay.

On November 7, 1918, the defendant wrote the following letter to Bell, one of the plaintiffs.

"Calgary, Canada
November 7th 1918

"W. K. Bell, Esq.

Dear Sir:

Confirming conversation this day.

The following order is placed with you upon the guarantee and representations which you made to me viz that you will deliver at points which I will name No. 1 Upland Prairie hay, cut green in August, in sweet condition, baled, in whatever car lot quantities I require at the rate of seventeen dollars ($17) per ton.

I agree to assist you to get permits free transportation for this hay.

I reserve the right to reject any cars or car which do not come up to this standard of which I alone shall be judge without incurring any expense in connection with any car or cars rejected by me.

I will make payment for each and every car within three

Alta.

App. Div.

PATTERSON, MCKINNON AND BELL v. LANE.

days after cars have been delivered at point of destination.
1 Car to be consigned to George Lane, Steveville, Alberta.
1 Car to George Lane, High River.
10 Cars to George Lane, Cassils, Alberta.
10 Cars to George Lane, Bazzanok, Alta.
These cars must be shipped within thirty days from the date of this letter consigned to me.

(Signed) Geo. Lane."

A stenographic report of the evidence was not available and we have only the notes of the trial Judge before us. These contain little reference to the conversation which occurred between Bell and the defendant when the letter was signed. We have these notes of Bell's evidence "When contract made defdt. knew I was going north to buy hay. Told Lane if he got any hay that was not satisfactory to wire me." Then the letter is referred to as being filed as Ex. 1 and is called "agreement." Everything else in the notes refers entirely to the shipments, the quality of the hay, the complaints, and the payments.

The evidence shewed that the deliveries began on December 18, and were continued through December and January and completed by January 30.

On January 25, 1918, defendant sent plaintiff a cheque for $1500, enclosed in a letter which made a complaint as to the quality of the hay and suggested a conference for settlement.

On February 27, defendant paid plaintiffs another $1500, but refused to pay anything more.

The plaintiffs claimed for 549779 lbs. at $17 a ton, which, after deducting the payment of $3000, left $1673.12.

The defendant pleaded in defence that the hay did not come up to the standard in quality agreed upon and claimed a deduction of $4.10 a ton in price. He claimed also $75 for demurrage on a car and paid into Court with his defence the sum of $334.12, but this was afterwards increased, by a further payment in, to $613.51.

The trial Judge adopted the defendant's view of the matter and gave judgment only for the amount paid in with a consequent direction as to costs.

The main ground upon which the plaintiffs rest their appeal is that there was no contract entered into between Bell and Lane when the letter of November 7, 1918, was signed and delivered to Bell, and that letter was only an order by Lane for hay which plaintiffs could fill or not, as

they pleased, that Bell made no contract to deliver any hay at all, that the different shipments of hay were really only deliveries to the buyer on approval or "on sale or return" within the meaning of R. IV. of sec. 20 of the Sale of Goods Ordinance, C.O., 1915, ch. 39, and that as defendant had kept the shipments beyond a reasonable time without returning them he must be held to have accepted them finally as in fulfillment of his order and could not afterwards object to their quality.

Of course there were shewn no words of the plaintiffs in the terms usual in "sale or return" contracts, or offers of contracts, but the plaintiffs contend that one clause of the defendant's letter has the same effect, namely: the paragraph which reads,—"I reserve the right to reject any cars or car which do not come up to this standard of which I alone shall be judge without incurring any expense in connection with any car or cars rejected by me."

I have examined all the cases cited in Benjamin and Chalmers and some others dealing with the law about contracts on sale or return. A great many of them I found to be cases arising on the question whether the property had ever passed and therefore whether the vendor could sue in detinue either the receiver or his pledgee or whether the goods passed to the receiver's trustee in bankruptcy or not. I found no case where a purchaser to whom the property had admittedly passed ever had directly tried to get damages for defects in quality.

The present case really turns, I think, upon the question of the true meaning of the contract between the parties. The plaintiffs' counsel contended that there never was a contract of sale effected at all until the defendant took delivery of the various car loads of hay, that is, that up to that point the plaintiffs had merely sent the hay to the defendant upon an offer to sell and upon the terms of "sale or return."

It is rather unfortunate that we have not available a more complete account of the conversation between the parties when the letter was signed. But I do not think the plaintiffs' contention that at that time they never, through Bell, agreed to do anything can be sustained. Even Bell himself seems to have spoken of a "contract" for the Judge's note of what he said is "when contract was made." And the letter itself, upon whose words in the paragraph above quoted the plaintiffs rely as being also tantamount to a

Alta.

App. Div.

PATTERSON, MCKINNON AND BELL v. LANE.

notice of "sale or return" on their part states that it confirms their conversation and that the order is placed with them "upon the guarantees and representations which you made to me, viz. that you would deliver &c. No. 1 Upland Prairie hay, cut green in August, in sweet condition, baled in whatever car lot quantities I require at the rate of $17 per ton."

And at the end the car lots required are, I think, specified so that any uncertainty as to the amount which the first paragraph reveals, was thus entirely removed.

There is no suggestion in the notes of evidence before us that the plaintiffs did not "guarantee" to deliver to the defendant the specified quantity and quality of hay. In my opinion, therefore, it is impossible for the plaintiffs to contend that in the conversation in question they never bound themselves by any contract at all. I think they undoubtedly did so and that, therefore, the case is very far removed from the character of a mere voluntary delivery by a prospective vendor to a prospective purchaser "upon approval" or upon "sale or return." They bound themselves to deliver to Lane hay described in the letter.

The plaintiffs' contention is, therefore, reduced in substance to this, that inasmuch as the defendant had by his written order, though accepted by them, reserved to himself what appears on its face to be a purely arbitrary right of rejection for defects in quality, and inasmuch as he failed to exercise this right and to object to the quality and reject at the moment of delivery, but received and used the hay, he must be taken to have then approved of the quality as fulfilling the guarantee and, therefore, could not afterwards make any claim for any defect.

Now sec. 13 of the Sale of Goods Ordinance C.O.N.W.T. 1915, ch. 39, enacts as follows:—

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

I think the real effect of the paragraph in the letter is that it makes it quite clear that if the hay was not of the quality specified the contract could be repudiated, that is, the existence of the specified quality in the goods was to be a condition and not a mere warranty. Lane could entirely reject the hay if it did not possess the specified quality. And but for one phrase in the paragraph there could be no question that under sec. 13 he could waive the condition and treat it as a warranty. That phrase is this "of which I alone shall be judge."

In my opinion the real meaning of that phrase is that "for the purpose of rejection for breach of the condition I shall be the sole judge of the quality." But I see nothing in the words of the paragraph which deprives him of the right given by sec. 13 to waive the condition and treat it as a mere warranty. If Lane had attempted to exercise the right of rejection for breach of the condition and had asserted his right to do so upon his sole judgment there would then perhaps have arisen a question whether he would not have been bound to exercise his agreed judicial function reasonably and not arbitrarily. The plaintiffs in order to maintain their argument are bound to contend that he could have decided arbitrarily and could have rejected the hay even though in fact it fulfilled absolutely the specified condition so that in effect it would be a "sale or return" contract. But I have, to say the least, very grave doubt whether he could ever have properly taken that position, considering the nature and circumstances of the contract. But is seems to me that the point is really immaterial because he never did endeavour, and has indeed not even in his defence to this action endeavoured to set up his arbitrary judgment. He did indeed refuse to pay more than what he paid into Court because of an alleged defect in quality but he ultimately submitted the question to the decision of the Court without suggesting a right to decide it himself.

I think, therefore, that the defendant's failure to exercise the right of rejection merely left him to his warranty and that there is still nothing to prevent him from relying upon that. This is subsequently the ground taken by the trial Judge.

There was also some question raised as to the length of time that elapsed between delivery and examination but the record before us is, I think, too meagre to justify us in venturing to deal with the point. In the absence of any-

B.C.
C.A.
SMITH v. MASON.

thing suggesting the possibility of exposure of the hay to the weather after delivery there would seem to be no ground for any contention of that kind.

The appeal should be dismissed with costs.

Appeal dismissed.

SMITH v. MASON.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 7, 1921.

Landlord and Tenant (§III.C—62) — Liability of Landlord for Dangerous Premises—Invitee of Tenant—Dangerous Premises not Included in Tenant's Lease—Injury to Person Visiting Tenant—Mistaking Passageway—Trap—Liability.

In an action by a husband and wife for damages to the wife resulting from her falling down a basement stairs, Macdonald, C.J.A., and Galliher, J.A., held that as the stairway formed no part of and was in no way connected with the premises she was going to, and was not included in the lease of such premises, the accident being the result of the plaintiff mistaking the passageway to the basement for the passageway to the entrance after dark, she never having visited the premises before, the landlord was not liable, the plaintiff being a trespasser at the time the accident occurred. McPhillips and Martin, JJ.A., held that it was the duty of the owner of the building to keep the premises in a reasonably safe condition, and not to maintain a trap which this passageway was, being within three feet of the sidewalk, and admitting of anyone consequent upon a slight swerve being precipitated to the basement, there being apparently an entrance way on either side, the plaintiff had a right to infer that either passageway was safe.

[See Annotations; Duty to licensees and trespassers, 1 D.L.R. 240; Defective premises—Liability of owner or occupant, 6 D.L.R. 76.]

APPEAL by plaintiffs from a judgment of Morrison, J., dismissing an action for damages received as a result of falling down a basement stairs. Affirmed, the Court being equally divided.

R. M. Macdonald and J. E. Bird, for appellant.

R. Symes, for respondent.

Macdonald, C.J.A.:—The plaintiffs, husband and wife, sue for injuries to the wife resulting from her falling down a basement stairway.

The plaintiffs can succeed, if at all, upon the ground of duty owed by defendant to the plaintiff in respect of the stairway.

The alleged trap consisted of the basement stairway aforesaid, set back 3 ft. from the street line, with a narrow passage from the street line to it. The building is on one of the principal thoroughfares of the city of Vancouver.

At the opposite side of the building from the said passage and stairway is another passage way leading to the door of entrance to the first floor. Between the said passage ways is a plate glass front coming out flush with the street line. The building is a narrow one and the said first floor was, at the time of the injuries complained of, in the occupation of one Mrs. Munroe as tenant of the defendant. The stairway however, and the passageway aforesaid leading thereto was not included in the lease. Mrs. Munroe carried on a laundry business in the premises and the plaintiff, Mrs. Smith, went to the laundry at night after the same had been closed, and mistaking the passage way to the basement for the entrance passage way, fell down the stairs. She says she had never been to the premises before and did not know which of the two passage ways gave entry to the laundry.

It was argued that the maintenance of said stairway so close to the street was a public nuisance and that as the plaintiffs had suffered special damage therefrom they were entitled to redress in this action.

In Hardcastle v. South Yorkshire R. etc., Co. (1859), 4 H. & N. 67, 157 E.R. 761, 28 L.J. (Ex.) 139, Pollock C.B. delivering the judgment of the Court said, at p. 74:—

> "When an excavation is made adjoining to a public way so that a person walking on it might by making a false step or being affected with sudden giddiness, or in the case of a horse or carriage, who might by the sudden starting of the horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different."

This case was followed in Binks v. S. Yorkshire R. and River Dun Co. (1862), 3 B. & S. 244, 122 E.R. 92, 32 L.J. (Q.B.) 26. These cases must be accepted as containing the correct statement of law relating to the matter with which they deal. It is therefore only a question of applying the law as so settled to the facts of the case at Bar. An excavation made within 3 ft. of a country road or pathway might well be a menace to those passing along it; a false step in the dark or sudden giddiness or the bolting of a horse might precipitate the passenger into the excavation,

B.C.

C.A.

SMITH v. MASON.

but such an accident could not in reason be apprehended on a city street in the circumstances in evidence here, where the passenger must deliberately turn from the sidewalk and proceed along a narrow passage, true only 3 ft., before coming upon the stairway. In my opinion it was not a public nuisance and upon that ground at all events, the plaintiffs are barred from success.

On the other branch of the appeal, viz., breach by the defendant of a duty owed by him to the plaintiff, the principle is thus stated in 21 Hals. pp. 515, 516, para. 867: "When the danger from such property does not affect the public the liability of an owner or occupier of the property for damage arising depends upon the relationship between him and the person damnified and the duty existing between them."

Assuming that Mrs. Smith was an invitee of Mrs. Munroe, the defendant's tenant, I think it cannot be said that she bore the same relationship towards the defendant. The lease to Mrs. Munroe did not include the stairway; no invitee of hers had a right to go to the stairway, nor could such a one reach the stairway from Mrs. Munroe's property but only from the public street. If there was any breach of duty on the part of anybody towards Mrs. Smith, it arose out of the fact that she was an invitee of Mrs. Munroe. Her invitation was not to go to the stairway but to go to the laundry which was in no way connected with the stairway, and if she made a mistake and went to the wrong place the liability by the defendant must be founded upon some other circumstance than that she was an invitee of Mrs. Munroe. The defendant had no right to act as invitor to Mrs. Munroe's premises and it is quite certain that he was not the invitor of Mrs. Smith to his own distinct premises, namely, the stairway.

The case is clearly distinguishable from those where the landlord leased offices or apartments to different persons with right to the tenants to use the common hallway which the landlord controlled and was bound to keep in a safe condition. The decision in such cases would be applicable if the laundry had been situated in the basement of the building and the stairway was the means of ingress and egress thereto. I have been unable to discover any case in which the Courts have gone so far as we are asked to go in this case and as I do not think that the principles laid down in such cases as Indermaur v. Dames (1866), L.R.

1 C.P. 274, can be applied to the facts of this case, I am driven to the conclusion that the appeal must fail.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I agree with the Chief Justice.

I have been at considerable pains to search authorities bearing on the responsibility of a landlord for an accident occurring to a customer or person going on business to the premises of his tenant. Of these cases I might mention Miller v. Hancock [1893] 2 Q.B. 177, and Dobson v. Horsley, [1915] 1 K.B. 634, 84 L.J. (K.B.) 399, which refers to Miller v. Hancock supra, and distinguishes it.

On the facts of the case before us, I cannot say that any of the cases I have considered is an authority in plaintiff's favour on the facts of this case, nor have I been able to find any to that effect.

The appeal must be dismissed.

My attention has been drawn to the case of Butts v. Goddard (1887), 4 T.L.R. 193, but as I view it that case is distinguishable on the facts. Here the area down which the plaintiff fell formed no part of and was entirely outside of the premises let, moreover, the invitors in that case were the owners themselves while to make the landlord liable here you must find him liable for something not connected with the leased premises themselves, but for something outside the premises, and by means of which there was no access to the premises — in fact, for a trap placed as affecting the proper entrance. I confess the case gives me considerable difficulty, but I am not satisfied that any of the cases go so far as we are asked to go on the facts of this case.

McPhillips, J.A.:—The appellant Erica Smith met with a very serious accident causing great personal injuries consequent on falling down an unlighted stairway at the entrance to a large apartment building of the respondent the appellant being on the way to the laundry in the building—never having been upon the premises before. It being the evening and dark, the appellant viewing the entrance to the building it appeared to her to afford two ways of entrance —that is to either side of the glassed-in show case—advertising the laundry situate on the street or sidewalk level, and proceeded upon the side which had a staircase within three feet of the street line, i.e., only three feet in from the line of the sidewalk passing the building and the staircase was unlighted at the time and without protection of

B.C.
C.A.
SMITH
v.
MASON.

any kind—no hand rail or rail in front of same to apprise one that there was a stairway at this point. In accordance with the present day method of construction of business premises, the show case or store front is in the centre with entrances upon each side thereof, and it was reasonable for the appellant to assume this. There was evidence that the staircase was lighted at times when a Checker Club met which had rooms in the basement but no meeting of the Club taking place this night, the staircase remained unlighted.

The Judge proceeded upon the ground that the appellant was guilty of contributory negligence and could not succeed. At this Bar the counsel for the respondent stated that he did not rely upon or contend that there was contributory negligence on the part of the appellant, but that he wholly relied upon the point that the appellant was a trespasser and that the respondent owed no duty to her.

The question now is whether upon the facts of the case, it can be said that there is responsibility upon the respondent for this very unfortunate accident resultant in such serious injuries to the appellant. The case is one which in my opinion admits of the application of the principle which was applied in Miller v. Hancock, [1893] 2 Q.B. 177—i.e., that the respondent in the present case knew that the premises would be frequented by persons having business with the laundry admits of no question—the show case called special attention to this business—and the method of construction of the premises was such as to constitute an invitation to enter the premises at either side of the show case and it was the duty of the respondent the owner of the building to his tenants as well as to all persons having business with them to keep the premises within his control, in a reasonably safe condition—and not maintain a trap as it may well be said this staircase was, being within 3 feet of the line of the sidewalk, admitting of anyone consequent upon a slight swerve, being precipitated to the basement below, quite apart from a person doing what would appear to have been a reasonable enough proceeding entering the premises upon the side upon which this concealed trap existed—unlighted and unprotected as it was—which the appellant did. The duty which rested upon the respondent was to keep the premises in a safe condition, and the question is, did he discharge that duty? I would refer to Dobson v. Horsley, [1915] 1 K.B. 634, at p. 639, Buckley

L.J. (now Lord Wrenbury) there referred to the Miller v. Hancock case, and said:—

> "By allowing a stairs to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped by something which he was not bound to anticipate and he suffered injury. That was the basis of the decision in Miller v. Hancock."

Now, was this lady the appellant, in any way called upon to anticipate that there was not a safe way upon the side upon which she attempted to enter the premises? Everything pointed to there being an entrance at either side of the store front or show case—that was the apparent construction of the premises and was the plain intimation and in fact invitation to enter the premises upon the faith that either way was a safe way. It was not a case of obvious danger that the appellant could have seen or anticipated, in fact it was not obvious to her at all—it was a concealed danger, a trap. The respondent may be said to be liable within the principle as laid down in Barnes v. Ward (1850), 9 C.B. 392, 137 E.R. 945, i.e., the staircase here was in its nature a pit close to the highway, and no precaution was taken for the safety of persons lawfully going to the laundry premises, which was the case of the appellant and I would particularly refer to what Maule J., said in Barnes v. Ward, at pp. 420, 421:—

> "With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of Bird v. Holbrook, 4 Bingh. 628, 1 M. & P. 607, the plaintiff was a trespasser, —and indeed a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved of in Lynch v. Nurdin (1 Q.B. 37, 4 P. & D. 677), and also in the case of Jordin v. Crump, in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal,

B.C.

C.A.

SMITH v. MASON.

agreed that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action."

The situation in the present case would appear to me to be one of exposing the appellant to a hidden danger of which the respondent was aware, (it is to be remembered that when the Checker Club met the stairway was lighted). Pritchard v. Peto, [1917] 2 K.B. 173, was a case where it was held that there was no liability but only because the plaintiff was not shewn to have been aware of the decay of the cornice which fell and caused injury. It is instructive however, to refer to what Bailhache J. said at p. 176:—

> "The present case is correctly pleaded as one of negligence and not of nuisance, and, in considering whether the facts support that allegation, one has first to ascertain what duty Mrs. Peto owed to the plaintiff; for unless her duty can properly be stated in terms large enough to cover this case, she can be guilty of no breach of duty towards the plaintiff. I have come to the conclusion that the duty owed to the plaintiff was the same as the duty owed to the plaintiff in Indermaur v. Dames (L.R. 1 C.P. 274, L.R. 2 C.P. 311), and that, stated in terms applicable to this case, Mrs. Peto's duty was to take reasonable care to keep her house in such a state of repair as not to expose the plaintiff to any hidden danger of which she was aware, or ought to have been aware: quite a different duty from that owed by the defendant to the plaintiff in Tarry v. Ashton (1 Q.B.D. 314). Now in order to make Mrs. Peto liable, if I have correctly described her duty, it must be shewn that she was aware, or ought to have been aware, of the decay of the cornice. It is admitted that she was ignorant of it. The plaintiff, if he desired to establish the fact that her ignorance was due to neglect of some reasonable precaution, should have given some evidence to shew what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them. This he made no attempt to do. I am sorry for the plaintiff. He was hurt through no fault of his, and, although he has tried to make two separate defendants liable, he has failed against both. I can only sympathize with him in his injuries and his disappointment."

Also see Maclennan v. Segar, [1917] 2 K.B. 325.

The fact that the staircase was lighted when the downstairs portion of the premises were being used, i.e., when the

Checker Club met, was plain indication that the respondent was aware and knew of the need to light the same, and it can reasonably be said that there should have been a light and if there had been the accident would not have happened. See Baldock v. Westminster City Council (1918), 35 T.L.R. 188, 88 L.J. (K.B.) 502.

Wilson Sons & Co. v. Barry R. Co., 86 L.J. (K.B.) 432, [1917] W.C. & I. Rep. 65, was the case of a workman held not to be an invitee to the defendant's warehouse but at most a licensee and that as there was no concealed danger the defendants were not guilty of any breach of duty towards the workmen, but upon the facts of the present case, the unlighted staircase was a concealed danger. Warrington L.J., at p. 437 said, "I think therefore that the duty of the defendant company under the circumstances of the present case was limited to giving warning of a concealed danger and as no such concealed danger existed, there was no liability at all attaching to them."

Kimber v. Gas Light and Coke Co., [1918] 1 K.B. 439, 34 T.L.R. 260, bears some analogy to the present case. There it was a hole in an upstairs landing which was badly lighted and left unfenced; there it was held that as the defendants' (the owners of the house) workmen knew that the plaintiff was lawfully upon the premises by the licence of the tenant and was going to the landing where the dangerous hole was, it was their duty to warn the plaintiff of the concealed danger and the defendants were held responsible in damages. Here the respondent well knew that customers of the laundry would be going to the premises and would go via the entrance to the building where the shop front or show case advertising the laundry was, and might on making entry upon the premises, fall into the unguarded and unlighted space occupied by the stairs, going into the basement and in view of this it was the duty of the respondent to warn persons of the concealed danger, i.e., the staircase should have had a rail or guard around it or at least the stairway should have been lighted. Pickford, L.J., in his judgment in the Kimber case, said that the learned Judge left these questions to the jury, and their answers were as follows:—(1) Were the defendants negligent in not protecting the hole? No. (2) Were the defendants negligent in not warning the plaintiff? Yes. (3) Was the plaintiff guilty of contributory negligence? No. (4) What were the damages? £275; and that (at pp. 443,

B.C.
C.A.
SMITH
v.
MASON.

444) "No objection was taken to the direction to the jury, except that it was said that the learned judge ought to have asked them whether it was negligent in the plaintiff to go into the house or upstairs at all considering the darkness. I do not think that any case was made as to darkness which required such a question, and I think the summing up can not be attacked. The real point made by the defendants is that as there was no negligence in making the hole and leaving it unfenced, they were under no duty to the plaintiff to warn her of its existence, as they were not occupiers of the house, and did not invite or licence her to enter it, and that therefore, the second finding of the jury cannot be supported. The defendants by their servants were not in occupation of the house, but they had sufficient control of it by the licence or invitation of the owner and tenant to justify them in making a hole in the flooring for the purposes of their work. I do not think that they invited or licensed the plaintiff to come upon the premises, and I attach no importance to the fact that the defendants' workmen opened the door and told the plaintiff which part of the house was to let, except that it informed them that she had come by the licence of the tenant to inspect the premises, and that she was going directly to the landing in which they had made the hole. They, of course, knew the conditions as to the lighting and otherwise which existed on the landing. If they had known that persons were likely to come to the premises for lawful purposes I think they would have been negligent in making and leaving a hole which, under the circumstances, would be a concealed danger to such persons unfenced, and without warning. See per Willes J., in Corby v. Hill, 4 C.B. (N.S.) 556, at p. 567, where the obstruction was in a private, not public road. In this case they had no reason to expect such persons to come, and therefore the making of the hole was found by the jury not to be negligent, nor was the leaving of it unfenced up to a point negligent. But when the workmen let the plaintiff in and knew that she was there lawfully by the licence of the tenant, and was going to the very landing where the dangerous hole was, I think that the same principle applies. They knew that what in the other case would have been anticipated had in fact happened in this, and I think that the same duty then arose towards the plaintiff, and that it was negligence any longer to leave the hole unfenced and without warning. As this was done in the

ordinary course of their duty the defendants were responsible for their actions, and the appeal must be dismissed with costs."

In the present case the respondent cannot be admitted to say that he did not invite or license the appellant to come upon the premises. Plainly the respondent must be held to have done this. It was a matter of necessary implication that the respondent the owner of the building would be under the obligation to keep the premises over which he retained control and in close proximity to the let premises, safe for persons having business with the tenants and failing in this an action against the owner is maintainable. Miller v. Hancock supra.

Lowery v. Walker, [1911] A.C. 10, 27 T.L.R. 83, in an authority which supports the right of the appellant in the present case to recover against the respondent. In that case it was held that the respondent owed a duty to the public crossing the field to give notice of probable danger from the horse, and that as he had failed to give such notice he was liable for the injuries caused to the appellant. In the present case it is idle to contend that the appellant was a trespasser. In the report of the Lowery case as set forth in the Times Law Reports we have this language at p. 84:

"The Lord Chancellor, moving to allow the appeal, said that they ought to consider the actual findings of the County Court Judge. His Honour after delivering judgment made—quite legitimately—a slight alteration of phraseology, and explained not strictly in legal terms the sense in which his words had been employed. He did not find whether there was a right of way or not, and found that there was no express leave. But the effect of the finding was that the plaintiff was there with the permission of the defendant; that the way had been used habitually as a short cut, and that he knew it to be dangerous. In such a case it was not necessary to refine. It might be admitted that the plaintiff was not in the field as of right. But the defendant ought not, without notice of the danger to the public, to have allowed a vicious animal to be in the field. The law was not free from difficulties, but there was no need to enter upon them.

"Lord Halsbury entirely concurred. The County Court Judge had used an ambiguous term—trespasser—but seeing that there might be misapprehension, he explained what he meant. There was no necessity to discuss that

B.C.
C.A.
SMITH
v.
MASON.

question. People who habitually went by this route were entitled to notice of any probable danger. The defendant, however, delined to take any steps, but still acquiesced in the practice which had grown up.

"Lord Atkinson thought that the defendant owed a duty to the public in the matter which he had not discharged.

"Lord Shaw held that the County Court Judge was entitled to explain and correct the language he had used."

In the present case it must be held that the appellant came upon the premises as of right, and the respondent was under an obligation to the appellant to guard or light the premises so that the staircase and the open space could be observed, or give some notice of the danger. Failing this, it was a trap, a concealed danger known to the respondent and maintained by him and unknown to the appellant; it was in no way an obvious danger or capable of being seen by the appellant.

In my opinion, it was the duty of the owner of the building to exercise all reasonable care and skill to make the premises as safe as they could be for all persons doing business with the tenants of the building, and upon the facts the respondent failed in this. He is shewn to have had premises decidedly unsafe, with a concealed danger known to him and unknown to the appellant upon a portion of the premises retained and under his control, and in such close proximity to the way that the appellant was entitled to take in entering upon the premises that the condition of the premises amounted to a trap, a concealed danger, and one not obvious to the appellant or capable of being seen by the appellant or capable of being reasonably avoided.

I have not been able to turn to the report of the case in Baikie v. Corporation of the City of Glasgow, [1919] S.C. (H.L.) 13, but the following appears in Mew's Annual Digest, 1920, at p. 196, as indicative of the extreme nicety of cases that arise and exhibiting the extreme care that must be exercised in determining responsibility:—

"A woman brought an action against a lighting authority for damages for personal injury caused to her by falling on a common stair of a tenement, which, as she alleged, had been left unlighted through the defendants' fault. She averred that, after dark, she was returning to her house, on the second storey of the tenement, and found the stair unlighted; that she proceeded to ascend the stair 'with the greatest caution,' but in the darkness

got too far over to the right hand side of the stair, where, owing to a turn, the steps were narrow and that her foot slipped off a step, and she fell and was injured. The Court of Session dismissed the action on the ground that the pursuer's averments disclosed a case of contributory negligence:—Held, reversing that judgment, that, although the pursuer's averments disclosed facts which would have to be left to the jury as evidence of contributory negligence, they did not conclusively establish such negligence, and cause remitted for trial by jury. Driscoll v. Patrick Burgh Commissioners, (2 Fraser, 368) commented on. Baikie v. Glasgow Corporation, [1919] S.C. (H.L.) 13 H.L. (Sc.)."

In the present case the appellant met with the accident in the reasonable and proper attempt to go to the premises of the laundry, and it is admitted that there was no contributory negligence in anything that she did. Contributory negligence never was contended for in the present case, in fact was disavowed expressly by the counsel for the respondent at this Bar.

I would allow the appeal, and failing an agreement as to what should be the proper measure of damages—there should be a new trial for the purpose of assessing the damages, the appellant to have the costs here and in the Court below.

Appeal dismissed by an equally divided Court.

HEFFER v. CANADIAN PACIFIC R. CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Railways (§II.D—70) — Animals "at Large" — Meaning of — Left Unguarded on Unenclosed Land—Injury by Train—Wilful Act of Owner—Damages.

Animals which are left on unenclosed land without anyone in charge for about an hour, while the persons supposed to be in charge go home, are "at large" through the wilful act of the owner or his agent within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, as amended by sec. 8 of 9-10 Edw. VII., 1910 (Can.), ch. 50, and if during the absence of such person they wander on to the railway track and are injured, the owner is not entitled to recover damages notwithstanding that the animals got upon the railway through a defective fence of the railway company.

[Anderson v. C.N.R. Co. (1918), 43 D.L.R. 255, 23 Can. Ry. Cas. 243, 57 Can. S.C.R. 134; Early v. C.N.R. Co. (1915), 21 D.L.R. 413, 19 Can. Ry. Cas. 316, 8 S.L.R. 27; Clayton v. C.N.R. Co. (1908), 17 Man. L.R. 426, followed, and see annotations 32 D.L.R. 397, 33 D.L.R. 418 and 35 D.L.R. 481.]

Sask.

C.A.

HEFFER v. CANADIAN PACIFIC R. CO.

APPEAL by plaintiff from the judgment at the trial in an action to recover damages for injuries to plaintiff's horses by one of the defendant's trains. Affirmed.

D. Buckles, K.C., for appellant.

L. J. Reycraft, K.C., for respondent.

Haultain, C.J.S.:—This action was brought to recover damages for three horses of the plaintiff's which were killed on the defendant's line of railway. The plaintiff's horses, about 21 in number, were being taken care of by his brother. According to the evidence, the horses were driven into an enclosed field at night and turned out every morning on to unfenced lands adjoining the line of railway. These horses, together with some 250 or 300 other animals, were, during the daytime, in charge of two young girls, daughters of the plaintiff's brother. On the day in question the horses were turned out as usual in the morning and kept together with the rest of the herd until they were watered at a near-by lake. The usual custom, which was followed out that day, was for the girls to leave the herd at about 11 o'clock in the morning and to go back to the house for 2 or 3 hours. Some time in the afternoon the girls went out to the herd, and at about 5 o'clock in the afternoon gathered them together and then left them on unenclosed land about a mile from the line of railway. The girls then went home, and returned to the herd about an hour later and discovered that three of the plaintiff's horses, having wandered away from the herd, had got on to the railway and were killed by a passing train. In my opinion the evidence further shews that the horses got on to the railway through an opening in the defendant's fence, which was broken down. I would also gather from the evidence that the animals were run into at a point on the line of railway east of the railway crossing. There is also some evidence shewing that the plaintiff's horses not infrequently wandered back from the land on which they were being kept across the line of railway to the plaintiff's farm or ranch, where they had usually been kept.

On this evidence I have no hesitation in holding that the plaintiff's horses were at large through the wilful act of the owner or his agent, within the meaning of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, as amended by 10 Ed. VII. 1910 (Can.), ch. 50, sec. 8, the law in force at the time in question.

If I am correct in that conclusion, it follows that the plaintiff is not entitled to recover, notwithstanding the fact

that his animals got upon the railway through a defective fence of the defendant. The rights of the owner of stock and the rights and liabilities of the railway company are exclusively declared by the above cited section of the Railway Act, and it is well established by numerous decisions that the specific provisions of that section cannot be modified or altered by other sections of general application. Thompson v. G.T.R. (1859), 18 U.C.Q.B. 92; Clayton v. C.N. Rly. (1908), 17 Man. L.R. 426; Early v. C.N.R. Co. (1915), 21 D.L.R. 413, 8 S.L.R. 27, 19 Can. Ry. Cas. 316; Anderson v. C.N.R. Co. (1918), 43 D.L.R. 255, 57 Can. S.C.R. 134, 23 Can. Ry. Cas. 243. See also Fraser v. C.N.R. Co. (1918), 43 D.L.R. 562, 23 Can. Ry. Cas. 250, 29 Man. L.R. 221. In my opinion, therefore, the trial Judge was right in dismissing the plaintiff's action, and the appeal should be dismissed with costs.

Lamont, J.A., concurs.

Turgeon, J.A.:—In this case I think the appeal must fail. The plaintiff's horses, together with other horses numbering in all between 150 and 200, and 150 head of cattle, were allowed to roam over unfenced lands of the plaintiff and of other owners through which lands the defendant's railway runs. On May 6, 1919, the day of the accident in question, all these animals were in charge of two young girls, Irene and Emily Heffer. These girls gathered the animals together about 5 or 5.30 o'clock p.m. and left them upon their father's land about one mile from the railway track. About one hour later the girls returned, and found the plaintiff's horses had left the herd and were on the railway, proceeding westward towards the intersection of the railway and a highway. They then heard a train whistle, and saw the horses running ahead of the train towards the highway crossing. Proceeding to this crossing, the girls found that three horses had been struck and were lying at the crossing. Apparently there was no fence or other obstacle between the spot where the animals had been left by the girls and the railway track except the defendant's fence, and this fence was broken at a point about 300 yards from where the horses were killed, the wires being flat upon the ground, leaving an opening wide enough for horses to pass through. The evidence seems to establish that the horses got upon the railway through this opening. Three of these horses were struck by the defendant's train, one being killed out-

Alta.

App. Div.

CANADIAN FAIRBANKS-MORSE CO. v. TEIGHTMEYER.

right, and the other two injured so seriously that they had to be put to death.

It seems to me that this case is governed by the provisions of sec. 294, sub-sec. 4, of the Railway Act, R.S.C. 1906, ch. 37, as amended by sec. 8 of ch. 50 of the Statutes of 1910, which was in force at the time of the accident. Under the law as it stood at that time, the owner of horses "at large," which roamed upon the property of the railway company, was debarred from recovering damages for injuries sustained by his horses if the company could establish that the horses got at large through the negligence, or wilful act or omission, of the owner or of his agent, even although the actual entry of the horses upon the railway track was due to a defective railway fence. The Act was interpreted in this manner in Anderson v. C.N.R., 43 D.L.R. 255; Early v. C.N.R., 21 D.L.R. 413, and Clayton v. C.N.R., 17 Man. L.R. 426.

The evidence of the plaintiff and his witnesses seems to establish very clearly that these horses were at large at the time of the acceident. I think the facts I have recited above will shew this. Whether they were so at large negligently or not it is not necessary to determine, as there is no doubt they were at large through the wilful act of the owner or his agent. In other words, while the mere fact that these horses were at large in the manner indicated might not be accounted as negligence against the plaintiff for other purposes, the fact remains that their being at large was the result of a deliberate act on his part or on the part of his agents, and, consequently, his action against the company must fail.

The appeal should be dismissed with costs.

Appeal dismissed.

THE CANADIAN FAIRBANKS-MORSE CO. v. TEIGHTMEYER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 22, 1921.

Sale (§II.A—29)—Agreement for, of Tractor and Separator—Special Clause as to Warranties—Interpretation of—Sales of Goods Ordinance (Alta.) as to Implied Condition of Fitness.

An agreement for the sale and purchase of a separator and one Fairbanks-Morse 15-30 Rebuilt Gasoline Tractor, contained this clause: "The above terms and conditions and the warranty herein described . . . . contain all the representations, conditions and warranties general, expressed and implied and made to me by the vendor or its agents during the negotiations for sale." The Court held that this clause referred only to representations, conditions and warranties made during the negotiations, this interpretation being the only one that would har-

monise with the preceding one providing for the supplying of new parts . . . . in the event of any of the goods supplied "failing to fulfil the guaranty or warranty hereto appended or any other guaranty or warranty prescribed by law," and that these clauses quite clearly made applicable the implied warranty in sec. 16 of the Sales of Goods Ordinance, Alta. C.O. 1915, ch. 39, that the goods should be reasonably fit for the purpose.

[The Sawyer & Massey Co. v. Ritchie (1910), 43 Can. S.C.R. 614, distinguished. See Annotation, Sale of Goods—Representations, Conditions, Warranties, 58 D.L.R. 188.]

APPEAL by defendant from a judgment of Ives, J., dismissing a counterclaim for damages in an action on a promissory note given as part of the purchase-price of a separator and gasoline tractor. Reversed.

H. P. O. Savary, for appellant.

D. Stuart, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.:—This is an appeal by the defendant from a judgment of Ives, J., at trial dismissing his counterclaim for damages.

The plaintiff sold the defendant a separator and "1 Fairbanks-Morse 15-30 Rebuilt Gasoline Tractor." The action was upon the last note for $1,000 as part of the purchase price. The contest was over the defendant's counterclaim for damages. Shortly after the plaintiff commenced its defence to the counterclaim the trial Judge expressed the view that the defendant should fail, and after argument on his behalf dismissed the counterclaim with costs. The evidence adduced shews that the engine did not give satisfaction and complaints were made, that the plaintiff had work done on it, that in answer to further complaints the defendant was told to make the best of it and the next year the plaintiff would give him a new one, that the next year he was told that the company was engaged in war work and not manufacturing engines, but that it would adjust the matter when the last note fell due.

The engine was found to have on it a plate containing a number, which the plaintiff's manager says is its number, and also describing it as H.P. 25, which everyone seemed to assume meant 25 horse power, but the description in the agreement of sale was "15-30," which the plaintiff's manager states means 15 horse power as a tractor and 30 horse power for driving the separator. He also states that this engine was built in 1910, '11 or '12.

He is asked "At the time that tractor was built, how was it rated by the company as to horse-power?" to which he

Alta.

App. Div.

CANADIAN FAIRBANKS-MORSE CO. v. TEIGHT-MEYER.

answered, "Well, they did not build the 15-30 till 1912, so I should judge it would be rated at that time as a 15-25." His evidence was only given on discovery, and probably lacks much that he might say if examined on behalf of the plaintiff, but the plaintiff's counsel says, what is of course not evidence, that the reason of the engine being described as 15-30 though originally described as a 25 is that competitors were describing their engines with higher ratings and that this engine in fact would when new develop more than 30 horse power.

However that may be, it seems from the manager's evidence without more that some explanation is necessary to rebut the prima facie case that this engine is not a 15-30 horse power.

Then again by sec. 16 of the Sales of Goods Ordinance, Alta. C.O. 1915, ch. 39, it is provided that when the buyer makes known to the seller the purpose for which the goods are required so as to shew that he relies on the seller's judgment and the goods are such as it is the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for the purpose.

If this provision applies, there is evidence which in my opinion calls for an answer on behalf of the plaintiff. It is contended, however, that the provision does not apply.

In Sawyer & Massey Co. v. Ritchie (1910), 43 Can. S.C.R. 614, it was held at p. 615 that a clause in the agreement that "there are no other warranties or guarantees, promises or agreements than those contained herein," excluded all implied warranties, including the condition of fitness.

The agreement in this case contains this clause, "The above terms and conditions and the warranty herein described . . . . contain all the representations, conditions and warranties general, expressed and implied and made to me by the vendor or its agents during the negotiations of sale."

The meaning of this is not very clear, but I would interpret it as referring only to representations, conditions and warranties made during the negotiations. That is the only answer I can see to the natural question, "all what representations, conditions and warranties?" That of course renders the words "implied" and "and" surplusage since implied representations, &c., would not be "made" but arise by implication of law. This, too, is the only interpretation which will harmonise this clause with the preceding one,

which provides for the supplying new parts free of charge in the event of any of the goods supplied "failing to fulfil the guaranty or warranty hereto appended or any other guaranty or warranty prescribed by law." This clause quite clearly makes applicable implied warranties, and if it cannot be reconciled with the following one, it must as against the vendor under its own contract prevail. The case is, therefore, quite distinguishable from the Ritchie case, and in my opinion the section of the Ordinance applies, and the evidence of the defendant must be met.

I would, therefore, allow the appeal with costs and direct a new trial, the costs of the first trial to be costs in the cause.

Appeal allowed.

CANADIAN BANK OF COMMERCE v. ROYAL BANK OF CANADA.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 1, 1921.

Assignment (§III.—32) — Owner of Land — Sale of Part Under Agreement—Assignment of All Existing Debts and Moneys Due —Judgment Creditor—Right of Purchaser to Pay Assignee in Preference to Judgment Creditor.

Where an owner of land makes an agreement for the sale of part of it, and subsequently makes an assignment to a third party of all existing or future indebtedness and liability . . . . and of all debts, accounts and moneys due or accruing due . . . to him, such third party is entitled to receive the payments due under the agreement, in priority to a judgment creditor although the assignment is unregistered.

[See Annotations, Bankruptcy Law in Canada, 53 D.L.R. 135, 59 D.L.R. 1.]

APPEAL by plaintiff from judgment of Macdonald, J., September 23, 1920. Reversed.

E. P. Davis, K.C., for appellant.

Alfred Bull, for respondent.

Macdonald, C.J.A.:—I would allow the appeal.

Martin, J.A. (dissenting), would dismiss the appeal.

Galliher, J.A.:—The first question that presents itself for our consideration is: Is the assignment of the moneys payable under the agreement for sale one that can be dealt with as an interest in land, and in this case subject to the provisions of the Execution Act, R.S.B.C. 1911, ch. 79, sec. 27, and the Land Registry Act, R.S.B.C. 1911, ch. 127, sec. 73?

If I could agree with Mr. Bull's contention, very ably put by him in argument, that this was a transaction affecting lands or an interest in lands, so as to bring it within the

B.C.

C.A.

CANADIAN BANK OF COMMERCE v. ROYAL BANK OF CANADA.

purview of the Registry Act and the Execution Act, the judgment he has obtained would seem to be within the authorities.

The Judge evidently thought it was, but I am, with respect, unable to accede to this view.

Under the decision of a majority of the Court in Bank of Hamilton v. Hartery (1919), 45 D.L.R. 638, 58 Can. S.C.R. 338, affirming a majority decision of this Court (1918), 43 D.L.R. 14, it was held that a subsequent registered judgment has priority over a prior unregistered mortgage.

Mr. Bull then urged that the Canadian Bank of Commerce cannot be in a better position than they would have been had they taken the higher form of security, viz., a mortgage against the lands which remained unregistered. That depends—in the first place the Courts would not have countenanced the giving of a mortgage security by the vendor to the bank after having disposed of the property by agreement for sale, but apart from that, what are the respective rights of the parties to this action?

It seems to me the confusion (if confusion there is) arises by treating this matter as if the original parties were in the same position as if no assignment had been made of the moneys. Had no assignment been made, Bank of Hamilton v. Hartery, supra, would apply.

Now what has been assigned to the plaintiffs? As I view it, merely the moneys due or as they become due from the Peoples' Trust Co. under the agreement for sale—no interest in the land—no security enforceable against the land.

It may be, and I think it is the most that can be said, that the vendor retains the right to withhold a conveyance of the land until the purchase-price is paid to his nominee, but this right he does not retain as a trustee for the assignee, but for his own protection in order that the moneys which he has assigned may be collected and applied in payment of his indebtedness to the Bank of Commerce.

If my analysis of the matter is correct, then the Land Registry Act and the Execution Act and the decision under those Acts have no application.

I would allow the appeal.

McPhillips, J.A.:—This is an appeal from the judgment of Macdonald, J., upon a special case, and has relation to the question of whether or not the appellant should be entitled to the moneys payable in respect of an agreement for the purchase of land, the appellant being the assignee from the

vendor, or whether the respondent should be held to be entitled to the moneys by reason of having or being entitled to enforce a judgment which was obtained by the Northern Crown Bank and duly registered in the Land Registry Office, the respondent being entitled to this judgment in consequence of having acquired the Northern Crown Bank's assets. The vendor, one Walker, being the owner in fee of certain lands in the New Westminster District, entered into an agreement for sale of the lands to the Peoples' Trust Co., Ltd., and the moneys payable under this agreement of sale are the moneys in question. The appellant claims under an assignment from Walker in the words and figures following:

"The undersigned hereby assign and transfer to the Canadian Bank of Commerce, as security for all existing or future indebtedness and liability of the undersigned to the bank, all the debts, accounts and moneys due or accruing due, or that may at any time hereafter be due, to the undersigned by the Peoples' Trust Co., Ltd., and also all contracts, securities, bills, notes and other documents now held or which may be hereafter taken or held by the undersigned, or anyone on behalf of the undersigned, in respect of the said debts, accounts, money or any part thereof.

Dated at New Westminster, B.C., the 30th day of April, 1912.

Walter J. Walker."

This writing was not registered in the Land Registry Office, and it is questionable if it could be registered; in fact, I am of the opinion that it is a writing that would not have been registerable. On the same date, namely, April 30, 1912, Walker executed and delivered to the appellant a further writing in the words and figures following:—

New Westminster, April 30th, 1912.

Messrs. The Peoples' Trust Company, Limited,
City.

Dear Sirs:

Referring to an agreement of sale covering the East half of the South half of Section 18, Block 5 North, Range 1 West, New Westminster District, please make the payments of $15,000 each and interest due and payable on the third days of December, 1912 and 1913, to the Canadian Bank of Commerce, New Westminster.

Yours truly,

(Sgd.) Walter J. Walker."

And likewise this was not registered.

B.C.

C.A.

CANADIAN BANK OF CANADIAN v. ROYAL BANK OF CANADA.

On the same date, viz., April 30, 1912, notice of this last mentioned writing was given to the Peoples' Trust Co., Ltd., and an acknowledgment thereof was given by the Peoples' Trust Co., Ltd., under seal, which acknowledgment is written on the writing itself. It would appear that the Peoples' Trust Co., Ltd., with the assent of Walker, subdivided the lands, and a subdivision plan was duly registered. Anterior to the writings above set forth, the Peoples' Trust Co., Ltd., namely, on February 28, 1911, entered into an agreement of sale with one Potts, of a portion of the land above described for $1,000, upon which there is now due approximately the sum of $300. The judgment recovered by the Northern Crown Bank, of which the respondent is now entitled to the benefit, was for the sum of $20,000, and was registered in the Land Registry Office at New Westminster on January 8, 1917, and was later renewed, and on March 12, 1917, the Northern Crown Bank obtained a judgment against Walker and the Peoples' Trust Co., Ltd., for the amount which should be found to be due to the said Northern Crown Bank by the Peoples' Trust Co., Ltd., upon a reference to the District Registrar of the Supreme Court of British Columbia, and there was found to be due on January 11, 1918, the sum of $58,748.61, the certificate of the Registrar being confirmed by an order of February 1, 1918. This judgment was also registered in the Land Registry Office at New Westminster on February 26, 1918, and re-registered on February 11, 1920.

It would seem that Potts is ready and willing to pay the balance of his purchase-money, and Walker and the Peoples' Trust Co., Ltd., are ready and willing to execute a conveyance of the land to Potts and the parties to the stated case agreed that the moneys which Potts is ready and willing to pay are to be treated as moneys being paid by the Peoples' Trust Co., Ltd., to the said Walker for a conveyance of the land.

It is further apparent that the Peoples' Trust Co., Ltd., have not paid to the appellant the deferred payments to which it is entitled under the assignment from Walker, nor has it paid the moneys to Walker, and the respondent has declined to release the lands from the judgments unless the balance of the purchase-money is paid to it as being the registered owner of a charge or charges against the lands by virtue of the judgments, and the appellant is claiming the money under the assignment to it.

The question that was put to the Court for answer was in the following terms:—

"Is the sum of three hundred ($300) dollars so about to be paid payable to the Canadian Bank of Commerce under and by virtue of the documents referred to in paragraph "2" and "3" hereof, or should the said money be paid to the Royal Bank of Canada, pursuant to its registered judgments against the said Walker?"

Macdonald, J., answered this question by holding that the $300 should be paid by Potts to the respondent to apply on its registered judgment against the defendant Walker, holding that the judgment was of the same effect as a mortgage for that amount. It is from this decision that this appeal is taken, and the respondent relies upon the Bank of Hamilton v. Hartery, 45 D.L.R. 638. In my opinion, however, that case can well be distinguished and cannot be deemed to apply to or be determinative of this appeal. There the sole question was the construing of and the effect of sec. 73 of the Land Registry Act and it was a question of priorities, the mortgage there being registered, and although prior in time registered later than the judgment. The judgment of this Court of Appeal was sustained on appeal to the Supreme Court of Canada, but as I have said, went wholly upon the construction to be put upon sec. 73 of the Land Registry Act which has relation to priorities as between registered charges. Here the appellant has no registered charge but is unquestionably the assignee of the moneys in question and no question arises of priorities under the Land Registry Act. Therefore it must follow that the Bank of Hamilton v. Hartery has no application to this appeal.

Further, if I may be enabled to say so, with respect, I do not think that the Courts ought to be called upon to further extend—unless there be intractable statute law in the way—the subversal of an equitable principle long known to the law, that a judgment creditor can have no better position than his judgment debtor.

I would refer to what Spragge, V-C., said in Harrison v. Armour (1865), 9 Gr. 303 at p. 307; that was the case of a mortgage created by the depositing of title deeds and we find the Vice-Chancellor saying:—

"With regard to the state of the law in respect of instruments incapable of registration, but which create equities to which the court is bound to give effect, it is

B.C.

C.A.

CANADIAN BANK OF COMMERCE v. ROYAL BANK OF CANADA.

a question for the legislature. In this case, as it happens, there is no real hardship, as the party seeking priority is a judgment creditor, who has no equity whatever to be preferred to the plaintiff."

So that according to a parity of reasoning the respondent has no equity whatever to be preferred to the appellant.

Grace v. Kuebler (1917), 39 D.L.R. 39, 56 Can. S.C.R. 1, was a case under the provisions of the Land Titles Act of Alberta, 6 Ed. VII. 1906, ch. 24, where it was held that the payment by a purchaser to his vendor of purchase-moneys without notice of an assignment to the vendor to a third person, was a valid payment. Here we have no question of want of notice of assignment that was complained of in that case. We have Fitzpatrick, C.J., saying in the Grace case, at pp. 39, 40:—

> "Stuart J., prefaces his judgment in the Appellate Division with the observation that 'the practice which seems to have obtained to some extent in this province whereby an owner of land, who has entered into a solemn agreement to convey the land to another upon payment of certain money, deliberately puts it out of his power to fulfil his contract by himself transferring the land to a third party is a reprehensible one.' The qualification does not seem too severe, and it may be added that it is also invalid, unless it be in the case of an innocent purchaser without notice, of which there can be no question here, as the deed of assignment to the appellant sets out the sale already made to the respondents. An owner of the land, who had agreed to sell it, has parted with his ownership and has nothing left but the bare legal title. The transfer of the title here was never effected as the transfer was not registered. The appellant, in my opinion, had only an assignment of the debt, and registration does not enter into the case at all."

Likewise in this case registration does not enter into the case at all, and we have Duff, J., at p. 46 saying:—

> "It is clear, however, that the vendor may assign the benefit of his contractual rights under the contract and the assignee may enforce those rights, assuming the provisions of the law with regard to assignments to be fulfilled, and the assignee to be in a position to require the vendor to carry out his obligations under the contract. It is elementary, however, that as against the assignee claiming under an assignment of the vendor's contractual

rights, the vendee is entitled to deal with the vendor until he has received notice of the assignment. See the observations of Lord Cairns in Shaw v. Foster (1872), L.R. 5 H.L. 321 at p. 339."

In Shaw v. Foster, supra, at p. 333 we have Lord Chelmsford, saying:—

"According to the well-known rule in Equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster; and it was competent to Pooley to assign the benefit of his contract, or to change his equitable interest in the property in favour of another person, and upon notice given to Sir William Foster of such assignment or charge, he would have been bound to protect and give effect to it."

And at p. 338, Lord Cairns said:—

"Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.

My Lords, in that state of things Mr. Pooley, the purchaser, being the real and beneficial owner, I apprehend that there cannot be any doubt of the rights of Mr. Pooley with regard to the property of which he had thus become the beneficial owner. He had a right to devise it; he had a right to alienate it; he had a right to charge it. There are various ways that might be suggested in which, for valuable consideration, he might have created a charge more or less affecting the property. I apprehend that he might have contracted for valuable consideration, with any person to whom he was indebted, that he (Pooley) would complete the purchase, and that when the purchase

B.C.

C.A.

CANADIAN BANK OF COMMERCE v. ROYAL BANK OF CANADA.

was completed and the property assigned to him, he would then make it over to the person to whom he was thus indebted. That would have been one way of dealing with his interest. Another way might have been this—he might have contracted with any person to whom he was indebted that he would pay the purchase-money remaining unpaid, and that then, the purchase-money being thus paid, and the time for the assignment having arrived, he would authorise and require the vendor to assign, not to him, Pooley, but to the person to whom he was indebted. A third and simpler way in which he might have affected his interest would have been to contract with anyone to whom he was indebted to assign to him the contract which he had entered into in whole, making the person to whom he was indebted assignee of the contract. Any one of those modes might, in my opinion, have been resorted to; and the only qualifications to which all or any of them would have been subject are these: first, that by none of these modes could anything have been done by Mr. Pooley derogating from, or impeding, or delaying the rights of the vendor to require the fulfilment of his contract according to its terms; and, secondly, whatever course was taken by Mr. Pooley and any person with whom he contracted to charge his interest, notice of the particulars of that charge, and the mode and form of the charge, would be required to be given to the vendor, in order that the vendor might shape his course according to the notice he had thus received."

Also see per Plumer, M.R. in Wall v. Bright (1820), 1 Jas. & W. 494, 37 E.R. 456; per Lord Westbury in Knox v. Gye (1872), L.R. 5 H.L. 656 at p. 675; per Jessel M.R. in Lysaght v. Edwards (1876), 2 Ch. D. 409 at pp. 509-510; per James L.J. in Rayner v. Preston (1881), 18 Ch. D. 1 at p. 12—and see Lord Parker in Howard v. Miller, 22 D.L.R. 75, at pp. 79, 80, [1915] A.C. 318, 20 B.C.R. at p. 230 and in Central Trust and Safety Deposit Co. v. Snider, 25 D.L.R. 410, at pp. 413-415, [1916] 1 A.C. 266, 35 O.L.R. 246.

In the present case the appellant is in the position of having assigned to it all the moneys due and payable by the Peoples' Trust Co. Ltd. to Walker and all the moneys payable in respect of the agreement between Walker i.e. the Peoples' Trust Co., Ltd. Also see Lord O'Hagan, at pp. 349, 350 (L.R. 5 H.L.).

Torkington v. Magee, [1902] 2 K.B. 427, is a case which is much in point in the present case, and although this case was reversed on appeal, it was reversed upon the facts only: [1903] 1 K.B. 644. Channell, J., in [1902] 2 K.B. discusses the law at some length, and makes it plain what the true principle of equity is. In that case we find the head note reads as follows:—

"The defendant contracted to sell his reversionary interest in property to R., who by deed assigned his interest under the contract to the plaintiff, and notice in writing of the assignment was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract:—

Held, that the assignment was an assignment of a 'legal chose in action' within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for the breach of contract."

It is clear from perusal of this case that the position of the appellant is that of being entitled to all the rights that Walker, its assignor, had, and here there was notice, in fact notice admitted of the assignment, and there is no question whatever of it being possible to make a conveyance. I may say at this Bar I asked that question, and it was stated that no question of inability to make title was called in question. It is pertinent to mention this point, as the Court, in Torkington v. Magee, [1903] 1 K.B. at p. 645, (Vaughan, Williams, Stirling, and Mathew, LL.J.) held that:—

"there is no cause of action against the defendant, inasmuch as neither the plaintiff's assignor, Rayner, nor the plaintiff himself, was ready and willing to carry out the contract in accordance with its terms."

Here, as I have said, no question of that kind arises whatever, the contract will be duly carried out if the moneys be paid to the appellant.

Finally, in my opinion, this appeal must succeed. I see no difficulty whatever in it being determined that the appellant is entitled to the moneys in question. Certainly the appellant is the assignee of the moneys and the case of Bank of Hamilton v. Hartery, supra, is no obstacle in the way of the appellant being entitled to succeed. It is not a case of priorities under the Land Registry Act, and the Land Registry Act has no application to the present case, and without application, the well-known equitable principles

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

must prevail, all of which the appellant is entitled to, that is entitled to all the rights and moneys that its assignee Walker had at the time of the assignment to it of the moneys in question. No question at all arises as to the records in the Land Registry Office, that is as to the judgments being a charge against the lands, all proper rectification can be and ought to be made in that regard in the carrying out of the judgment of this Court; that was clearly pointed out in Howard v. Miller, 22 D.L.R. 75.

I would therefore allow the appeal.

Eberts, J.A., would allow the appeal.

Appeal allowed.

MURDOCH v. THE MINNEAPOLIS THRESHING MACHINE CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Sale (§III.A—57)—Farm Implement Act, R.S.S. 1920, ch. 128—Agreement to Purchase Under—Breach of Warranty—Rejection of Goods—Remedies of Parties.

The purchaser of a motor under an agreement in form "A" of the Farm Implement Act, R.S.S. 1920, ch. 128, who rejects it in accordance with the provisions of the agreement is limited in his remedy to a return of the purchase-money, the freight paid by him and any notes given; he is not entitled to the consequential damages which under an open contract he could recover by reason of the Sales of Goods Act, R.S.S. 1920, ch. 197.

[See Annotation, Representations, Conditions, Warranties, 58 D.L.R. 188.]

APPEAL by plaintiffs from the judgment at the trial in an action to recover the price paid for a farm motor purchased under the Farm Implement Act, contract (Sask.), and for damages, the purchaser having rejected the motor. Affirmed.

C. E. Gregory, K.C., for appellant.

F. L. Bastedo, for respondent.

Haultain, C.J.S. (dissenting):—By an agreement in writing in Form "A" of the Farm Implement Act, R.S.S. 1920, ch. 128, the plaintiffs agreed to buy and the defendant agreed to sell one 15 H.P. farm motor for the price of $1850. The farm motor was duly delivered on June 24, 1918, to the plaintiffs, who thereupon paid $700, the cash payment called for by the agreement, and $47.50 for freight, and gave their note for $1150 for the balance of the purchase money. After a trial of the machinery, the plaintiffs gave the defendant notice that the machinery did not work well,

as provided for in the agreement, and later on, on failure of the defendant to make the machinery perform the work for which it was intended, the plaintiffs rejected the machinery and demanded the return of the moneys paid and the note given, in accordance with the terms of the agreement. The defendant having neglected or refused to comply with this demand, the plaintiffs brought this action for rescission of the agreement and return of the moneys paid and the note given. The plaintiffs also claimed $47 for materials used and wages paid in attempting to make the engine work.

There is a further claim for $9800 damages, as set forth in the following paragraphs of the statement of claim:—

At the time the plaintiffs entered into the said contract the plaintiffs expressly made known to the defendants one of the purposes for which they required the said engine, namely; to cultivate 475 acres of land in the season 1918 for crop in 1919. By reason of the failure of the said engine to perform the work for which it was intended, and by reason of neglect and refusal of the defendants to return to the plaintiffs the moneys and notes given, and the freight paid by them, the plaintiffs were unable to cultivate the said 475 acres of land and have lost the crop thereof for the year 1919, and will lose the crop thereof for the year 1920.

If the plaintiffs had been able to crop the said land in the year 1919, as they intended and as the defendants well knew, they would have realised thereon a profit of at least $10 an acre, which they have lost by reason of the failure of the said engine to work, or by reason of the failure of the defendants to return to the plaintiffs the moneys and notes to which they were entitled, and the plaintiffs will lose a similar amount in the year 1920.

The plaintiffs purchased for the express purpose of operating with the said engine a set of plows at a cost of $200 which have been wholly useless to the plaintiffs by reason of the failure of the said engine to work.

The plaintiffs have further suffered damage by reason of loss of time in endeavouring to get the said engine to work and in negotiating with the defendants.

The plaintiffs have further suffered loss and damage by the loss of crops and loss of profits in breaking, plowing, cultivating, and threshing for themselves and for others by reason of the failure of the said engine to work

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE Co.

and the failure of the defendants to return the plaintiffs the moneys and notes to which they were entitled.

The defendant, along with defences denying liability, pleaded that the plaintiffs had rejected the motor under the proviso to the second warranty in the contract and that the only relief to which they were entitled was a return of the moneys paid and note given and freight paid by them. The defendant paid into Court with a denial of liability sufficient to cover the purchase price paid and interest thereon and the amount paid for freight, and filed in Court the note for $1150, and, while counterclaiming for payment of the note, consented to withdraw the counterclaim in the event of the plaintiffs accepting the sum paid in, in satisfaction of the plaintiffs' claim.

The plaintiffs did not accept the money paid into Court, and the note, but proceeded to trial. At the trial, at the close of the plaintiffs' case, the defendant withdrew its denial of liability so far as the return of the money and notes was concerned. The trial Judge thereupon withdrew the question of damages from the jury, holding that, as the plaintiffs had rejected the machinery and rescinded the agreement, they were only entitled to the return of the moneys paid and note given. He also held that the plaintiffs had not taken reasonable steps to mitigate their loss, and that the loss of the crop was not reasonably within the contemplation of the parties as a probable result of the breach of the contract, or the immediate or natural consequence of the defendant's failure to comply with the warranty. He accordingly gave judgment for the plaintiffs for the amount paid into Court, and the return of the note, with costs of the action up to the time of payment in, and gave the defendant its costs of the action subsequent to the payment into Court. The counterclaim was dismissed with costs.

The plaintiffs now appeal on the following grounds:

That the trial Judge erred in holding that the Sale of Goods Act R.S.S. 1920, ch. 197 did not apply herein. That the trial Judge erred in holding that the contract sued on herein excluded all implied warranties. That the trial Judge erred in finding that the plaintiffs could not recover for loss of crops, and erred in finding that the loss of the 1919 crop did not arise naturally from the breach of warranty, or was such as might reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract. That the trial Judge

erred in finding that the plaintiffs did not take reasonable steps to mitigate their loss. That the trial Judge erred in awarding the defendant the costs after payment-in with a denial of liability.

The terms of the written agreement (statutory Form A.) entered into between the parties and material to this case are as follows:—

"On arrival of the said machinery at the point above named the purchaser agrees to receive the same subject to the terms and warranties herein. . . . The said machinery is intended to perform the following work, namely, plowing."

The said machinery is sold upon the following express warranties on the part of the vendor:—

1. The vendor warrants that the said machinery is well made and of good materials. 2. The vendor warrants that the said machinery will well perform the work for which it is intended, if properly used and operated:

Provided, however, that if the purchaser cannot make the said machinery perform well the work for which it was intended upon a ten days' trial of the same he shall within the said ten days or within two days after the expiration of the same give notice in writing to the vendor or his agent at in Saskatchewan that the machinery does not work well. If the purchaser gives such notice the vendor shall have eight days from the receipt of such notice to make it perform well the work for which it was intended. If within the said eight days the vendor does not make it perform well such work, either by replacing the parts or otherwise, the purchaser may either reject said machinery, in which case this contract shall be at an end and he shall be entitled to a return of any moneys paid or notes given therefor by him and the freight paid by him, or he may retain said machinery and hold the vendor liable for the difference between the value of the machine as it is and the value it would have had if it had fulfilled this warranty.

The following sections of the Act may also be considered, secs. 8, 14, 21, 22.

From the foregoing it will be seen that the statute in question very considerably changes and modifies the general law relating to the sale of goods in many important respects. The contract for the sale of a large implement, such as the one in question, must be in writing and in the prescribed

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

form. It must be signed by both parties. The contract must not contain any language in any wise limiting or modifying the legal liability of the vendor as provided in the Act or forms. The statutory form when completed must be taken and held to be the entire contract between the parties. The purchaser is given the right of ten days' trial, the right to call upon the vendor to make good his warranty, and the right to reject for breach of warranty or failure of the vendor to make the machinery perform well the work for which it was intended. If the vendor fails to do this, the purchaser is put to his election either to reject the machinery and put the contract "at an end" and thereby become entitled to return of moneys paid, notes given and money paid for freight, or to retain the machinery and hold the vendor liable for the difference between the value of the machine as it is and the value it would have had if it had fulfilled the warranty.

In view of all these special provisions, I am of opinion that the effect of the statute with the forms is to exclude the application of the general law in pari materia, and to state exclusively the respective rights and liabilities of the purchaser and vendor.

Under secs. 51 and 52 of the Sale of Goods Act, R.S.S. 1920, ch. 197, in addition to the damages provided for in the statutory form "A" of the Farm Implement Act, a purchaser may claim further damages for breach of warranty. The fact that the Legislature has only mentioned the one class of damages makes it, in my opinion, clear that any other claims were intended to be excluded. It seems only reasonable where the ordinary rights of the purchaser are so extended and altered for his benefit to assume that it was also intended to modify in some degree the liability of the vendor.

I therefore come to the conclusion that the trial Judge was right in withdrawing this branch of the case from the jury.

As to the question of costs, I think that the order of the trial Judge was, in effect, correct.

Where the defendant pays money into Court with a denial of liability and the plaintiff proceeds with the action,

> "there are two distinct issues raised namely (a) whether the defendant is under any liability to the plaintiff, and (b) whether the sum paid in is sufficient to cover the liability, if any. If the plaintiff succeeds in recovering

from the defendant an amount which carries costs even though it is less than the sum paid into court, he succeeds in the first of those issues and is entitled to the whole costs of the action down to payment in and the subsequent costs of the issue on which he has succeeded." Ann. Prac. (1921), p. 381.

The above statement of the practice under similar rules to our own was adopted in Powell v. Vickers Sons & Maxim Ltd., [1907] 1 K.B. 71 and Fitzgerald v. Thomas Tilling, Ltd. (1907), 96 L.T. 718.

If the plaintiff does not recover more than the amount paid into Court, the defendant is entitled to the general costs of the action after the time of payment in, less any severable costs subsequent to the payment into Court in respect of any issue on which the plaintiff has succeeded. Powell v. Vickers, supra; Fitzgerald v. Thomas Tilling, Ltd. supra; The Blanche, [1908] P. 259; Wagstaffe v. Bentley, [1902] 1 K.B. 124.

The defendant is prima facie entitled to the general costs of the action after payment in, but must pay the costs of any issue on which he has failed even though the issue is not one going to the whole cause of action. Hubback v. British North Borneo Co., [1904] 2 K.B. 473; Ridout v. Green (1902), 87 L.T. 679.

In England since 1913, by a new rule (C. 22. 2. 6), if a plaintiff does not accept money paid into Court with a denial of liability, but proceeds to trial and does not recover more than the sum paid into Court, he shall not be allowed his costs of the issue as to liability unless the Judge is satisfied that there were reasonable grounds for not accepting the sum paid in. We have no such rule here.

In Davies v. Edinburgh Life Ass'ce Co., [1916] 2 K.B. 852, it was held that, while the new rule gave the Judge power to deprive the plaintiff of his costs of the issue as to liability, it gave him no power to make him pay the defendant's costs of an issue on which the plaintiff had succeeded.

"The effect of that alteration in the rule is to prevent the plaintiff from obtaining the subsequent costs of the issue on which he succeeded without the certificate or expression of opinion from the judge that he is satisfied that there were reasonable grounds for not accepting the sum paid in. The plaintiff did not obtain that certificate in the present case, therefore the plaintiff is unable to

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

obtain the subsequent costs of that issue. But his complaint is, and it seems to me well founded, that this is no reason why the defendants should have as against him the costs of the issue on which he (the plaintiff) succeeded at the trial. They certainly would not have obtained them before this Order of 1913. On the contrary the plaintiff would have obtained these costs against the defendants. The effect of the alteration of the rule is to prevent a plaintiff obtaining these costs without a certificate, but it does not give those costs to the defendants." Davies v. Edinburgh Life Ass'ce Co., supra, per Swinfen Eady L.J., at p. 855.

In Cook-Henderson Co. Ltd. v. Allen Theatre Co. Ltd. (1919), 49 D.L.R. 503, 12 S.L.R. 519, it was held by this Court that a defendant who pays a sum of money into Court with a denial of liability is entitled to his subsequent costs where the plaintiff recovers only the sum paid in, and the case of Mundy Ltd. v. London County Council, [1916] 1 K.B. 159, is cited as an authority for that proposition.

If the effect of that decision is to give the defendant the costs of the issue upon which the plaintiff succeeded, I have no hesitation in saying that this Court has no power to make such an order. The case of Mundy Ltd. v. London County Council does not support such a proposition, as the question for decision in that case was one concerning the bona fides of a notice paying money into Court and denying liability. The order in the present case should be similar to the orders made in Wagstaffe v. Bentley, and Davies v. Edinburgh Life Ass'ce Co., namely, that the plaintiff should have the costs of the action up to the time of the payment into Court, that the defendant should have the general costs of action from that time, and that the plaintiffs should have the costs of the issues found in their favour.

The appeal should therefore be allowed, but as the appellant failed on the main ground of appeal and only succeeds on the question of costs, which owing to the decisions was a doubtful one, there will be no costs of appeal.

Lamont, J.A.:—Under an agreement in writing in form "A" of the Farm Implement Act, R.S.S. 1920, ch. 128, the plaintiffs agreed to purchase from the defendants one 15 H.P. farm motor for $1850. The motor was delivered, and the plaintiffs paid thereon $700, and gave their note for $1,150. They also paid $47.50 for freight. The chief purpose for which the motor was purchased was ploughing.

The plaintiffs tested it at ploughing for four days, but could not make it work, and so notified the defendants on June 28, 1918. The defendants' expert then tried to make it fulfill the warranty as to ploughing, but failed to do so, with the result that on July 6 the plaintiffs notified the defendants that they rejected the motor under the proviso in warranty 2 of the agreement, and asked for a return of the purchase money and freight and of the note given for the balance. The defendants refused to return either the money or note, and the plaintiffs brought this action in which, in addition to asking for the rescission of the contract and a return of the moneys paid and the note, they ask for damages for loss of crop and profits by reason of the failure of the motor to fulfill the purpose for which it had been sold by the defendants.

In their statement of defence the defendants set up the rejection of the motor by the plaintiffs, and they paid in to Court, with a denial of liability, the $700 paid and $50.44 interest thereon, and the $47.50 paid for freight; in all, $797.94; and they filed with the Local Registrar the note for $1,150, to be delivered to the plaintiffs if they accepted the sum paid into Court in satisfaction of their claim. The plaintiffs did not accept the money paid into Court, but proceeded to trial to recover damages in addition thereto. The trial Judge held that, under the terms of the agreement, the only claims of the plaintiffs to which effect could be given were the return of the purchase money paid with interest, repayment of the freight and the delivery up of the note for cancellation. He accordingly withdrew from the jury the plaintiffs' claim for damages, and gave judgment for the plaintiffs for the amount paid into Court and the delivery to them of the note. He gave the plaintiffs the costs of the action up to payment into Court, and the defendants the costs subsequent thereto. The plaintiffs now appeal.

The first question we have to determine is, whether or not the purchaser of a motor under an agreement in form "A" of the Farm Implement Act, who rejects it in accordance with the provisions of the agreement, is limited in his remedy to a return of the purchase money, the freight paid by him and the notes given; or whether, in addition thereto, he is entitled to the consequential damages which, under an open contract, he could recover by reason of the Sale of Goods Act.

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

In the first place it will be observed that the agreement in question is a statutory agreement, and that, under the Act, an agreement for the sale of a large implement, to be valid, must be in the statutory form. The form requires the purpose for which the implement is purchased to be stated. In this case the stated purpose is "plowing." Then the character of the ploughing is more specifically stated in the following warranty:—

"That the engine will, if properly operated, pull upon the following land, N.W. ¼ Sect. 25, T. 12, R. 20-3, 2 14-inch plows in breaking, at a depth of 4 inches; or 3 14-inch plows in stubble, at a depth of 5 inches."

Then we have this general provision:—

"The said machinery is sold upon the following express warranties on the part of the vendor:

"1. The vendor warrants that the said machinery will well perform the work for which it is intended if properly used and operated.

"Provided, however, that if the purchaser cannot make the said machinery perform well the work for which it was intended upon a ten days' trial of the same he shall within the said ten days or within two days after the expiration of the same, give notice in writing to the vendor or to his agent at Regina in Saskatchewan, that the machinery does not work well. If the purchaser gives such notice the vendor shall have eight days from the receipt of such notice to make it perform well the work for which it was intended. If within the said eight days the vendor does not make it perform well such work, either by replacing the parts or otherwise, the purchaser may either reject said machinery, in which case this contract shall be at an end and he shall be entitled to a return of any moneys paid or notes given therefor by him and the freight paid by him, or he may retain said machinery and hold the vendor liable for the difference between the value of the machine as it is and the value it would have had if it had fulfilled this warranty."

In connection with the agreement embodied in form "A" must be read sec. 29 of the Farm Implement Act, which is as follows:

"29. Where a contract is made in form A, B or C, as the case requires, and the said forms are duly completed, the same shall be taken and held to be the entire contract between the parties."

In view of the fact that the Legislature has declared that

upon the sale of a large implement the contract between the vendor and purchaser shall be in a certain form, which requires the purpose for which the implement is purchased to be set out, and which provides that, in case the implement fails to fulfill that purpose, the purchaser may within a specified time reject it, and which also provides that, in case of rejection the purchaser shall have certain remedies, and where the Legislature has also declared that the contract contained in the form specified shall be the entire contract between the parties, the intention of the Legislature, in my opinion, must be held to have been to restrict the purchaser's remedies upon rejection to those specified in the contract.

It seems to me very reasonable that the makers of our law should say to a farmer purchasing a large implement, particularly an implement whose adaptation to the needs of the farmers of this Province is more or less in the experimental stage: "We will fix the terms of the contract to be used in the sale of a large implement; we will provide that the purpose for which you buy the implement shall be stated; we will provide that if it does not fulfill that purpose you may within a specified time reject it, and we will not allow the vendor to insert any term in the contract by which your right to so reject it shall be denied or held to be waived or the time for rejection abridged; but, on the other hand, if you do reject it, the contract will provide that your remedies shall be limited to a return of the purchase money and freight paid and notes given; you will not be entitled to other consequential damages, which, under the general law, might be yours under an open contract, which open contract a vendor of his own free will would, in all probability, refuse to make." This is what I think the Legislature has, in effect, said by the Farm Implement Act, and it is binding on the purchaser as well as on the vendor.

It was contended that, in any event, the plaintiffs were entitled to be reimbursed the amounts which they had paid out for gasoline and oil, and the wages paid to the men employed in endeavouring to make the motor fulfill the purpose for which it had been sold. That contention cannot be given effect to. If the Legislature had deemed it advisable to require the vendor to reimburse the purchaser for these out-of-pocket expenses, they would have been included in the statutory contract. It is a matter entirely for the Legislature, and not for the Courts. So long as the Legisla-

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO

ture limits the purchaser's remedies to a return of the purchase money, freight and notes, the Courts must hold that these are all the purchaser can get.

I am, therefore, of opinion that the trial Judge was right in withdrawing the claim for damages from the jury.

The only other point requiring consideration is the question of costs. The trial Judge, following the decision of this Court in Cook-Henderson Co. v. Allen Theatre Co. (1919), 49 D.L.R. 503, 12 S.L.R. 519, gave the costs of the action up to the time the money was paid into Court to the plaintiff, and the subsequent costs to the defendant. We are now asked to vary the rule laid down in that case, because it is not entirely in harmony with the decisions of the English Court of Appeal when that rule in England was identical with our own.

According to the interpretation placed upon the rule by the English Courts, if the defendant paid money into Court with a denial of liability, and the plaintiff did not accept this amount but proceeded with the action and established liability, but did not recover a greater amount than the amount paid in, the plaintiff was entitled to the costs of the action up to payment and the costs of the issue establishing liability, while the defendant was entitled to the costs of the action after payment in, less the costs of the issue establishing liability. This necessitated a separation of the issues involved in the action for the purposes of taxation. Under the judgment of this Court in the Cook-Henderson case, there is no separation of the issues. If the defendant pays into Court money enough to satisfy the plaintiff's claim, the plaintiff must either take it with costs up to that time or go on to trial, at the risk of paying costs if it is found that he was not entitled to more than was paid in. To that extent our decision is out of harmony with the English decisions. There is, however, nothing in the rule requiring us to award the costs in accordance with the English practice, any more than with that laid down in the Cook-Henderson case. Where a rule may be interpreted in more ways than one, the practice to be adopted is that which is most convenient and suitable. In the English Courts the taxing officers are experts, and no difficulty arises from the necessity of separating the issues on which the parties went to trial and allotting the costs of each. In this Province it is entirely different. Here the Local Registrar of the Court is the taxing officer. On grounds of public policy, the offices

of Local Registrar and sheriff have been combined in some 15 out of the 20 Judicial Districts into which the Province is divided, and the sheriff in these districts performs the duties of Local Registrar. These sheriffs have no legal training. To require them to separate the issues on which the parties went to trial and to apportion the costs of the various issues, would be to require them to do that which we know they cannot. Practicability and convenience demand that we follow the simpler procedure laid down in the Cook-Henderson case.

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

Turgeon, J.A.:—In June, 1918, the parties to this action entered into a contract for the sale by the defendant to the plaintiffs of a 15 H.P. farm motor, the price being $1,850, payable $700 cash, and the balance on November 1, 1918; this balance to be secured by a lien note bearing interest at the rate of 9%. The motor was shipped to the plaintiffs in due course, and they made the cash payment and signed and delivered the lien note. The contract was made (as in order to be valid it had to be made) under the provisions of the Farm Implement Act of 1917 (now ch. 128, R.S.S. 1920), and is in the form "A" prescribed by that Act. The portion of this statutory form of contract with which we have particularly to deal reads as follows: "2." [see ante p. 287.] And the contract also sets out the following: "The said machinery is intended to perform the following work, namely, plowing."

The motor was tested according to the above provisions of the contract, both by the plaintiffs and by the defendants, but was found to be unfit for the purpose for which it was intended. Thereupon the plaintiffs elected to reject the motor, as the contract entitled them to do, and gave notice accordingly. The defendants refused at first to admit the plaintiffs' right to reject, whereupon the plaintiffs brought this action. In their statement of claim they asked for rescission of the contract, a return of the $700 paid by them and of the note given, and also for the sum of $47.50 paid for freight. In addition they claimed damages in respect of the following items, viz: (1) loss of profit on the crop which might have been grown upon the 475 acres of land they had intended to plough, at $10 per acre, which land, they alleged, they were unable to cultivate at all on account of the failure of the motor to do the ploughing; (2) $31 for wages paid by them to men engaged in testing

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE Co.

the motor, and (3) $26 for gasoline and oil which they used in trying to make the motor work properly.

The defendants, while denying liability, paid into Court $797.94, being an amount sufficient to cover the cash payment of $700 made by the plaintiffs, with interest at the rate of 5%, and $47.50, the sum paid by the plaintiffs for freight, and they filed the plaintiffs' lien note for $1,150 in Court, to be handed back to the plaintiffs in case they accepted the amount paid in in satisfaction of their claim. The defendants alleged that, in any event, the plaintiffs, having elected to reject the machinery and put an end to the contract, were not entitled to claim any other relief than that expressly set out in the contract, and consequently were not entitled to claim for the sums paid for wages and for gasoline and oil, or for damages for the probable loss of crops. As to this last item they also contended that the damages claimed under this head were too indefinite and too remote and could not be attributed to the failure of their engine to do the ploughing.

At the conclusion of the plaintiffs' case counsel for the defendants withdrew the denial of liability which accompanied the payment made into Court, and asked the trial Judge to withdraw the rest of the plaintiffs' case from the jury. This was done, on the ground that, by the terms of the contract, the plaintiffs, having elected to reject the machinery, were entitled to recover only the money paid by them on account of the purchase price, the lien note given to secure the balance, and the amount paid for freight. The trial Judge ruled that, in any event, the damages claimed for loss of crops were too remote, and that they could not reasonably be attributed to the failure of the defendants' motor to plough the land.

On this appeal we have to decide whether the purchaser of a farm implement, having rejected the implement upon its turning out to be unfit for his purposes, is restricted to the remedies specifically set out in the contract, or whether he may, in addition, recover damages for any loss he may have met with and which would not have occurred if the implement had proved fit for such purposes. In this contract we find an express statement that this machinery is intended for the purpose of ploughing and an express warranty that it is fit for such purpose. There is no doubt that at common law, and later under the codification contained in the Sale of Goods Act, the buyer under an open contract

would be entitled, upon the machine proving to be unfit for ploughing, to reject it and throw it back upon the seller's hands, and to receive back the money paid by him for the machine, and also to recover the expense, if any, incurred in freighting and keeping it, and damages for the loss of profits which could reasonably have been expected to flow to him if the machine had complied with the warranty (or rather condition) of fitness. Section 49 of the Sale of Goods Act provides the damages which may be recovered in the case of non-delivery of goods by the seller, and a seller who delivers goods which are not in accordance with the contract in such a degree as to entitle the buyer to reject them, is in the same position as if he had failed to deliver any goods at all. An explanation of this principle will be found at p. 1124 of the 6th Ed. of Benjamin on Sales, where the author refers to the well-known case of Heilbutt v. Hickson (1872), L.R. 7 C.P. 438; 41 L.J. (C.P.) 228, and the more recent case of Molling v. Dean & Son (1901), 18 T.L.R. 217.

I may say here that, notwithstanding the use of the word "warranty" in the contract made between the parties, I am of opinion that the provision regarding the capacity of the engine to perform the ploughing referred to would, in case this contract were governed by the Sale of Goods Act, be a condition and not a warranty within the meaning of sec. 51 of the said Act. (See sec. 13, sub-sec. 2.)

In this case we have to deal with a contract wherein the parties have expressly set out what is to occur upon the purchaser rejecting the machinery on the ground of unfitness. The contract says:—

"The purchaser may either reject said machinery, in which case this contract shall be at an end and he shall be entitled to a return of any moneys paid or notes given therefor by him and the freight paid by him, or he may, etc."

The question to be determined is whether the use of this language excludes the recovery of damages such as were held to be recoverable in Heilbutt v. Hickson, supra, and holds the buyer down to a refund of his purchase money and his disbursements for freight. I am of opinion that it does, and that the trial Judge was right in his disposition of this branch of the case.

Before going further, I wish to make note of two points that should be cleared up. I do not wish to be understood in this judgment as expressing any opinion on the interpretation of similar language if used by parties in the mak-

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE Co.

ing of a contract not coming within the provisions of the Farm Implement Act. Nor do I wish to be considered as holding that a buyer in a contract made under the Farm Implement Act would have no remedy in damages, in accordance with sec. 49 of the Sale of Goods Act, against the seller if the latter wrongfully neglected or refused to deliver the goods at all. I do not think it is necessary to decide either of these points in the present case, and I refrain from doing so. The only general proposition which I believe it necessary to state is, that where in the case of a farm implement it is found, in regard to any particular point, that the Farm Implement Act is expressly or impliedly in conflict with the Sale of Goods Act, the former must prevail over the latter (this, of course, requires no elaboration); and as I find that the former Act was intended to cover the whole question of the rights of the parties arising upon the rejection of the goods by the buyer after trial, I am of opinion that no other rights accrue to them.

The contract is in form "A" in the schedule to the Act. Being a contract for the sale of what is described in the Act as a "large implement," it had to be in form "A" in order to be a valid contract. Section 12 of the Act is as follows:—

"12. No contract for the sale of any large implement shall be valid and no action shall be taken in any court for the recovery of the whole or part of the purchase price of any such implement or of damages for any breach of any such contract unless the said contract is in writing, and in form 'A,' and signed by the parties thereto."

This form "A" contains the warranties given by the vendor and the agreements entered into by the purchaser, and sets out the remedies which accrue in certain cases upon the default of the one or the other of the parties. And then we have sec. 29 of the Act, which applies to the whole contract, and which says:—

"29. Where a contract is made in form A, B or C, as the case requires, and the said forms are duly completed, the same shall be taken and held to be the entire contract between the parties."

In my opinion the Legislature in enacting the Farm Implement Act, which it did for the first time in 1915, intended, in so far as the foregoing matters are concerned, to settle absolutely the respective rights and obligations of the parties. In order to arrive at the true meaning and intent

of the Farm Implement Act, it is necessary to proceed in the manner first laid down in Heydon's Case (1584), 3 Co. Rep. 7, 76 E.R. 637, and referred to from time to time in a long list of decisions ever since, as, for instance, in In re Mayfair Property Co.; Bartlett v. Mayfair Property Co., [1898] 2 Ch. 28, 67 L.J. (Ch.) 337. In this judgment I find the following paragraph, at p. 35:

"In order properly to interpret any statute, it is as necessary now as it was when Lord Coke reported Heydon's Case (1584), to consider how the law stood when the statute to be construed was passed; what the mischief was for which the old law did not provide; and the remedy provided by the statute to cure that mischief. The Companies Act, 1879, was passed in order to remedy some defects in the law relating to unlimited companies, and which defects, although long known to lawyers, startled the public when the City of Glasgow Bank stopped payment in 1878, etc."

We know, then, that all matters pertaining to the sale of farm implements, and particularly of "large" farm implements, such as traction engines, grain separators, engine ploughs and engine discs, have been for many years matters of great concern to the people of this Province, on account of the paramount importance of the farming industry and of the great importance in the business and home life of the average farmer of any contract whereby he undertook to purchase such an implement. Case after case came before the Courts wherein it was made evident that the provisions of the Sale of Goods Act and of the common law were inadequate to establish an equitable basis of contract between the farmer and the vendor, on account of the great difference in education, business training, and legal knowledge which existed between the parties. The result was that a great number of these large gasoline and oil engines, still in their experimental stage, were sold to farmers under contracts which put all the risks involved in the experiment upon the farmer and none upon the vendor. For an example of the conditions which I am now describing, I may refer to the remarks of Idington, J., and of Brodeur, J., of the Supreme Court of Canada, in the case of Ozias v. Reeves & Co. (1911), 1 W.W.R. 517. The remarks of Brodeur, J., are practically a suggestion that the Legislature should intervene in this matter as it had done in other cases, as, for instance, in the case of insurance contracts. As a result of the situation

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

known to exist, the Legislature of Saskatchewan adopted the present law in 1915.

It appears to me that one of the objects of the Act was to provide a basis upon which the experiment necessary to determine the real as distinguished from the theoretical capacity of any of these large implements might be conducted without imposing undue hardship upon either of the parties in case of an unfavourable result. A perusal of the cases which came before the Courts for determination, and of which the aforesaid case of Ozias v. Reeves is but an instance, will shew that, beyond all doubt, this question of the capacity of an implement, the manner in which it is to be tested, and the purchaser's rights upon the implement proving to be unfit, was the most fruitful cause of controversy, and that, invariably, the contract entered into by the parties and which the Courts had to recognise, was to the entire disadvantage of the purchaser. And always there was apparent the great practical and mechanical difficulty of anybody being able to say in advance that a given implement would work satisfactorily when put to the test in actual ploughing or threshing. The result was that, in many cases, the farmer was left with an implement on his hands which did not suit his purposes, which he would gladly have returned, but which on account of his contract he had to keep and pay for; his sole remedy, if any, being a doubtful suit for damages. There is no doubt, in my opinion, that the main object of the Act was to remedy this situation by stipulating, in express terms, what conditions should prevail between the parties in regard to this most important feature of the contract.

The statutory provisions which we have under consideration here seem to contain a frank recognition of the difficulties involved. First, the purchaser has 10 days in which to try the machine; if this trial proves unsuccessful, the vendor has 8 days in which to remedy the defect and to make the machine work; if he does not succeed within these 8 days, the purchaser may reject the implement, in which case, the clause says, "the contract shall be at an end and he (the purchaser) shall be entitled to a return of any moneys paid or notes given therefor by him and the freight paid by him." The clause further goes on to provide that, if the vendor succeeds in making the machine work and the purchaser's failure to do so is found to be due to his own improper management or want of skill, the vendor shall

be entitled to recover his expenses from the purchaser. No provision is made for having the purchaser reimbursed his running expenses by the vendor in the contrary case, and I cannot believe, under the circumstances, that the omission was not intentional. It cannot, it seems to me, be treated as an oversight. The provision as a whole is substantially in favour of the purchaser, as it alters very considerably the conditions which existed during the time that freedom of contract prevailed and the contracts entered into were prepared solely by the vendor. And the same may be said of the statute in its entirety. It is reasonable to assume, therefore, that the Legislature, in imposing such a contract upon the vendor, intended at the same time to limit his obligations by express words. If I am right in my view of the matter, the plaintiffs are not entitled to recover the sums claimed for wages paid to workmen, for gasoline and oil, or on account of the loss of crops, but the judgment appealed from awards to them all they are entitled.

We next have to deal with the question of costs. Under the judgment given, the appellants recover the amount paid into Court, and no more, and the trial Judge awards the costs of action subsequent to such payment to the respondent. The appellants contend that this order should be reversed and the appellants allowed their costs upon the issue of liability, which was found in their favour. The payment in was made under the provisions of Rr. 196 and 201. Upon the argument, counsel for the appellants admitted that the decision of this Court in Cook-Henderson Co. v. Allen Theatre Co., 49 D.L.R. 503, 12 S.L.R. 519, stood in his way, but he asked us to find that that case was wrongly decided, and to follow instead the rule laid down in Wagstaffe v. Bentley, [1902] 1 K.B. 124, and in several other English cases cited by him, all of which were decided when the language of the English Rule of Court was identical with our own, and which no doubt differ in effect from the decision in the Cook-Henderson case. The English cases in question decide that, where payment in, is made with a denial of liability and the plaintiff proceeds with the action and establishes the defendant's liability but does not recover more than the sum paid in, the general costs of the action, after the payment in, go to the defendant, but that the plaintiff is entitled to his costs upon the issue of liability found in his favour. The judgment of this Court in the Cook-Henderson case is very brief and does not set out the

Sask.

C.A.

MURDOCH v. MINNEAPOLIS THRESHING MACHINE CO.

facts at length. Enough can be gathered from the report, however, to make it clear that, although the plaintiff in that case succeeded in establishing the defendant's liability, the Court, nevertheless, refused to allow him his costs upon that issue. The effect of this decision is to establish the rule that, whether the payment into Court is made with or without a denial of liability, the plaintiff must either accept the sum so paid in or lose all the subsequent costs of the action, unless he recovers more than such sum, regardless of whether the issue of liability is found in his favour. And I may say here, in passing, that, whether it agrees with the English decisions or not, this rule appeals very strongly to my judgment, as it must tend to discourage the pursuit of litigation upon questions which very often are of purely academic interest. We are asked to reverse this rule because the decision in question upon an important point of practice is at variance with the decisions of the Court of Appeal in England upon the same point. It may very well be that the decision which is now being questioned does not commend itself to the judgment of all those who analyse it, and some, no doubt, may be convinced that it is based upon an erroneous view of the law, more particularly as it cites in support of its conclusions the case of Munday Ltd. v. London County Council, [1916] 2 K.B. 331, which, it must be admitted, was decided under an amendment to the English Rule made in 1913 not contained in our rules. But there are doubtless many decisions of Courts of Appeal which do not commend themselves to universal approbation. Nevertheless, it would be a very serious thing, indeed, if decisions which purport to establish the law and the practice, and to settle the rights of litigants according to fixed rules, were to be set aside merely because the Court sitting to-day may be led to believe that the Court sitting two years ago ought to have decided otherwise. More particularly is this true when the decision in question is the unanimous decision of the Court, as was the case in Cook-Henderson Co. v. Allen Theatre Co., supra, and was delivered after the decisions of the English Court of Appeal now cited against it. This whole question was discussed at length in recent years in the following cases: Stuart v. Bank of Montreal (1909), 41 Can. S.C.R. 516, per Anglin, J.; Read v. The Bishop of Lincoln, [1892] A.C. 644; and London Street Tramways v. London County Council, [1898] A.C. 375. I think the rule to be gathered from these cases is that this Court should follow its own

previous decisions where rights of property or matters determining the payment of money are involved.

Counsel for the appellants cited in support of his contention the case of Rex v. Hartfeil (1920), 55 D.L.R. 524, 16 Alta. L.R. 19, where a majority of the Appellate Division of the Supreme Court of Alberta overruled a previous decision of its own. The decision in the Alberta case was upon a point of criminal procedure, where, obviously, different considerations apply, as was pointed out in the judgments rendered.

I think, therefore, that the appeal must fail upon the question of costs as well as upon the main issue, and that, upon the whole case, the appeal should be dismissed with costs.

Appeal dismissed.

McKINNON v. BROCKINTON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 20, 1921.

Sale (§III.C—72) — Of goods — Fraud — Repudiation — Rights of Parties.

A party induced by fraud to enter into a contract for the purchase of goods may repudiate the contract if he does so promptly after discovery of the fraud and is in a position to return what he received in the same condition as that in which he received it. A representation that a traction engine is a 22 horse power engine when to the knowledge of the vendor it was only 16 horse power is fraud within the above rule, and repairs made to the engine while in the possession of the purchaser which enhance its value do not preclude repudiation upon learning of the fraud.

[Lagunas Nitrate Co. v. Lagunas Syndicate, [1899], 2 Ch. 392; Addison v. Ottawa Auto & Taxi Co. (1913), 16 D.L.R. 318, 30 O.L.R. 51, referred to.]

APPEAL by the defendant from the judgment at the trial in an action to recover the price of a second-hand traction engine. Reversed and action dismissed.

J. F. Kilgour, K.C., for appellant.

S. H. McKay, for respondent.

Perdue, C.J.M., and **Cameron, J.A.,** concur.

Fullerton, J.A.:—The plaintiff sues to recover $800, the price of a second-hand North-West Traction Engine sold by the plaintiff to the defendant. The main defence is that the sale was induced by false and fraudulent representations.

Both plaintiff and defendant are farmers. Plaintiff had been operating a gasoline engine and 28-inch separator. He

Man.

C.A.

McKINNON v. BROCKINTON.

wanted to put on a self-feeder, and as his gasoline engine was not powerful enough to operate the separator with the self-feeder, he decided to purchase a second-hand steam engine. He spoke to one Maxwell, who told him plaintiff had a second-hand engine for sale—in fact, plaintiff had previously employed Maxwell to sell the engine. The defendant and Maxwell together went to the plaintiff's farm, where the sale of the engine was arranged. The plaintiff made a number of representations respecting the engine, but the most material one was that it was 22 horse power. Plaintiff agreed to put the engine in shape for threshing, and shortly afterwards Maxwell, who had been employed to fix up the engine, delivered it to the defendant at his farm. Defendant started it up and used it for threshing 15¼ days. From the very start it proved unsatisfactory in every way; was continually breaking down and requiring repairs. The main trouble appears to have been with the slide valve, which was worn and allowed steam to pass through causing back pressure and thereby reducing the efficiency of the engine. There were other defects. The main shaft was out of round, cross head guides and eccentric worn and tubes and stay bolts in the boiler leaking.

The result was that it was impossible to keep a head of steam sufficient to operate the separator properly. The defendant was put to expense in repairs and by reason of loss of time.

After operating 14 days defendant attempted to thresh rye, but found that the engine had not sufficient power to run the separator. He then hired another engine to complete his threshing.

The contention of the plaintiff is that the defendant having operated the engine for 15¼ days must be assumed to have accepted it and cannot now repudiate the contract.

If the only question here was the failure of the plaintiff to fulfill his collateral contract to put the engine in shape for running I think there can be little doubt that the contention of the plaintiff would be correct and that the only remedy defendant would have would be damages for breach of that contract.

There is, however, the further question of the false and fraudulent representation with regard to the horse power of the engine. The engine was delivered about September 9. In October the defendant discovered that one Bent had previously owned it, and from him he learned that the en-

gine was only 16 horse power. Defendant thereupon by letter repudiated the contract.

The trial Judge finds as a fact that the engine was only 16 horse power, and that the plaintiff knew that fact when he represented to the defendant that it was 22 horse power. He further finds that it was only after seeing the plaintiff in the latter part of October that he (the defendant) was informed by Bent, that he had bought it as a 16 horse power.

The contention of the defendant, therefore, is that he had elected to rescind within a reasonable time after discovering that the representation was false and that he can return the engine in the same, if not better, condition than he received it.

The authorities are clear that a party induced by fraud to enter into a contract for the purchase of goods may repudiate the contract if he does so promptly after the discovery of the fraud and is in a position to return what he received in the same plight as that in which he received it. Benjamin on Sale, 472; Clarke v. Dickson, etc. (1858), El. Bl. & El. 148, 120 E.R. 463; Street v. Blay (1831), 2 B. & Ad. 456, 109 E.R. 1212; Urquhart v. Macpherson (1878), 3 App. Cas. 831.

The defendant here promptly repudiated the contract after he discovered the fraud, and is entitled to have the contract rescinded.

I would allow the appeal, set aside the judgment and dismiss the action with costs of the trial and of this appeal.

The counterclaim should be dismissed without costs. The defendant had the use of the engine for 14 days, which would about cover the expenses and loss of time caused by the breach of the plaintiff's contract to put the engine in shape for threshing.

Dennistoun, J.A.:—The plaintiff in this action has sued to recover the price of an engine sold to the defendant.

The trial Judge has directed judgment to be entered for $800 on the plaintiff's claim and for $650 on the defendant's counterclaim as damages for false and fraudulent representations.

The defendant appeals, alleging that he is entitled to rescission, which the trial Judge was apparently willing to grant, had he not been under the impression that the defendant had by delays and laches lost his right to avoid the contract.

The misrepresentation that the engine was of 22 horse

Man.

C.A.

McKINNON v. BROCKINTON.

power was the most serious of several made by the plaintiff. He knew it was false when he made it, and he induced the defendant to act upon it and to burden himself with a machine which was a source of trouble and loss for 15 days until it was discarded.

The trial Judge finds that it was not until the later part of October that the defendant learned that the engine had but 16 horse power, and that all his efforts to make it do the work he had a right to expect it to do, were useless.

On November 6 the defendant wrote the plaintiff "As the engine was misrepresented we will not keep it and wish you would remove same." The trial Judge was in error in stating that this letter was not written until November 26. The election to rescind the contract was made within a few days after the fraud was discovered, and in my humble judgment there was no waiver of the right to rescind, nor any election express or implied to affirm the contract and claim damages for deceit.

The right to rescind is expressly claimed by paras. 8 and 9 of the statement of defence and damages for deceit are claimed only in the alternative.

"A fraudulent misrepresentation, or as it is better called deceit, consists in leading a man into damage by wilfully or recklessly causing him to believe and act upon a falsehood. A representation in order to be fraudulent must be one (1) which is untrue in fact; (2) which the defendant knows to be untrue or is indifferent as to its truth; (3) which was intended or calculated to induce the plaintiff to act upon it; and (4) which the plaintiff acts upon and suffers damage." Kerr on Fraud, 5th ed. p. 19.

All of these elements of deceit are present in the case at Bar as found by the trial Judge.

"If it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined forever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. . . . As long as he has made no election he retains the right to determine it either way subject to this. ...." Kerr on Fraud, pp. 10-11.

There is no evidence of any act of affirmation or election on the part of the defendant which I have been able to discover. He was not put to his election until he had know-

ledge of the fraud, and he acted promptly and with decision on discovery of it.

It is generally stated that a repudiation of a contract on the ground of misrepresentation is only competent to the party misled where restitutio in integrum is possible, that is where the parties can be restored to their original position as before the contract, for it is a rule that "where a contract is to be rescinded at all it must be rescinded in toto, and the parties put in statu quo." Thus anything received under the contract must be returned or tendered to the other party. But the rule must not be taken too literally, and as imposing on the party seeking to avoid the contract an absolute obligation in all events to restore the other party fully to his original position. There will be no such obligation where the status quo ante has been changed or modified, either by some cause for which the party seeking relief is not responsible, or by the legitimate exercise of the rights given him by the contract. See Benjamin on Sale at p. 442.

The defendant during the short time he used the engine expended $74.25 upon repairs, and it is apparently in condition as good as, or better than when the sale was effected.

I think the sale should be set aside. The engine reverts to the plaintiff who will receive as compensation for its use the money and labor expended by the defendant upon it.

The use to which the engine was put was only such as was contemplated by the contract and the conduct of the defendant throughout the transaction is found to be "perfectly candid and upright."

I refer to Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392, at p. 456; Addison v. Ottawa Auto & Taxi Co., (1913), 16 D.L.R. 318, at p. 324, 30 O.L.R. 51; and the cases therein referred to by Meredith, C.J.O.

Section 58 of the Sale of Goods Act, R.S.M. 1913, ch. 174, is as follows:—

"The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods."

I would allow the appeal with costs, and dismiss the action with costs, and the counterclaim without costs.

Appeal allowed.

B.C.

C.A.

REX v. CANADIAN PACIFIC WINE CO.

REX v. CANADIAN PACIFIC WINE CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 9, 1921.

Certiorari (§I.A—9)—British Columbia Prohibition Act, 6 Geo. V. 1916, ch. 49—Right of Company to Writ of Certiorari or Appeal Under—Sections 53 and 54 as Affecting Right.

Sections 53 and 54 of the British Columbia Prohibition Act, 6 Geo. V. 1916, ch. 49, do not take away the right of an incorporated company to a writ of certiorari or the right of appeal because of the incapacity of the company to make the affidavits required by the sections.

[Bank of Montreal v. Cameron (1877), 2 Q.B.D. 536, distinguished.]

APPEAL by accused from the judgment of Morrison, J., sustaining a preliminary objection to the granting of a writ of certiorari in proceedings under the British Columbia Prohibition Act. Reversed.

C. Wilson, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.:—This is a proceeding under the British Columbia Prohibition Act, 6 Geo. V. 1916 (B.C.), ch. 49. The information was laid by a police officer on July 19, 1920, charging the appellant with unlawfully keeping liquor for sale. The complaint was tried before a magistrate, pursuant to the provisions of the Summary Convictions Act, 5 Geo. V. 1915 (B.C.), ch. 59, a provincial enactment. The appellant was fined and a large stock of liquor found on its premises was, by the magistrate, declared to be forfeited to His Majesty. The appellant then moved before a Judge of the Supreme Court for an order nisi directed to the respondent to shew cause why a writ of certiorari should not issue to bring up the conviction. Preliminary objection was taken by counsel for the respondent because of the absence of an affidavit on the part of the appellant as required by sec. 53 of the Prohibition Act.

The appellant's contention is, that that section is not applicable to a corporation seeking the writ. It enacts that no writ of certiorari shall issue to quash a conviction unless the party applying shall produce an affidavit "that he did not by himself, or his agent, servant or employee, or by any other person, with his knowledge or consent, commit the offence." Section 54 of the same Act takes away the right of appeal "unless the party appealing . . . . shall make an affidavit" to the effect above set out.

Now while, if it stood alone, a plausible and not unconvincing argument might be founded on sec. 53, to bring cor-

porations within its terms, that cannot be said of sec. 54, its sister section, dealing as it does with a similar right or privilege in unequivocal language. The one section takes away, unless the condition be fulfilled, the right to the writ, the other the right of appeal. I cannot think that it was the intention, while giving individuals the right of appeal, to deprive corporations thereof because of the incapacity of a corporation to make the affidavit. Nor can I think that it was intended that corporations should be doomed to be within the purview of the one and not of the other. I think, therefore, that the Legislature had not corporations in mind when enacting the two sections.

What then is the result? Are corporations deprived of these remedies? In Bank of Montreal v. Cameron (1877), 2 Q.B.D. 536, the Court of Appeal denied the benefit of the rule in question there to a corporation, but in that case the benefit did not exist outside the rule, while here the right to apply for the writ, and the right of appeal, existed independently of secs. 53 and 54 and still exist unless taken away by them. It, therefore, follows that if corporations are not within the purview of these sections, as I think they are not, the preliminary objection should have been over-ruled.

The application for the writ not having been heard on its merits, I think the order for the writ should be made.

I would allow the appeal.

Martin, J.A. (dissenting), would dismiss the appeal.

Galliher, J.A.:—I take the same view as Macdonald, C.J.A., whose reasons I have had the advantage of reading, in which I concur.

McPhillips, J.A. (dissenting), would dismiss the appeal.

Eberts, J.A., would allow the appeal.

Appeal allowed.

CAMPKIN v. WALLER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A: June 13, 1921.

Brokers (§II.B—12)—Sufficiency of Broker's Services—Letter from Owner Acknowledging Broker's Right to Commission — Purchasers Denying that Broker was Inducing Cause of Sale.

Where land has been listed with a real estate agent for sale at an agreed commission, and a prospective buyer of his, on deciding not to buy, tells another party about the property, with whom the agent enters into negotiations and to whom a sale is eventually made, the owner of the property during the negotiations writing the agent and asking him to "put the commission on them instead of me," and so acknowledging his right to a commission on the sale, the agent is entitled to the agreed com-

Sask.

C.A.

CAMPKIN v. WALLER.

mission although the purchase money was not paid over to him, and the purchasers deny that he was the inducing cause of their buying the property.

[See Annotation, Real estate agent's commission, 4 D.L.R. 531.]

APPEAL by plaintiff from a judgment dismissing an action to recover the commission on the sale of land. Reversed.

A. G. Mackinnon, for appellant.

A. Casey, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—This is an appeal from a judgment dismissing the plaintiff's action for $900 commission on the sale of land.

That the defendant listed his land for sale with the plaintiff, who is a real estate agent, is admitted. That his commission was to be 3% is also admitted; so is the fact that a sale was made of the land to J. S. King.

The defence is that the plaintiff did not find the purchaser. The evidence shews that, pursuant to the listing, the plaintiff in June obtained a Mr. Collins as a prospective purchaser, and took him to Whitewood, where the defendant lived, to inspect the farm. Negotiations with Collins continued through the summer, but Collins felt that he could not put up the cash payment of $10,000. In September the defendant reduced the price of the farm to $30,000, with a cash payment of $5,000, but about that time, Collins says, things were not looking very well and he decided not to buy. In the meantime Collins, or one of his sons, had told the Kings, who were neighbours, about the visit of Collins and Campkin to Whitewood with a view of purchasing the defendant's property. On or about October 18, Mrs. King, the mother of J. S. King, telephoned to the plaintiff and asked him if the Waller place at Whitewood was sold. The plaintiff told her that it was not, and asked her if she would consider purchasing it. She replied that she would not look at the place so long as Mr. Collins was considering it. The plaintiff says that after Mrs. King telephoned he arranged with Collins to come in, which he did that night and announced definitely that he would not buy the farm. The plaintiff also says that next morning he telephoned Mrs. King that Collins was out of the proposition, and that she agreed to go to Whitewood and look at the place. On October 19, Mrs. King and her son John visited the defendant's place and looked over the land, but the defendant asked a cash pay-

ment of $10,000, and no deal was made. The Kings went to look at other properties before returning home. On October 20 the defendant wrote the plaintiff as follows:—

"Dear Mr. Campkin:

We had a visit from Mrs. King and her son John on Tuesday, the 19th instant. When we had shewn them around the farm and buildings I asked them what they thought about it. Mrs. King said they could not say anything till another son would pass his opinion, and he would come down and see the place.

I made a big mistake in telling them they could have the furniture, but as you know we have made a great reduction in the price of the property, I thought you would have put your commission on, but you said nothing to them and the property is cheap enough. Could you put your commission on them instead of us. I don't think it would be out of place; I told them I wanted $10,000.00 down and the balance in ten (10) instalments at 6 p.c., so do the best you can; kindly don't forget to tell them about the furniture; I do hope you will succeed in selling the property, as I am just about all in at times."

When the Kings returned home the plaintiff telephoned to them in reference to the Waller place; in fact Mrs. King says he telephoned so persistently that it became a byword in the family. He also went to see them in reference thereto, but Mrs. King said there would be nothing doing until her other sons had seen the place. She also told the plaintiff that the terms asked by Waller were different from the ones he had given her. Whether this conversation took place while the plaintiff was at the King's or over the telephone, is not clear. The plaintiff says that when Mrs. King told him that the cash payment had been increased to $10,000, she also said that they could not buy with such a large cash payment. He says he told her that they probably could get the place for a cash payment of $8,000, to include the furniture, and that she asked him to get into communication with the Wallers to see if they would accept $8,000 cash, and, if they would, her other sons would go down the following Saturday to see the place. He says he called up Mrs. Waller, and she said to let them come down. Mrs. King denies this conversation, and the trial Judge has stated that where the evidence of the plaintiff and that of the Kings conflicted, he would accept the evidence of the Kings. There was, however, put in evidence a letter written by the plain-

Sask.

C.A.

CAMPKIN v. WALLER.

tiff to the defendant on October 23, which corroborates, to some extent at least, the story of the plaintiff. It is as follows:—

"Dear Mr. Waller:

I duly received yours of the 20th instant.

As I telephoned Mrs. Waller this morning, the two King boys are going down on the train with a view to looking over the farm again to-day, and if it should prove satisfactory they will pay $8,000 cash and the balance arranged, but this is to include furniture.

P.S.—In regard to the commission. I have found it most unsatisfactory to add a commission, or a price, after a price has been quoted and, in addition to that, have never made any deals of real estate in which the purchaser had to pay the commission. It is for that reason I have the flat rate of 3% for all."

The King boys went down to see the place, and a sale was agreed upon, with a cash payment of $8,000. It is admitted that the morning after their return the plaintiff telephoned J. S. King, was informed that arrangements had been concluded, and suggested that King come to the plaintiff's office and make a deposit. This was not done, because Mrs. King told her son to have nothing to do with the plaintiff. In his evidence, J. S. King testified that, in talking the matter over with the plaintiff in the first instance, his mother was doing so with a view of getting the land for him. He also testified that on their first visit, on October 19, his mother discussed with the Wallers the position of the plaintiff in respect to the matter, and was informed that the plaintiff had nothing to do with the sale.

Under these circumstances, is the plaintiff entitled to recover? The defendant's letter of October 20 shews that he had inquired from the Kings if the plaintiff had said anything to them about his commission, and was informed that he had not. Having been made aware that the plaintiff had not mentioned his commission to the Kings, it would, I think, be a fair inference that he ascertained just what the plaintiff had said, but, in my opinion, it is immaterial whether he did so or not. He knew that the Kings had seen the plaintiff as the defendant's agent, otherwise there would have been no talk of the plaintiff's commission; and, knowing that, the defendant wrote the letter of October 20, asking the plaintiff to put his commission on the Kings instead of on himself. That letter, in my opinion, is a clear admission

that the plaintiff would be entitled to a commission in case a sale to the Kings was made.

It was suggested, in argument, that the letter was written under a mistaken belief that the plaintiff had secured the Kings as purchasers. If the defendant was not aware of the true facts when he wrote that letter, he could have gone into the witness box and said so. This he did not do, and we cannot assume that he was in any way misled. The letter was written after the defendant himself had failed to close a deal with Mrs. King and her son, and it instructed the plaintiff to do his best to close the deal. That he was persistent in so doing, Mrs. King admits; and a sale was eventually made. Whether the closing of the deal was due to the persistence of the plaintiff, or solely to the desire of the Kings to acquire the land, is, in my opinion, immaterial under the circumstances. Under the letter, the defendant impliedly agreed to pay the plaintiff his commission if the Kings purchased, and he cannot escape that obligation because the Kings now say that the plaintiff was not the inducing cause of their buying the land.

The appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for his commission and costs.

Appeal allowed.

PITTZEN v. SHOKLUK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 22, 1921.

Negligence (§I.C—69)—Exposed Excavation on Unenclosed Lands—Knowledge of Licensee as to Condition—Injury to Cattle of—Damages.

A bare licensee on the premises of another must take the premises as he finds them, but the owner of the premises owes him a duty not to keep in existence any secret or hidden trap not discernible to the licensee even if it was in existence before permission to enter was given. Such licensee cannot recover damages for injury to his cattle by falling into an exposed excavation even though in the nature of a trap which he had full knowledge of and had helped to create.

[Thyken v. Excelsior Life (1917), 34 D.L.R. 533, followed; See also Annotations, 1 D.L.R. 240; 6 D.L.R. 76.]

APPEAL by defendant from a District Court judgment in an action for damages for injuries caused to plaintiff's cow, by its falling into an excavation on defendant's land. Reversed.

H. S. Patterson, for appellant.

W. J. Mellican, for respondent.

Alta.

App. Div.

PITTZEN v. SHOKLUK.

The judgment of the Court was delivered by

Harvey, C.J.:—This is an appeal by the defendant from McNeill, Dist. Ct. J.

The plaintiff and defendant were neighbours living in the outskirts of the city of Calgary. The defendant occupied a house, and his lot was fenced. He decided to move his house to another place, which he did, assisted by the plaintiff. There was an evacuation 9 x 12 ft. and 5 or 6 ft. deep, which was left exposed by the removal of the house. The fence was also torn down and taken away, which left the excavation open to cattle which were in the habit of running at large in the neighbourhood. The plaintiff swears that he asked the defendant what he was going to do about it and he said he supposed it would have to be filled up. A cow belonging to the plaintiff fell in and was killed.

This is an action to recover damages for the loss of the cow.

The trial Judge considered that the excavation was of the nature of a trap and held the defendant liable.

The best position in which the plaintiff can be is that of a bare licensee, and in Thyken v. The Excelsior Life Ins. Co. (1917), 34 D.L.R. 533, 11 Alta. L.R. 344, we had occasion to consider the rights of a bare licensee. Stuart, J., says, at p. 538:—

"A bare licensee as distinguished from a person invited or there upon the defendant's business as well as his own must take the premises as he finds them; but the owner must not after the permission is given create by a negligent act a new danger not there before. It may be that even in the case of a bare licensee the owner owes him a duty not to keep in existence a secret hidden trap or peril known to him to be dangerous and not discernible by the licensee even if it had been there before the permission was given."

Also in Martle v. Northern Life Ass'ce Co. (1920), 60 D.L.R. 319, we held that the owner could not be held liable for a trap which he did not know existed.

A trap suggests some hidden or concealed danger, and it is only because of that element, as the Thyken case shews, that liability is imposed. Now whatever might be said about any other owner, this was not hidden from the plaintiff since he not merely knew of it but actually helped to create it. It would be strange if under these circumstances he could compel the defendant, who did not object to his letting his cattle go on the land, to make it free from all danger

while he could stand by and take no precaution whatever for the protection of his own property from a risk of which he was fully cognisant.

I know of no law which gives any such light or imposes any such obligation.

The plaintiff's part in the operation, however, is only incidentally disclosed in the evidence and no emphasis appears to have been put on it by counsel, though it is in my opinion the essential feature, and as the trial Judge does not refer to it, it probably escaped his notice.

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

Appeal allowed.

CANADIAN PACIFIC WINE CO. v. TULEY.*

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 9, 1921.

Constitutional Law (§II.B—369a) — Intoxicating Liquors — B.C. Prohibition Act—Matter of Local Nature in the Province—Right to Search Premises — Export Houses — Confiscation of Liquor—Validity.

The British Columbia Prohibition Act, 6 Geo. V. 1916, ch. 49, is intra vires the Provincial Legislature, and section 48, which gives the police the right to search premises, applies to liquor export houses, and a conviction and order for the confiscation of liquor by a magistrate, there being admittedly evidence of an illegal sale and it being a possible and reasonable inference that the stock of liquor was kept for illegal sale, will be sustained.

[Att'y Gen'l for Manitoba v. Manitoba License Holders' Ass'n, [1902] A.C. 73, 71 L.J. (P.C.) 28; Quong Wing v. The King (1914), 18 D.L.R. 121, 23 Can. Cr. Cas. 113, 49 Can. S.C.R. 440, applied.]

APPEAL by plaintiff from the judgment of Murphy, J., in an action of replevin to recover a stock of liquor, declared to be forfeited to His Majesty in proceedings under the British Columbia Prohibition Act. Affirmed.

C. E. Wilson, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.:—This is an action of replevin to recover a stock of liquor belonging to the plaintiff which in proceedings under the British Columbia Prohibition Act, before a magistrate, was declared to be forfeited to His Majesty. There were also certain books, documents and a sum of money included in the relief claimed, but these are not in question in the appeal.

* Affirmed by the Privy Council July 22, 1921. Will be published later in D.L.R.

B.C.

C.A.

CANADIAN PACIFIC WINE CO. v. TULEY.

The validity of the forfeiture aforesaid was attacked in certiorari proceedings which failed before a Judge of the Supreme Court because of a preliminary objection which was sustained by him.

I agree with the reasons for judgment of Murphy, J., and cannot usefully add to what he has said. I would, therefore, dismiss the appeal.

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

Galliher, J.A.:—I would dismiss the appeal for the reasons given by the trial Judge.

McPhillips, J.A.:—This appeal is from a judgment of Murphy, J., dismissing the action (save as to the sum of $60 with costs on the County Court scale, being an amount held to be the property of the appellant) which was one for the return of a stock of liquors to the value of about $230,000 and damages for claimed illegal seizure and confiscation thereof. The proceedings taken for which the appellant is claiming the respondents are answerable for were proceedings had and taken under and in the enforcement of the provisions of the British Columbia Prohibition Act, 6 Geo. V. 1916, ch. 49, and the proceedings were taken under the Summary Convictions Act, 5 Geo. V. 1915 (B.C.), ch. 59, and the appellant appealed and defended in the proceedings had and taken before the Police Magistrate in the city of Vancouver, and the appellant was convicted of a violation of the provisions of the British Columbia Prohibition Act and the stock of liquors was in the conviction declared to be forfeited to His Majesty.

Now this conviction and forfeiture still stand, no appeal being taken, either by way of appeal to the County Court or by way of a stated case to the Supreme Court—in the appeal to the County Court the hearing may be de novo, either party calling witnesses, and in the stated case questions of error in law, or excess of jurisdiction. In view of this situation the action would not appear to be maintainable; the conviction and forfeiture well support the respondents in all that they did. If an appeal had been taken or a stated case—then there would follow an appeal to this Court in ordinary course.

It is impossible to adopt the course of bringing an action and re-agitating the merits in the Supreme Court and then on appeal in this Court. I cannot, with deference, at all agree with this contention, as advanced by the counsel for the appellant. But then it is contended that the British

Columbia Prohibition Act is ultra vires legislation, and if that be so, that all the proceedings had and taken are illegal and void. Now as to the Act itself (British Columbia Prohibition Act), it in the main can be said to be analogous statute law to the Manitoba Liquor Act which was passed upon and upheld, by their Lordships of the Privy Council, in Att'y Gen'l for Manitoba v. Manitoba License Holders' Ass'n, [1902] A.C. 73, 71 L.J. (P.C.) 28. The particular sections of the Act that the counsel for the appellant challenges, viz., secs. 19, 28 and 30 to 55, would seem to me to be wholly intra vires of the Provincial Legislature. Lord Macnaghten in the Manitoba case, at pp. 78, 79, said:—"The controversy,, therefore, seems to be narrowed to this one point: 'Is the subject of the "Liquor Act" a matter of merely local nature in the Province of Manitoba, and does the Liquor Act deal with it as such?'" That is the question here, and I cannot see that the Act in any way transgresses the limits of the jurisdiction of the Legislature of the Province of British Columbia. All proper provisions are to be found admitting of the full exercise of bona fide transactions in liquors between a person in the Province and a person in another Province, or in a foreign country, and it cannot be said that the Act invades the subject of "the regulation of trade and commerce" which is within the exclusive jurisdiction of the Dominion Parliament.

Then it was strenuously argued by the counsel for the appellant that the Act might be supported upon the ground of regulation of morals if confined to a small local area but not when applied to the whole Province—that in the case of the whole Province, it would be a situation calling for legislation and legislation only of the Parliament of Canada. Upon this point I would refer to Quong Wing v. The King (1914), 18 D.L.R. 121, 23 Can. Cr. Cas. 113, 49 Can. S.C.R. 440, (and it is to be noted that the Privy Council refused leave, May 19, 1914, to appeal in this case); the Act under review was one containing a prohibition against the employment of white female labour in places of business and amusement kept or managed by Chinamen, and the Act was held to be intra vires of the Provincial Legislature. It is to be observed that in the British Columbia Prohibition Act this language is to be found in the preamble to the Act, "whereas it is expedient to suppress the liquor traffic by prohibiting Provincial transactions in liquor," and unquestionably the intention of the Act was to cope with a condi-

B.C.

C.A.

CANADIAN PACIFIC WINE CO. v. TULEY.

tion that the Legislature in its wisdom deemed needed a drastic remedy, i.e., a "local evil," and I would refer to what Duff, J., said in the Quong Wing case, at pp. 137, 138 (18 D.L.R.):—

"I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it to abate or prevent a 'local evil' and that considerations similar to those which influenced the minds of the Judicial Committee in The Attorney-General of Manitoba v. The Manitoba License Holders' Association, [1902] A.C. 73, lead to the conclusion that the Act ought to be regarded as enacted under sec. 92 (16), 'matters merely local or private within the Province,' rather than under sec. 92 (13), 'property and civil rights within the Province.' There can be no doubt that, prima facie, legislation prohibiting the employment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the 'local and provincial point of view,' may fall within the domain of the authority conferred upon the provinces by sec. 92 (16). Such legislation stands upon precisely the same footing in relation to the respective powers of the Provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to. The enactment is not necessarily brought within the category of 'criminal law,' as that phrase is used in sec. 91 of the B.N.A. Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in Hodge v. The Queen (1883), 9 App. Cas. 117, and in the Attorney-General for Ontario v. The Attorney-General for the Dominion, [1896] A.C. 348, as well as in the Attorney-General of Manitoba v. The Manitoba License Holders' Association, [1902] A.C. 73, already mentioned, established that the Provinces may, under section 92 (16) of the B.N.A. Act, 1867, suppress a provincial evil by prohibiting simpliciter the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable milieu for it, under the sanction of penalties authorised by sec. 92 (15)."

It would not appear to be at all doubtful, in view of all the judicial pronouncements upon analogous statute law, that the Act (British Columbia Prohibition Act) is intra

vires of the Legislative Assembly of the Province of British Columbia.

In my opinion it cannot be gainsaid that the Legislature has the power to wholly prohibit the sale of liquor within the Province and that involves the right to control the possession of liquor within the Province, and I cannot see that the Act in any way transcends this power and jurisdiction. Even were it open to go into the facts of the case upon this appeal, the conviction and forfeiture could be supported—the Court would not be entitled—where there was evidence upon which the magistrate could proceed—to balance the evidence or to review the judgment of the magistrate upon the facts, and there was evidence admittedly of an illegal sale—and upon the facts it was a possible and reasonable inference that the stock of liquor was kept for illegal sale—being sold illegally it might well be said that it was held for illegal sale—and the forfeiture was justifiable.

The Summary Convictions Act was also challenged, and it was contended that it also was ultra vires, with deference though, I cannot say it was very seriously argued, I find it only necessary to say that legislation of this nature has for many years stood upon the statute books of all the Provinces of Canada without challenge, and nothing was submitted that could be said to even require a second thought, the Act is plainly intra vires and proper provincial legislation.

I would dismiss the appeal.

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

Appeal dismissed.

MARTLE v. NORTHERN LIFE ASSURANCE CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. June 25, 1920.

Negligence (§II.C—60)—Unused Well—Trap—Existence of, Not Known to Owner—Ownership as Fixing Owner with Knowledge—Injury to Bare Licensee—Liability.

The mere fact of ownership is not sufficient to fix the owner of land with knowledge that there is a trap on the land, and without such knowledge he is not liable in damages for injuries caused to a bare licensee.

[See Annotations, Duty to licensees and trespassers, 1 D.L.R. 240; Defective premises, 6 D.L.R. 76.]

APPEAL by plaintiff from judgment of Greene, D.C.J., in an action to recover damages caused by falling into an unused well on defendant's land. Affirmed.

Alta.

App. Div.

MARTLE v. NORTHERN LIFE ASSURANCE CO.

G. M. Blackstock, for appellant.

G. L. Fraser, for respondent.

The judgment of the Court was delivered by

Ives, J.:—On March 14, 1918, the defendant became the registered owner of the north-east quarter of sect. 24, tp. 11, range 4, west of the fourth meridian, and was such on March 2, 1919. On the latter date the plaintiff while lawfully on this land with his saddle horse fell into an unused well with his horse. The well had been covered with some inch boards and there being some 10 inches of snow on the ground the boards and well were concealed. The land was and had been unoccupied. I think the conditions I have stated, and which are more fully set out in the findings of the trial Judge, may fairly be held to constitute a trap. The quality of the plaintiff is at best that of licensee. There is no evidence that the defendant had any knowledge of the existence of the trap; nor is there any evidence of when the boards were put over the well or by whom. The duty owing a bare licensee from the owner of the subject of the license is pretty well settled, and it may be that the law extends so far as to impose a duty on the owner not to continue on his premises a trap after he has knowledge of its existence, but I can find no authority for the proposition that the mere fact of ownership shall fix the owner with knowledge. I think the appeal should be dismissed with costs.

Appeal dismissed.

TOWN OF NORTH BAY v. C.N.O.R. CO.

(Annotated)

Board of Railway Commissioners, December 27, 1920.

Highways (§II.A—22)—Crossed by Railway—Compensation—Interest—Severance—Costs—Railway Act, 1919 (Can.), ch. 68.

In an arbitration to determine the compensation under sec. 255 for lands injuriously affected by the construction of a railway across a highway, interest is not allowed on the amount awarded there being no severance. Following the general practice of the Board, each party to the arbitration pays his own costs, and the general costs of the arbitration are borne by the railway company.

[Leak v. City of Toronto (1900), 30 Can. S.C.R. 321, followed.]

APPLICATION for compensation arising from the construction of the respondent's railway through the town of North Bay.

A. G. Slaght, K.C., for the applicants.

F. A. Landriau, for Rev. A. Renando.

White, for the respondent.

Assistant Chief Commissioner: — The Chief Commissioner stated at the hearing that he did not propose to go into the question of values, it being held by him that the findings of Mr. Simmons, the Board's engineer, who had by consent acted as arbitrator, should in this regard be accepted as final. His disposition should, in my opinion, be taken as the position of the Board.

The matter is therefore concluded on the merits. The only matters arguable are those concerning points of law which may be involved. At the hearing, counsel made some eight claims, viz., those of O. Conte, claim No. 35; L. Conte and Concreta Conte, claims Nos. 3 and 73; T. Decicco and Mary Decicco, claims Nos. 22 and 23; S. Zimbolato, claim No. 6; A. Lamourie, claim No. 32; Terasina Pelangio and P. Pelangio, claim No. 88,—raising questions of law as to the allowance of costs and interest.

Counsel for Rev. Father Renando raised not only the status of his client in regard to compensation, but also his rights in regard to interest on such compensation.

The questions of interests and costs were raised in the proceedings before the arbitrator, who used the following language concerning these topics in his report.

"Interest on amounts awarded Claimants.—The claimants ask for interest at 5% on any amounts that may be awarded them, but I understand that decisions in the Courts have been against awarding interest on claims that have not been established. The company states that the claims had been

Ry. Bd.

TOWN OF NORTH BAY v. C.N.O.R. Co.

demanded. I leave this matter to be disposed of by the Board.

"Costs.—As to costs, I think each party should pay its own costs, and place the general costs of the arbitration on the railway company."

It has been held that interest cannot be allowed on the amount of damages awarded for lands injuriously affected, there being no severance. Leak v. City of Toronto (1900), 30 Can. S.C.R. 321. It is in substance contended by Mr. Slaght, counsel for applicants other than Father Renando, that what is involved in the present application is equivalent to land being taken and compensation determined therefor. And it follows from his contention that there is a further contention that interest should apply in connection with such compensation.

I am of the opinon, however, that to regard what is herein involved as being equivalent to the taking of land is a forced construction. As the matter presents itself to me, it must be dealt with as a question of damages, there being no severance involved, and is, therefore, a matter governed by Leak v. City of Toronto.

It follows, therefore, that the addition of 30% to the principal, as asked for by Mr. Slaght, in lieu of interest, is in the same position.

In dealing with the question of costs, the somewhat unusual conditions involved and the proceedings whereby a consensual arrangement as to the scope of the reference was arrived at must be borne in mind as one factor. While, under the Railway Act, 1919 (Can.), ch. 68, the Board has a discretionary power in respect of the fixing of costs and of the determination by whom and to whom costs are to be paid, it has with few exceptions been the practice of the Board not to award costs. The exceptions involved were during the earlier years of the Board's history.

Considering what burden may be imposed, if, for example, an unsuccessful applicant had to pay the railway costs, it being recognised that the practice adopted as to costs must be reciprocal, there has developed a practice based on public interest that each party should pay his own costs. This practice has developed as a result of the type of jurisdiction the Board is given and as a result of the nature of the cases with which it has had to deal, which are in many ways sharply distinguished from those coming before other tribunals.

As pointed out, the Board has in matters falling within the Railway Act so provided for the burden. In a matter such as the present, which is to a great extent based on consent not on jurisdiction, it seems to me that the argument for applying the practice which has been applied in cases where the Board has complete jurisdiction is strengthened. After full consideration of the informative and capable argument made by Mr. Slaght I have arrived at the conclusion that the parties should bear their own costs.

In dealing with the case of Rev. Father Renando, the arbitrator uses the following language:—

"Rev. A. Renando (Claim No. 8).—This claimant acquired an interest in lot 686 and the north half of lot 687, Second Avenue, by mortgage, July 19, 1913. The amount of the mortgage was $865, and J. M. McNamara acted as trustee for Renando, acquiring full title to the property in September, 1916. Renando became interested in the property through endorsing a note for $800, to enable Rommano, the owner of the property, to build a house. The note came due, and the amount was charged up to Renando's account. To protect himself he took a mortgage, and stated that Rommano promised he would pay him back when he sold the property to the Canadian Northern Railway, or was paid the claim that he had filed. Renando claims now that with the property he acquired the claim against the railway. Mr. White claims that, as Renando was not the owner of the property at the time the railway was built, he can have no claim under the Railway Act; but admits he has a claim under the Municipal Act, as the by-law diverting the street was not passed until June, 1918.

I am inclined to agree with Mr. White's contention that there can be no claim under the Railway Act, as the railway was built about a year previous to the time when Renando acquired the property; but he went on and obtained a deed for it, with his eyes open, and knowing that it had been damaged by the construction of the railway. I shall have to refer this to the Board for decision.

The diversion of Second Avenue damages the property slightly, but the embankment on the street to the north, and on the right-of-way to the east, damages it considerably. Nothing can be assessed for the latter, as it is on the company's land.

I allow $420 for damages, divided as follows:—Embankment on street $280, diversion of street $140."

Ry. Bd.

TOWN OF NORTH BAY v. C.N.O.R. Co.

The argument of counsel for this applicant is in effect that his client has a standing under the Railway Act, and this should be given weight. Title to the property was acquired some time in 1917; the railway work was constructed in September, 1916. It is contended by counsel for this applicant that his client steps into the rights of the owner at the time of the construction of the railway. My understanding of the award is that while in various cases there were questions as to the scope of what fell under the Railway Act, that with a view to closing the matter up the railway did not press these questions to their logical conclusion.

Section 255 of the Railway Act is the section which covers the jurisdiction, if any, of the Board in respect to the case herein involved. An embankment has been built across Second Ave., which carries the tracks, and Second Ave. is continued by a diversion into Front St. Section 255 provides that the railway may, on leave, be carried upon, along, or across any existing highway, subject to compensation to adjacent or abutting land owners, if the Board so directs.

Instead of Second Ave. as it existed prior to the construction of the railway, there is now a closing by means of which the railway is carried across Second Ave., and a diversion by means of which traffic is carried on the highway. It may be that in other cases dealt with by the arbitrator, similar facts arose, and notwithstanding this, provision may have been made for compensation, a provision which the railway has agreed to and which is, therefore, in no way involved in or affected by the present case.

A strong argument may, I think, be made for the position that where the tracks are carried across a street by a separation of grades and a substituted highway provided, this situation does not fall within the provisions of sec. 255. In other words, if I am correct, what the section had in contemplation was the carrying of the tracks upon, along, or across an existing highway, on the level.

When an appeal limited to the particular case in point, this appeal being based on a point of law, is made to the Board, the Board has to consider what the standing of the applicant is under the Railway Act and what jurisdiction, under the Railway Act, the Board has to make an order, because mere consent does not extend the jurisdiction of the Board.

As the matter presents itself to me, I do not consider that the situation herein involved falls within sec. 255. It therefore follows that an order cannot be made as asked for. ANNOTATION

The Chief Commissioner concurred.

ANNOTATION.

Compensation for lands injuriously affected but not taken for railway purposes.

By A. D. Armour.

The right of expropriation is the result of legislation by which the doing of an act is authorised, which in the absence of such authority would be unlawful or to the detriment of some legal right, and would result in a cause of action or an indictment. Much of the difficulty which has arisen in determining when compensation or damages is payable for the doing of such an act, can be traced to the prevalent idea that no invasion of a legal right will be permitted without some redress being provided. In fact, it was said in Commissioner of Public Works v. Logan, [1903] A.C. 355, that unless it clearly appears that a Legislature intended to take away property without paying or requiring the payment of compensation, such an intention will not be inferred. Though no such inference will be drawn, the right to compensation is not, however, absolute, it is purely statutory, and whatever the intention of the Legislature authorising expropriation may have been, compensation must be definitely provided for in an enactment passed for that purpose. It sometimes happens that private rights must give way to what is found to be expedient in the interests of the public and it rests with the Legislature to say whether the loss of such rights shall be compensated for. In Hammersmith, etc., R. Co. v. Brand (1868), L.R. 4 H.L. 171, Lord Chelmsford said at p. 202:—

"The 86th section (Railway Clauses Act) gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly [be] used without occasioning vibration and consequent injury to neighbouring houses . . . it must be taken that power is given to cause that vibration without liability to an action . . . The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house,

ANNOTATION a question which must be decided entirely by the provision of the Acts of Parliament relating to the subject."

First of all, therefore, unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed. Penny v. S.E. R. Co. (1857), 7 El. & Bl. 660 at p. 667, 119 E.R. 1390. Secondly, it does not follow that a party would have a right to compensation in some cases, in which, if the Act of Parliament had not passed, there might have been not only an indictment but a right of action. Caledonian R. Co. v. Ogilvy (1856), 2 Macq. 229 at p. 235. It was even suggested by Blackburn, J., in the Hammersmith case, at p. 199, that the onus of shewing that the Legislature has given compensation lies upon the claimant.

It has always been a question of great difficulty and nicety whether compensation is payable to a landowner who has suffered damage by reason of the exercise of the powers of a railway company, when no part of his lands have been taken. The difficulty was increased in Canada, until the decision in Albin v. C.P.R. (1919), 47 D.L.R. 587, 24 C.R.C. 398, 45 O.L.R. 1 reversed in (1919), 49 D.L.R. 618, 59 Can. S.C.R. 151, by the judgments in The Corporation of Parkdale v. West (1887), 12 App. Cas. 602, and in Re Birely v. T.H. & B. R. Co. (1897), 28 O.R. 468; 25 A.R. (Ont.) 88, holding that cases under the English Railway Clauses Act 1845 (Imp.), ch. 20 did not apply to cases under the Canadian Railway Act, 1888 (Can.), ch. 29. Much of the difficulty disappears if it is remembered that compensation is granted only for the invasion of a property right and not for mere personal inconvenience. Compensation is granted for the taking of lands, or damages are awarded for injury to lands but no redress is given for damages personally sustained by an individual by reason of the doing of an act which has been declared to be lawful. In Hammersmith, etc., R. Co. v. Brand, L.R. 4 H.L. 171, no part of the claimant's lands was taken, but damages were claimed and awarded for actual physical damage done to the land during the construction of the railway. But a further claim was made in respect of damage or annoyance arising from vibration, occasioned (without negligence) by the passing of trains, after the railway was brought into use. It was held by the House of Lords that this was not the subject of compensation even though the value of the property was actually depreciated thereby. It

ANNOTATION

was pointed out by the Court that damages were claimed for purely personal discomfort, which was not an interference with the actual user of the property, nor with the right of property. A distinction was also drawn between damages which resulted from the construction of the railway, for which compensation was awarded, and discomfort arising from the operation of the railway after construction. That being the thing authorised to be done, no right of action existed, and no provision was made by the Act for compensation. In The Queen v. Cambrian R. Co. (1871), L.R. 6 Q.B. 422, Cockburn, C.J., interpreted the judgments in the Hammersmith case, and Ricket v. Metropolitan R. Co. (1867), L.R. 2 H.L. 175 as follows, at p. 428:—"It seems to me that the only way in which one can interpret the language of the learned Lords who formed the majority in the decision in those cases in the House of Lords, is, that, while the Act of Parliament secures compensation wherever property is corporeally or actually touched and affected by the construction of the railway, yet that to things that are simply incidental to the ownership or possession of the property, in the way of additional advantage or enjoyment, the compensation given by the statute does not extend."

In The Queen v. Cambrian it was held that the construction by a railway company under its corporate powers of a bridge, with a footpath for passengers, over a river near to a ferry, which did not interfere with the exercise of the franchise, but diverted traffic from the ferry, gave a right to compensation, on the ground that a franchise was an hereditament, and therefore "lands" under the statute. That case was overruled in Hopkins v. G.N.R. Co. (1877), 2 Q.B.D. 224, and compensation was disallowed for two reasons, (1) no action would lie if the building of the bridge was not authorised by Act of Parliament, for it did not interfere with the exclusive right to carry passengers across by boats, and, (2) compensation is only given for damages caused by the construction of the railway and works, and is not given for damage caused by the user of the railway after it has been opened to the public. Att'y-Gen'l v. Metropolitan R. Co., [1894] 1 Q.B. 384, was a case where a railway company had constructed a tunnel under lands owned by them. Subsequently an opening was made in the roof of the tunnel for ventilation purposes. It was held that an adjoining owner was not entitled to compensation by reason of the emission of smoke and gas through the opening. The rule applicable

ANNOTATION to cases in which no land is taken was stated, at p. 392, as follows:—

"A line has to be sharply drawn, first, between cases in which land of the person claiming compensation has been taken; and cases in which no land of his is taken; and secondly (as regards the last class of cases), between injury occasioned by construction of works, and injury occasioned by the use of the railway. If, as in this case, no land of the person claiming is taken, compensation can be obtained for injury done by the construction of any of the works authorized, but no compensation can be obtained for injury occasioned by the use of the railway, or of such works, unless there is negligence, and there is none here."

In Caledonian R. Co. v. Walker's Trustees (1882), 7 App. Cas. 259, Lord Selborne, L.C., at p. 276, enunciates 4 propositions which have been established by the English cases:—

"(1) When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. (2) When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. (3) Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. [See Ricket v. Metropolitan R. Co., L.R. 2 H.L. 175, and at p. 283 (7 App. Cas.), quoting from the Ricket case, Exchequer Chamber decision, "Such damage did not accrue to the plaintiff in his capacity of owner of an estate in land. . . . The trading carried on in the house is entirely distinct from the estate in the house."] (4) The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way is a proper subject for compensation."

See Caledonian R. Co. v. Walker's Trustees, 7 App. Cas. 259 at p. 303, and Metropolitan Board of Works v. McCarthy (1874), L.R. 7 H.L. 243:—

"When an access to private property by a public highway is interfered with, the owner can have no action of dam-

ANNOTATION

ages for any personal inconvenience which he may suffer, in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts, if they are constructed under statutory powers."

What amounts to a sufficient obstruction so as to entitle the land-owner to compensation is a question of fact in each case. Caledonian R. Co. v. Ogilvy, 2 Macq. 229.

It now becomes necessary to ascertain how far these principles have been adopted or followed in the Canadian Courts. A great difference of opinion arose as to whether the difference in the wording between the English Act and the earlier Canadian Railway Acts excluded the application of the English cases to Canada. In re Day v. G.T.R. Co. (1856), 5 U.C.C.P. 420 was a case decided under sec. 4 of 14 and 15 Vict. ch. 51.

"Compensation shall be made to the owners and occupiers of . . . land so taken or injuriously affected by the construction of the said railway, for the value of all damages sustained by reason of such exercise as regards such lands, of the powers by this or the special act, etc., vested in the Company." (p. 423.)

It will be noticed that the right to compensation is confined to lands taken or injuriously affected by construction. In the case referred to above, it was held following Caledonian R. Co. v. Ogilvy, supra, that where a railway was lawfully constructed along a highway in front of the claimant's land, but no part of his land was taken, compensation was not payable, the lands not being damaged by construction. In re Widder and Buffalo, etc., R. Co. (1861), 20 U.C.Q.B. 638; 23 U.C. Q.B. 208, and Widder v. Buffalo, etc., R. Co. (1865), 24 U.C.Q.B. 520, the principle is recognised that damages sustained by persons from the construction of the railway as distinguished from the injurious affection of land, are not the subject of compensation. In that case compensation was awarded, because access to a navigable river on which the claimant's land abutted, was interfered with. Draper, C.J., at p. 217 of the report in 23 U.C.Q.B. refers to the English Acts as follows:—"We see no solid dis-

ANNOTATION tinction between the language of these English statutes and that used in our own," and pointed out that compensation was confined by the Act to damage caused by construction.

A good example of the difference between compensation for lands taken and damages for lands not touched by the railway but injuriously affected by construction will be found in Bowen v. Canada Southern R. Co. (1887), 14 A.R. (Ont.) 1, where after an arbitration had been had as to one of the three lots in a tier belonging to the same owner, part of which was taken by the railway, damages were awarded by reason of the cutting down of the grade of the highway in front of the other two, thus cutting off access to them. Burton, J.A., at pp. 5, 6, quotes from Eagle v. Charing Cross R. Co. (1867), L.R. 2 C.P. as follows:—"Both principle and authority seem to me to shew that no case comes within the purview of the statute unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be an actual injury to the land itself, as by loosening the foundations of buildings upon it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration.

A change was made in the Railway Act R.S.C. 1886 ch. 109, by the enacting of a new section (92), in 1888 (Can.), ch. 29.

"The Company shall in the exercise of the powers by this of the special Act granted, do as little damage as possible and shall make full compensation in the manner herein and in the special Act provided, to all parties interested for all damages by them sustained by reason of the exercise of such powers."

In Re Birely and T.H. & B. R. Co. 28 O.R. 468, the arbitrators awarded damages in respect of the operation of the railway. No part of the plaintiff's land had been taken. Armour, C.J., pointed out that Hammersmith, etc., v. Brand, supra, was decided on the ground that the sections of the English Act providing for compensation and damages were restricted in their effect to that part of the Act dealing with construction. He considered that the words "exercise of the powers by this or the special Act granted" in the Railway Acts of Canada, 1888, ch. 29, sec. 92, were wide enough to include the exercise of the general powers set out in the Act, and that therefore the right of parties to

ANNOTATION

damages was not confined to the construction of the railway but extended to its operation as well. This judgment was affirmed on appeal (1898), 25 A.R. (Ont.) 88, on the ground that no appeal lay. The construction of the amended Act was not dealt with. Later in the same year the case of Powell v. T.H. & B. R. Co., 25 A.R. (Ont.) 209 was decided. The Court considered Re Birely and Toronto, Hamilton and Buffalo R. Co. but were dubious as to whether the effect of sec. 92 of the Act of 1888 extended to damage by reason of the operation of the railway, and pointed out that the nature of the damages in that case was not disclosed by the report. It was not, however, necessary to decide that point. A railway had been lawfully constructed along a street in which the plaintiff owned a house and greenhouse. The main part of her claim was for damages owing to the constant passage of cars up and down the tracks and to the fact that the cars would often necessarily be left standing from time to time thereon during shunting operations, she would no longer be able, as she had hitherto done, to back up her carts and waggons against the sidewalk opposite the windows of her greenhouses which opened upon the road and take in and put out stuff from these windows, and from the same causes that access into her premises from the street was likely to be constantly interrupted. The Court applied the test as to whether the damage arose from construction or operation—would the works as they now stand, if left unused, form an obstruction to the access to the plaintiff's premises? If not, then the damage arises from operation. The Court held that in this case only damage anticipated from the use and operation of the railway was shewn. After a review of the English cases and both the Canadian and English Acts, Osler, J.A., at p. 214 said:—

"The provisions and arrangement of those Acts are no doubt very different from those of our Railway Act . . . but under the one as well as the other, the land owner who makes a claim for damage sustained by the execution and user of the authorized works which in the present instance . . . were executed after compliance with all statutory and municipal preliminaries and conditions — must show that the Act has expressly given him the right to recover it."

After pointing out that the plaintiff's right to damages for operation could arise only by reading the section dealing with general powers (sec. 90, now sec. 162) with sec. 92,

ANNOTATION now sec. 264, and the interpretation clause (sec. 2, now 2) his Lordship pointed out that these sections, particularly 92 (now 164) must be read in connection with the group of clauses commencing with 136 (now 205) which were then under the heading "Lands and their valuation," and that from a perusal of these clauses it was evident having regard especially to secs. 144 to 147 (now 213 to 216) that the damage intended by sec. 92 (now 164) is some actual injury or damage to land occasioned by the exercise of the powers of the railway, that it is, in short, damage of the same character as that for which compensation is recoverable under the English Acts, where no land is taken, though it is possible that it may also extend to such damages when caused by the operation as well as by the construction of the railway. The Court did not decide this point, however, as they came to the conclusion that in the circumstances of the case, if the works had not been authorized by the statute, an action would not be maintainable. The Judge applied Caledonian R. Co. v. Ogilvy and Caledonian R. Co. v. Walker's Trustees, and held that direct and immediate access was not affected and that the damage complained of was a matter of personal inconvenience and not an injury to her estate in the land. Maclennan, J.A., at pp. 218, 219, points out that "Our law is therefore substantially the same as the English law . . . a land owner is not entitled to any compensation for depreciation in the value of his property arising from the mere fact that a railway has been constructed and is being operated upon a street in front of his property. . . To enable her to do that she would have to shew that she had suffered some special damage peculiar to herself, such as that by embankment or excavation her access to her land from the street had been cut off or obstructed or rendered substantially inconvenient, whereby the value thereof has been lessened."

Finally in Holditch v. C.N. R. Co., 27 D.L.R. 14, [1916] 1 A.C. 536, 20 C.R.C. 101, it was definitely decided that compensation could not be awarded for damages arising by reason of operation. After hearing a full argument on all the Canadian cases Lord Sumner at p. 19 said:—

"The substantive obligation upon the railway company to make compensation is derived from sec. 155 [now 164] and the other two sections [191 and 193, now 213 and 215] are only concerned with the procedure by which this obligation is to be enforced. The language of sec. 155 is taken

ANNOTATION

with modifications to which in this case no importance can be attached, from the proviso to sec. 16 of the Railway Clauses Consolidation Act, 1845, and it is well settled by decisions of the highest authority that land so taken 'cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation.' The decisions on this construction of the Railway Clauses Consolidation Act have been applied to the Canadian legislation many years ago."

It is curious that while the similarity of the English and Canadian Acts was being upheld in cases like Bowen v. Canada Southern R. Co., 14 A.R. (Ont.) 1, The Queen v. Buffalo and Lake Huron R. Co. (1864), 23 U.C.Q.B. 208, Powell v. T.H. & B. R. Co., 25 A.R. (Ont.) 209 and other cases referred to in the judgment of Anglin, J., in C.P.R. v. Albin, 49 D.L.R. 618, there were cases where this was absolutely denied. The Corporation of Parkdale v. West, 12 App. Cas. 602, and North Shore R. Co.. v. Pion (1889), 14 App. Cas. 612. It is noteworthy, however, that no matter how strong were the opinions of the Court in those cases any dicta on this point were obiter, because the takers of the land were held to be mere trespassers and therefore not within the Act. With regard to damages for loss of business and profits, the third proposition in the Caledonian Railway case is a correct statement of the law in Canada. In Albin v. C.P.R. damages were awarded on the basis of how far the loss of business affected the value of the property as a marketable article, and that loss of business arose out of interference with access resulting in an actual physical deterioration of the land. As to damage peculiar to the individual and that does not affect his estate in the land, no case in the Canadian Courts can be found where it has been allowed when no land has been taken. The cases of Dodge v. The King (1906), 38 Can. S.C.R. 149, Lake Erie, etc., R. Co. v. Schooley (1916), 30 D.L.R. 289, 53 Can. S.C.R. 416, 21 C.R.C. 334, Pastoral, etc., v. The Minister, [1914] A.C. 1083, referred to in the dissenting judgment of Idington, J., in C.P.R. v. Albin, 49 D.L.R. 618, at p. 621, were cases where land had been taken. On the other hand the cases of St. Catharines, etc., v. Norris (1889), 17 O.R. 667, and the Albin case upheld the law as stated in the third proposition of the Caledonian Railway case.

The following rules are submitted for ascertaining what is a proper subject for compensation under the Canadian Railway Act:—

ANNOTATION 1. When a railway intersects a parcel of land compensation is allowed in the first place, for the land actually taken, and a further sum is allowed as damages for the injury done to the lands not taken, by reason of compulsory severance. In re Myerscough and Lake Erie, etc., R. Co. (1913), 11 D.L.R. 458, 4 O.W.N. 1249, 15 C.R.C. 168. 2. And these damages are for injury and damage to the land anticipated from the use and operation of the railway as well as its construction. Re Birely and Toronto, etc., R. Co. 28 O.R. 468. Consequently compensation with regard to smoke, noise and vibration should be allowed as affecting that part of the lands which lies in reasonable proximity to the railway while a part of the train is passing over the strip in question: Re Billings & C.N.R. (1913), 15 D.L.R. 918, 16 C.R.C. 375, 29 O.L.R. 608. 3. Compensation should be confined to smoke, noise and vibration generated on the part taken, C.N.R. v. C. M. Billings (1914), 32 D.L.R. 351, 21 C.R.C. 310, Burt v. Dominion Steel and Iron Co. (1915), 25 D.L.R. 252, 19 C.R.C. 187, 49 N.S.R. 339 affirmed 33 D.L.R. 425, 20 C.R.C. 134, [1917] A.C. 179. 4. But damages for injury to land outside of the land taken for the purposes of the railway will only be awarded in a case of actual severance. An so where an owner has subdivided lands and sold lots before expropriation and the remaining land does not form a connected compact parcel, no compensation is payable in respect of lots not touched by the right of way: C.N.R. v. Holditch (1914), 20 D.L.R. 557, 50 Can. S.C.R. 265, 19 C.R.C. 112, affirmed 27 D.L.R. 14, [1916] 1 A.C. 536, 20 C.R.C. 101, followed in Re C.N.P. R. Co. v. Byng-Hall (1916), 35 D.L.R. 773, 23 B.C.R. 38, 21 C.R.C. 324; and see annotation in 20 C.R.C. at p. 109. 5. Compensation must be made for all damages arising out of the construction of the railway whether any lands of the claimant are taken or not: Corporation of Parkdale v. West, 12 App. Cas. 602; Pion v. North Shore R. Co. (1886), 9 Leg. News. 218, 12 Q.L.R. 205; 14 Can. S.C.R. 677; 14 App. Cas. 612. And it is not a good defence for the company where damage is done to lands adjacent to the railway, no part of which has been taken, that the damage was done by contractors, if the damage done was such as should reasonably have been anticipated. Hounsome v. Vancouver Power Co. (1913), 9 D.L.R. 823, 15 C.R.C. 69, 18 B.C.R. 81, affirmed 19 D.L.R. 200, 49 Can. S.C.R. 430. 6. Where no part of the land of the claimant is taken the right

to compensation for damages anticipated by reason of the use and operation of the railway depends upon whether the injury is to the land, irrespective of any particular use to which it may be put by the owner, or is only an inconvenience to the owner, and does not affect the land. The rule is that if injury is caused otherwise than to the land, and to the land only, by the use of the authorised works, no part of the land having been taken, there is no remedy. 7. Section 164 is to be read in conjunction with the sections dealing with the valuation of lands and their expropriation, particularly secs. 213 et seq. The damage intended by sec. 164 is some actual injury or damage to land, occasioned by the exercise of the powers of the railway; damage of the same character as that for which compensation is recoverable under the English Acts where no land is taken. 8. Interference with direct and immediate access between the street and the premises affected is the subject of compensation, but not personal inconvenience to the claimant which is not an injury to land. Powell v. Toronto, etc., R. Co., 25 A.R. (Ont.) 209. In the Birely case, supra, damages were allowed for the alteration in the grades of streets upon which the claimant's land fronted, though none of the lands were taken. The facts in Powell v. Toronto, etc., R. Co., supra, were similar, but damages were refused. The Birely case was referred to, but not followed on this point. The Birely case must therefore be taken to be over-ruled on this point. 9. The test as to whether the lands are actually damaged by operation is to consider whether the works as constructed, if left unused, would interfere with the actual enjoyment of the lands. If not, no compensation is payable. 10. Anticipated loss of profits is not a subject of compensation where no land is taken, but is evidence to be weighed in considering whether the land has been so affected as to be a less marketable parcel.

LITTLE v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

British Columbia Supreme Court, Clement, J. November 21, 1921.

Constitutional Law (§II.A—233) — B.C. Government Liquor Act, 1921 Stats., ch. 30—Provincial Government Tax on Liquor Imported—Constitutionality.

The tax imposed by sec. 55 of the B.C. Government Liquor Act (B.C. Stats., 1921, ch. 30), which says in effect that any person in the Province becoming possessed of imported liquor must report the fact and pay to the Government such a tax on such liquor as will in the opinion of the Board of Liquor Control put the Province in the position it would have been in if the holder of

B.C.

S.C.

LITTLE v. ATT'Y-GEN'L. FOR BRITISH COLUMBIA.

such liquor had purchased it from the Government stores, is a direct tax and within the power of the Provincial Legislature. [Att'y-Gen'l of Manitoba v. Manitoba License Holders' Ass'n, [1902] A.C. 73, 71 L.J. (P.C.) 28; Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada et al, [1896] A.C. 348, 65 L.J. (P.C.) 26, applied; Great West Saddlery Co. v. The King, 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102, distinguished.]

ACTION for a declaration that plaintiff is not liable for the tax imposed by sec. 55 of the B.C. Government Liquor Act (B.C. Stats. 1921, ch. 30) on liquor imported from another Province. Action dismissed.

E. P. Davis, K.C., and H. N. Hossie, for plaintiff.

S. S. Taylor, K.C., for Attorney-General.

Clement, J.: — The facts in this case are within a very narrow compass. The plaintiff, a resident of Vancouver, B.C., imported from Calgary, Alta., a case of whisky manufactured in Toronto, Ont. On its arrival in Vancouver, he notified the Provincial Government, asking that labels be sent him bearing the official seal prescribed by the Government Liquor Act, 1921 (B.C.), ch. 30, in order that he might affix such labels to the 12 bottles contained in the case. These labels, so affixed, would indicate that the liquor was lawfully in plaintiff's possession. The Government, through the Liquor Control Board, established under the Act for its administration, in reply to the plaintiff's notification referred him to sec. 55 of the Act, and made a demand upon him for $11 as the tax payable by him under that section.

The plaintiff brings this action claiming a declaration that he is not liable for such tax, on the ground that sec. 55 of the Act is ultra vires. That section provides that with certain exceptions, within which the plaintiff admittedly does not fall,

"55. (1) Except in the case of:—(a) Wine imported by a minister of the gospel and kept for sacramental purposes; or (b) Liquor had and kept by a person and in a place and manner referred to in section 48; or (c) Liquor had and kept for export by a licensee under section 54 in the warehouse or place of business covered by his licence; or (d) Liquor which has been sealed, or which a person is entitled to have sealed pursuant to section 114,—every person who keeps or has in his possession or under his control any liquor which has not been purchased from a Vendor at a Government Liquor Store shall, by writing in the prescribed form, report the same to the Board forthwith; and shall pay to the Board, for the use of His Majesty in right of the Province, a tax to

be fixed by the Board either by a general order or by a special order in any particular case, at such rates as will, in the opinion of the Board, impose in each case a tax equal to the amount of profit which would have accrued to the Government in respect of the liquor so taxed if it had been purchased from a Government Liquor Store, increased by the addition to that amount of an amount equal to ten per centum thereof. (2) Every person keeping or having in his possession or under his control any liquor in respect of which a tax is payable by him under subsection (1), without having reported the same to the Board in the prescribed form, or without having paid the tax so payable by him, shall be guilty of an offence against this Act, and shall be liable, on summary conviction, to a penalty of not less than an amount equal to five times the unpaid tax so payable by him, nor more than an amount equal to ten times such unpaid tax."

Counsel on both sides admitted, and I therefore assume without closer scrutiny of the Act in this regard, that this particular section strikes only at imported liquor, whether, as in the case at Bar, from another Province or from abroad. Mr. Davis contends that this is a tax on importation, in disregard to sec. 121 of the B.N.A. Act which provides that "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

This contention, clearly, does not raise any question of conflict between Dominion and Provincial powers. Mr. Davis did, it is true, faintly contend that sec. 55 is an interference with "trade and commerce" but wisely, I think, refrained from arguing it. The point is often taken in these liquor cases and as often overruled. I need not dwell upon it here further than to say that it is directly opposed to the cases hereafter noted.

Before dealing with the real matter in controversy I may say that no general attack is made upon the scheme of the Government Liquor Act, which provides for the establishment throughout the Province of Government stores, at which alone liquor may be sold. Speaking broadly no one is allowed to buy elsewhere within the Province than at a Government store from a Government vendor.

In the Manitoba Liquor Act case (Att'y-Gen'l of Manitoba v. Manitoba License Holders' Ass'n, [1902] A.C. 73, 71 L.J. (P.C.) 28) the power of a Provincial Legislature to pass Acts in restriction or even prohibition of the liquor traffic

B.C.

S.C.

LITTLE v. ATT'Y-GEN'L FOR BRITISH COLUMBIA.

was finally affirmed. It was in the opinion of the Privy Council "the better opinion" that this power is based on No. 16 of sec. 92 of the B.N.A. Act, being legislation, that is to say, in respect of a matter of "a merely local or private nature in the Province." The Act then under scrutiny was characterised by their Lordships (at p. 80) as "more stringent probably than anything that is to be found in any legislation of a similar kind." Their Lordships went on to say, at p. 80, "unless the Act becomes a dead letter it must interfere with the revenue of the Dominion, with licensed trade in the Province of Manitoba, and indirectly at least with business operations beyond the limits of the province. That seems clear."Equally clear to my mind, would be its interference with the importation of liquor, whether from another Province or from outside Canada. All objections on that score were in their Lordships' opinion removed by the judgment of the Board in the Local Prohibition case (Att'y-Gen'l for Ontario v. Att'y-Gen'l for Canada, [1896] A.C. 348, 65 L.J. (P.C.) 26). The Manitoba Liquor Act, 1900 (Man.), ch. 22, did not extend to bona fide transactions in liquor between a person in the Province and a person in another Province or in a foreign country, so that their Lordships were relieved from the necessity for a pronouncement upon the broader question as to the power of a Provincial Legislature to prohibit the importation of liquor into the Province. But their Lordships quoted with apparent approval the report of the Board in the Local Prohibition case (supra) at p. 79 that "there might be circumstances in which a provincial legislature might have jurisdiction to prohibit . . . the importation of such liquors into the province." They added that for the purpose of the question before them it was immaterial to enquire what those circumstances might be. Evidently, in their Lordships' view, sec. 121 of the B.N.A. Act could not be invoked as decisive against such prohibition for that section was, as appears in the reports, relied on by the respondents, though not expressly referred to in their Lordships' judgment. The point is not, strictly speaking, before me but even at the risk of being guilty of an obiter pronouncement, I venture to think that for the effectual working out of the scheme of the Government Liquor Act now in question, prohibition of importation into the Province would be constitutionally justified. Those inhabitants of the Province who, for the reason perchance that they dislike the brands of liquor kept for sale at the Government

stores or for any other reason, would like to import liquor, would be compulsorily put upon the same basis as the other inhabitants of the Province. So far as regards the source of their supply sec. 121 of the B.N.A. Act—a revenue section—would not, in my opinion, have any application. This prohibition of importation into this Province would not, in my opinion be dealing with the traffic otherwise, constitutionally speaking, than as a provincial matter. But the Act now in question does not directly prohibit importation. Section 55 says, in effect, that any person in the Province becoming possessed of imported liquor, must report the fact and pay to the Government such a tax upon the liquor so held in the Province as will, in the opinion of the Board of Liquor Control, put the revenues of the Province in the position they would have been in if the holder of such imported liquor had patronised the Government stores. Such a tax, admittedly a direct tax, is in my opinion well within the power of the Provincial Legislature. Importation may be affected, it is clear, but the section was passed olio intentu, in my opinion, as a way of working out the scheme of the Act. With its wisdom this Court has no concern.

I have carefully considered the recent judgment in Great West Saddlery Co. v. The King, 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102, and can find nothing therein which militates against the view I have just expressed.

The action will therefore be dismissed. Under our Crown Costs Act, R.S.B.C. 1911, ch. 61, I conceive that I have no jurisdiction to award costs. Under the circumstances I regret this.

Having dealt with the main controversy, I refrain from expressing any opinion on the other points raised on behalf of the Attorney-General.

Action dismissed.

THOMPSON v. LYNNE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Principal and Agent (§II.D—26) — Unauthorised Agreement and Receipt of Money by Agent—Liability of Principal—Ratification.

If an agent makes an agreement for the sale of land which he was not authorised to make and receives money payable under such agreement, which he had no authority to receive, the principal can be liable for the money paid only in case he with the knowledge that the agent has received it ratifies his action in so obtaining such money. Ratification must be evidenced either

Sask.

C.A.

THOMPSON v. LYNNE.

by clear adoptive acts or by acquiescence equivalent thereto, and must be accompanied by full knowledge of all the essential facts.

[Marsh v. Joseph (1897), 1 Ch. D. 213, followed.]

APPEAL by defendant from the judgment at the trial (1920), 56 D.L.R. 729, in an action for the return of $500 paid by plaintiff to the defendant's agent and for damages. Reversed.

T. D. Brown, K.C., for appellant.

J. M. Stevenson, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—In this action the plaintiff sues for the return of $500, paid by him to the defendant's agent Doner, and $500 damages incurred under the following circumstances:—

The defendant was the owner of a 1,600 acre farm near Carnduff, which was under lease to one Moore. The defendant on November 28, 1917, listed for sale said farm with one G. F. Doner, a real estate agent in Winnipeg. The defendant says the farm was to be sold subject to the lease. This appears to be correct, for Doner advertised it "subject to a lease." Doner's advertisement came to the notice of the plaintiff, and a correspondence between them ensued, with the result that they met at Carnduff about February 19, 1918, and went out to see the farm. On their return to Carnduff, Doner and the plaintiff entered into an agreement of sale upon terms entirely different from those upon which Doner was authorised to offer the farm for sale. Not only were the financial terms different, but the agreement provided that the plaintiff was to have possession on April 1, 1918. During the negotiations the plaintiff asked Doner if there would be any trouble about the lease, and Doner assured him that he need not bother about that at all, that he had arranged with the tenant to give up possession. The agreement set out that the vendor (defendant) agreed to sell his lands (which were described) "at and for the price and sum of forty-eight thousand ($48,000.00) dollars in gold or its equivalent to be paid to the vendor at the Merchants' Bank of Canada in Carnduff, Sask., as follows: five hundred ($500.00) dollars by cheque on Northern Crown Bank (receipt whereof is hereby by the vendor acknowledged), eight thousand ($8,000.00) dollars by transfer and assignment of eight bonds of one thousand dollars each, etc."

On the execution of this agreement by himself and Doner, the plaintiff gave Doner a cheque for $500, which Doner

cashed. The plaintiff admits that the agreement was entered into subject to the approval of the defendant, who was then in the United States. Doner then saw the defendant's tenant about giving up possession, but the tenant absolutely refused to give up his lease. Doner than attempted to get into communication with the defendant, but did not do so until March 14, when, in answer to a telegram from Doner saying that the farm had been sold and asking when he would return, the defendant telegraphed to Doner as follows: "Will arrive in about a week or sooner." On the strength of this telegram Doner telegraphed to the plaintiff as follows:—"Message from Lynne, deal all right." The only meaning the plaintiff could take from these words was that the defendant had approved of the agreement. This was not so, and Doner knew it was not so, and his conduct towards the plaintiff in this respect cannot be described as honest. On receiving the message from Doner, the plaintiff called a sale of his stock, sold a portion thereof and started for Carnduff with the balance, and thus incurred the damage for which he has sued. The defendant arrived in Winnipeg and met Doner. Doner says that he gave the defendant the particulars of the deal, and that the defendant expressed himself as pleased with the arrangements he had made. He says he handed the defendant a copy of the agreement, which the defendant started to read, but was reading it so slowly that he took it himself and read it to the defendant. The defendant denies that Doner read or shewed him the agreement, but says that he told him of the terms of the sale and the particulars of the transaction, and that he was not satisfied therewith as it left him with his stock on his hands, and it was then too late to feed them up for a spring sale. He asked Doner if he had arranged with the tenant, and was informed that he had not. He however agreed to go with Doner to the tenant and see if he would give up possession. They went, but the tenant refused to surrender his lease. Doner then told the plaintiff that they could not give him possession. The plaintiff asked what position he was in as to the $500 he had paid and the expenses he had incurred. Doner told him that he would pay him back the $500, and allow him $200 for expenses, but he did not make the payment. Some time later the plaintiff met the defendant and stated that he had not yet got his money back. The defendant asked him what money, and was told that he had paid $500 to Doner under the agreement. The defendant

Sask.

C.A.

THOMPSON v. LYNNE.

said he did not know that the plaintiff had paid any money at all. In his evidence the defendant testified that Doner had not told him, and he did not know before his conversation with the plaintiff, above referred to—which he thinks was in July—that any money had been paid by the plaintiff under the agreement. Doner admits that he promised to pay back the $500, and that he still has it. Not getting his deposit back, the plaintiff sued.

The trial Judge held (1920), 56 D.L.R. 729, that the claim for damages was not maintainable, as Doner had no authority to agree to pay the plaintiff for the trouble and expense to which he had been put. As to the $500 deposit, he held, at p. 730, that when Doner and the defendant went to Carnduff to see if the tenant would give up possession, "the defendant was fully aware of the terms of the agreement and was prepared to accept same, provided he could get his tenant to vacate," and he gave judgment for the plaintiff for $500. From that judgment this appeal is brought.

With deference, I am of opinion that the judgment cannot be upheld. As the agreement was entered into subject to the approval of the defendant, and the defendant never approved of it, the document never attained the status of a contract. This is admitted by counsel for the plaintiff, but he contends—and it is his sole contention—that the defendant, by expressing himself in Winnipeg as pleased with what the agent had done in making a deal with the plaintiff, had ratified the action of the agent up to that time, including the receipt by him of the $500.

"Ratification must be evidenced either by clear adoptive acts or by acquiescence equivalent thereto. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts." 1 Hals. 178.

In Marsh v. Joseph, [1897] 1 Ch. D. 213, at p. 246, Lord Russell of Killowen said:—

"To constitute a binding adoption of acts a priori unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."

Had the defendant knowledge that Doner had been paid $500 under the agreement? In his evidence he states, more

than once, but he had not until the plaintiff spoke to him in July. In rebuttal Doner was called, but, although the plaintiff's claim was dependent upon his ability to establish ratification by the defendant of Doner's unauthorised arrangement, Doner was not asked if he had told the defendant that he had received the $500.

The burden of proving ratification rests on the person alleging it, who must prove full knowledge of the facts. Wall v. Cockerell (1863), 10 H.L. Cas. 229 at p. 243, 11 E.R. 1013.

The only evidence from which it could be inferred that the defendant had such knowledge is that of Doner, who says that he read the agreement to him. On that evidence, and on the fact that he went to Carnduff with Doner, the trial Judge has found that when they went to Carnduff the defendant was fully aware of the terms of the agreement. Assuming that to be so, what were the terms of which he had notice? The only term from which he could acquire such knowledge is the one providing that $48,000 was to be paid to the vendor at the Merchants' Bank of Canada in Carnduff, as follows:—"$500 by cheque on the Northern Crown Bank (receipt whereof is hereby by the vendor acknowledged)." How would that provision inform the defendant that the plaintiff had paid $500 to Doner? It informed him that the whole purchase money was to be paid to himself at the Merchants' Bank at Carnduff, $500 of it by a cheque on the Northern Crown Bank. He knew that no portion of the purchase-money had been paid to him. Is the clause acknowledging receipt sufficient to charge him with knowledge? Under the circumstances I am clearly of opinion that it is not. He says he did not know that a payment had been made, and there is not, in my opinion, sufficient evidence to the contrary to justify the conclusion that he did. The only man who could have given this evidence (although called in rebuttal) did not give it. The plaintiff not having established that the defendant knew that he had paid Doner the $500 when the act of ratification is alleged to have taken place, cannot hold the defendant liable therefor.

For the plaintiff, the case of Ellis v. Goulton, [1893] 1 Q.B. 350, was cited as authority for the statement that payment to Doner was payment to the defendant. In that case, Bowen, L.J., at pp. 352, 353, said:—

"When a deposit is paid by a purchaser under a contract

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE CO.

for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal."

In order to make the principle there laid down applicable, two things must exist: there must be an agreement under which the money was paid and an agent authorised to receive it. In the present case, Doner had no authority to make the agreement or receive the money on behalf of the defendant. The defendant could, therefore, be liable for the money paid only in case he, with knowledge that Doner had received it, ratified his action in so obtaining it. As I have already held, such ratification has not been established.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs.

Appeal allowed.

BUCHANAN v. CANADIAN LIFE ASSURANCE CO.

Manitoba King's Bench, Mathers, C.J.K.B. January 18, 1921.

Railways (§I—9) — Spur Line — Agreement for — Construction—Right of Way Supplied—Private Line—Termination of, by Acquisition by Others of Land—Trespass in Maintaining.

An agreement was entered into between a railway company and a box company for the construction and operation of a spur from the railway company's track across the box company's property to its factory, the City of Winnipeg having given permission to construct and operate the spur across the necessary avenues of the city. The agreement provided that the box company should construct the spur, the railway company supplying the material or that the latter should construct it at the cost of the box company. Either party had the right to terminate the agreement at any time upon notice or upon default of payments for two months or for breach of covenants without notice.

The railway company made a plan, profile and book of reference showing the location of the proposed spur and deposited it in the land titles office and a duplicate with the Board of Railway Commissioners which authorised the construction.

The plaintiff by a final order of foreclosure or a mortgage acquired a part of the land over which the spur passed to reach the factory, the rights under the original agreement having been surrendered to the railway company and a new agreement

having been entered into with a company which had acquired the factory to which the spur had been built. The Court held that the spur so built did not form part of the railway and the fact that the Board had assumed to authorize its construction did not make it so. It was a mere private spur depending on its right to traverse the land upon the leave and license of the box company and the right to occupy the land terminated with the termination of the agreement by which it was granted, and the defendant who had acquired title to another part of the land over which the spur ran, and the railway company had no right to maintain the spur over plaintiff's land against his will. The plaintiff's knowledge of the existence of the spur and failure to take objection to it and the fact that he did not in his application for final foreclosure, mention its existence, did not estop him from denying the defendant's right to use the land.

[Blackwoods Ltd. v. C.N.R. Co. (1910), 44 Can. S.C.R. 92; Clover Bar Coal Co. v. Humberstone (1911), 13 Can. Ry. Cas. 162; Boland v. G.T.R. Co. (1915), 21 D.L.R. 531, 18 Can. Ry. Cas. 60, followed].

ACTION for damages for trespass in maintaining a spur line over plaintiff's land and for an injunction. Judgment for plaintiff.

Hugh Mackenzie, for plaintiff.

J. T. Thorson, for Canada Life Assurance Co.

L. J. Reycraft, K.C. and H. A. V. Green, for C.P.R.

W. J. Moran, K.C., for Duncan Fuel Co.

Ward Hollands, for Manitoba Steel and Iron Co.

Mathers, C.J.K.B.:—This is an action brought against the Canada Life Assurance Co., the C.P.R. Co., the Duncan Fuel Co., and the Manitoba Steel and Iron Co., Ltd., to recover $3,000 damages for trespassing on the plaintiff's land, and for an injunction to restrain a further trespass; or in the alternative, compensation for use and occupation of the land at the rate of $50 per month.

The land in question is Lot 11, excepting the easterly six ft. in width thereof, in Block 51, part of 35 St. John, as shewn on Plan 331 filed in the Winnipeg land titles office.

The essential facts are as follows:—

On and before May 12, 1905, the Czerwinski Box Co., Ltd., was the owner of Lots 10 and 11 in the said Block 51. This block lies between Higgins and Henry Avenues. The said company also at that time owned the whole of Block 21, part of parish Lot 11, St. John, as shewn on Plan 117. This latter block extends from Henry Ave. to Logan Ave., and the eastern half of it is immediately across Henry Ave., from the said Lot 11 in Block 51. On the portion of the said Block 21 fronting on Logan Ave. the box company

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE CO.

operated a factory. There was a track of the defendant railway company on the north side of Higgins Ave. and parallel thereto.

On June 15, 1905, the box company and the railway company entered into an agreement for the construction and operation of a spur from the railway company's track aforesaid in a southwesterly and southerly direction across Higgins Ave., traversing Lots 10 and 11 before mentioned, across Henry Ave. and to the box company's factory on Block 21.

Previously on May 12, 1905, the City of Winnipeg by agreement of that date between the city, the railway company and the box company, gave permission to construct and operate said spur across Higgins and Henry Avenues.

The agreement between the box company and the railway company of June 15, 1905, provided that the box company should construct the spur, the railway company supplying the material, or that the latter should construct it at the cost of the box company, and for the use of the rails and material the box company agreed to pay the railway company $50.77 per annum, payable in advance on June 1 in each year. Paragraph 9 provided that the box company should secure the right of way over the land on which the siding was to be built, outside of the land or property of the railway company used for right of way, and should save the company harmless from all claims for compensation by owners of the land or by owners and occupiers of any other lands who might be damaged by the construction or operation of the siding.

By para. 11 it was provided that in default of payment of the annual rent for two months or on breach of any of the covenants of the box company, the railway company might enter and remove the siding and thereupon the agreement should ipso facto terminate without notice.

Paragraph 12 provided that either party should have the right to terminate the agreement at any time upon giving to the other party notice in writing of its intention to do so, naming in such notice a day at least 2 months after the giving of the notice on which the agreement was to terminate, and after the day named the box company should cease to have any right to use the siding or to pass upon the property of the railway company upon which any part of the siding was laid.

The railway company made a plan, profile, and book of

reference, shewing the location of the proposed spur track and on January, 18, 1906, deposited the same in the Winnipeg land titles office and a duplicate with the Board of Railway Commissioners. The plan shews a railway line from the railway company's Higgins Ave. line to Logan Ave., following the course described in the agreements referred to.

Upon the application of the railway company, the Board of Railway Commissioners, by an order dated July 12, 1906, authorised it to "construct, maintain and operate a branch line" from a point on its Higgins Ave. spur to the northern side of Logan Ave., as indicated on the plan, subject to the terms and conditions contained in the agreement with the city of May 12, 1905. This order was registered in the Winnipeg land titles office on July 24, 1906.

Subsequently a spur track was constructed by the railway company as indicated in the plan, and completed before May 7, 1907. The track is still in existence and is used by the railway company for the purpose of serving its co-defendants.

On June 1, 1910, the box company transferred to the Petrie Mfg. Co., Ltd., Lot 10 and the easterly 6 ft. in width of Lot 11, and received in exchange therefor Lot 12 in the same block.

On May 23, 1910, the box company executed to the Northern Trusts Co. a mortgage for $3,400 on Lots 11 and 12, excepting the easterly 6 ft. in width of Lot 11.

On November 28, 1912, the box company mortgaged to the defendants, the Canada Life Ass'ce Co., the whole of Block 21 for the sum of $45,000. The box company made default in payment of this mortgage and on July 10, 1917, a final order for foreclosure was made and on the same day a clear certificate of title was issued in the name of that company.

On December 24, 1913, the box company mortgaged the portion of Lot 11 owned by it and Lot 12 to the plaintiff to secure the payment of $5,000. Default was made under this mortgage in 1915, and proceedings were taken in due course to foreclose it. On May 29, 1917, the plaintiff made an application for a final order of foreclosure. In the application, which he verified by his own affidavit, he stated that he was informed that the land was unoccupied except that there was upon it a frame cottage and stable. He was then, and had been from the beginning, aware of the exist-

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE CO.

ence of this branch line. On August 3, 1917, a certificate of title was upon this application issued to him for Lot 11, less the easterly 6 ft., and Lot 12 in Block 51, subject only to the mortgage of the Czerwinski Box Co. to the Northern Trusts Co. dated June 13, 1910. On August 27, 1917, a discharge of this last-mentioned mortgage was registered.

After the assurance company became owners of Block 21 it entered into a lease of the factory theretofore occupied by the box company to the defendant, the Manitoba Steel & Iron Co., and another portion of the property was leased to the Duncan Fuel Co.

On August 1, 1911, the box company surrendered to the railway company all its estate, right, title and interest in the siding and the materials, and in and to the agreement itself.

On June 15, 1912, a new agreement was entered into between the railway company and the box company giving the latter the use of the siding for an annual rental of $35.15. The other provisions were practically identical with those of the former agreement, including the provision as to right of way and right to terminate the agreement.

By an instrument bearing date June 15, 1917, this last-mentioned agreement was in turn surrendered by the box company and a new agreement which is dated June 16, was entered into between the railway company and the assurance company. This latter agreement differs in no essential respect from the one made between the box company and the railway company on June 15, 1912. It recites that the assurance company is interested in premises near the railway and desires to have the use of a railway siding which connects the premises with the railway, and it provides that the assurance company may as tenants of the railway company use it on the terms set out in the agreement.

The seventh paragraph of this agreement provides that the assurance company will secure the right of way over the land on which the siding shall be built, outside the land or property of the railway company used for right of way, and will save the railway company harmless from all claims for compensation by owners of said land and by owners and occupiers of any other lands who claim to be damaged by the construction or operation of said siding or any part thereof.

It is clear from the correspondence that the last mentioned surrender and the agreement between the railway company

and the assurance company were not executed for several months after the day on which they respectively bear date.

The claims of the plaintiff is that he is now the owner of Lot 11 and the defendants are by the operation of this spur track across it, trespassers, and he asks for damage for trespass and an injunction to restrain further acts of trespass, or in the alternative compensation for use and occupation.

The track was constructed in assumed exercise of the powers conferred by the Railway Act, 3 Ed. VII. 1903 (Can.), ch. 58, sec. 175. That section provided that "before commencing to construct any such branch line the company shall obtain the authority of the Board and comply with the following provisions— . . . 2. The company shall make a plan, profile and book of reference, showing the proposed location of the branch line and conforming to the requirements of section 122, and shall deposit the same * * * in the offices of the registrars of deeds for such districts or counties respectively."

Turning to sec. 122 it will be seen that amongst other things the plan must shew "the areas and length and width of lands proposed to be taken, in figures," and the book of reference must describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots and the area, length and width of the portion thereof proposed to be taken and the names of the owners and occupiers so far as they can be ascertained.

The reason for requiring this information to be furnished in all cases where the land is to be taken is quite obvious. In the absence of such data it would be quite impossible to fix the compensation for land so taken.

The plan in this case does not shew the area nor does the book of reference describe the portion of land proposed to be taken in any lot to be traversed, nor the area, length and width of the portion thereof proposed to be taken. The reason for the omission clearly is that no land was to be taken. The agreement made between the railway company and the box company provided that the latter should secure the right of way for the proposed spur to its factory located on Lot 21, and for that purpose it purchased Lots 10 and 11 in Block 51. It then owned all the land required to be traversed with the exception of the two streets mentioned. It wanted the spur as an adjunct to its own business and of course as against it all that was required was

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE Co.

its consent to construct and operate the line. That consent was given by the agreement of June 15, 1905. So long as that agreement remained in force and so long as it owned all the land over which the line was laid, the railway company had a right to maintain and operate the spur and of course could not be charged with trespassing in so doing.

On August 1, 1911, that agreement was surrendered but on June 15, 1912, another agreement to the like purport was entered into and continued in force until terminated by an instrument already referred to, bearing date June 15, 1917, and was not thereafter renewed.

It is not open to doubt it seems to me that after the termination of the agreement between the railway company and the box company all right which the former had to maintain and operate the spur upon the land of the latter which depended upon that agreement came to an end, and if the railway company thereafter desired to maintain and operate the spur it would be necessary for it either to secure the consent of the then owners of the land traversed or proceed to take the land under the powers contained in the Railway Act.

The box company had defaulted under its mortgage to the plaintiff and he proceeded to foreclose under the Real Property Act, R.S.M., 1913, ch. 171, with the result that on August 3, 1917, he obtained a certificate of title for the mortgaged lands, subject only to a mortgage to the Northern Trusts Co., which was subsequently discharged. The plaintiff thus became the absolute owner of Lot 11, Block 51 (less the easterly 6 ft.) and of Lot 12, the latter of which is not touched by the spur in question.

The box company also defaulted in its mortgage to the assurance company and the latter foreclosed and obtained a clear certificate of title on July 10, 1917.

On July 23, 1917, and again on July 30, the acting superintendent of terminals of the railway company wrote the assurance company to know if it wanted the agreement of the box company surrendered and a new agreement made with itself respecting this spur. The assurance company replied on July 31, that it would be advisable to have a lease with itself and suggested that the same be prepared.

On August 3, 1917, the assurance company requested that the matter be allowed to stand as it was negotiating a sale of the property.

On December 21, 1917, the acting superintendent of ter-

minals again wrote, saying:—"I would suggest that if you wish agreement kept alive that you immediately make application for a new agreement, as at the present there is no agreement covering the tracks, and some of the other interested parties may make a request on us to take the tracks up."

To that letter the superintendent of the assurance company replied on December 22, saying:—"I think you had better have the agreement completed without further delay."

Further correspondence shews that the agreement was delivered executed on January 24, 1918, but dated back to June 16, 1917. The agreement is on a printed form and is practically identical in terms with the second box company agreement and contains a provision that the assurance company will secure the right of way over all the land outside the land of the railway company used for right of way purposes and save the latter harmless from all claims for compensation by owners of such land.

The plaintiff has never consented to the siding traversing the portion of Lot 11 owned by him, nor has the railway company ever proceeded to take the land required for right of way under the powers contained in the Railway Act. A railway company may on complying with the provisions of the Railway Act take the land requisite for the undertaking with or without the owners' consent. When this siding was put down it was not necessary to have recourse to these powers because the applicant owned all the land to be traversed and by agreement gave the railway company permission to lay the siding and operate it for the purpose of serving the owner's factory.

The agreement provided for the laying of a track upon the box company's own land for the service of its business convenience. It was in no sense a permanent railway but a mere temporary thing, terminable upon notice from either party. The right of the railway company under that agreement, it appears to me, was that of a licensee, the license and consequently the right to occupy the land continuing during the existence of the agreement and no longer. The right to occupy the lands without compensation depended upon the agreement and when the agreement was terminated the right went with it.

The main contention of the defendants is that the spur or siding was constructed pursuant to the powers conferred upon the railway company by and in compliance with the

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE Co.

provisions of the then Railway Act, and by the authority of the Board of Railway Commissioners, and that the plaintiff's only right, if any, is to proceed for compensation as the Act directs.

If the correctness of the defendants' premise be assumed it would follow I think that their conclusion would be incontrovertible.

All the Railway Acts have contained a clause providing that the compensation for any land which may be taken without the consent of the owner shall stand instead of the land and that the claim to the land shall be converted into a claim to the compensation: 3 Edw. VII. 1903 (Can.), ch. 58, sec. 173; R.S.C., 1906, ch. 37, sec. 213; 9-10 Geo. V., 1919, (Can.), ch. 68, sec. 236; consequently, where land is taken possession of by a railway under its compulsory powers, the owners' only recourse is to proceed for compensation: Essery v. G.T.R. Co. (1891), 21 O.R. 224; Slater v. Canada Central R. Co. (1878), 25 Gr. 363; In Re Ruttan and Driefus and C.N.R. Co, (1906), 12 O.L.R. 187.

That is the situation where land is taken for right of way for either the main or for a branch line. The title to the right of way is acquired by the railway company either by agreement with the owner or by expropriation and he must be content with the compensation agreed upon or fixed as the Act directs. His right to the land taken is gone, it has become the property of the railway. But, can this be said with respect to a spur or siding such as the one in question?

The land upon which the track was laid did not become the property of the railway but the title to it continued to be vested in the owner. A reference to the plan and book of reference will shew that it never was intended that any land should be acquired by the railway company for right of way either by the exercise of compulsory powers or otherwise. As the applicant for the spur track owned all the land other than the city streets which it was necessary to cross, it was not necessary that any land should be acquired. The spur was being built for the sole accommodation of the applicant, under an agreement which either party might terminate on two months' notice. The agreement gave the railway company no right or title to the land which the spur was to traverse. The box company was to secure the right of way. It does not say that it was to be secured in the name of the railway company and when secured it was presumably to be secured in the name of the box company and as its

own property. The defendants do not claim by their pleading that under either of the agreements with the box company the railway company acquired anything more than its leave and license to construct, maintain and operate the spur upon its land.

The railway company took no land and consequently the question of compensation for land taken did not arise.

Under the circumstances is this spur a part of the railway or is it a mere private undertaking, built and operated by agreement between the railway company and the box company upon the land of the latter with the permission of the city to cross Henry and Higgins Avenues? If it is the latter then it is not part of the railway and did not require the authority of the Board of Railway Commissioners; and the fact that the Board did assume to authorise it does not affect the situation one way or the other, at least so far as the ownership of the land is concerned.

In Blackwoods, Ltd. v. C.N.R. Co. (1910), 44 Can. S.C.R. 92, and Clover Bar Coal Co. v. Humberstone (1911), 13 Can. Ry. Cas. 162, 45 Can. S.C.R. 346, the Supreme Court held that a spur or siding laid upon the lands of the applicant for it by agreement between himself and the railway for the purpose of serving his own particular business convenience was in no sense a part of the railway but a mere private spur or siding over which the Board of Railway Commissioners had no jurisdiction. In neither of these cases had the siding been authorised by the Board. That is the only respect in which the circumstances of these cases differ from those of the present case.

Subsequently, the Board, in Boland v. G.T.R. Co. (1915), 21 D.L.R. 531, 18 Can. Ry. Cas. 60, ruled that the fact that the construction of the spur was authorised by the Board did not make it a part of the railway where otherwise it would have been a mere private siding. In that case the spur was laid upon the property of the Fairbanks-Morse Co. to accommodate their own business, pursuant to an agreement similar in all essential terms to the present agreement. The Board had authorised its construction in assumed compliance with sec. 222, R.S.C., 1906, ch. 37, which was the same as sec. 175 of the 1903 Act.

In his judgment the Chief Commissioner said at p. 535:—

"As the Order relied on by the applicant as making the siding part of the railway on its face states that it is made 'subject to the terms and conditions set forth in said agreement,' I am at a loss to see, apart from all other considera-

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE CO.

tions, how such a construction can be given to it. Apart from the Order, the construction of that part of the siding on the lands of the contractor could have been made without approval by the Board."

Further on he says:—

"I am of the opinion that the construction made under an Order issued under the provisions of sec. 222 is not ipso facto railway property. Whatever the effect of such Order might be as against the railway company, it cannot in any way affect the title of the others, and transfer the right-of-way on which the siding may be built from them to the railway. While it well may be that the section contemplates the acquisition of the right of way by the railway company, it can only contemplate this being done by agreement with the landowner or after payment of compensation fixed under the appropriate sections of the Act. Nothing of the sort has happened here."

To the same effect was the Board's ruling in Standard Crushed Stone Co. v. G.T.R. Co. (1915), 18 Can. Ry. Cas. 374; and in Beverly Coal Mine, etc. Co. v. G.T.P. R. Co. (1918), 44 D.L.R. 364, 23 Can. Ry. Cas. 64.

I entirely agree, if I may be permitted to say so, with the reasoning of the Chief Commissioner as to the effect of the Board's order. What was said with respect to the order in the Boland Case is equally applicable to the order made in this case. It too is made subject to the terms and conditions contained in the agreement between the railway company, the box company and the City of Winnipeg of May 12, 1905. The agreement between the railway company and the box company of June 15, 1905, is not referred to in the order but it is recited in the agreement subject to which the order is made and many of its provisions are incorporated in that agreement.

The agreement of May 12, 1905, provides that the right to maintain the spur across Higgins and Henry Avenues shall be during the pleasure of the council and no longer, and shall be removed when required by the council. It also provides for the payment by the box company for the cost of all work and materials (except certain articles mentioned) in and about the "construction, maintenance, repair or removal" of the siding.

In my opinion a spur so built is not a part of the railway and the fact that the Board has assumed to authorise its construction does not make it so. It was then and has continued to be a mere private spur depending for its right to

traverse Lot 11 upon the leave and license of the box company at least so long as that company continued to own the land. It may be that the plaintiff could not have objected to the existence of the siding so long as the agreement with the box company remained in force. As that agreement had terminated before this action was brought that question does not arise.

If this spur was not a part of the railway, as I hold it was not, the title to the land occupied by it never was vested in the railway company but remained in the box company and is now in the plaintiff. Cases as Essery v. G.T.R. Co. supra, and the section of the Railway Act upon which they were decided, are entirely inapplicable. As no land was taken there was no right to proceed for compensation. All the railway company required for its purpose and in fact all that it obtained under the agreement was a mere revocable license, co-extensive in point of time with the agreement by which it was granted.

The contention of the assurance company that it acquired an easement or servitude over the plaintiff's land is, in my view, without foundation. It is based upon the fact that the plaintiff when he took his mortgage on Lot 11 knew of the existence of this spur track. He also knew, and so did the assurance company when it took its mortgage on Block 21, that the right of the railway company to maintain and operate the spur depended upon the leave and license of the box company. The assurance company might then have protected itself by stipulating for an easement over Lot 11 for the siding, but it did not do so.

It is next said that the plaintiff in his application for a final order of foreclosure declared that the land was unoccupied and concealed from the District Registrar the fact that there was a spur track upon the land. That charge is well founded because the application does declare the land to be unoccupied contrary to the fact. It is said that the District Registrar would otherwise have insisted upon the defendants being given notice of the application. Had notice been given, the most the District Registrar could have done would have been to issue the certificate of title subject to the rights of the defendants. That would not have established their rights nor have precluded them from now being enquired into so that I cannot see that the defendants have been injured by the untrue statement in the application. If they conceive themselves to be injured they have a remedy by applying to the District Registrar to re-

Man.

K.B.

BUCHANAN v. CANADIAN LIFE ASSURANCE Co.

call his certificate. As they have not done so, I am bound to treat the certificate as properly issued.

Next it is said that the plaintiff, having had actual knowledge of the existence and use of the right-of-way by the defendants across these lands since he became mortgagee, and having stood by and suffered and permitted the same without objection, he is now estopped from denying the defendants' right to make use of the lands.

It is not alleged that by the plaintiff's acquiescence the defendants have been induced to change their position nor are any other facts alleged upon which an estoppel could possibly be founded.

Next it is claimed that by the mortgaging of Lots 11 and 12 to the plaintiff without reserving a right of way over Lot 11 for the siding, the box company had committed a fraud upon the defendants or that it amounted to an attempt to derogate from its grant to the assurance company.

When the box company mortgaged Block 21 to the assurance company it granted no interest in Lot 11, Block 51. Subsequently mortgaging Lot 11 to the plaintiff was no derogation from the grant of the assurance company nor was there any fraud in the transaction. It is a complete answer to both these claims to say that the agreement with the box company on which depended the right to traverse Lot 11 by this spur track was terminated at the request of the assurance company and a new agreement made between the railway company and itself several months after the plaintiff had become the owner of Lot 11.

For these reasons none of the defendants have, in my opinion, any right to maintain and operate this spur upon the plaintiff's land against his will. If they desire to continue the spur they are not without remedy. The railway company can take the necessary land under its compulsory powers. In the meantime it is without the protection of the Railway Act and is like any other trespass, liable to an action; Jacobs' Railway Law, p. 293.

I find that the defendants in using said spur have trespassed upon the plaintiff's land and he is entitled to damages and to an injunction.

As there is no evidence of special damage or that the property has been diminished in value by reason of the trespass, the plaintiff is entitled to nominal damage only, which I fix at the sum of 25 cents.

There will be judgment in favour of the plaintiff for 25 cents nominal damages and costs of the suit, and an injunc-

tion restraining further trespass. The issue of the injunction will be suspended for 90 days to permit the railway company to proceed to expropriate under the Railway Act, if so advised.

Judgment accordingly.

FLETCHER v. CITY OF CALGARY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 22, 1921.

Municipal Corporations (§IIG—205)—Sidewalks on Steep Slope—Used by Children with Sleighs and Toboggans—Duty of City to Take Extra Precautions to Protect Pedestrians—Negligence—Injury—Damages.

When a sidewalk is on a steep slope and is used, to the knowledge of city officials whose duty it is to put sand and ashes on the slippery places, by children with sleighs and toboggans making it more than naturally slippery, there is a duty on the city to pay more attention to it than to others not so dangerous, and failure to take extra precautions to prevent injury to pedestrians is negligence for which the city is liable.

[German v. City of Ottawa (1917), 39 D.L.R. 669, 56 Can. S.C.R. 80, referred to.]

APPEAL by plaintiff from a judgment of Ives, J. dismissing an action for damages for injuries sustained by falling on an icy sidewalk. Reversed.

F. E. Eaton, K.C., for appellant.

C. J. Ford, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.:—This is an appeal by the plaintiff from a judgment of Ives, J. dismissing her action for damages.

On March 13, 1920, while walking on the sidewalk on the west side of 17th., St. W. she slipped and fell breaking her arm and wrist. There was icy snow on the sidewalk on which she slipped. There was a conflict of testimony as to the slippery condition of the sidewalk and as to children using it for sleighing and tobogganing for it was on quite a steep slope, but the trial Judge says: "From the evidence of Miss Davidson I am satisfied that there was an accumulation of hard packed snow on this sidewalk brought about by the children sliding there." The weather reports put in shew that for the first 6 days of March the weather was severe with a slight precipitation on each of 4 days amounting in all to about an eighth of an inch of water but the evidence does not shew what depth that would be of snow, but it is clear that it would not have been sufficient on any day to have caused the removal of the snow by the defendant.

Alta.

App. Div.

v.

FLETCHER CITY OF CALGARY.

On the 7th., the temperature rose and on each day thereafter until the 13th., was above freezing each day but dropped below each night. On each of the days it was above 40° but according to the chart furnished by the city the temperature on the 13th., did not rise above 30° until 9 a.m. when it reached 34° and then dropped to 30° rising again a little after 12 to 34° but dropping before 1 o'clock to 30° or 32° and remaining practically constant at that temperature the rest of the afternoon. The plaintiff says it was a cold cloudy day threatening snow.

It seems clear that the thawing of that day would not be sufficient to materially lessen the slipperiness of the icy snow caused partly by the thawing and freezing of the preceding days. The plaintiff was wearing rubbers and there is no suggestion that she was in any way a fault. It seems clear therefore, that the street was in a dangerous condition and the city can be excused only if it did all that could be reasonably expected of it to make it safe. We know that under the conditions of our climate it is impossible to keep sidewalks absolutely free from snow and ice and all that can be done is to minimise the danger resulting therefrom. As the trial Judge points out, for this purpose, the city was divided into districts and men employed with a superintendent over them to clear away the snow and put sand or ashes on the slippery places. The men, whose duty it was to place sand and ashes in this neighborhood, were called and they were all very indefinite as to when they put ashes on this sidewalk but some of them were positive that they did put ashes there during the winter. It is perhaps not surprising that they could not speak with any greater degree of certainty since it was not till just before the trial, almost a year after the accident, that they were asked to recall what they had done. The trial Judge, however, says that "one witness, Mitchell, remembers ashing this sidewalk in March because of a neighbor of his having moved to this street after the first of March and his calling on him at the time he did the work." This seems to be the one point in determining the Judge that ashes were applied in March but even that does not fix it as before the accident and the Judge also overlooked that though the witness first spoke of putting the ashes on the street generally, later in his evidence he limits it to the sidewalk on the side of the street on which his friend was, which was opposite to where the accident occurred. The plaintiff says there were no ashes on the street where the accident took place and Miss

Davidson, on whose evidence the Judge was prepared to rely, states that she noticed no ashes and she believes she would have if they had been there.

As stated, the sidewalk was on a steep slope, it was used, to the knowledge of the city officials in charge of this work, by children with sleighs and toboggans, making it more than naturally slippery and the alternate freezing and thawing of the previous days would add to the dangerous condition.

In my opinion, there was, owing to those conditions, an obligation on the defendants to pay more attention to this sidewalk than to others in less dangerous condition. A careful reading of the evidence of all the officials and employees as to the regulations and as to what was done in pursuance of them leaves me far from satisfied that in what was done their obligations were fulfilled.

In German v. The City of Ottawa (1917), 39 D. L. R. 669, 56 Can. S. C. R. 80, there had been a thaw and then over night a sudden freeze up and at 9 o'clock the next morning the plaintiff slipped on the ice and fell. Though the majority of the Court thought otherwise, two of the Judges of the Supreme Court of Canada, agreed with the trial Judge that it was "gross negligence" on the part of the City not to have protected the slippery condition of the sidewalk even before that hour. In this case the accident took place between 12 and 1 o'clock in the middle of the day and, in my opinion, there is no evidence fairly warranting the conclusion that any precautions whatever had been taken prior to the accident during that month. That being the case I think the defendants did not do what they might reasonably be required to do and are, therefore, liable.

The plaintiff was a professional nurse earning as a masseuse, she says, about $60 a week prior to an operation in the previous summer from which she had not yet fully recovered. At the time of the accident she was earning $100 a month.

Her expenses from the accident were $100 and she had to give up her occupation for one month after which she resumed it until it came to an end. For several months she did little, but to what extent that was due to the accident is not very clear. At the time of the trial a year after the accident she was doing some general nursing earning about half what she estimated she would earn as a masseuse and she complained of weakness and suffering still from the

B.C.

C.A.

WESTERN CANADA RANCHING CO. v. DEPARTMENT OF INDIAN AFFAIRS.

broken wrist. The doctor said the weakness might continue but from the general tone of his evidence I would gather that he did not anticipate such a result.

On the whole beyond the $200 definitely ascertainable damages, I think an allowance of $1,000 would be a fair amount and I would allow the appeal with costs and direct judgment in favor of the plaintiff for $1200 with costs.

Appeal allowed.

THE WESTERN CANADA RANCHING CO. LTD. v. THE DEPARTMENT OF INDIAN AFFAIRS.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and Eberts, JJ.A. April 29, 1921.

Waters (§II—60)—B.C. Water Act, 4 Geo. V. 1914, (B.C.) ch. 81, sec. 288—Powers of Board of Investigation Under.

The power conferred upon the Board of Investigation under the Water Act, 4 Geo. V. 1914 (B.C.) ch. 81, sec. 288, is confined to adjudication upon the claims of persons holding or claiming to hold records under any former Act or Ordinance, and upon all other claims and rights to the use of water under any former Act or Ordinance. The Board has therefore no right to adjudicate on a claim of the Kamloops Indian Reserve and make an allotment of water from St. Paul's Creek for the use of the reserve, the Indians not holding their water rights under any Ordinance or record.

APPEAL by plaintiffs from an order of the Board of Investigation under the Water Act, 4 Geo. V. 1914, (B.C.), ch. 81, allotting a quantity of water from St. Paul's Creek to be used for irrigation purposes on the Kamloops Indian Reserve. Reversed.

E. C. Mayers, for appellant.

W. D. Carter, K.C. for respondent.

Macdonald, C.J.A.:—The Ranching company claim to be the present holders of two water records, the first issued to Robert Thompson and James Todd, on December 9, 1869, and the second to John Holland on December 14, 1869. At the foot of the first record, the official who made it added these words: "This record is made subject to the rights of the Indians, of using water on the Reserve opposite Kamloops."

The Land Act, 1865, under which water records were then made, enacted that "Every person lawfully occupying and bona fide cultivating lands, may divert any unoccupied water" for certain specified purposes.

The Indian lands on which the water in dispute has been used, were reserved for the use of the Kamloops tribe in

1866. No record, under said Land Act or any other Act or Ordinance in favour of the Indians or of any individuals of the tribe, has been produced or proven. It was indeed not argued that there was a record of that nature at all. In 1877, the "Indian Reserves Commission," instructed by the Governments of Canada and British Columbia, fixed the boundaries of the Kamloops Reserve and they added these words to their report:—

"The prior right of the Indians as the oldest owners and occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek, (the Creek in question) and its sources, and northern tributaries, is, so far as the commissioners have authority in the matter, declared and confirmed to them."

Again in the schedule of "Indian Reserves" in the supplement to the Annual Report of the Department of Indian Affairs, for the year ending June 30, 1902, there is this item in the column headed "Remarks":— "Five hundred inches of water recorded from St. Paul's Creek allotted by Joint Reserves Commission, July 29th, 1877."

It appears that on September 26, 1888, an application for a record of 500 miners' inches of water from this creek for use on the said Indian reserve, was filed in the office of the Dominion Lands agent, at New Westminster. It is upon these four items and riparian rights that the Indian Department respondent, relies to sustain the order for the conditional license made by the Board, allotting 500 inches to the respondent for use upon the reserve.

The Board constituted under the provisions of the Water Act, 4 Geo. V., 1914, (B.C.) ch. 81 was by sec. 288 of the Act, given its powers to investigate into and adjudicate upon conflicting claims for the use of water. As I read that section, the power conferred is confined to adjudication upon the claims of persons holding or claiming to hold records under any former Act or Ordinance, and upon all other claims and rights to the use of water under any former Act or Ordinance. If therefore the respondent's claim was one not falling within the language just used, that is to say, was not one founded upon a record or right obtained pursuant to an Act or Ordinance, the Board had no jurisdiction to make the order appealed from, which is one granting a conditional license to the respondent to divert 500 inches of water from said creek for use of the Indian tribe on the Kamloops Reserve. Whatever rights to the use of the

B.C.

C.A.

WESTERN CANADA RANCHING CO. v. DEPARTMENT OF INDIAN AFFAIRS.

water the respondent or the Indian tribe or the individuals thereof may have outside the jurisdiction of the Board, either at common law or by virtue of the Acts and declarations referred to above, I am constrained to think that those put forward do not fall within the language of said sec. 288.

Apart from any power which may have been conferred upon the Board by sec. 6 of that Act, which section was not relied upon by counsel, doubtless because the time had passed for taking advantage of it, the jurisdiction of the Board is as defined in said sec. 288. I do not find, and we were not referred to any other section of the Act giving the Board a larger or more extensive jurisdiction, at all events, a jurisdiction which would cover the facts relied upon by the respondent as establishing its right to apply for a license to divert and use water from this creek.

This will leave the parties in respect of their several rights in the position which they occupied respectively at the date of the initiation of the proceedings before the Board.

I would allow the appeal.

Galliher J.A.:—I agree with Mr. Mayers' contention that the Board had no power to create rights.

The Board is defined in the interpretation clause to the Act 4 Geo. V. 1914, (B.C.) ch. 81, as follows: "'Board' means the Board of Investigation under this Act," and in Part VIII of the Act, its functions and procedure are set out, sec. 288—and stated to be "shall hear the claims of all persons holding or claiming to hold records of water and all other claims and rights to the use of water under any former Act or Ordinance."

It is clear the Indians do not hold under any former Act or Ordinance—the question then is: do they hold under a record; The Board evidently proceeded upon the ground that they did. The evidence adduced in support of this was:

A photostal copy of a list shewing water allotted to the Indians by the Indian Reserve Commission in 1877, and filed by J. W. Mackay, Indian agent, with the agent of Dominion Lands at New Westminster. Dealing with this—the Indian Reserve Commission had no power to allot or deal with water allotment under their commission. In their report they have dealt with it in this way, A.B. 118b:—

"The prior right of the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek and its sources and northern tributary, is so

far as the Commissioners have authority in the matter, declared and confirmed to them."

This can in no sense be called an allotment and if it could, would be beyond their powers. The fact that it was treated as an allotment in the Dominion Blue Book, 1902, does not in my opinion, add any force to the contention.

I can find nothing in the evidence to justify the Board in treating the different steps taken as constituting a record. The records granted Robert Thompson and James Todd on December 9th, 1869, were made subject to the rights of the Indians. Do these latter words mean subject to what rights they then had or whatever rights might at some future time be determined? I agree with Mr. Fulton's submission before the Board that it was the then rights of the Indians. To adopt the other construction might be to render useless the records granted to Thompson and Todd and under which the complainants now base their claim.

In fact Mr. Mayers has convinced me that in so far as taking water from the creek is concerned, that would be the outcome. In this view it appears to me that the ruling of the Board was wrong and that the appeal should be allowed.

Eberts, J.A. would allow the appeal.

Appeal allowed.

BIGFORD v. SQUIRRELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Solicitors (§IC—33)—Judgment—Stay of Execution—Settlement by Parties—Execution Issued by Plaintiff's Solicitor—Illegality of—Right to Compensation.

Where solicitors issue execution under which the sheriff makes a seizure when their client had no right to have execution issue because he had already received the amount of the judgment from the defendant the execution and the seizure are illegal and cannot be charged for by the solicitor in the absence of proof of collusion between the parties to deprive him of his costs by the settlement.

APPEAL by defendants from an order of a Judge in Chambers that a solicitor's bill of costs be taxed and an execution reduced to the amount of such bill. Reversed.

L. B. Ring, for appellant.

P. E. MacKenzie, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—In May, 1920, the plaintiff obtained a judgment against the defendant for some $1123.95. The

Sask.

C.A.

BIGFORD v. SQUIRREL.

defendant obtained a stay of execution for 3 months. The firm of Morse & Morse were the solicitors acting for the plaintiff. On August 13 the plaintiff and the defendant met, and the defendant settled the judgment in full. On August 17, the plaintiff's said solicitors, without being aware of the settlement, issued execution on the said judgment for $1123.95. This execution did not include the costs of the action, as no costs were given against the defendant. On September 7, the sheriff seized the defendant's crop. The defendant then applied to a Judge in Chambers for an order vacating the execution and the seizure. On the return of the application counsel appeared on behalf of the solicitors, although they were not parties to the application, and filed an affidavit of C. R. Morse which set out, (1) that their firm had acted as solicitor for the plaintiff in obtaining the said judgment and that their costs had not been paid, and (2) that prior to the settlement the defendant knew their costs had not been paid, and (3) Morse expressed the belief that the settlement had been effected for the purpose of depriving his firm of its costs. The Judge in Chambers ordered that the bill of costs of the solicitors be taxed, and that the sheriff reduce the execution issued in the action to the amount of the solicitor's bill so taxed, plus the costs of the application. The defendant now appeals.

In my opinion the Chamber Judge overlooked the fact that after August 13, when the defendant settled the plaintiff's judgment the plaintiff had no judgment upon which he could validly issue execution. The execution issued by the solicitors was issued on behalf of the plaintiff. As the plaintiff had no right to an execution at that date, the execution issued was, so far as he was concerned, invalid against the defendant, and cannot be maintained. If the plaintiff cannot maintain it, I do not see how the solicitors can, for they can have no higher rights under it than the plaintiff.

It was contended that the settlement was collusive and that, in such a case, the Court will interfere to protect the solicitors.

If the settlement was entered into for the specific purpose of depriving the solicitors of their costs, the Court will protect them by allowing them to apply summarily for payment of their costs by either of the parties to the collusive scheme. In re Margetson and Jones [1897] 2 Ch. 314; Dicarllo v. McLean (1915), 21 D.L.R. 673, 33 O.L.R. 231.

The solicitors, however must apply to the Court, and they must establish that the settlement was collusive. They have in this case made no application to the Court. They merely appeared in Chambers on an application by the defendant to set aside the plaintiff's execution. Neither have they established collusion. The only evidence of collusion was a letter signed by the plaintiff and addressed to Morse, in which the plaintiff stated that the defendant had said the solicitors "would not have the handling of any of the money." This is not evidence against the defendant. Neither the plaintiff nor anyone else has pledged his oath that the defendant ever made any such statement.

Even if the solicitors had made an application for an order directing the settlement of their costs by the defendant, and if they had been able to establish collusion so as to be entitled to such order, it would afford no good ground for refusing the defendant's application to set aside the plaintiff's invalid execution.

The appeal should, therefore, be allowed with costs, the order in Chambers set aside, and an order entered discharging the execution and the seizure.

As the only persons opposing the defendant's application were the solicitors, they will pay the defendant's costs of this appeal.

Appeal allowed.

MACINNES v. DALY.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and Eberts JJ.A. April 29, 1921.

Solicitors (§IIC—35)—Company—Winding-Up Act R.S.C. 1906 ch. 144—Liquidator Appointing Solicitor on Authority of Court—Personal Liability for Costs.

In proceedings under the Winding-up Act R.S.C. 1906, ch. 144 a liquidator who is authorised by the Court pursuant to sec. 38 of the Act to appoint a solicitor and who acting in such authority appoints a solicitor to promote a Bill before Parliament to facilitate the winding-up, is not personally liable to the solicitor for his costs, but the solicitor is held to have contracted relying on the assets of the estate.

[Ex parte Watkin (1875), 1 Ch.D. 130 followed; Burt v. Bull [1895] 1 Q.B. 276 distinguished.]

APPEAL by a garnishee from a judgment of Morrison, J. in an action attaching the costs owing to a solicitor, by the liquidator, in winding-up proceedings, the liquidator claiming the right to set off an indebtedness by the solicitor to the company against these costs. Reversed.

B.C.

C.A.

MACINNES v. DALY

C. Wilson, K.C., for appellant.
J. A. MacInnes, for respondent.

Macdonald, C.J.A.:—In proceedings under the Winding-up Act, R.S.C. 1906, ch. 144, the liquidator was authorised by the Court, pursuant to sec. 38 of the Act, to appoint a solicitor, and acting on this authority, he appointed the defendant to promote a Bill before Parliament to facilitate the winding-up. The plaintiff a creditor of the defendant sued him and attached the costs owing to him by the liquidator of the company in liquidation, the Dominion Trust Co. The defendant was largely indebted to the company and the liquidator claimed to set-off the said indebtedness against these costs. Against this claim it was argued that the debt attached was one owing by the liquidator personally and that there could be no set-off.

This was the sole question argued in the appeal. Mr. Wilson relied strongly on In re Anglo-Moravian Hungarian Junction R. Co., Ex parte Watkin (1875), 1 Ch. D. 130, and Mr. MacInnes, counsel for the respondent, relied with equal confidence upon Burt etc. v. Bull, etc., [1895] 1 Q.B. 276, 64 L.J. (Q.B.) 232. There was no special agreement between the liquidator and the solicitor in respect of the costs. It was decided in Burt v. Bull, supra, that a receiver and manager appointed by the Court to carry on an insolvent's business and who retained a solicitor in connection therewith, was personally liable to the solicitor, though he might re-coup himself out of the estate. The decision in Ex parte Watkin, was that an official liquidator who appointed a solicitor with the approval of the Court, was not personally liable to the solicitor for his costs, but that the solicitor must be held to have contracted relying upon the assets of the estate. The decision in each case was that of the Court of Appeal.

No reference to the earlier case was made in the later one, so that unless the earlier one was over-looked, and I cannot think that it was, the two cases are not to be regarded as parallel ones. In other words, a different rule with respect to the rights of the solicitor has been laid down where he was solicitor in winding-up to that which was adopted where he was the solicitor for a receiver and manager. It is impossible to read the reasons of the four Judges who decided Ex parte Watkin, supra, and the judgment of Bacon, V.-C., in a previous case approved by the Court of Appeal, without seeing that the rule has been

clearly laid down that in compulsory winding-up as well as in voluntary winding-up, the solicitor appointed with the approval of the Court is not the solicitor of the liquidator, but must look to the assets of the company in liquidation for his costs which the Act makes a preferential claim. This result was arrived at with due consideration of the statute which governed such proceedings, namely, the Companies Act, 26-26 Vict. 1862, (Imp.) ch. 89.

The sections of our Winding-up Act, corresponding to the ones referred to in the English case are practically the same as those of the Companies Act of 1862. There was no distinction between the facts of the two cases, with one exception, in Ex parte Watkin: the solicitor was appointed by the liquidator, which appointment was approved by the Court; here the liquidator was authorised by the Court pursuant to said sec. 38 to appoint a solicitor. I cannot see in that circumstance, any material distinction between the two cases. The point in both is, that the solicitor was appointed in pursuance of the statute.

I would therefore allow the appeal.

Galliher, J.A.:—Mr. MacInnes frankly stated in the argument that if he was not within the decision of Burt etc. v. Bull etc., [1895] 1 Q.B. 276, that he was out of Court.

This was a case where a manager and receiver appointed by the Court (in an action by debenture holders) for the purpose of carrying on the business was held personally responsible for timber ordered from the plaintiff in the course of carrying on the business, and is a decision of the Court of Appeal composed of Lord Esher, M.R., Lopes and Rigby, L.JJ.

In Nelson v. Roberts (1893), 69 L.T. 352, the manager and receiver who was also executor of the estate, in the course of his duties as such receiver, purchased certain lambs from a debtor of the estate. In an action for the price of the lambs the Court, Mather and Wright, J.J., held the liability was a personal one and that the receiver could not set off the debt due the estate as against the price of the lambs.

Both these cases were decided subsequently to In re Anglo-Moravian Hungarian Junction R Co., Ex parte Watkins, 1 Ch. D. 130, and in neither case was reference made to it. In the Anglo-Moravian case, supra, it was decided that a solicitor appointed by the official liquidator with the sanction of the Court, could claim only as against the assets

B.C.
C.A.
MacInnes
v.
Daly

of the company. That was a case of compulsory winding-up wherein the provisions of the Companies Act came up for consideration. Brett, J. at pp. 135, 136, says:—"I am of opinion that the solicitor appointed by the official liquidator according to the terms of the statute is appointed on the terms that he is to look to the assets of the company only, and is not appointed on the terms of looking to the personal credit of the official liquidator. That seems to me to follow from a consideration of the 97th and 110th sections of the Companies Act, 1862. A solicitor appointed according to the terms of the 97th section, is not any solicitor whom the official liquidator may choose. He has not the choice of all the world of solicitors from whom he may select one at his own option; he is confined to the appointment of such a solicitor as the Court may sanction. According to the 110th section, the Court has power to order that the costs of the solicitor shall be paid in priority to the costs of the liquidator. Now, both of these considerations are, in my opinion, wholly inconsistent with the idea that a solicitor is appointed by the official liquidator on the terms of looking to his personal credit. I should have thought so if the statute stood alone, but I further think that the decision of the Master of the Rolls in the case which has been cited gave that construction to the statute which I think the statute itself would bear. If it did not, I think that the reasoning of the Vice-Chancellor Bacon, (1872), Law Rep. 14 Eq. 278, in the case of In re Trueman's Estate, is a reasonable one, which cannot be answered, and shews that this is the true interpretation of the statute. Therefore, even if it were right to say, as has been argued, that the Master of the Rolls' decision does not conclude the point, I think that the case before Vice-Chancellor Bacon decided it in the most express terms. The solicitor does not look to the personal credit of the official liquidator, he looks only to the assets, and if the assets are not sufficient to pay in full, he loses the difference between the amount of his costs and the assets. Even although the assets are not sufficient, he cannot look to the official liquidator as personally liable to him for the difference; therefore I entirely concur in the view that according to the true construction of the Act there is no personal liability at all on the part of the official liquidator to the solicitor."

Similar provisions have to be considered in the case at Bar, but did not have to be considered in the Burt case or

in Nelson v. Roberts, supra, which probably accounts for the fact that in neither of these cases was the Anglo-Moravian case referred to.

It appears to me that the Anglo-Moravian case is directly in point here and it is the decision of a very able Court and should be followed.

The appeal should be allowed.

Eberts, J.A., would allow the appeal.

Appeal allowed.

THE BRITISH EMPIRE INSURANCE CO. v. GRIFFITH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. June 13, 1921.

Costs (§I—14)—Security for—Order Fixing Time—Expiration of Time Fixed—Letter by Solicitor Giving Option of Delivering Victory Bonds or Furnishing Security Ordered—No Time Fixed—Waiver of Right to Sign Default Judgment on Expiration of Time Fixed in Order—Reasonable Notice Necessary Before Signing.

Where a solicitor by letter after the time for furnishing security for costs has expired, gives the plaintiff the option of delivering victory bonds or of furnishing the security ordered, and fixes no time within which this should be done, he waives his right of having the security furnished within the time fixed by the order, and is not entitled to sign judgment on account of the default which he has waived without first giving reasonable notice of his intention to do so.

APPEAL by defendant from an order of the local Master opening up a judgment on terms. Affirmed.

L. MacTaggart, for appellant; A. Benson, for respondent.

Haultain, C.J.S., concurs with Lamont, J.A.

Lamont, J.A.:—The facts in this appeal are as follows:—In June, 1920, the plaintiffs, who carried on business in British Columbia, brought an action against the defendant for $1069.70, for calls and interest on stock in the plaintiff company for which the defendant had subscribed. On June 28, 1920, the defendant obtained an order directing the plaintiffs, within three months of the date of service of the order, to give security for the defendant's costs in the sum of $400, by depositing with the local Registrar cash to that amount, or the bond of an approved guarantee company. The order also contained the following clause: "It is further ordered that in default of such security being given as aforesaid, that this action be dismissed with costs as against the plaintiff without any further order."

After the above order was made, negotiations took place between the parties with the object of having Victory Bonds

Sask.

C.A.

BRITISH EMPIRE INS. CO. v. GRIFFITH.

deposited in lieu of the security ordered by the Court, and, on August 23, an arrangement was entered into by which the plaintiffs were to deposit Victory Bonds in the amount of $400 with the solicitors of the defendant. Nothing more appears to have been done until October 4, when the plaintiffs' solicitor wrote the defendant's solicitors saying that the plaintiff's manager desired the Victory Bonds referred to to be held by the solicitor of the plaintiff company, and asking if the defendant had any objection to this being done. The time limited by the order of the Court for furnishing the security had then expired. On October 7 the defendant's solicitors wrote to the plaintiff's solicitor as follows:—"Replying to your letter of the 4th instant would say that if your clients do not wish to deposit the bonds with us, they had better file the security in the usual way."

Not hearing from the plaintiffs, and the bonds not having been deposited, the defendant, on October 23, caused judgment dismissing the plaintiffs' action to be entered for default in furnishing the security as ordered. The plaintiffs then applied to the local Master for an order opening up the judgment and allowing the plaintiffs to proceed with the action. In his affidavit in support of the application, the manager of the plaintiff company set out that, desiring to avoid the expense of a bond or the tying up of $400 in Court, he caused negotiations to be conducted with the defendant's solicitors with a view to depositing Victory Bonds in lieu of the security ordered by the Court, and that by reason of these negotiations, and the fact that he had not been definitely informed as to the time limited for furnishing the security, the time limited by the order was, through inadvertence, allowed to slip by; but that he was then ready to deposit a bond as required by the order of the Court. The local Master granted the application and directed that judgment be opened up, but upon terms. These were, that the plaintiffs pay the defendant's costs of entering judgment and the costs of the motion to open up. From this order the defendant appealed to the Chief Justice of the Court of King's Bench in Chambers. The Chief Justice affirmed the order of the local Master. The defendant now appeals to this Court.

In my opinion the appeal should be dismissed, as the defendant was not entitled to sign judgment when he did. When the letter of October 7 was written, the time for furnishing the security ordered by the Court had expired. Not-

withstanding that such was the case, that letter gave the plaintiffs the option of delivering Victory Bonds to the defendant's solicitors or of furnishing the security ordered, and no time was fixed within which this should be done. The defendant thus waived the right which, under the order, was his, of having the security furnished within the 3 months. Until it was waived, time was strictly of the essence of the order. After waiving performance within the time so fixed, the defendant, in my opinion, was not entitled to sign judgment on account of a default on the part of the plaintiffs, which had been waived, without first giving the plaintiffs reasonable notice of their intention to do so.

The principle applicable seems to be that adopted in the case of a contract in which time is expressed to be of the essence of the contract, but, by reason of waiver, has ceased to be so. It is a well known rule that in a contract where, although originally of the essence of the contract, the time fixed had by reason of waiver ceased to be applicable, a reasonable time for cancellation must be fixed before the contract can be rescinded as against the party in default.

In Webb v. Hughes (1870), L.R. 10 Eq. 281, it was held that, even if time had been of the essence of the contract, a purchaser, by continuing negotiations as to title after the day fixed for completion, had waived it and could not rescind without reasonable notice, and the decision in Upperton v. Nickolson (1871), L.R. 6 Ch. 435, shews that, once the time has gone by, the subsequent rights of the parties are governed by the general principles upon which Courts act. The signing of judgment by the defendant, under the circumstances, was, therefore, an irregularity, which entitled the plaintiffs, upon a proper application, to have the judgment set aside ex debito justitiae. The plaintiffs, however, did not move to set aside the order on the ground of the irregularity. Had they done so, the application might not have been opposed. They must, therefore, take their order subject to the terms imposed by the local Master.

The appeal should be dismissed with costs, which costs may be set off pro tanto against the costs payable to the defendant under the local Master's order.

Turgeon, J.A.:—I concur in the conclusion arrived at by my brother Lamont, but in so doing I wish to confine myself to the following reasons only: I think the judgment in question is a judgment by default within the meaning of

B.C.

S.C.

THE KING v. U.S. FIDELITY CO.

Rule 235, and that the plaintiffs in their application to the local Master made out a proper case for the exercise of the power given to the Court by that rule; and this being so, I think the plaintiffs are entitled to the order made by the local Master subject to the terms imposed by him.

Appeal dismissed.

THE KING v. U.S. FIDELITY CO. ET AL.

British Columbia Supreme Court, Gregory, J. May 11, 1921.

Taxes (§VA—180)—Succession duties—Appointment of Commissioner to Enquire into Amount—Valuation of Executor Taken—Power of Court to Interfere with—Succession Duties Act R.S.B.C. 1911 ch. 217, secs. 23-33.

The Finance Minister being dissatisfied with valuation of property given by the executor for succession duty purposes appointed a Commissioner to enquire into the value. The Commissioner made a valuation somewhat lower than that of the executor. The Auditor-General then fixed the amount of succession duty on the valuation given by the executor without any protest on his part, and the defendant became a surety for the payment of the amount so fixed, under sec. 23 of the Succession Duty Act, R.S.B.C. 1911, ch. 217. In an action upon the bond the Court held that the property had been very greatly overvalued and at the time of the action was practically valueless, but that the only jurisdiction of the Court to interfere with the values as fixed was by the Court of Appeal under sec. 33 of the statute, when there was an appeal from the report of the Commissioner, and in this case there had been none.

ACTION upon a bond given to secure the payment to the Crown of succession duty, the defendants being surety for the executor. Judgment for plaintiff.

S. S. Taylor, K.C. for plaintiff.

H. B. Robertson, for U. S. Fidelity Co.

F. C. Elliott, for defendant Quagliotti.

Gregory, J:—This is an action upon a bond given to secure the payment to the Crown of succession duty upon the estate of Patronilla Quagliotti, the Fidelity Company being surety for the executor Lorenzo J. Quagliotti.

The bond was given under the provisions of the Succession Duty Act, being ch. 217, R. S. B. C. 1911 and is in the form provided by the schedule to that Act. The condition of the obligation is to be void if "Lorenzo Joseph Quagliotti, the executor of all the property of Patronilla Quagliotti... do well and truly pay ... any and all duty to which the property, estate and effects of the said Patronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act ...."

It is suggested that deceased had practically no estate, as the estate so called consisted of a large amount of real property devised to her by her former husband, Carlo Bossi and that, under the provisions of the Land Registry Act R.S.B.C. 1911 ch. 127 she had acquired no title as the same had not been registered in her name and the same is true of L. J. Quagliotti who is the sole devisee under the will of the deceased.

It is not disputed that Carlo Bossi died possessed of a large amount of real estate and that his widow took possession of it and received the profits thereof and after her death her second husband L. J. Quagliotti in turn took possession, managed it and received the profits. By virtue of the provisions of the Land Registry Act neither the deceased nor L. J. Quagliotti may be the registered owner of the legal estate therein, but L. J. Quagliotti is undoubtedly the owner of all the equity and the only person entitled to be registered as owner of the legal estate. Such property is undoubtedly liable for succession duty. It is argued that his possession must have referred to his capacity of devisee and not that of executor, and that, therefore, it cannot be said that the property has come into his hands and not having come into his hands he is not liable for the succession duty. I cannot agree to this. The property has, in every sense that real estate can, "come to the hands" of Quagliotti and I do not think it necessary or proper to make any fine distinction as to whether his dealing therewith was in his capacity as executor or devisee. The condition of the bond only requires that the property shall come into the hands of "the said Louis Joseph Quagliotti" and makes no reference to the character in which they shall so come — although he is earlier described as "executor of all the property of" etc.

The next question which arises is what is the amount of duty payable. There is no dispute that it is governed by the value of the property at the date of the death of Mrs. Quagliotti.

The defendants allege that the property was largely overvalued and I am satisfied from the evidence that it was and that the gross value of the estate was $500,000.

Upon the application for probate the defendant Quagliotti in his affidavit made a list of the properties and their values totaling $886,000. In his application to the defendant company for a bond he furnishes the same list and values. Upon

B.C.

S.C.

THE KING v. U.S. FIDELITY CO.

such a valuation the duty would be $44,287.50 and I do not think that any reasonable person could come to any other conclusion than that both the defendants and the Crown believed when the bond was executed that it was to secure the payment of that amount. That amount had been determined by the Auditor-General under the provisions of sec. 22 of the Succession Duty Act, and was based absolutely on Quagliotti's valuation. The Finance Minister, under sec. 29 of the Act, if dissatisfied with the affidavit of valuation could appoint a Commissioner to enquire into the value. He did this and the Commissioner made a valuation somewhat lower than that of Quagliotti's and naturally the Crown was then willing to accept Quagliotti's valuation and the Auditor-General fixed the amount accordingly without any protest by Quagliotti. Section 33 of the Act provides for an appeal from the Commissioner's report by any person dissatisfied with it. Of course there was no appeal.

Under the ascertainment of the amount of duty payable the Registrar, under sec. 23 of the Act, shall "require immediate payment of the amount or security therefor to be given by bond" etc. The bond sued on was given in pursuance of this section of the Act. The amount of the bond is governed by sec. 24 and is a penal sum equal to 10 per cent. of the value of the property liable to succession duty. The amount was so fixed in the present case.

In a somewhat similar case, Rex v. Roach and London Guarantee and Accident Co., [1919] 3 W.W.R. 56, Simmons, J., re-valued the property and reduced the amount of duty payable and this case has been strongly pressed upon me as authority for my doing the same thing here and I would be very glad to follow such a precedent if the statutes in Alberta and British Columbia were similar. But the Alberta Stats., ch. 116, C.O., 1905, contains no provision similar to that in sec. 22 of our Act enabling the Auditor-General to "determine the amount of succession duty." It contains provisions for the appointment of an appraiser and an appeal from his decision. There was no such appointment in the Roach case. But there is a general section, viz., sec. 12, which provides that the Court shall have jurisdiction to determine what property is liable to duty, the amount thereof and may exercise "any of the powers which by sections 7 to 10 (being the section governing appraisement and appeal) are conferred upon any officer or person." Simmons, J., at p. 59 of the report, says:—"The provincial

treasurer did not appoint an appraiser. . . . and the parties interested had no other recourse where the treasurer did not accept the value of the executor . . . than to defend an action and raise by way of defence any objection." In the present case the executor's valuation was in the end accepted. Simmons, J., on the same page says:—"Where an appraiser is appointed . . . there is an appeal to a Judge and his decision is final. In other cases finality, other than by agreement, can only be arrived at by an action . . . under secs. 11 and 12. Unless there is an agreement . . . I am of the opinion, that the whole question of values is open under sec. 12."

Our statute contains no such general provision as that contained in sec. 12 of the Alberta Ordinance and the only jurisdiction of the Court to interfere with the values as fixed is (by the Court of Appeal under sec. 33 of our statute) when there is an appeal from the report of the "Commissioner," and there was none.

It does not seem to me possible to allege that Quagliotti did not agree to the amount of duty as fixed by the Auditor-General. It was fixed on his own valuation. He never, until this action was launched, made the slightest protest. In the Roach case the executor had protested—though later, by entering into the bond, he seemed to acquiesce. The defendant company is, I think, equally barred, it was well aware of the executor's valuation and that the duty has been fixed upon it and it knew or should have known that, under sec. 23 of the Act, the bond was to secure the payment of the amount so fixed.

There must, therefore, be judgment for the plaintiff for the sum of $44,287.50 with interest thereon at the rate of 6 per cent. from May 21, 1915, but the defendant company upon paying the amount due, under the judgment, will be entitled to stand in the place of the Crown so far as the amount of duty is concerned, but subject to the superior rights, if any, which may have been acquired by any innocent purchaser for value, not represented in these proceedings.

I hope it will not be considered impertinent in me to suggest that this is a fitting case for the Crown to reduce the amount of duty as an act of grace and bounty. The property today is practically valueless—it has, as a matter of fact, largely been sold for taxes and there cannot be in the mind of any reasonable person any doubt that the

Sask.

K.B.

R. EX REL KNIGHT v. LARSON.

several properties were never worth the values put upon them. There had been a most unprecedented boom in real estate shortly prior to the death of Mrs. Quagliotti during which absolutely unheard of values were put upon real estate in every part of the city of Victoria—the values in the inventory were based upon those inflated prices—probably through the natural unwillingness of owners to admit even to themselves that the boom was over and the values gone.

The whole country has suffered and is still suffering from the effects of the "wild cat" speculation of those days.

I would also respectfully suggest that the form of the bond given in cases of this kind should be remodelled and that some provision should be inserted in the statute for the repayment of duties paid upon property which it is afterwards discerned has no value or has entirely disappeared. Such provisions are to be found in the statutes of other Provinces.

Judgment for plaintiff.

REX EX REL KNIGHT v. LARSON.

Saskatchewan King's Bench, Bigelow, J. May 9, 1921.

Certiorari (§IB—11)—Conviction by Justice of the Peace—Disorderly Conduct—Village Act R.S.S. 1920, ch. 88, sec. 117 (40)—Magistrate's Act R.S.S. 1920, ch. 64—Appeal Under Sec. 749 of the Criminal Code.

Where there is a right of appeal from the decision of a Magistrate or Justice of the Peace, having jurisdiction, certiorari will not be granted unless there are exceptional circumstances.

[See The King v. Eremenko, p. 393 post.]

APPLICATION for a writ of certiorari. Dismissed.

P. H. Gordon, for accused.

C. E. Gregory, for informant.

Bigelow, J.:—This is an application for a writ of certiorari to bring up a conviction made by R. A. Mackinlay, a Justice of the Peace, whereby the accused was convicted for that he did, on March 12, 1921, conduct himself in a disorderly manner by using profane language in a public place, the waiting room of the C.P.R. depot, contrary to By-law 36 of the Village of Hatton.

The grounds in the notice of motion are—(a) That there was no evidence to sustain the said conviction. (b) That there was not sufficient evidence to sustain the said conviction. (c) That the presiding Justice of the Peace was biased and prejudiced in favour of the informant and

against the said Swan Oscar Larson. (d) That the informant and other persons were instrumental in preparing the judgment of the Justice of the Peace and did assist him therein.

(C) and (d) were not referred to in the argument, and I take it, were abandoned. The only grounds relied on, then, are that there was no evidence, or not sufficient evidence.

By the Village Act, R.S.S. 1920, ch. 88, sec. 147, sub-sec. 40, the council of a village has the power to pass by-laws for preventing disorderly conduct in streets, lanes or other public places within the village. By ch. 64, sec. 8, R.S.S. 1920, any proceedings for infringement of such a by-law are to be conducted under Parts XV and XXII of the Criminal Code, which also apply to appeals from convictions. Section 749 of the Criminal Code provides for an appeal to a District Court Judge. Mr. Gregory takes the point that where a right of appeal is given, certiorari should be refused except under exceptional circumstances which do not exist here.

As this point has not come squarely before the Saskatchewan Courts, as far as I know, I deem it advisable to review authorities from other Provinces.

Crankshaw, 4th ed. at p. 1153, states:—

"Where there is a remedy by review or appeal a certiorari should not be granted unless under exceptional circumstances, but the discretion of the court as to granting it should be exercised by refusing it unless special circumstances are shewn therefor."

The cases cited by Crankshaw are:—Ex parte Young (1893), 32 N.B.R. 178; Ex parte Ross (1895), 1 Can. Cr. Cas. 153; The Queen v. Herrell (1899), 3 Can. Cr. Cas. 15; Ex parte Damboise (1909), 16 Can. Cr. Cas. 292; and Re Traves (1899), 10 Can. Cr. Cas. 63.

In Ex parte Young, supra, Allen, C.J., in giving the judgment of the Appeal Court of New Brunswick, at p. 182 says:—"In future I think that where there is a right of review a rule nisi for a certiorari should not be granted unless under exceptional circumstances. This decision was followed by Ex parte Ross, supra, a decision of Tuck, J.

In The Queen v. Herrell, supra, it was held by Dubuc J. that:—"Where there is a right of appeal from a summary conviction, and it appears upon an application

Sask.

K.B.

R. EX REL KNIGHT v. LARSON.

for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the Court should be exercised by refusing the certiorari."

In Ex parte Damboise, supra, it was held that—"Where there is a right of appeal from the Magistrate to a County Court, under a liquor license law, a superior Court should refuse certiorari on grounds not going to the jurisdiction of the Magistrate, unless there are exceptional circumstances to be considered."

In that case there were several objections taken to the conviction, none of which affected the jurisdiction of the Magistrate, and it was held that no exceptional circumstances existed. See also O'Shaughnessy v. Montreal (1904), 9 Can. Cr. Cas. 44.

In Re Traves, supra, was a decision the other way, by Martin J. of the Supreme Court of British Columbia, who had this point squarely before him.

In Rex v. O'Brien (1917), 41 D.L.R. 97, 29 Can. Cr. Cas. 141, 45 N.B.R. 275, it was decided by the Supreme Court of New Brunswick, Appellate Division, that "If there is a right of appeal from a summary conviction, but it has not been taken advantage of, certiorari will not be granted unless there are exceptional circumstances."

This point was considered by the Appellate Division of the Supreme Court of Alberta in Dierks v. Altermatt, (1918), 39 D.L.R. 509, 13 Alta. L.R. 216. Stuart J., in giving the judgment of the Court, said, at p. 514:—

"The existence of a right of appeal is sometimes said to prevent the exercise of power of certiorari as a matter of discretion unless there are exceptional circumstances. See Crankshaw 1153. But exceptional circumstances may always be said to exist where there is either lack of jurisdiction or such irregularity in the proceedings as touches the substantial rights of the party so that he may be said really to have been aggrieved."

In that case it was held that there were exceptional circumstances. They were, that the Magistrate adjourned the case sine die and thereby lost his jurisdiction to deal with it, and further, the Magistrate did not appear to have taken down the depositions of the witnesses as they were given, and the provision of the Criminal Code was not observed.

I agree with the proposition supported by most of the

cases referred to, that where there is a right of appeal, certiorari should not be granted unless under exceptional circumstances. I cannot find any exceptional circumstances here. The Justice of the Peace had jurisdiction, and the only complaint is about the evidence or weight of evidence. That is to my mind decidedly a question for appeal, and not for certiorari.

The application is dismissed with costs.

Application dismissed.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. June 22, 1921.

Damages (§III.I—188)—Accident on Railway Line—Death of Passenger—Action Under Ordinance Respecting Compensation to Families of Persons Killed in Accidents—Measure of Compensation—Proper Method of Computing Damage.

The amount payable under the ordinance respecting compensation to families of persons killed by accidents (ch. 48 of C.O. 1898) corresponding to Lord Campbell's Act, is compensation for the personal individual pecuniary loss to each beneficiary from the point of maintenance or assistance, and in ascertaining the amount, the Court must take into account not the earning power of the deceased alone but also the pecuniary benefits accruing as a result of his death such as accident insurance which would not have become payable but for the accident, also accelerated value of life insurance moneys, and the value of the accelerated use of the estate left, the Court taking a reasonable view of the case and giving what they consider under all the circumstances to be a fair compensation.

[Review of authorities and method on which compensation should be computed: Horner v. Canadian Northern R. Co. (1920), 55 D.L.R. 340; (1921), 58 D.L.R. 154, 61 Can. S.C.R. 547, referred to.]

APPEAL by the defendants from the assessment of damages made by Hyndman, J. without a jury in an action for damages under the ordinance respecting compensation to the families of persons killed in accidents. Damages reduced.

A. H. Clarke, K.C., and G. A. Walker, K.C., for appellant.

A. McL. Sinclair, K.C., for respondent.

Harvey, C.J.:—The plaintiffs are the administrators of the estate, with the will annexed, of the late Dr. Chambers, who was killed in a railway accident on the defendants' line. This action is for damages suffered by the wife and only son. It was tried before Hyndman, J., without a jury, who assessed the damages at $80,000, which he apportioned $65,000 to the widow and $15,000 to the son, a boy of 4 years of age.

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. Co.

This is an appeal by the defendants from the assessment of damages merely on the ground that they are excessive.

Appeals from the verdicts of juries on the ground of excessive damages are of common occurrence but assessments by a Judge are rarely questioned on that ground. There was an appeal from the same trial Judge on the ground of the inadequacy of the damages, awarded in Kerley v. City of Edmonton (1915), 21 D.L.R., 8 Alta. L.R. 335. In that case the Court saw no reason for disagreeing with the opinion of the trial Judge on the quantum of damages and it was, therefore, not necessary to consider carefully the principle upon which the judgment could have been properly altered.

In writing the reasons for the judgment, I said that I assumed the principle to be the same as if the appeal were from the verdict of a jury. Notwithstanding the opinion of Gwynne J. in Cossette v Dun (1890), 18 Can. S.C.R. 222, at p 256, that this is the correct view, I am of opinion that the later authorities notably, re Arnold Estate; Dominion Trust Co. v. New York Life Ins. Co., 44 D.L.R. 12, [1919] A.C. 254 hold that except as to matters in which the trial Judge has an advantage derived from observing the witnesses not only are the Judges of the Appellate Court free but they are bound to exercise their own judgment.

I may say in the beginning that I have found no good reason for questioning the reasonableness of the $15,000 awarded to the son and I shall not further consider it.

The deceased was a specialist in medicine and surgery, who had been practising his profession as a specialist for between 8 and 9 years in Calgary. He was 46 years old and his widow, whom he had married between 6 and 7 years before, was 32 years at the time of his death. He had a good practice and the evidence indicates that for some time, at least, it would probably have increased, perhaps not in volume, for apparently his time was almost, if not quite fully occupied, but in revenue. His net earnings for the 2 years before his death were, as far as the evidence indicates, not less than $10,000 a year and in one of the years, at least, were perhaps $15,000 or more.

In Horner v. C.N.R. Co. (1920), 55 D.L.R. 340, affirmed (1921), 58 D.L.R. 154, 61 Can. S.C.R. 547, in case in this Province for the death of a brakesman, aged 26, earning a little over $2,000 a year, his widow aged 23, and two small

children were awarded $20,000 which this Court refused to set aside on the ground that it was excessive. The plaintiffs contend that the amount awarded in the present case is, in reality, much less proportionately.

It is necessary, therefore, to consider in some detail the principles on which the damages are to be allowed and the essential elements in the case.

On the first point, I think I cannot do better than quote the words of Patterson, J., of the Court of Appeal of Ontario in Beckett v. Grand Trunk R. Co. (1886), 13 A.R. (Ont.) 174 at 196 where he says:—

"The subject must, of course, be approached with a distinct apprehension of the doctrine, now so well settled, that there is no question of solatium for injuries to the feelings or affections of the surviving relatives, or of punitive damages against the wrongdoer. It is compensation for such loss only as can be estimated on a pecuniary basis. The widow has lost her husband and the children their father; but the only aspect in which, under the statute, we can regard their loss is expressed in the question: how much worse off are they in their material circumstances than they would have been if he had lived?"

The estate left by the deceased was of a net value of approximately $66,000 which included $10,000 of life and accident insurance leaving $56,000 of acquired property, all of which the widow says he acquired since he commenced practice in Calgary, that is to say, in less than 9 years, and she says he had very little when they married six and a half years before his death. In addition he purchased a home, which he gave her and which was in her name at the time of his death, which she values at $15,000. In other words he acquired and set aside property of the value of about $70,000 in about 7 years. It is clear, therefore, that he did not spend nearly all of his income in living expenses.

The widow puts the latter at approximately $10,000 a year but it is apparent from her evidence in giving the details of such expenses that in some cases, at least, she is giving estimates of contemplated or desired expenditures rather than of past actual expenditures.

But if we take $10,000 a year as the average amount which they would have probably spent each year if he had lived, how much is it fair to say she is personally deprived of by his inability to provide it? I leave the consideration of

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. Co.

the son to one side and consider her interest alone since the sum of $65,000 is appropriated expressly to meet her financial loss. It may be noted, however, in passing that in her estimate of $10,000 a year are included items for the support of the son, while the same items are included in the evidence adduced to shew the son's financial loss.

The evidence shews what we all know to be the fact, that investments can be made in Provincial and Dominion long term securities to yield from 5½ to 6½ per cent. It seems unreasonable, therefore, to take for computation any rate of interest lower than 6 per cent. Perhaps before considering what is the actual pecuniary loss suffered by the widow it may be advisable to consider what direct pecuniary benefit she derived upon the death of the deceased.

She is the sole beneficiary under his will under which she becomes immediately possessed of an estate conservatively sworn at $66,000. He was in good health and the evidence shews that he had an expectancy under normal conditions of 23 years. The widow therefore acquires the use of $66,000 for 23 years as the result of the accident. $5,000 of this is accident insurance which would not have come to her at all but for an accident, therefore, not merely the use of that but the absolute corpus of it is a financial gain from the accident. This was pointed out by Lord Campbell in Hicks v. The Newport &c. which is reported in a note on p. 510 of 122 E.R., and in G.T.R. Co. v. Jennings (1888), 13 App. Cas. 800. Lord Watson at p. 805 referring to general life insurance moneys says:—"In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration."

The other property of the estate to which she succeeds, of course, is in exactly the same position. If he had not met with the accident we may assume that he would have lived out the normal expectation and until then the widow would have had no use of the moneys which, by virtue of the accident, came immediately to her hands. There was accident insurance of $5,000 in the estate and $15,000 out of it payable directly to her, making a total of $20,000 which is a direct benefit from the accident and to be set off against the loss. Then the rest of the estate amounting to $61,000 and other life insurance payable directly to the widow, $7,645 she receives 23 years accelerated use of.

The expert actuary called by the plaintiffs gives $257 as

the present worth of $1000 payable 23 years hence, calculating interest at 6%. In other words $257 of each thousand put aside at interest now will amount to $1000 at the end of 23 years and $743 is, therefore, as the witness states, the present worth of the accelerated use for 23 years of each $1000 which the widow receives. This gives a present benefit for the approximately $68,500 of estate and life insurance of $50,895.

In addition to this there is a policy of $10,000 nominal face value payable to the widow not as capital but in income. The payments on it are $43 a month or $516 a year. The witness was not asked to capitalise this, but it can be done without difficulty with the use of logarithm tables and such a computation shews that the present capitalised value of these payments for the 23 years of the deceased's expectation of life reckoning interest only, annually is between $6,000 and $6,500. If interest were reckoned monthly as the payments are made it would come to nearly $1000 more, but to be on the sure side I will take the amount at $6,000. We thus find a benefit to be deducted from any allowance for loss, of $20,000 for accident insurance, $50,895 for value of acceleration of general estate and insurance and $5,000 in respect of the income policy making a total of $76,895. These are all matters of fairly accurate ascertainment.

As against this she has lost all possibility of a larger estate being accumulated by the deceased's efforts and passing to her on his death. As I have already shewn he was accumulating property rather rapidly but he was approaching middle age where his keenness and energy would no doubt gradually lessen. Here we are in a field largely one of speculation, and one's opinion is no doubt as valuable as another's.

The above calculations have, in addition to the present value of $76,895 allowed for an estate coming into existence at the expiration of 23 years of the amount of the present estate with the ordinary life insurance viz: $68,500. It is necessary, therefore, to consider how much more than that the deceased would probably have left and how much should be allowed to be set aside now to produce it. The insurance of $12,500, we will have to assume as constant, since there is no evidence that there will be any accretions to it by way of profit. The estate also is relieved of the payment of all insurance premiums which amounted to nearly $1,000 a year.

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

The plaintiff's expert says that $114,957 will produce an income of $10,000 for 23 years. In my opinion $5,000 is as much as may be reasonably said to be the actual annual personal financial loss of the widow and that income would be equivalent to a present capital of $57,500 or almost $20,000 more than the capitalised financial benefit derived. The damage suffered therefore is the amount necessary to add to $20,000 to make sufficient for investment now to realise in 23 years a sum which may fairly be considered to represent the reasonable probable additional accumulations and accretions to the deceased's estate.

We have already seen that $257 will amount to $1000 in 23 years. In other words the accretions alone, without additional accumulations, would be almost three times the present amount.

One must take into consideration all the contingencies, including the possibility of the husband changing his will so that she would cease to be his sole beneficiary, but not forgetting at the same time the probabilities in such an event of the son taking her place, in which event the liability of the defendants would not be changed. One must also consider the chances of illness or other accidental loss of earning power on the part of the husband and of stoppages of earnings and increases of expenses by possible vacations for pleasure or for improvement to keep abreast of the advances in his professional work. One must consider also that, while the evidence shews, that the husband's speculations and investments had apparently generally been profitable, there are always chances of reverses and allowance must be made for such contingencies.

On the whole, therefore, while the deceased might, if he had lived out his normal expectancy, have left an estate of half a million dollars it would not be fair or reasonable to assume that, but I think that on the evidence half that amount might be fairly anticipated. That involves the allowance being made for approximately $200,000 in addition to the $56,000 already provided for. The present worth of that amount at $257 for each $1000 is approximately $51,000, from which we have $20,000 to deduct, leaving $31,000 as the amount necessary to provide for an estate in 23 years of a quarter of a million dollars, provision having already been made for an allowance to the widow in the meantime of $5,000 annual income for her own personal use. After the 23 years her income will be that derived from a

capital of $250,000, which at 6% will amount to $15,000, to which is to be added the income from the $10,000 life insurance policy amounting to $516 a year.

I am free to say that these allowances are greater than I would be disposed to make upon the evidence as presented by the record but I desire to make all allowances for the benefit the trial Judge derived from hearing the widow give her evidence as to her previous manner of life and prospects.

If we test the situation by the actual figures as they at present stand we obtain the following results. The estate is worth $66,000. In addition the widow has $22,645 of insurance payable directly to her. This $88,500 at 6% will give an annual return of $5,310 in addition to which there is $516 from the $10,000 income insurance policy giving a regular income of $5,826 a year leaving the principal intact which includes $20,000 of accident insurance which would not have been received but for the accident, one policy of $5,000 being the return from a premium of $1.00.

She is thus the owner of $20,000 of capital which she would not have received at any time but for the accident and she is in receipt of an annual income which will give her all the comforts of life and more of the luxuries than would probably have come to her if her husband had lived. Any damages allowed, therefore, will be in the way of providing her with a fund mainly for the purpose of leaving it on her death.

The husband's obligation is to maintain his wife during her life not to provide her with an estate for disposition on her death.

It is apparent, therefore, that this stands in a somewhat different position from an allowance to keep her during life in a position of financial benefit equal to what could have been expected from her husband if he had lived though, in my opinion, it cannot be disregarded. In considering it, however, there should be some allowance for the $20,000 of accident insurance which now will always be part of the widow's capital allowance.

Taking everything into consideration, I am of opinion that $25,000 is a reasonable allowance to make to the widow as compensation for her personal financial loss. If she desires to use the income from it she will have an annual income for life on a 6% basis of $7,326 with an estate for disposition of $113,500.

It may seem strange that in the result the damages pay-

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

able in the case of a person of receipt of a large income and having considerable means should be little greater than in the case of a common brakesman as in the Horner case, but it is to be observed that as has already been pointed out it is only the financial loss that is compensated for and the larger the property the accelerated use of which is gained, and the greater the accident insurance, the more there is to reduce what would otherwise be pecuniary loss. A person might be of great wealth and in receipt of a large income and yet his death might result in no pecuniary loss to those dependent upon him and consequently give rise to no cause of action. Lord Watson said in the Jennings case, 13 App. Cas. 800, at p. 804,

"When a man has no means of his own, and earns nothing, it is obvious that his wife and children cannot be pecuniary losers by his decease. In like manner when by his death the whole estate from which he derived his income passes to his widow or to his child . . . no statutory claim will lie at their instance."

I would, therefore, allow the appeal with costs and reduce the amount of damages awarded to $40,000 to be apportioned $25,000 to the widow and $15,000 to the son.

Stuart, J.:—The other members of the Court have set forth in their reasons for judgment, which I have had the advantage of reading, the many aspects in which this case may be considered. I do not think I should be able to add any new aspect or new consideration if I were to attempt to discuss the matter at any length. I agree that, in the circumstances of this case and with the evidence in the form in which it is, there is no reason why we should not review quite freely the assessment of damages made by the trial Judge. In order to do so I do not think it is necessary to feel any check to one's conscience and to say that Hyndman, J., went beyond all possible reason in the matter.

I am quite satisfied, however, that the amount allowed to the wife was much too large, while on the other hand, I think the allowance to the child was possibly less than it should have been.

Inasmuch, however, as the other two members of the Court have agreed upon a certain sum I see no advantage of speaking at any length in giving reasons why I would be inclined to give a somewhat larger amount than they have decided upon, or in even naming the exact sum which I would allow.

I agree that the appeal should be allowed with costs and the verdict reduced and as the naming of any sum by me would be ineffectual the result will be that the judgment will be reduced to $40,000, divided as indicated in the other judgments.

Beck, J.:—This is an appeal by the defendant company from the assessment of Hyndman J. of compensation to a widow and one child in an action brought by the plaintiff company as administrator of the estate of the deceased under the Ordinance respecting Compensation to families of persons killed by Accidents (ch. 48 of C.O. N.W.T. 1898) corresponding to Lord Campbell's Act—also referred to as the Fatal Accidents Act 1846, 9-10 Vict. (Imp.) ch. 3, but the title of which is "An Act for compensating the Families of Persons killed by Accidents."

I have purposely emphasised the title of the Act and of the Ordinance because it has an influence on their interpretation. Blake v. Midland R. Co. (1852), 18 Q.B. 93, 118 E.R. 35; Kenrick v. Lawrence & Co. (1890), 25 Q.B.D. 99 at pp. 104-5.

Hyndman, J., assessed the compensation at $80,000, of which he allotted $65,000 to the widow and $15,000 to the only child of the deceased, a boy of 4 years of age.

In my opinion the amount allowed for compensation is excessive, and, as I think a careful consideration of the evidence will shew, so excessive as to lead to the conclusion that the trial Judge either took into consideration matters which he ought not, or omitted to take into consideration matters which he ought to have taken into consideration, and on a whole to have acted on a wrong principle. So that had the amount been fixed by a jury this Court could have set aside the verdict (C.P.R. v. Jackson (1915), 27 D.L.R. 86, 52 Can S.C.R. 281, and cases therein discussed); but it is quite clear on the authorities that this Court has a much freer hand in dealing with the decision of a Judge than with the judgment of a jury.

I collected a number of English and Canadian cases which point out the difference, in Rex v. O'Neil (1916), 25 Can. Cr. Cas. 323, 9 Alta. L.R. 365. To these may be added Greene Swift Co. v. Lawrence (1912), 7 D.L.R. 589 and Re Arnold Estate; Dom. Trust Co. v. N.Y. Life Ass'ce Co. 44 D.L.R. 12, [1919] A.C. 254.

The opinion of Gwynne J., apparently shared by Fournier J., expressed in Cossette v. Dun, 18 Can. S.C.R. 222 at pp.

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. Co.

256-7, in which he seems to place the findings of a Judge upon the same plane as the verdict of a jury, when considered in appeal, is not in accord with the later decisions, in which the distinction is explicitly marked.

In the present case we are not called upon to consider conflicting testimony or testimony which could appreciably be affected by the demeanour or appearance of the witnesses and consequently we are in as good a position as the trial Judge to estimate the compensation.

The claim, that the $15,000 allotted to the child was excessive was not seriously pressed and I think it may stand; leaving for our consideration only the allowance of $65,000 to the widow.

Circumstances in the present case—the facts that the income of the deceased considerably exceeded all that was expended by him for the personal benefit of his family, that he had accumulated a considerable estate; that it would appear that these accumulations would probably in the course of his lifetime, had he not been accidentally killed, have been very considerably increased—such circumstances call for a careful consideration of the principles to be applied in fixing the compensation and of the matters to be taken into account in endeavouring to estimate it.

By reason of the principle of law expressed in the maxim actio personalis moritur cum persona, the executors or administrators of the deceased have no right of action for the benefit of the estate arising out of the death of the deceased. See generally Broom's Legal Maxims; and Clark v. London General Omnibus Co., [1906] 2 K.B. 648.

The right of action given to the personal representatives by Lord Campbell's Act is not for the benefit of the estate, but is to be brought in their name for the benefit of the beneficiaries and the personal representatives are merely trustees of the moneys recovered for the beneficiaries. Pulling v. Great Eastern R. Co. (1882), 9 Q.B.D. 110; Bradshaw v. Lancashire & Yorkshire R. Co. (1875), L.R. 10 C.P. 189, at p. 192.

The plain inference is that the compensation to be given to the beneficiaries, which by the words of the Ordinance (sec. 3) are to be "such damages, as it thinks proportionate to injury resulting from such death to the parties respectively for whom and for whose benefit such action has been brought," is compensation for the personal individual pecuniary loss to each beneficiary from the point of view of

maintenance (in a wide and generous sense) or assistance, as the case may be, of the beneficiary in the manner and to the extent that the deceased maintained or assisted the beneficiary during his life time and might in reasonable probability be expected to have continued to do but for his premature death. The estate, whether large or small, was at the disposal of the deceased (with some restrictions in this province) or would devolve according to law. In estimating the individual pecuniary loss, expectations of benefit as legatee or next of kin are of importance only as a reasonable probable source of income for maintenance or assistance in default of other provision; while on the other hand actual immediate benefit as legatee or next of kin ought to be taken into account by way of mitigation of the loss.

The statute provides for recovery of compensation for all those dependent upon the deceased. It is not the intention that this compensation should be sufficient to enable the beneficiary to leave an estate for the benefit of those who may perhaps be dependent legally or morally upon the beneficiaries themselves; but sufficient only to preserve the beneficiaries themselves personally in that pecuniary position which was customary in the life time of the deceased, subject to reasonably anticipated changes. There are limits too to the capacity of any individual to spend money for his own maintenance, even in a wide and generous sense; an extreme limit which doubtless the Court would fix from its own knowledge. I think it will be found that the decisions accord with these views.

One of the earliest cases is Blake v. Midland R. Co., 18 Q.B. 93. That case held that compensation could be given only for pecuniary loss to the beneficiaries. The Court in that case included an observation in its reasons for judgment which I think it well to bear in mind (at p. 111):—"We must recollect that the Act we are construing applies not only to great railway companies but to little tradesmen who send out a cart and horse in the care of an apprentice."

There is the Ontario case of Beckett v. G.T. R. Co., 13 A.R. (Ont.), 174, affirmed by the Supreme Court of Canada, 16 Can. S.C.R. 713, in which leave to appeal was refused by the Privy Council; See Jennings v. G.T. R. Co. (1887), 15 A.R. (Ont.) 477, at p. 486. The Privy Council in G.T. R. Co. v. Jennings, 13 App. Cas. 800, 58 L.J. (P.C.) 1, said, at pp. 803, 804, 805:

"In Becketts Case, as well as in the present, all the Courts

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

below have justly held that the right conferred by statute to recover damages in respect of death occasioned by wrongful act, neglect or default, is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. When a man has no means of his own, and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease. In like manner, when by his death the whole estate from which he derived his income passes to his widow, or to his child (as was the case in Pym v. G. N. R. Co., 2 B. & S. 759; S.C. 4 B. & S. 396) no statutory claim will lie at their instance. A very different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation.

Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by the husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine the estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life, effected and kept up by a man in the

position of the deceased William Jennings. The pecuniary benefit which accrued to the respondent (the widow) from his premature death, consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell in Hicks v. Newport &c. R. Co., 4 B. & S. 403n (122 E.R. 510) suggested to the jury that in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased, the amount of the premiums which, if he had lived he would have had to pay, out of his earnings for the maintenance of the policy."

In Hicks v. Newport &c. R. Co., supra, Lord Campbell in the course of his address to the jury said, at pp. 510, 511 (122 E.R.):—

"I think you should first consider what would be the sum if there were no insurances.... If there be an insurance for £1,000 by some Company that insured him against accidents by railways, and they (the family) being entitled to receive a £1,000 upon that policy, it is quite clear that there ought to be a deduction from the aggregate amount in respect of that £1,000 Then with regard to the policies upon his life independently of accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will be only in respect, I should think, of the premiums that would be paid by the family or which would have been paid by himself if this fatal accident had not happened. * * * You will first make a calculation and say what you think would be a reasonable sum that ought to be allowed as a compensation for the pecuniary loss his family would sustain had there been no insurance. You will then deduct from that the £1,000 insured against accidents, and then any reasonable sum that you think should be further deducted in respect of the life insurances."

In Bradburn v. G.W.R. Co. (1874), L.R. 10 Ex. 1, Lord Campbell's statement of the propriety of deducting the amount of accident insurance (in cases under Lord Campbell's Act) was approved. To come to the particular facts: The widow gave evidence of the amount which the deceased expended on the maintenance of the family. She estimated it at "around" $10,000 per annum.

Alta.

App. Div.

ROYAL TRUST CO. v. CANADIAN PACIFIC R. CO.

Under cross-examination she seemed to acknowledge that in giving the following items, she had included everything that ought to be included.

The items are: Groceries, $75 per month; Butcher, $30 per month; Clothing for herself, $80 per month; Clothing for child, $17 per month; Heating (gas), $35 per month; Electric light and power, $6.25 per month; Taxes on home, $35 per month; Insurance (fire), $5 per month; maintenance of motor car (which she only contemplates having), $50 per month; Servants—Maid, $50, Washerwoman, $12, Floorman $5, Gardener $17; Nurse, Druggist and incidents to sickness, $20; Milk and bread, $21; Pin money, $75; Water, $2; Ice (season 18), $1.50;Telephone, $3.25; Amusements, $40; Holiday tours ($3,000) every two years, taking child and maid), $125—total, $705. 12 x $705, $8,460.

Not only do some of the items seem to be excessive, judging from one's own experience, but some of the items explicitly include items which must be taken to be included in the allowance for the child (e.g., his clothing, probably ½ of the expenses of the biennial holiday tour; for the item included for travelling expenses and maintenance of a nurse) but the amount should of course be reduced by the cost of the maintenance of the deceased and the child as two members of the family. Evidently $6,000 a year or $500 a month would be an extremely generous calculation of the pecuniary loss suffered by the widow from the point of view of maintenance using this term, as I intend it, in a wide sense.

According to the evidence of the actuary, the present worth of an income of $6,000 a year during the expectancy of the deceased's life, is $68,974.62, say $69,000. This amount invested at 6% per annum will produce annually what seems a reasonable income for the maintenance of the widow as she was accustomed to live in her husband's life time. But in accordance with decisions already referred to I think the following deductions ought to be made:—

Accident Insurance, $20,000; Accelerated value of life insurance moneys (Confederation, $5,000, Royal, $5,645, London, $2,000—$12,645), say $9,500; Capitalised value of income from policy of $43 a month, $6,340—Total, $35,840, leaving a balance ($69,000 less $35,840) of $33,160.

Leaving the account as it stands at this point, the widow if given a compensation of $33,160, would have in hand a cash amount which would insure her a permanent income of $6,000 per annum for her own personal individual main-

tenance throughout the whole period of the expectancy of the deceased's life, without taking into account all "the changes and chances of this mortal life," which might have occurred had her husband lived—e.g., sickness, retirement, vacations for pleasure or advancement in his profession.

Then besides having already received from her husband a home valued at $15,000, she has received the whole of his estate exceeding in value $55,000, which though in the course of time it might perhaps have considerably increased, yet would not with certainty have come to her even if her husband predeceased her, and in relation to which some consideration must be given to possible losses from unwise investments and unforeseen economic conditions.

In my opinion, taking these additional circumstances and possibilities into consideration, a fair compensation to be allowed to the widow is $25,000.

I am disinclined to go further than I have done into a minute calculation of figures because these cases are commonly tried by juries and I think it has never been intended that they should make exact calculations.

It was said in Rowley v. L. & N. W. R. Co. (1873), L.R. 8 Ex. 221, at p. 231, by Brett, J.:

"To the best of my belief the invariable direction to juries, from the time of the cases I have cited until now, has been 'that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.' I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount which would be an equivalent for the pecuniary injury, would be unjust."

For the reasons indicated I would reduce the allowance to the widow from $65,000 to $25,000, and give the costs of the appeal to the appellant.

Appeal allowed.

THE KING EX REL SANDERSON v. EREMENKO.

Saskatchewan King's Bench, McKay, J. May 18, 1921.

Certiorari (§IB—11)—Dismissal of Complaint by Justice—Lack of Evidence—Right of Appeal—No Special Circumstances for Granting.

Where a Justice dismisses an information and complaint because there was no proof before him of the notice of complaint required by sec. 34 (1) of the Stray Animals Act R.S.S., 1920 ch. 124 having been given, it is a matter of evidence which

Sask.

K.B.

THE KING EX REL SANDERSON v. EREMENKO.

can be supplied on appeal and there being a right of appeal from his judgment, certiorari will not be granted in the absence of special circumstances.

[Rex v. Larson ante p. 376 followed.]

APPLICATION for a writ of certiorari for the removal into the Court of King's Bench of a judgment by a Justice of the Peace dismissing an information and complaint that the impounding of certain cattle was illegal and that the damages claimed were excessive. Application refused.

P. H. Gordon, for Sanderson.

C. E. Gregory, K.C., for Eremenko.

H. E. Sampson, K.C., for the Justice of the Peace.

McKay, J.:—This is an application for a writ of certiorari for the romoval into this Court of a certain order or judgment dated November 21, 1920, made by Clement Blythman, J.P., whereby the information and complaint of the said Eremenko, that the impounding of certain cattle by Sanderson was illegal, and that the damages claimed were excessive, was dismissed, or for an order quashing the said judgment or order, and for an order that the said impounding was illegal without the actual issue of a writ of certiorari, upon the following grounds:—

(a) That there was no evidence to support the said judgment or order. (b) That on the evidence given, the said presiding Justice should have held that the pounding was illegal. (c) That no objection was taken to the fact that a notice of intention to complain was not served upon the pound-keeper. (d) That such notice was in fact actually served on the first day of November, 1920. (e) That no proof of such notice was necessary. The said presiding Justice had no jurisdiction to receive the information or complaint and no jurisdiction to adjudicate upon the case.

At the hearing of this application Mr. Gregory took the position that where the applicant had a right of appeal certiorari should not be granted unless special circumstances were shewn, and as the applicant herein had the right of appeal and no special circumstances were shewn this application should be refused.

In Crankshaw's Criminal Code, 1915 ed. at p. 1153, the author states as follows:—"Where there is a remedy by review or appeal, a certiorari should not be granted unless under exceptional circumstances, but the discretion of the Court, as to granting it, should be exercised by refusing it, unless special circumstances are shown therefor," and cites a number of cases which support this proposition.

In King v. O'Brien (1917), 41 D.L.R. 97, 29 Can. Cr. Cas. 141, 45 N.B.R. 275, the Appellate Division of the Supreme Court of New Brunswick held that, if there is a right of appeal from summary conviction but it has not been taken advantage of, certiorari will not be granted, unless there are exceptional circumstances.

I agree with the above proposition laid down by Crankshaw. See also Rex v. Larson not yet reported decided by my brother Bigelow.*

In this case at Bar the applicant had a right of appeal, but did not appeal, and no special circumstances are shewn why a writ of certiorari should be granted.

It would appear the Justice dismissed the information and complaint because there was no proof before him of the notice of complaint required by section 34 (1) of the Stray Animals Act, R.S.S. 1920, ch. 124, having been given. This is a matter of evidence which the informant could have supplied on appeal. The application is dismissed, but under the circumstances of this case without costs.

Application refused.

AGHION v. STEVENS.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. June 7, 1921.

Costs (§II—38)—Payment into Court—Plaintiff Recovering Less than Amount Paid in—Defendant in First Instance not Denying Liability—Subsequent Denial of Liability—B.C. Rule 260.

Under B.C. Rule 260 when the amount recovered by the plaintiff is less than that paid into Court by the defendant, the defendant is entitled to judgment carrying the costs subsequent to payment in, but not including the costs occasioned by the issue of liability which latter costs should with those incurred before payment in, go to the plaintiff. The fact that the defendant did not in the first instance deny liability does not affect the disposition.

[Wagstaffe v. Bentley, [1902] 1 K.B. 124 followed.]

APPEAL by plaintiff from the judgment of Morrison, J., as to the disposition of costs when payment into Court has been made and the plaintiff recovers less than the amount paid in.

A. Bull, for appellant.

A. H. NacNeill, K.C., for respondent.

Macdonald, C.J.A.:—The defendant paid into Court a sum of money as sufficient to satisfy the plaintiff's claim. At the time of payment in there was no denial of liability but

*See 60 D.L.R. 376.

B.C.
C.A.
AGHION
v.
STEVENS.

subsequently defendant was allowed to deny liability and the action proceeding to the trial the plaintiff recovered less than the amount paid into Court.

The Court is now asked to define the issues upon which depend the rights of the parties to the costs of the action under the statute, which enacts that the costs shall follow the event. It has been decided in England by the Court of Appeal in Wagstaffe v. Bentley, [1902] 1 K.B. 124, that the question of liability and the quantum of damages are distinct issues and that when the amount recovered is less than that paid into Court, the defendant is entitled to judgment carrying the costs of the action subsequent to payment in, but not including the costs occasioned by the issue of liability, which latter costs should with those incurred before payment in, go to the plaintiff.

The rule which was then similar to our R. 260 was afterwards amended in England but not here, to enable the Court to deprive the plaintiff of his said costs. The later case of Davies v. Edinburgh Life Ass'ce Co., [1916] 2 K.B. 852, is not in point, since it merely decides that the amended rule while giving power to deprive, gave the Judge no power to order the plaintiff to pay to defendant the costs of the issue as to which the plaintiff had succeeded.

The fact that the defendant did not in the first instance deny liability in no way affects the disposition of this motion.

The costs therefore should follow the respective events as in Wagstaffe v. Bentley, supra, and there should be no costs of this motion.

Martin, J.A., agrees.

Galliher, J.A.:—In this case there were two events to be tried out under the amended pleadings. First liability, and second, quantum of damages.

The plaintiff has succeeded on the first and is entitled to the costs of that event. As to the second, he obtained judgment for less than the amount paid into Court.

The English rule which was then the same as our R. 260 was interpreted in Wagstaffe v. Bentley, [1902] 1 K.B. 124, a case in the Court of Appeal, in which it was held per Collins, M.R., and Stirling and Matthew, L.JJ., that as the plaintiff had recovered less than the amount paid in there should be judgment for the defendant with the general costs of the action, with costs to the plaintiff upon the issue upon which he succeeded.

We have not in our R. 260, the amendment made to the

English rule in August, 1913, under which the case of Davies v. Edinburgh Life Ass'ce Co., [1916] 2 K.B. 852, was decided.

I do not think that the fact that the money paid in at first inadvertently or otherwise, was without denial of liability, should alter the case, in view of the fact that the defendants amended denying liability and the trial proceeded on that basis.

The plaintiff is of course, entitled to the costs of appeal.

McPhillips, J.A., agrees.

DUNN v. CITY OF MOOSE JAW.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Estoppel (§IIIH—110)—Sale of Land—Vendor to Clear of Back Taxes—Purchaser Informed by City Officials that only 1919 and 1920 Taxes not Paid—1918 Taxes not Paid—Land Advertised for Sale—Payment Made by Purchaser to Prevent Sale—Action for Recovery Back—No Notice Given to Vendor—Damage—Prejudice.

Under the terms of sale of certain lots it was agreed that the vendor was to clear the lots from the taxes in arrear, and it was arranged between the parties that the purchaser should retain out of the purchase-money the amount of the 1919 taxes and the proportion of the 1920 taxes and that he should assume these taxes; no mention was made of the 1918 taxes as those were believed by both parties to have been paid. The 1918 taxes had not in fact been paid, although upon making inquiry at the proper office the purchaser was informed that only the 1919 and 1920 taxes were unpaid, and the purchaser had to pay the 1918 and 1919 taxes in order to prevent the land from being sold for taxes by the city corporation. In an action to recover the 1918 taxes from the city corporation the Court held, reversing the trial judgment in favour of the plaintiff, that the vendor was under obligation to clear the taxes in arrear, and that had she been notified she might have paid the taxes at once, and in the absence of notice to the vendor the Court could not assume that she would not have made good her contract, and had she done so the plaintiff would not have been prejudiced in any way and he had not therefore shewn such damages or prejudice as would estop the city corporation from claiming the 1918 taxes.

[Compania Naviera Vasconzada v. Churchill, etc. [1906] 1 K.B. 237, 75 L.J. (K.B.) 94, followed.]

APPEAL by defendant from a judgment in favour of the plaintiff for taxes paid by him to the defendants under protest.

The facts and circumstances of the case are fully set out in the judgments reported.

W. A. Beynon, for appellant.

Sask.

C.A.

DUNN v. CITY OF MOOSE JAW.

W. H. B. Spotton, for respondent.

Haultain, C.J.S.:—The provisions of sec. 433 of the City Act, 6 Geo. V., 1915 (Sask.), ch. 16, [R.S.S. 1920, ch. 86, sec. 460] seem to me to afford a complete answer to the plaintiff's claim. That section enacts as follows:—

> 433. The taxes due upon any land may be recovered from any owner or tenant originally assessed therefor, and from any subsequent owner of the whole or any part thereof; and such taxes shall be a special lien upon the land and shall be collectible by action or distraint in priority to every claim, privilege, lien or incumbrance of any person except that of his Majesty, and the lien and its priority shall not be lost or impaired by any neglect omission or error of any officer of the city.

In this case the taxes in question were due upon the land. They were, therefore, recoverable against the person originally assessed therefor, and against the plaintiff as a subsequent owner of the land at the time that he paid them. The taxes were a special lien upon the land, and the lien and its priority could not be lost or impaired by any neglect, omission or error of any officer of the city. In any event, the plaintiff has not, in my opinion, shewn that he has altered his position prejudicially owing to the incorrect information given to him by the city. If, as I have found, he is liable to pay the taxes in question, he has his remedy against his vendor, who was bound under the contract to pay all taxes. If he has overpaid his vendor, he has his remedy against her, and there is nothing in the evidence to shew that he has even demanded the overpayment back, much less that the amount is not recoverable.

I would allow the appeal with costs. The judgment below should be set aside, and judgment entered for the defendant dismissing the action with costs.

Lamont, J.A.:—This is an appeal from a judgment in favour of the plaintiff for taxes paid by him to the defendants under protest and under the following circumstances. In April, 1920, one Ida Macklin, through her agent, wrote the plaintiff as follows:—

"I hereby agree to sell to you lots 20 and 21, in block 23, in Rosemont Addition to the City of Moose Jaw, Plan No. K4594 and house as it stands, except tenant's fixtures, at $6,500.00 on terms that you are to assume the mortgage now registered against the said property and pay the balance of the purchase money in cash upon delivery of title.

All adjustments to be made as of and possession given on completion of transfer."

The plaintiff accepted this offer. He then telephoned the defendants to ascertain the amount of taxes against the said lots, and was informed that there were no taxes in arrear except the taxes for 1919. In settling with Mrs. Macklin for the property, the plaintiff retained the taxes for 1919 and the proportion for 1920, together with some other claims, and paid her the balance of the purchase money and received title. In October, when he went to pay the taxes, he learned for the first time that the taxes for 1918—amounting to $135.44—had not been paid, and that the defendants were about to advertise the lots for sale for unpaid taxes. These taxes, through an error on the part of some official, had not been carried forward to the 1920 assessment roll, and, in giving the information to the plaintiff, the clerk who gave it evidently only looked up the roll for 1920, which was supposed to contain an accurate statement of existing taxes. Under protest, and to prevent the lots being sold, the plaintiff paid the 1918 taxes, and then brought this action to recover the amount so paid from the city. The ground upon which he bases his claim is, that the defendants, having notified him that there were no taxes in arrear except those of 1919 (and he having settled with Mrs. Macklin on that basis), were estopped from afterwards claiming the taxes for 1918.

A representation which will estop the representor from afterwards setting up a state of affairs different from that represented, must be (1) a representation of an existing fact; (2) it must have been acted upon by the party to whom it was made and in the manner intended, and (3) the party to whom it was made must thereby have altered his position to his prejudice. 13 Hals. 377, et seq., Compania Naviera Vasconzada v. Churchill and Sim, [1906] 1 K.B. 237, 75 L.J. (K.B.), 94.

Unless, therefore, the plaintiff acted upon the representation made to him and altered his position to his prejudice by reason thereof, the city is not estopped from claiming the taxes for 1918, even apart from the curative sections of the Act relied on by the defendants.

Did the plaintiff act to his prejudice? Under the agreement between himself and Mrs. Macklin, the plaintiff was under obligation to pay all the purchase money over and above the mortgage to Mrs. Macklin, and she was under obligation to clear the lots from the taxes in arrear. It was

Sask.

C.A.

DUNN v. CITY OF MOOSE JAW.

arranged between the plaintiff and Mrs. Macklin's agent that the plaintiff should retain out of the purchase money the amount of the 1919 taxes and the proportion of the 1920 taxes, and that he should assume these taxes. No mention was made of the 1918 taxes, as these were believed to have been paid. The plaintiff therefore did not assume the 1918 taxes. The legal position then was this: That the plaintiff had performed his obligation under the contract by paying the purchase money to Mrs. Macklin, but she had not performed her obligation of clearing the lots of the taxes. When the plaintiff found the taxes for 1918 were not paid, he did not, so far as the evidence shews, even notify Mrs. Macklin of her unfulfilled obligation to pay these taxes. Had she been notified, she might have paid the taxes at once. Without notice to her, how can we assume that she would not have made good her contract and thus prevented the lots from being offered at the tax sale? Had she done so, it is clear, the plaintiff would not have been prejudiced in any way.

In 13 Hals., para. 542 at p. 384, the author says: "The mere payment of money under a mistake of fact induced by the representation in circumstances where there is not the slightest difficulty in getting it back, is not such damage or prejudice as will give rise to an estoppel."

For this proposition he cites Carr v. London & North-Western R. Co. (1875), L.R. 10 C.P. 307, as explained in Compania Naviera Vasconzada v. Churchill and Sim, supra. In the latter case, Channell, J., at p. 250, in referring to Lord Esher's remarks on the former case, said:—

"I think, however, that the learned judge must be considered to have been referring to the facts of the case before him, where apparently there would not have been the slightest difficulty in getting the money back, and that it cannot be truly said as a general proposition that a person cannot be prejudiced by having made a payment which he has a legal right to get back from the person to whom he paid it, unless it is shewn that such person is insolvent. It appears to me that the parting with the money, and consequently the being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the legal right to get it back, may amount to an acting to the payer's prejudice sufficiently to establish an estoppel against the person in reliance upon whose statement he has made the payment."

The onus of proving prejudice is on the plaintiff. If to

create an estoppel it is necessary to shew not only the parting with the money, but that, to get it back would occasion trouble and probably expense, to say the least, it follows, in my opinion, that the onus is on the plaintiff of shewing that a request to Mrs. Macklin to fulfil her obligation under the contract or that notice to her that the taxes for 1918 were still unpaid, would not have been sufficient to secure their prompt payment. This onus the plaintiff has not discharged. His action, therefore, in my opinion, fails.

The appeal should be allowed with costs, the judgment below set aside, and judgment entered for the defendants with costs.

Turgeon, J.A. (dissenting):—In July, 1920, the respondent purchased from Ida May Macklin, Lots 20 and 21 in Block 23, Rosemount Addition, in the city of Moose Jaw. The purchase price agreed upon was $6,500, out of which the respondent was to pay certain encumbrances and all taxes in arrear, as well as the current taxes down to June 6, 1920, the balance only to go to the vendor. In order to ascertain the amount of the taxes due to the appellant, the respondent made inquiry at the office of the city treasurer, and was informed that the only taxes unpaid on this property were the current taxes for 1920 and the arrears for 1919. He therefore deducted from the purchase money $203.43, to meet these taxes, and paid the balance of the $6,500, less the amount of the encumbrances, to the vendor, who lives in the Province of Ontario. In September or October the respondent took steps to pay the taxes due upon the lots, when he was informed by the city treasurer that the taxes for the year 1918 were also in arrear. Admittedly this was the first intimation made to him of the existence of any other claim by the appellant than for the taxes for 1919 and 1920. Had he been informed of these arrears before completing his transaction with the vendor, he would have been entitled, under his contract, to charge the amount against the money payable to her. In the meantime he had parted with it. The respondent in his evidence then goes on to say:—

"The city authorities proceeded to advertise the property for sale for taxes for 1918 and 1919, and in order to protect my title to the property I paid to the city treasurer as alleged in my pleadings, under protest and with a denial of liability, the taxes for the two years, the payment under protest and the denial of liability applying to the 1918 taxes only and

Sask.

C.A.

DUNN v. CITY OF MOOSE JAW.

not to the 1919 taxes. The total of the 1918 taxes are $135.44 as shewn by my pleadings."

This is the only evidence we have upon the important matters of the proceedings taken by the appellant's officials against the property and of the protest and denial of liability which accompanied the payment made by the respondent, except that the city treasurer also testified that the property was advertised for sale. If the protest was in writing, it was not produced. It, no doubt, would have been more satisfactory if more light had been thrown upon those matters at the trial, because a party who pays money over to another, which he knows he is not legally bound to pay, is generally expected, in an action to recover the money so paid, to make out a good case of compulsion, on the one hand, and of an unequivocal notice on the other hand to the party exercising the compulsion, that the payment is made under protest and without any waiver of rights.

Just what facts will constitute a sufficient compliance with these legal requirements in a particular case, is for the Court to decide. However, the statement of the respondent upon these points, such as it is, is not questioned or contradicted, and I think we are justified in assuming, therefore, that he made this payment under protest, without in any way intending to give up his right, and solely in order to stop the tax sale proceedings, which would have gone on if he had not made the payment.

In these circumstances, I think the respondent is entitled to recover the amount so paid to the appellant. Street v. The Corpn. of Simcoe (1862), 12 U.C.C.P. 284; Spring-Rice v. Town of Regina (1901), 5 Terr. L.R. 171.

I think the rule of estoppel applies against the appellant in this case, and, as I base my judgment upon that ground, I do not find it necessary to examine the questions raised regarding the condition of the tax roll. I think it is no answer to the respondent's claim against the appellant to assert that he likewise has a claim which he might have asserted against his vendor who, it must be remembered, resides out of the jurisdiction in the Province of Ontario. Compania Naviera Vasconzada v. Churchill & Sim, [1906] 1 K.B. 237, 75 L.J. (K.B.) 94.

It was also argued by counsel for the appellant that the respondent is precluded from disputing the appellant's claim for the 1918 taxes by reason of secs. 460 and 461 of the City Act, R.S.S. 1920, ch. 86. These sections contain curative provisions, and the primary object of their enactment was

to put an end to the raising of technical defences in evasion of the payment of taxes. They cannot, in my opinion, be advanced as an answer to a claim of substantive right such as is set up by the respondent in this case.

The appeal should be dismissed with costs.

Appeal allowed.

THE BANK OF MONTREAL v. THE DOMINION BANK.

Ontario County Court, County of York, Widdifield Co. Ct. J. February 20, 1921.

1. **Banks (§IVB—104)—Cheque—Loss of—Notice to Bank—Forged Endorsement—Notice to Subsequent Endorsers—Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 50.**

The different branches or agencies of a bank are to be regarded as separate and independent endorsers for the purpose of the notice required under sec. 50 of the Bills of Exchange Act R.S.C. 1906, ch. 119, which protects the paying bank only if notice of an endorsement being a forged or unauthorised endorsement is given to each subsequent endorser within the time and in the manner mentioned in the section.

2. **Cheques (§II—14)—Effect of Acceptance by Bank After it is in Hands of a Third Party—Negotiability.**

The effect of an acceptance of a cheque by the bank, after it has got into the hands of third parties is to substitute the liability of the bank for that of the drawer and the cheque thereby becomes negotiable as cash.

[Gaden v. Newfoundland Savings Bank, [1899] A.C. 281 distinguished; Boyd v. Nasmith (1888), 17 O.R. 40, followed.]

ACTION against the defendant as subsequent endorser to recover the amount of a cheque, which was lost and payment stopped. Endorsement of the payee's name was afterwards forged and the cheque paid by the plaintiff bank, notwithstanding the order stopping payment. Action dismissed.

J. A. Worrell, K.C., for plaintiffs.

L. B. Campbell, for defendants.

Widdifield, Co. Ct. J.:—On February 26, 1918, the Hydro-Electric Power Commission of Ontario issued a cheque for $215 on a Toronto branch of the plaintiff bank to the order of "G. Pace," marked "for services." On March 8, Pace lost this cheque, together with other papers, and the next day he went to the bank and gave notice of the loss. He also notified the drawers, and, on June 11 they wrote the bank as follows:—

"Cheque H-5675 of the Hydro-Electric Power Commission dated Feb. 26th, 1918 in favor of G. Pace for $215 has been lost or destroyed and a duplicate cheque is being issued in

Ont.

Cy. Ct.

BANK OF MONTREAL v. DOMINION BANK.

lieu thereof. I would be glad if you would arrange to have payment of the original cheque stopped in case it is presented."

On September 9, 1918, a man representing himself to be Gordon Pace purchased some clothing from Lessor Bros., a retail firm in Montreal, and tendered the lost cheque in payment. As he was a stranger to Lessor Bros. they refused to accept the cheque but agreed to send it to Toronto for collection, and, if paid, pay him the balance. On this understanding the man endorsed the cheque "Gordon Pace," which I find was a forgery. Lessor Bros., without endorsing the cheque, handed it to the branch of the Dominion Bank in Montreal with which they do business, and it was stamped for deposit to their credit. The Dominion Bank endorsed the cheque, below the forged endorsement, as follows:—"Pay any bank or order for the Dominion Bank, St. Lawrence Boulevard branch, Montreal, W. A. Fisher, Manager."

On September 10, the cheque was sent to the Dominion Bank at Toronto for collection, with a stamp on its face shewing it to be a bill for collection, with a request that the Toronto office wire Montreal if the cheque was paid.

On September 12, the Dominion Bank at Toronto sent the cheque to the branch of the plaintiff's bank on which it was drawn and the plaintiffs marked it "accepted" and charged it to the account of the drawers, and the next day the cheque passed the Toronto Clearing House.

On the cheque being "accepted" the Dominion Bank at Montreal was notified by wire and the $215 was credited to Lessor Bros., and by them checked out the following day.

On October 10, the Hydro Electric Commission discovered that the forged cheque had been charged to their account and the same day they returned the cheque to the plaintiffs calling their attention to the fact that "Your bank was communicated with asking you to refuse payment of the cheque if presented."

On October 12 plaintiffs wrote the defendants at Toronto advising defendants of the forgery. No notice of the forgery was sent to the St. Lawrence branch of the bank at Montreal.

There was some further correspondence between the Toronto banks, and on November 16 the defendants repudiated liability.

There is a well known custom among banks in dealing

with countermanded cheques. A colored slip containing the particulars of the "stopped" cheque is attached to the page of the ledger containing the drawer's account. This was not done in this case although the plaintiffs had verbal notice from Pace and written notice from the drawers. This information was not given to the ledger-keeper, and it is admitted that if the custom had been followed this cheque would not have been paid.

The plaintiffs rely on sec. 50 of the Bills of Exchange Act, R.S.C. 1906, ch. 119. This section protects the paying bank only "if notice of the endorsement being a forged or unauthorized endorsement is given to each such subsequent endorser within the time and in the manner in this section mentioned." Sub-section 3 provides that the notice "may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonour of a bill may be given or addressed under this Act."

The Dominion Bank at Toronto was not an endorser subsequent to the forged endorsement. The only subsequent endorsement was that of the St. Lawrence branch of the bank at Montreal. The different branches or agencies of a bank are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonour; The Queen v. Bank of Montreal (1886), 1 Can. Ex. 154; Rex. v. Lovitt, [1912] A.C. 212 at p. 219. I think they must also be held to be separate endorsers for the purpose of notice under sec. 50. It is just as important for the endorser to know promptly that a previous endorsement is a forgery as it is to know that the drawer has no funds, or not sufficient funds to meet payment.

Mr. Worrell contends that, in any event, R. 26 (f) of the clearing house makes the defendants liable apart from the provisions of sec. 50. I think this rule must be read in connection with the Act and subject to it. But I have serious doubts whether the rules of the clearing house apply here. The cheque had been accepted by the plaintiffs before it went to the clearing house, and it was admitted there was nothing to prevent the defendants obtaining payment of the cheque instead of getting an acceptance. On the argument I suggested that the effect of an acceptance of a cheque by a bank was to substitute the liability of the bank for that of the drawer, and the cheque thereby became negotiable as cash, having in mind Boyd v. Nasmith (1888), 17 O.R. 40. Mr. Worrell argued that the judgment

Ont.

Cy. Ct.

BANK OF MONTREAL v. DOMINION BANK.

in Gaden v Newfoundland Savings Bank, [1899] A.C. 281, establishes the rule that the only effect of an acceptance is an admission by the bank that it has funds to meet the cheque when presented. That part of the judgment dealing with this phase is as follows, at pp. 285, 286:—

"It is contended on behalf of the appellant that the initialling of the cheque had the effect of making it current as cash. It does not, however, appear to their Lordships, in the absence of evidence of such a usage that any such effect can be attributed to this mode of indicating the acceptance of a cheque by the bank on which it is drawn. A cheque certified before delivery is subject as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."

In that case the Court was dealing with the case of a cheque marked before delivery—a cheque never out of the possession of the payee. The distinction between a case of that kind and an acceptance after the cheque has got into the hands of a third party is pointed out in Falconbridge on Banking, p. 765:—"The cheque is duly paid and therefore the conditional payment or satisfaction of the original consideration by the giving and taking of the cheque becomes absolute." See also Boyd v. Nasmith, supra.

In Northern Bank v. Yuen (1909), 2 Alta. L.R. 310, Beck J. referring to the above citation from the Gaden case, says at p. 315:—"These words . . . shew also that the acceptance of a cheque by the bank-drawee creates a direct liability on the part of the bank to the holder of the cheque." If this liability is created by acceptance before the cheque is sent to the clearing house, I do not see how it assists the plaintiffs if the cheque was subsequently and unnecessarily sent to the clearing house.

It was admitted that the effect of the countermand by the payee and the drawers of the cheque was to prevent the bank from recovering from the drawers (its customers); that as regards the drawers the bank was negligent in its duty to its customers. But it is said the plaintiffs owed no duty to the defendants. While it is an elementary principle of law that there can be no negligence where there is no duty, I am not prepared to say the plain-

tiffs owed no duty to the defendants in the circumstances of this case. If the Montreal branch of the defendant bank had sent the cheque direct to the drawee-bank for collection I do not see how, having regard to the well known custom of bankers in this respect, it can be argued the plaintiffs owed no duty to the defendants. And I fail to see how the parties are, or should be, in any worse position because the cheque was sent to the defendant bank indirectly instead of directly. In Shearman & Redfield on Negligence, vol. 3, para. 586, pp. 1592, 1593, it is said:—

"The duty of a banker to collect paper left with him for collection, not being founded on express contract, but on implied agreement arising from the custom of banks, the duty is raised or the agreement implied in behalf of such a person as may be beneficially interested in having the duty performed; so that if A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arises, the latter is the proper person to bring suit for an injury arising from the neglect of that duty; citing Bank of Utica v. M'Kinster (1833), 11 Wend. 473.

In Allen v. Merchants Bank (1839), 22 Wend. 215, it was held that where a bank received on good consideration a note or bill for collection it is liable for neglect, omission or other conduct by which the money is lost, or other injury sustained by the owner of the note unless there be some agreement to the contrary express or implied. This was approved of in Commercial Bank of Pennsylvania v. Union Bank of New York (1854), 11 N.Y. 203, where a bank failed to protect a bill sent to it by another bank for collection.

I think the action must be dismissed. Should the defendants be held liable, then, on the principle laid down in Bank of Ottawa v. Harty (1905), 12 O.L.R. 218, they are entitled to relief against Lessor Bros.

See the recent case of Souchette Ltd. v. London County etc Bank (1920), 36 T.L.R. 195, a case on negligence in cashing forged cheques.

Action dismissed.

COCKSHUTT PLOW CO. v. FLOEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Limitations of Actions (§IVC—167)—Lien Note—Action Barred by Act Respecting Limitations of Actions—Acknowledgment in Writing — New Cause of Action Created — Sufficiency of Writing.

Sask.

C.A.

COCKSHUTT PLOW CO. v. FLOEN.

In the Province of Saskatchewan an acknowledgment in writing of a statute-barred debt, which expressly or impliedly contains a promise to pay is sufficient to constitute a new cause of action against which the statute begins to run from the time of the acknowledgment.

[Review of legislation and authorities.]

APPEAL by plaintiff from a District Court judgment, holding that an acknowledgment of a debt could not operate to remove the bar, under the Act respecting limitations of actions. Reversed.

G. A. Ferguson, for appellant.

P. G. Hodges, for respondent.

Haultain, C.J.S., concurs with Lamont, J.A.

Lamont, J.A.:—The plaintiffs in this action sue upon two lien notes or agreements in writing; by the first the defendant promised to pay the plaintiffs the sum of $68 on or before December 1, 1911, and by the second he promised to pay the sum of $12 on November 1, 1912. Both agreements bore interest at the rate of 8% until due and 10% thereafter until paid. The action was commenced in June 1919.

In his defence the defendant set up that the claim was barred by the Act respecting Limitations of Actions. In reply the plaintiffs pleaded that the defendant, by a letter dated November 2, 1913, written to the plaintiffs, had acknowledged liability for payment of the said notes and promised to pay the same. The letter reads:—"I will be paying up the notes this month, if not all at once I will have the biggest part paid anyway. (Sgd.) O. J. Floen."

For the plaintiffs it was urged that this letter was sufficient to take the claim out of the statute and give them 6 years from the date of the letter within which to bring their action. The District Court Judge held that in this Province an acknowledgment of a debt could not operate to remove the bar of the statute, and he cited as authority therefor the judgment of the Supreme Court of Canada in Rutledge v. U.S. Savings and Loan Co. (1906), 37 Can. S.C.R. 546. For reasons to which I shall presently refer, that decision, in my opinion, does not govern the present case.

At common law there was no time limit within which an action had to be brought. Until the debt was paid a right of action existed to enforce payment. Limitations upon this right are creatures of the statute and derive their authority therefrom. The first general statute imposing

a time limitation upon the right to bring an action, was 21 James I, 1623, ch. 16. That Act, among other things, provided that all actions of account and upon the case (with certain exceptions) and all actions of debt grounded upon any lending or contract without specialty, should be sued or brought within 6 years after the cause of such action or suit arose and not after. This statute made no provision for the revival of a cause of action barred by its terms, but, in recognition of the moral obligation to pay debts without regard to the efflux of time, the English Courts, notwithstanding the express and definite language of the statute, held that if a debtor acknowledged his debt as an existing liability or promised to pay it, it was revived and continued as a binding obligation. Clark v. Bradshaw, etc. (1800), 3 Esp. 155; Bryan v. Horseman (1804), 4 East 599, 102 E.R. 960; Gibbons v. M'Casland (1818), 1 B. Ald. 690, 106 E.R. 253.

In this latter case Bayley J., at p. 693, said:—

"To satisfy the Statute of Frauds, there must be a promise in writing, and to take the case out of the Statute of Limitations, there must be a promise within six years. Both these requisites concur in the present case. It is said that the acknowledgment must be in writing; but that is not necessary, for the defendant's liability is fixed by the original promise in writing, and the acknowledgment within six years is only to shew that that liability has not been discharged." See also 25 Cyc. 1327.

The promise to pay made by express words, or by implication from an acknowledgment of the liability, was considered a new contract the consideration for which was the old debt, and such promise was held to constitute a new cause of action. Verbal acknowledgments continued to be held sufficient to take a case out of the statute until the passing of Lord Tenterden's Act, 9 Geo. IV. 1828, ch. 14. That Act, after reciting that various questions had arisen in actions founded upon simple contracts as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking a case out of the operation of the Statutes of Limitations, enacted, sec. 1: "that in Actions of debt or upon the Case grounded upon any Simple Contract no Acknowledgment or Promise by Words only shall be deemed sufficient Evidence of a new or continuing Contract, whereby to take any Case out of the Operation of the said Enactments . . . , unless such Acknowledgment or Promise shall be made or contained by

Sask.

C.A.

COCKSHUTT PLOW CO. v. FLOEN.

or in some Writing to be signed by the Party chargeable thereby."

This Act constituted a statutory recognition of the rule laid down by the Courts, that, notwithstanding that the Act of James I. required all actions of debt, etc., to be commenced within 6 years after the cause of action arose, such actions might properly be brought within 6 years from the time the debtor acknowledged his obligation to pay the debt. After the passing of Lord Tenterden's Act, however, no acknowledgment was sufficient to take a case out of the statute unless the acknowledgment was in writing.

In 1886 the Parliament of Canada declared the laws of England relating to civil and criminal matters as the same existed on July 15, 1870, to be in force in the North-West Territories, in so far as applicable thereto and in so far as the same had not been or might not thereafter be altered or modified by competent authority. In 1888 the Legislative Assembly of the North-West Territories enacted as follows:—

"All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract, without specialty, shall be commenced and sued within six years after the cause of such action arose."

This provision has been re-enacted by the Legislature of the Province and is the law now embodied in the statute. It was argued that the Legislature by enacting the above provision, which is substantiated by the Act of James I., shewed as clearly as it was possible to do an unmistakable intention that an action must be brought within 6 years from the time the debt first became payable, and further that the Supreme Court of Canada in Rutledge v. U.S. Savings and Loan Co., supra, had affirmed the correctness of this contention.

In my opinion this is not so. What was held in that case was, that the Legislative Assembly of the Yukon by re-enacting in substance the Act of James I., without at the same time re-enacting the exception to that Act created by the Acts of 4 Anne 1705, ch. 16, indicated an intention no longer to recognise the exception. The Act of Anne provided that in any action of debt, etc., if the debtor was beyond the seas, the action could be brought within 6 years after his return. In the Rutledge case the action was brought at a time more than 6 years after the cause of

action arose, but within 6 years after the debtor came within the jurisdiction of the Yukon Courts. Obviously, the Statute of Anne was not in force and the action was barred by the Ordinance. The Supreme Court held, that as the Legislative Assembly of the Yukon had fixed a time limit within which such actions must be brought, without making any exception for cases in which the debtor was beyond the seas, the legislative intention must be held to be that such exception no longer existed. This decision, in my opinion, does not affect the present case. The binding force of an acknowledgment to take a case out of the operation of the statute does not depend on any legislative enactment modifying or altering the Act of James I., but upon the fact that a new promise to pay or an acknowledgment from which a new promise will be implied, constitutes a new cause of action which starts the statute running afresh. This has been held to be so ever since the passing of the statute of James I., and, if that is its effect under that statute, I see no reason why it should not be held to be its effect under our statute.

In Sawyer Massey v. Weber (1912), 6 D.L.R. 305, 5 Alta. L.R. 362, the Alberta Court en banc held that a part payment of a debt made after the expiration of the period of limitation was sufficient to revive the cause of action. The headnote of that case, in part, is as follows:—

"The fact that a Canadian legislature has re-enacted that portion of the statute of James which placed a time limitation upon an action for simple contract debts, without making any reference to subsequent judicial interpretations of that statute and without embodying them in the local statute itself and without any reference to 9 Geo. IV. C. 14, S. 1 which refers to acknowledgments in writing does not lead to the conclusion that the legislature intended to repudiate such interpretations and to reject the statute of George and leave the Court free to apply the words of the local Act as they stand.

"Where an ancient English statute has been the subject of a long series of judicial interpretations and a settled rule of English law adopted by the highest courts in England has been laid down in regard to it a Canadian court is bound to apply the same rule to the statute of its own legislature which is enacted in practically the same terms."

I am, therefore, of opinion that in this Province an acknowledgment in writing of a statute-barred debt, which

Sask.

C.A.

COCKSHUTT PLOW CO. v. FLOEN.

expressly or impliedly contains a promise to pay, is sufficient to constitute a new cause of action against which the statute begins to run from the time of the acknowledgment. That the defendant's letter of November 2, 1913, was sufficient to take the debt out of the statute, is, in my opinion, beyond question.

The appeal should, therefore, be allowed with costs, the judgment below set aside and judgment entered for the plaintiffs for the amount of their note and costs.

Turgeon, J.A.:—The plaintiff issued a writ against the defendant on June 26, 1919, for the recovery of $154.16, being the amount of two lien notes dated respectively April 19, 1911, and May 25, 1911. The defendants pleaded the Statute of Limitations, R.S.S. 1909, ch. 50. The plaintiff met this plea by setting up an acknowledgment in the form of a letter written by the defendant to the plaintiff on November 2, 1913, and containing the following words:—"I will be paying up the notes this month, if not all at once I will have the biggest part paid anyway. (Sgd.) O. J. Floen."

In my opinion the evidence discloses that this letter was signed by the defendant and that the two lien notes in question in this action are the notes referred to by him in the letter.

The trial Judge held that, notwithstanding this acknowledgment made less than 6 years prior to the commencement of the action, the plaintiff is debarred by the Statute of Limitations because, in his opinion, the state of the law in this Province is such that the 6 years' limitation provided by ch. 50 of R.S.S. 1909 begins to run, in a case of this kind, from the due date of the note sued on and not from the time of any subsequent acknowledgment, and that an acknowledgment such as the one contained in the defendant's letter in this case is of no effect. In arriving at this conclusion the trial Judge relies upon the authority of the decision of the Supreme Court of Canada in Rutledge v. U.S. Savings & Loan Co., 37 Can. S.C.R. 546.

I cannot agree with this conclusion. The Rutledge case decided that the provisions of the statute known as the Statute of Anne are not in force in the Yukon Territory, where an ordinance of limitations framed in the same language as our statute has been in existence for some years. The questions raised in that case are not the same as the question raised here, and cannot be disposed of by the

Sask.

C.A.

COCKSHUTT PLOW CO. v. FLOEN.

same process of reasoning. The decision of the Supreme Court establishes, (1) that a judgment obtained in a foreign country is, in this country, equivalent to a simple contract debt and, therefore, subject to the 6 years' limitation provided by the Yukon Ordinance governing actions brought to recover such debts, and (2) that the Statute of Anne, 4 Anne, 1705, ch. 16, which suspends the operation of the English Statute of Limitations while the defendant is beyond the seas, is not in force in the Yukon. It is the second point only which concerns us here, and the finding of the Supreme Court upon it is arrived at in the following manner. The original Statute of Limitations known as the Statute of James, 21 Jac. I. ch. 16, provides expressly that its limitation should not commence to run against a plaintiff who was beyond seas at the time his right of action accrued, but should be suspended until his return. No provision was made to suspend the limitation in cases where the defendant was beyond seas, and the Courts held that they could not interpret the Statute of James so as to read such a suspension into it. The two cases of Hall v. Wybourn (1689), 2 Salk. 420, 91 E.R. 365, and Dupleix v. De Roven (1705), 2 Vern. 540, 23 E.R. 950, will serve to illustrate this point. Both these cases are referred to by Idington J. in his judgment in the Rutledge case, and extracts therefrom are cited by him (p. 555). The Statute of Anne was passed to remedy this state of the law, and it provided that the plaintiff in such cases should preserve his right of action against an absent defendant until 6 years after the latter's return from beyond seas. Both these English statutes, as well as the whole body of English law applicable to conditions in the Yukon, as such law existed on July 15, 1870, were introduced into the Yukon by virtue of a Dominion statute. The passing of the Yukon ordinance, 4 Geo. V. 1914 (Yukon T.O.) ch. 6, which merely fixed the limitation and did not carry forward the exceptions expressly provided in the English statutes, must be interpreted as having done away with these exceptions, and, consequently, in the Yukon case the plaintiff's right to bring action was not protected during the absence of the defendant in the United States.

The case at Bar is clearly distinguishable. Our Statute of Limitations R.S.S. 1909, ch. 50, sec. 1:—in simple contract actions is worded as follows:

"All actions for recovery of merchants' accounts, bills,

Sask.

C.A.

COCKSHUTT PLOW CO. v. FLOEN.

notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of action arose."

The essential words of the Statute of James are substantially the same in sec. 3:—

"All Actions of account and upon the Case . . . all Actions of Debt grounded upon any Lending or Contract without Specialty, and all Actions for Debt for Arrearages of Rent . . . shall be commenced and sued within . . . Six Years next after the cause of such Action or Suit and not after."

It is a well settled rule of law that statutes framed in this manner do not extinguish the plaintiff's contractual right but merely bar his remedy. Neither the original English statute nor the Saskatchewan statute contain any express provision for the revival of this remedy by means of an acknowledgment to be made by the defendant, or by part payment or part satisfaction. Nevertheless the English Courts always interpreted the Statute of James to mean that the right of action was revived each time the defendant made a suitable acknowledgment or a part payment, and that the 6 years' limitation started to run afresh from the date of such revival. Or, perhaps, instead of using the word "revival" it would be more accurate for me to say that the "cause of action" referred to in both statutes and which in the case of a note would "arise" on its due date and be limited to exist for 6 years only, would acquire an additional 6 years of life upon the occasion of such acknowledgment or part payment. This construction of the English statute is well established by several old cases, among which I may refer to Leaper v. Tatton (sometimes given as Leper v. Tatton) (1812), 16 East 420, 104 E.R. 1147; Hurst v. Parker (1817), 1 B. & Ald. 92, 106 E.R. 34; and Pittam v. Foster (1823), 1 B. & C. 248, 107 E.R. 92. These authorities establish the rule that the acknowledgment might be either verbal or written and would suffice, in either case, to revive the right of action if made in appropriate language. The reasoning of these decisions is applicable to the statute of this Province and, in my opinion, should be followed by us.

In 1828 the Act known as "Lord Tenterden's Act" was passed, 9 Geo. IV. ch. 14. The effect of this Act can best be shewn by quoting the portion of it which is of interest in this case. The preamble refers to the Statute of James

and to a similar statute in force in Ireland, and then proceeds as follows, (sec. 1):—

"and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof: Be it therefor enacted that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

Prior to this enactment the acknowledgment might have been merely verbal; after its passing it would be ineffective unless made in writing and signed by the debtor.

It is unnecessary, in my opinion, to decide whether Lord Tenterden's Act is in force in this Province or not, because in either case the plaintiff's claim would be in the same position. It has a statement from its debtor, in writing, containing words which, I believe, constitute an effective acknowledgment of the debt, and consequently the Statute of Limitations cannot stand in its way.

I would allow the appeal with costs. The judgment of the trial Judge should be set aside and judgment entered for the plaintiff for the amount of his claim and costs.

Appeal allowed.

THE KING v. BUSY BEE WINE & SPIRITS IMPORTERS OF SASKATCHEWAN, LTD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Intoxicating Liquors (§IIIC—65)—Company not Licensed to Sell Liquor in Province—Mail Order Export Business—Sale by Employee for Local Consumption—Employer Ignorant of Sale—Proceeds of Sale not Given to Employer—Scope of Employment—Mens Rea.

The Court will not assume that it is in the course of a servant's employment to do that which his employer is prohibited by law from doing because this would shew that he was employed for an unlawful purpose, and there being no assumption of this

Sask.

C.A.

THE KING v. BUSY BEE WINE AND SPIRITS IMPORTERS.

sort in favour of the prosecution, it must be shewn affirmatively that the servant's employment did extend to the act committed before liability can attach to the employer.

[Boyle v. Smith, [1906] 1 K.B. 432; Hudson Bay Co. v. Heffernan (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, referred to.]

APPEAL from a conviction for making an unlawful sale of intoxicating liquor in violation of the Saskatchewan Temperance Act. Reversed.

T. A. Lynd, for appellant.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case the defendant company was convicted on June 25, 1920, for making an unlawful sale of intoxicating liquor in violation of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194.

The defendants are not authorised vendors under the Act. They carry on an export liquor business over which the Legislature of the Province has no jurisdiction (Hudson Bay Co. v. Heffernan (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322), and they are not licensed in any manner under the Saskatchewan Temperance Act or any other Act of the Provincial Legislature, or of any enactment of the Parliament of Canada. In the absence of all statutory law on the subject, they carry on this business as a common law right, and, being an incorporated company, they derive their power to do so from their charter. The company have in their employ a boy named Jack Mainfoid. On May 22, 1920, Mainfoid sold a bottle of liquor to one Sylvester for $5. The company carry on their business by mail-order. Mainfoid's duties were described by Hickman, the manager and secretary-treasurer of the company, as being of a "general utility" character. Among other things, he opens the mail in the manager's absence, makes up the parcels for shipment and delivers them to the express company. Mainfoid, at the time of the sale to Sylvester, was under specific instructions from Hickman, from whom he takes his orders, not to sell liquor in the Province. Hickman did not know of the sale and there is no knowledge of it that can be attributed to the company. Hickman also swears that Mainfoid did not pay over to him the money received for the bottle sold to Sylvester, and I think the proper inference to be drawn from the evidence is that Mainfoid did not pay it to the company at all. Under these circumstances we have to de-

termine whether Mainfoid's unlawful act can be attributed to the company so as to make it liable to the penalty.

As in the case of Rex v. Ping Yueng which was argued before us the day before we heard the argument in this case, we have to deal here with the question of mens rea, but this time in its application to the case of a master's liability for an act of his servant done without the master's knowledge. In one of the leading cases cited to us on the argument, Strutt v. Clift, 80 L.J. (K.B.) 114, [1911] 1 K.B. 1, Lord Alverstone, C.J., enunciates the general rule applicable to these penal statutes as follows at p. 116:—

"Cases in which the question arises as to whether the particular offence necessitates mens rea are always difficult. Under ordinary circumstances mens rea must be shewn, unless by express enactment or necessary implication the doctrine is excluded. I endeavoured to express my opinion on this subject in Emary v. Nolloth, [1903]."

A great number of cases were cited to us both for the Crown and for the defendant company, and, in my humble opinion, it is very difficult to reconcile all the decisions that have been given in the English Courts upon the questions involved. In the main, however, I think it may be said that these decisions are divisible into three groups differing in principle from each other.

First we have a group of cases where the master was held liable for a breach of the law committed by the servant, although both master and servant were free of any guilty knowledge or intention, and although in some cases the master had given specific instructions to the servant to refrain from doing the act complained of. The principle underlying these decisions is that the intention of the statute is to prohibit the act absolutely, and that guilty knowledge on the part either of the master or of the servant is unnecessary, provided the servant is acting within the scope of his employment. (Peark's Dairies Ltd. v. Tottenham Food Control Committee (1918), 120 L.T. 95, 88 L.J. (K.B.) 623; Buckingham v. Duck (1918), 120 L.T. 84, 88 L. J. (K.B.) 375). In the first of these cases the servant was innocent of any guilty intention, in the second case the servant intended to violate the statute. The result was the same. In both cases it was found that the servant who committed the offence was acting within the scope of his employment.

In the second group we have to deal with cases where the

Sask.

C.A.

THE KING v. BUSY BEE WINE AND SPIRITS IMPORTERS.

rule of mens rea is not excluded entirely from the statute in question, but where, while the mens rea must exist, the guilty intention of the servant is attributed to the master and will satisfy the statute. Commissioners of Police v. Cartman, [1896] 1 Q.B. 655, 65 L.J. (M.C.) 113; Bond v. Evans (1888), 21 Q.B.D. 249, 57 L.J. (M.C.) 105. In Sherras v. De Rutzen, [1895] 1 Q.B. 918, 64 L.J. (M.C.) 218, Wright, J., in referring to cases of this class, says, at p. 922:—

"But . . . there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence."

In these cases, as in those of the first group, the servant must be acting within the scope of his employment. Once this is established, the fact that the master has given the servant express instructions to obey the law will not relieve him from responsibility: Commissioner of Police v. Cartman, supra.

And finally we have these cases, of which Boyle v. Smith, [1906] 1 K.B. 432, 75 L.J. (K.B.) 282, is an illustration, where the attempt to fix liability upon the master for the act of his servant failed because the act complained of was not within the scope of the servant's employment. And it seems to me that this test,—the scope of the servant's employment—is the first test to be applied to all these cases and to the case at Bar. Unless this first essential element is found to exist, there is, in my opinion, no necessity to enquire further, because no guilt can be imputed to the master. If it is established, the next step is to ascertain whether the statute under review is of the class dealt with under the first group of cases, where mens rea on the part of the servant is not essential; if so, the master is liable in any event; if not, the case may still come within the rule of the second group, where the servant's guilty intention will cast liability upon the master.

In Boyle v. Smith, supra, the statute in question was the Licensing Act of 1872, 35-36 Vict. (Imp.) ch. 94, wherein it was enacted by sec. 3:

"No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his license to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicat-

ing liquor at any place where he is not authorised by his license to sell the same, shall be subject to the following penalties."

Different classes of licenses were provided by the Act. The accused was the holder of a license which authorised him to sell beer by retail at his premises for consumption off the premises. He had no license to sell in any other manner. His draymen were instructed to deliver beer only to persons who had previously given orders for beer at the brewery, as his license did not allow him to furnish beer to others, and they were instructed to bring back to the brewery at the end of each day any beer which might remain undelivered in their drays. Upon one occasion, a drayman, finding himself with some beer which he had been unable to deliver, sold it to two persons who had not placed orders at the brewery. A charge was laid against the accused for this act of his servant. It was held, on appeal to the King's Bench Division, that the master was not liable because the act in question was not within the scope of the drayman's employment. In dealing with this feature of the case, Lord Alverstone, C.J., has this to say, at p. 284:—

"I am satisfied that the only charge made against the respondent was in respect of the sale of beer in the street on these occasions, and not in respect of the delivery of beer to customers who had previously ordered it. What we have, therefore, to consider is whether or not this appeal should be allowed in respect of the sales to people in the street. That raises a difficult question which is not, in my opinion, entirely covered by any of the authorities cited."

He then goes on to review several authorities which he distinguishes, and he then continues:—

"But the question remains whether the respondent is liable for the act of his drayman. In my opinion the magistrate has taken the correct view of the law applicable to the case, that the respondent is not liable. He cannot, I think, be held liable because the drayman whom he has sent out to deliver beer to customers sells it contrary to his orders. This is not a case of delegated authority within the class of cases of which Bond v. Evans and Commissioner of Police v. Cartman are instances."

I think the case we are dealing with on this appeal comes within the authority of Boyle v. Smith, supra. In this latter case the accused had no license to deal in beer in the

N.S.

S.C.

McINTYRE v. DOMINION COAL CO.

manner in which his drayman did deal in it. Consequently it could not be assumed without proof that the drayman did something within the course of his employment in selling the beer as he did. To assume this would be to assume that the master had employed him for an illegal purpose, a thing which would have to be proved specifically and could not be inferred from the mere fact that the servant did, on one occasion, without the knowledge of his master and against his instructions, take advantage of the control he had over his master's beer to dispose of it in an illegal manner.

And in the case at Bar it seems to me that the same considerations apply. The defendants are not licensed to sell liquor in this Province at all. They are taking advantage of the state of the law to carry on an inter-provincial (and, it may be, an international) traffic in liquor; that is, they sell liquor at their premises to persons buying from them in another Province or in a foreign country. They carry on their business on the mail-order plan, receiving their orders by mail and shipping the liquor by express. We cannot assume that it was in the course of Mainfoid's employment to sell liquor locally, because, if that could be assumed, it would follow consequently that the defendants are keeping their liquor for sale within the Province, and this would make them liable, under the Act, to have their entire stock of liquors seized and forfeited, in addition to the severe penalties of the Act being imposed upon them. There being no assumption of this sort in favour of the prosecution, it must be shewn affirmatively, in order that liability may attach to the defendants, that Mainfoid's employment did extend to the act committed by him. The facts do not, in my opinion, establish any such case, and I would, therefore, allow the appeal and quash the conviction with costs.

Appeal allowed.

McINTYRE v. DOMINION COAL CO., LTD.

Nova Scotia Supreme Court, Russell, J., Ritchie E.J., and Mellish, J. April 2, 1921.

New Trial (§II—7)—Nova Scotia Judicature Act, Rule 17, Order 22—Rule Imperative—Failure to Observe.

Rule 17 of Order 22 of the Judicature Act, (1920) Nova Scotia, is as follows: "Where a cause or matter is tried by a Judge with a jury no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into Court or of the amount paid in. The jury shall be required to find the amount of debt or damages without reference to any payment into Court." The words of this rule are

N.S.

S.C.

McINTYRE v. DOMINION COAL CO.

imperative, and where counsel in closing states to the jury that money has been paid into Court and mentions the amount, a new trial will be granted.

APPEAL by the defendant from the order for judgment in favour of plaintiff for the sum of $1,850 and costs in an action tried before Longley, J., with a jury. New trial ordered.

H. Ross, K.C., for appellant.

W. F. Carroll, K.C., for respondent.

Russell, J., agrees with Ritchie, E.J.

Ritchie, E.J.:—This is an action in which the plaintiff claims that the defendant company has operated and worked its coal mines in a negligent and improper manner, thereby causing the land on which the plaintiff's house stands to subside; for this alleged injury damages are claimed.

The case was tried at Sydney before my brother Longley and a jury. A verdict was found for the plaintiff.

Rule 17 of O. 22 of the Judicature Act, 1920 (N.S.), is as follows:—"17. Where a cause or matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into court."

The plaintiff's counsel in closing stated to the jury that the defendant company had paid money into Court and named the amount.

An argument as to the liability of the defendant company was based thereon. It is, I think, fairly obvious that this would be a good jury argument and likely to affect the result if the jury was in doubt. An objection to this course was taken at the time by the counsel for the defendant company, but the trial Judge apparently took no notice of the objection and did not warn or caution the jury that they should not act upon the information as to the payment into Court. The defendants' counsel in his notice of appeal takes the point specifically and there is no way of escape from dealing with it. I am of opinion that on this ground there must be a new trial. The words of the rule are in imperative, clear and explicit terms. If counsel through inadvertence or otherwise violates the rule, and nothing is said to prevent the jury acting on the fact that money has been paid into Court and drawing an inference of liability therefrom, the penalty must be a new trial; otherwise the rule becomes

Yukon
Terr. Ct.
FINLAY
v.
BLACK.

useless. It is laid down in the Annual Practice that the proper course in such case is for the Judge to stop the case and discharge the jury, and it may be that the mischief having been done, it would be of no avail to warn the jury not to act on the fact of the payment into Court.

I purposely refrain from expressing any opinion on the merits of the case.

Mellish, J.:—I agree that a new trial should be had.

New trial ordered.

WILLIAM FINLAY v. JOHN BLACK, PUBLIC ADMINISTRATOR OF THE YUKON TERRITORY AND EX-OFFICIO ADMINISTRATOR OF THE ESTATE OF WILLIAM JOHN O'BRIEN, DECEASED, AND JOSHUA ELLSWORTH STEPP.

Territorial Court of the Yukon Territory, Macaulay, J.
July 13, 1921.

Companies (§IVG—136)—Unincorporated Club—Member Loaning Money to Officers Signing Bonds and Notes—Personal Liability of Persons Signing.

Officers of an unincorporated lodge, who sign bonds and notes for the repayment of money loaned to the lodge for the use and benefit of the lodge are personally liable on such bonds and notes as having contracted for a principal who has no existence in law, there being no evidence of any contract to relieve such officers from personal liability, or that if the funds of the lodge became exhausted the person making the loan should not be paid.

[Kelner v. Baxter (1866), L.R. 2 C.P. 174; Crane v. Lavoie (1912), 4 D.L.R. 175, 22 Man. L.R. 330, discussed and followed.]

ACTION to recover the balance due on certain bonds and notes signed by defendants as security for moneys loaned to an unincorporated club of which the defendants were officers.

C. E. McLeod, for plaintiff.

C. B. Black, for defendant John Black.

Macaulay, J.:—At the trial of this action the defendant Stepp was not represented by counsel and did not enter an appearance to the writ.

The following admissions of fact were made by counsel for the plaintiff and for the defendant Black, namely:—1. That the defendant John Black is public administrator of the Yukon Territory and ex-officio administrator of the estate of the late William John O'Brien. 2. That the said William John O'Brien, the defendant Stepp and one Lionel Gordon Bennet were at all times material to this action, and particularly on or about October 1, 1914, members and officers of a society known as "Dawson Lodge No. 1393, Loyal

Order of Moose," the said Bennet being styled the "dictator," the said O'Brien the "secretary," and the defendant Stepp the "treasurer" of the said society, respectively. 3. The said "Dawson Lodge No. 1393, Loyal Order of Moose," was at all times material to this action, an unincorporated body or society. 4. At a meeting of the members of the said society, held at the lodge room thereof, at the said Dawson, on March 27, 1914, at which meeting the said William John O'Brien was present, the following resolution was duly passed:—"Moved by Bro. Wheeler and duly seconded by Bro. O'Brien that Bonds be issued for $10.00 each bearing interest at 6% and only sold to Members of the Order. Carried." 5. At the said meeting the following resolution was also passed:—"Moved by Bro. Wheeler and regularly seconded that a committee be named to be known as the Finance and Building Committee to issue bonds. Carried." 6. In the minute book of the said society, in which was kept a record of the proceedings of its meetings, and immediately following the resolution set forth in para. 5 hereof, appears the following entry:—"The Dictator appointed the following Committee: Bro. Wheeler, O'Brien, Stepp, Knudson, Ed. J. McKenzie, with power to add to their number." 7. In the said minute book, in the record of proceedings of a meeting of the said society held on July 10, 1914, at which meeting the said William John O'Brien was present, appears the following entry in the handwriting of the said O'Brien:—"To the fact that the trustees had not O.K.'d the secretary's acct. as they wanted further information as to whether the secretary was entitled to 5% commission on the amount raised from the sale of the building bonds, and whether sums realised from the sales of building bonds up to date of June 30/14 were included in the amounts for which the secretary was charging his 5% commission. The secretary stated that the by-laws of the lodge provided that 'the secretary was to receive 5% on the gross receipts of the Lodge as compensation for his services,' and that he thought he was entitled to commission under that section on the sale of the bonds. That he was responsible for the money derived from the sale of the bonds until turned over to the treasurer, the same as for any other moneys of the lodge; also that the said bond money had to be entered in the books of the lodge and proper accounts kept of the expenditure of the same, and that there was more work attached to the bond money than the other funds of the lodge. Brother Wheeler stated

Yukon

Terr. Ct.

FINLAY v. BLACK.

that as chairman of the auditing committee he thought the secretary was entitled to his commission on the sale of the bonds and that it was none too much for the amount of work attached to it. Bro. Firth stated that the trustees were only seeking information on the subject, and that he agreed that the secretary was not receiving any too much for his services re the bond issue moneys. Bro. Firth then moved, seconded by Bro. Taylor: that the secretary be paid 5% on all receipts of the lodge. Carried." 8. The O'Brien mentioned in paras. 4 and 6 hereof, is the said William John O'Brien, who is likewise the "secretary" referred to in para. 7 hereof. 9. On or about October 1, 1914, the plaintiff loaned to the said society or body the sum of $2,000, paying such sum to the said O'Brien who received the same on behalf of the said society. 10. The plaintiff received 200 documents called bonds, each for the sum of $10, and bearing interest at 6% per annum, and in the form set out in the second next following paragraph hereof. 11. That on May 30, 1916, the sum of $600 was paid to plaintiff out of the funds of Dawson Lodge No. 1393 Loyal Order of Moose by said William John O'Brien in his capacity as said secretary of said lodge. 12. The plaintiff is the holder of 140 documents called bonds and numbered respectively 661 to 800, both numbers included, each purporting to be an acknowledgment that Dawson Lodge No. 1393, Loyal Order of Moose, is indebted to the plaintiff in the sum of $10, with interest at the rate of 6% per annum, and each dated October 1, 1914, and signed by the said William John O'Brien, the defendant Stepp, and the said Lionel Gordon Bennet. The said 140 documents are all alike. The following is a copy of one of the said documents:—

"No. 662. Bond. $10.00

Loyal Order of Moose
Dawson Lodge, No. 1393.

Know all men by these presents that Dawson Lodge No. 1393 is firmly held and bound unto Wm. Finlay in the sum of ten ($10.00) dollars of lawful money of Canada to be paid to the said William Finlay or attorney certain executors, administrators or assigns, for which payment well and truly to be made shall bind Dawson Lodge No. 1393 its heirs, executors, administrators or assigns, forever firmly by these presents.

The condition of the above written bond or obligation is such that upon payment of the sum of ten ($10.00) dollars

by Dawson Lodge No. 1393, L.O.O.M., with interest at the rate of 6 per cent. per annum, this bond or obligation to be void.

Dated this 1st day of October, A.D. 1914.
Seal, Dawson Lodge No. 1393
Loyal Order of Moose
Lionel G. Bennet, Dictator, J. E. Stepp, Treasurer, Wm. J. O'Brien, Secretary."

13. None of the said 140 bonds has ever been paid. 14. The plaintiff is the holder of a certain instrument or paper writing signed by the said William John O'Brien, the defendant Stepp and said Lionel Gordon Bennet, in the words and figures set forth hereafter, namely:—

"$2,000.00 Dawson, Y.T., October 1st, 1914.

One year after date, Dawson Lodge No. 1393, Loyal Order of Moose promises to pay to the order of William Finlay the sum of Two Thousand Dollars at six per cent. per annum, value received. This note is given as further security upon two hundred bonds issued by the said Dawson Lodge Number 1393 Loyal Order of Moose, it being distinctly understood that upon payment of said two thousand dollars plus six per centum. per annum, this promissory note is to be delivered to the said Dawson Lodge Number 1393 together with the said two hundred bonds issued in the name of William Finlay.

Seal Loyal Order of Moose.
Lionel G. Bennet, Dictator, Wm. J. O'Brien, Secretary,
J. E. Stepp, Treasurer,
Officers of Dawson Lodge, No. 1393."

15. That the sum of $2,000.00 alleged in para. 2 of the statement of claim to have been borrowed from the plaintiff by the persons mentioned therein was in reality loaned by the plaintiff to the unincorporated society known as Dawson Lodge No. 1393 Loyal Order of Moose referred to in para. 6 of the statement of claim. 16. That said sum of $2,000 so loaned by the plaintiff to said Dawson Lodge No. 1393 Loyal Order of Moose was expended by and under the authority of said lodge for the benefit of said lodge and the members thereof. 17. That plaintiff knew at the time said sum of $2,000.00 was loaned by him to said Dawson Lodge No. 1393 Loyal Order of Moose that the same was to be expended by and under the authority of said lodge for the benefit of said lodge and the members thereof. 18. The

Yukon

Terr. Ct.

FINLAY v. BLACK.

plaintiff was a member of the said lodge at the time he loaned the said money to the lodge. 19. The said William John O'Brien signed the bonds referred to in para. 3 of the statement of claim in his capacity as the duly nominated and elected secretary of and under the authority of said Dawson Lodge No. 1393 Loyal Order of Moose. 20. That said William John O'Brien signed the instrument referred to and set forth in para. 5 of the statement of claim in his capacity as the duly nominated and elected secretary of and under the authority of said Dawson Lodge No. 1393 Loyal Order of Moose.

The plaintiff was called as a witness on his own behalf and in answer to the question. "Q. Will you tell us the circumstances under which you came to part with the possession of this money you loaned?" answered: "I was at a meeting one evening, a meeting of the Moose Lodge, in Dawson, and after the evening was over Mr. O'Brien announced that they needed a little more money and if anybody had any money lying idle in the bank they would be doing well to loan it to them; he said 'we are paying 6 per cent. interest.' I said nothing at the lodge at the time, but I went over to his office the next day or a couple of days after. I said 'I understand you want to borrow money?' He says 'Yes'; he says 'we are selling bonds.' I says 'I have a little money in the bank I can let you have for a year but at the end of the year I want it.' He said 'that will be all right; you can have it any time you want it; just give us a week's notice.' I went over to the bank and handed the money to O'Brien and he gave me a receipt and he said 'you call round later on and I will have the bonds ready.' I went over and he had the bonds ready and he shewed me one of the bonds. I says 'It does not state on this bond when I am to get this money.' 'Oh,' he says, 'that will be all right; you can have it at any time you want it, just by giving us a week's notice.' I said 'Yes, that is all right, but I want it in writing; I want something to shew for it'; and he made out this promissory note. That is about all there was to it." In answer to the question: "Q. At the time you loaned this money to the Lodge was there anything in the way of special terms as to its repayment to you at all?" the plaintiff says "No." Further: "Q. Was anything said to you as to a limitation to the funds of the Lodge? A. No, there was not." Further: "Q. What did you know at the time you loaned this money as to the status of the Lodge, as to

its legal status? A. I didn't know anything. Q. You simply knew it was a Lodge? A. Yes. Q. Did you know what a Lodge was? A. No; well, of course, I knew a Lodge was an organised body of members that paid in their dues and were entitled to sick benefits. Q. In sub-paragraph (b) of paragraph 8 of the statement of defence the defendant says this (reading); what have you to say as to that? A. There was nothing said about that, but of course I expected the money would come from the lodge. Q. Was anything said limiting your redress to the funds of the lodge, as alleged in this paragraph? A. No. Q. Was there anything further in the way of an agreement between you and the people to whom you loaned money as to any limitation of your redress, whatever it was? A. No."

. . . . . .

"Q. What was your attitude towards Mr. O'Brien personally in connection with this loan; how did you look upon Mr. O'Brien personally in the transaction? A. I thought he was just acting as agent for the Lodge, that he was the one that was handling the moneys for the Lodge, and that I would have to look to him; I loaned my money to him, and I would have to look to him to get it, but of course I expected it would come from the Lodge. Q. Did you have anything to do with anyone else other than Mr. O'Brien in connection with this loan? A. No. Q. It was always to Mr. O'Brien that you made your application? A. Yes. Q. Did he ever say anything to you to the effect that you were going to the wrong person? A. No."

Portions of the examination for discovery of the plaintiff were put in for the defence underlined in blue lead pencil, and the defendant Stepp was also called as a witness for the defence, but the evidence offered by them, I think, is covered by the admissions of fact made by counsel as aforesaid.

From the admissions of fact and from the evidence it is quite clear that when the plaintiff loaned the $2,000 he expected he would be repaid from the funds of the lodge. He looked upon O'Brien as the person from whom he should receive the money as the secretary, or, as he says in his evidence, the agent of the lodge. He was not aware of the legal status of the lodge and that it was an unincorporated body incapable of contracting and not recognised by law. When he saw the bonds and noticed that they contained no date for repayment he was not satisfied and was given, in addition, the note above mentioned (which, it is admitted, is

Yukon

Terr. Ct.

FINLAY v. BLACK.

not a negotiable instrument) fixing a due date for repayment of the money, and, this seeming to him all that was necessary, he looked upon the lodge as a body that would be able to repay the money when it became due and gave the matter no further consideration. When he required the money to purchase a horse it was to O'Brien he went and from O'Brien he obtained the $600 on account, and it is quite clear that the $600 paid to him by O'Brien came from the funds of the lodge and was so understood.

There is no evidence to shew whether the defendants knew or did not know of the legal status of the lodge. The defendant Stepp was not asked the question while in the witness box giving his evidence.

When in March, 1914, it was resolved to raise money for improving and furnishing the lodge and a committee to be known as the building and finance committee was appointed with authority from the lodge to issue the bonds, the late W. J. O'Brien and the defendant Stepp were appointed members of that committee. The plaintiff was a member of the lodge and attended some of the meetings but apparently was not present at the meeting when this committee was appointed. It is quite clear, however, that the plaintiff knew that the money he loaned was for the purpose of improving and refitting the said lodge.

There is no conflict on the evidence and the case is one wholly involving questions of law.

The first of these questions is: Are the defendants liable because they were the officers of the lodge who signed the documents in question on behalf of the lodge, having contracted for a principal who had no existence in law. And the second question is: Where credit is given to an abstract entity such as a club or lodge, can the person who gives the credit to it look to those who assumed to act for it and those who authorised or sanctioned that being done.

Many authorities were cited by counsel in support of and as opposed to the above propositions.

In Kelmer v. Baxter et al. (1867), L.R. 2 C.P. 174, the defendants had entered into a contract on behalf of the Gravesend Royal Alexandra Hotel Co. At the time the contract was made there was in fact no such company in existence; its existence was contemplated, but the company was as yet not incorporated. The principle followed was: "Where a contract is signed by one who professes to be signing as 'agent,' but who has no principal existing at the

time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it; and a stranger cannot by a subsequent ratification relieve him from that liability. . . . Held, that A, B and C were personally liable on their agreement as for goods sold and delivered; that no subsequent ratification by the company would relieve them from that liability without the assent of the plaintiff; and that parol evidence was not admissible to shew that personal liability was not intended."

Crane v. Lavoie (1912), 4 D.L.R. 175, 22 Man. L.R. 330: This action was on a promissory note purporting to be made by a company which was in fact not incorporated at the time. The persons signing the note as president and manager were held liable by the unanimous decision of the Court, upholding the decision of Robson, J. The circumstances here were somewhat different from those of the case at Bar as the promissory note began with the words "We promise" and was a negotiable instrument, but the principle followed was the same as in the case of Kelner v. Baxter, supra, Richards and Perdue, JJ.A., holding that persons who sign a promissory note as president and manager of a non-existing company are liable upon their implied warrant of its actual existence for the full face value of such note.

The Bank of Ottawa v. Harrington (1878), 28 U.C. C.P. 488: In this case the plaintiff sued the defendant as maker of three several promissory notes in the following form:

"Two months after date the Carlton Club promise to pay to the order of B $497.66, for value received," signed by the defendant, president of the club, and by the secretary. The trial Judge ordered judgment to be entered in favour of the plaintiff. On appeal the judgment of the Judge was reversed. The judgment of the Court was delivered by Hagarty, C.J., who states, at p. 493, "The notes sued upon do not impose any individual liability. The Carlton Club, not the defendant, promises to pay, and defendant signs as president, countersigned by the secretary. The notes were given to Buchanan, a member of the managing committee who, of course, possessed the same knowledge of all the facts as the defendant. Buchanan could have sued the club for the goods supplied by him, and the club could have had no defence on the executed consideration. At his desire and for his benefit or accommodation we may assume these notes were given in contemplation of raising money on them. As between the defendant and Buchanan we do not see the

Yukon

Terr. Ct.

FINLAY v. BLACK.

slightest ground for assuming that the defendant either did incur or intended to incur any personal liability whatever."

The Court held that "defendant was not liable . . . for even if, as the plaintiffs contended, the 37 Vic. ch. 34, O., under which the club was incorporated, did not authorize the making of notes, this was a matter of law known to the plaintiff as well as defendant, and upon which they could exercise their judgment."

Counsel for defendant argued that this case was on all fours with the case at Bar in this respect,—that the Carlton Club was incorporated although it did not have the power to make notes, it could sue and be sued, and, as stated by Hagarty, C.J., in his judgment, had it been sued in this instance could have had no defence on the executed consideration. He also says, at p. 497: "We also think there is no ground for assuming that the club or its members have ever repudiated liability on these notes or intend to do so."

In the case before me for consideration the lodge was not an incorporated body and could, therefore, neither sue nor be sued as such. It was a body which the law cannot recognise as party to a contract, and the above case, in my opinion, is not applicable thereto.

In Re St. James Club (1852), 2 DeG. M. & G. 383, at p. 387, 42 E.R. 920, St. Leonards, L.C., stated the principle governing the liability of members of a club, as follows:—"The law which was at one time uncertain, is now settled that no member of a club is liable to a creditor except so far as he has assented to the contract in respect of which such liability has arisen."

In Todd v. Emly (1841), 7 M. & W. 427, 151 E.R. 832, the same principle was followed by the Court.

In Pears v. Stormont (1911), 24 O.L.R. 508, the plaintiff made a lease to an athletic association of premises to be used for the purposes of the association; and as the association turned out to be a mere voluntary unincorporated association he sued the members of the executive committee for a sum unpaid for rent. There was no evidence as to whether the plaintiff knew the position of the association when he made the lease. His negotiations were with the executive committee and the lease was signed by the chairman of the committee under seal by the direction and at the instance of the executive committee who were appointed by the whole body of members.

Held, that "those were bound who were responsible for the procuring of the lease and the enjoyment of its benefits; and, semble, the whole body of the members initiating and approving of the lease might have been made liable; but this did not relieve from liability the members of the executive committee who had been sued."

The trial Judge, Sir John A. Boyd, C., discussed the law very fully and referred to and discussed, at p. 509, a number of cases which have been cited on the argument before me; among them, Shaw v. Tassie (1896), 17 P.R. (Ont.), 315, where it was held by the Court of Appeal that "Where money was lent on mortgage to an incorporated society, and the mortgage was executed in the name of the society as if it were an incorporated company, and it was said that the defendant, one of them, who had actively carried on the negotiations, was personally liable on implied liability arising from the fact that the society turned out to be an unincorporated one, and that the other members would be jointly liable with him.

He also discusses the case of Aikins v. Dominion Live Stock Ass'n of Canada (1896), 17 P.R. (Ont.) 303, and the view held by Rose, J., in that case which was contrary to the above principle, who based his judgment on the cases of Jones v. Hope (1880), 3 T.L.R. 247 and Overton v. Hewett (1886), 3 T.L.R. 246, and says, at p. 510 (24 O.L.R.), "But I think the better opinion is that of the Chief Justice in the Aikens case (p. 305), that 'where credit is given to an abstract entity such as a club, the person who gives the credit to it may look to those who in fact assumed to act for it, and those who authorised or sanctioned that being done;' . . . 'At all events, where he did not know of the want of authority of the agent to bind the club.'"

He discusses the cases of Jones v. Hope, Overton v. Hewett and Steele v. Gourley, etc. (1887), 3 T.L.R. 772, which cases will be hereafter referred to by me, and prefers to follow the case of Steele v. Gourley, etc., which apparently is in conflict with the cases of Jones v. Hope and Overton v. Hewett. He also cites and discusses an American case,—Fredendall v. Taylor (1868), 23 Wis. 538, which follows the English rule as expressed in Steele v. Gourley, etc., Jones v. Hope and others. This was an action brought by a solicitor against the officers of a militia corps on a contract of employment for services rendered on behalf of the corps. On appeal it was held that the plaintiff could not succeed be-

Yukon

Terr. Ct.

FINLAY v. BLACK.

cause he had distinctly contracted to look to the funds of the corps for payment of his account and that the defendants, the officers, did not intend to pledge their personal credit nor did the plaintiff intend to accept the personal credit of Colonel Dunford or other officers of the corps, and that, therefore, there was no contract entered into which could bind the officers or members of the corps personally.

Overton v. Hewett et al., supra.

This was an action brought against Sir William Hewett and other members of the committee of the Empire Club (sued as such members) to recover the balance of an account for poultry supplied for the use of the club. The case was tried before a jury when the jury, in answer to three questions put to them, found a verdict for the plaintiff. On appeal to the Divisional Court composed of Wills and Granthem, JJ., the verdict was set aside and judgment entered for the defendants, the Court holding that an individual member of a club, or a member of a committee of management, not having in any way pledged his personal credit, is not personally liable for goods ordered for and supplied to the club as a whole.

Steele v. Gourley, etc., supra.

This was an action by the plaintiff who was a butcher, for the price of meat supplied to the Empire Club. At the trial before Day, J., and a jury the jury found two of the defendants, Gourley and Davis, responsible and His Lordship gave judgment accordingly. On appeal to the Divisional Court the Court followed the decision of the Divisional Court in Overton v. Hewett, et al., and reversed the judgment entered by Day, J. On appeal to the Court of Appeal the Court reversed the decision of the Divisional Court and restored the judgment for the plaintiff. The defendants were acting members of the managing body of the club. The contracts were made and the orders given by the steward of the club.

The Master of the Rolls in his judgment said, at p. 773,

"It was plain that the plaintiff had not given credit to these defendants in supplying the meat, but to the club, although he did not do so on the terms that if the club funds were exhausted he ought not to be paid. He had, however, no right to look to the members of the club personally for payment."

The law had been clearly settled by many cases which would not now be overruled, and he adds on the same page,

"That although a tradesman upon an order being given by an agent supposed that that agent was authorized by a particular individual to give the order, and it afterwards appeared that that individual had not authorized the agent to give the order, but that some other person had authorized him to do so, that other person was liable to the tradesman, and the individual to whom the tradesman had in his mind given credit was not liable. . . . The proposition that the plaintiff had supplied the meat without any contract at all but looking to the honour of the members of the club to repay him was quite untenable. There was evidence then to go to the jury that the defendants had rendered themselves liable by authorizing the orders to the plaintiff, and if they authorized those orders they authorized them on the ordinary terms. Under the circumstances, the verdict of the jury was not unreasonable."

Lindley, L.J., was not prepared to say that there was no evidence of the authorisation of the orders by the defendants. There appeared to him to be also some slight evidence in support of the view which did not commend itself to the jury—namely, that the plaintiff contracted to be paid out of the funds of the club. But such evidence was very slight, and the jury had not accepted that view. The jury had found that both the defendants had so conducted themselves as to induce the steward to order this meat from the plaintiff and since there was evidence upon which they might reasonably come to that conclusion their verdict would not be set aside.

Lopes, L.J., on the same page, said that "the only question was who were the principals of the servants of the club. The plaintiff might think he was contracting with the club and might give credit to the club, but he could only sue the real principals. There appeared to be sufficient evidence on which the jury could find as they did and they did not act unreasonably in holding the defendants liable." He thought that there was no evidence that the plaintiff "undertook to look for payment to the funds of the club only."

The distinction between the case of Steele v. Gourley and the cases of Jones v. Hope and Overton v. Hewett appears to me to be that in the former case the Court found that there was evidence of the authorisation of the orders by the defendants, while in the case of Jones v. Hope it was held that the plaintiff contracted to be paid out of the funds

Yukon
Terr. Ct.
FINLAY
v.
BLACK.

of the corps only if there were such funds and in no way intended to look to the personal liability of the defendants or to hold any member of the corps personally liable for the debt. And in the case of Overton v. Hewett et al. the Court held that the defendants in no way pledged their personal credit for the goods ordered and supplied to the club. In the Overton v. Hewett case the jury found that the defendants authorised the giving of the order for the goods and that the defendants held themselves out as liable to pay for the goods. Wills, J., in his judgment states that there was no evidence that the defendants pledged their own credit or held themselves out as liable for goods supplied to the club and therefore reverses the findings of the jury in this respect. This would account for the decision in that case which is in apparent conflict with the case of Steele v. Gourley until a close analysis of both cases is made.

In Barnett and Scott v. Wood (1888), 4 T.L.R. 278, the action was by a firm of jewellers against the vice-president and secretary of a football club to recover £57, the price of certain articles supplied for the purpose of being given away as prizes. At the trial Manisty, J., non-suited the plaintiffs upon the authority of Overton v. Hewett, 3 T.L.R. 246.

On appeal to the Court of Appeal, Lord Esher, M.R., says at p. 279: "If a man gives an order, and at the time distinctly says that he does so without pledging his own credit, and the goods are supplied upon that condition, then I should say the person supplying the goods cannot afterwards turn round and try to make that other person personally liable. In this case there was nothing of that sort. Surely the case must go to the jury." The Court ordered a new trial, following the same principle as laid down in Steele v. Gourley.

In Stansfield v. Ridout (1889), 5 T.L.R. 656, the same principle was followed.

In Harper v. Granville-Smith (1891), 7 T.L.R. 184, which was an action to recover the sum of £43 9s for goods sold by a firm to the Salisbury Club, the same authorities were cited and the same rule followed.

In Draper v. Earl Manvers (1892), 9 T.L.R. 73, the same rule was followed, but the plaintiff was non-suited on the ground that there was not sufficient evidence of liability to go to the jury.

In Hawke v. Cole (1890), 62 L.T. 658, the same authorities were discussed and the same rule followed, and it was

held that an individual member of a mess, who has not in any way pledged the credit of the mess, is not personally liable for goods supplied to the mess by the orders of the wine caterer.

In Austin v. Hober et al., [1917] 3 W.W.R. 994, an action brought against the three defendants for payment of the sum of $500 and interest, it was alleged that the three defendants were members of a non-incorporated association known as Amity Lodge No. 76 of the Independent Order of Oddfellows; that the defendants as agents for this association borrowed from the plaintiff the sum of $500 under an agreement partly verbal and partly written, dated June 21, 1913, in which they promised to repay to the plaintiff the said sum at the expiration of one year with interest at 10%, and alternatively the sum claimed was sought to be recovered from the defendants on the ground that the defendants as members of this association had borrowed the said sum on the said terms, and further alternatively, the plaintiffs claimed against the defendant Mackay under a promissory note made by him for payment of the said indebtedness. The defendant Mackay, the maker of the promissory note whose signature thereon was followed by words describing him as an officer of an association which was unincorporated, was held personally liable thereon on the authority of Crane v. Lavoie, 4 D.L.R. 175, and the defendant Hill was held liable on the authority of Todd v. Emly (1841), 8 M. & W. 505, 151 E.R. 1138, as a member of an unincorporated association who was present when moneys were lent for the purposes of the association, and who was a party to the negotiations which led up to the signing by two other members of a promissory note payable to the lender for the amount of the loan.

The cases of Beattie v. Lord Ebury (1872), L.R. 7 Ch. 777, and an appeal in (1874), L.R. 7 H.L. 102, Robertson v. Glass (1869), 20 U.C. C.P. 250, and Thomson v. Feeley (1877), 41 U.C. Q.B. 229, were also cited, but, in my opinion, have no particular bearing on this case.

I am of opinion, on the authority of Kelner v. Baxter, Crane v. Lavoie and Austin v. Hober, above discussed, that the defendant is liable because O'Brien was an officer of the lodge who signed the documents in question on behalf of the lodge, having contracted for a principal who had no existence in law.

As regards the second question: O'Brien was a member

Yukon

Terr. Ct.

FINLAY v. BLACK.

of the building and finance committee who were authorised to issue bonds for procuring money to be expended for the use and benefit of the lodge. The plaintiff who was supplying the money for such use refused to accept the bonds, as no date for repayment of the money supplied by him was mentioned in the bonds and was given the further document known as the promissory note also signed by O'Brien and other officers of the lodge.

There is no evidence in this case that the plaintiff distinctly contracted to look to the funds of the lodge for repayment of the loan and to relieve the members of the committee or officers who obtained the money on loan from any personal liability. Nor is there evidence to shew that the plaintiff in supplying money to the lodge and giving credit to the lodge did so on the terms that if the lodge funds were exhausted he ought not to be paid. The proposition that the plaintiff had supplied the money without any contract at all but looking to the honour of the members of the lodge is quite untenable. Nor is there any evidence that O'Brien, or the other members of the committee or officers of the lodge, when obtaining the loan from the plaintiff, distinctly said that they did so without pledging their own personal credit and that the plaintiff must look to the funds of the lodge for repayment and to such funds alone.

The plaintiff in this case supplied the money for the use and benefit of the lodge in the same manner as plaintiff in the Steele v. Gourley case supplied the goods for the use and benefit of the club, and in the same manner as goods were supplied to clubs in the other cases above mentioned, which followed the decision in that case. Also O'Brien and the other members of the building and finance committee or officers of the lodge signed the contract for repayment of the money to the plaintiff in the same manner as the defendant Stormont in the case of Pears v. Stormont executed the lease in that case, at the instance of the building and finance committee who acted for the whole body of the members who appointed the said committee for the very purpose of obtaining money for the use and benefit of the lodge. The fact that all the members were not made parties does not relieve from liability the defendants who have been sued. The fact that the plaintiff was a member of the lodge, but who was not present when the by-laws were passed authorising the appointment of a building and finance committee and was not present when such committee was named, does

not, in my opinion, debar him from maintaining this action in the same manner as if he had been a stranger and not a member of the lodge.

Under the above authorities and upon the facts and evidence as disclosed in this case, the plaintiff who gave credit to an abstract entity,—the lodge, is, in my opinion, entitled to look to those who assumed to act for it and those who authorised or sanctioned that being done.

Judgment will, therefore, be entered for the plaintiff for the amount claimed, together with the costs of the action.

Judgment for plaintiff.

REX v. SMITH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Intoxicating Liquors (§IIIA—56)—Unlawful Sales—Onus of Proof—Weight to be given to Evidence by Magistrate—Arbitrary Conviction—Setting Aside—Certiorari.

The effect of sec. 69 (3) of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194 is that where the accused adduces no evidence at all, he must be held guilty of the offence charged because he has not discharged the onus cast upon him, but that where he adduces evidence to prove his innocence, that evidence must be considered and given its proper weight, and the magistrate cannot put it aside and enter a conviction arbitrarily, and where there is no legal evidence to support the conviction it will be quashed on certiorari.

[Rex v. McPherson (1915), 26 D.L.R. 503, followed.]

APPEAL by the Crown from an order of the Chief Justice of the Saskatchewan Court of King's Bench quashing a conviction under the Saskatchewan Temperance Act on the ground that it was made without evidence. Affirmed.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

P. G. Hodges, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—The accused was convicted on January 7, 1921, for unlawfully keeping liquor for the purpose of sale, barter or exchange, contrary to the provisions of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, sec. 41. He applied on certiorari to have the conviction quashed. The application was heard in Chambers by Brown, C.J.K.B., who quashed the conviction on the ground that it was made without evidence. He says in his judgment: "There is absolutely no evidence of guilt in this case."

The Director of Prosecutions argued upon the appeal that certiorari does not lie in the case of a conviction under this

Sask.

C.A.

REX
v.
SMITH.

section of the Act, or, that, in any case, the evidence taken by the magistrate cannot be looked at by the Court upon the hearing of the application to quash the conviction.

That certiorari does lie appears to be abundantly clear from the terms of the Act itself. Section 76 provides that no writ of certiorari in aid of habeas corpus or otherwise shall issue for the purpose of quashing a conviction under the Act, unless the applicant shall file an affidavit declaring his innocence of the offence charged against him. Section 83 provides for a notice of motion to quash the conviction being served within 20 days of the date of the conviction. Several other sections set out the procedure to be followed in such cases and the rules which the court is to observe in arriving at a decision.

Then as to the argument that the evidence taken by the magistrate is not to be looked at by the Court, I am of opinion that it likewise must fail. In the first place we are obliged, I think, to follow the decision of the Supreme Court of Saskatchewan en banc in the case of Rex v McPherson (1915), 26 D.L.R. 503, 25 Can. Cr. Cas. 62, 8 S.L.R. 412. This was a case under the Sales of Liquor Act, 5 Geo. V. 1915 (Sask.), ch. 39 (now repealed). The accused was convicted of keeping liquor for sale contrary to the provisions of that Act. The judgment of the Court was delivered by Lamont, J., who deals with the point as follows, at p. 506:—

"I cannot find any evidence at all that the accused had the liquor for sale, barter or exchange. . . . It was contended that the magistrate having found, as a matter of fact, that it was kept for these persons, we could not, on certiorari, question the correctness of his finding. I agree that where there is evidence upon which a summary conviction can be based, an Appellate Court will not consider the weight of conflicting evidence; but where there is no legal evidence at all to support the finding, the conviction cannot be upheld."

The Saskatchewan Temperance Act contains a provision respecting this matter which is similar to the provision in the Sales of Liquor Act under which the McPherson case was decided. The provision to which I refer is contained in sec. 82, and is to the effect that no conviction shall be quashed by reason of any defect in form or substance provided that (1) it can be understood from the conviction that it was made for an offence against some provision of the Act within the jurisdiction of the justice, and (2) there is evidence

to prove such an offence. Instead, then, of the position being that the evidence must not be looked at by the Court, as argued by the Director of Prosecutions, the Act makes it clear that the evidence must be before the Court and must be given effect to, notwithstanding defects in form or substance, that the evidence and the question of jurisdiction are the two things (and the only things) to be enquired into by the Court on certiorari. I do not believe that the Legislature intended by these words that the evidence should be considered and given effect to against the accused but not in his favour. It would require much more explicit language than the section contains to convince me of that.

Again, the Court in the McPherson case had to deal with a provision in the statute similar to that contained in sec. 69, sub-sec. 3 of the Saskatchewan Temperance Act, which raises a presumption of guilt against the accused from the mere finding of the liquor in his possession and places upon him the onus of proving his innocence. It was argued on this appeal that, such being the case, the magistrate's decision on the evidence, by which he refuses to find that the accused had discharged that onus, cannot be questioned. In the McPherson case this point was dealt with as follows (26 D.L.R., at p. 506):—

"It was contended that, as the onus was on the accused to prove his right to have possession of the liquor, he could not be said to have discharged that onus until the magistrate was satisfied.

"If this contention prevailed, it would mean that no matter how clearly the evidence established the right of the accused to the possession of the liquor, the magistrate, without any evidence to the contrary, or anything upon which an inference of guilt could be drawn, could arbitrarily find the accused guilty and such finding could not be questioned by the Appellate Court.

"I am of opinion that an Appellate Court may look to the depositions to ascertain whether or not there is any evidence at all to support the magistrate's finding. If there is no evidence, the conviction must be quashed."

I am of opinion, therefore, that all the questions of law raised in this case were settled for us by the decision in Rex v. McPherson, supra. The effect of sec. 69 (3), as I take it, is, that where the accused adduces no evidence at all, he must be held guilty of the offence charged, because he has not discharged the onus placed upon him; but that, where

Sask.

C.A.

REX v. SMITH.

he adduces evidence to prove his innocence, that evidence must be considered and given its proper weight, and the magistrate cannot put it aside and enter a conviction arbitrarily.

It remains to therefore consider the evidence in this case. Witnesses were called both for the accused and the prosecution. The accused himself swears positively that he never sold or trafficked in liquor, that he never kept liquor in his garage or elsewhere than in his dwelling-house, where this liquor was found and where the law allows it to be kept provided it is not kept for sale. He told where the liquor came from and when he received it.

The only real evidence given for the prosecution is that of the constable who found the liquor, and who testified that the accused had lied to him about the quantity of liquor he had and about the existence of a basement or cellar to the house. The constable also swore that he found two bottles of liquor among the kindling in the wood-box.

The magistrate's minute of adjudication is as follows:—

"The accused I. B. Smith in my judgment has not satisfied the onus placed upon him. I disbelieve the evidence of Smith on account of the statement made to the police after the search warrant had been read to him, and the various places the liquor was concealed on the premises of the accused.

"The evidence of Mrs. McElwee not being explained or contradicted by the accused.

"I find the accused guilty of the charges and fine him $200.00 and costs, in default 30 days in gaol."

The evidence of Mrs. McElwee is not evidence at all. She says: "I could swear Smith was dealing with liquor." The reasons she gives for this most positive statement made under oath are, that on one occasion, about 2 months before the trial, she saw two men come out of the accused's garage; that upon another occasion she saw two men come from the direction of the garage with a suit-case, get into an automobile, and drive away; and that, on different occasions she saw men go with Smith to his garage and come out again. Nevertheless the magistrate says he bases his judgment on this "evidence," which, he says, the accused has not explained or contradicted, and this in face of the positive and specific contradiction given by the accused. According to the constable, the only liquor found on Smith's premises consisted of one bottle of whisky which Smith handed to the constable, seven bottles lying in a sack on the

floor of the cellar, and two bottles in the wood-box. The only case which might be described as a "concealment" was the case of the two bottles found in the wood-box; but even that, as is stated by the Chief Justice, is quite consistent with innocence. As to the lies which the constable swore were told him by Smith, and which constitute the only ground for his judgment which required serious consideration, I am of opinion that they cannot be taken as a factor of sufficient importance to turn the scales against the accused and justify a conviction against him upon the evidence which is before us.

I agree, therefore, with Brown, C.J.K.B., that there was no sufficient legal evidence before the magistrate upon which he could refuse to hold that the accused had discharged the onus cast upon him by the Act.

The appeal should be dismissed with costs.

Appeal dismissed.

KRAWCZUK v. OSTAPOVITCH.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 4, 1921.

Pleadings (§IIID—325)—Agreement for Sale of Land—Action by Vendor for Possession—Inability to Get Wife to Sign Dower Act Forms—Argument as to Whether Pleadings Disclosed Good Defence—Order for Re-argument as to Whether Statement of Claim Disclosed Cause of Action.

By an agreement for the sale and purchase of land, the vendor agreed to procure a certificate of title to the premises in question, and upon the purchaser making his payments as agreed, covenanted to execute a transfer or conveyance to the purchaser and for the purpose of implementing that transfer agreed to procure his wife's signature to the requisite statutory forms of consent thereto. In an action by the vendor claiming possession of the land, the plaintiff alleged that he endeavoured to obtain the consent of his wife but failed, and that her refusal had been duly notified to the purchaser who wrongfully refused to vacate the said lands. The referee ordered that the questions of law raised by the pleadings, as to whether certain paragraphs shewed a defence to the action and the question whether the counterclaim was good in law should be set down for argument before the trial of the issues of fact. On the argument the Judge held that the statement of defence as a whole alleged fraud on the part of the plaintiff and consent on the part of the wife to the defendants taking possession and therefore constituted a good defence, as to the counterclaim he held that the defendant should be allowed to shew damages. Nothing was said in the judgment as to whether the statement of claim disclosed a cause of action. The Court held on appeal that although the matter was not argued before the lower Court nor before the Court of Appeal, the matter should be set down on the list again for re-argument as to whether or not the statement of claim disclosed a cause of action.

[See Annotation, Pleading, 10 D.L.R. 503.]

Man.

C.A.

KRAWCZUK v. OSTAPOVITCH.

APPEAL by plaintiff from the judgment of Prendergast, J., on an argument by order of the referee as to certain questions of law in an action by the vendor claiming possession of certain lands, agreed to be sold under an agreemen for sale. Re-argument ordered as to certain other questions.

The facts and circumstances of the case are fully set forth in the judgment of the Court delivered by Cameron, J.A.

F. Heap, for appellant; J. R. Crawford, for respondent.

Cameron, J.A.:—The plaintiff in his statement of claim alleges that he is the owner of a quarter section of land near Beausejour in this Province, the same being a "homestead" as defined by the Dower Act, 9 Geo. V., 1919 (Man.), ch. 26, and that he entered into an agreement in writing for the sale of the same to the defendant in the following terms:—

"November 17th, 1919.

"Received from Nikolas Ostapovitch of Thalberg P.O. in the Province of Manitoba, farmer, the sum of $25.00 being deposit on account of purchase of the north-east quarter of section 4-17-8 East. Purchase price $1400.00; $500.00 in cash, balance payable in three equal annual instalments on the first day of November 1920, 1921, and 1922, with interest at 6% per annum. Vendor to pay taxes to December 31st, 1919. The purchaser to get possession of property on March 1st, 1920. Vendor to clear title and make application for Torrens title. Purchaser and vendor to pay half each of costs of Torrens title and of this sale. Vendor to allow further rebate to purchaser and any excess interest which the purchaser may be required to pay in order to raise any moneys, if necessary, required to complete this transaction, in excess payable sooner than the terms above provided. The vendor shall procure the execution of the necessary Dower Act Forms by his wife at his own expense.

Dated at Beausejour in Manitoba, this 17th day of November, A.D. 1919.

Witness: (Sgd.) J. D. Crawford

(Sgd.) John his x mark Krawczuk

Nicholas his x mark. Ostapovitch.

The plaintiff alleges further that he "endeavoured to obtain the consent as aforesaid from his wife but failed and has been unable to procure the said consent, the said wife disapproving of the said sale and refusing to consent thereto which fact has been duly notified to the defendant."

The concluding allegation of the statement of claim is that "Notwithstanding the premises and in spite of warnings from the plaintiff not to do so, the defendant has wrongfully entered into and still is in possession of the said land, against (as he has all along well known) the will and wish of the plaintiff and refuses to vacate the same although the plaintiff has repeatedly applied to him and ordered him to so vacate." The plaintiff claims possession of the said land.

In his amended statement of defence and counterclaim the defendant denies that the plaintiff endeavoured to obtain the consent of his wife and alleges that the plaintiff has received another offer for the purchase of the land and that he has induced his wife to refuse to execute the necessary statutory form of consent.

He further, in para. 6, denies that he has wrongfully entered into possession of the land but that he entered into possession and became entitled thereto under an agreement made on or about November 17, 1919, granting possession to the defendant for a period less than three years.

He further alleges that in accordance with representations made by the plaintiff as to consent by his wife to the sale the plaintiff and his wife gave up possession and the right to possession of the said land to the defendant and are now estopped from denying his right to possession thereof. The defendant further states that the plaintiff's statement of claim shews no cause of action and pleads estoppel as against the defendant. These are in substance the material allegations in paras. 3, 4, 5, 6, 7, 8, 9 and 10 of the statement of defence.

In his counterclaim the defendant alleges that the plaintiff by the said agreement covenanted to procure the execution of the necessary statutory forms by his wife, that the plaintiff fraudulently represented that his wife had already consented and was willing and ready to execute such forms and that relying upon said representations, he paid to the plaintiff $25 by way of deposit on account of the purchase of the said land.

The defendant further alleges that, relying on these representations, he entered into the agreement set forth in

Man.

C.A.

KRAWCZUK v. OSTAPOVITCH.

the statement of claim and entered into possession of the land expending money and labour in repairing, improving and cultivating the same, and that he has tendered the plaintiff the amount of cash payment.

The defendant alleges his willingness to make his payments in accordance with the said agreement and that he has tendered the plaintiff the cash payment.

He further says (para. 17):—

"17. The defendant further alleges that by reason of the false and untrue representations of the plaintiff or by the plaintiff's refusal or failure to obtain the necessary Dower Act forms (if any) by his (the plaintiff's) wife, the defendant has suffered damages by reason of (a) having given up possession of the lands formerly occupied by him (the defendant); (b) loss of increased value of the said lands agreed to be sold; (c) incurred expenses in transferring his goods to and from the said premises agreed to be sold; (d) loss of emblements or season's crop planted by the defendant during the year 1920; (e) loss of time, money and labour expended on repairing, improving and cultivating the lands herein referred to; (f) moneys paid by the defendant to the plaintiff in consideration of the sale of the said lands; (g) expenses incurred for legal advice and time lost in investigating title, mental worry and distress, and other general damages. 18. That by reason of the representations of the plaintiff the defendant will further suffer damages in the event of ejectment, in the loss of time, and money expended, in obtaining lodgings for himself, and his family, and shelter for his goods, chattels and stock, and in having to purchase in the open market food for himself and his family and his stock ordinarily grown and produced by the defendant from the lands in his possession."

The defendant accordingly asks for the dismissal of the plaintiff's action or damages.

In the statement of defence to the counterclaim the plaintiff denies the charges of fraud and states that the counterclaim shews no cause of action.

The defendant joined issue on the plaintiff's defence to the counterclaim.

An order of the Referee was made July 12, 1920, in the following terms:

"Upon the application of the plaintiff and upon hearing counsel for both parties (the counsel for the defendant admitting that the agreement in writing set forth in para-

graph 2 of the Statement of Claim was signed and made by the plaintiff and is the agreement referred to in paragraph 6 of the Statement of Defence): 1. It is ordered that the questions of law raised by the pleadings (including the question whether paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 shew a defence to the action and the question whether the counterclaim is good in law and if so the nature of the damages, if any, recoverable by the defendant) shall be set down for argument and trial at a Wednesday Court before the trial of the issues of fact."

It is plain that the questions intended to be submitted to the Court are indicated in a vague and unsatisfactory manner. It is as if the Court were required to examine the pleadings, find out the matters of law involved in them, state those matters of law in the form of questions and then proceed to answer them. This uncertainty is somewhat modified by "including" the questions whether the paragraphs specified shew a defence, whether the counterclaim is good in law and, if so, what are the damages recoverable thereunder. The difficulties of the case are aggravated by the loose and confusing manner in which the facts are presented in the pleadings. For instance, it is not clear what precise meaning is to be given to the inducement or preliminary statement in para. 17 of the counterclaim. What are "the false and untrue representations of plaintiff"? What is the meaning of the terms "refusal or failure to obtain the necessary Dower Act forms (if any) by his wife"? Is this paragraph the joinder of two separate causes of action or does it state one cause of action dependent on either one of the two events whichever may happen to be the origin? And it seems an extraordinary step to ask a Court to define what damages may be recoverable in an action before the evidence has been heard. Such a question as that might well be answered by referring the parties to Mayne on Damages.

These are but instances of the difficulties raised by the inartificially drawn pleadings and by the vague terms of the order under which they are submitted to the Court and upon which the Court is asked to construe the far-reaching and not clearly defined provisions of a new and most important statute.

Prendergast, J., held that the statement of defence as a whole alleged fraud on the part of the plaintiff and consent on the part of the wife to the defendant's taking possession,

Man.

C.A.

KRAWCZUK v. OSTAPOVITCH.

and therefore constituted a good defence. As to the counterclaim he held the defendant should be allowed to shew damages under sub-paras. (c), (d), (e), (f) and (g). Nothing is said in his judgment as to whether the statement of claim discloses a cause of action. That subject was not apparently argued before him nor was it discussed before this Court.

The plaintiff's action appears to be based solely upon the agreement and his right to recover possession of the lands is apparently made to depend on his own default or failure to secure the execution of the necessary Dower Act forms by his wife as required by his covenant in the agreement. This is followed up by the concluding allegation that, notwithstanding the premises, which is obviously a reference to the plaintiff's failure to secure his wife's consent as required by the agreement, the defendant has wrongfully entered into and still remains in possession of the said lands.

But can it be said that the plaintiff bound himself to secure his wife's written consent in statutory form to the agreement? He has covenanted to obtain a certificate of title. Does not that, considered with the other terms of the agreement contemplate a subsequent transfer to which his wife's consent is to be obtained?

The agreement provides for (1) the payment of the instalments by the defendant; (2) payment by the plaintiff of taxes to December 31, 1919; (3) possession by the defendant on and after March 1, 1920; (4) obtaining a Torrens title by the plaintiff, the parties to share in the expense thereof; (5) a concession of any additional interest the defendant might have to pay should he raise money to pay off the instalments before maturity, and (6) the procuring by the vendor of the execution of the necessary Dower Act forms by his wife.

The substance of it may be taken to be that the vendor agrees to procure a certificate of title to the premises in question and, upon the purchaser making his payments as agreed upon, he covenants to execute a transfer or conveyance to the purchaser and, for the purpose of implementing that transfer, he agrees to procure his wife's signature to the requisite statutory forms of consent thereto.

Until that time has come it may well be contended that no cause of action has accrued. If that be the case the plaintiff cannot accelerate it by now coming forward and volunteering the information that he knows that when the

final payment is made, November 1, 1922, his wife will refuse to give her consent to the transfer, or that she has now indicated her intention to refuse when that date arrives. It can be argued that if she now said so herself it would not be conclusive as she might change her mind and, moreover, that, when the defendant does become entitled to his formal transfer under the agreement, the wife may not be surviving. What the plaintiff says is that before action was brought he endeavoured to obtain from his wife the consent provided for by the agreement but has been unable to procure the same and that it is in consequence of that failure that the defendant is wrongfully in possession. It can be argued that what occurred between the plaintiff and his wife prior to June 8, 1920, when this action was commenced, can have no relevancy to the agreement on which the action is founded; and that no consent by the wife is possible or necessary before the plaintiff has acquired his certificate of title and the defendant has made the payments agreed upon, and thereby becomes entitled to the conveyance to which the wife's consent is necessary. It cannot be denied that the agreement is at least open to this construction and if it be correct it is obvious the action is prematurely brought.

It is to be borne in mind that the allegations in this statement of claim must all be taken against the plaintiff in accordance with the wholesome rule that the pleading is to be read against the pleader.

If the plaintiff had confined his statement of claim to allegations that the defendant had wrongfully entered into and retained possession of the lands in question it might have been unobjectionable. It would then have been for the defendant to justify his acts by setting up the agreement in question or otherwise as he might be advised. It would thereupon have devolved upon the plaintiff to take the necessary steps to dispose of the defence by moving to strike it out or by replying to it or dealing with it in such other manner as might properly present the issues for the determination of the Court. But the plaintiff has deliberately rested his claim for relief on the agreement and on the terms of that agreement it may fairly be contended that he is not now in a position to bring an action.

As I have stated this is a matter which was argued neither before Prendergast, J., nor before this Court. It may be that certain features of the Act already discussed may again have to be considered. For instance plaintiff's counsel

Sask.

C.A.

GREGORY v. GOODWIN.

urged that the agreement was in contravention of sec. 3 of the Act and therefore wholly void. In answer to this it may be pointed out, amongst other considerations, that the action is not brought for the cancellation of the agreement on that ground but on the agreement and on plaintiff's own default in carrying it out.

In my opinion the parties should be asked to argue the questions of law raised by the statement of claim. Those questions are plainly included in the order. If they be disposed of adversely to the plaintiff it makes an end of this case as it is now before the Court. I think the matter should be set down on the list again for re-argument when the question to be discussed should be this: Does the statement of claim disclose a cause of action?

Judgment accordingly.

GREGORY v. GOODWIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Contracts (§IIIA—195)—Mortgagee in Possession—Appropriation of Rents and Profits—Agreement with Mortgagee by Tenant Whose Lease Has Expired—Validity—Owner Bound by, on Regaining Possession—Power of Owner to Make Contract with Tenant While Mortgagee in Possession.

Where a mortgagee has entered into possession of the premises under its mortgage and has appropriated the rents and profits, and has made an arrangement with a tenant whose lease has expired during its tenancy as to the amount of rent to be paid for a period of one year from the termination of the lease, and the tenant has paid such rent to the mortgagee, any alleged agreement as to rent made between the owner and the tenant during the possession of the mortgagee is invalid, and after recovering possession of the premises the owner is bound by the arrangement made with the mortgagee while in possession.

APPEAL by defendants from the judgment at a trial, in an action by the owner of certain premises to recover rent alleged to be due under an agreement made with the owner, while the mortgagee was in possession and had appropriated the rents and profits. Reversed.

A. Casey, K.C., for appellants.

P. H. Gordon, for respondent.

Haultain, C.J.S.:—The defendants were in January, 1919, in occupation of a portion of a building owned by the plaintiff as tenant of the plaintiff, under a lease in writing for a term commencing on May 1, 1918, and ending on April 30, 1919, at a rental of $75 a month. In January, 1919, the Northern Trust Co., who had a mortgage on the demised

premises from the plaintiff went into possession under its mortgage and appropriated the rents and profits. The company continued as mortgagee in possession until June 30, 1919. A settlement was made between the plaintiff and the company under which the company gave back possession of the mortgaged premises on, from and after June 30, and the tenants were duly notified. On the termination of the defendant's lease on April 30, the defendants continued in occupation of the premises in question under a verbal agreement with one Carmichael, the local agent of the Northern Trust Co., for a further term of one year at a rental of $80 per month.

Some time in April, while the mortgagee was still in possession and receiving the rents and profits, the plaintiff commenced negotiations with the defendants with a view to a renewal of their lease from him at an increased rental of $95 per month. There is some conflict in the evidence as to whether this amount was agreed on. Whether it was or not does not seem to me to be material. The plaintiff had no authority to negotiate for a lease at that time, as the mortgagee was still in possession. Rent at the rate of $80 a month was paid to the mortgagee during the months of May and June; that is, for the period intervening between the termination of the lease from the plaintiff to the defendants and the re-delivery of possession by the mortgagee to the plaintiff. On resuming possession of the premises, the plaintiff demanded rent from the defendants at the rate of $95 a month from May 1, on the strength of the alleged verbal agreement to that effect. This demand was refused by the defendants. The defendants continued to occupy the premises until November 18, 1919, when they vacated them. Rent at the rate of $80 a month was duly paid by the defendants from May 1 to September 30.

This action was brought for the recovery of rent at the rate of $95 per month from May to November, inclusive, and for one month's rent in lieu of notice. The action was defended on the ground that the defendants held the premises under the verbal lease from the mortgagee, and were only liable for $80 a month. The defence also set up a relinquishment of the premises to the plaintiff in November with his consent. Tender of $80 rent for October was also pleaded, and $166 was paid into Court to cover the rent for October and November and $6 claimed for some damage to the premises. On the trial the trial Judge found in favour

Sask.

C.A.

GREGORY v. GOODWIN.

of the plaintiff, and allowed him rent at the rate of $95 a month from May to November, both inclusive, and $6 damages referred to above, and an additional month's rent of $95 in lieu of notice. The plaintiff thereby obtained judgment for $15 a month from May to October and $95 a month for October and November, and an additional $95 in lieu of a month's notice.

The defendants now appeal. The trial Judge held that the authority of Carmichael to make the alleged agreement with the defendants was not proved, and that, therefore, the defendants held under an agreement with the plaintiff for a further term at $95 a month rent.

I do not agree with this finding. The plaintiff had no power or authority to make an agreement with the defendants pending the possession of the mortgagee. Further, there is uncontradicted evidence of the arrangement with Carmichael, and the further fact that the mortgagee was paid and accepted the new rental of $80 a month for the months of May and June, while it was still in possession. Under no circumstances could the plaintiff be entitled to claim anything for those two months.

I am, therefore, of the opinion that the plaintiff was bound by the verbal lease from Carmichael, and is only entitled to rent at the rate of $80 a month.

The evidence does not support the plea of tender of the September rent. The tender was made on the condition of a receipt in full being given, and was therefore not a good tender. The trial Judge has found, on conflicting evidence, that the plaintiff did not acquiesce in the giving up of the possession by the defendants in November, and that finding should not be interfered with.

When he commenced his action, the plaintiff was, therefore, entitled to rent at the rate of $80 a month for October and November and to $80 in lieu of notice, and to $6 for the damage above referred to; in all $246.

The judgment below will, therefore, be varied by reducing the amount of $366 to $246. The defendants are entitled to their costs of appeal, which will be set off against the amount of the judgment below.

The plaintiff will be entitled to payment out of the money paid into Court.

Lamont, J.A.:—The only question which it is necessary to consider in this appeal is, whether or not one J. S. Carmichael, representing the mortgagee in possession, had

authority to grant the defendants a lease of the premises in question. If he had not, the judgment should stand. If he had, the rent should be only $80 a month, instead of $95 as allowed.

The defendant Goodwin testified that Carmichael verbally leased him the premises for a year from May 1, 1919, at $80 per month, and the Judge found that Carmichael did so, but that it was not shewn that he had authority so to do.

With deference, I am of opinion that sufficient was shewn to justify the conclusion that he had ample authority. In the first place, he was the representative of the Northern Trust Co., who were mortgagees in possession. In the second place, the plaintiff was evidently satisfied as to his authority, as appears by the following letter:

"North Battleford, July 11, 1919.

Messrs. Murray, Munro & Morrison,

Dear Sir:

Re Northern Trusts vs. Self.

"You will recollect that when I asked the question whether any arrangement had been made by yourself or any representative of the Northern Trusts Company to give any tenant in my building a lease, you stated that you had not done so, and that you would 'phone Mr. Carmichael to find out if he had made any arrangement. Your office 'phoned Mr. Carmichael and the information you gave me was to the effect that Mr. Carmichael had stated he had not done so.

You will also recollect that I then stated that I understood that certain tenants claimed to have been promised a lease by him, and that I wanted a written statement from Mr. Carmichael that he had made no promise."

The inference to be drawn from this letter, in my opinion, is, that if Carmichael had given a lease to a tenant in the plaintiff's building, the plaintiff was satisfied that he would be bound thereby. No question is raised in the letter as to Carmichael not having authority to act if he had made a lease. In the absence of evidence to the contrary, it must, I think, be held that Carmichael had the necessary authority. This leaves the defendants owing three months' rent at $80 per month, and some $6 for other matters not disputed.

The appeal should, therefore, be allowed with costs, and the judgment below reduced to $246.

Turgeon, J.A., concurs with Haultain, C.J.S.

Appeal allowed.

Alta.

App. Div.

REX v. STEFANIC.

REX v. STEFANIC.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 5, 1921.

REX v. STEFANIC.

Evidence (§XIII.—989)—Seduction—Corroboration Required—Criminal Code secs. 212 and 1002.

The corroboration required by sec. 1002 of the Criminal Code in order to secure a conviction under sec. 212 is in "some material particular" not in "every material particular," and is satisfied by corroboration, in some material respect which strengthens the credibility of the main witness and justifies the evidence being accepted and acted upon. There being corroboration of the evidence of the girl seduced as to the seduction and the age of the parties, corroboration of her evidence of the promise of marriage is not necessary.

[R. v. Daun (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227, followed.]

CASE RESERVED by the trial Judge, on dismissing a charge under sec. 212 of the Criminal Code on the ground that there was no corroboration of certain evidence.

A. H. Gibson, for Crown; H. C. Macdonald, for accused.

Harvey, C.J.:—This is a case reserved by Taylor, D.C.J., at the instance of the Crown.

The accused was charged for "that he being a person above the age of twenty-one years did under promise of marriage seduce and have illicit connection with Katie Heron an unmarried female of previously chaste character and under the age of twenty-one years." The charge was dismissed on the ground that there was no corroboration of the evidence of the girl that there had been a promise of marriage or that she was of previously chaste character, the case stating that "on all other issues there was corroboration of her evidence and of the other witnesses for the Crown." The question reserved is whether this is a proper view of the law.

Inasmuch as previous chastity is presumed and the absence of it must be shewn by the defence, the fact that there was no corroboration of the girl's evidence as to that is immaterial and the sole point is whether there being corroboration of her evidence of the seduction and as the case states, of the fact that she was over and she under 21 there must also be corroboration of her evidence of the promise of marriage.

The necessity for corroboration is imposed by sec. 1002 of the Code which provides that no person accused of the specified offence "shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused." This and

kindred offences, also perjury, forgery and certain other offences are specified.

It is to be noted that the Act requires corroboration in "some material particular," not in "every material particular." The consideration of these words in my opinion settles the whole case. In Rex v. Magdall (1920), 33 Can. Cr. Cas. 387, 15 Alta. L.R. 313, Beck, J., considered this exact question somewhat exhaustively and expressed the view in accord with that of the highest Court of Ontario in R. v. Daun (1906), 12 O.L.R. 227 that the statute was satisfied by corroboration in respect of either of the material particulars of seduction or breach of promise. The other Judges did not consider this exact point and in the judgment of the Supreme Court of Canada (1920), 57 D.L.R. 623, 61 Can. S.C.R. 88, on appeal there is nothing from which we can obtain much assistance. The Judges there agreed that there was corroboration but whether they thought it was of only one or of both of the elements does not appear from the reasons.

The charge is under sec. 212. That section and the others dealing with offences of a similar nature for which corroboration is required all have reference to the offence of seduction under different conditions, having regard to the age of the offender and the person seduced or their relation to each other or other conditions. One of the conditions in this case is that there has been a promise of marriage. The promise of marriage is certainly not the offence, which is the seduction but under the circumstances specified.

Whether it might be argued that evidence in respect to any of these conditions does not implicate the accused since he can only properly be said to be implicated in the offence, there seems no room for such an argument in respect of the act of seduction itself and in my opinion corroboration of the evidence of that act not merely is evidence in some material particular but also implicates the accused, that is to say if it connects him with the act, as it is of course to be assumed is the case here.

I think therefore that in this case the statute was satisfied.

Of course the Judge or jury must also be satisfied as well in all cases even where the legal corroboration exists, and that satisfaction amounts to a conviction beyond a reasonable doubt, of the guilt of the accused.

Having come to the conclusion that the trial Judge's rul-

Alta.

App. Div.

REX v. STEFANIC

ing was erroneous the only power we seem to have would appear to be to direct a new trial under sec. 1018 (b), which I would consequently do.

Beck, J.:—I concur; but in any view as to the interpretation of the section requiring corroboration I think it is needed only and sufficient only when directed to acts of the accused.

Stuart, J. (dissenting):—After considerable hesitation I with respect do not feel disposed to agree with the opinion of Harvey, C.J.

I should hesitate to make any decision which would, for example, make a conviction for perjury possible where the corroboration was only as to what the accused had in fact sworn to, which might easily be a matter of dispute, and not as to the falsity of it, though perhaps this danger is not really involved.

My real ground of hesitation is this. There is nothing criminally wrong in the seduction of a girl under 21 by a man over 21 years of age. It is only the added element that it is done under or by means of a promise of marriage that makes it criminal. I therefore am inclined to think that it must be with regard to this special element as well as the act of sexual intercourse that corroboration is required.

Section 1002 says: "No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused, etc."

Now the pertinent question to my mind is to ask this: "'Implicating the accused' in what?" Clearly it must be implicating him in the offence charged. Does implicating him in an act which is not in itself criminal implicate him in an offence which consists in accomplishing that act by a particular method?

There seems to me to be some confusion about such expressions as "ingredients" or "elements" of the offence. The fact that the accused must be over 21 years of age is not really an ingredient or element of the offence at all. The statute merely defines a class of persons who alone can be guilty of it. It is merely the case that the Act does not apply to men under 21 or in favour of women over 21 years of age. So with regard to previously chaste character. This expression merely limits the class of women in whose favour

the statute applies. None of these things can I think properly be called ingredients or elements of the offence.

The real offence charged here is that the accused (being one of a certain class to whom the law applies) made a promise of marriage to the complainant, being of the class of women to whom the Act applies, for the purpose and with the intention of inducing her to yield to sexual intercourse and that he thereby did induce her to yield and had the sexual intercourse with her.

I am unable to see how a man can be said to be "implicated" in such an offence at all unless he be "implicated" in all the acts essential to its being an offence under the Code. It may be said that it is not morally wrong to make a promise of marriage and that it is only as to what is morally wrong in the offence that corroboration may be required. But I do not so construe the statute. I think the statute does treat as morally wrong a prostitution of the sacred promise of marriage to the base purpose of inducing sexual intercourse before the marriage is performed. With people of the ages defined it is only because it is so induced that the seduction is condemned as criminal.

Upon the other view I have difficulty in seeing what is added to the meaning of the statute by the words "implicating the accused." Without them there would have to be corroboration "in some material particular."

Moreover I think the "one witness" referred to must be a witness testifying to wrongful act of the accused whose evidence if believed would convict him once there is sufficient other evidence that the accused and the complainant come within the classes referred to. I think this is the only reasonable interpretation to place upon the phrase "upon the evidence of one witness." This I think excludes from all consideration the evidence shewing their respective inclusion in the specified class. There is probably no question of a restricted class of persons involved in the other clauses of sec. 1002. But this I think only strengthens the view that the expression "in some material particular" refers properly to some material particular related logically to the alleged wrongful act of the accused. And it is for this reason that I cannot see what is added to the meaning of the section by the words "implicating the accused" unless we say that they mean that whatever is necessary to implicate him in the essentially wrongful, i.e., criminal act taken as one act must be corroborated if it is sought to be proved by the

Sask.

C.A.

SMITH v. HOYES

evidence of one witness. I rather think it is confusing rather than helpful to speak of distinct "issues."

The matter is a difficult one and I confess that I have about as much hesitation in finally adopting the view I suggest as in assenting to the view of the Chief Justice. But on the whole I prefer to take the former course and would therefore answer the question submitted in the affirmative.

New trial ordered.

SMITH v. HOYES.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

1. **Contracts (§IID—194)—Repairs to Automobile—Usual Charge in Properly Equipped Garage—Work Taking Longer Because Garage not Properly Equipped—Right to Charge Usual Rate.**

Where the usual charge for making repairs to an automobile is $1.00 per hour in a garage having proper equipment to do the work, a garage which is not properly equipped, and because of the lack of proper equipment takes longer to do the work is not entitled to charge at the same rate, unless the lack of equipment is explained to the customer and he is willing to pay the usual rate in the absence of such equipment.

2. **Negligence (§IA—4)—Automobile—Left for Repairs at Garage—Mechanic Leaving Waste in Oil Tube—Oil System Clogged—Engine Overheated and Damaged—Liability of Garage Owner.**

Leaving waste in the tube of the oil system of an automobile while repairing it, whereby the oil system is clogged up, and the engine becomes overheated and damaged is negligence for which the employer of the mechanic making the repairs is responsible.

APPEAL by defendant from the judgment at the trial, in an action to recover the amount alleged to be due for repairing an automobile and supplying certain parts. Reversed.

W. H. B. Spotton, for appellant.

N. Gentles, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—The defendant employed the plaintiff to overhaul and repair his automobile. The plaintiff's account for so doing amounted to $358.14, being made up of $145.64 for new parts supplied, and $212.50 for labour, being 212½ hours at $1 per hour. The defendant did not dispute the amount charged for the parts supplied, but he contended that 212½ hours was an unreasonable time to take for the work done. He also contended that, on account of the negligent manner in which the plaintiff's workmen repaired his car, the oil system became plugged and failed to operate, with the result that the main bearings, pistons and connect-

ing rods were burned out and totally destroyed, and he counterclaimed for $600 damages.

A charge of $1 per hour for a reasonably skillful automobile mechanic is usual, and, as prices now are, must be considered a fair charge. The plaintiff's foreman testified that 212½ hours work had actually been put on the defendant's car. He admitted, however, that the plaintiff's garage did not have the proper equipment for overhauling cars as large as the defendant's, and that by reason of this lack of proper equipment it took from 20 to 40 hours more than it otherwise would have taken to overhaul the car. The expert, Wagman, called on behalf of the plaintiff, testified that after 5 years' experience he found that 187½ hours was the time ordinarily required for overhauling a car of this class, but that it would take longer if the garage was not properly equipped. The District Court Judge allowed the plaintiff the 212½ hours, holding that it would take longer in a country garage where the facilities were not equal to those of a well-equipped garage.

In so doing I am of opinion that the Judge erred. Where $1 per hour is the usual charge working with proper equipment, a garage man is only entitled to make that charge when he has the usual equipment, unless the lack of equipment is explained to the customer and he is willing to pay the usual prices in the absence of such equipment. There is nothing here to shew that the defendant knew the plaintiff's garage was not equipped to handle his car. According to Wagman's evidence, 187½ hours was a reasonable time to allow for work done by the plaintiff's men. In my opinion, therefore, the defendant, in the absence of a special agreement, can only be called upon to pay for the time reasonably necessary for the performance of the work with the usual equipment. I would reduce the number of hours to 187½, and consequently reduce the plaintiff's judgment to $333.14.

I am also of opinion that the Judge erred in dismissing the defendant's counterclaim. He found, and in my opinion rightly so, that the waste which clogged up the oil system was in the pipe when the car left the plaintiff's garage. This plugging caused the damage which was done. He however disallowed the claim because the defendant's son, who was driving the car when it became overheated, did not ascertain what the trouble was when the car was found to be working badly. He evidently overlooked the fact, admitted

B.C.
C.A.
McKAY v. DRYSDALE.

by the plaintiff, that, after the defendant took out the car and found that it became overheated he returned it to the garage, where the foreman examined it to ascertain the cause, but failed to discover it. If the plaintiff's foreman could not ascertain the cause, I do not see how the defendant's son can be charged with negligence because he was unable to do so. The whole damage was caused by the waste being left in the tube of the oil system. This was negligence on the part of the plaintiff's workmen for which the plaintiff is responsible.

The Judge, for the information of this Court in case an appeal was taken, assessed the damages to which he thought the defendant would be entitled on his counterclaim if his judgment dismissing the same was reversed. He fixed the amount at $208.75. To this, in my opinion, should be added $22.16 in respect of two items. The plaintiff in his account charged the defendant $10.12 each for pistons. Six were burned out through the negligence of the plaintiff's workmen, but the defendant was only allowed as damages therefor $7.28, or $43.68 in all. As the plaintiff had to pay $10.12 each for the pistons, his loss when these were destroyed must necessarily be what he paid. I would therefore increase the damages in respect of this item from $45.68 to $66.72. Then the plaintiff charged $16.56 for 18 piston rings, while the defendant was allowed as damages for these same rings the sum of $11.34. His loss in respect of these rings is what he had to pay the plaintiff for them. I would therefore increase the damages on this item by $5.22.

The appeal, in my opinion, should be allowed with costs, the judgment of the plaintiff below reduced to $333.14, and judgment entered for the defendant on the counterclaim for $230.91 with costs, with a right of set-off.

Appeal allowed.

McKAY v. DRYSDALE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. June 7, 1921.

Evidence (§IIH—255)—Collision Between Motor Cars—Defendant's Car Being Driven by Servant — Finding in Favour of Plaintiff on Question of Negligence — Presumption that Defendant's Car Being Driven in the Master's Service.

In an action alleging that the defendant's servant while driving defendant's motor car, negligently drove it so as to collide with the plaintiff's motor car causing damage, the Judge having found in favour of the plaintiff on the question of negligence,

the fact that the servant was driving the defendant's car raises the presumption that it was being driven in the master's service, and unless the defendant adduces evidence to destroy this presumption the plaintiff is entitled to succeed.

[O'Reilly v. McCall, [1910] 2 I.R. 42, applied; Beard v. London General Omnibus Co., [1900] 2 Q.B. 530, referred to.]

APPEAL by plaintiff from the judgment at the trial nonsuiting him and dismissing the counterclaim in an action for damages for injuries received in a collision between plaintiff's and defendant's motor cars. Reversed.

J. A. Aikman, for appellant; S. T. Hankey, for respondent.

Macdonald, C.J.A.:—To entitle the plaintiff to the relief which he claims, he must make it appear that the driver of the defendant's motor car was, at the time of the alleged wrongful act, on his master's business. It is not necessary, however, that he should allege and prove affirmatively that which the law will presume. If he allege and prove facts from which an inference may be drawn that the servant was on his master's business that is sufficient to make out a prima facie case. In this case the plaintiff alleged and proved that the driver was the servant of the defendant and that he was driving the defendant's car at the time of the accident. There was no denial of these allegations and no suggestion in the defence that the servant was not acting within the scope of his employment. There was nothing in the time and circumstances of the collision to rebut the inference which I think may fairly be drawn from these facts, which is that the driver was on his master's business at the time of the collision.

The judgment below should be set aside and a new trial ordered.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—The plaintiff claims for damages alleging in his plaint that the defendant's servant, while driving the defendant's motor car, negligently drove it so as to collide with the plaintiff's motor car causing damages.

The defendant in his dispute note does not deny that the driver was his servant or that it was his motor car, he simply denies the negligence of his servant and pleads in the alternative that if his servant was negligent the plaintiff could have avoided the result of such negligence and by way of counterclaim repeats the denial of the driver's negligence and claims damage from the plaintiff by reason of his (the plaintiff's) negligence.

The plaintiff on the one hand does not allege nor seek to

B.C.
C.A.
McKAY
v.
DRYSDALE.

prove that the accident occurred when the driver was acting in the course of his employment. Nor does the defendant on the other hand allege that the driver was not so acting and although the driver was called by the defendant no evidence was adduced either one way or the other. The whole course of the trial seems to have been as to who was negligent in the premises and it was only at the close of the evidence that Mr. Hankey raised the point in argument that the plaintiff should have alleged and proved that the driver was acting on his master's business when the accident occurred.

The trial Judge held with Mr. Hankey and non-suited the plaintiff and dismissed the counterclaim.

The neat point before us is, was the Judge right in so doing in the circumstances of this case?

The authorities are not all reconcilable and some of them are in direct conflict—but given as we have here these facts either admitted in pleadings or proved: 1. that the driver was the servant of the defendant; 2. that the car which was being driven was the car of the defendant; and 3. evidence to go to a jury as to negligence, it certainly seems to me that it cannot be urged that there was no case to go to a jury. The fact that the defendant's servant was driving the defendant's car raises the presumption that it was being driven in the master's service and in my opinion the onus shifts and it is incumbent on the defendant to adduce evidence to destroy that presumption and not having done so and the trial Judge having found in favour of the plaintiff on the question of negligence, he should have given judgment for the plaintiff.

In O'Reilly v. McCall, [1910] 2 I.R. 42, FitzGibbon, L.J., says at pp. 68, 69:—

"At the close of the plaintiff's case the evidence that the chauffeur was at the time of the accident acting within the scope of his employment was merely presumptive, the presumption arising from the facts—(1) that the car which did the damage was proved or admitted to be the defendant's car, and (2) that the person who was driving it was employed by the defendant as a chauffeur. The presumption arising from these facts ceased when or if sufficient and uncontradicted evidence was given to prove that what brought Whittaker (the owner) to Wood Quay was not the defendant's business."

It was urged that there was a distinction where a person

was employed as a chauffeur and some American authorities seem to support that.

I would answer that by saying that while in the case of a chauffeur the presumption may be stronger (I do not say it is) that does not detract from the fact that the presumption may arise on the particular facts and circumstances of a case even though it may be a question of degree. See also the remarks of Romer and Smith, L.JJ., in Beard v. London General Omnibus Co., [1900] 2 Q.B. 530.

The appeal should be allowed.

Appeal allowed.

THE KING v. REGINA WINE & SPIRIT LTD.; THE KING v. PRAIRIE DRUG CO. LTD.

Saskatchewan King's Bench, Embury, J. June 6, 1921.

Constitutional Law (§I.A—3)—Saskatchewan Temperance Act—Failure to Make Returns Under Sec. 11 (2)—Validity of Secs. 11 and 12—Regulation of Trade and Commerce.

The effect of construing secs. 11 and 12 of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, in conjunction with sec. 59 of the Act is to make these sections ultra vires the Provincial Parliament as being legislation relating to trade and commerce, as enforcing on persons engaged in interprovincial trade the necessity of carrying on their business in a certain manner.

APPEAL from the decision of a Police Magistrate dismissing a charge against each of the respondents for failing to make the returns required under sec. 11 (2) of the Saskatchewan Temperance Act R.S.S. 1920, ch. 194. Affirmed.

T. D. Brown, K.C., for appellant.

J. F. Frame, K.C., for respondent.

Embury, J.:—This is an appeal from the decision of the Police Magistrate of the City of Regina dismissing with costs a charge against each of the respondents for that "being a brewer, distiller, compounder, or other person within the meaning of sub-sec. 2 of sec. 11 of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, or a liquor exporter, did at Regina, in the said Province, unlawfully fail forthwith on the coming into force of the Saskatchewan Temperance Act (namely, the 15th day of December, A.D. 1920) to send to the Commission the return required by sub-sec. 2 of sec. 11 of the Saskatchewan Temperance Act."

On the hearing counsel filed admissions as follows:—

Re His Majesty the King v. Regina Wine and Spirit Ltd.

"It is agreed between counsel for the appellant and for the respondent company that the following admissions be

Sask.

K.B.

THE KING v. REGINA WINE & SPIRIT LTD.; THE KING v. PRAIRIE DRUG CO.

made for the purpose of this case:—1. That the respondent Regina Wine and Spirit Limited is, and at all times material to this prosecution, was a Company incorporated and operating under the Companies Act of Saskatchewan. 2. That the respondent company is, and at all times material to this prosecution was, a liquor exporter within the meaning of section 11, sub-section 2 of the Saskatchewan Temperance Act and amendments thereto, carrying on such business at Regina, in the Judicial District of Regina, and at all times duly complied with the Liquor Exporters Taxation Act, chapter 35 R.S.S. 1920 and chapter 6 of the Statutes of Saskatchewan 1917 (2nd session). 3. That the respondent company failed to make, or send to the Commission, the return required by section 11, sub-section 2 of the Saskatchewan Temperance Act as amended by chapter 70 of the Statutes of Saskatchewan, 1920. 4. That the respondent company is and at all times herein referred to was duly registered or licensed under the Saskatchewan Companies Act and was so registered or licensed during the time it failed to make or send said return. 5. That a certified copy of the charter of the respondent company is filed herein. 6. Counsel for the prosecution further agrees that in the event of a conviction being finally made in this case against the respondent company for failing to make or send said return then such conviction shall not be used hereafter in any proceeding against the respondent company as proof that it unlawfully kept or unlawfully offered for sale or sold or bartered or exchanged liquor. 7. As far as counsel are aware the respondent company has not as a fact unlawfully kept, or unlawfully offered for sale or sold, bartered or exchanged liquor in Saskatchewan."

Re His Majesty the King v. Prairie Drug Company, Ltd.

"It is agreed between counsel for the appellant and for the respondent company that the following admissions be made for the purpose of this case:—1. That the respondent Prairie Drug Company Limited is, and at all times material to this action was, a company incorporated and operating under a Dominion charter. 2. That the respondent company is, and at all times material to this prosecution was, a liquor exporter within the meaning of section 11, sub-section 2 of the Saskatchewan Temperance Act and amendments thereto, carrying on such business at Regina, in the Judicial District of Regina, and at all times duly complied with the Liquor Exporter's Taxation Act, chapter 35 R.S.S. 1920 and chapter 6 of the Statutes of Saskatchewan 1917

(2nd session). 3. That the respondent company failed to make, or send to the Commission, the return required by section 11, sub-section 2 of the Saskatchewan Temperance Act as amended by chapter 70 of the Statutes of Saskatchewan 1920. 4. That the respondent company is and at all times herein referred to was duly registered or licensed under the Saskatchewan Companies Act and was so registered or licensed during the time it failed to make or send said return. 5. That a certified copy of the charter of the respondent company is filed herein. 6. Counsel for the prosecution further agrees that in the event of a conviction being finally made in this case against the respondent company for failing to make or send said return then such conviction shall not be used hereafter in any proceeding against the respondent company as proof that it unlawfully kept or unlawfully offered for sale or sold or bartered or exchanged liquor. 7. As far as counsel are aware the respondent company has not as a fact unlawfully kept, or unlawfully offered for sale or sold, bartered or exchanged liquor in Saskatchewan.

Sections 11 and 12 of the Act, R.S.S. 1920, ch. 194, as amended by secs. 8 and 9 of ch. 70 of the Statutes of Saskatchewan for 1920, read as follows:—

"11. Nothing herein contained shall prevent any brewer, distiller, compounder, or other person duly licensed by the Government of Canada for the manufacture or compounding of liquors, from keeping or having in any building wherein such manufacture or compounding is carried on, or used by such brewer, distiller, compounder or other person, any liquors for sale to any person in another province or in a foreign country for use and consumption outside of Saskatchewan or from selling therefrom to such persons."

"2. Every such brewer, distiller, compounder or other person and every liquor exporter shall, forthwith upon the coming into force of this Act, make a return showing in separate detail: (a) an inventory of the kinds and quantities of all liquors in his possession at the date of the coming into force of this Act; (b) the exact place or places where such liquor is stored; and (c) a statement of the kinds and quantities of all liquors ordered by him for delivery but not received by him at the date of the coming into force of this Act, together with the date of the order or orders and the name and address of each person from whom any of the liquor had been ordered.

Sask.

K.B.

THE KING v. REGINA WINE & SPIRIT LTD.; THE KING v. PRAIRIE DRUG CO.

"The return shall be certified over the signature of such person as correct and shall be forthwith sent to the commission by registered mail.

"(3.) Every such brewer, distiller, compounder or other person and every liquor exporter shall also, on every Monday, make to the commission a return showing in separate detail all sales of liquor made during the preceding week together with the name and address of every purchaser, the method of shipment, the place from which the same is shipped and such other information in respect thereof as the commission may require. The returns mentioned in this and the preceding sub-section shall be in such form as the commission may from time to time require, and forms for making such return shall be obtained from the commission.

"(4.) Evidence of the falsity of any return mentioned in the preceding sub-sections, or of failure to make any such return, shall in any proceeding against any such brewer, distiller, compounder or other person or against any liquor exporter be prima facie proof that the person accused has unlawfully kept and unlawfully offered for sale or sold, bartered or exchanged liquor."

" 12. For the purpose of evidence, every brewer, distiller, compounder or other person licensed by the Government of Canada and mentioned in section 11 and every liquor exporter, who makes a sale of liquor in the province shall immediately enter in a book to be kept for that purpose the date of such sale, the name and address of the person to whom such sale was made, the kind and quantity sold, and the person or carrier to whom the same was delivered for carriage; and shall, prior to the delivery of the liquor, give a written return of such particulars to the chief inspector or anyone named by him for receiving such returns; and the failure of such person to make, keep and produce as evidence the said entry and record of such sale shall, in any prosecution under this Act of such person for illegally making such sale of liquor, be prima facie evidence against such persons of having illegally sold such liquor.

" 9. Section 12 is amended by striking out the words 'in the province' in the fourth line and by inserting after the word 'sale' in the thirteenth line the words 'or to give the said return.' "

Section 11 provides for the making of certain returns, etc., and then goes on to provide in effect that where an exporter of liquor is on trial for a specific offence of having unlawfully

kept and unlawfully offered for sale or sold, bartered or exchanged liquor within the Province, then, in case he shall not have complied with the provisions of the section, the onus will be shifted to him of proving that he is not guilty of the offence charged.

Section 12 similarly provides for the keeping of certain records, etc., and further provides that where an exporter is on trial for making a specific illegal sale, the onus is shifted to him of proving his innocence in case he shall not have complied with the section.

The object of these two sections of the Act is to ensure that wholesale dealers in liquor engaged in export and inter-provincial trade do not make sales within the Province in contravention of the Saskatchewan Temperance Act. And, I cannot see if the two sections have this object that they can be held to be legislation re inter-provincial trade as is urged by the respondents. Indeed, sec. 11 at the outset expressly in effect disclaims any such purpose, and section 12 sets out that it is passed "for the purpose of evidence."

But the charge against the respondents herein, while it is alleged to be under sec. 11, sub-sec. 2 of the Act, is not in fact laid under either sec. 11 or sec. 12. The respondents are charged with "failing to send the returns," etc. The two secs. 11 and 12 clearly contemplate—not that failure to make the return or keep the record shall give ground for a prosecution for such failure—but rather that on a trial for a breach of the statute the onus of proof shall be shifted to the accused. If the statute does not create any such offence his charge necessarily falls to the ground.

It might be urged that secs. 11 and 12, having provided for the doing of certain things by the exporter and not having provided any penalty for non-performance, then that sec. 59 of the Act would apply, which section reads as follows:—

"Any person violating any of the provisions of this Act for the violation of which no penalty is herein specifically provided shall be guilty of an offence and liable to a penalty of $200.00, and in default of immediate payment to imprisonment for three months."

But the effect of so construing secs. 11 and 12 in conjunction with sec. 59 would in my opinion make the two secs. 11 and 12 ultra vires the Provincial Legislature as being legislation relating to trade and commerce, which is one of the classes of subjects reserved by the B.N.A. Act for the exclusive jurisdiction of the Dominion Parliament. So long as the legislation merely has the effect of shifting the onus

Sask.

K.B.

THE KING v. REGINA WINE & SPIRIT LTD.; THE KING v. PRAIRIE DRUG CO.

of proof in a prosecution proper under the Act, the legislation is intra vires of the Provincial Legislature. But from the other point of view it cannot be upheld so as to give the Provincial Legislature the power to enforce on persons engaged in inter-provincial trade the necessity of carrying on their business in a certain way as this would be legislation regarding trade and commerce.

Legislation which is clearly within the competence of the Provincial Legislature would not of necessity be ultra vires because it overlapped one of the classes of subjects reserved exclusively for the Dominion Parliament by sec. 91 of the B.N.A. Act. Such an overlapping is bound to arise and where the same is incidental to the main legislation it would be proper, as where it provides for shifting the onus of proof where certain returns and records are not provided. But legislation providing for punishment for failure to conduct one's export business in a certain manner would be legislation not "incidental to" but "additional to" the main legislation. If such legislation were proper then it would be equally proper for the Province in passing any legislation within its competence to add thereto further legislation, on a subject reserved exclusively to the Dominion Parliament by sec. 91 of the B.N.A. Act and so largely to increase the provincial jurisdiction. Such a course would be clearly unconstitutional.

The charge herein being laid, not for a breach of the Act as to sale or keeping for sale, but rather for failure to send the return, was properly dismissed by the Police Magistrate, first because the Legislature never intended to create any such offence, and secondly, if the Legislature had such intention, then the legislation was beyond their powers under the B.N.A. Act.

Having come to the above conclusion it will be proper for me to follow the rule laid down by the Privy Council and not deal with the other questions of jurisdiction raised on the argument.

See Hodge v. The Queen (1883), 9 App. Cas. 117, 53 L.J. (P.C.) 1 at p. 5, and Citizens Insurance Company v. Parsons (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 11.

Appellant has asked for a stated case which will be granted.

Authorities: Att'y-Gen'l for Manitoba v. Manitoba License Holders' Ass'n, [1902] A.C. 73, 71 L.J. (P.C.) 28; Rex v. Shaw (1917), 29 Can. Cr. Cas. 130, 28 Man. L.R.

325; Gold Seal v. Dominion Express (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377; Rex v. Nat Bell Liquors Ltd. (1921), 56 D.L.R. 523, 16 Alta. L.R. 149; Citizens Ins. Co. v. Parsons, supra; Hodge v. The Queen, supra; Rex v. Warren (1904), 25 Que. S.C. 31; Bank of Toronto v. Lambe (1887), 12 App. Cas. 575; Hudson Bay Co. v. Heffernan (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322; Att'y-Gen'l for Ontario v. Att'y-Gen'l for the Dominion, [1896] A.C. 348, 65 L.J. (P.C.) 26; Russell v. The Queen (1882), 7 App. Cas. 829, 51 L.J. (P.C.) 77; John Deere Plow Co. v. Wharton, (annotated), 18 D.L.R. 353, [1915] A.C. 330; Corp'n of City of Toronto v. Bell Telephone Co., [1905] A.C 52, 74 L.J. (P.C.) 22; particularly Att'y-Gen'l for Australia v. Colonial Sugar Refining Co., [1914] A.C. 237.

THE ROYAL BANK v. IZEN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. June 7, 1921.

Mortgage (§I.E—20)—Bank Holding One Party Liable for Part of Amount — Not Liable for Other — Payment of Money Due by Such Party—Refusal of Bank to Deliver up Securities Until Whole Amount Paid.

A bank holding a mortgage on property for a certain amount for part of which one party is liable and for the balance of which he is not liable, the mortgaged premises being as against the primary debtor the only property that can be resorted to, is not required on payment of the portion of the debt owing such party to hand over its security to him, but may retain it until the whole of the amount of the mortgage is paid.

[Farebrother v. Wodehouse (1856), 23 Beav. 18, 53 E.R. 7, followed; Forbes v. Jackson (1882), 19 Ch. D. 615, 51 L.J. (Ch.) 690, referred to.]

APPEAL by defendant from the judgment of Murphy, J., of January 3, 1921. Affirmed.

J. A. MacInnes, for appellant.

A. Bull and R. Tupper, for respondent.

Macdonald, C.J.A.:—I would dismiss the appeal for the reasons given by Galliher, J.A.

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

Galliher, J.A.:—After a careful perusal of the evidence, I am of opinion that the trial Judge came to a right conclusion on the facts.

I have no doubt as to the admissibility of the memorandum sworn to by the witness Crosby, and even apart from that when one examines the series of transactions between

B.C.
C.A.
THE ROYAL BANK v. IZEN.

the parties, one must, I think, incline to the view that the $1,900 debt was intended by all parties to be included in the Biggar mortgage. The position then is simple.

The bank holds a mortgage on the Biggar property for $4,679. Of this amount $2,798 is upon notes endorsed by Izen and upon which he is liable to the bank, and the balance $1,900 is the amount due on a note made by C. F. Biggar and endorsed G. C. Biggar and M. J. Biggar, and as to which Izen has no liability.

It is a case then of the bank holding a mortgage on the same property upon the amount of which as to one portion Izen is liable, and as to the remaining portion he is not liable. Izen has been called upon by the bank to pay the portion upon which he is liable and agrees to do so if the bank will hand him over the securities they hold. This the bank refuses to do unless he pays the amount of $1,900 on which he is not liable.

As against the primary debtor the mortgaged premises are the only property that can be resorted to. As laid down by Gorell Barnes, J., in The Chioggia, [1898] P.D.1, at p. 6:—

"According to equitable doctrines, in order to marshal not only should there be two creditors of the same person but one of them should have two funds belonging to the same person to which he can resort." That does not pertain here.

As to the right to have the security handed over on payment of the moneys for which Izen is liable, the case of Farebrother v. Wodehouse (1856), 23 Beav. 18, 53 E.R. 7, seems to me to be on all fours with the case at Bar. That case was disapproved of in Forbes v. Jackson (1882), 19 Ch. D. 615, 51 L.J. (Ch.) 690, but on reading the case of Forbes v. Jackson, I think it must be admitted that the remarks of the text writer, De Colyar on Guarantees, 3rd ed., at p. 325, are to the point. Referring to Forbes v. Jackson, the writer says:—

"Now it is to be noticed that in this case it was admitted that the subsequent advances were made without the surety's knowledge or consent. It is therefore submitted that this circumstance is quite sufficient of itself to support the judgment of Hall, V.-C., and that consequently his decision in no way conflicts with Farebrother v. Wodehouse, where at the time the suretyship was entered into the surety knew (as I have found here) that the securities held by the

creditor were intended to cover not only the sum guaranteed but also another sum to which the promise of the surety did not extend."

I would dismiss the appeal.

Appeal dismissed.

REX v. PEEL (No. 1).*

Nova Scotia Supreme Court, Harris, C.J., Russell, Longley and Chisholm, JJ. December 18, 1920.

1. **Evidence (§IV.G—422)—Criminal Charge—Arson — Testimony of Accused at Coroner's Inquest—Canada Evidence Act, sec. 5.**

On a trial for arson, the testimony of the accused then in custody, given without objection at a coroner's inquest held on the body of a person who lost his life in the fire in question, may properly be proved in evidence against him under the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 5.

2. **Indictment (§III.—65) — Joinder of Counts — Limitation on Charge of Murder—Cr. Code sec. 856.**

A count for arson may properly be joined with a count for manslaughter founded on the same occurrence. A count charging that the accused did "unlawfully slay and kill" another is not a count charging murder; and the prohibition of Cr. Code sec. 856 against joining other charges than that of murder with a count for murder does not apply.

3. **Evidence (§XI.T—885)—Criminal Charge—Res Gestae—Arson.**

On an Indictment for arson where the enquiry is to ascertain whether the building was set on fire by the accused or another, or whether the fire was merely accidental, evidence may be admissible as a part of the res gestae to shew the condition of the building and what was taking place there immediately before the fire broke out. (Per Harris, C.J., and Chisholm, J.)

4. **New Trial (§III.B—15)—Erroneous Verdict—Criminal Case—Cr. Code sec. 1021.**

On an application to the Court of Appeal for a new trial made by leave of the trial Judge under Cr. Code sec. 1021, the question for the Court is whether the verdict was such that the jury, viewing the whole of the evidence, reasonably could find a verdict of guilty. (Per Harris, C.J., and Chisholm, J.)

The Court was evenly divided on the application of the rule to the facts, and the motion for a new trial stood dismissed.

5. **New Trial (§III.B—15)—Criminal Case—Motion to Court of Appeal by Leave of Trial Judge—Cr. Code sec. 1021.**

A verdict may be set aside on an appeal by leave under Cr. Code sec. 1021, on the ground that it is against the weight of evidence without finding that the trial Judge should have withdrawn the case from the jury. (Per Russell, J.)

6. **Evidence (§XII.L—987) — Reasonable Doubt — Circumstantial Evidence.**

A verdict against the accused when based wholly on circumstantial evidence is justifiable only when the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. (Per Russell, J.)

*See Rex v. Peel (No. 2) post 509.

N.S.

S.C.

REX v. PEEL (No. 1).

APPEAL on a case reserved by Ritchie, E.J., on certain questions for the opinion of the full Court and from his refusal to reserve other questions of law arising on the trial of defendant who was indicted and tried for manslaughter of one Lewis A. King and also for having unlawfully and without legal justification or excuse set fire to a certain building in the town of Oxford, Cumberland County, N.S. There was a concurrent motion for a new trial under Cr. Code sec. 1021 made by leave of the trial Judge. The prisoner was acquitted on the first charge and convicted on the second.

The Court being evenly divided the appeal stood dismissed.

H. J. Logan, K.C., and J. J. Power, K.C., for the prisoner.

S. Jenks, K.C., and J. L. Ralston, K.C., for the Crown.

Harris, C.J.:—I fully concur in the decision of Chisholm, J.

Russell, J.: — The practice of granting new trials in criminal cases is so recent an innovation that the rules may not yet have been fully developed which should govern such cases. In a civil case the verdict of a jury will be set aside if it is such as no reasonable jury could have given. The rule in a criminal case should certainly be as broad. Mr. Tremeear, founding his dictum on the decision in R. v. Schama (1914), 11 Cr. App. R. 45, 84 L.J. (K.B.) 396, points out that: "The rule as to the burden of proof in criminal cases is different from that in civil cases because of the doctrine of reasonable doubt, and although an appellant might fail in a civil case where the probabilities based on the evidence were equal, a defendant appealing on the weight of evidence should succeed because of the onus cast on the Crown to establish the crime beyond reasonable doubt." Tremeear's Annotated Criminal Code, p. 1352.

If that rule be applicable to the present case it must in my opinion lead to a new trial. Under the evidence in this case I do not see how it was possible for any juror to have come to a conclusion against the prisoner, without at least having reasonable doubts. The fact that they did come to such a conclusion is to my mind convincing evidence that there must have been some influence that interfered with the calm and unbiased exercise of their functions. And it is not difficult to understand what that influence was. The trial Judge was aware of it when charging the jury and properly warned them in words which they would have done

well to heed. The body of a popular and promising young man, known to the whole community and a favourite with the community, had been found in the ashes of a building that had been partially destroyed by fire. It was believed that there were suspicious circumstances connected with the occurrence of the fire and the usual inquiries were made by the agents of the insurers. The accused was the person who was last known to have been with the deceased and there was some evidence tending to shew that he had an interest in the property destroyed by the fire and would profit in consequence of it. There was, as there always is in such cases, a popular demand for a victim and the most obviously suitable one was the defendant in this case. The facts were left to the jury in as fair and colourless a light as possible, and if the jury had been as free from bias as the trial Judge there could not have been any other result than an acquittal. It would have been impossible to have reached a conclusion that was free from reasonable doubt. The question for us now is whether this is sufficient ground on which to set the verdict aside. The doubt has suggested itself to my mind whether the Court can set a verdict aside without coming to the conclusion that the trial Judge should have withdrawn the case from the jury. But on reflection I do not see why there should be any such difficulty. In civil cases verdicts have frequently been set aside where there was no question as to the propriety of the submission, and in which the question could not properly have been withdrawn from the jury. Consider the case of a verdict for the defendant where no reasonable case had been made out in answer to the otherwise conclusive evidence of the plaintiff. That case would not have been taken out of the jury's hands and yet the unreasonable verdict would be set aside. In the present case I assume, but I only assume for the present, that the trial Judge could not properly have withdrawn the case from the jury. Nevertheless, if the Court comes to the conclusion that the verdict is one which a reasonable jury could not have given, I see no reason why a new trial should not be ordered.

My own judgment goes further than this. The verdict is based wholly on circumstantial evidence. As to the sufficiency of such evidence I take the rule to be as stated in R. 4 of Wills' chapter on "The Rules of Evidence," [Wills on Circumstantial Evidence, 4th ed., at pp. 188, 189] that

N.S.

S.C.

REX v. PEEL (No. 1).

"in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt." Now, to my mind, there is not a single fact in the case which cannot very easily and very reasonably be accounted for consistently with the hypothesis of the prisoner's innocence. It may be suggested that this statement could be made in many cases in which prisoners have been justly convicted. That may be true in cases where, although each individual fact or circumstance isolated from all others and considered in itself could be reconciled with the hypothesis of innocence, nevertheless the cumulative effect of the whole is overwhelmingly convincing. But no one fairly perusing the evidence as a whole in this case will say that it is such a case as I have just suggested.

Let us look at the facts. The prisoner on the night of the fire had been indulging in a carouse in the back shop in which the fire must have been assumed by the jury to have had its origin. He was there in company with the deceased and two others and all of them were drinking. Some rabbits were kept in the room and they had gone in "to have a look at them." There was a lamp there, the electric lights being "out of commission." While they were there the lamp was upset, some oil spilled out, and a small piece of paper caught fire which was extinguished. The accused made the usual joke — "said something about the damn thing being insured; he said 'Never mind, the damn thing is insured,' as near as I can remember that."

If it had not been for the fire that took place later in the course of the night the remark, if remembered at all, would have been regarded as the commonplace joke which has been repeated hundreds of times on the like occasion and is an almost inevitable banality that accompanies such an accident. Shortly after this two of the company went out and left the deceased and the accused to continue the carouse. Later in the night, Mrs. Rushton, who occupied the adjoining room in the building heard, between 12 and 1 o'clock, a noise as if someone was dragging a box over the floor and some sort of a racket which she thought was someone in a fight. After this things quieted down and the witness then went over to where there was a crack in the floor that had been caused by a previous fire. Through this she heard a voice saying "Al, Al, you damn fool, you will have

everything on fire. A little later she heard someone holler "Ted, Ted, come down here." The prisoner's name is Alva and the deceased had a younger brother who was familiarly called "Ted." A little later the witness heard a kind of laugh, or something between a laugh and a cry, or "it was a kind of laugh and cry together." I suppose it was upon this evidence, together with that shewing a motive, that the accused was indicted for manslaughter and arson. The prisoner was engaged in firing the premises and had taken the deceased with him to be a witness! Conceiving a fear lest the witness might "complain on him" he concluded that he would be better out of the way. He therefore killed him and dragged his body over to where it would be most certain to be burned in the fire. In his agony the dying man called upon his little brother to come to his help. All of which is within the bounds of possibility. But the warning as to the fire and the threat of the complaint might be equally applicable if "Al" were "monkeying" with the lamp which had once before on the same night caused a blaze. The dragging noise might be the moving of a table or the dragging across the floor above it of a bag of coal by Mr. Miller, as sworn to in his evidence at the trial, and which occurred between 12 and 1 o'clock in the night. There was also an altercation such as is not unusual between two drunken fools. Mrs. Rushton heard someone say "Do you know what you are, you are a God damn fool. Who is? You are. You are right, you are a damn fool." Clearly there was a drunken brawl in progress; but the conversations and recriminations and the noises were not sufficient to convince the jury that the accused had slain his crony. They acquitted him of the manslaughter, but found him guilty of arson.

I cannot say that there was no evidence of a motive for burning down the property. There was some evidence that the property was over-insured and a document was produced shewing a partnership between the accused and his father. The banker who drew this document explained that the only purpose of it was to enable the son who, his wife says, was working on wages for his father at $20 a week, to sign drafts and bills so as to bind the father, and that the paper was not read before it was signed. The trial Judge naturally attached great importance to the fact that the father was in Court all day and could easily have disproved the partnership if it did not exist. That is true, but if the goods were

N.S.

S.C.

REX v. PEEL (No. 1).

over-insured or unsaleable, the fire, if accidental, was a piece of good fortune to the owner, and I can well understand his reluctance to be subjected to a cross examination which would imperil his claim on the insurance company and throw away a piece of good fortune that a lucky accident had thrown in his way. If he had any reason to think that a verdict against his son was possible on the evidence before the jury, it is fair to assume that he would have been sworn and sacrificed his material interests to the safety of his son. It would be a cruel injustice if the boy were now to suffer for his father's miscalculation. All that I am here suggesting is that the failure of the father to be sworn is reasonably and easily consistent with the innocence of the boy.

There is some quite important affirmative evidence tending to shew the innocence of the prisoner. Although he went from the shop so drunk that he could not or did not undress himself (and his wife, when the fire occurred, thought him unfit to go out to it) he had enough sense left when he heard the whistle and learned where the fire was to be quite concerned about the matter. Bessie Chisholm who slept in the same house with the Peels tells us that after Lloyd Johnston informed him where the fire was he exclaimed "God, dad's business" or something to that effect. When he was at the fire he made the quite natural remark to one or other of the bystanders, "We did not expect last night that this was going to happen." According to Peter Slade's evidence, after giving someone the books he had rescued, he looked through the glass on the side and said "Oh, my, what will I do." Slade said "you will have to wait results now, it is all you can do," and he says 'my father is away,' and he commenced to cry."

The supposition that the fire was deliberately set seems to me a violent one. The accused and the deceased either left the shop in company or the accused went home leaving the deceased in the shop. If the first is the correct statement of fact, the deceased must have in some way secured a later entry into the premises and there is evidence that the bolt of the lock could be, and had been once, if not more than once, pushed back from the outside with the blade of a jack-knife. If the deceased was left behind in the shop when the accused went home it is quite easy to understand how he might cause the fire by turning the lamp over if lighted, or in the endeavour to light it, if not.

It would be a long task to examine and analyse the

evidence fully and I think it is an unnecessary task. Perhaps I should not omit a reference to the conflicting stories told by the defendant after the fire. The probability is that he was too drunk at that time to know what he was saying or what were the facts. When he recovered his senses he gave a fair and consistent account of the matter. In dealing thus with this part of the case I think I am in accord with the view regarded as reasonable and admissible by the trial Judge.

After the most careful perusal of the evidence I have come to two conclusions: First, that a reasonable jury could not have arrived at a verdict that the prisoner was guilty without having a reasonable doubt about the matter. Secondly, that there is no single fact proved in the case that is not reasonably and quite easily consistent with the innocence of the prisoner, and no such combination of inculpatory facts as should have led to his conviction. The first stated of these conclusions would only lead to a new trial, which in my opinion is the least the prisoner is entitled to ask. The same conclusion to which my reasoning has brought me seems to clearly warrant, if I am right, the judgment that he should be discharged.

Possibly it may follow, as a matter of logic, that the Judge could have withdrawn the case from the jury. I will not shrink from this conclusion, but I must add that he was not bound to withdraw it and it would not have been the part of wisdom to do so. The line between such inadequate evidence as will warrant a new trial, and such a state of the evidence in a case like the present, resting wholly on circumstantial evidence, as will enable a Court to say that the verdict is against law, is perhaps an indefinite boundary line. The prisoner himself in cases where there are suspicious circumstances is usually advised to prefer an acquittal by the jury to a dismissal by the Judge. I think, however, that the trial Judge would not have erred as a matter of law, if he had told the jury that the circumstances proved did not come up to the requirements for a conviction on circumstantial evidence and had recommended an acquittal, and I have come to the conclusion, after giving the evidence and the law the best consideration of which I am capable, that the prisoner should be discharged, without being subjected to the ordeal of another trial.

Longley, J.:—In this case a case was reserved by the Judge as follows:

N.S.
S.C.
REX
v.
PEEL
(No. 1).

1. Was I in error in admitting as evidence the testimony of Mrs. Nina Rushton, a witness called on behalf of the Crown, who deposed that she heard an unidentified voice from the direction of the shop of E. I. Peel and Son, at Oxford, N.S., on the morning of March 20, 1920, saying "Al, Al, you damn fool, you will have everything on fire, I will complain on you," and "Ted, Ted, come down here." My answer to this question is No.

2. (a) Was it misdirection for me not to instruct the jury that the said testimony of the said Mrs. Rushton was tendered by the Crown for the purpose only of identifying the prisoner, Alva L. Peel, with the transaction or matter in issue on the said trail.

(b) Was I in error to entirely omit from my charge to the jury any reference whatever to the evidence of the said Mrs. Rushton, set out in point one above reserved? In answer to both (a) and (b) I say, No.

3. Was I in error in admitting the evidence tendered on behalf of the Crown of one Elsie Rushton who deposed that she heard a dialogue or conversation between two unidentified persons from the direction of the shop of E. I. Peel and Son, at Oxford, N.S., on the morning of March 20, 1920? I answer, No.

4. Was it error on my part to admit as evidence on behalf of the Crown, the testimony of the said Alva L. Peel given at an inquest in Oxford before T. M. Johnson, Coroner, and a Justice of the Peace, presiding over an inquest on the body of one Lewis A. King, who was burned in the shop of E. I. Peel and Son, at Oxford aforesaid on March 20, 1920, when the prisoner, Peel, was in custody under the circumstances set out in the evidence of W. W. Johnson, T. M. Johnson, H. A. Patton, Mrs. Alva L. Peel, C. H. Jakeman, and C. C. McNeil? I answer, No.

5. (a) Was I in error in admitting as rebuttal evidence for the Crown the evidence of Robert King, as to an alleged conversation between the said Robert King and Stanley Anderson, a witness for the defence, as detailed in the evidence of the said Robert King?

(b) Was I in error in not instructing the jury as to the application and relevancy of the evidence of the said Robert King as to such conversation? I answer both these: No.

The Judge refused to grant a reserved case upon 5, 6, 7, 8, 9, 10, 11, and 12, which are as follows:—

5. Was it error on the part of the Judge in refusing to

admit the evidence of Clarence Silliker that said Silliker had, within a short period of time before the said fire, made an offer to E. I. Peel for the purchase of the stock of E. I. Peel and Son, which the prisoner by the said conviction is alleged to have wilfully burned, and the motive for which was to collect insurance on said stock, after John W. Pritchard a partner of said Silliker, as disclosed in the evidence, had made an examination of said stock with a view to the purchase of same by the said Pritchard and Silliker, and who by such examination was in a position to know the value of said stock?

6. Was it error in the Judge to refuse to receive the evidence of Thomas E. McNair, who a short time before the fire had secured a verbal option from E. I. Peel for the purchase of said stock of E. I. Peel and Son at a price very much in excess of the insurance outstanding on said stock?

7. Was it error for the Judge to try the prisoner on the indictment, the first count of which was, in substance murder, the said indictment being thereby in contravention of sec. 856 of the Criminal Code? 8. Was it error in the Judge, after he directed the jury to acquit the prisoner on the third count of the indictment to then proceed to ask the jury to find him guilty or not guilty on the second count of the indictment and for which he was convicted? 9. Was the said indictment incongruous and inconsistent for the counts contained therein and was the conviction thereof of the prisoner valid and was he prejudiced by his said trail on the said indictment? 10. Was it error in the Judge to entirely omit from his charge to the jury any reference whatever to the evidence of the said Mrs. Rushton, set out in point one of this notice? 11. Was it error in the Judge to admit rebuttal evidence for the Crown which contradicted the evidence given by Stanley Anderson, a witness for the prisoner, who was asked in cross-examination as to certain statements the said Anderson had made detailing a conversation he overheard of the prisoner's father improperly offering money to parties in the interest of the accused and also statements by the said Anderson to other parties detailing the prisoner's father's offer of said moneys or making statements as to his, Anderson's improperly offering money in the interests of the prisoner? To all of these questions I answer, No.

In addition to these various questions the Judge has granted the same time and place under sec. 1021 of the

N.S.

S.C.

REX v. PEEL (No. 1).

Criminal Code for leave for the said Alva L. Peel to apply to the Supreme Court in banco for a new trial on the ground that the conviction was against the weight of evidence.

Upon this point and upon this point only, does there exist real and substantial ground for asking for a new trial.

The evidence is excessively voluminous. The charge of the Judge is superlatively consistent and fair throughout, and he never seeks by a word to secure the conviction of the prisoner. Nevertheless it is necessary to consider the grounds upon which the plaintiff relies in support of the evidence. They are, firstly, the evidence of Mrs. Rushton. Secondly, the fire which is alleged on the part of the Crown to have originated in Peel's shop; the fact that the prisoner was making arrangements to depart; and that he was intoxicated and in the place up to 12 o'clock on the night of the fire, and that he gave irregular and unsatisfactory answers at the coroner's inquest. All these things there was evidence of, but there was an equal amount of evidence shewing that the prisoner was not going away; that he had not over-insured his goods; that he was not in the building when the fire took place; that the fire originated in the stove or connection of the stove pipe in Rushton's; and that the prisoner in his statements before the coroner was in the first place under the influence of drink, on Saturday, and on Monday his statement of his whereabouts that night were entirely consistent. Now, these points balance each other, and all the proof that is offered against the prisoner seems to me to leave the door open to the conviction of perfect innocence.

That the public in the vicinity were greatly excited in regard to this man Peel because his friend had perished that night in the flames may have led to such a concentration of feeling against him as made it impossible for him to have an entirely fair trial; and although it is a difficult thing to do, and though so much depends on a jury that one does not feel at liberty to oppose or resist it, yet in this case, upon reading the evidence carefully, and examining the Judge's charge, I have reached the conclusion it was impossible for a man, perfectly fair and independent, to reach a conclusion such as the jury did; and therefore I feel justified in answering the Judge's question, that he did not receive a fair trial in the affirmative, and the conviction must for that reason be quashed.

Chisholm, J.:—The prisoner Alva L. Peel was committed

for trial by a Justice of the Peace in and for the County of Cumberland on the charges hereinafter mentioned and was indicted at the June sittings, 1920, of the Court at Amherst, the indictment containing three counts as follows:

"1. That Alva L. Peel did at Oxford in the said county of Cumberland on Saturday, the 20th day of March, A.D. 1920, unlawfully slay and kill one Lewis A. King, at Oxford aforesaid, deputy postmaster.

"2. That Alva L. Peel did at Oxford in the said county of Cumberland on Saturday, the 20th day of March, A.D. 1920, wilfully and without legal justification or excuse, and without colour of right, set fire to a certain building, to wit, the Wood-Patton Block, so called, belonging to Hedley A Patton, and Mrs. Mary E. Wood, and situate at the corner of Rideau and Main streets in Oxford aforesaid.

"3. That Alva L. Peel did at Oxford in the said county of Cumberland on Saturday, the 20th day of March, A.D. 1920, by negligence cause a fire in a store under his control situate in the Wood-Patton Block, so called, which said fire caused the death of one Lewis A. King and destroyed property to the value of over fifty thousand dollars."

The prisoner was acquitted on the first and third counts of the indictment and convicted on the second count, which charged him with arson.

Counsel for the prisoner applied to the trial Judge to reserve twelve points for the consideration of the Court in banco, and the Judge refused to reserve the points numbered 5, 6, 7, 8, 9, and 10, and he reserved the points numbered 1, 2a, 2b, 3, 4, 5a and 5b. The Judge also gave leave to the prisoner under sec. 1021 of the Criminal Code to move the Court in banco for a new trial on the ground that the verdict was against the weight of evidence.

The questions which the Judge refused to reserve are as follows:—

5. Was it error on the part of the Judge in refusing to admit the evidence of Clarence J. Silliker that the said Silliker had, within a short period of time before the fire, made an offer to E. I. Peel for the purchase of the stock of E. I. Peel & Son, which the prisoner by the said conviction is alleged to have wilfully burned and the motive for which was to collect insurance on said stock, after John W. Pritchard, a partner of said Silliker, as disclosed in the evidence, had made an examination of said stock with a view to the purchase of the same by the said Pritchard and Silliker and

N.S.
S.C.
REX
v.
PEEL
(No. 1).

who by such examination was in a position to know the value of said stock? 6. Was it error in the Judge to refuse to receive the evidence of Thomas E. McNair, who a short time before the fire had secured a verbal option from E. I. Peel for the purchase of said stock of E. I. Peel & Son at a price very much in excess of the insurance outstanding on said stock? 7. Was it error for the said Judge to try the prisoner on the indictment, the first count of which was, in substance, murder, the said indictment being thereby in contravention of section 856 of the Criminal Code? 8. Was it error in the Judge, after he directed the jury to acquit the prisoner on the third count of the indictment to then proceed to ask the jury to find him guilty or not guilty on the second count of the indictment and for which he was convicted? 9. Was the said indictment incongruous and inconsistent for the counts contained therein and was the conviction thereon of the prisoner valid and was he prejudiced by his said trail on the said indictment? 10. Was there any evidence to suport the said conviction?"

The prisoner has appealed from the Judge's refusal to reserve these questions. It was so clearly shewn upon the argument that questions numbered 5, 6, 7, 8, and 9 had so little substance that it is unnecessary to deal with them. Question No. 10 is involved in the motion dealing with the new trial and requires no separate treatment here.

The questions which were reserved are as follows:—

1. Was I in error in admitting as evidence the testimony of Mrs. Nina Rushton, a witness called on behalf of the Crown, who deposed that she heard an unidentified voice from the direction of the shop of E. I. Peel & Son, at Oxford N.S., on the morning of March 20th, 1920, saying, "Al, Al, you damn fool, you will have everything on fire, I will complain on you,"—and "Ted, Ted, come down here"? 2a. Was it misdirection for me not to instruct the jury that the said testimony of the said Mrs. Rushton was tendered by the Crown for the purpose of identifying the prisoner, Alva L. Peel, with the transaction or matter in issue on the said trial? 2b. Was I in error to entirely omit from my charge to the jury any reference whatever to the evidence of the said Mrs. Rushton, set out in point one above reserved? 3. Was I in error in admitting the evidence tendered on behalf of the Crown of one Elsie Rushton who deposed that she heard a dialogue or conversation between two unidentified persons from the direction of the shop of E. I. Peel &

Son at Oxford, N.S., on the morning of March 20th, 1920? 4. Was it error on my part to admit as evidence on behalf of the Crown the testimony of the said Alva L. Peel given at an inquest at Oxford before T. M. Johnson, coroner, and a justice of the peace, presiding over an inquest on the body of one Lewis A. King who was burned in the shop of E. I. Peel & Son, at Oxford aforesaid, on March 20, 1920, when the prisoner, Peel, was in custody, under the circumstances set out in the evidence of W. W. Johnson, T. M. Johnson, H. A. Patton, Mrs. Alva L. Peel, C. H. Jakeman, and C. C. McNeil? 5a. Was I in error in admitting as rebuttal evidence for the Crown the evidence of Robert King, as to an alleged conversation between the said Robert King and Stanley Anderson, a witness for the defence, as detailed in the evidence of the said Robert King? and, 5b. Was I in error in not instructing the jury as to the application and relevancy of the evidence of the said Robert King as to such conversation?

All the above questions I should answer in the negative.

Questions 1, 2a, 2b, and 3 relate to the evidence of Nina Rushton and Elsie Rushton. Nina Rushton lived in the Wood-Patton Block and near but not directly over the shop occupied by the prisoner. During the night and shortly before the fire was discovered she heard noises and conversation in the prisoner's shop. She listened at a hole or crack in the closet and she heard a voice saying "Al, Al, you d——d fool, you will have everything on fire; I will complain on you." The prisoner was sometimes called Al by his intimate friends. She did not recognise the voice. Elsie Rushton, daughter of Nina Rushton, also heard men's voices and stooping over to listen she heard someone say, "Do you know what you are; you are a d——d fool." Who is? You are. You are right. You are a d——d fool." This was also shortly before the fire and it was shewn that the prisoner and others were in the shop during the night, drinking.

Where the inquiry is to ascertain whether the premises were set on fire by the accused or another, or whether the fire was merely accidental, the condition of the premises and what was taking place on the premises immediately before the fire broke out, would, it seems to me, be so far a part of the res gestæ as to make the evidence of these witnesses admissible. That view is supported by the ruling of Lord Campbell in the case of R. v. Fowkes, Leicester Spring

N.S.

S.C.

REX v. PEEL (No. 1).

Assizes, 1855, published in The Times of March 8, 1856, and in a note to Stephen's Digest of the Law of Evidence, 5th ed., p. 4, [art. 3, illus. a.]

If the evidence was admissible, as I believe it was, I am unable to see that it was the duty of the trial Judge to tell the jury that it was tendered by the Crown only for the purpose of identifying the prisoner.

With respect to the evidence on behalf of the Crown setting forth the testimony of the prisoner given at the coroner's inquest, I can see no valid objection to its reception. The prisoner was a witness at the inquest and sec. 5 sub-sec. 1 of the Canada Evidence Act R.S.C. 1906, ch. 145, enacts that no witness shall be excused from answering any question on the ground that the answer to such question may tend to criminate him. That is the general rule and I cannot find any excluding rule to make such evidence inadmissible, which the prisoner can invoke.

The evidence given in rebuttal by Robert King was admissible on the ground that it was open to the Crown to shew bias on the part of a witness previously called by the prisoner. Phipson on Evidence, 5th ed., p. 478.

The trial Judge, under the provisions of sec. 1021 of the Crim. Code, gave the prisoner leave to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. Under this section the power of the Court is limited to granting a new trial. The question then becomes—whether the verdict was such that the jury viewing the whole of the evidence reasonably could find a verdict of guilty.

That there was some evidence to go to the jury is apparent from a perusal of the case; so much so that the able counsel for the prisoner did not see fit to ask the trial Judge to direct a verdict of acquittal. The evidence is largely circumstantial and the trial Judge very clearly and accurately reviewed the evidence and instructed the jury on the points of law.

There was evidence to shew that the prisoner and his father were interested in the stock of boots and shoes. The father was present in Court and did not undertake to contradict the evidence given by the Crown as to the partnership. It was shewn that the stock was depleted and was insured in an amount largely in excess of its value. It was shewn that at the time of the blaze in the shop, earlier in the evening, the prisoner told his companions to "let the

d——d thing burn, it was insured anyhow." Again, the conduct of the prisoner on the night in question and on the following days, and the various explanations he gave of his whereabouts on that night were highly suspicious circumstances. There were other matters shewn which it is unnecessary to review in detail. The jury saw the witnesses and observed their demeanour and had the right to disbelieve the evidence or portions of the evidence of particular witnesses. After a careful and exhaustive summing up of the evidence by the trial Judge, in terms of which the prisoner's counsel did not and could not complain, the jury found a verdict of guilty; and I cannot venture to say, after a careful perusal of the case, that the verdict was against the weight of evidence and one which the jury could not reasonably have found.

Motion for new trial dismissed on an equal division.

HAYDEN ET AL v. RUDD.

Alberta Supreme Court, Scott, J. June 9, 1921.

Damages (§III.A—70)—Purchase of All Straw on Farm—Breach of Contract—Goods Obtainable in District at Same or Lower Price—Measure of Compensation.

The purchaser of all the straw on a particular farm, for the purpose of feeding his stock over the winter, is only entitled to nominal damages where the evidence shews that he could have purchased an equal amount in the same district at the same or even a lower price.

ACTION for damages for breach of contract.

A. H. Clarke, K.C., for plaintiffs.

A. B. Mackay, for defendant.

Scott, J.:—The plaintiffs claim $15,000 for breaches by the defendant of the following agreement between the parties:—

"This agreement made in duplicate this 5th day of August, A.D. 1919, between William T. Rudd of Rockyford in the Province of Alberta, Rancher, of the first part (hereinafter called the party of the first part) and Lewis C. Hayden of Nanton in the said Province of Alberta, Rancher, T. Roy Bridges of Nanton aforesaid, Rancher, John Howard McRae of Nanton aforesaid, Rancher, J. Orlando Brakey of Nanton aforesaid, Rancher, Fred W .Comstock of Nanton aforesaid, Rancher, John D. Hayden of Nanton aforesaid, Rancher, of the second part (hereinafter called the party of the second part). Witnesseth:

Whereas the party of the first part is the owner of a ranch

Alta.

S.C.

HAYDEN v. RUDD.

situate at Rockyford in the said Province of Alberta, and has agreed with the party of the second part to sell to them the said party of the second part the straw from 3,400 acres of wheat and from 200 acres of flax, part of his said ranch, and to give them the said party of the second part the run of all his said ranch for their stock (excepting the horse pastures) from as soon as threshing is completed this fall until the 1st day of April, 1920, or until the said stock will interfere with the seeding operations of the party of the first part in the spring of 1920.

Now this agreement witnesseth that in consideration of the premises, and in consideration of the sum of one dollar of lawful money of Canada now paid by the party of the second part to the party of the first part (the receipt whereof is hereby by him acknowledged) he the said party of the first part hereby agrees to sell to the said party of the second part the straw from 3,400 acres of wheat and from 200 acres of flax on the ranch of the said party of the first part at Rockyford aforesaid, and to give them the said party of the second part the run of all his said ranch for their stock, except the horse pastures, from as soon as the threshing is completed this fall until the first day of April, 1920, or until the said stock will interfere with the seeding operations of the party of the first part in the spring of 1920 at or for the price of five thousand five hundred dollars ($5,500.00) of lawful money of Canada, payable as follows:

$2,750 on the 1st day of November, 1919 (included in which is a note for $1,000 given by the party of the second part to the party of the first part on the sealing and executing of this agreement, on payment of which the said note is to be returned to the party of the second part, and the balance of $2,750 to be paid by accepted note at 90 days from November 1st, 1919, with interest at 8 per cent. on the said accepted note. The above mentioned note for $1,000 is given as security for the due performance of the contract or agreement on the part of the said party of the second part, and it is agreed between the said party of the first part and the said party of the second part that should damage by hail or loss by fire happen to the said 3,400 acres of wheat and the said 200 acres of flax before the stock mentioned herein is placed on the land, then, the said note will be null and void (as also will be this agreement) and shall be returned to the said party of the second part.

The party of the first part guarantees that there will be

sufficient water on the said ranch for the stock of the said party of the second part.

This agreement shall extend to, and be binding upon the heirs, executors, administrators and assigns of the parties hereto."

On the date of the agreement two of the plaintiffs gave their promissory note for $1,000 payable on November 1 following which was accepted by him in compliance with the condition that the plaintiffs should give their promissory note for that amount as security for the performance by them of the agreement.

On October 14, 1919, plaintiff L. C. Hayden wrote the defendant as follows:—

"Would it be possible to get you to build a lane in the west field down to the spring in the horse pasture as you will remember we talked of when we were there.

We will pay you what ever is right for time and material, we may not come north until it freezes up, on account of so much green feed grown here this fall.

Is the east field ready to turn stock in? as one of our party has a bunch of cattle at Olds and is out of feed there. Hoping you can help us with the fence and thanking you for an early reply, I am,"

To this letter defendant replied on October 18, as follows:

"Your letter of the 14th inst. to hand.

I will build the lane down to the spring in the horse pasture as soon as I finish threshing.

The field east of the house will be ready by the 1st of November for sure.

Trusting this will be satisfactory."

On November 10, 1919, the defendant's solicitor wrote the plaintiffs as follows:—

"We are instructed by Mr. William T. Rudd, of Rockyford, Alberta, Rancher, to say to you that by reason of your default in payment and failure to otherwise carry out the terms of your contract with him dated the 5th day of August, 1919, that the contract is declared null and void and without effect. We therefore, on Mr. Rudd's behalf, enclose you the note dated at Rockyford the 5th day of August, 1919, and payable on November 1st, 1919, in favour of Mr. William T. Rudd at the Canadian Bank of Commerce, Rockyford, for $1,000."

On the same day plaintiff Bridges telegraphed the defendant as follows:—"Have you threshed yet; would the feed hold fat stuff for any length of time."

Alta.

S.C.

HAYDEN v. RUDD.

To this telegram defendant replied as follows:—"Have sold feed to another party; you and your associates did not live up to your agreement so I resold thinking you did not want the feed as you had paid no money by November first I notified L. C. Hayden to this effect."

On December 17, 1919, some of the plaintiffs met the defendant at Calgary and there tendered him $2,750 on account of the purchase-money but the defendant refused to accept it. Nothing was then said about giving a note for the balance of the purchase-money. The plaintiffs state that they were prepared to give such a note but they admit that it was never drawn up.

On November 18, 1919, the plaintiffs' solicitors wrote the defendant as follows:—

"We have been consulted by Mr. Lewis C. Hayden and others with whom you contracted to sell your straw under written agreement of August 5th, 1919.

It appears that you have broken your agreement and are not now in a position to carry it out. This means very ruinous loss to the parties to whom you sold, as they have been fully relying upon pasturing their stock upon your ranch in accordance with the agreement.

As we view it, there is no justification whatever for your having sold the feed, notwithstanding the fact that the payment due on the 1st of November was not punctually paid. You had abundant security for the money and even if you had not, you were not justified in selling without first giving notice and allowing a reasonable time for payment.

Owing to the present conditions of weather and scarcity of food, it looks as if it will cost our clients some $10 per head per month for wintering their cattle, and they will hold you responsible for the cost whether greater or lower than that amount in excess of what they agreed to pay you, viz., $5,500. It seems to be in the interest of all parties that this loss may be minimised as far as possible. Our clients are not aware of any place where they can procure pasture and feed, and it looks as if they will have to feed hay, which you will realise is pretty expensive. It may be that you will be able to do something by finding pasture elsewhere, if not upon your own ranch, whereby this loss can be kept as low as possible.

Our clients will be very willing to co-operate in any way in reducing the loss, but it must be distinctly understood that you will be held responsible for the whole loss, and

this letter is written with the view of giving you an opportunity of rendering all assistance you can to relieve the situation for which you are entirely responsible.

If you can make any suggestions to relieve the situation kindly send them to us so that we may communicate them to the other parties to the agreement."

On November 26, defendant's solicitors replied as follows:—"Mr. W. T. Rudd had handed us your letter of recent date, and has instructed us to say that by reason of the failure of your clients to carry out the terms of purchase he regards himself as being under no obligation whatever to them."

On November 8, the defendant resold to one Thompson a portion of the crop and pasturage included in the agreement with the plaintiffs together with other portions of his crop and pasturage. The price he obtained for the portion included in the agreement does not appear to be very much in excess of the amount which the plaintiffs agreed to pay therefor. On November 10 the defendant's solicitors returned the $1,000 note to the plaintiff.

I am satisfied that the defendant's only reason for reselling a portion of the crop and pasturage included in the agreement was that, the plaintiffs not having paid the $1,000 note at its maturity or given any excuse for its non-payment, he considered that they had abandoned the intention to carry out the agreement and that he should resell to avoid loss as the market was falling. He appears to have been unable to resell the portion not included in the sale to Thompson and about January 1 following he allowed one of his men to pasture his stock on 640 acres without charge.

The plaintiffs are ranchers and farmers residing in the vicinity of Nanton. There was almost a total failure of crops in that vicinity in 1919 and, in consequence, feed for cattle there was very scarce and very expensive. In fact McRae, one of the plaintiffs, states that he tried to get feed around there but was unable to obtain any. Three of the plaintiffs came north looking for feed and came to Rockyford where the defendant resides.

It appears that they would have had noserious difficulty at that time in procuring a sufficient quantity in that locality from others than the defendant. When they entered into the agreement their intention was to drive their cattle up to the defendant's premises or ship them there by rail and feed them there during the following winter.

Alta.

S.C.

HAYDEN v. RUDD.

Section 49 of the Sale of Goods Ordinance, ch. 39, Cons. Ord. N.W. T. 1915 provides that where the seller wrongfully neglects or refuses to deliver the goods to the buyer the measure of damages where there is an available market for the goods is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered. See Valpy, etc., v. Oakeley (1851), 16 Q.B. 941, 117 E.R. 1142.

In Hamlin v. Great Northern R. Co. (1856), 1 H. & N. 408, 156 E.R. 1261, 26 L.J. (Ex.) 20, at p. 23, Alderson, B., says:—"The principle is, that, if the party does not perform his contract, the other may do so for him as near as may be and charge him for the expenses incurred in so doing."

As far as my notes of the evidence disclose the only evidence of the absence of such market was that of the plaintiffs Lewis C. Hayden, and McRae. The former states that there was no feed that the plaintiffs could procure elsewhere in Alberta and that the scarcity of feed and the impossibility of obtaining it was the general talk in the newspapers, but he does not shew that he made any attempt to procure any such feed after the defendant refused to deliver. The latter states that about November 27 he went to Rockyford looking for feed, that he inquired there but could not find any but that he obtained a field at Redlands which I find is situate about 10 miles from Rockyford and a quarter section about 2½ miles north of that place.

One Kenny, a live stock dealer, states that he wintered about 1,300 head of cattle in the winter of 1919-1920 within an area of about 11 miles around Rockyford, that about November 1 that he paid $1,200 for 1,200 acres consisting of flax straw, wheat straw and pasture, that about November 8 he rented another 500 acres mostly of wheat straw and a little pasture about 8 miles from Rockyford for which he paid $500, and that about the end of November he rented about 1,600 acres of wheat straw and pasture about 11 miles from Rockyford for which he paid $1,400.

One Gibson states that in 1919 he had about 1,050 acres of crop of which 95% was wheat, and that he rented the field for grazing purposes about November 15 for $2,000.

In my opinion the plaintiffs have failed to establish that there was no reasonably available market for the purchase of the feed and pasturage which the defendant refused to supply. In my view they failed to make any reasonable

effort to ascertain whether they could obtain same elsewhere either in the vicinity of Rockyford or at some other easily accessible place in the Province at which they could have placed their cattle for winter feeding. It was their duty to make reasonable efforts to minimise the loss which they would sustain by reason of the failure of the defendant to fulfill his contract.

While I am of opinion that the defendant should have acceeded to the reasonable request of the plaintiff's solicitor in his letter of November 18 that he should furnish information as to where the plaintiffs could procure pasturage for their cattle elsewhere I am also of opinion that he was not bound to do so and that he was entitled to rely upon their inability to shew that they could not procure it elsewhere.

By far the greater portion of the damages claimed are such as the plaintiffs would be entitled to recover only upon their shewing that there was no market reasonably available in which they could procure what the defendant failed to supply. The remainder of the portion of the damages claimed and shewn, amounts to less than the purchase-price payable by the plaintiffs.

If it had been shewn that there was no available market in which the pasturage the defendant failed to supply could have been procured I would have had to assess the damages that the plaintiff would be entitled to recover at $14,182 over and above the purchase-price of $5,500 payable by them under the agreement. The plaintiffs owned about 600 head of cattle and had entered into a contract to pasture 300 head for others. At $19,682 the loss would amount to about $22 per head. I find it difficult to believe that they could not by reasonable effort have avoided at least the greater portion of that loss.

As the plaintiffs have failed to shew that they have sustained any damages they are entitled to payment for merely nominal damages. I therefore give judgment for them for $10 with costs.

Judgment for plaintiffs.

NOEL v. BUFFUM

Saskatchewan King's Bench, Maclean, J. July 12, 1921.

Brokers (§IIB—12)—Sale of Land—Agreement to Pay Broker's Commission—Agreement for Sale Signed by Vendor and Purchaser—Right of Broker to Commission—Burden of Proving Collusion Between Purchaser and Broker.

Sask.

Sask.

NOEL v. BUFFUM.

The fact that the vendor and purchaser execute an agreement for the sale and purchase of land is prima facie evidence that the buyer was ready, willing and able to carry it out, and entitles a broker to his commission under an agreement to pay him if he found a buyer. Where a vendor seeks to avoid payment of the commission on the ground of collusion between the broker and the purchaser, the burden of proof of this is on the vendor.

[See Annotation, Real estate agent's commission, 4 D.L.R. 531.]

ACTION by a real estate broker to recover the amount of commission on the sale of land. Judgment for plaintiff.

A. G. Mackinnon, for plaintiff.

A. L. Gordon, K.C., for defendant.

Maclean, J.: — The plaintiff claims from the defendant $640 as commission on the sale of a certain section of land by the defendant to one Bechard. The defendant in his evidence admitted that he agreed to pay the plaintiff one dollar per acre as commission if the plaintiff found a buyer, that the plaintiff did find Bechard, and that Bechard as buyer and the defendant as vendor executed an agreement of sale of the land in question, which agreement was under seal and dated March 31, 1920. The defendant resists payment on the ground that Bechard was not a buyer ready, willing and able—particularly that he was not able—to purchase the land. The fact that the defendant and Bechard executed the agreement of March 31, 1920, is prima facie evidence that the buyer Bechard was ready, able and willing to carry it out. On these facts alone the plaintiff would be entitled to recover. But the defendant alleges that there was collusion between the plaintiff and Bechard—meaning undoubtedly that the plaintiff, for the purpose of earning a commission, produced a buyer who could not and did not intend to carry out the terms of purchase. The burden is on the defendant to establish this. The purchase-price in the agreement of March 31 is $44,001, of which one dollar is acknowledged as paid. The agreement provides for payment of the balance as follows: $12,000 by assuming payment of a certain mortgage; $10,000 in cash on December 15, 1920, and the remainder in annual half-crop payments. The agreement also provides that the defendant (vendor) shall deliver up possession to Bechard on or before January 1, 1921. Bechard did not make any payment on the mortgage referred to, nor did he pay any portion of the $10,000 instalment due December 15, 1920. Negotiations for the purchase of the section in question began on or about October 21, 1919, and Bechard on that day paid to the de-

fendant as a deposit on the purchase-price $1,000. The delay in executing a formal agreement of sale (October 21, 1919, to March 31, 1920) was not due to the plaintiff nor due wholly or even principally to Bechard. The defendant was desirous of remaining in possession during 1920, and so arranged with Bechard. In consequence of or as part of such arrangement, the first instalment of purchase-price was to become payable on December 15, 1920, instead of December 15, 1919, the date which Bechard agreed to verbally when he paid the deposit of $1,000. In the meantime, about November 1, 1919, the defendant through the agency of the plaintiff sold to Bechard two quarter sections for a substantial price. The deposit of $1,000 was by consent applied on the price of one of the two quarters. The defendant testified the sale of the section and two quarters was one transaction, although covered as a matter of convenience by three separate written agreements, and that the thousand dollars was a deposit on the whole transaction, although accredited in one sum in the agreement covering one of the quarters. Bechard paid for the two quarters in full before this action was commenced, and before the time limited for payment in his written agreement. There was some evidence that Bechard was in a position to pay the $10,000 instalment in 1919 if the extension had not been arranged. There is also some evidence that he could have made the payment of $10,000 in December, 1920, but could not get into communication with the defendant. In or shortly after January, 1921, negotiations were commenced between Bechard and defendant with a view of having the defendant lease the section from Bechard for the year 1921. In or about March, 1921, the defendant commenced action for cancellation of the agreement of March 31, 1920. Shortly after that, and before the action was ready for trial, the defendant and Bechard executed quit claim deeds dated respectively April 7 and 11, 1921, releasing each other from the agreement of March 31, 1920. Apparently it suited Bechard better to be released from the agreement than make payment, as it apparently suited the defendant better to sue for cancellation than sue for payment of the instalment. There is no evidence suggesting collusion between the plaintiff and Bechard, and I find that there was none. The defendant's evidence does not establish that Bechard was unable to pay. On the contrary, there is some slight evidence that he was able to pay. The defendant also contends that

N.S.

S.C.

REX v. CHARLES SOO.

the plaintiff agreed to waive payment of commission unless and until Bechard paid the full purchase-price. I find that the plaintiff agreed to wait until December 15, 1920, for payment of his commission as a matter of convenience to the defendant, but that the plaintiff did not waive his commission or make it conditional on any portion of the purchase-price being paid. The defendant released Bechard, and cannot now take advantage of that act to deprive the plaintiff of his commission. There will be judgment for the plaintiff for $640 and costs.

Judgment for plaintiff.

REX v. CHARLES SOO.

Nova Scotia Supreme Court, Russell, J. Ritchie, E.J., and Mellish, J. April 9, 1921.

1. **Disorderly House (§1—15)—Keeping Common Bawdy House——Form of Stating the Offence—Words to Like Effect—Cr. Code, secs. 225, 228, 773, 852, 1152, Code Form 55.**

A conviction on summary under Cr. Code R.S.C. 1906, ch. 146, secs. 228 and 773 will be upheld as a valid conviction for keeping a common bawdy house although in form it is for keeping "a bawdy house, i.e. kept and maintained for the purposes of prostitution," as the keeping for such purposes is within the statutory definition of a "common bawdy house" contained in Cr. Code sec. 225.

2. **Disorderly House (§1—1) Offence of Keeping—Stating Time of Offence as During Specified Months, including the Month in which Charge was Laid—Interpretation—Powers of Amendment—Cr. Code secs. 228, 773, 1124.**

A conviction on summary trial upon a charge of keeping a disorderly house "during the month of February and March" will not be quashed because of the conviction having been made before the expiring of the same month of March, if supported by evidence of such keeping during that part of the month of March antecedent to the laying of the charge, and also during the month of February. If the conviction were not to be so interpreted, the Court on habeas corpus should amend it in that respect to conform with the evidence under the powers conferred by Cr Code sec. 1124.

MOTION on habeas corpus for discharge. Defendant was convicted and sentenced to six months' imprisonment as the keeper of a house of prostitution. Application was made to the Court in banco for his discharge on the grounds stated in the opinion of Ritchie, E.J.

F. McDonald, K.C., in support of application.

W. J. O'Hearn, K.C., contra.

Ritchie, E.J.:—Section 228 of the Criminal Code as amended by 8-9 Ed. VII. 1909 (Can.), ch. 9, is as follows:—"Disorderly house. Every one is guilty of an indictable of-

fence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house or opium joint as hereinbefore defined."

Under this section Charles Soo was convicted and sentenced to six months' imprisonment. The information charged that he "did during the months of February and March A.D. 1921, unlawfully keep a bawdy-house, that is to say, [street and house number were here given] in the said city of Halifax, kept and maintained for the purpose of prostitution."

An application is made for the discharge of Soo on habeas corpus on the following grounds:

1. That the house is not described in the conviction and warrant of commitment as a "common bawdy house."

2. That the conviction and warrant are bad for uncertainty.

The conviction and warrant are dated the 11th day of March, 1921, and the contention is that the conviction being for an offence committed "during the months of February and March" it may have been committed after the 11th day of March.

Dealing with the first contention, I am clearly of opinion that it is disposed of against Soo by section 225 of the Code which I quote, 7-8 Geo. V., 1917 (Can.), ch. 14:

"225. Common bawdy-house defined. A common bawdy-house is a house, room, set of rooms or place of any kind for purposes of prostitution, or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes."

Here we have a statutory definition shewing the decisive factor to be whether or not the house "is kept for purposes of prostitution." The conviction and warrant state that the house was "kept and maintained for the purposes of prostitution."

More might be said on this point in favour of the validity of the conviction, but I think the terms of section 225 effectively dispose of the contention.

Coming to the second objection, the evidence which is before us shews that the offence was committed on the evening of the 10th March. If I give the conviction and warrant a reasonable construction I have no difficulty in coming to the conclusion that the offence was committed in March, before the making of the conviction. I do not think that

Sask.

K.B.

McINNIS BROS. LTD. v. TORONTO TYPE FOUNDRY CO.

the authorities drive me to an unreasonable construction, but if they did, I would amend under section 1124 of the Code. For this course the case of The King v. Demetrio (No. 2) (1912), 1 D.L.R. 515, at p. 516, 20 Can. Cr. Cas. 318, at p. 319, is authority. In that case Middleton, J., of Ontario, said: "The intention of Parliament in giving power to amend, is that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by defects in form."

There is no doubt whatever as to the guilt of Soo. I may add that on his own admission he was the proprietor of the place in question and there is clear evidence that the place was resorted to for the purposes of prostitution in February.

The application, in my opinion, should be dismissed.

Russell, J.:—I agree.

Mellish, J.:—There may be a possible distinction between a bawdy-house and a common bawdy-house. If there be such I think the conviction ought to be amended accordingly as the evidence would clearly warrant such amendment.

The other grounds raised on the prisoner's behalf are, I think, clearly not tenable.

The application should be dismissed.

Application dismissed.

McINNIS BROS. LTD. v. THE TORONTO TYPE FOUNDRY CO.
Saskatchewan King's Bench, Maclean, J. July 12, 1921.

Brokers (§IIB—12)—Sale of Duplex Press—Letter as to Commission—Services Rendered Determining Factor in Effecting Sale—Right to Commission.

On the sale of a Duplex press the plaintiff's claim for commission was based on a letter, the material part of which is as follows:—"We had a communication from Mr. Wynn, direct in regard to this, and we have given him a quotation on the Press. Should he purchase from us this press I will see you regarding a commission spoken of next time I go to Regina." The plaintiff did not introduce the purchaser to the defendant, but the Court held that he did render some service which was the determining factor in effecting a sale and he was therefore entitled to his commission.

[See Annotation, Real estate agent's commission 4 D.L.R.. 531.]

ACTION to recover certain type chases, and a paper truck or their value claimed by the defendant to be included in the term "Duplex press" which it purchased. The plaintiff also claimed commission on the sale of a press to another company. Judgment for plaintiff.

A. Ross, K.C., for plaintiff; P. C. Hodges, for defendant.

Maclean, J.:—On January 16, 1920, the plaintiff sold to

the defendant a Cox Duplex press. A memorandum of the sale is contained in a letter, as follows:—

"Regina, Sask. 16th Jany., 1920.

"Toronto Type Foundry Co. Ltd.,
Winnipeg.

Gentlemen:

We hereby agree to sell you our 12-page Cox duplex press which we guarantee to be in good running order as it stands on our floor for the sum of three thousand five hundred (3500) dollars, cash on delivery.

It is understood that you have 30 days in which to pull down and take delivery of the press. If it suits your convenience better to take possession in 60 or 90 days it will be all right. Yours truly,

Accepted for the McInnis Brothers Limited.
Toronto Type Foundry Limited, Per W. McInnis."
H. J. Hardie.

The press was at the time of sale and until possession by the defendant in the plaintiff's building along with considerable machinery and articles used in the printing business.

In the latter part of March or early in April the defendant sent an employee (O'Shea) to take possession of and dismantle the press and to ship it elsewhere. O'Shea carried out his work without any supervision by the plaintiff's officers or employees. He (O'Shea) shipped along with the press 29 type chases and one paper truck which he found in the building where the press stood. The chases and truck were manufactured by the manufacturers of the press. The plaintiff did not discover for some months that the chases and truck had been taken by the defendant, and the plaintiff asks in this action for the value thereof. The plaintiff contends that the term "duplex press" includes the chases and truck, and that a press is not complete without them. The truck is constructed for the purpose of conveying large rolls of paper such as are used in newspaper printing, and chases are for the purpose of holding the type. Considerable evidence was tendered with a view to shewing that "press" included chases and truck, and was so understood in the printing trade. The evidence shews that "press" or "duplex press" does not include chases and truck, and that in the printing trade chases and trucks are specially mentioned when quotations of prices are given. Chases are necessary—just as type is neces-

Sask.

K.B.

McINNIS BROS. LTD. v. TORONTO TYPE FOUNDRY CO.

sary—to have certain work done by the press, but no one contends that type is part of a press or included in that term.

I find that the defendant is not entitled to the chases and truck, under its agreement with the plaintiff, and that the plaintiff is entitled to the value thereof. I fix the value of the cases at $20 apiece, and the truck at $15.

The plaintiff also claims for a commission of $250 on the sale by the defendant to the Enterprise Publishing Co. Ltd., Yorkton, of a Cox duplex press. Wynn, hereinafter mentioned is manager or representative of the Enterprise Publishing Co. Ltd. The defendant's Western manager, Hardie, admits that he had discussion with the plaintiff's officers, Walter McInnis and E. B. McInnis, concerning commission on the sale of the press, which was subsequently sold to the Enterprise Publishing Co. There is considerable conflict between the evidence of the plaintiff's witnesses and the evidence of the defendant's witnesses, as to what was actually said and promised. The defendant's witnesses contended that commission was to be payable to the plaintiff only in the event of a sale being made to some other purchaser than the Enterprise Publishing Co. Ltd. The plaintiff put in evidence a letter written by Hardie on behalf of the defendant, which reads as follows:—

"February 13th, 1920.

"McInnis Bros.,
Regina, Sask.

Attention Mr. Walter McInnis.

Dear Sir:

I thank you for your favour of January 28th. We have had communication from Mr. Wynn direct in regard to this, and we have given him a quotation on the press. Should he purchase from us this press I will see you regarding a commission spoken of next time I go to Regina.

Yours truly,
Toronto Type Foundry Co. Limited.
H. J. Hardie, Manager Western Branches."

H.J.H.
I.N.R.

This letter is consistent with the evidence of the plaintiff's witnesses, and I accept their version that the defendant promised to pay to them a commission on sale of the press in question to the Enterprise Publishing Co. Ltd. The plaintiff did not introduce the purchaser to the defendant,

but the plaintiff did render some service which was the determining factor in effecting a sale, and the plaintiff is entitled to its commission of $250.

The plaintiff will have judgment for $845 and costs.

At trial the defendant abandoned certain portions of its counterclaim. The balance of the counterclaim is dismissed, but without costs.

Judgment for plaintiff.

STEWART v. MOLYBDENUM MINING AND PRODUCTION CO.

British Columbia Court of Appeal, Macdonald, C.J.A., McPhillips and Eberts, JJ.A. May 6, 1921.

Trusts (§ID—22)—Agreement to Work Mineral Claim—Default and Expiry of Claim—Claim re-staked by Party Making Default—Rights of Original Owners of Claim.

By an agreement entered into between two owners of a mineral claim and a third party, such third party agreed to do and record the necessary assessment work which was due that year, but made default and brought about the expiry of the claim. The owners in the belief that the claim was a subsisting one, at a later date entered into agreement of sale with the same party in substitution of the first. Such third party with other associates, upon finding that the claim had expired, re-staked the claim along with other ground. The Court held that having in mind the fact that it was the default of the third party which had caused the loss of the original claim, the re-stakers must in equity be held to be trustees for these owners, and that the plaintiff was entitled to a declaration that the company subsequently formed and to which the re-staked claims were transferred was a trustee of an undivided half interest in so much of the ground covered by the said re-stakings as was formerly embraced within the boundaries of the original claim.

2. **Statutes (§IIA—95)—The Allied Forces Exemption Act 1915, (B.C.) ch. 3 — Construction — Limited to Claims Owned by Enlisted Men at Date of Declaration of War.**

The Allied Forces Exemption Act, 1915 (B.C.), ch. 3 confines its benefits to mineral claims owned by enlisted men at the date of the declaration of war. The amending Act. ch. 4 of 1916, does not remove the date limit set by ch. 3 but is intended to provide for cases not covered by it, and which "upon proof of bona fides on the part of enlisted men, and of other circumstances proper to be considered shall. . . . . merit relief."

APPEAL by plaintiff from judgment of Hunter, C.J.B.C., of October 29, 1920. Reversed.

S. T. Hankey for appellant.

H. A. Maclean, K.C., for respondent, Molybdenum Co.

F. C. Elliott, for respondents, Riel and Teetzel.

The judgment of the Court was delivered by

Macdonald, C.J.A.:—In my opinion the Allied Forces

B.C.
C.A.
STEWART v. MOLYBDENUM MINING AND PRODUCTION CO.

Exemption Act, 1915 (B.C.) ch. 3, did not relieve the owners of the "Conundrum" mineral claim from their obligation to do and record the annual assessment work. The preamble to the said Act does I think, confine its benefits to mineral claims owned by enlisted men at the date of the declaration of War and as the deceased McGrath did not own the "Conundrum" mineral claim at that date, he is not within its purview. But it was submitted that the amending Act, ch. 4, of 1916 in effect removed the limitation in respect of the date of ownership. This amendment enables the Lieutenant-Governor in Council to grant relief from forfeiture of mineral claims and then proceeds:—

"It being the intent of said chapter 3 and of this Act that forfeiture or loss of rights arising under the 'Mineral Act' or the 'Placer-mining Act' on or after the fourth day of August, 1914, shall be avoided if the recorded owner of a mining claim or interest therein has enlisted for active service at home or overseas against the King's enemies."

I read this not as being intended to remove the date limit set by ch. 3, but as being intended to provide for cases not covered by it, and which, upon proof of bona fides on the part of the enlisted man and of other circumstances proper to be considered, shall, in the opinion of the Lieutenant-Governor in Council, merit relief. If otherwise there would be no sense in providing for the intervention of the Lieutenant-Governor in Council. As no application was made in this case to the Lieutenant-Governor in Council, further consideration of this Act becomes unnecessary.

But the above does not dispose of the case. It appears that by an agreement of sale of May 26, 1915, between the owners of the said mineral claim, plaintiff Stewart and said McGrath, and one Riel, the latter agreed to do and record the assessment work which would be due on June 13 of that year. Riel made default and thus brought about the expiry of the claim. The owners under the belief, no doubt, that the claim was a subsisting one, on August 19, 1915, entered into another agreement of sale with Riel in substitution for the first. Included in the agreement was an adjoining claim named the "Blackwell," owned by one Hayes; but while Hayes is a party to this action and to the appeal, I am unable to see how he is concerned with the relief which the plaintiff Stewart claims. He was concerned with the agreement aforesaid, but as that was afterwards cancelled before the commencement of this action

and as the action has to do with the ownership of the "Conundrum," ground in which he has no interest, I think his presence here may be ignored.

Riel had as his associate Teetzel, Ross and ultimately the firm of Stillwell Bros., and in October or November, 1915, Riel, Ross and J. B. Stillwell visited the claim and upon search in the Mining Recorder's office, were told that the claim had probably expired by reason of the failure of the owners to do and record the assessment work aforesaid. The "Conundrum" ground was thereupon re-staked by Riel in the presence or with the knowledge of the others above-mentioned under the names "Molybdenum," "Molly 1," "Molly 1 Fraction," and "Success," and were so re-staked in the names of Riel, Teetzel and Riel's wife.

Having in mind the fact that it was Riel's default which brought about the loss of the "Conundrum" to its owners, the re-stakers must in equity be held to be trustees for these owners. The re-staking included other ground not within the limits of the "Conundrum." Whether or not all the re-staked ground is to be deemed to be held in trust or only that formerly embraced by the "Conundrum," is a question which was not argued before us. When the plaintiff Stewart learned the facts above recited, he demanded that the new claims should be transferred to himself and his co-owner McGrath, but received no answer to the letter making the demand.

I do not think that Riel and his associates aforesaid intended in the beginning to do an injustice to the owners of the "Conundrum." I think their intentions were to repair the injury done by Riel's default. Their intention was to treat Stewart and McGrath as the owners and to treat the agreement of August 19 as still subsisting and applicable to the re-stakings should the "Conundrum" be held to have expired. That agreement called for a payment of purchase-money of $10,000, to be made on or before August 2, 1916, the whole purchase price being $35,000. Riel and his associates proceeded to exploit and develop the ground and spent large sums aggregating in the neighbourhood of $100,000 in doing so. This was done, I think, not on the assumption that the ground was theirs under the re-stakings, but that they would get it under the agreement of August 19. I think that all parties acquiesed in that situation, because as late as February, 1916, the agreement of August 19 was amended with the consent of all

B.C.

C.A.

STEWART v. MOLYBDENUM MINING AND PRODUCTION CO.

parties, and in effect re-executed. Matters went on in this way but default was made in payment of the said $10,000 on August 2. Most, if not all of the moneys spent on the ground was expended before the vendors under the August agreement cancelled it pursuant to a term enabling them to do so upon default in payment of purchase-money. In the meantime, namely, in May, 1916, Riel and his associates incorporated the defendant company and transferred the re-stakings and I think also the benefits of the agreement of August 19 to the company. I do not regard this fact as of importance.

The promoters of that company, with the possible exception of the Stillwells, were from the beginning well aware of the facts from which a Court of Equity would infer a trust of the re-stakings in favour of the owners of the "Conundrum," and there is evidence that the Stillwells were also aware or had sufficient notice of the facts leading to the same conclusion. They could not have regarded the re-stakings as the property of the re-stakers in view of their recognition of the rights of the vendors under the August agreement. The promoters of the company therefore, and the directors and shareholders who authorised the taking over of the re-stakings, were possessed of knowledge which precludes the company from claiming to be innocent purchasers for value without notice.

Nothing appears to have been done in respect of the default of August 2 until December or January following, when notices were given cancelling the agreement of August, because of such default. Up to this point in the relationship of the parties, I find nothing which would deprive the vendors of the "Conundrum" of their right to be regarded in equity as the owners of the ground under the re-stakings. After the said cancellation the actions of the parties on both sides gives rise to considerable embarrassment. Options of purchase were given by each side, concurred in by the other which appear to recognise an interest in each, that is to say, that Stewart and Mrs. McGrath, the widow and executor of McGrath, had an interest to the value of $35,000, and that the defendants, other than Mrs. McGrath, also had interests of considerable value in the property in question, and this is not unnatural, since in addition to the plant and machinery placed there by the defendants, there was the fact of the additional ground taken in by the re-stakings.

It is also to be noticed that Stewart, as shewn by the correspondence of his solicitors, with Riel and Ross, was firmly contending that the "Conundrum" had not expired but had been protected by the statutes above mentioned, thus asserting a claim adverse to the one which he is now, in my opinion confined to, namely, that the re-stakings are now held by the company in trust for himself as to an undivided one half thereof. But after careful consideration of the correspondence and of the evidence, I am convinced that what took place between the parties between January, 1917, and the issue of the writ in his action in February, 1918, were attempts at settlement more or less confused, because Stewart had some ground as his legal advisers thought, for still holding to the "Conundrum" as a valid claim, and I cannot see that what took place in these endeavours to sell the property and compose their differences amounted to an abandonment of Stewart's equitable rights in the re-stakings, which he promptly in the beginning asserted. In his statement of claim, he claims alternatively, and in my opinion he is entitled to a declaration that the defendant company is a trustee of an undivided half interest in so much at least of the ground covered by the said re-stakings as was formerly embraced within the boundaries of the "Conundrum" mineral claim. Just how this may be carried out has not been adverted to in argument, whether by a transfer of a half interest in the re-stakings or by partition, I shall not enquire into, as I have heard no argument upon the point, but if necessary, counsel may have the opportunity of speaking to that question.

I should add, out of respect for the opinion of the Chief Justice, who tried the action, that I am unable to agree with his finding that the plaintiff was estopped, because of his standing by while moneys were being expended upon the property and not more promptly and effectively asserting his rights. Riel and his friends were quite well aware of his rights and the rights of Mrs. McGrath, not only so but as above pointed out, they spent their money on the assumption that they were getting the property in pursuance of the agreement of August 19. The evidence points conclusively to the willingness of the vendors to accept what the agreement would give them in full satisfaction of their interest, which they doubtless thought was confined to the "Conundrum" ground alone.

The appeal should be allowed.

Appeal allowed.

Sask.

K.B.

MURPHY v. ASH.

MURPHY v. ASH.

Saskatchewan King's Bench, McKay, J. June 29, 1921.

1. **Vendor and Purchaser (§IE—28)—Agreement for Sale and Purchase of Land, Deterioration of Property Before Purchaser Should Take Possession—Liability of Vendor.**

If after an agreement for the sale and purchase of land is entered into and before the purchaser takes or ought to take possession any deterioration takes place by the conduct of the vendor who must take reasonable care of the property, such vendor is liable in damages to the purchaser.

[Lobel v. Williams (1915), 22 D.L.R. 127, referred to.]

2. **Election of Remedies (§I—7)—Agreement for the Sale of Land—Default in Payments—Right of Vendor to Personal Judgment and Cancellation of Agreement for Default.**

The vendor under an agreement for the sale and purchase of land is not entitled to personal judgment against the purchaser under the agreement and also cancellation of the agreement in default of payment.

[Standard Trusts v. Little (1915), 24 D.L.R. 713; Davidson v. Sharpe (1919), 52 D.L.R. 186, followed.]

ACTION to recover the balance due under an agreement for the sale and purchase of land. Counterclaim by defendant for damages for injury to the premises.

S. P. Petersen, for plaintiff.

W. A. Doherty, for defendant.

McKay, J.:—This is an action on an agreement for sale dated November 19, 1919, whereby the plaintiff agreed to sell, and the defendant agreed to purchase from the plaintiff, the north-east quarter of Sect. 9, Tp. 32, Range 7, west of the 2nd Meridian, in the Province of Saskatchewan, at and for the price of $1,500.

The defendant paid to the plaintiff the sum of $800 by transferring certain property to the plaintiff, for which amount the plaintiff gives him credit as of the date of the agreement.

The balance claimed by the plaintiff is $700 and interest at the rate of 8% per annum.

I find the plaintiff is entitled to the balance due under his agreement, viz., $700 and interest, less the amount to be allowed on defendant's counterclaim, and amount paid in June, 1920.

The plaintiff under the agreement dated November 19, 1919, agreed to give immediate possession of the said land to the defendant, but the defendant says it was understood he was not to get possession until March 1, 1920. The plaintiff was unable to give possession until after May 1, 1920, and the defendant obtained possession on May 8, 1920.

I find that after the agreement was entered into, and before May 1, 1920, the premises covered by the agreement were damaged by the plaintiff's tenant.

In Fry on Specific Performance, 6th ed., 1921, at p. 654, the author states:—

"If, after the contract and before the purchaser takes, or ought to take possession, any deterioration takes place by the conduct of the vendor, or his tenants, he will be accountable for it to the purchaser. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it."

See also Lobel v. Williams (1915), 22 D.L.R. 127, 25 Man. L.R. 161.

The plaintiff, in my opinion, is liable to the defendant for the damages to the premises as follows:—

The defendant claims 5 tons of hay removed from the roof of the stable, $100.

I find from the evidence that this was hay put on the stable 5 or 6 years before 1920 and was not worth the amount claimed by the defendant, but it was worth something as old hay for the roof. It would cost something to replace it with old hay or straw. I allow for this item $10.

To damages to house, $50.

Although the defendant has not given items for the whole of this amount, yet, from his evidence, as to the damage to the house, I think $40 a fair and reasonable amount to allow for the cost to repair the damage. He had to pay a boy $3; the door would cost about $4, and there would be getting the straw or hay for thatching and the mud, etc., and doing the work. I allow for this item $40.

Damage to hen house, $15. I allow for this item $10.

Damage to stable, door jammed, chopped useless, 1 door carried away. I allow for this item $5.

Damage through loss of wood, $70.

The defendant's evidence is too general as to this item except as to the 5 loads taken by a Doukhabour.

I allow for these 5 loads at his own valuation of $2 per load. The balance I disallow. $10.

For willow posts:

The defendant says that six or eight hundred were taken off the premises. He could only tell from the stumps but did not count them.

I am satisfied, however, from his evidence, that not less

Sask.

K.B.

MURPHY v. ASH.

than four hundred were taken, and I will allow him 400 @ 5c a post. $20.00.

Cross fence, $14.75. I allow for the loss of this fence $11. Yard fence, $10. I allow this item $10. Total allowed, $116.

I disallow the claim for breaking and wire fence as the defendant has not satisfied me the alleged representations were made as to these items.

And I disallow the claim for loss of service fees for the stallion as being too remote. The evidence does not satisfy me that, at the time the defendant agreed to purchase the land, the plaintiff knew that he was going to keep his stallion on this land.

The defendant was entitled to have the amount due on the agreement of May 8, 1920, reduced by said sum allowed for damages, viz., $116.

I find the amount due to the plaintiff on said agreement is $494.44, made up as follows:—

Nov. 19, 1919:	Balance due	$700.00
May 8, 1920:	Interest on $700.00 @ 8% per annum from Nov. 19, 1919, 171 days	26.23
		$726.23
	By damages allowed	116.00
		$610.23
June 1, 1920:	To interest on $610.23 from May 8, 1920, to date @ 8% 24 days	3.20
		$613.43
June 18, 1920:	To interest on $613.43 from June 1 to date @ 8%, 17 days	2.28
		$615.71
	By cash	159.00
		$456.71
June 1, 1921:	Interest on $456.71 from June 18, 1920, to date at 8% per annum, 347 days	34.72
		$491.43
June 29, 1921:	To interest on $491.43 from June 1, 1921, to date, 28 days	3.01
		$494.44

The plaintiff is entitled to his costs on the claim, and the defendant on the counterclaim, with a right of set-off.

The plaintiff cannot get personal judgment against defendant for the amount due and cancellation of the agreement. Standard Trusts v. Little (1915), 24 D.L.R. 713, 8 S.L.R. 208; Davidson v. Sharpe (1919), 52 D.L.R. 186, 60 Can. S.C.R. 72.

From the way the prayer for relief is drawn, I take it that the plaintiff asks for cancellation in default of payment.

There will be an order nisi ordering the defendant to pay into Court to the credit of this cause, on or before 3 months from the date of the Local Registrar's certificate of taxation of the defendant's costs, the sum of $494.44, with interest at the rate of 8% per annum from June 29, 1921, with plaintiff's taxed costs, less the taxed costs of the defendant, and, in default of such payment, the said agreement to be cancelled and put an end to, free of all right, title or interest of the defendant, or any person or persons claiming through or under it, or through or under the defendant. The defendant and all persons claiming through or under said agreement or defendant to give up possession of the said land to the plaintiff within 20 days after service upon him, or them, of a copy of the final order. Copy of the order nisi to be served on the defendant and his solicitors.

Judgment accordingly.

THE CANADIAN CULTIVATION CO. LTD. v. PETERSON. CANADIAN FAIRBANKS MORSE CO. LTD. (Third Party.)

Alberta Supreme Court, Simmons, J. June 23, 1921.

Sale (§IIA—29)—Farm Tractor—Representations as to Fitness—Tractor Unable to do the Work—Relief Under sec. 5 of the Farm Machinery Act 1913 (Alta.) ch. 15.

Where the purchaser of a farm tractor relies upon the representations of the vendor at the time of purchase, and it is shewn in evidence that the machine cannot perform the work for which it was purchased, the purchaser is entitled under sec. 5 of the Farm Machinery Act 1913 (Alta.) ch. 15 sec. 5 to have the price reduced to what the machine is actually worth.

[See Annotation, Sale of Goods, 58 D.L.R. 188.]

ACTION on a promissory note given in payment for a Townsend tractor engine. Claim reduced.

L. H. Fenerty, for plaintiff.

J. J. O'Connor, for defendant.

A. H. Clarke, K.C., for third party.

Simmons, J.:—The plaintiff sues on a promissory note made by the defendant dated April 27, 1918, for the sum of

Alta.

S.C.

CANADIAN CULTIVATION CO. v. PETERSON.

$1,450. The said note was given to the plaintiff by the defendant in payment for a Townsend gas tractor engine purchased by the defendant from the plaintiff. The defendant resists payment on the ground that the defendant was induced to purchase the said tractor by reason of certain specific representations made by the plaintiff, which representations the defendant alleges were untrue. The specific representations were, first, that the engine was superior to a 10-20 Titan tractor sold by the International Harvester Co. of Canada Ltd., both in its style, operation and development of power; second, that the said gas tractor engine would pull two 14 inch breaker bottoms in breaking and three ploughs in stubble; third, that the said tractor would work any place on any ground where horses or other engine could work and would draw discs, drills, or other farm machinery more economically than horses; fourth, that the said Townsend gas tractor was easy to operate and required little skill, that it was light on repairs and was made of a specially good and durable material. The defendant also sets up that the plaintiff represented the said Townsend gas tractor to be of good material, proper construction, design and workmanship, and in first class working condition, and that it would perform satisfactorily the work for which it was intended and was free from latent and other defects and properly designed and constructed to insure reasonable duration. The defendant alleges that the said tractor did not conform to any of the said representations.

The sale was made by Coatsworth, the farm manager of the plaintiff company. The plaintiff company were the agents of the Canadian Fairbanks Morse Co., Ltd., the third party in this action, for farm implements, tractors and machinery. Under a separate agreement, however, they bought two Townsend tractors for their own use from the Canadian Fairbanks Morse Co. Ltd.

The defendant had ordered a Titan International Co. tractor and had paid a deposit of $300 upon it but he ascertained that the company would not be able to deliver one in time for that season's work, and, as he was anxious to obtain a tractor, he approached Coatsworth, the plaintiff's manager, and Coatsworth sold one of the tractors which the plaintiff company had purchased from the Canadian Fairbanks Morse Co. Ltd.

Coatsworth denies the specific allegation made by the

defendant in regard to the representation and I am not able to say that his evidence is in any way inferior to that of the defendant, and as the burden was upon the defendant, to prove the specific representation, he has failed to do so. The evidence of the defendant and his witnesses, however, very clearly established the unsuitability of the Townsend tractor for the work which it was expected to perform. It was known as a 12-25 gas tractor, which should develop 12 horse power on the draw bar and 25 horse power on the belt. The defendant has not established the inability of the engine to develop this horse power. The defendant, however, has very satisfactorily proved that the gas tractor will not perform the work which a tractor of that style and size is intended to perform. It is common ground that in ordinary breaking it should draw two 14 inch breaker bottom plows and should draw three bottoms in stubble. The defendant's land is rolling and the chief difficulty in operating the tractor was this, that it would not develop power to overcome the grade where there was any appreciable rise in the surface of the land. This defect, I think, can be easily located. Farm tractors of this style are usually made with one, two and three speeds so that these tractors can be thrown into a lower gear to overcome an ascent in the surface of the ground. This tractor is built in the United States and I am satisfied that it is not such a tractor as will work successfully on an uneven or rolling farm because it has only the one set of gears with the result that when the tractor has to ascend a moderate rise, it does not develop sufficient power in that gear, whereas if it were supplied with an adjustable gear that would throw the tractor into a lower speed, additional power could be developed with a corresponding decrease in the rate of travel.

The plaintiffs knew the purpose for which the tractor was being purchased. The plaintiffs had no particular knowledge of the machine at that time other than what was furnished by their own vendor and it is common ground that the machine should perform the work of a tractor of that size and description. I have already indicated that the tractor cannot perform this work and I have indicated the reasons. The defendants have established, however, an inferior mechanical defect in the governor. The governor is set too near the fly wheel and apparently in travelling over uneven soil, the governor may strike the fly wheel,

Alta.

S.C.

CANADIAN CULTIVATION CO. v. PETERSON.

with the result that it is broken. I think this is a mechanical defect which could be remedied quite readily and with little expense.

My conclusion, however, is that the defendant has a remedy under sec. 5 of the Farm Machinery Act, as the engine will not satisfactorily perform the work for which it is intended. The tractor, however, is, in my view, of considerable value. The defendant disced 70 acres in the spring of 1918 and the tractor is also of value as a stationary tractor for doing threshing, chopping, and other work which such tractors are expected to do on a farm. I do not think, however, that the tractor is worth more than $1,000 and the plaintiff's claim will be reduced accordingly.

There will therefore be judgment for the plaintiff for the amount of the note and interest and costs. Judgment for the defendant on his counterclaim for $450 and costs. Since the plaintiff's claim of $1,450 on a promissory note is reduced by the counterclaim to $1,000, the plaintiff will be entitled to interest only upon $1,000 from October 1, 1918, the due date of the note at 5% per annum. The costs of the plaintiff will be the scale appropriate to a judgment for $1,000 and interest from October 1, 1918, at 5% per annum. The costs on the counterclaim to be taxed on the same scale.

The plaintiff claims over against the third party and it is necessary to deal with that claim. The agreement under which the plaintiffs purchased the property from the third party is in writing and contains a warranty which purports to limit the third party's liability to the warranty and representations therein contained. I am of the opinion, however, that the third party comes within the purview of sec. 5 of the Farm Machinery Act, ch. 15 of the 1913 Alberta statutes. Notwithstanding that, while the plaintiffs were the general sales agents for farm machinery for the third party, the two tractors, of which one in question was one, were purchased under a separate agreement. The plaintiffs were a farming company and purchased these tractors for operation upon their farm and in my view this brings the third party quite within the purview of the Act.

There will therefore be judgment for the plaintiff against the third party for the sum of $450 and costs to be taxed on the same scale as the costs in the main action.

Judgment for plaintiff.

REX v. PEEL (No. 2)

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J. and Mellish, J. March 29, 1921.

Bail and Recognisance (§I—3)—Conviction—Criminal Offence—Conviction Affirmed—Application for Mercy of Crown—Sec. 2022 Criminal Code—Right of Convicted Person to Bail.

After the conviction of the crime of arson, a reserved case was granted with the result that the conviction was affirmed. Application was made under sec. 2022 of the Criminal Code for the mercy of the Crown. The Minister of Justice entertained a doubt as to whether the conviction should have been made and directed a new trial.

The Court held that it had no jurisdiction after a conviction has been affirmed to grant bail upon the Minister of Justice directing a new trial.

APPLICATION to admit prisoner to bail. Dismissed.

J. J. Power, K.C., moved (March 19, 1921) to admit the prisoner to bail on the grounds that two Judges of this Court were of the opinion that the evidence was not sufficient to convict and that the Minister of Justice, in allowing a new trial had doubt as to the conviction. He referred to The King v. Spicer (1901), 5 Can. Cr. Cas. 229, note.

F. F. Mathers, K.C., Deputy Attorney-General, opposed the application on the ground that the prisoner had been found guilty and two members of the Court concurred. Also on the ground that it is unusual to grant bail after indictment. He cited Archbold's Criminal Pleadings, 25 ed., pp. 87, 92.

Russell, J.:—I agree with Ritchie, E.J., in the result of his opinion and with the reasons given for the opinion except that stated in the last paragraph. I cannot attach any importance to the fact that the jury found there was no reasonable doubt. I have already expressed the opinion that the conviction made on circumstantial evidence was against law. No reasonable jury could in my judgment have come to a conclusion to convict the prisoner without having at least a reasonable doubt as to his guilt.

Ritchie, E.J.:—Peel was convicted of the crime of arson. A reserved case was granted with the result that the conviction was affirmed. Application was made on behalf of Peel, under sec. 2022 of the Criminal Code, R.S.C. 1906, ch. 146, for the mercy of the Crown. The Minister of Justice entertained a doubt as to whether the conviction should have been made and has directed a new trial. There has been a difference of judicial opinion as to whether or not the conviction ought to have been made, but in the view which I take this difference of opinion does not affect the

Sask.

C.A.

CANADIAN LUMBER YARDS LTD. v. DUNHAM McLEAN ET AL.

question. Under the practice it is not usual to grant bail after indictment found; here it is a case of after conviction, the indictment having been tried. Unless jurisdiction is specially given I think the Court has not the power to bail after the conviction has been affirmed. If the Court had ordered a new trial, bail could have been granted, but this is because sub-sec. 3 of sec. 1023 gives jurisdiction to the Court to do so in such a case; there is no like provision when the new trial is directed by the Minister of Justice. No authority was cited for the proposition that bail could be granted under the circumstances of this case and I have been unable to find any such authority.

If the view which I have expressed is not well founded I still would refuse bail because the offence is a very serious one for which life imprisonment is the extreme penalty. Granting it is a case of doubt, that doubt is for the consideration of the jury, and one jury has found against the doubt being a reasonable one. I mention these considerations because they might be a strong inducement to Peel to forfeit his bail if it was granted. In my opinion the application must fail.

Mellish, J.:—I am not at all clear that the Court has power to grant bail under the peculiar circumstances of this case. Before a new trial was granted as an act of mercy we clearly had no such power pending the application therefor and I incline to the opinion that the exercise of such an act of mercy impliedly confers no such power. No express power is given by the Code under such circumstances. Further, consistently with the decision I made refusing bail on the depositions, I do not think I can now be a party to granting it.

Application refused.

THE CANADIAN LUMBER YARDS, LTD. v. DUNHAM, McLEAN ET AL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Homestead (§IVA—30)—Dominion Lands Act—Mortgage of Homestead Before Patent Issued—Validity.

The decision in American-Abell Engine Co. v. McMillan (1909), 42 Can. S.C.R. 377, that a mortgage is a "transfer" within the meaning of sec. 142 of the Dominion Lands Act (R.S.C. 1906 ch. 55) and consequently null and void and ineffective against a transferee after patent issued, is unaffected by the Dominion Lands Act of 1908, ch. 20, sec. 29 and a mortgage before patent issues is still null and void unless the Minister of the Interior otherwise declares.

APPEAL by defendant from the judgment in an action to have a mechanic's lien declared to be first charge against certain land and also among other things that a mortgage of a homestead made before the issue of the patent was null and void. Affirmed.

P. H. Gordon, for appellant McLean.

H. J. Schull, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—The defendant Dunham was the homestead entrant under the provisions of the Dominion Lands Act, 7-8 Ed. VII., 1908 (Can.), ch. 20, of the north-east quarter of sect. 32 in township 17 and range 12, west of the 3rd meridian. On or about July 24, 1914, the patent to the said land was issued to him. Three days prior to the issue of such patent, Dunham executed a mortgage against the land in favour of the defendant McLean, which mortgage was registered in the proper Land Titles Office on September 24, 1914. During the year 1916 Dunham became indebted to the plaintiff for the price of lumber and other building material. On August 11, 1916, the plaintiff filed a mechanic's lien against the land in order to protect its claim against Dunham. Subsequently, the plaintiff sued Dunham, and recovered judgment against him for the amount of its account on March 31, 1918. Later it brought this action to have its mechanic's lien declared to be a first charge against the land, and also to have it declared among other things, that the aforesaid mortgage executed by Dunham in favour of McLean was null and void and ineffective as a charge against the land by reason of the provisions of the Dominion Lands Act, the said mortgage having been executed prior to the issue of the patent.

In the year 1909 it was held by the Supreme Court of Canada in the case of American-Abell Engine Co. v. McMillan (1909), 42 Can. S.C.R. 377, that a mortgage was a "transfer" within the meaning of sec. 142 of the Dominion Lands Act, R.S.C. 1906, ch. 55, and consequently null and void and ineffective against a transferee after patent issued. Section 42 of the Act of 1906 is almost identical in terms with sec. 31 of the Act as re-enacted by ch. 20 of the statutes of 1908, and it makes use of the same language in describing the transactions which are to be null and void unless the Minister of the Interior otherwise declares. The case in question is governed by the Act of 1908. This decision of the Supreme Court of Canada has always been

Sask.

C.A.

CANADIAN LUMBER YARDS LTD. v. DUNHAM McLEAN ET AL.

taken to have settled the law regarding the invalidity of mortgages of homesteads made before the issue of patent. In the case at Bar, however, the defendant McLean contends that the above decision is no longer applicable to mortgages, because the new Dominion Lands Act of 1908 (ch. 20 aforesaid) contains a section which was not in the Act of 1906 and was not, therefore, applicable to the American-Abell case. This section is as follows:—

29. Except in so far as provision is hereinafter made respecting advances of seed grain or any indebtedness to the Crown, no charge of any nature may be created upon a homestead, a purchased homestead or a pre-emption; but any charge heretofore created under the provisions of section 145 of chapter 55 of the Revised Statutes, 1906, or of the corresponding provisions of any previous Act respecting Dominion lands shall continue to be recoverable in the manner provided by said chapter 55.

It was contended by counsel for the defendant mortgagee that the effect of this section which makes use of the words "charge of any nature" is to remove mortgages from the provision of sec. 142 of the Act of 1906, now sec. 31 of the Act of 1908, to bring them solely within the provisions of this sec. 29, and thus to change the law as interpreted by the Supreme Court.

In the first place, I cannot agree that the enactment of sec. 29 has any effect upon the interpretation to be placed upon sec. 31 (formerly sec. 142). I think that the reasoning of the American-Abell case still applies, and that a mortgage is a "transfer" within the meaning of sec. 31 of the Act of 1908, and consequently null and void unless the Minister of the Interior otherwise declares.

In the second place, I am of opinion that the real effect of sec. 29, if it has any effect upon mortgages, is to add another prohibition to the one contained in sec. 31 (formerly sec. 142). This sec. 29 says that "no charge of any nature may be created upon a homestead, a purchased homestead or a pre-emption." If sec. 29 had to be taken as the only provision in the Act pertaining to mortgages, it would appear to me to be an effective prohibition rendering the mortgage illegal at the time it was made and incapable of acquiring legality by the mere fact that the termination of Parliament's jurisdiction over the land taking place after the execution of the mortgage.

The appeal should be dismissed with costs.

Appeal dismissed.

ATTORNEY-GENERAL OF CANADA v. ATTORNEY-GENERAL OF ALBERTA.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Viscount Cave, Lord Phillimore and Lord Carson. November 11, 1921.

Constitutional Law (§IA—3)—Legislative powers of Dominion Parliament—Regulation of Trade and Commerce—Criminal law—Peace, order and Good Government—Combines and Fair Prices Act, 1919 (Can.) ch. 45—Board of Commerce Act 1919 (Can.), ch. 37.

The Combines and Fair Prices Act, 1909 (Can.), ch. 45, and the Board of Commerce Act 1919 (Can.), ch. 37, by which a Board of Commissioners was set up to administer it, are both ultra vires the Dominion Parliament as being beyond the powers conferred by sec. 91 of the British North America Act.

[Re the Board of Commerce Act, and the Combines and Fair Prices Act (1920), 54 D.L.R. 354, 60 Can. S.C.R. 456, opinion of Idington, Duff and Brodeur, JJ., affirmed.]

APPEAL by the Attorney-General of Canada from the decision of the Supreme Court of Canada (1920), 54 D.L.R. 354, 60 Can. S.C.R. 456, the Judges being equally divided as to whether the Board of Commerce Act, and the Combines and Fair Prices Act were within the power of the Dominion Parliament to enact. Opinion of Idington, Duff and Brodeur, JJ., that the Acts were ultra vires affirmed.

The judgment of the Board was delivered by

Viscount Haldane:—This is an appeal from the Supreme Court of Canada (1920), 54 D.L.R. 354, 60 Can. S.C.R. 456, before which were brought, under statute, questions relating to the constitutional validity of the Acts above mentioned. As the six Judges who sat in the Supreme Court were equally divided in opinion, no judgment was rendered. Davies, C.J., and Anglin and Mignault, JJ., considered that the questions raised should be answered in the affirmative, while Idington, Duff and Brodeur, JJ., thought that the first question should be answered in the negative and that therefore the second question did not arise. These questions were raised for the opinion of the Supreme Court by a case stated under sec. 32 of the Board of Commerce Act, 1919, (Can), ch. 37, and were: (1) Whether the Board had lawful authority to make a certain order; and (2) Whether the Board had lawful authority to require the Registrar, or other proper authority of the Supreme Court of Ontario, to cause the order, when issued, to be made a rule of that Court.

The order in question was to the effect that certain retail dealers in clothing in the city of Ottawa were pro-

Imp.
P.C.
ATT'Y-GEN'L OF CANADA v. ATT'Y-GEN'L OF ALBERTA.

hibited from charging as profits on sales more than a certain percentage on cost which was prescribed as being fair profit. The validity of this order depended on whether the Parliament of Canada had legislative capacity, under the B.N.A. Act of 1867, to establish the Board and give it authority to make the order.

The statutes in question were enacted by the Parliament of Canada in 1919, and were to be read and construed as one Act. By the first of these statutes, the Board of Commerce Act, a Board was set up, consisting of three commissioners appointed by the Governor-General, which was to be a Court of Record. The duty of the Board was to be to administer the second of the two statutes in question, the Combines and Fair Prices Act, 1919, (Can.), ch. 45, called the Special Act. It was to have power to state a case for the opinion of the Supreme Court of Canada upon any question which, in its own opinion, was one of law or jurisdiction. It was given the right to inquire into and determine the matters of law and fact entrusted to it, and to order the doing of any act, matter, or thing required or authorised under either Act, and to forbid the doing or continuing of any act, matter or thing which, in its opinion, was contrary to either Act. The Board was also given authority to make orders and regulations with regard to these, and generally for carrying the Board of Commerce Act into effect. Its finding on any question of fact within its jurisdiction was to be binding and conclusive. Any of its decisions or orders might be made a rule or order or decree of the Exchequer Court, or of any Superior Court of any Province of Canada.

The second statute, the Combines and Fair Prices Act, was directed to the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and enhancement of the prices of commodities. By Part I the Board of Commerce was empowered to prohibit the formation or operation of combines as defined, and, after investigation, was to be able to issue orders to that effect. A person so ordered to cease any act or practice in pursuance of the operations of a combine, was, in the event of failure to obey the order, to be guilty of an indictable offence, and the Board might remit to the Attorney-General of a Province the duty of instituting the appropriate proceedings. By Part II the necessaries of life were to include staple and ordinary

articles of food, whether fresh, preserved, or otherwise treated, and clothing and fuel, including the materials from which these were manufactured or made, and such other articles as the Board might prescribe. No person was to accumulate or withhold from sale any necessary of life, beyond an amount reasonably required for the use or consumption of his household, or for the ordinary purpose of his business.

Every person who held more, and every person who held a stock-in-trade of any such necessary of life, was to offer the excess amount for sale at reasonable and just prices. This, however, was not to apply to accumulating or withholding by farmers and certain other specified persons. The Board was empowered and directed to inquire into any breach or non-observance of any provision of the Act, and the making of such unfair profits as above referred to, and all such practices with respect to the holding or disposition of necessaries of life as in the opinion of the Board, were calculated to enhance their cost or price. An unfair profit was to be deemed to have been made when the Board, after proper inquiry, so declared. It might call for returns and enter premises and inspect. It might remit what it considered to be offences against this part of the Act to the Attorney-General of the Province, or might declare the guilt of a person concerned, and issue to him orders or prohibitions, for breach of which he should be liable to punishment as for an indictable offence.

The above summary sufficiently sets out the substance of the two statutes in question for the present purpose.

In the first instance the Board stated for the opinion of the Supreme Court of Canada, a case in which a number of general constitutional questions were submitted. That Court, however, took the view that the case was defective, inasmuch as it did not contain a statement of concrete facts, out of which such questions arose. Finally, a fresh case was stated containing a statement of the facts in certain matters pending before the Board, and formulating questions that had actually arisen. These related to the action of certain retail clothing dealers in the city of Ottawa. An order was framed by the Board which, after stating the facts found, gave directions as to the limits of profit, and a new case was stated which raised the questions already referred to.

Imp.
P.C.
ATT'Y-GEN'L OF CANADA v. ATT'Y-GEN'L OF ALBERTA.

Under these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact the statutes in question.

The second of these statutes, the Combines and Fair Prices Act, enables the Board established by the first statute to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces of Canada, as the Board may consider to be detrimental to the public interest. The Board may also restrict, in the cases of food, clothing and fuel, accumulation of these necessaries of life beyond the amount reasonably required, in the case of a private person, for his household, not less than in the case of a trader for his business. The surplus is in such instances to be offered for sale at fair prices. Certain persons only, such as farmers and gardeners, are excepted. Into the prohibited cases the Board has power to inquire searchingly, and to attach what may be criminal consequences to any breach it determines to be improper. An addition of a consequential character is thus made to the Criminal Law of Canada.

The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in war time. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of sec. 91 of the B.N.A. Act, confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in sec. 92, untrammelled by the enumeration of special heads in sec. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in sec. 92, and is not covered by them. The decision in Russell v. The Queen (1882), 7 App. Cas. 829, appears to recognise this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal

circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject matter to be dealt with in the case would be one falling within sec. 92. Nor do the words in sec. 91, the Regulation of Trade and Commerce, if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under sec. 92. In the case of Dominion companies their Lordships in deciding the case of John Deere Plow Company v. Wharton (annotated), 18 D.L.R. 353 at 359, [1915] A.C. 330, expressed the opinion that the language of sec. 91 (2) could have the effect of aiding Dominion powers conferred by the general language of sec. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces. This result was the outcome of a series of well-known decisions of earlier dates which are now so familiar that they need not be cited.

For analogous reasons the words of head 27 of sec. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the Criminal Law, except

Imp.
P.C.
ATT'Y-GEN'L OF CANADA v. ATT'Y-GEN'L OF ALBERTA.

the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one by which its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion Criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that sec. 101 of the B.N.A. Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be ultra vires for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for everyday life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them individually,

and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local provincial undertakings for meeting provincial requirements of social life.

Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by sec. 91. They find confirmation of this view in sec. 41 of the Board of Commerce Act, which enables the Dominion Executive to review and alter the decisions of the Board. It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either sec. 92 or sec. 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the B.N.A. Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognised in earlier decisions, such as that of Russell v. The Queen, both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada, that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers

Imp.
P.C.
CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

enacted by the Constitution Act, without the co-operation of the Provincial Legislatures. It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the argument at the Bar for the Attorney-General for Canada. But even this consideration affords no justification for interpreting the words of sec. 91 (2) in a fashion which would, as was said in the argument on the other side, make them confer capacity to regulate particular trades and businesses.

For the reasons now given their Lordships are of opinion that the first of the questions brought before them must be answered in the negative. As a consequence the second question does not arise.

They will humbly advise His Majesty to this effect. There should be no costs of these proceedings, either here or in the Supreme Court of Canada.

CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

Judicial Committee of the Privy Council, Lord Birkenhead, L.C., Viscount Haldane, Lord Buckmaster, Lord Carson, and Sir Louis Davies, C.J. July 21, 1921.

1. Constitutional Law (§IA—20)—Federal and Provincial Rights—Suppression of Liquor Traffic—Matter of Local Nature—B.N.A. Act sec. 92 (16)—British Columbia Prohibition Act, 1920 Stats. ch. 72—Validity—Construction.

The British Columbia Prohibition Act as consolidated in 1920 ch. 72 for the suppression of the liquor traffic in that Province is within the powers of the Provincial Legislature, under sec. 92 (16) of the B.N.A. Act, its subject being a matter of merely a local nature within the meaning of the section, although in its enforcement it must necessarily interfere with the revenue of the Dominion and with business operations outside of the Province.

The Summary Convictions Act of the Province of British Columbia, 1915 (B.C.), ch. 59, only relates to punishment for offences against the provisions of the statutes of the Province and is to be read as if the provisions to this end were expressly declared in some such statute, and reading secs. 91 and 92 of the B. N. A. Act together there is no doubt that the Act is within the competence of the Provincial Legislature.

[Att'y-Gen'l of Ontario v. Att'y-Gen'l for the Dominion, [1896] A.C. 348; Att'y-Gen'l of Manitoba and Manitoba Licence Holders' Ass'n, [1902] A.C. 73 followed.]

Imp.

P.C.

CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

2. Levy and seizure (III.A—35)—B.C. Prohibition Act—Seizure of Stock of Liquor, Books, Papers and Sum of Marked Money—Part of Seizure not authorised without Search Warrant—Trespass—Summary Convictions Act—Construction.

Where there is an abuse of part only of a distress, the distrainor is not a trespasser ab in itio as to what was rightly distrained.

[Harvey v. Pocock (1843), 11 M. & W. 740, 152 E.R. 1003 followed; The Six Carpenters Case (1611), 8 Co. Rep. 146a, 77 E.R. 695, referred to.]

APPEAL from a judgment of the Court of Appeal of British Columbia (1921), 60 D.L.R. 315, which affirmed the judgment at the trial, of an action brought for the return of moveable property of the appellants including books and papers and a stock of liquor, alleged to have been illegally seized and for damages for such seizure and for unlawful entry into appellants' warehouse. The respondents excepting the respondent South, who is a Deputy Police Magistrate, are police officers of the City of Vancouver. Affirmed.

The judgment of the Board was delivered by

Lord Birkenhead, L.C.:—The first question to be decided relates to the constitutional validity of the statutes under which the respondents purported to act. These are the British Columbia Prohibition Act, as consolidated in 1920 (B.C.), ch. 72, and the Summary Convictions Act, 1915 (B.C.), ch. 59.

The former statute provides by sec. 10 that, subject to exceptions not here material, no person shall within the Province, by himself, his clerk, servant or agent, expose or keep for sale, on any pretence or upon any device sell or barter, or offer to sell or barter, or in consideration of the purchase, a transfer of any property or thing, or for any other consideration, or at the time of the transfer of any property or thing, give to any other person, any liquor.

By sec. 11 the keeping, having, or giving of liquor in any place other than the private dwelling house where a person resides is prohibited.

Section 19 provides that nothing in the Act shall prevent the keeping of liquor for export, provided that the warehouse in which it is kept complies with certain requirements in default of the observance of which it is not to be deemed to be a warehouse within the Act, or from selling from such warehouse liquor to persons in other Provinces, or in foreign countries, or to a vendor under the Act. By an amendment introduced into the Act in 1919 by way of an addition to sec. 19, it is provided that any person who has liquor in a warehouse shall furnish the

Imp.
P.C.
CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

Commissioners under the Act with certain information as to the warehouse and the liquor in it, and as to all removals from it of such liquor, with its destination, and the Commissioner or his agent authorised in writing may enter and make such searches in the warehouse as he thinks necessary for the purpose of obtaining or confirming information. Penalties imposed under the Act are by sec. 30 to be recoverable under the provisions of the Summary Convictions Act.

By sec. 48 the Commissioner, Superintendent or any police officer are for the purpose of detecting the violation of any of the provisions of the Act to have power, where it is believed that liquor is kept contrary to its provisions, to enter and search, and break open lockfast places, and anyone who obstructs such entry is to be guilty of an offence against the provisions of the Act.

By sec. 49 if the Commissioner, Superintendent, or any police officer believes that liquor intended for sale in violation of the Act is concealed in the vehicles or on the land of any person, he or they are to have the power without warrant to search for and seize such liquor and the vessels in which it is kept, and by sec. 50 the Justice who convicts for the keeping of liquor contrary to the provisions of the Act, may declare the liquor and the vessels to be forfeited.

By sec. 28 every person contravening or committing any breach of the provisions of sec. 10 is made liable to fine or imprisonment, and further, for every offence against the Act for which a penalty has not been specially provided, penalties of fine or imprisonment are enacted.

The above summary represents sufficiently for the purposes of the present appeal, the main provisions of the statute. Their Lordships are of opinion that it was within the power of the Legislature of British Columbia to enact it. The case is in their opinion governed by the principles enumerated when their decision was given in favour of the Province of Manitoba on the interpretation of secs. 91 and 92 of the B.N.A. Act, 1867, in Att'y-Gen'l of Manitoba v. Manitoba Licence Holders' Ass'n, [1902] A.C. 73.

The second statute under which the proceedings of the police are justified in the present proceedings, and which in turn is impeached, is the Summary Convictions Act of the Province. This statute provides (sec. 2) that in every case in which a penalty or imprisonment is prescribed by any statute of the Province, and it is not provided in

Imp.

P.C.

CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

such statute in what manner or by what procedure such penalty or punishment may be recovered or enforced, such penalty or imprisonment shall be enforced on summary conviction before a Justice (including a Police Magistrate) as if the same was expressly so declared in such statute.

By sec. 4, the Act is to apply to cases in which any person commits or is suspected of having committed any offence or act over which the Legislature has legislative authority, and for which such person is liable on summary conviction to imprisonment, fine, or other punishment; and to cases in which a complaint is made to any Justice in relation to any matter over which the Legislature has such authority, and with respect to which the Justice has authority by law to make any order for the payment of money or otherwise. The Act further contains provisions for procedure, and for enabling, under sec. 11, the Justice to detain anything seized and brought before him for the purposes of evidence.

It was contended at the Bar that this statute was ultra vires of the Provincial Legislature, on the ground that it was an attempt to enact provincial legislation for "criminal law," including procedure in criminal matters, within the words of sec. 91 (27) of the B.N.A. Act. But that section only declares that it is to be lawful for the Sovereign, with the advice of the Dominion Parliament, to make laws for the peace, order and good government of Canada generally, in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the Legislatures of the Provinces, and the enumeration of matters which follows in sec. 91 to which the exclusive authority of the Dominion Parliament extends is only a declaration that certain subjects fall under this description. When the language of sec. 92, which defines the matters to which the exclusive legislative authority of the Province extends, is scrutinised, this definition is found to include the administration of justice in the Provinces embracing the constitution, maintenance and organisation of provincial Courts, both civil and criminal, and procedure in civil matters in these Courts. Sub-head 15 of sec. 92 expressly adds the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of a Province, made in relation to any of the classes of subject enumerated in the section; and sub-head 16 gives exclusive legislative power to the Provincial Legislatures in

Imp.
P.C.
CANADIAN PACIFIC WINE CO. LTD. v. TULEY.

all matters of a merely local character. Reading secs. 91 and 92 together, their Lordships entertain no doubt that the Summary Convictions Act was within the competence of the Legislature of British Columbia. It relates only to punishment for offences against the provisions of the statutes of the Province, and is to be read as if the provisions to this end were expressly declared in some such statute. No other conclusion would appear to be in harmony with the principle of construction laid down by the Judicial Committee in Att'y-Gen'l of Ontario v. Att'y-Gen'l for the Dominion, [1896] A.C. 348.

The two preliminary constitutional points having thus been disposed of, their Lordships turn to the facts as proved in the proceedings.

The appellants are dealers in liquor, as importers into the Province and exporters from it, in the city of Vancouver. They possess a warehouse in that city where, on July 15, 1920, they had a large stock of liquor. On that date the respondents Tuley, Sutherland, Copelands and Thompson, who were police officers, entered the warehouse. Previously some 60 dollars had been marked and handed to a police officer, who had gone to the warehouse to ascertain whether liquor for that amount would be unlawfully sold to him by the appellants. It was so sold and the money in payment therefore was accepted. When the respondents above mentioned entered, they seized the whole stock of liquor there, with the money marked referred to above, and subsequently removed the liquor, books and papers of the appellants from the warehouse. On July 19, one of the respondents, South, laid an information against the appellants under the Summary Convictions Act for unlawfully keeping liquor for sale. On this information the Deputy Police Magistrate before whom the proceedings came, convicted the appellants, finding that all the liquor in the warehouse was unlawfully kept there. He ordered it to be confiscated and fined the appellants. On August 9, 1920, the appellants issued the writ in this action, claiming replevin and other relief. In due course, the action came for trial before Murphy, J. The Judge held that the appellants were entitled to recovery of the $60 first paid by the police and afterwards seized by them. Whether this decision was right or not, there is no cross-appeal with regard to it. But he further held that the confiscation order of the Police Magistrate was valid. A second point was made before him

to the effect that even if the entry and seizure were lawful, the police became trespassers ab initio because they seized and carried away the money and books without the authority of a search warrant. But the Judge held that, even if there were no authority in the terms of the Prohibition Act for these seizures, this fact did not make the police trespassers ab initio. In so far as the seizure of the liquor was concerned, their Lordships agree with Murphy, J. This seizure must be taken to be within the statute on the facts proved. The Six Carpenters Case (1611), 8 Co. Rep. 146a, 77 E.R. 695, left the further point which arises from the unauthorised seizure of other properties unsettled. But it was subsequently disposed of by the judgment of the Court of Exchequer in Harvey v. Pocock (1843), 11 M. & W. 740, 152 E.R. 1003. There a landlord had taken in distraint, along with chattels that were distrainable, others that were not. It was decided that the distrainor was a trespasser ab initio only as to the goods that were not properly distrainable. Lord Abinger C.B., delivering the judgment of the Court, which included Gurney, B. and Rolfe, B., decided that the opinion of Lord Holt in Dod v. Monger (1905), 6 Mod. 215, 87 E.R. 967, ought to be followed, and that where there is an abuse of part only of the distress, the distrainor is not a trespasser ab initio as to what was rightly distrained. Their Lordships find themselves in agreement with this statement of the law. The Judge held further that the books and papers seized were taken under a search warrant properly issued under the Summary Convictions Act. In any event these books and papers appear to have formed the subject of a separate proceeding, and to have been returned to the appellants. Their Lordships do not think that any substantial question arises with regard to them.

The Court of Appeal, 60 D.L.R. 315, affirmed the judgment of the trial Judge without adding to the reasons he gave for his judgment.

For the reasons indicated, the Board will humbly advise His Majesty that this appeal should be dismissed.

There will be no order as to costs.

Appeal dismissed.

Sask.

C.A.

MORTON v. DEAN.

MORTON v. DEAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

New Trial (§II—5)—Slander—Privileged Occasion—Presumption that Defendant Believed Charge—Malice as Taking Away Protection—Judge's Charge to Jury—Misdirection.

In an action for slander for words alleged to have been spoken upon the privileged occasion being established, the rule is that the defendant must be presumed to have believed the charge made by him, and the onus is upon the plaintiff to shew that he did not. Malice will take away the protection given by the occasion but the plaintiff must shew that the malice existed. Held also on the authority of Clarke v. Molyneux (1877), 3 Q.B.D. 237, 47 L.J. (Q.B.) 230, that the Judge's charge to the jury was sufficiently defective to constitute misdirection and entitle defendant to a new trial.

[See Annotation, Libel and Slander, 9 D.L.R. 73.]

APPEAL by defendant from the judgment at the trial in an action for slander for words spoken on a privileged occasion. New trial ordered.

A. T. Procter, for appellant.

A. G. MacKinnon, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case I have come to the conclusion that there must be a new trial, on the ground that the trial Judge's charge to the jury is defective in several particulars and to an extent sufficient to constitute a misdirection, which may have had an effect upon the jury substantially unfavourable to the appellant. This is an action for slander for words alleged to have been spoken upon a privileged occasion. The rules which should govern the trial Judge in his charge to the jury in these cases are carefully considered and set out in the judgment of the Judges of the Court of Appeal in England in Clark v. Molyneux (1877), 3 Q.B.D. 237, 47 L.J. (Q.B.) 230. The principles laid down in that case have been referred to with approval in subsequent decisions of the House of Lords and of the Judicial Committee of the Privy Council. In the case of Clark v. Molyneux reference was made with approval of the earlier cases of Somerville v. Hawkins (1851), 10 C.B. 583, 138 E.R. 231, 20 L.J. (C.P.) 131, which arose out of a statement made by a master concerning the conduct of a servant whom he had discharged from his service, and was, therefore, in the same class as the case at Bar. I do not think that I can attain any useful object by summarising in my own language the rules laid down in these

cases, so I refrain from doing so. I think a mere reference to the cases will be found at least quite as satisfactory.

Now the privileged occasion being established, the rule is that the defendant must be presumed to have believed the charge made by him, and the onus is upon the respondent to shew that he did not. In other words, malice will take away the protection given by the occasion, but the plaintiff must shew that the malice existed. The defendant is not called upon to shew that he acted in good faith; this is presumed in his favour. In this important particular I think the trial Judge did not make the position of the parties clear in his charge.

In the course of his charge the trial Judge told the jury that the defendant would be justified, "if as a reasonable man he had a right to think that it was true." This is clearly a misdirection in view of the rules to which I have referred. The question to be determined is, not whether an ordinary reasonable man would have believed the charge under the circumstances, but whether the defendant did in fact believe it, regardless of his degree of intelligence, or credulity. The only thing to be considered is the state of the defendant's mind.

Again in his charge the trial Judge made the following statement: "Then you are entitled to take into consideration on the question of malice that he has ever since even refused to apologise, although he could have apologised and prevented this litigation."

With all deference, I must say that I cannot see the reasonableness of this direction. The defendant, in his pleading and in his evidence, asserts in the first place, as to one of the charges he is stated to have made, that he did not make it at all, while he admits making the other. As to both charges, he says he believed them to be true upon the occasion in question and that he still believes them to be true. How then could he have been expected to apologise? An apology would mean an admission that he made the charges and that he was wrong in making them. I think, therefore, that it was clearly an error to tell the jury that the defendant's omission to apologise was evidence of malice, that is, evidence of the fact that he did not believe the charges to be true but that he made them out of ill-will, or some other improper motive.

In the case of Clark v. Molyneux, supra, it was stated by Bramwell, L.J., that in dealing with the summing up of

Alta.

S.C.

ROYAL TRUSTS CO. v. FAIRBROTHER.

a Judge it is to the interest of the parties that it be not criticised too rigorously, and that a verdict should not be set aside merely on the ground of some incautious and possibly inaccurate expression. He says that the whole of the charge should be looked at in order to see whether, upon the whole, it afforded the jury a fair guide. Our Rule of Court 650 also says that a new trial should not be granted on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned at the trial. With all respect I must confess that, notwithstanding the caution with which the Court should proceed in these matters, I am of opinion that in justice to the defendant in this case he should be granted the opportunity of a new trial.

I would, therefore, allow the appeal with costs, and order a new trial.

Appeal allowed: New trial ordered.

THE ROYAL TRUST CO. v. FAIRBROTHER ET AL.

Alberta Supreme Court, Scott, J. June 13, 1921.

Reformation of Instruments (§I—1)—Contract for Sale and Purchase of Land — Agreement of Immediate Possession — Mutual Mistake in Instrument—Land Subject to Lease — Impossibility of Performance—Liability.

One who is induced to enter into a contract for the purchase of land on the distinct understanding that he take possession of the land at once and cut and take the crop of hay then growing, and who on entering into possession finds that the land is under lease to another who is entitled to the hay, and who relying on the representations and warranties brings an action against the lessor to restrain him from trespassing on the land, and from cutting or dealing with the hay, but is unsuccessful in such action a lease of the property having been given by the vendor's agent, without the knowledge of the vendor, and the contract, by mutual mistake having been made subject to existing leases, is entitled to have the contract reformed so as to express the true intention of the parties, the result of such reformation being to entitle him to damage for breach of the covenant to give immediate possession.

ACTION upon an agreement for sale of lands. The facts are fully set out in the judgment delivered.

F. Ford, K.C., and A. Knox, for plaintiff.

H. R. Milner and E. D. H. Wilkens, for defendants.

Scott, J.:—This action was originally instituted by the deceased. By order of the Master at Edmonton it was revived after the death of the deceased and the present plaintiff substituted for the deceased.

The action is upon an agreement for sale of lands made by the deceased to the defendant dated July 28, 1919. The plaintiff alleges that default was made in the payment of the purchase-money and claims an order cancelling the agreement and delivery up of the same, immediate possession, sale or foreclosure or specific performance, the balance of the purchase-money and interest and costs.

The defendants allege that during the negotiations leading up to the agreement and deceased became aware that the defendant would require immediate possession for the purpose of putting up the hay crop for that year, which crop was, to the knowledge of the deceased, of considerable value, that in order to induce them to execute the agreement he represented to them that no person or persons had any right, title or interest therein and that they should immediately be permitted to take possession of the lands for the purpose of putting up the crop, that the agreement contained a provision that the defendants' right to possession should be subject to the terms of any lease affecting the lands and a further provision that the current rent, if any, earned by the property should be apportioned as of the date of the agreement, that it was not intended to contain any reference to any lease and that it was drawn up and executed under a mutual mistake in that the defendant never agreed to the insertion of the provisions referred to.

The defendants by counterclaim allege that immediately upon the execution of the agreement they entered into possession of the lands and cut and put up hay thereon, that one Gehan entered upon same claiming the right to remove and cut the hay, that the defendants relying upon the representations and warranties of the deceased, commenced an action against Gehan claiming a declaration that the hay crop was their property, an order that he deliver it to them and for an injunction restraining him from trespassing upon the lands and from cutting or dealing with the hay thereon, that judgment was given for Gehan who thereby became entitled to the hay crop as against them, that by reason of the matters referred to the defendants were put to great trouble, were deprived of the hay and were put to the expense of the cost of Gehan, their own costs and the expense of putting up the hay.

The defendants further charge that the deceased made the representations referred to fraudulently and, either

Alta.

S.C.

ROYAL TRUSTS CO. v. FAIRBROTHER.

with knowing that they were false or recklessly and not caring whether they were true or false.

The defendants counterclaim for rectification of the agreement by the elimination of the words complained of, special damages for the loss of the hay, the costs paid to Gehan, their own costs incurred in the action referred to, the expenses incurred by them in putting up the hay, general damages and costs.

I find upon the evidence that at the time the agreement was entered into the deceased represented to the defendants that the lands in question were not subject to any lease and that no other person than the deceased had any interest in the hay then growing thereon and that it was understood and agreed by the parties that the defendants were to be entitled to the hay thereon. The agreement was upon a printed form which contained provisions to the effect that the defendants' right to possession should be subject to the terms of any lease affecting the lands and the current year's rent, if any, earned by the property should be apportioned as of its date between the vendor and purchaser.

The conveyancer who drew up the agreement omitted to call the attention of the parties to these provisions in the term and they were not aware that they were contained therein, and it was contrary to the intention of the parties that they were included in the agreement. I also find that at the time the representations were made by the deceased he believed them to be true. Upon referring to the pleadings in the action brought by Gehan he claimed to be entitled to possession of the premises under a lease made to him by an agent of the deceased and I am satisfied that the latter believed that he had never authorised an agent to grant a lease thereof.

The plaintiff contends that, even if the defendants were entitled to have the agreement reformed, they have forfeited their right by delay in taking proceedings for that purpose.

It is apparent from the evidence that the deceased was standing behind and supporting the defendants in the Gehan action. In an affidavit filed in that action he repeats the representations made by him at the time the agreement was entered into and states that there was no lease in existence affecting the lands, that no one other than the defendants had any right to possession thereof or the hay thereon, that he had never given to any one any authority

to lease the premises or make any disposition of the hay. The defendants therefore had every reason to believe that when the time came for them to pay the balance due upon the purchase money of the land the deceased would allow them to deduct therefrom any damage they might sustain by reason of Gehan's claim and that it would therefore be unnecessary for them to seek a reformation of the agreement in the meantime. The contention that they have by their delay forfeited their right to obtain such reformation therefore cannot be upheld.

Under ordinary circumstances the deceased would not have been bound by the judgment obtained by Gehan, as he was not a party thereto, but the plaintiff in its reply to the counterclaim does not raise that question, nor is it denied that Gehan was entitled to possession of the premises or the hay thereon, but, apart from this, the conduct of the deceased with respect to the action brought by Gehan was such that the deceased must be taken to have agreed to be bound by the result of it.

It is shewn that on March 30, 1921, the defendant Fairbrother assigned his interest in the lands under the agreement to one Lewis C. Fairbrother. Counsel for the defendants applied to amend by adding the assignee as a party to the action and produced the consent of the latter to be so added. It was shewn that the assignment was merely in trust and that the assignee took no beneficial interest under it. If it were necessary that he should be added I would do so, but it is shewn that any damages which the defendants sustained were incurred before the date of the assignment and, if any damages awarded to them were set off against the balance of the purchase-money under the agreement, the assignee would have no reason to complain. I therefore see no reason why he should be added as a party.

I hold that the defendants are entitled to judgment for the rectification of the agreement by expunging therefrom the provisions referred to.

Counsel for the plaintiff contended that, as the representations made by the deceased were made innocently, the defendants' only remedy is the rescission of the agreement.

The effect of the reformation of the agreement is to render liable to damages for breach of the agreement to give the defendants immediate possession. It is open to question whether, upon the pleadings, they have claimed

Alta.

S.C.

ROYAL TRUSTS CO. v. FAIR-BROTHER.

damages upon that ground but, if they have not done so, their counterclaim should be amended in such manner as to so claim.

The defendants are entitled to damages for the loss of the hay crop. By an order made in their action against Gehan they were directed to cut and stack the hay in order that it might be preserved and that it should remain upon the premises until the trial or other disposition of the action. It appears that it was afterwards sold by the defendants who received the proceeds amounting to $1,980.94, and that the expenses of baling and marketing it amounted to $600.45. I cannot find in my notes any evidence as to what disposition the defendants made of the proceeds. It may be that they or some portion thereof were paid over to Gehan. The defendants claim $1,380.49 as the net value of the hay and it was agreed by counsel that, if it were found that the defendants were entitled to recover anything for putting up the hay, they were to be entitled to recover at the rate of $5 per ton for 70 tons. If they have paid over to Gehan the net proceeds their damages for the loss of the hay will amount to $1,880.49. This however should be reduced by the amount, if any, retained by them out of the net proceeds of the sale of the hay.

The defendants are also entitled to recover the costs taxed by Gehan against them including the costs of the appeal. If the parties cannot agree upon the amount there will be a reference to the clerk to ascertain same.

The defendants will also be entitled to recover the costs of their solicitor incurred in the Gehan action. These will be taxed by the clerk, the plaintiff to have due notice of the taxation and to be at liberty to appear thereon.

I disallow the claim of $700 for special damages. The only evidence of special damage is that, by reason of the loss of the hay, the defendants were obliged to sell some of their cattle. They are now recovering the value of the hay and they could have bought hay at that time at the same price.

It was agreed by counsel at the trial that, if I should hold that the defendants were entitled to succeed upon their counterclaim, the amount awarded them should be set off against the amount due to the plaintiff under the agreement for purchase-money and interest and that, if the amount to which the defendants were found entitled to

recover exceeded the purchase-money and interest, the defendants should be entitled to judgment against the plaintiff for the excess and to a conveyance of the property. The judgment will therefore be in accordance with those terms.

The defendants will have the costs of the action to be taxed under column 4 of the schedule.

In their action against Gehan the defendants might have joined the deceased as a defendant and claimed alternatively against him the relief claimed by them in this action, (see Child v. Stenning (1877), 5 Ch. D. 695) and thus saved the costs of this action. I doubt, however, whether their failure to take that course disentitles them to recover such costs.

Judgment accordingly.

HOULDING v. CANADIAN CREDIT MEN'S TRUST ASS'N.

Saskatchewan King's Bench, Taylor, J. July 14, 1921.

1. **Husband and Wife (§IIE—80)—Loans by Wife—Sale of Motor Car by Husband to Wife—Memorandum of Agreement—Change of Possession and Ownership—Sufficiency of — Bankruptcy of Husband—Rights and Creditors.**

A husband while apparently in sound financial condition made an arrangement with his wife whereby in consideration of $600 loaned by the wife and previous loans by her amounting to $1,500 in all, the husband agreed to transfer to her his McLaughlin car, and a written memorandum was made after which the wife treated the car as her own personal property. A bill of sale was subsequently drawn up and recorded but this was invalid as not being registered in accordance with the requirements of the Bills of Sale and Chattel Mortgage Act (R.S.S. 1920, ch. 200). In an action directed by the Judge in Bankruptcy the Court held that there had been sufficient delivery and change of possession to comply with the Act, that there had been no fraud and that the wife was entitled to possession of the car.

[Ramsay v. Margrett, [1894] 2 Q.B. 18 followed. Kingsmill v. Kingsmill (1917), 41 O.L.R. 238, referred to.]

2. **Bankruptcy (§I—6)—Authorised Assignee or Trustee under Bankruptcy Act—Right to Bring Action to Set Aside Transaction for Non-Compliance with Bills of Sale and Chattel Mortgage Act—Transaction Completed Before Passing of Bankruptcy Act.**

The authorised assignee or trustee in bankruptcy can maintain an action to set aside a transaction for want of compliance with the provisions of the Bills of Sale and Chattel Mortgage Act, (Saskatchewan) even although the transaction was complete before the Bankruptcy Act came into force. There being under the Provincial legislation an existing cause of action in which the transaction was liable to be impeached, it was open to the Dominion Parliament to enact that this cause of action be vested in authorised trustee and prohibit any creditor from thereafter bringing action for his own

Sask.

K.B.

HOULDING v. CANADIAN CREDIT MEN'S TRUST ASS'N.

benefit to impeach the transaction and this is what was done in the Bankruptcy Act secs. 6 (3), and 18, the only exception being under sec. 35, where the trustee refuses to act.

[See Annotations Bankruptcy Law in Canada, 53 D.L.R. 135, 59 D.L.R. 1.]

3. Evidence (§IVG—421)—Examination Taken Under the Bankruptcy Act—Use of Portion of in Collateral Proceedings.

A portion only of an examination taken under the Bankruptcy Act cannot be tendered as evidence in an issue directed to be tried by the Judge in Bankruptcy to determine the ownership of property alleged to have been wrongfully transferred by the bankrupt to his wife.

TRIAL of an issue directed by the Judge in Bankruptcy to determine whether a McLaughlin motor car was the property of the plaintiff as against the authorised assignee of her husband's property. Judgment for plaintiff.

R. F. Hogarth, for plaintiff.

A. M. McIntyre, for defendant.

Taylor, J.:—By an order made on May 16, 1921, by the Judge in Bankruptcy an issue was directed to determine whether the McLaughlin touring car, Model H. 49, No. 32171, then in possession of the plaintiff, was her property as against the authorised assignee of her husband's property, and the trial of the issue came before me at Saskatoon pursuant to the order.

I shall first deal with the question of the admissibility of the portion of the examination of the plaintiff tendered by the counsel for the defendant as evidence against the plaintiff.

Counsel for the plaintiff admitted that one Charles E. Houlding had made an assignment to the defendant, an authorised trustee, under the Bankruptcy Act, 9-10 Geo. V. 1919 (Can.), ch. 36, and that under that Act proceedings had been taken to examine the present plaintiff as a person having property of the debtor in her possession, and she appeared, though not represented by counsel, before the Local Registrar at Saskatoon, and had been examined under oath on November 11, 1920. It was stated by plaintiff's counsel when admitting that the examination had been held (and not denied by the defendant's counsel), that the examination had proceeded somewhat irregularly, questions having been asked not only by the two counsel who appeared for the trustee but also by another representative of the trustee. Counsel for the defendant tendered as evidence against the plaintiff questions Nos. 1 to 15 inclusive, 22 to 36 inclusive, and 39 to 50 inclusive, on that examination.

and it was objected that this was not receivable in evidence in these proceedings against the plaintiff.

The main contention was that this examination appears to be taken under the Bankruptcy Act and rules, for a particular purpose, to enable the trustee to move on admissions therein for delivery up of the property therein attempted to be held by the person examined. Such an application was made in this bankruptcy proceeding to the Judge in Bankruptcy, and the decision of McKay, J. thereon is found in In re Houlding (1921), 59 D.L.R. 238, 14 S.L.R. 277.

His decision is that he had power to make an order for delivery of the automobile to the trustee, but concluded that in this case it would be more satisfactory to all parties that he should direct an issue to be tried, making the plaintiff claimant in the issue. The inference would be that from the whole examination he could not conclude that there had been such clear admissions of fact as would justify an order to deliver up the car to the trustee.

According to the practice prevailing in England it would appear that an examination in bankruptcy before the Commissioner can be proved and put in evidence by a party adverse in interest. The first important rule to be borne in mind is (and I quote from Taylor on Evidence, 10th ed. p. 523):—"....that the whole statement containing the admission must be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained.....such rule applies equally both to written and to verbal admissions."

And at p. 525:—

"Where (see Goss v. Quinton, 12 L.J. (C.P.) 173) plaintiffs who were assignees for bankrupt gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, it was held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, he had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as some evidence on his behalf of the agreement and its contents."

And at p. 526:—

Sask.

K.B.

HOULDING v. CANADIAN CREDIT MEN'S TRUST ASS'N.

"....where a defendant had been examined on two days before commissioners of the Court of Bankruptcy, and the plaintiff read the examination taken on the first day, he was compelled to read that also which was taken on the second day. (Smith v. Biggs, 2 L.J.(Ch.) 161)."

The conclusion would seem to be that a portion merely of an examination taken under the Bankruptcy Act cannot be tendered in evidence in collateral proceedings such as the proceeding before me, and that if the examination be admissible at all, the whole must be put in evidence. The objection, therefore, taken by counsel for the plaintiff to the admission of these particular questions and answers as evidence in this proceeding appears to have been well taken.

The evidence taken before me established that one Charles E. Houlding was a hardware merchant at Saskatoon in rather a large way, up to the time of his assignment on October 12, 1920; that on January 1, 1921, he had a book surplus of assets over liabilities of about $20,000, as the representative of the trustee afterwards figured, "pairing it," as he stated, for the purpose of a return to the Income Tax Commissioner. On January 20, he was advanced by his bankers between $8,000 and $9,000 which was paid to a creditor.

A year previously he had procured from his wife Victory Bonds of the part value of $900, for which he gave the plaintiff receipt (Ex. "Pl."). On February 6, 1920, he procured a further advance from his wife, the plaintiff, of $600, and at that time it was agreed that she should have the McLaughlin automobile, a written memorandum of the agreement being then made under date of February 6, 1920. The agreement clearly points to the fact that the car was then to be considered as her property. The car was then in a public garage. Shortly afterwards the plaintiff and her husband left for British Columbia. Before leaving she instructed the chauffeur to take the car to the garage and look after it for her. They did not return from British Columbia until April 29. The plaintiff was quarantined for smallpox from that time until about the middle of July. She then had an extra piece put on the shift gear so that she could drive it, and from that time on it would be used by her or by her husband as suited their convenience. The husband paid the garage bills.

On July 21, 1920, the husband suggested to her that a bill of sale of the car be drawn and recorded. He instructed

solicitors, who prepared this, and the plaintiff, knowing, I am satisfied, little of the effect of the document or its meaning, made the affidavit of bona fides. Although her testimony before me is contradicted to some extent by the bill of sale, and apparently to some extent inconsistent with her examination, her evidence before me impressed me as creditable and true.

The husband was apparently drinking, and under these circumstances she may well have desired to have the car to represent the loan which she had made to him, and the additional advance of $600, and as between husband and wife it would not at all be surprising that the husband would be quite willing to let her have the car, although he might have sold it for a better figure; and under the circumstances I would not infer any intent to defraud.

The public accountant and auditor employed by the trustee attributes the subsequent deficiency of assets to the fall in value in the stock-in-trade of the bankrupt between January 1, 1920, and the time of the assignment. The conclusion at which I arrive is that on February 6, 1920, the plaintiff bought the car in good faith for valuable consideration.

It cannot be contended that the transaction is liable to attack under the Bankruptcy Act, as that Act did not come into force until July 1, 1920.

The contention is, however, that the transaction was not, in February, 1920, accompanied by an actual and continued change of possession of the goods and chattels sold, and was therefore required to be made in writing accompanied by an affidavit of execution and an affidavit of bona fides, registered within 30 days from the execution; otherwise the transaction is absolutely void against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

The first argument in answer to this contention was that the authorised assignee is not a creditor of the bargainor, or a subsequent purchaser or mortgagee in good faith, and has no status to attack the transaction. The same objection was before McKay, J., 59 D.L.R. 238, on the application to him and he expresses the general opinion that the trustee has a right to attack the plaintiff's title or ownership to the car, concluding that the trustee is in a similar position to the liquidator under the Winding Up Act, R.S.S. 1920, ch. 82, citing Dominion Trust v. Royal Bank of Canada

Sask.

K.B.

HOULDING v. CANADIAN CREDIT MEN'S TRUST ASS'N.

(1921), 59 D.L.R. 224, and referring to sec. 31 of the Bankruptcy Act, which provides that certain conveyances or transfers of property shall be deemed fraudulent and void as against the trustee under the authorised assignment, and in such cases the trustee would be the person to take the necessary proceedings to have the conveyance or transfer declared void.

But this transaction is not attacked under sec. 31 of the Bankruptcy Act. As I have previously stated, that Act did not come into force until July 1, 1920, and the transaction was completed in February of 1920, and if it can be successfully attacked it can be done only under the Saskatchewan legislation respecting Bills of Sale and Chattel Mortgages, R.S.S. 1920, ch. 200, to which I have referred, and so far as the position of a liquidator under the Winding-Up Act is concerned the decision of Riddell, J., in Re Canadian Shipbuilding Co. (1912), 6 D.L.R. 174, 26 O.L.R. 564, that he is not a creditor or purchaser for valuable consideration and cannot take advantage of the provisions of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, is squarely in point. This conclusion seem to me to be borne out by the authorities cited by him. See also Security Trust Co. Ltd. v. Stewart (1918), 39 D.L.R. 518, 12 Alta. L.R. 420, at p. 423, in which Beck and Hyndman, JJ., approve Re Canadian Shipbuilding Co. Security Trust Co. Ltd. v. Stewart must now be taken to have been overruled on one of the questions therein decided, that only execution creditors can avail themselves of the provisions of the Act, by the decision of the Supreme Court of Canada in Grand Trunk Pacific R. Co. v. Dearborn (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315.

In my opinion, however, the authorised assignee or trustee in bankruptcy can maintain an action to set aside a transaction for want of compliance with the provisions of the Bills of Sale and Chattel Mortgage Act, even although the transaction was complete before the Bankruptcy Act came into force. The effect of the provincial legislation would be that at the time the Act came into force there was an existing cause of action created by the provincial legislation, in which the transaction was liable to be impeached. As bankruptcy legislation it was open to the Dominion Parliament to enact that this cause of action be vested in the authorised assignee or trustee in bankruptcy and prohibit any creditor from thereafter bringing action for his own

benefit to impeach the transaction; and that I think is what has been done in the Bankruptcy Act. On a receiving order being made the property of the debtor (as to the meaning of which see sec. 3, sub-sec. (dd)) forthwith passes to and vests in the trustee (sec. 6, sub-sec. (3)), and no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose. (Sec. 6, sub-sec. (1)).

It is provided in sec. 35 that:

"If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorised assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceeding after being duly required to do so, the creditor may, as of right, obtain from the Court an order authorising him to take proceedings in the name of the trustee, but at his own expense and risk upon such terms and conditions as to indemnity to the trustee as the Court may prescribe—etc."

As provided also in sec. 18, an authorised trustee may exercise any powers the capacity to exercise which is vested in the trustee under the Act. The conclusion, therefore, would seem to be that, except in those cases where a creditor is authorised under the provisions of sec. 35 to take proceedings, any proceeding to be taken for the benefit of the bankrupt's or authorised assignor's estate is to be taken by the trustee or authorised assignee.

In my opinion, therefore, the defendant can, on behalf of all creditors, set up the provisions of the Chattel Mortgage Act in answer to the plaintiff's claim, if upon the facts the transaction is open to attack thereunder, and as there was no writing evidencing the transaction registered within 30 days of the execution thereof (which would be 30 days from February 6, 1920) the sale is void unless it can be said to have been accompanied by an immediate delivery and followed by an actual and continued change of possession of the car.

With some hesitation I have arrived at the conclusion that there was sufficient delivery and change of possession to comply with the statute.

There are many cases dealing with what amounts to

Sask.

K.B.

HOULDING v. CANADIAN CREDIT MEN'S TRUST ASS'N.

actual delivery and change of possession as between husband and wife, and, as pointed out by Middleton, J., in Kingsmill v. Kingsmill (1917), 41 O.L.R. 238, the distinction between the case of a gift to the wife and a sale by the husband to the wife must be borne in mind. A sale is valid without delivery, and when the possession is doubtful it is attached by law to the title. The facts here are very similar to those in Ramsay v. Margrett, [1894] 2 Q.B. 18. There a wife who had separate estate agreed to purchase from her husband some furniture and other personal chattels belonging to him which were in the house in which she lived with him. There was no formal delivery of the goods by the husband to the wife, but they remained as they had previously been, in the house in which the husband and wife were living together. She subsequently sent part of the goods to her own bankers, and the remainder were afterwards taken in execution by a judgment creditor of her husband. There, as here, the wife agreed with the husband in perfect honesty and good faith to purchase goods which belonged to him, and under the bargain the property in the goods passed to his wife. In Ramsay v. Margrett, supra, the goods were in the house in which the husband and the wife were living together. Here, the automobile was apparently considered subject to her control and direction and used by the husband no more, so far as the evidence goes, than it might be expected that a wife would permit her husband with whom she was living to use her property. Possession being doubtful it is attached by law to the title. The intention was that both the property in the automobile and the possession of it should pass at once to the wife, and the fact that the automobile remained in a garage as before is as equally consistent with it being in her possession as with it being in her husband's possession. Ramsay v. Margrett, supra, was followed in Shuttleworth v. McGillivray (1903), 5 O.L.R. 536, in the Divisional Court.

These cases seem to me to practically take any bona fide transactions as between husband and wife out of the Act, and to substitute a constructive or presumed change of possession for the actual and continued change of possession required by the Act. Ramsay v. Margrett appears, however, to be accepted as settled law, and it would be most unjust to take that from the wife for which she has paid her husband, because of failure to register a bill of sale. The penalty would appear entirely out of proportion to the

omission, and the creditors would get the benefit of her money and the automobile too.

There will be judgment for the plaintiff declaring the automobile in question to be her property, and she is entitled to costs.

Judgment for plaintiff.

McKAY v. BIXBY.

Alberta Supreme Court, Simmons, J. May 20, 1921.

Damages (§IIIA—62)—Agreement to Purchase Land—Purchaser's Knowledge of Lease Preventing Fulfillment—Rights of Parties.

A purchaser of land who at the time he agreed to purchase knew of a lease, which unless the tenant would agree to give up possession would prevent the vendor from carrying out the agreement, there being no failure on the part of the vendor to disclose the existence of such lease, and no fraud or laches on his part, cannot recover damages against the vendor for inability to carry out the agreement.

ACTION claiming specific performance or in the alternative damages for breach of an agreement for the sale of land. Dismissed.

A. McL. Sinclair, K.C., for plaintiff.

H. F. Stow and H. C. B. Forsyth, for defendant.

Simmons, J.:—Plaintiff claims specific performance, or in the alternative damages for breach of an agreement made between the plaintiff and defendant for sale by the defendant to the plaintiff of sect. 7-35-21 W. 4th M. in the Province of Alberta.

It is admitted plaintiff cannot get specific performance as defendant is not now the owner and no relief is claimed against the registered owners of the land.

On March 6, 1919, plaintiff wrote defendant asking for terms and price and advising plaintiff that defendant could sell this land for him.

On July 10 he wired defendant offering $19 per acre, $1,000 per year or balance at 6%—want possession at once.

Defendant replied accepting offer and asking plaintiff to advise Wilcon that defendant had three places in Oregon that defendant would let him have if he, Wilcon, would come to Oregon, and saying, "I think you can fix up with him all O.K."

Wilcon was to the knowledge of the plaintiff the lessee in occupation of these lands but it is not clear that plaintiff knew the exact terms of said lease, which was a lease for 5 years.

Sask.

K.B.

CLARK v. MOOERS ET AL.

An agreement was sent by plaintiff from Elnora to defendant at Newberg, Oregon, and defendant signed same and forwarded one copy with draft attached to same through the bank at Newberg, Oregon, which draft and agreement were examined by plaintiff at the Union Bank of Canada at Elnora, when it was ascertained that same was not properly executed.

The agreement was returned for proper execution and was executed by defendant and again forwarded through the bank with draft attached. In the meantime McKay had learned from Wilcon that the latter would not give up possession and he wired defendant to this effect and asked defendant to come to Elnora "to get matters straightened out."

Defendant came to Elnora and there was a conflict of evidence between plaintiff and defendant as to what was said but it is quite clear that Wilcon was still unwilling to surrender his lease and give up possession.

In view of the fact that plaintiff knew of the lease when he agreed to purchase and that through no failure on the part of the defendant to disclose the existence of same and no fraud and no laches upon the part of the defendant, the agreement was not one which could be performed by the defendant, the defendant is not liable in damages for inability to perform.

I conclude, therefore, that the rule in Bain v. Fothergill (1874), L.R. 7 H.L. 158, 43 L.J. (Ex.) 243, applies and the plaintiff's action for damages fails.

The plaintiff's action is therefore dismissed with costs.

Action dismissed.

CLARK v. MOOERS ET AL.

Saskatchewan King's Bench, Bigelow, J. July 8, 1921.

Companies (§VG.—291)—Promoter—Interests Acquired Prior to Forming Company—Assignment of Interests in Consideration of Issue of Shares—Notice to Shareholders—Absence of Fraud or Concealment—Agreement Within Power of Company—Powers of Minority Shareholders to Cancel Issue of Stock.

Whether a promoter of a company has acquired assets as a trustee of the company which is formed subsequently to the acquiring of such interests is a question of fact, and where the prospectus filed substantially shews the agreement between the promoter and the company, and the number of shares the promoter is to receive for the assignment of the interests he has acquired, the shareholders having notice of the agreement and there having been no fraud or concealment, the promoter

will not be deemed to be the agent or trustee of the company as to the shares allotted to him in accordance with the terms of the agreement and the agreement being within the powers of the company, a minority of shareholders, cannot have the issue of stock cancelled or compel the promoter to pay for such stock but he may be made to account for travelling expenses, entertainments and donations paid out to him or by him out of the funds of the company without any authority. [Dominion Cotton Mills Co. Ltd. v. Amyott, 4 D.L.R. 306, [1912] A.C. 546, followed.]

ACTION by a shareholder on behalf of himself and other shareholders to have all the stock issued to a promoter of the company cancelled, and to make him account for moneys paid to him by the company as salary and expenses.

W. B. Willoughby, K.C., N. R. Craig and E. M. Thomson, for plaintiff.

W. F. Dunn and W. H. B. Spotton, for defendants.

Bigelow, J.:—The defendant H. F. Mooers conceived the idea of building a cold storage warehouse at Moose Jaw. On January 26, 1912, he entered into an agreement with His Majesty The King, represented by the Minister of Agriculture for the Dominion of Canada, whereby he agreed to build a public cold storage warehouse at Moose Jaw, and the Minister agreed to give him a subsidy of $27,000. On February 6, 1912, Mooers entered into an agreement with the City of Moose Jaw, whereby the city agreed to sell, and Mooers agreed to buy certain lots for $6,000.

A company was incorporated, called the Moose Jaw Cold Storage Co. Ltd., on February 19, 1912, the subscribers being H. F. Mooers, of Kingston, 1 share, $100; Andrew McLean of Kingston, 1 share, $100, and N. M. Jackson of Calgary, 1 share of $100.

Articles of Association were filed on February 19, 1912, and a prospectus was filed February 19, 1912. The prospectus filed states:—

"By agreement in writing dated 8th day of February, 1912, the company have secured from Mr. H. F. Mooers all his right, title and interest in and to the subsidy and contract granted by the Dominion Government bearing date the 26th day of January, 1912, for cold storage purposes at the City of Moose Jaw, Saskatchewan, in consideration of the issue to him by the company of 270 shares of the 8% cumulative preference stock of the company and of 270 shares of the ordinary stock of the company, both fully-paid up and non-assessable. The said agreement may be inspected at the office of the company's solicitors during business hours."

Sask.

K.B.

CLARK v. MOOERS ET AL.

Another prospectus was issued soon afterwards, but not registered, which includes a similar clause, but states that the company has secured Mooer's agreement with the City of Moose Jaw as well, and that Mooers is to receive 270 shares of preference stock and 360 shares of common stock.

No agreement between Mooers and the company, dated February 8, was put in evidence, but there is such an agreement dated May 17, 1912.

A meeting of directors was held on May 9, 1912, at which only Mooers was present in person, but the minutes were afterwards signed by McLean, at which meeting a resolution was passed: "That H. F. Mooers assign and transfer all his interest in the above-mentioned agreements (referring to the two agreements above-mentioned) to the company; that the assignment thereof be prepared and that the same be accepted by the company and executed."

Another similar meeting of directors was held on May 17, 1912, at which this resolution was passed: "That the assignment be approved and accepted and executed, and the seal of the company be attached, and that 270 shares of the preference stock and 360 shares of the common stock of the company be allotted and transferred to H. F. Mooers, and that the secretary be instructed to register him as the holder of such shares, both fully-paid up and non-assessable."

These shares were issued to H. F. Mooers. In the meantime — the exact time does not appear — twenty-five citizens of Moose Jaw subscribed for preference stock of $1,000 each.

A resolution was also passed on May 17, 1912, that the company's warehouse be constructed under the supervision of H. F. Mooers who shall be paid the sum of 10% over and above the cost of labour and material.

On the construction of the warehouse the company owed Mooers $8,300 which he says the company could not pay in cash, so Mooers issued to himself, without the authority of the directors or shareholders, 67 shares of the par value of $6,750 on that account.

This action is brought by a shareholder on behalf of himself and other shareholders in which they seek to have all stock issued to H. F. Mooers—some of which was transferred to the two other defendants, Mary Mooers and Edwin Mooers—cancelled, or in the alternative that he pay for that stock.

The plaintiff further claims that the defendant H. F. Mooers do account for all moneys paid to him by the said company as salary and expenses and that he repay such sums as shall be shewn to have been improperly paid.

In the first place I do not think Mooers was the agent or trustee of the company in getting these two contracts. He got them on his own behalf. He probably did have an intention all the time of forming a company, but that would not prevent him acquiring these contracts for himself and selling to the company if he made full disclosure. It seems to me absurd to contend that these two contracts were of no value. The land was obtained at a cheap price, and, while anyone else would have obtained a similar agreement from the City of Moose Jaw, no one else could have obtained a subsidy from the Dominion Government for a cold storage warehouse at Moose Jaw after Mooers had obtained same. See Omnium Electric Palaces Ltd. v. Baines, [1914] 1 Ch. 332. Sargant, J., states, at p. 347:—

"Whether promoters are in fact acquiring any assets as trustees for a company . . . a question of fact; and whereas here the whole scheme has throughout been that they are to sell to the intended company at a profit the assets which they are acquiring, the natural inference of fact is that qua those assets, they are not intended to be trustees for the company, but are intending to occupy the relationship to the company of vendors. That this relationship when coupled with promotion involves certain fiduciary duties is undoubted . . . but it is only confusing matters to identify such a fiduciary relationship with ordinary out and out trusteeship."

Did he make full disclosure? The prospectus filed substantially shewed the agreement between Mooers and the company. A new prospectus was issued, and I believe was circulated. Three of the shareholders say they never saw it, but the plaintiff admits it was shewn to him, and this corroborates Mooers' evidence that he distributed the prospectus to the subscribers. This second prospectus shews the agreement between Mooers and the company, and shews how many shares he was to receive for the assignment of these two agreements.

Then it is contended that, not only must Mooers make full disclosure but the contract must be submitted to an independent board of directors who will exercise independent and intelligent judgment and will protect the company in

Sask.

K.B.

CLARK v. MOOERS ET AL.

its dealings with the promoter. I agree with the proposition. See Erlanger v. The New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218. I am of the opinion that the board of directors Mooers and McLean who passed on this agreement were not an independent board of directors. I think this would be a good ground for voiding the contract if action had been taken in time and the parties could be restored to their original status. Edgar v. Sloan (1894), 23 Can. S.C.R. 644. That is not the case here. All the Moose Jaw shareholders had notice—actual notice I think in most cases—and in other cases by the filing of the prospectus of the agreement between Mooers and the company. There was no concealment, and I do not think they can void the contract at this late date.

Another document put in which would affect the question of notice was an agreement made September 25, 1912, between H. F. Mooers and 8 shareholders whereby these 8 shareholders were to guarantee a line of credit to the extent of $25,000 and obtain some of Mooers' stock for so doing, and the 25 subscribers referred to above were to receive some of Mooers' stock. If they did not know exactly what stock Mooers had obtained for these two agreements they should certainly have been put on their enquiry then.

Another reason why plaintiff cannot succeed is that the minority shareholders are confined to actions in which the acts complained of are of a fraudulent character or beyond the powers of the company. Dominion Cotton Mills Co. Ltd. v. Amyot, 4 D.L.R. 306, [1912] A.C. 546. I cannot find any fraud here, and the acts complained of are not beyond the powers of the company.

I am also of the opinion that if plaintiff had any action for the matters above set out, it would be barred by the Statute of Limitations and by the great delay in bringing the action.

I do think, however, that the plaintiff should have some redress against defendant H. F. Mooers for travelling expenses, entertainment, and donations paid out to him or by him out of the funds of the company without any authority. Such payments I consider a fraud on the company. I cannot say that the salary paid him is unreasonable. There was no evidence to shew what salary would be reasonable for a manager of a cold storage plant. He spends a good deal of his time in Moose Jaw, but again he is away a good deal, and I am very doubtful whether the company has got value for the salary he gets.

I direct a reference to the Local Registrar to ascertain the amounts paid out to H. F. Mooers for travelling expenses, entertainment and donations or paid out of the funds of the company without any authority for 6 years from the beginning of the action. The plaintiff will have judgment against H. F. Mooers for that amount; said amount on being obtained to be paid into the funds of the company; otherwise the action is dismissed with costs.

The defendants, except the defendant company, will have all costs of the action up to June 7, 1921, the date when the amendment was made claiming these wrong payments. After that, the defendants, except the defendant company, will have all costs except those that relate exclusively to that part of the plaintiff's claim which the plaintiff will have.

I am giving costs to the defendants Mary Mooers and Edwin Mooers on the statement of counsel that defences have been filed for them, although in the copy of pleadings before me no such defences appear. This would be the fault of the solicitors for plaintiff. I do not know whether the defendant company filed a defence or not. In any event I do not think they should have costs.

Action dismissed.

STRONG & DOWLER v. MUNICIPAL DISTRICT OF PATRICIA NO. 485, AND R. D. McLAREN.

Alberta Supreme Court, Scott, J. June 16, 1921.

Municipal Corporations (§IIB—35)—Municipal District—By-law to Raise Money to be Used to Buy Seed Grain and Feed — Money Advanced by Bank — Purchase of Hay by Person Appointed by Councillor—No Resolution Giving Councillor Authority—Liability of District.

A municipal district council passed a by-law under the provisions of the Municipal District Seed Grain Act 1918 Alta. stats. ch. 10 which provided that the district might advance money for seed grain or feed to farmers residing on patented lands . . . . and that the council might, to enable them to make such advances, borrow a certain sum on the promissory notes of the district and under this by-law the council obtained the amount required from the bank. No resolution of the council was ever passed relating to the purchase of seed grain or feed under the by-law or for the disposition thereof or appointing any person or persons to purchase or dispose of same. The Court held that in the absence of a resolution authorising one of its councillors to buy hay, the district was not liable for hay purchased by his instructions and if such councillor had been authorised to purchase the hay in question he had no right to delegate that power to another, and the district was not liable for hay purchased by such delegated authority.

Alta.

S.C.

STRONG & DOWLER v. MUN. DIST. OF PATRICIA No. 485 AND MCLAREN.

ACTION to recover the balance due for the price of hay alleged to have been purchased by the defendant district, or in the alternative damages for breach of agreement, or in the further alternative damages against one of the councillors for breach of implied warrant of authority. Action dismissed.

G. B. Henwood, for plaintiff.

S. W. Field, for defendants.

Scott, J.:—The plaintiffs allege that by agreements in writing dated respectively the 8th, 12th, 13th, 14th and 17th, 1920, they sold to the district which purchased from them 20 cars of timothy hay and 14 cars of upland hay of which accepted and paid for seven cars, that by writing dated April 28, 1920, the district requested the plaintiffs who agreed thereto, that they should act as its agent in reselling or otherwise disposing of the remainder of the hay so purchased and agreed to pay them the balance, if any, owing to them in respect of the purchase-price over and above the net amount realised by such resale after deducting the usual agency commission and expenses incidental to such resale, that the plaintiffs thereupon proceeded to sell and dispose of the remainder of the hay so purchased and that, after crediting the net moneys realised from such resale, there remained a balance of $2,636.46 payable by the district to the plaintiffs, on the price of the hay so purchased by the district.

The plaintiffs further allege in the alternative that about April 28, 1920, defendant McLaren, being then a councillor of the district and assuming to be the agent thereof, asserted and warranted to the plaintiffs that he was authorised by it to instruct them to resell or otherwise dispose of the hay on account of the district and that it would pay them the difference between the contract price and the price realised; that upon the faith of such assertion and warranty they entered into the agreement to sell the hay, that the district alleges that McLaren was not authorised by it to enter into such agreement and refused to be bound by it and that, if he had no such authority, the plaintiffs have suffered damage to the amount of $2,636.46 by reason of the breach of the implied warrant of authority of McLaren. They claim that amount as the balance due by the district on the purchase of the hay, or, in the alternative, the like amount for damages for breach of the agreement of April 28th, 1920, or, in the further alternative, damages as

against McLaren for the like amount for breach of implied warrant of authority.

On March 6, 1920, the council of the district passed a by-law under the provisions of the Municipal District Seed Grain Act ch. 10 of 1918, (Alta.) which provided that the district might for the spring of 1920 advance money for seed grain or feed to farmers residing on patented lands who, owing to bad crops or other adverse conditions, required such assistance and that the council might, to enable them to make such advances, borrow on the promissory notes of the district the sum of $25,000.

Under this by-law the council obtained upon its promissory notes advances from the Canadian Bank of Commerce at Vegreville to the amount of $25,000, less the discount charges.

Section 8 of the Act as amended by ch. 11 of 1919, (Alta), provides that no money of the fund should be advanced to any person for the purpose of providing seed grain or seed grain and feed and that the intention of the Act was that the purchase of all such grain and the disposition thereof should be entirely done and carried on by the council or by such person or persons as might be appointed by resolution of the council and in the manner appearing to them best calculated to carry out the purpose of the Act. Section 185 of the Rural Municipalities Act, ch. 3 of 1911-12 Alta., provides that, except as therein provided, "the council of every municipality may exercise the duties and powers conferred on it by this Act either by resolution or by by-law."

No resolution of the council was ever passed relating to the purchase of seed grain or feed under the by-law or for the disposition thereof nor appointing any person or persons to purchase or dispose of same.

Defendant McLaren was the councillor for Division No. 1 which lies adjacent to Viking. Apparently at his suggestion $8,000 of the funds was transferred to a bank at that place for the purpose of purchasing feed for farmers in his division and a number of blank cheques upon the bank there signed by the reeve and secretary-treasurer were delivered by the latter to him to purchase same.

Shortly after the by-law was passed defendant McLaren came to Edmonton to look for feed and there saw one McPherson to whom he gave instructions to purchase hay and other feed for delivery at Viking, and delivered to him a

Alta.

S.C.

STRONG & DOWLER v. MUN. DIST. OF PATRICIA No. 485 AND MCLAREN.

number of the blank cheques referred to. It appears that the greater portion if not the whole of the hay in question was purchased from the plaintiffs by McPherson.

One Kelly, the secretary-treasurer of the district of Iron Creek which adjoins the south boundary of the defendant district, was purchasing hay at that time for his district and defendant McLaren arranged with him that he should superintend the reception and distribution of the hay purchased for the defendant district. McLaren's instructions to McPherson were that he should keep in touch with Kelly and ascertain from him from time to time what quantity of hay was required. It appears that after he gave these instructions to McPherson he did not further interfere in the purchase or delivery of the feed but left those matters entirely in the hands of Kelly and McPherson. One result of his non-interference was that $1,000 of the $8,000 deposited at Viking was applied in payment of feed purchased for the Iron Creek District.

Defendant McLaren states that he was present at the meeting at which the by-law was passed, and that it was there agreed that he should have charge of the money placed at Viking. Riddell, the secretary-treasurer of the municipality, states that, at that meeting, there was some discussion as to the situation at Viking and as to placing some of the money there but that no decision was reached, and that the intention of the council was that the farmers should buy the hay and that the council should advance them the money to pay for it.

I hold that in the absence of a resolution to that effect defendant McLaren was not authorised by the council to buy the hay in question and that, therefore, the defendant district is not liable to the plaintiffs for the hay purchased by his instructions. It is not shewn whether the latter accepted it but, even if it had been accepted, such acceptance would not render the district liable. See Young v. Mayor of Leamington (1883), 8 App. Cas. 517 and McKay v. City of Toronto, 48 D.L.R. 151, [1920] A.C. 208.

Even if defendant McLaren had been duly authorised by the council to purchase the hay he had no power to delegate that authority to another. Where an agent is appointed by reason of his personal fitness or skill to exercise the powers conferred upon him the maxim delegata potestas non poteat delegari must apply.

The evidence does not support the claim of the plaintiffs

that defendant McLaren warranted to the plaintiffs that he was authorised by the defendant municipality to instruct the plaintiff to resell or dispose of the hay in question or to enter into the agreement of April 28, 1920. On the date of the agreement McLaren met one Boss, the agent of the plaintiffs. The former states that the latter asked him to sign the agreement and that he then told him that he had no authority to sign it but that he would sign it if that was the only way to dispose of it. The latter admits that McLaren may then have told him that he had no authority to sign it.

I dismiss the action, with costs.

Action dismissed.

WADIN v. BOYD.

Saskatchewan King's Bench, Bigelow, J. June 30, 1921.

Contracts (§IC—25)—Agreement to Cancel a Contract for the Sale and Purchase of Land—Inadequacy of Consideration — Evidence of Fraud—Ground for Cancelling Transaction.

Where in an agreement, the consideration is so inadequate as to amount in itself to evidence of fraud, it is a ground for cancelling the transaction.

[See Annotation, Recission of contract for fraud and damages for deceit, 32 D.L.R. 216.]

ACTION by vendor on an agreement for sale of a farm.

A. F. Sample, for plaintiff.

G. N. Broatch, for defendant.

Bigelow, J.:—The plaintiff sues as vendor on an agreement for sale of a farm.

The defence is that the agreement was cancelled on March 22, 1921. Such a document was signed by the plaintiff, but plaintiff alleges that his signature was obtained by fraud.

When plaintiff and defendant entered into an agreement for the sale of the farm, plaintiff delivered to the defendant as part of the consideration chattels worth about $2,500. Defendant paid cash at the time of the agreement $1,500, went into possession and farmed the land for the season, and, although defendant agreed to deliver one-half share of the crop at the elevator or in cars at Vantage in the name of the vendor, he did not deliver any of the crop, and plaintiff only received $100 and 20 bushels of wheat worth about $50 after the cash payment. The value of the half share of the crop which defendant should have delivered to the plaintiff was about $1,225.

Sask.

K.B.

WADIN v. BOYD.

Defendant alleges that he made some improvements on the place which were a consideration for the plaintiff releasing him from the contract. The value of the improvements,—not counting lightning rods $103 and lumber $73, which are not yet paid for and which plaintiff may have to pay—is about $200.

The plaintiff received in cash and wheat $1,650, for chattels and crop worth $3,725; a balance due him $2,075, and it is alleged that the plaintiff agreed to cancel the original agreement in consideration of the $200 worth, out of improvements.

I cannot believe that the plaintiff intended entering into any such agreement. The plaintiff is illiterate, and cannot read or write English. The cancellation agreement was prepared by one Bright, a bank manager, who was supposed to be acting for both parties. He drew up the original agreement for sale. Many of the clauses in the form, containing covenants by the purchaser, were struck out. It would seem to me that Bright acted only in the interest of the purchaser when the original agreement was drawn, and I can quite understand him so acting when the alleged cancellation agreement was drawn. Bright's evidence was that the plaintiff understood the cancellation of the agreement when he signed it. I cannot believe that, and think that Bright must be mistaken. I believe the evidence of the plaintiff that he insisted on getting his half share of the crop that had been grown by the defendant before he would settle, and that he signed the cancellation agreement in the belief that he was signing a preliminary document and was told that if he would sign that document the settlement could be made the following Monday. Kerr on Fraud, 4th ed., pp. 184, 185, states:—"But inadequacy of consideration if it be of so gross a nature as to amount in itself to evidence of fraud is a ground for cancelling a transaction."

The consideration alleged here is so inadequately gross that I think it is evidence of fraud. I would therefore cancel the agreement of March 22, 1921.

There will be a reference to the Local Registrar to ascertain the amount due on the contract and the amount of arrears. The Local Registrar may use the evidence given at the trial on this point. Plaintiff will have judgment for the amount so found due, and costs, and a declaration that the plaintiff has a vendor's lien on the land for the said

amount; said amount and interest and costs to be paid in three months, and in default, the land in question to be sold under the direction of the sheriff, Moose Jaw; sale to be advertised in the newspaper for 4 weeks and by bills for 4 weeks posted securely in 5 conspicuous places in Vantage, Mossbank, Assiniboia, and Expanse; proceeds of the sale to be applied: (1) In payment of the costs of the action and costs of the sale. (2) Balance to be credited on plaintiff's judgment.

The caveat filed by defendant is discharged.

The defendant is to be relieved from the consequences of his default on payment of the arrears found by the Local Registrar and interest and costs, within 3 months.

Judgment accordingly.

SENIOR ET AL v. SMITH.

Saskatchewan King's Bench, Macdonald, J. June 28, 1921.

Evidence (§IIB—110)—Seizure of Crop—Action for Damages—Claim Based on Volunteers and Reservists Relief Act, 6 Geo. V. 1916 (Sask.) ch. 7, sec. 3—Proof of Date of Demobilization—Necessity of.

One who bases his claim that a seizure of his crop was illegal at the time it was made, on the fact that he is protected under the provisions of the Act for the Relief of Volunteers and Reservists, being 6 Geo. V. 1916 (Sask.) ch. 7, sec. 3, must shew all facts necessary to establish that he is within the protection of the said Act. Failure to give legal evidence of the date of demobilization held to be fatal to plaintiff's claim.

ACTION for damages for alleged wrongful seizure of plaintiff's crop. Dismissed.

C. R. Morse, for plaintiff.

A. M. Panton, K.C., for defendant.

Macdonald, J.:—The defendant is the registered owner of the west half of sect. 13, tp. 40, range 9, west of the 3rd meridian, in the Province of Saskatchewan, and is also the assignee from one Levi Price of a certain agreement for sale made on January 14, 1911, between said Levi Price, then owner of said land as vendor, to plaintiff Whiteley Senior, as purchaser of the said west half of sect. 13.

The plaintiff Senior is the registered owner of the north-west quarter of sect. 12, tp. 14, range 9, west of 3rd meridian. The said north-west quarter is subject, among other encumbrances, to a mortgage made by said Senior in favour of Price for $500, dated January 14, 1911, and the defendant is the transferee of said mortgage from said Price, which transfer of mortgage is dated January 2, 1920.

Sask.

K.B.

SENIOR ET AL v. SMITH.

The plaintiff John Matthews is the lessee of the south-west quarter of said sect. 13 under a lease dated February 28, 1920, and made by Senior, the plaintiff, by his attorney G. E. Wainwright as lessor of the said Matthews as lessee. He is also lessee of the north-west quarter of the said sect. 13 under a lease dated December 18, 1918, made between said Senior as aforesaid as lessor and said Matthews as lessee.

The plaintiff Herbert Rogers is the lessee of the north-west quarter of said sect. 12 under a lease dated November 16, 1918, between Senior, plaintiff aforesaid, as lessor and said Rogers, as lessee.

By the agreement between the said Price and the plaintiff Senior, the said plaintiff Senior attorned as tenant to the said Price, at a rental equal to the amounts due under the said agreement.

The mortgage from Senior, the plaintiff herein, to the said Price also contains a clause whereby the said Senior attorns as tenant to the said mortgagee for the said lands at a yearly rental equal to the annual payment under the mortgage, and grants power to the mortgagee to seize and distrain upon the said lands or any part thereof and by distress warrant to recover by way of rent reserved as in the case of demise as much of said principal and interest as shall from time to time be or remain in arrear or unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent.

The plaintiff Senior was in arrears under his agreement to purchase with Price, assigned to the defendant as aforesaid and also under the mortgage from said plaintiff to said Price, which mortgage as already observed, was transferred to the defendant Smith.

On or about September 22, 1920, the defendant served notices on the plaintiffs Senior and Matthews, and on the plaintiff Senior and Rogers respectively that he had distrained on the landlord's share of the whole crop then upon the respective lands for the amount due respectively under the agreement and under the mortgage. He made no physical seizure of any portion of the crop, but in consequence of the service of the notices and subsequent conversations with the plaintiffs Matthews and Rogers respectively, the latter put into an elevator one-half of the crop grown on the lands respectively held by them for said year, such being the rental payable by them to the plaintiff Senior in respect to the lands in question.

The plaintiffs bring this action for damages against the defendant for alleged wrongful seizure.

The plaintiff Senior alleges that he was at the time of the said seizure "a volunteer or reservist in the forces raised by the Government of Canada for Overseas Service on behalf of the Allies of Great Britain in the war lately existing."

The three plaintiffs, according to the statement of claim, would appear to set up that the crop said to have been seized by the defendant was their joint property, but from the notices of distress already referred to, which was the only step taken by way of distraining, it is clear that the defendant did not purport to seize the property belonging to the plaintiffs Matthews and Rogers. The seizure, according to the evidence, was made before there was any division of the crop between Senior and his tenants, and, as the defendant did not purport at that time to seize anything but the landlord's interest in the crop, it is clear that, properly speaking, he did not purport to seize anything, as the crop was then wholly the property of the tenants. The tenants, however, did convey to the elevator and set aside as for the plaintiff Senior one-half of the crop grown on the said lands respectively, thereby acquiescing in the claim made by the defendant to what might popularly be regarded as the landlord's share of the crop. It was therefore clear that the plaintiffs, Matthews and Rogers, suffered no damage whatsoever by reason of anything done by the defendant, and, in fact, I do not understand them in their evidence to claim anything against the defendant.

With respect to the claim of the plaintiff Senior, the gist of this action is that the seizure was made by the defendant Smith at a time when it was illegal for him to do so on account of the provisions of the Act for the Relief of Volunteers and Reservists, being ch. 7, 6 Geo. V. 1916 (Sask.) and amendments thereto. Section 3 of said Act, as amended by ch. 34, sec. 48, sub-sec. 7 of 7 Geo. V. 1917 (Sask.) 1st sess. and by 8 Geo. V. 1917 (Sask.) ch. 59, sec. 2, 2nd sess., reads as follows:—

"(3) Notwithstanding any provision in any agreement for sale of land, or in any bond, mortgage, or other lien, or encumbrance affecting land made by a volunteer or reservist, or the obligations of which have been assumed by or have devolved upon a volunteer or reservist either before or after the date when this Act comes into force, no action or

N.S.
S.C.
REX v. WARD.

other proceeding, judicial or extra judicial for cancellation, sale or foreclosure, or upon a personal covenant contained in any such instrument shall be had or taken until the expiration of one year after the conclusion of the war, or after the discharge of the volunteer or reservist which ever shall first take place."

As the plaintiff Senior's claim is entirely based on the allegation that he is within the protection of said Act, it seems to me that the burden is on him to shew all facts necessary to establish that he is within such protection. Now in the case before me, there is no legal evidence whatsoever as to the date when the plaintiff Senior was discharged. One George Wainwright, did in his evidence state that he had a letter from the plaintiff Senior giving the date of his demobilisation, but, of course, such a statement by the witness would not constitute legal evidence. The said plaintiff has therefore not shewn that he is entitled to the protection of the Act. The action must therefore be dismissed with costs.

Action dismissed.

REX v. WARD.

Nova Scotia Supreme Court, Russell and Longley, JJ., Ritchie, E.J. and Mellish, J. April 9, 1921.

Justice of the Peace (§III—12)—Jurisdiction—Criminal Case — Part of Trial Held Beyond Limits of Territory for Which Appointed—Validity.

A stipendiary magistrate in Nova Scotia has no jurisdiction in a criminal case to conduct a trial or any part of a trial outside of the limits of the territory for which he is appointed.

[The King v. Jack (1915), 25 D.L.R. 700, 24 Can. Cr. Cas. 385, referred to.]

APPLICATION for an order for leave to issue a writ of certiorari to remove into the Supreme Court a certain record of conviction made on or about January 5, 1921, whereby the applicant, Norman H. Ward, was convicted of unlawfully keeping for sale intoxicating liquor.

The application was made to Chisholm, J., at Chambers, the ground chiefly relied upon being that the convicting magistrate adjourned the trial from the town of Kentville of which he is stipendiary magistrate to the home of a witness some four miles outside the limits of the town for the purpose of taking the evidence of said witness. In order that the point might be definitely settled as to whether the magistrate, in criminal matters, could exercise

his functions anywhere within the limits of the county the Judge referred the application to the Court in banco.

H. W. Sangster, for the applicant.

No one contra.

Russell and **Longley, JJ.**, concurred with Ritchie, E.J.

Ritchie, E.J.:—Ward was convicted by the stipendiary magistrate for the town of Kentville of the offence of unlawfully keeping intoxication liquor for sale. An application is made to remove the conviction into this Court so that its validity may be attacked.

During the trial the magistrate went outside of the limits of the town of Kentville to a place called Canaan and took the evidence of one David Alders. It is contended that the magistrate had no jurisdiction to take this evidence outside of the town of Kentville.

What the magistrate did was to conduct part of the trial outside of the limits of the town of Kentville. He only has jurisdiction within the limits of the territory for which he was appointed unless there is a statute giving him jurisdiction outside those limits. Cause was not shewn against the motion and therefore the Court had not the advantage of hearing counsel in support of the course taken by the magistrate. This is a criminal case and I am unable to find any statute which gives jurisdiction to a stipendiary magistrate in a criminal case to conduct a trial or any part thereof outside the limits of the territory for which he is appointed. There being no such statute it is clear that the magistrate had no jurisdiction to partly try the case at Canaan and in my opinion the order asked for should be granted.

Mellish, J.: — I concur in the decision of my brother Ritchie. I think, further, that the case is governed by a decision of this Court, viz., The King v. Jack (1915), 25 D.L.R. 700, 24 Can. Cr Cas. 385, 49 N.S.R. 238.

Order applied for granted.

REX v. WALLER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Intoxicating Liquors (§IIIG—85)—Bona Fide Sale to Person Residing in Montana—Vendor Authorized to Sell by Saskatchewan Temperance Act—Delivery of and Payment for in Saskatchewan—Construction of Act, sec. 27—Liability Under Act.

A sale of liquor by a person in Saskatchewan, authorized by the Saskatchewan Temperance Act, sec. 3 (2) to sell liquor to a

Sask.

C.A.

REX v. WALLER.

person in a foreign country is not contrary to sec. 27 of the Act, if the sale is bona fide, although the liquor is to be delivered to the purchaser in Saskatchewan at a point 18 miles outside of the city where the vendor resides, where he is to receive payment from the purchaser who is to carry the liquor from that point across the border in motor trucks.

[Rex v. Shaw (1920), 54 D.L.R. 577, 34 Can. Cr. Cas. 28, distinguished; Gold Seal v. Dominion Express Co. (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, Hudson's Bay Co. v. Heffernan (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, referred to.]

APPLICATION by way of certiorari to quash a conviction under the Saskatchewan Temperance Act.

P. M. Anderson, K.C., for applicant.

T. D. Brown, K.C., for respondent.

Haultain, C.J.S.: — The applicant was convicted on November 28, 1920, on a charge of unlawfully keeping liquor for sale contrary to the provisions of sec. 27 of the Saskatchewan Temperance Act, 7 Geo. V. 1917 (Sask.), 1st sess., ch. 23.

The facts of the case as they appear in the evidence are, shortly, as follows:—

The applicant Waller resides in Regina, where he carries on a liquor business as manager for D. Hunter & Co. Ltd. Some time in the early part of November, one Mabee, a resident of the State of Montana, came to Regina, and interviewed Waller with a view to purchasing a quantity of whiskey to be taken to Montana. Waller suggested that the order for whiskey should be sent from Montana, so Mabee returned to Montana and ordered one hundred cases by telegram. Mabee then came back to Regina for the purpose of arranging for payment of the price and delivery of the whiskey. The first arrangement apparently was that the whiskey was to be delivered at or near the Montana boundary line, and that the purchase price was to be paid on delivery. It was afterwards arranged that the liquor was to be delivered at some point 15 or 20 miles south of Regina. In pursuance of this arrangement, Waller had the liquor loaded on trucks and started for the point where delivery and payment were to be made. He was to be met at this point by Mabee, with a number of automobiles which Mabee had brought over from Montana to transport the liquor. At or near the point where delivery was to be made, and before delivery was made, the liquor was seized by the provincial police, and Waller was arrested and subsequently convicted on the charge which is the subject of this application.

The only question to be considered in this case is, whether the transaction, as above described, constitutes a sale or attempted sale of liquor in breach of the provisions of the above mentioned sec. 27.

Section 27 enacts as follows: — "Any person not authorised by this Act to expose or keep for sale or sell liquors in Saskatchewan for use or consumption in Saskatchewan, who exposes or keeps for sale or sells, or barters or exchanges any liquor in Saskatchewan except to a person in another province or in a foreign country, for uses and purposes outside of Saskatchewan, shall be guilty of an offence and liable to a penalty of $200 and imprisonment for three months for the first offence, and in default of payment of the said sum to imprisonment for a further period of thirty days; and to a penalty of $300 and imprisonment for six months in case of a second or any subsequent offence, and in default of payment of said sum to imprisonment for a further period of three months. And if the offender is an incorporated company it shall be liable to a penalty of $1,000 for each offence."

If the transaction does not come within the exception mentioned in the section, then there is evidence that there was an unlawful sale, or an attempted unlawful sale, which would be sufficient to support the conviction. The evidence, in my opinion, brings the transaction within the exception. The section expressly excepts a sale in Saskatchewan to a person in a foreign country for uses and purposes outside of Saskatchewan. All of these conditions appear to be present. Mabee was, so far as the evidence goes, a bona fide resident of Montana. The fact that he came up from Montana to take delivery of the liquor does not, in my opinion, make any difference. Delivery to a railway company or to any other carrier, for him as consignee, would equally constitute delivery to him. Instead of providing automobiles for the purposes of transportation across the boundary line, Mabee might have secured a car from some railway company and taken delivery at the station in Regina. Every sale for export involves payment and delivery, and the statute does not place any restrictions on the manner, time or place of delivery or payment.

Section 3 of the Act says that no person shall sell liquor in Saskatchewan except as provided by the Act. Section 27 provides for two exceptions: (1) A person authorised by the Act to sell liquors in Saskatchewan for use or con-

Sask.
C.A.
REX
v.
WALLER.

sumption in Saskatchewan. (2) A person who sells liquor in Saskatchewan to a person in another Province or in a foreign country for uses and purposes outside of Saskatchewan.

The uncontradicted evidence in this case clearly establishes a contemplated bona fide sale to a resident of Montana for export to Montana and brings the transaction within the second exception. The case of Rex v. Shaw (1920), 54 D.L.R. 577, 34 Can. Cr. Cas. 28, was strongly relied upon by counsel for the respondent. On the facts of that case it was held that the transaction in question was a sale to a person in Saskatchewan and not to a person in another Province or in a foreign country. There are broad statements in the judgments delivered by Elwood, J., and myself with regard to "sale in Saskatchewan" which can only be supported by the special facts of the case. I must admit that my statement (54 D.L.R. at p. 579, 34 Can. Cr. Cas., at p. 35) that "the thing prohibited is the sale in Saskatchewan, without regard to the purposes, legitimate or otherwise, for which the liquor is purchased" is not a correct statement of the statutory law. The thing prohibited is a sale in Saskatchewan, unless that sale comes within either of the exceptions mentioned above. The sale in the Shaw case did not come within either of these exceptions. It was not a sale to a person in another province or in a foreign country, and it was not for uses and purposes outside of Saskatchewan. It was bought for the purpose of replenishing the stock in trade of the purchaser, and for the uses and purposes of his business in Saskatchewan. Subsequent sales of the liquor by the purchaser, however legitimate, could not affect or change the character of a former sale of the liquor.

For the foregoing reasons, I would allow the application with costs.

The usual protection will be given to the magistrate.

Lamont, J.A.:—This is an application by way of certiorari to quash a conviction against the accused for that he on November 28, 1920, at Regina in the Province of Saskatchewan did unlawfully keep liquor for sale contrary to the Saskatchewan Temperance Act.

The facts are simple and not in dispute. The accused, Waller, was the manager of the D. Hunter Liquor Co. Ltd., which company kept a quantity of liquor in Regina for export. Some time in the month of October or the early

part of November, one Mabee, of Havre, Montana, one of the United States of America, was in Regina, and inquired of the accused if it was possible to lawfully take liquor from Canada to the United States. The accused took legal advice, and in pursuance of that advice told Mabee that, "if the order came from the United States and the goods were sent by carrier to the United States, it was not against the Canadian law. Mabee returned to Havre, and sent an order for one hundred cases of Bourbon whiskey. He hired a number of automobiles in Montana to come over and transport back to Havre the hundred cases. These automobiles came to a point within 18 miles of Regina, where they stopped. Mabee came on to Regina and saw Waller, who agreed to let him have the whiskey. Waller then arranged with a cartage company to take the 100 cases 18 miles south of Regina, where they were to be transferred to Mabee's automobiles and paid for. About 2 o'clock in the morning of November 24, the cartage company took the liquor south, but before it had reached the automobiles hired by Mabee, or had been paid for, it was seized by the provincial police. On these facts Waller was tried and convicted of unlawfully keeping liquor for sale.

The evidence establishes, and the director of prosecutions, who appeared on the argument, frankly admitted, that the sale in question was one having for its object the transfer of 100 cases of Bourbon whiskey from this Province to Havre in the State of Montana. He also admitted that there was no reason to doubt that the liquor would have reached its destination in the United States in due course but for the interference of the police. We have, therefore, to determine whether or not a sale of intoxicating liquor, which sale is a bona fide transaction in liquor for export to the State of Montana made in Saskatchewan by a resident thereof to a resident of the State of Montana, contravenes the provisions of the Saskatchewan Temperance Act.

Sections 3 and 27 of the Act then in force, (ch.23 of 1917) are the sections applicable to this case. These sections are as follows:— "3. No person shall expose or keep for sale, or sell, barter or exchange liquor in Saskatchewan except as provided by this Act.

"27. Any person not authorised by this Act to expose or keep for sale or sell liquors in Saskatchewan for use or consumption in Saskatchewan, who exposes or keeps for

Sask.
C.A.
REX
v.
WALLER

sale or sells, or barters or exchanges any liquor in Saskatchewan except to a person in another province or in a foreign country for uses and purposes outside of Saskatchewan, shall be guilty of an offence and liable to a penalty of $200 and imprisonment for three months for the first offence . . . . . And if the offender is an incorporated company it shall be liable to a penalty of $1,000 for each offence."

Under sec. 27, it will be observed that a sale made to a person in a foreign country for uses outside of this Province is expressly excepted from the prohibition of selling or keeping liquor for sale contained in the Act; but, in order to make it doubly certain that it was not attempting to restrict or interfere with bona fide sales of liquor for export to a foreign country or other Provinces, the Legislature added sec. 80, which is as follows:— "While this Act restricts and regulates transactions on liquor and the use thereof within the limits of Saskatchewan it shall not affect and is not intended to affect bona fide transactions in liquor between a person in Saskatchewan and a person in any other province or in a foreign country and the provisions of this Act shall be construed accordingly."

The sale in question, having been shewn to be a bona fide transaction between the accused and a resident of a foreign State for export of liquor to that foreign State, comes squarely within the language of sec. 80 and the exception contained in sec. 27. The Saskatchewan Temperance Act has, therefore, no application to such a transaction, and does not forbid it.

Even if sec. 80 and the exception contained in sec. 27 had not been embodied in the Act, the same result would appear to follow; for in Hudson's Bay Co. v. Heffernan, (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, the Court en banc of this Province held that it was beyond the power of the Provincial Legislature to prohibit the keeping of liquor in Saskatchewan for export to other Provinces or to foreign countries; such legislation can only be lawfully enacted by the Parliament of Canada.

See also Gold Seal, Ltd. v. Dominion Express Co. (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta L.R. 377.

Stress was laid upon the fact that the accused admitted that he had agreed to deliver the liquor to Mabee in this Province and that he was to be paid for it here. That cannot, in my opinion, in any way affect the case. The right

to keep liquor in Saskatchewan for export to a foreign country or to other Provinces implies a right to make a sale of it, to deliver it and to receive the purchase price thereof in this Province. With such right the Provincial Legislature has expressly declared it does not attempt to interfere, provided that the sale thereof is a bona fide sale for export purposes between a person in Saskatchewan and a person in any other Province or foreign country. For "export purposes" implies that the liquor is to be used or consumed outside of the boundaries of this Province. If the purchaser, although a resident of a foreign country taking delivery here, attempts to dispose of or to consume within the Province any portion of liquor purchased, that would be evidence from which an inference might be drawn that the sale had not been a bona fide sale for export, so far, at least, as the purchaser was concerned.

The director of prosecutions also contended that this case came within the principle laid down in Rex v. Shaw, 54 D.L.R. 577, 34 Can. Cr. Cas. 28. That case, however, has no bearing on the present one, for in that case there was no suggestion that the sale made by Shaw was for export to a foreign country or to another Province. Shaw, who carried on business at Broadview, Saskatchewan, sold and delivered to the Dominion Liquor Co. at Regina, also within the Province, a quantity of liquor. He knew that the destination of his liquor was Regina and not a foreign country or other Province. That case was simply a sale by a resident of the Province to a company carrying on business in the same Province.

As the sale in question in this appeal has been shewn to be a bona fide transaction with a person in a foreign state for the sale of liquor for use in such foreign state, the accused was, in my opinion, clearly within his rights in making the sale and in keeping the liquor in his warehouse for that purpose. As this sale to Mabee was the only evidence that he did unlawfully keep liquor for sale, and as such was perfectly lawful, the conviction should be quashed.

Turgeon, J.A. concurs with Lamont J.A.

Conviction quashed.

SPRIGGS v SPRIGGS.

Saskatchewan King's Bench, Taylor, J. July 8, 1921.

Divorce and Separation (§II—5)—Action for Divorce — Orders Dispensing with Personal Service on Defendant and Co-Defendant—Notice of Trial Served by Filing—Irregularity—Juris-

Sask.

K.B.

SPRIGGS v. SPRIGGS

diction of Local Master—Divorce and Matrimonial Causes — Rule 811—Consolidated Rule 112.

In an action for divorce an order was made by the Local Master at Saskatoon, dispensing with personal service of the writ and proceedings on the plaintiff's wife and directing service by publication in an Alberta newspaper and in a Toronto newspaper. An order was also made by a Judge in Chambers dispensing with service of the writ and statement of claim upon the co-defendant and allowing the action to proceed to trial without such service, and by still another order the plaintiff was granted leave to use as evidence on his own behalf on the trial a certified copy of the evidence of four witnesses, in the Alberta Court in a former action.

Held that the Court was not justified in granting a decree for divorce in proceedings conducted in this way; that the order of the Local Master in dispensing with personal service of the writ of summons was ineffective for want of authority under the King's Bench Act to make such order, and notice of trial having been made by filing a copy in the office of the Local Registrar; held also that the effect of Rule 811 of the Divorce and Matrimonial Causes Rules, made consolidated Rule 112 inapplicable in divorce actions, and notice of trial must be served personally unless otherwise ordered by a Judge in Chambers.

ACTION for divorce. Dismissed.

R. Robinson for plaintiff.

Taylor, J.:—This is an action which may truly be described as a proceeding ex parte for divorce.

The plaintiff Arthur D. Spriggs was married to the defendant at Duck Lake, in Saskatchewan, on November 6, 1915. He was then a soldier on active service, on a visit to his brother on short leave. He did not return from overseas service until 1919, and then discovered that his wife had gone to Edmonton, in Alberta, with one W. A. Hunter, had committed adultery with Hunter and had had a child to him. This is purported to be proven by the transcript of the evidence taken in the Alberta Court. Proceedings for divorce were taken in the Alberta Court; the wife was served with the proceedings, and the application was dismissed on the ground that the plaintiff had no domicile in Alberta. On the trial before me I think the plaintiff adduced sufficient facts from which it can be inferred that he is domiciled in Saskatchewan.

On March 5, 1921, an order was made by the Local Master at Saskatoon dispensing with personal service of the writ and proceedings upon Florence Edna Spriggs, the plaintiff's wife, and directing service by publication in an Alberta newspaper and a Toronto newspaper.

By an order made by Bigelow, J., in Chambers at Saskatoon, on May 14, 1921, service of the writ of summons

and statement of claim was dispensed with and the action allowed to proceed to trial without service of the writ and statement of claim upon the defendant W. A. Hunter. The recital in this order simply reads that it was made upon reading the plaintiff's notice of motion with proof of service, (which was made by filing,) the affidavit of non-appearance as to the defendant Florence Edna Spriggs, and the pleadings and proceedings taken herein, and upon counsel appearing for the plaintiff. It will be noted that this recital does not shew that there was any material before the Judge verified by affidavit to prove the exceptional facts or circumstances which must have been before the Judge before he made the order. However, I find on the file an affidavit purporting to be made by the plaintiff on April 15, 1921, which may have been used, in which he deposes that Hunter was a forest ranger near Duck Lake, in Saskatchewan; that he believes that he left Duck Lake for Edmonton; that subsequently to the trial of the action in Edmonton the deponent made enquiries of the police there and was advised that Hunter had been sentenced to imprisonment for a term of 6 months in Alberta, had served his term, and since that time the police had no record of his whereabouts; that Hunter is a man of no financial means, and that any money which the plaintiff might spend endeavouring to serve him could not be recovered from him even though he should obtain a judgment against him for damages; and the deponent adds his belief that it would be impossible to effect personal service upon Hunter.

There was no attempt to serve any notice of trial upon Hunter, and notice of trial upon the wife was served by filing a copy endorsed "filed for service upon the defendant Florence Edna Spriggs," in the office of the Local Registrar at Saskatoon.

On the application to the Local Master to dispense with personal service upon the wife it is stated in para. 4, of the plaintiff's affidavit that during the year 1919 he instituted divorce proceedings against his wife in the Supreme Court at Edmonton, where she was then residing with a man by the name of Hunter "as she advised me and as I fully believe." In the plaintiff's evidence given me before he stated that he had met his wife in Edmonton, having located her there through the services of the police, but I understood him to say that she was then working as a domestic on a farm near Edmonton, and I did not under-

Sask.

K.B.

SPRIGGS v. SPRIGGS

stand the plaintiff to suggest that she then advised him that she was living with Hunter.

Further in the affidavit the plaintiff says that he has made numerous enquiries "with a view of locating the defendant" since the Alberta action was dismissed, but was unable to get any trace of her except that contained in a letter which is produced, and he adds that he believes that it would be impossible to locate the defendant or to effect personal service of the writ of summons upon her. The affidavit does not disclose what "numerous enquiries" he made.

And by still another order on May 16, 1921, obtained on similar material, it is ordered that the plaintiff be and is thereby granted leave to use as evidence on his own behalf on the trial a certified copy of the evidence of 4 witnesses in the Alberta Court.

In my opinion the Court will not be justified in granting a decree for divorce in proceedings conducted in this way, and I do not think it makes any difference that it may be well established at the trial that the erring spouse has been guilty of such conduct as will ordinarily entitle the applicant to a divorce. It does not appear that the plaintiff has taken any real steps whatever to find either his wife or Hunter, and I think it improbable that either have the slightest inkling of these proceedings or the charges which are now made herein against them (unless I am to infer that they are the same as in the Alberta Court), and under such circumstances I decline to accept the responsibility of decreeing dissolution of the marriage. The effect of so doing is not only, it must be remembered, to dissolve the marriage, but to brand the child as an illegitimate.

It may be argued that I am bound by the orders made in Chambers, to which I have referred. None of these applications were contested applications, however; and I do not think my brother Bigelow, had he the matter before him as I now have it, would take a different course from that taken by me.

Further, I doubt very much the jurisdiction of the Local Master to make the order dispensing with personal service and providing for substitutional service in a divorce action. The offices of Master in Chambers and Local Master are created by the King's Bench Act, 5 Geo. V. 1915 (Sask.), ch. 10, and the jurisdiction, powers and authority to be exercised by the Master in Chambers, the Referee in Cham-

bers, and the Judges of the District Courts acting as Local Master, shall be such as may be assigned to them respectively by rules of Court. The rules of Court in force in the Supreme Court of Saskatchewan immediately prior to the coming into force of the King's Bench Act were continued in force in the Court of King's Bench until altered or annulled by rules made under that Act, and it is provided that the Court of King's Bench may at any time with the concurrence of a majority of the Judges thereof alter and amend these rules and make further or additional rules for carrying the Act into force, and in particular for certain matters enumerated. Amongst the enumeration (sec. 51, sub-sec. (d)): To empower the Master in Chambers, or Official Referee, or the Local Masters in respect of actions brought or proposed to be brought in their respective judicial districts to do any such thing and to transact any such business and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom or by the rules or practice of the Court are now or may be hereafter done, transacted or exercised by a Judge of the Court sitting in Chambers and as shall be specified in any such rule except in respect of the following proceedings and matters and amongst these exceptions is number (vi); Applications with respect to the sale or other disposition of infants' estates or matters affecting the custody of infants.

In 1915 when this legislation was enacted jurisdiction in divorce was not recognized, and as a matter of legal history it is well known that a Judge in Chambers exercised no jurisdiction in such actions.

The general wording of the section to which I have referred directing that the jurisdiction of the Local Masters shall be such as may be assigned to them respectively by rules of Court must, I take it, be deemed to be limited by the express provision to which I have also referred, and it follows that no rule of Court can be passed which will empower the Master in Chambers or Official Referee or Local Masters to deal with matters affecting the custody of infants, and a rule purporting to do so would be ineffective.

There is no rule which purports in plain terms to confer jurisdiction upon the Master in Chambers or Local Masters in divorce actions. It is argued that it is to be inferred from

Sask.

K.B.

SPRIGGS v. SPRIGGS

Rule 800 of the Divorce Rules, promulgated on February 23, 1920, which provides that:—

"All actions for nullity of marriage, restitution of conjugal rights, jactitation of marriage, judicial separation, or dissolution of marriage shall be commenced by writ of summons and except as is herein otherwise provided the procedure and practice shall be the same as is provided for actions so commenced in the Court of King's Bench."

And from Rule 829, which provides as follows:—"No application under this order except those falling within the provisions of Rule 800 hereof shall be made to a Master or Local Master."

Can it be said that because it is provided that the procedure and practice is to be the same as provided for actions commenced by writ of summons in the Court of King's Bench it follows that the Master or a Local Master can in a divorce action exercise the jurisdiction which he ordinarily exercises in an action commenced by writ of summons in the King's Bench. It might he inferred from Rule 829 that it was intended to so provide. The jurisdiction to be exercised by an official such as a Master or Local Master is not included in the "procedure and practice" of the Court. As I have pointed out, the offices of Master and Local Master are created by statute. Ordinarily the statute creating an office defines and limits the jurisdiction. In this particular case the King's Bench Act has assigned to the Judges of the Court of King's Bench the duty of regulating by rules the jurisdiction to be exercised by these officials subject to the special directions to which I have referred; but in my opinion it does not follow that the expression "procedure and practice" is thereby enlarged, or those matters ordinarily included therein, extended to include the jurisdiction of these officials. And if jurisdiction has not been conferred in Rule 800 I do not think it could be inferred from Rule 829, for 829 is not an "enabling statute," but restrictive.

There is a further consideration. In many divorce actions, as in the case which I now have for consideration, questions arise affecting the legitimacy of children of the wife. The presumption is that the husband is the father of children born to the wife, and he has rights, considerably curtailed by recent legislation in this Province, as to the custody of the children and has responsibilities for maintenance. As I have pointed out, the provisions of the King's Bench Act

limit the authority to empower Local Masters to deal with applications which may affect the custody of infants. Adopting the argument which is made in toto, that it was intended that the Master in Chambers and Local Masters should have jurisdiction in all divorce actions, it follows that the rule has purported to confer a jurisdiction in matters affecting the custody of infants—and that, in my opinion, no rule could do.

I therefore hold that the order of the Local Master in this action dispensing with personal service of the writ of summons upon the defendant is ineffective for want of authority in the Local Master to make such an order. In making this finding I do not want to intimate that I concur in the view that in an action for divorce that where such an order has been made on insufficient material the matter must be considered res judicata, and cannot be taken into consideration by the trial Judge in determining the question whether a decree nisi or a final order for dissolution should be made. He must take it into consideration in determining the propriety of making the decree.

As to the notice of trial, as I have pointed out, service of notice of trial was made by filing a copy in the office of the Local Registrar. It is argued that Rule 800 of the Divorce and Matrimonial Causes Rules make Consolidated Rule 112 applicable in divorce actions. This rule provides that "where no appearance has been entered for a party all orders, notices, papers, documents in or relating to the action may, unless otherwise ordered by a court or judge, be served by filing the same or a copy thereof in the local registrar's office." Rule 811 provides that "In an action under this order (Divorce and Matrimonial Causes O. LVI) a plaintiff shall not be entitled to judgment in default of appearance or defence or on admissions in pleadings; but, in such event, the action shall proceed as if there had been filed and delivered a statement of defence denying all the allegations in the statement of claim."

I had taken the effect of this rule to be to deny to the plaintiff the benefits ordinarily conceded to a plaintiff proceeding against a defendant in default in a King's Bench action, and had heard applications in Chambers for directions as to service; and I thought that the practice was fairly well established against serving notice of trial by filing, a method which I need hardly say will not bring to the defendant real notice of the time and place of trial. On

Sask.

K.B.

SPRIGGS v. SPRIGGS

the trial of an action before me at Weyburn some months ago counsel proceeded to prove that he had served notice of trial, in a case where the defendants did not appear, by filing, and I was referred to decisions given by two of my brother Judges in the King's Bench holding that notice of trial served in that manner was effective service and all that was required. I felt that I ought to follow, and did then follow, these decisions. However, counsel in this action has intimated that my present decision will be taken to the Court of Appeal, and for the purpose of bringing the matter squarely before the Court for decision I express my view and hold that the effect of Rule 811 is to make Rule 112 inapplicable in divorce actions; that inasmuch as it is provided in Rule 811 that in actions under this order, notwithstanding default of appearance or defence, they are to proceed as if a statement denying all the allegations in the statement of claim has been filed and delivered, notice of trial is to be served personally, unless otherwise ordered by a Judge in Chambers.

The question of notice of trial and the jurisdiction of Local Masters is not one of little moment. In one of the actions in which I refused to accept a notice of trial served by filing as sufficiently given, the plaintiff had applied to a Local Master, after the date fixed for the opening of the sittings, ex parte, for leave to serve short notice of trial, set down for the sittings then being conducted, and proceed to trial. The material in support was in an affidavit shewing that the solicitor had not proceeded as promptly as he might have, and that he therefore desired to serve short notice of trial; but there was no suggestion whatever in the material that the defendants had been guilty of any such conduct as would disentitle them to the usual notice of trial and for which the plaintiff should be indulged. Yet the order was made.

I feel that the Court must set its face against quick and easy divorce. A loose practice will encourage divorce actions, and, considering what may result, I feel constrained to put myself on record as against a loose practice facilitating divorces. The general principle is stated in the Am. & Eng. Encyc. 2nd ed., vol. 9, pp. 728, 729:—

"The state permits the dissolution of marriage only where the purpose of the relation has been defeated by grave and serious misconduct. Such misconduct must, on an application for divorce, be established by competent evidence of a

full and satisfactory character. A cause for divorce cannot be established by the default, consent, or admission of the parties, as public policy requires that the misconduct be established otherwise."

At p. 729:—

"The relatives and children of the parties have an interest in the marriage, but cannot be protected as they cannot become parties to a divorce suit; the interest of such parties is said to be represented by the Court."

It is highly probable that the plaintiff Spriggs is entitled to a divorce. The way in which he has endeavoured to establish his claim is not to my mind satisfactory, and I refuse the decree and dismiss the action.

Action dismissed.

MILLER v. O'NEILL-MORKIN MACHINERY CO. AND GREEN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 20, 1921.

Appeal (§XI—720)—Leave to Appeal to Supreme Court of Canada—When Granted—Special Leave Required—Matter of Public Importance.

Where special leave to appeal to the Supreme Court of Canada is required it should be granted only when the question at issue is of some public importance. Such leave cannot be granted upon the ground only that there may be error in the judgment of the Court appealed from.

APPLICATION for leave to appeal to the Supreme Court of Canada from the Alberta Supreme Court Appellate Division in an action for damages arising from the sale of certain machinery. Application dismissed.

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

R. E. McLaughlin, for O'Neill-Morkin Machinery Co.

D. W. Mackay, for Green Bros.

The judgment of the Court was delivered by

Harvey, C.J.:—The plaintiff bought some machinery which was in the custody of an agent for sale with authority to sell. Without knowledge of the sale to the plaintiff the agent sold and gave possession to another party who moved the machinery. The plaintiff claimed damages from the principal and agent. The amount claimed was more than a thousand dollars but the defendants admitted that the plaintiff was entitled to the amount received for the machinery from the second purchaser and paid it into Court, thus leaving the amount actually in controversy between three and four hundred dollars. The trial Judge gave judgment in the plaintiff's favor which was unanimously reversed on appeal.

Alta.

App. Div.

MILLER v. O'NEILL-MORKIN MACHINERY CO. AND GREEN

The plaintiff now applies for leave to appeal to the Supreme Court of Canada, while maintaining that he may have a right to appeal without leave.

Assuming that leave is necessary we have to determine whether it should be granted. Naturally any Court is loath to refuse anyone the privilege of questioning the correctness of its decision, but we have a responsibility to the other parties and Courts which we must assume and fortunately we have numerous decisions of the Supreme Court of Canada which are binding on us which declare in a general way the principle to be applied, and from their decisions the general principle seems deducible that when special leave is required it should be granted only when the question is of some public importance.

In Fisher v. Fisher (1898), 28 Can. S.C.R. 494, in which the Court of Appeal of Ontario, with one dissenting Judge, had reversed the trial Judge, leave to appeal was refused, the Court unanimously holding that (p. 496), "it did not appear that the questions at issue in the case were of sufficient public importance to justify the court in making an order granting special leave to appeal." This case shews that difference of opinion among the Judges as to the law or its application is not to be a guiding principle. In Dominion Council of Royal Templars, etc. v. Hargrove (1901), 31 Can. S.C.R. 385, the same rule was applied as also in Att'y Gen'l for Ontario v. Scully (1902), 33 Can. S.C.R. 16, where a half dozen cases to the same effect are cited and it is stated that (p. 19), "such leave cannot be granted upon the ground only that there may be error in the judgment of the Court of Appeal." When the amount in controversy is over $1,000 there was and still is under the law applicable to this case an appeal as of right and in Goold Bicycle Co. v. Laishley (1903), 35 Can. S.C.R. 184, the judgment was for $1,000 exactly but the costs were over $2,000, and the judgment from which it was desired to appeal was one reversing the trial Judge but the leave was refused. In Lake Erie & Detroit River R. Co. v. Marsh (1904), 35 Can. S.C.R. 197, in which the judgment was also for $1,000, leave was refused, but it was stated that (p. 200), "where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted."

It seems clear that if nothing more is involved than the private interests of the parties regarding which the Court may have made a mistake in applying well recognised principles of law which is the most that can be said in regard to this case, leave to appeal should not be granted.

The application should therefore be dismissed with costs.

Application dismissed.

REX v. KENNEDY.

Saskatchewan King's Bench, Bigelow, J. April, 1921.

Intoxicating Liquor (§IIIG—85)—Keeping for Sale—Proof Beyond a Reasonable Doubt—Statutory Presumption—Proving Legality of Purpose in Having Possession—Sask. Temperance Act, R.S.S. '920, ch. 194 and 1920 (Sask.) ch. 70.

On a charge for unlawfully keeping liquor for sale in contravention of the Sask. Temperance Act, the accused ought not to be convicted unless upon the whole case it is shown that he is guilty beyond a reasonable doubt. An appeal from a summary conviction will be allowed and the conviction quashed if the Appellate Court finds on the evidence below that the liquor found in the possession of accused was kept for a lawful purpose although the accused may have laid himself liable to conviction upon a charge of keeping the liquor in an unauthorised place.

APPEAL from a summary conviction for unlawfully keeping liquor for sale in contravention of the Temperance Act, R.S.S. 1920, ch. 194, as amended 1920, (Sask.), ch. 70.

John Feinstein, for defendant appellant.

H. F. Thomson, for informant respondent.

Bigelow, J.:—This is an appeal from a conviction for unlawfully keeping liquor for sale. The evidence shows that the police constable, knowing that accused had received a 5-gallon keg of liquor on January 31, 1921, obtained a search warrant and went to his place of business, a livery barn, on February 1, and asked accused where that keg of liquor was. Accused did not attempt to conceal it; he took the constable to his private garage back of the house, which is some distance from his livery barn. The evidence shows that there were three buildings between the garage and the livery barn. There the accused lifted up some planks and showed the constable 11 bottles of liquor in a sack, and 10 bottles not in a sack, all wrapped in paper. The keg had been emptied into the bottles and had been placed outdoors on the east side of the livery barn, where it was found by the accused and shown to the constable.

Sask.

K.B.

REX
v.
KENNEDY

On being asked why he had taken the liquor from the keg and put it into the bottles, and why he kept it under the floor of the garage instead of in his dwelling, the accused said his wife was opposed to him having liquor, and he did not want his wife to know that he had so much as a keg; that he had put it in bottles to take into the house that night and conceal it in the house from his wife.

Under sec. 73 of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, "the burden of proving the right to have or keep or sell or give liquor (etc.) shall be on the person accused of improperly or unlawfully having or keeping or selling or giving." [See sec. 73 as amended 1920, Sask., ch. 70.] This section means that possession of liquor in Saskatchewan is prima facie unlawful. Once possession is proved, a conviction may follow if the accused is unable to satisfy the Court that he is not guilty. The common law rule is reversed; the accused must prove his innocence to the satisfaction of the Court.

The accused swore that he did not keep the liquor for sale. If I believe him, he has proved that he did not commit an offence; if I do not believe him he has not proved his innocence. I quite agree with the contention of the prosecution that because accused swore he was innocent I do not have to accept that as sufficient proof that he was innocent.

In Rex. v. Covert (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, a judgment of the Appellate Division of the Supreme Court of Alberta, Beck, J. says, at pp. 673, 674:—

"It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused and that it was open to him to do so. But in my opinion it cannot be said without limitation that a judge can refuse to accept evidence. I think he cannot if the following conditions are fulfilled: (1) That the statements of the witness are not in themselves improbable or unreasonable; (2) that there is no contradiction of them; (3) that the credibility of the witness has not been attacked by evidence against his character; (4) that nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and (5) that there is nothing in his demeanour while in Court during the trial to suggest untruthfulness."

In a later case of the same Court, Rex. v. Morin (1917),

38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 Alta. L.R. 101, Harvey, C.J., discussing this judgment, says, at p. 619:—"It seems clear that all that is involved in this is that a trial judge should accept as trustworthy the evidence tendered before him unless there is some reason for his not believing it."

The facts surrounding this case do not lead me to a conclusion that I should disbelieve the accused. The circumstances are somewhat suspicious but they are consistent with the accused keeping the liquor for his private use. The fact that the accused got a case of liquor on December 18, 1920, and a gallon about New Year's, does not seem to me to raise any presumption that he was keeping liquor for sale. That may have been for his own use, as he says it was.

The Crown also proved that in the fall of 1918, while driving a passenger in a livery car for which the fare was to be $8, the accused gave the passenger some liquor to drink and charged him $10 in all. This does not help me in coming to a conclusion as to whether accused kept liquor for sale on February 1, 1921. Neither does the fact that he might have been convicted under another section of the Act for keeping liquor in an automobile garage assist me on the question as to whether it was kept for sale.

In these liquor cases I agree with Beck, J., of the Alberta Court, that the accused ought not to be convicted unless upon the whole case it is shown that he is guilty beyond a reasonable doubt. All the facts in this case offered as matters of suspicion are quite consistent with the innocence of the accused.

For these reasons I accept the evidence of the accused that he kept this liquor for lawful purposes.

The appeal is allowed and conviction quashed with costs against the informant.

Conviction quashed.

IN RE FLORENCE SILVER MINING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. June 7, 1921.

Waters (§IIA—60)—Board of Investigation—Conditional Grant of Right to Divert Flow of Creek for Mining Purposes—Certain Date Fixed to Make Beneficial Use of Water—Cancellation of License Before Date Fixed.

The Board of Investigation constituted under the Water Act, 4 Geo. V. 1914 (B.C.) ch. 81 having on July 9, 1919, made an order allowing the appellant who was the holder of two

B.C.
C.A.
IN RE FLORENCE SILVER MINING CO.

records giving his liberty to divert water from the Woodberry Creek for mining and other purposes, until November 1, 1924, to make a beneficial use of the water for the purposes for which it was granted, cancelled his records and licenses because he did not make beneficial use of the water for a period of time preceding that date. The Court held that the Board was in error in making this order, and that it should be set aside, and the appellant's right restored under said records and conditional licenses.

APPEAL by the company from an order of the Board of Investigation under the Water Act. Reversed.

C. R. Hamilton, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.:—This is an appeal under sec. 50 of the Water Act, 1914, 4 Geo. V. (B.C.), ch. 81. The appellant was the holder of two records made in 1896 and 1904 respectively, giving the holder liberty to divert water from Woodberry Creek for mining and other purposes specified therein.

In 1915 the Board of Investigation constituted under said Act made enquiry concerning the waters of Woodberry Creek and after hearing all parties concerned, affirmed the validity of said records, and directed the Comptroller of Water Rights to issue to the appellant conditional licenses, in pursuance of powers in that behalf contained in secs. 288 and 289 of the said Act, embodying terms inter alia that the works required to be constructed by the licensee before final license would be issued, were those necessary for the carriage and distribution of water, that the construction of same should be commenced on or before June 1, 1920, and should be completed and the water beneficially used for the purpose set out in the conditional licenses on or before November 1, 1924.

The order of the Board just referred to, refers in its opening to June 14, 1915, as if that were its date but at the end contains these words: "Made and entered into the 9th day of July, 1919." The conditional licenses bear the latter date.

Mr. Taylor contended that sec. 91 of the Act which provides for the issue of conditional licenses has no application to a case where there were prior records, but I think said sec. 289 disposes of this contention.

On July 26, 1920, pursuant to sec. 17 of the said Act, the Comptroller of Water Rights served notice upon the appellant, calling upon him to shew cause, at a meeting of the Board, why his conditional licenses should not be revoked

on the ground that the same had not been acted upon or had ceased to be acted upon. The respondent in this appeal, the Florence Silver Mining Co., Ltd., had applied to the Board for a license to divert water from the said creek and had requested the Board to cancel the appellant's said licenses and his said records.

Counsel for the respondent in opening before the Board, clearly set forth the ground upon which cancellation was asked for and which he specified in these words: "No beneficial use or attempt to use the water has been made." The chairman of the Board also stated the ground of complaint to be "non-user." Not a word was said about non-commencement of the work within the time aforesaid.

By their order the Board of Investigation "Now determines that the powers granted under the said records and licenses have not been exercised in good faith for three consecutive years (and they direct the Comptroller of Water Rights to cancel the said records and said conditional licenses unquestionably for that reason)."

In giving this reason for their order of cancellation, the Board, it is evident, had in mind sec. 16 of the Act. That section as amended by ch. 102 of the Act of 1920, sec. 7, reads in part as follows:—"If the powers granted under any license shall not be exercised (in good faith and not colourably) for three successive years, the license shall become null and void."

Even if it can be said that this section is applicable to default in commencement of the work the case which the appellant was called upon to meet had solely to do with "non-user" of the water.

It is also to be noted, though I do not found my decision upon it, that the works which were to be constructed were really works of repair or re-construction of old works damaged by fire. The appellant was under the impression that the commencement of construction of the works had reference not to this work of reconstruction and repair but to the works of 1896 when the dam flume and mining plant were constructed or in course of construction. If there was any legitimate ground of complaint that the appellant had not commenced the re-construction of the flume which had been partially burned within the time specified, one would expect that the Comptroller of Water Rights or the Engineer would have called the appellant's attention to the fact and have given him the opportunity to rectify his omis-

Sask.

C.A.

JANOWSKY v. SMITH BROS. & WILSON.

sion before taking the drastic proceedings which were adopted here. There is no suggestion that delay, if any, in commencement of construction had rendered it difficult to make completion within the time specified. The nature of the work to be done and the evidence as to the time which would be required to do it makes it quite manifest that no just complaint could be found on the default, if any, in commencement of construction.

The situation then, as we find it in this appeal, is that while the Board of Investigation on July 9, 1919, made an order allowing the appellant until November 1, 1924, to make a beneficial use of the water for the purposes for which it was granted, they cancelled his records and licenses because he did not make beneficial use of the water for a period of time preceding that date. With respect, I think the Board was in error and that their order must be set aside, and the appellant's right restored under said records and conditional licenses.

The respondents should pay the costs.

Galliher, J.A.:—I agree in allowing the appeal and with costs.

McPhillips, J.A.:—I am in agreement with the reasons for judgment of my brother the Chief Justice.

Appeal allowed.

JANOWSKY v. SMITH BROS. & WILSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Contracts (§IID—145)—Claim for Heating Building by Sub-Contractor—Claim Based on Letters—Construction.

The plaintiff sued for $122.50 being the cost of fuel and labour used in heating a building in course of construction. The defendants were the contractors for and the plaintiff was a sub-contractor. The plaintiff's claim did not rest on the contract but upon a request alleged to be contained in two letters and an implied promise to pay. The letters are as follows:—

"Confirming our wire of today:—

Send in report on progress of work immediately, needed for architect. Is brickwork completed? State when ready for lather and electrician. Can you procure stove for temporary heating owing to change in furnace?"

Dec. 10th, 1918.

"The plumber has been asking us about the cutting for his trade. You will note on page 9 and 20 it clearly states that the cutting shall be done for these other trades. He also says that there is little coal and while we do not know why he should want a lot of heat it is to the advantage of everyone concerned to dry the building out as quickly as possible and we would suggest that you see the local bank manager

and propose that if he supplies the fuel you will keep the furnace going so that the building will be thoroughly dry for him to move in, he will no doubt be able to realize that this will mean something to him from a health point of view."

The Court held that there was no request in the letters and no implied promise on the part of the defendants to pay for the heating.

APPEAL by defendants from the judgment at the trial in an action to recover the cost of fuel and labour used in heating a certain building in course of construction. Reversed.

B. H. Squires, for appellants; H. J. Schull, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—The plaintiff sues for $122.30, being the cost of fuel and labour used in heating a building erected at Unity for the Royal Bank. The defendants were the contractors and the plaintiff was a sub-contractor. The contract between the parties required the plaintiff to provide all the materials and perform all the work mentioned in the specifications and shewn in the drawings, except the heating, roofing, sheet metal work, plumbing, and electric wiring. By "heating" was meant the installation of the hot air furnace. The building was to be completed by November, 1918. The contract contained a clause by which it was agreed that if, by reason of alterations or other causes for which the defendants were responsible, the work was carried into the cold weather, the defendants were to be liable to the plaintiff for the amount expended by him in heating the building. The specifications which were made part of the contract contained the following provisions:—

"The charge and care of the building until such time as the contracts are fulfilled, and the work accepted by the owners will be and remain with and at the risk of the contractor or contractors for the several works, who will be responsible for any loss or damage to same that may occur during the progress of the work, until such time as the building is taken off the contractor's hands."

The building was not completed in November, and the work was carried into the cold weather, but the plaintiff admits it was through no fault of the defendants. In August, 1919, the building was completed and the defendants paid for the same in full, with the exception of the item sued for in this action, which they claimed they did not owe. The plaintiff does not claim to be paid the amount of these items by reason of anything contained in the con-

Sask.

C.A.

JANOWSKY v. SMITH BROS. & WILSON.

tract. He bases his claim upon a request by the defendants and their implied promise to pay, which request, he says, was contained in two letters received by him from the defendants, written one on November 6, 1918, and the other December 10, 1918. These letters read as follows:—

"Confirming our wire of to-day:—

Send in report on progress of work immediately, needed for architect. Is brickwork completed. State when ready for lather and electrician. Can you procure stove for temporary heating owing to change in furnace."

"December 10, 1918.

"The plumber has been asking us about the cutting for his trade. You will note on page 9 and 20 it clearly states that the cutting shall be done for these other trades.

"He also says that there is little coal and while we do not know why he should want a lot of heat it is to the advantage of everyone concerned to dry the building out as quickly as possible and we would suggest that you see the local bank manager and propose that if he supplies the fuel you will keep the furnace going so that the building will be thoroughly dry for him to move in, he will no doubt be able to realise that this will mean something to him from a health point of view."

Pursuant to the suggestion contained in the latter of these two letters, the plaintiff saw the manager of the bank, but he would not agree to supply the fuel. The plaintiff heated the building, and now seeks to recover the cost of heating for two periods, December 11 to December 31 and February 1 to February 22, as he says he did not require the heat during these periods for his own men, but that it was required for the other trades. The defendants counterclaim for $109.73, being payments made by them to the plaintiff, which they assert the plaintiff agreed to refund if the architect did not allow the items which they represented, and that the architect subsequently refused to allow them.

The trial Judge gave judgment in favour of the plaintiff for the amount of his claim and dismissed the counterclaim. He allowed the plaintiff's claim because he inferred from the letters above quoted, and from the fact that the defendants knew or ought to have known the nature of the work being done during the periods claimed for, that the defendants expected the plaintiff would keep the building sufficiently warm for the other sub-contractors, and that it was unrea-

sonable to expect the plaintiff to do it at his own expense.

With deference, I am of opinion that this conclusion cannot be supported. The plaintiff's claim does not rest on the contract, but upon a request alleged to be contained in the above letters and an implied promise on the part of the defendants to pay. I cannot find any such request in the letters. The letter of November 5 suggests the purchasing of a stove for temporary heating owing to a change in the furnace. The clear meaning of this is, that the defendants having made changes in the furnace, would not be able to have it installed so that the plaintiff could use it for any temporary heating he required, and they ask him to procure a stove until the furnace could be ready. He did procure a stove, but he is not asking to be paid therefor. What he is asking for is payment of the fuel he used and costs of having it put in the stove or furnace. Had the furnace been installed, there would have been no necessity for procuring the stove, but the plaintiff would have had to provide the fuel which he required. There is no request in that letter to purchase fuel on the defendants' account. Neither is there in the letter of December 10. That letter, instead of intimating that the plaintiff could obtain fuel on the defendants' account, suggests that he should endeavour to induce the manager of the bank to supply it. The manager of the bank refused, but the letter contains no intimation that if the bank refused to supply fuel the defendants would pay for it. I am, therefore, of opinion that the plaintiff has failed to establish any implied promise on the part of the defendants to pay for the heating.

The defendants' counterclaim for a return of moneys paid rests upon the allegation that the plaintiff's representative agreed, as a condition of his getting paid, that the money should be returned if the architect refused to allow the items. The plaintiff's representative absolutely denies making any such agreement. As the Judge dismissed the counterclaim, I take it he accepted this denial. The counterclaim was, therefore, properly dismissed.

The appeal, in my opinion, should be allowed with costs, the judgment below set aside, and both claim and counterclaim dismissed with costs.

Appeal allowed.

Que.

K.B.

REX v. LABRIE.

REX v. LABRIE.

Quebec King's Bench, Lamothe, C. J., Lavergne, Carroll, Pelletier and Martin, JJ. October 27, 1919.

Evidence (§XIE—781)—False Pretenses — Criminal Intent— Evidence of Subsequent Acts—Admissibility of, to Establish.

On a charge of obtaining a promissory note under false pretences and with intent to defraud, there was evidence that at dates subsequent to the offence charged, the prisoner obtained notes from other persons by false pretences similar to those used on the occasion charged in the indictment. The Court held this evidence admissible not as corroboration of the act charged but as tending to establish criminal intent.

APPEAL by way of stated case from a conviction for obtaining a promissory note by false pretences. Affirmed.

Labrie was charged with having obtained from one Gagnon, under false pretences and with intent to defraud the said Gagnon, a promissory note for $200. He was found guilty, but on April 30, 1919, he obtained leave from the Court of King's Bench to have the following questions reserved for the decision of the Court of Appeal. These questions are drawn up as follows:

(a) As to the proof made at the time of the trial to the effect that subsequently to the obtaining of the signature of the man named Gagnon the accused obtained from a man named Pard $1,200 which he converted to his own use.

Was this evidence of any legal value or effect, seeing that previously good and legal proof had been made that the accused had obtained a promissory note from said Gagnon by false representations, as per depositions of C. Gagnon, J. B. Bouchard and A. Gagnon, and that, although objection was entered in the deposition, there was no ruling asked or given as to the legality of the proof objected to: (b) As to the proof of obtaining other amounts subsequently to the obtaining of the signature of Gagnon, in the name of a company called Auto-Piston-Ring, which amount he had also converted to his own use. Was this evidence of any legal value or effect, under the circumstances above mentioned, and was the omission under the said circumstances by the trial judge to declare to the jury that this evidence objected to was illegal, prejudicial to the accused?

The Court of King's Bench was called upon to decide if this evidence was legal.

The facts are set forth in the following notes:

C. C. Cabana, for appellant.

J. Nichol, K.C., and A. C. Hanson, for the Crown.

Lamothe, C.J.:—The reserved case which is submitted to us reads as follows: (See above).

"After studying the record, I am of the opinion that the giving in evidence of the facts mentioned in the reserved case did not cause a substantial wrong to the accused and that according to article 1019 of the Crim. Code, the verdict should not be set aside. Without taking these extraneous facts into consideration, there was sufficient evidence of the guilt of the accused. We are not called upon to interfere.

Pelletier, J.:—The accused has obtained a reserved case and he submits to our attention several questions of which three deserve consideration. In order the better to understand them, it is necessary to review in a few words the facts which have been proved against the accused.

Labrie was manager of a concern known as the Auto-Piston-Ring Co. Gagnon was one of the shareholders of this company, together with Rev. Mr. Cote and a number of others. The company was in need of funds. It is clearly established by several uncontradicted witnesses that Labrie called on Gagnon and represented to him that the other shareholders had signed a note or notes to raise an amount of $1,000, and that Gagnon as a shareholder should do like the others and sign a note for $200. Gagnon hesitated, and Labrie then represented that the Rev. Mr. Cote had himself signed, as the other shareholders had done. The representation of this fact overcame Gagnon's opposition, but he decided to confirm its truthfulness by telephoning to the Rev. Mr. Cote. Unfortunately he could not be reached by telephone, but Gagnon was satisfied with Labrie's consent to his calling up the cure to corroborate his assertions, and he came to the conclusion that Labrie was telling the truth. He therefore signed the note in question. The cure had not signed, as represented by Labrie, and Gagnon's consent was obtained under false pretences.

The accused now says that the Crown proved illegally that Labrie had discounted the note obtained from Gagnon and converted the proceeds thereof to his personal use, that this was not the offence with which Labrie was charged, but proved an entirely distinct intention to steal or to convert to his own use, and that the evidence adduced under this head by the Crown was of a nature to prejudice the jury against the accused.

I do not believe that this contention is well founded. The

Que.
K.B.
REX
v.
LABRIE.

evidence adduced by the Crown on this point was that, at a subsequent meeting of the shareholders of the company, Labrie was asked what he had done with the proceeds of the Gagnon note, and that he replied that this did not concern the company, that Gagnon's note was a personal matter between himself and Gagnon and that he had no account to render in this connection.

I think that this evidence was legal as shewing Labrie's guilty intention when he obtained Gagnon's signature to the promissory note, and further as corroborating the evidence that Labrie had made use of false pretences to obtain Gagnon's signature.

We are asked in the second place if the Crown adduced illegal evidence in asking the witness Bouchard how he had "understood" the conversation between Gagnon and Labrie, when the latter obtained Gagnon's signature to the promissory note. Bouchard answered "My impression was that the note was made for the company."

If this answer of Bouchard's stood alone, the question now submitted to us might be seriously considered, but if the whole of Bouchard's evidence is read together, it appears that Bouchard was unable to repeat word for word the conversation between Gagnon and Labrie. That is self-evident. All he did was to reproduce it as well as he could from memory, and if at a given moment he made use of the word "impression" this does not render his evidence illegal to the extent of causing any prejudice.

The accused further complains that the evidence adduced by the Crown went so far as to implicate him on a charge of having on another occasion obtained from one Pard a sum of $1,200, again for the Auto Piston Ring Co., and having converted this sum to his own use.

The jury must have been prejudiced against Labrie as a result of this evidence of a considerable conversion absolutely foreign to the charge. The Pard affair was a much too important part of the evidence. The Crown's answer is that the Pard matter was not brought up by the prosecution but by the accused himself.

That is quite true. It was indeed in the course of the cross-examination on behalf of the accused of the witness Rodrigue that this Pard matter came to light, but Rodrigue's answers to the attorney for the defence on this point were not of a nature to cause prejudice. I think that the Crown was at fault in returning to this subject in its re-

examination of the witness Rodrigue, and in obtaining from him answers of a nature to compromise Labrie in connection with the Pard matter. In fact, Rodrique in the course of his re-examination swore that Labrie had converted to his personal use the $1,200 he had obtained from Pard.

But the Crown understood that all this evidence might lead to injustice, and recalled the witness Bouchard to establish that Rodrigue was in error in stating that Pard's $1,200 had not been remitted to the company. In fact, Bouchard, who was one of the officers of the company, produced the company's bank book and shewed that Labrie had deposited the money received from Pard to the company's credit. Any prejudice that might have resulted from Rodrigue's evidence on this point was thus removed.

It is true that Bouchard proved that of the $1,200 received from Pard and deposited to the company's credit, Labrie withdrew on the same day a sum of $800 for his personal use. The witness goes on to say, however, that Labrie would not have withdrawn that amount by a cheque signed by him alone, but that a signature of another officer of the company, Bouchard himself, was required on this cheque for $800 before Labrie could cash it. Bouchard admits that he signed it, because Labrie represented that the company owed him that amount. Bouchard having consented to sign the cheque for this reason, Labrie to all appearance withdrew monies which were due to him. I think that this evidence explained matters satisfactorily and removed the prejudice that the incident might otherwise have caused to Labrie.

As to the evidence that the accused also made use of false pretences in obtaining other amounts, I do not think that the verdict should be set aside on that score.

This sort of proof, and my remarks also apply to the Pard incident, is admissible in cases in which false pretences are charges, for the purpose of establishing intention and guilty knowledge. The jurisprudence is fixed on this point.

I think that the verdict is valid.

Martin, J.:—The evidence in the case in the Court below has been transmitted to this Court, and after consideration of the same, we have arrived at the conclusion that the verdict must stand.

To constitute the offence of obtaining by false pretenses, it is perhaps elementary to state that four essentials are necessary, viz.:—1. There must be a false statement, which

Que.

K.B.

REX v. LABRIE.

represents as existing, something which does not exist, or which represents as having happened or having existed, something which has not happened or has not existed; 2. The offender must have known at the time of making the false statement or representation, that it was false; 3. The goods or money in question must have been parted with in consequence of and through the false representation; and 4. The false statement or representation must have been made with the intent to defraud.

As appears from the evidence and in the opinion of the trial Judge, good and legal proof was made that the accused had obtained by false representation the promissory note as charged in the indictment.

Objection is made that evidence was improperly allowed, that the accused had fraudulently obtained other sums from other people in matters arising out of the conduct of this same company.

It has been frequently held that where there is evidence that, at dates subsequent to the offence charged, the prisoner obtained goods from other persons by false pretenses similar to those used on the occasion charged in the indictment, on trial such evidence is admissible when it points to one and the same system of fraud and a connected scheme of dishonesty. Not as corroboration of the act charged but as tending to establish criminal intent—Crankshaw's Criminal Code, 4th ed. p. 446 and authorities there cited.

Moreover it appears that the enquiry as to other acts and incidents was provoked by the cross-examination by counsel for the accused of a witness, one Geo. Rodrigue. He was asked if the company was in need of money to pay salaries, to which he replied that it was difficult to say as the accused had a few days previously received $500 from one place, $500 from another and later $1,200 from one Pard. From the enquiry so opened up, it developed that the Pard money was deposited to the credit of the company and the accused drew out for his own purposes $800 of same.

The objection as to the admissibility of this evidence, under the circumstances disclosed in this case, is unfounded and such objection should have been, as it practically was, overruled by the trial Judge in the Court below.

Question "a" should be answered "Yes as evidence of criminal intent."

To the first part of question "b" "Yes, as evidence of criminal intent."

To the second part "No."

Judgment. "Having heard the said Athanase T. Labrie by his counsel upon the merits of the questions reserved by the Judge of the Court of King's Bench (criminal side), sitting in and for the district of St. Francis, for the opinion of decision of this Court, to wit:

"(a) As to the proof made at the time of the trial to the effect that subsequently to the obtaining of the signature of the man named Gagnon the accused obtained from a man named Pard $1,200 which he converted to his own use, as per deposition of George Rodrigue, pp. 37 and 38.

"Was this evidence of any legal value or effect, seeing that previously good and legal proof had been made that the accused had obtained a promissory note from said Gagnon by false representation, as per deposition of C. Gagnon, J. B. Bouchard and A. Gagnon, and that, although objection was entered in the deposition, there was no ruling asked or given as to the legality of the proof objected to?

"(b) As to the proof of obtaining other amounts subsequently to the obtaining of the signature of Gagnon in the name of a company called Auto Piston Ring, which amounts he had converted to his own use.

"Was this evidence of any legal value or effect under the circumstances above mentioned and was the omission under the said circumstances by the trial Judge to declare to the jury that this evidence objected to was illegal, prejudicial to the accused?

"Having heard and considered the case stated by the said Judge; having heard what was said by counsel appearing on behalf of the Crown; having examined the evidence adduced at the trial in the Court below and deliberation on the whole being had; it is, by the Court of Our Sovereign the King now here, considered that there is no error in the judgment appealed from, to wit; the judgment rendered by the Court of King's Bench (criminal side), sitting in and for the district of St. Francis, on December 11, 1918;

"Considering that question (a), in the said stated case should be answered "Yes, as evidence of criminal intent."

"Considering that the first part of question (b), of the said stated case should be answered "Yes, as evidence of criminal intent", and to the second part of said question (b), "no."

Alta.

App. Div.

REX v. BREWER.

"Doth dismiss the said stated case, and doth in consequence adjudge that the conviction be affirmed and the same is affirmed with costs; and it is ordered that an entry hereof be made of record in the said Court of King's Bench (criminal side), sitting in and for the district of St. Francis, and that the record herein be remitted to the said Court for such further order and proceedings as to law and justice may appertain."

Conviction affirmed.

REX v. BREWER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 29, 1921.

Perjury (§III—30)—Affidavit of Justification of Bond—Default—Judgment—Examination for Discovery in Aid of Execution—Contradictory Statements—Necessary Proof—Trial Judge Withholding Part of Examination from Jury on Trial for—Right of Jury to Have Whole of Examination for Consideration—New Trial.

On a prosecution for perjury for knowingly, willfully and corruptly swearing in an affidavit of justification to a bond for security for costs that he was worth $400 over and above what was sufficient to pay all his just debts and over and above his exemptions, the Court held that the examination of the defendant for discovery in aid of execution on the judgment recovered on the bond in respect of which he made the affidavit of justification was sufficient to justify the jury in finding it to constitute a contradiction of the affidavit of justification, and also to justify the conclusion that of the two contradictory statements it was the affidavit which was false.

The accused was entitled to have the whole of his examination for discovery considered by the jury, and when the trial Judge reads certain portions of the examination to them, and practically withdraws from their consideration all parts of the examination except those quoted, the accused is entitled to a new trial.

CASE RESERVED as to certain questions of law in a case of perjury tried before Simmons, J., with a jury, in which there was a verdict of guilty.

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

James Short, K.C., for the Crown.

The judgment of the Court was delivered by

Beck, J.:—This is a case of a charge of perjury tried before Simmons, J., with a jury, in which there was a verdict of guilty and in which the trial Judge reserved certain questions of law.

The defendant is charged with knowingly, willfully and corruptly swearing in an affidavit of justification to a bond

for security for costs that he was worth $400 over and above what was sufficient to pay all his just debts and over and above his exemptions.

He was sued upon the bond and judgment having been obtained against him, he was examined under oath in the action by way of discovery in aid of execution and his depositions thus taken were put in as part of the Crown's case in the prosecution for perjury.

It is urged in his behalf as a matter of law, that assuming the defendant's statements on his examination for discovery are a contradiction of his statements in the affidavit of justification, this is insufficient to justify a conviction for perjury in the affidavit of justification inasmuch as it does not appear which of the contradictory statements is the false one.

Section 1002 of the Criminal Code, R.S.C. 1906, ch. 146 enacts that in prosecutions for perjury no person shall be convicted upon the evidence of one witness, unless such witness is corroborated in some particular by evidence implicating the accused.

This provision is used to assist the argument in favour of the accused although the principle involved in the argument in the defendant's behalf does not necessarily depend upon the application of this statutory provision.

There are some half dozen cases referred to in all the books touching the point raised. In Crankshaw's Criminal Code (1915), 4th ed., p. 164, notes to sec. 171, it is said:—"If in two causes, or, in one cause, at different examinations or at one examination, a witness swears to two opposite and irreconcilable things he commits perjury by that one of the two statements which is false, but not by that one which is true. And though what he said when he told the truth may be shewn in evidence against him on an indictment for false statement, still there must be evidence over and above his own contradictory statements as to which of them is false." Reg. v. Hughes (1844), 1 Car. & Kir. 519; Reg. v. Hook (1858), Dears. & B. 606, 4 Jur. (N.S.) 1026; 8 Cox C.C. 5. And at p. 165 it is said, "It is not a necessary consequence that a person has committed perjury when he has sworn on two different occasions, to conflicting statements, for there are cases in which a person might honestly swear to a particular fact from the best of his recollection and belief, and, at a subsequent time from other circumstances, be convinced that he was wrong and swear to the reverse. So that the mere fact of a person swearing one thing at one

Alta.

App. Div.

REX v. BREWER.

time, and another at another, is not sufficient to convict him of perjury where there is no other evidence adduced to shew which is true and which is false. (R. v. Jackson, I. Lew. 270). [Jackson's case (1823), II. Lew. 270?]

"But where one witness proves the falsity of the accused's sworn statement, which is the subject of an indictment, contradictory written statements of the accused, though not made upon oath, have been held to be a sufficient corroboration. (R. v. Mayhew (1834), 6 C. & P. 315.)"

In R. v. Harris (1822), 5 B. & Ald. 926, 106 E.R. 1430, the Court of Queen's Bench held that an indictment charging the defendant with perjury because he had sworn at one time one way and at another time another way, and then saying "So he was guilty of perjury" was insufficient; that the indictment must allege which of the statements is the false one; and that the evidence must establish the falsity of the statement in respect of which the perjury is alleged.

R v. Knill (1822), reported in a note to R. v. Harris, supra, was a case in which it was contended that the only evidence was the two contradictory statements under oath of the accused. The Court, however, held that this evidence was sufficient inasmuch as the contradiction was by the accused himself and the jury might infer from the circumstances a motive for the falsity of the statement in respect of which the perjury was laid.

R. v. Knill is questioned. In Reg. v. Hook, 8 Cox C.C. 5 at pp. 9, 10, Pollock, C.B., says of it:—"It appears to me to be quite clear, even assuming the case of R. v. Knill as not quite safe to be acted upon (though certainly it is supported by the Court of King's Bench, as constituted in the time of Lord Tenterden, and also supported according to the authority of Chambers, J., by the Whole Court of King's Bench in the time of Lord Mansfield) and that the probability is that no judge would act upon it without some confirmatory evidence, that in this case there is abundant confirmatory evidence."

In Russell on Crimes, 7th ed., p. 514, note (b) R. v. Knill and an anonymous case, apparently to the same effect, are discussed and it is said:—"But supposing those cases go the length of establishing the proposition that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned, it is conceived

that they cannot be supported"; but the writer puts it on the ground substantially that it would be left in doubt which of the oaths was the false one. The decision in R. v. Knill, however, seems to be one applied to a case where the facts excluded such a case. The short expression used in the report "The jury might infer the motive from the circumstances" seems to mean that, while if nothing more appeared than two contradictory oaths of the accused a conviction would not be justified, a conviction would be justified if from the other evidence it could be reasonably inferred that it was the oath in respect of which the perjury was charged that was false. Interpreted in this sense I think that R. v. Knill ought to be accepted as sound law.

R. v. Cleland (1901), 20 N.Z.L.R. 509 is a decision of the New Zealand Court of Appeal. The head note is as follows:—"The fact that a person accused of perjury made a statement, on an occasion prior to his giving evidence on oath, absolutely contradictory to his subsequent statement on oath is not sufficient evidence of the falsity of his statement on oath to justify a conviction, though the prior contradictory statement is testified to by two witnesses. Dicta in R. v. Hook followed. R. v. Knill not followed."

In New Zealand there is a statutory provision similar to ours requiring corroboration in a case of perjury. The question is also dealt with in 9 Hals. tit "Criminal Law," p. 498, especially note (c).

It must, it seems to me, be taken as undoubted law that it is not sufficient to prove merely a statement by the accused, whether made under oath or not and whether made before or after the sworn statement in respect of which perjury is charged contradicting that statement, to justify a conviction (inasmuch as it does not appear which is the false statement) but there must be evidence (in addition to the accused's contradictory statement) shewing the falsity of the statement in respect of which the perjury is charged, and consequently in such a case there must be evidence over and above the defendant's contradictory statements to establish the falsity of the statement in respect of which the perjury is charged.

In England in 1911 the Perjury Act 1-2 Geo. V. (Imp.) ch. 6 was passed. Section 13 provides that a person shall not be liable to conviction for perjury "solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

Alta.

App. Div.

REX v. BREWER.

It is undoubtedly on the question of the falsity of the statement in respect of which the perjury is charged that further evidence was required at common law and is required by our statute and by the English statute. See Archbold's Criminal Pleading, Evidence and Practice, 25th ed., pp. 1130-1; 1134-5.

But it seems to me that neither our statute, nor the English statute, nor that of New Zealand, was intended to meet the case of two contradictory oaths by the accused; but only the case of one witness produced at the trial to contradict the statement sworn to by the accused in respect of which perjury is charged—such a single witness must be corroborated by some additional evidence not necessarily another witness; and that the case of the two contradictory sworn statements of the accused is to be dealt with on the principles indicated in the cases already referred to.

The examination of the defendant for discovery in aid of the execution on the judgment recovered on the bond in respect of which he made the affidavit of justification in my opinion is not only sufficient to justify a jury on finding it to constitute a contradiction of the affidavit of justification but also to justify the conclusion that of the two contradictory statements it was the affidavit which was false.

Inasmuch as I think the statutory provision for corroboration has no application, this virtual admission by the defendant if so found by a jury, would be sufficient proof of the falsity of the affidavit without other evidence, the evidence of the deputy sheriff of the existence in the sheriff's hands at the time of a number of executions against the defendant, could, I think, be taken to be sufficient corroboration if it were necessary, as I think it is not.

What I have said sufficiently answers, I think, the points in the minds of counsel intended to be covered by the 1st and 3rd questions submitted to us—viz., the sufficiency of the evidence generally and its sufficiency from the point of view of its being a case of two contradictory statements of the defendant.

But there remains the second question, namely:—"Was the judge's charge to the jury right in stating that in view of the admissions, made by the accused upon his examination under oath in another proceeding, that he did not have more than $400 or $500, that it did not seem necessary to take up any more time discussing whether or not he (the accused) was worth the sum of $400 over and above his

just debts; it seems to me there is a straight admission there that he was not."

The affidavit of justification was made on April 26, 1919. The examination for discovery took place on November 6, 1920.

In his examination the defendant said that "a couple of years ago," his father having died, he received from his estate $400 or $500. As presumably this was cash, there is no question of exemptions. There was, however, a question of debts. Though in the course of his examination the accused admitted there were several judgments against him and seemed to admit that he owed a considerable sum in respect of them, yet after being examined as to the nature and circumstances of the debts, he said that in one instance the liability was that of two others besides himself and that he had satisfied his share; that in another instance his wife had paid the judgment, and he subsequently stated as follows:—"Q. It was not right that you were worth $400 or $500 merely because you had certain money in your pockets? A. There was not much against me. Q. About $600 or $700 at least? A. Only about $160. I think it would be a little over $100. Q. So that you would not be worth $400 at that time, would you? A. Pretty nearly. Q. What do you mean by pretty nearly? A. I would not be much short. Q. You would be short, would you not? A. Not much. Q. You would not be worth $400? A. Very nearly. I had over $400 in my pocket."

The examination consisted of about 450 questions and answers. There is nothing to indicate that the jury had it while deliberating. The Judge read to them some portions of the examination and then made the observation complained of. He did not read the portion which I have quoted. It seems to me that this was practically withdrawing from the jury the consideration of all parts of the examination, except those quoted by the Judge, something perhaps specially important in view of evidence as to the change of the bond and affidavit from $200 to $400 and the defendant's assertion that he was not sworn on the second occasion. The accused was entitled to have the whole of his examination considered by the jury. Arch. Crim. Prac., 25th ed., p. 382.

In the result, although on the evidence I think there was sufficient evidence on which the jury could convict, though I think they might have declined to do so, I think a new

Sask.

K.B.

EVERSON v. HODGSON.

trial should be directed on the ground of misdirection.

New trial ordered.

EVERSON v. HODGSON.

Saskatchewan King's Bench, Embury, J. January 10, 1921.

Vendor and Purchaser (§IE—28)—Agreement for Sale and Purchase of Land—Failure to Pay Purchase Money—Extension of Time—Terms—Rights of Parties.

Where an extension of time is granted for making the payments due under an agreement for the sale and purchase of land it should only be granted on such terms as if complied with would provide ample security as the Court although leaning towards indulgence must not make an order which would be inequitable to the vendor.

APPEAL from an order of a Local Master extending the time for redemption in an action for cancellation of an agreement for sale of land. Varied.

H. Fisher, for plaintiff; P. H. Gordon, for defendant.

Embury, J.:—The principles by which the Court is to be guided in extending the time for redemption in foreclosure actions would appear to be: (1) That there must be ample security; (2) That the mortgagor has a reasonable probability of obtaining the money wherewith to pay the mortgage debt.

In such a case as this (being the latest of several applications for extension) it is required to be proved that there has been unexpected delay in obtaining the money, and the probability that the money will be forthcoming must be a strong one. See Idington v. Trusts and Guarantee Co. (1917), 34 D.L.R. 86, at pp. 90, 91, 11 Alta. L.R. 337, and the cases therein referred to. And where an extension of time is granted, it should only be on payment of all arrears of interest and costs in full. See Eyre v. Hanson (1840), 2 Beav. 478, 48 E.R. 1266, and Coombe v. Stewart (1851), 13 Beav. 111, 51 E.R. 44. In cases such as this, "when the question decided is in the discretion of the Judge, the general rule is that the Court of Appeal will not interfere unless the discretion has been exercised on a wrong principle." See McGregor v. Peterson & Williams (1916), 27 D.L.R. 788, 9 S.L.R. 196.

The Local Master gave his reasons for the order herein as follows:—"My reason for granting this extension is that the defendant, although he has had an extension from time to time, has had no crop from which to make payments. That this fact has evidently been recognised by the plain-

tiff himself by his entering into an agreement for an extension of time to November 1, 1920. That my order now given gives the plaintiff as much or more than he would have received under that extension agreement. Further that I am always inclined, so long as the defendant shews that he is doing his utmost to make payment, to give him every opportunity to make a settlement and save his property."

The inclination as stated by the Local Master in the last sentence of his reasons is one which cannot help but meet with approval. And his reason as set out in the first sentence thereof accounts for the delay in making payment. But on the authorities this is not sufficient, and the terms imposed by the Local Master fall short of what is required. In the present circumstances it would not be difficult to impose such terms as if complied with would provide ample security. This could be done by insuring that the sum outstanding at the expiry of the period for redemption should approximate $2,000. To ensure this it would be necessary to provide for the immediate payment of (1) All arrears of taxes; (2) All arrears of interest; (3) All costs; (4) A further sum of about $200. This would leave ample security. But this application is the latest of a number of applications for extension, and the vendor has rights which must not be overlooked. If indulgence is to be granted for ten months (a very long term, but the only one of any benefit by reason of the annual crop) then there should be a strong probability that the amount due on November 1 next will be paid in full. The Court leans towards indulgence where it can be granted to one without injury to another. To grant this extension without there being a good prospect of full payment would in my judgment be grossly inequitable to the vendor. It is therefore to be considered what is the probability of payment in full on November 1 next, provided the above terms are imposed and complied with. The defendant conducts a garage in Swift Current and does not live on the farm. There are 60 acres to be put in crop this year. See defendant's affidavit of November 27, 1920. These are practically the only two facts which we have on which to rely on coming to a conclusion in the matter. In my judgment, with an average crop selling at less than present prices, it would be probable that the defendant would be able to make such a payment as would reduce the balance payable to considerably below $1,000, in which case

Sask.

D.C.

BAKER LUMBER CO. LTD. v. LEE ET AL.

the balance could, I have no doubt, be raised by way of first mortgage loan.

Accordingly the time for redemption will be extended to November 1 next, provided the defendant do, before February 20, 1921:—(1) Pay all arrears of taxes and interest and penalties thereon; (2) Pay all arrears of interest; (3) Pay all costs, including the taxed costs of this appeal; (4) Pay a further sum of $200. In default there will be a final order for cancellation. Costs to appellant.

Judgment varied.

BAKER LUMBER CO. LTD. v. LEE ET AL.

Saskatchewan District Court, Taylor, J. April 21, 1921.

Judicial Sale (§IV—35)—Application to Confirm—Right of Highest Bona Fide Bidder to be Declared Purchaser—Mechanic's Lien Action.

An application to confirm a sale of land sold under a judgment of the Court to realise a mechanic's lien is analogous to the application for a certificate and the highest bona fide bidder at such sale provided he shall bid a sum equal to or higher than the reserved price if there is any, should be declared the purchaser, unless the Court or Judge on the ground of fraud or improper conduct in the management of the sale, either opens the biddings, holding such bidder bound by his bidding, or discharges him from being the purchaser.

[Canada Permanent Mortgage Co. v. Jesse (1909), 2 S.L.R. 251; Re Joseph Clayton (1920) 1 Ch. 257, referred to.]

APPEAL by plaintiff from an order made in a mechanic's lien action by a District Court Judge on an application to confirm a sale of certain lands sold under a judgment of the Court to realise the claimant's lien. Reversed.

H. D. Pickett, for appellant.

E. S. Williams, for Weyburn Security Bank.

W. D. Graham, for defendant.

Taylor, J.:—On the return of the motion of the plaintiff to confirm the sale, the defendant who had been served with notice of motion appeared and opposed the application. He had not entered an appearance but had, without an order, been served with notice of the motion.

The disposal made by the Judge of the District Court of the application to confirm is peculiar. Under the order nisi directing sale it had been directed that the amount of the lien be paid into Court within 5 months after the clerk's certificate which was July 14, 1920. This time is extended by the Judge of the District Court until December 31, 1921, and application for confirmation of the sale is adjourned

until December 31, 1921, and leave is given to the purchasers to withdraw as purchasers on or before December 31, 1921. In such event they are entitled to have the purchase price paid into Court by them returned to them, and, in the event of their withdrawing, the plaintiff is to be at liberty to apply for a further order and reference in respect to the mechanic's lien. The defendant is to pay the costs.

As pointed out in the judgment under review, no objection to the regularity of the proceedings under which the sale was had herein is raised, nor is there any suggestion of any impropriety in directing the sale or in the conduct thereof. The Judge arrives at the conclusion that owing to the conditions prevailing in the district in which the defendant resides he has had no crop for some years, and the Judge is of the opinion that the defendant's prospects for a good crop in 1921 are excellent, and that with careful handling by the defendant of his business affairs he should be able to clear off all liabilities which are charged against his land. In the exercise of what the Judge conceives to be a just, reasonable and equitable discretion, the defendant should be given a further opportunity to redeem.

I quite agree that it seems a hardship that for the small amount of the plaintiff's claim the defendant should have his land sold, but it must be remembered that the Judges are not in anyway responsible for the legislation conferring upon the plaintiff a right of lien and to have the land sold to realise his lien in the event of non-payment.

It has been held by the Court en banc in Canada Permanent Mortgage Corp'n. v. Jesse (1909), 2 S.L.R. 251, that the provisions of the Imperial statute, the Sale of Land by Auction Act, 30-31 Vict. (1867), ch. 48, and particularly sec. 7 thereof, apply in this Province. This sec. 7 provides:—

"And whereas it is the long settled practice of Courts of Equity in sales by auction of land under their authority to open biddings even more than once, and much inconvenience has arisen from such practice, and it is expedient that the Court of Equity should no longer have the power to open biddings after sales by auction of land under their authority: Be it further enacted by the authority aforesaid, that the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery shall, from and after the time appointed for the commencement of this Act, be discontinued, and the highest

Sask.

D.C.

BAKER LUMBER CO. LTD. v. LEE ET AL.

bona fide bidder at such sale, provided he shall have bid a sum equal to or higher than the reserved price (if any) shall be declared and allowed the purchaser, unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or Judge before the Chief Clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or Judge shall think fit."

This section has recently been considered by Peterson, J., in In re Joseph Clayton Ltd.; Smith v. The Company, [1920] 1 Ch. 257. Peterson, J., reviewing the authorities points out that in England there is a series of decisions which establish that a purchaser was not entitled to the benefit of his purchase until the certificate of the result of the sale had become binding, and when the certificate became binding it related back to the date of the sale. The certificate recognised, allowed or approved of the highest bidder as the purchaser, and it was the certificate which enabled the highest bidder to say that he was the purchaser and entitled to the benefit of his purchase. Taking advantage of the fact that the highest bidder did not become the purchaser before the certificate was binding the Court of Chancery was in the habit of opening the biddings where a higher bid was obtained after the sale, so that the highest bidder at the auction was always exposed to the risk that the property might be sold to some other person who subsequently offered a better price. In order to meet the inconvenience of that practice sec. 7 of the Sale of Land by Auction Act, which I have quoted, was passed, and the practice of opening the biddings was prohibited, and it was enacted that the highest bidder should be declared and allowed the purchaser if the sale had been conducted as required by the statute. In In re Clayton, supra, Peterson, J., held that as one of the conditions, that the reserve price be reached, had not been complied with the Court was not bound to certify the highest bidder to be the purchaser and refused the certificate.

In my opinion the reasons inducing such legislation in England are applicable here. The Court will always strive in sales under its direction to obtain the highest possible

price. That can be obtained only if the proposed bidder can feel that, should he be the highest bidder and declared by the auctioneer to be the purchaser, he is secure in his purchase. How otherwise would a purchaser care to sign an agreement to purchase and pay his purchase price? He is bidding for the property, not for a chance to buy the property; and while this is probably a hard case, yet to hold that the Court would refuse to confirm a sale held under judicial process or its direction where sale proceedings were regularly and properly conducted in accordance with the orders of the Court, would be liable to work hardship to a great number in other cases, and jeopardise all sales by auction under judicial process.

In my opinion the application to confirm the sale is analogous to the application for a certificate; and the highest bona fide bidder at a sale under judicial process provided he shall bid a sum equal to or higher than the reserved price (if any) should be declared and allowed the purchaser, unless the Court or Judge on the ground of fraud or improper conduct in the management of the sale, either opens the biddings, holding such bidder bound by his bidding, or discharges him from being the purchaser. Unless it is a case where the bidding should be opened or the purchaser discharged under the provisions of sec. 7 of the Sale of Land by Auction Act the sale should be confirmed.

My understanding of the practice in vogue in this Province is that the order for confirmation of sale goes as a matter of course unless there is some fraud, irregularity, or impropriety in the sale.

It is further to be noted that counsel for the purchaser intimates that in this particular case, should confirmation be refused and the order under appeal be affirmed, they will at once under the leave granted withdraw from the sale. The property is subject to a prior encumbrance, and it is stated by counsel for the purchaser, that for overdue payments thereunder no provision is now made.

It is too late on an application to confirm a sale regularly made to apply for further time to redeem. Had the application been made before the sale the decision under review does not appear to be in conformity with that of Embury, J., in Everson v. Hodgson (1921), ante p. 594, in which the conditions upon which a defaulting mortgagor may obtain an extension of time are set out.

I have not overlooked the objection taken to the appeal

Man.

C.A.

REX v. VAN PRAEGH.

that this was a final and not an interlocutory order, but in my opinion the order under review is an interlocutory order.

The appeal will be allowed and an order made confirming the sale. The plaintiff is entitled to costs of the appeal and the application to confirm.

Appeal Allowed.

REX v. VAN PRAEGH.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. November 3, 1920.

Taxes (§VIII—300)—Manitoba Amusements Taxation Act 8 Geo. V., 1918, ch. 1, and Amendments—Construction—Application of to Billiard-Room Owners—Non-Compliance with Requirement as to Making Returns—Penalties.

Section 9 (2) of the Manitoba Amusements Taxation Act, 8 Geo. V., 1918,ch. 1, as amended by sec. 6, ch. 3, 1920, does not apply to billiard-room owners, because they are required to make their returns fortnightly, not weekly, nor do they charge any price for admission, and this being the only section for violation of which penalties are provided, there is no penalty under the Act which can be imposed on the proprietor of a billiard-room who fails to make the return required by sec. 3 (j) of the Act.

MOTION for certiorari to quash a conviction under the Amusements Taxation Act, 8 Geo. V. 1918, Man., ch. 1, as amended by 9 Geo. V. 1919, ch. 2 and by 10 Geo. V. 1920, ch. 3. Conviction quashed.

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

John Allen, K.C., and W. R. Cottingham, for the Crown.

The judgment of the Court was delivered by

Dennistoun, J.A.:—A motion is made in this case for certiorari and to quash a conviction under the Amusements Taxation Act, 8 Geo. V., 1918 (Man.), ch. 1, as amended by 9 Geo. V. 1919, ch. 2, and by 10 Geo. V. 1920, ch. 3. The defendant Van Praegh, as owner of a billiard room in the City of Winnipeg has been convicted on admissions made with the object of testing the constitutionality of the Act. Mr. Trueman argues that the provisions of the Act in so far as they relate to billiard rooms impose a tax on owners which by the intention of the Legislature and the bent of the legislation is obviously to be borne by their patrons in violation of the provisions of sec. 91 (2) of the B.N.A. Act which limits a Provincial Legislature to direct taxation within the Province in order to raise a revenue for provincial purposes.

This is the only ground taken before this Court but for reasons which will be indicated, I am of opinion that this motion cannot be satisfactorily disposed of upon that

ground. It is necessary in order to avoid misunderstanding hereafter to draw attention to certain defects in the legislation which make it impossible to uphold this conviction, quite apart from the constitutional point referred to.

The offence for which Van Praegh was convicted as extracted from the conviction is: "that he being an owner of a place of amusement as defined by the Amusements Taxation Act unlawfully failed to remit to the Superintendent under the said Amusements Taxation Act cheque for the tax of ten per centum of the gross revenue of the billiard room of the said Leonard Van Praegh for the fortnightly period ending Saturday, July 17th, 1920."

He was fined $50 and costs.

The statute and amendments under consideration, so far as the clauses relating to billiard rooms are concerned, are most unsatisfactory. There is such a confusion of ideas and mixture of principles, as to render it impossible to determine what is the legislative effect of their provisions.

The object of the Legislature when the Act was passed appears to have been to impose a tax upon patrons of places of amusement. The tax was intended to be collected by the owners of such places of amusement and remitted to the officers of the Government. It was to be paid by the person attending on admission, and was represented by a special ticket upon a sliding scale varying with the amount of the fee charged for admission.

Billiard rooms do not seem to have been contemplated when the Act was passed. It was by the amending Act of 1920 which enlarged the definition of "place of amusement" so as to include "any place where a fee is charged for participating in any game," that they were included.

Inasmuch as the patrons of billiard rooms do not pay an admission fee it became necessary to devise some special method of levying and collecting the tax, and this the draftsman attempted to do by an amendment which has only to be looked at to make it apparent that it has no grammatical sequence to what goes before and introduces a new principle of taxation completely at variance with the foregoing and following provisions of the Act.

Section 3 of the Act as amended by ch. 3 sec. 3 of the Act of 1920 now reads:—

"3. Every person attending an exhibition, performance or entertainment at a place of amusement shall, upon each admission thereto, pay to His Majesty for the public uses of the Province of Manitoba, a tax as follows·

Man.

C.A.

REX v. VAN PRAEGH.

(j) A tax of ten per centum of the gross revenue shall be paid in the case of pool rooms and billiard rooms, and of one cent per string in the case of bowling alleys. Returns for the same shall be made fortnightly by the owners of pool rooms and billiard rooms and bowling alleys situated in the City of Winnipeg, such returns to be in the hands of the superintendent not later than five o'clock in the afternoon of Wednesday following the expiration of each fortnightly period ending with the preceding Saturday. Returns in other cases shall be made for each calendar month and shall be in the hands of the superintendent not later than five o'clock in the afternoon of the sixth day of the following month."

This sub-clause cannot be read as dependent on the main section. It imposes a tax on the owner measured by the gross revenue collected, in contra-distinction to a tax on the patron based upon, and paid, in addition to an admission fee.

There does not appear to be any reason why the Legislature could not by appropriate words and clauses impose the tax in certain cases upon the patrons and in other cases upon the owners. In such cases it would be a direct tax and within the powers of the Province, but if such be the policy intended it is necessary to follow each method of taxation to a legitimate conclusion by providing appropriate machinery for collection and distinct and separate penalties for infraction.

By attempting to include in one section these unconnected and radically diverse methods of taxation without regard to general sections of the Act which do not apply to both the result is confusion and chaos.

A closer scrutiny of other sections of the Act will make this clear.

By sec. 3 (j) billiard room owners are to make their returns fortnightly, such returns to be in the hands of the superintendent not later than 5 o'clock in the afternoon of Wednesday following the expiration of each fortnightly period ending with the preceding Saturday.

By sec. 9 (2) as amended by sec. 6 of ch. 3, 1920:—

"The owner of every place of amusement where the tax is payable in cash, not later than five o'clock in the afternoon of each Wednesday, shall make a return to the superintendent in the form of a statutory declaration showing the price of admission and the daily attendance at such place

of amusement during the week ending on the previous Saturday, together with a cheque covering the tax collected in cash during each week and such other information and in such form as the minister may require. Failure to comply with this sub-section shall render such owner liable to lose the right to collect in cash the tax imposed by this Act."

This section clearly does not apply to billiard room owners for they by sec. 3 (j) are required to make their returns fortnightly, not weekly, nor do they charge any price of admission.

This becomes of vital importance when the penalty clause of the Act is examined. It is sec. 17 and reads as follows as amended by the Act of 1920:

"If any owner, or employee of any owner, of a place of amusement, refuses to produce to the superintendent any books, letters or documents or to answer any questions relating to the affairs of any place of amusement, or fails to make satisfactory returns or to remit cheques in the case of cash returns to the superintendent at the time designated in section 9, he shall on summary conviction before a police magistrate or a justice of the peace, be liable to a penalty of not less than $50.00 (fifty dollars), and not more than $200.00 (two hundred dollars), in respect of such offence, and, in default of payment, to imprisonment for a period not exceeding six months."

It is under this section that Van Praegh has been convicted and fined. He is a billiard-room owner and not governed by the provisions of sec. 9 and no penalties are provided by the Act for violation of any other section.

There is in this Act no penalty which can be imposed on the proprietor of a billiard room who fails to comply with the provisions of sub-sec. (j).

Even if this Court should give effect to the argument of Mr. Allen that an effort be made if possible to uphold provincial legislation in accordance with the principles enunciated in Severn v. The Queen (1878), 2 Can. S.C.R. 70, at p. 103; Regina v. Watson (1889), 17 A.R. (Ont.) 221, at p. 235, and in Re Alberta Railway Act (1913), 12 D.L.R. 150, at p. 159, 48 Can. S.C.R. 9, 15 Can. Ry. Cas. 213, and even if this Court should regard (j) as an independent legislative enactment creating a new tax upon a new class of persons, the conviction under consideration could not stand in the absence of any provision for penalties in the case of

B.C.
C.A.
REX
v.
DAHLIN

those who violate its provisions. Moreover it is hopeless to try to sever it from the operation of the remaining clauses of the Act such as 4 and 5 to which it is unnecessary to make particular reference.

The statute is defective and incomplete and in my judgment an order for certiorari should issue and the conviction be quashed.

There should be no order as to costs.

Judgment accordingly.

REX v. DAHLIN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 21, 1919.

Constitutional Law (§IA—3)—British Columbia Prohibition Act—Power of Provincial Legislature To Pass—Power to Impose and Enforce Penalty.

Where the local Legislature has power to pass a law such as the British Columbia Prohibition Act, the penalty of imprisonment may be imposed for the breach of that Act, and the enactment of procedure to enforce the penalty is competent to the local Legislature.

[Regina v. Wason (1890), 17 A.R. (Ont.) 221; The Queen v. Robertson (1886), 3 Man. L.R. 613 followed.]

APPEAL by way of stated case from a County Court judgment, convicting the accused for breach of the provisions of the B. C. Prohibition Act, 1916, ch. 49. Affirmed.

The case stated was as follows:

Information was laid on July 14, 1919, by G. A. Murray charging Gus Dahlin the appellant herein for that at the city of Vancouver on July 13, 1919, he did unlawfully sell liquor contrary to the form of the statute in such case made and provided. The said charge was heard under the provisions of the Summary Convictions Act on July 22, 1919, at the Police Court in the city of Vancouver by C. J. South, Deputy Police Magistrate for the City of Vancouver. The Deputy Police Magistrate above named found the appellant guilty of the charge and sentenced him to 6 months' imprisonment. Against this conviction the appellant appealed to the County Court of Vancouver holden at Vancouver, notice of appeal being dated July 22, 1919. The hearing of the appeal came before me as one of the County Court Judges of the County Court of Vancouver, and after several adjournments was finally heard by me on Friday, October 24, 1919, and I dismissed the appeal after the evidence had been taken. Counsel for the said appellant raised the following point which I now desire to submit to this Honour-

able Court upon the question of law thereby involved.

"Was I right in deciding that the Provincial Legislature has the power to pass legislation providing the procedure for the enforcement of provincial penal legislation such as the British Columbia Prohibition Act, 1916, ch. 49 and amendments thereto?"

J. A. Russell for appellant; W. M. McKay for the Crown.

Macdonald, C.J.A.: I think the appeal should be dismissed. I rely on Regina v. Wason (1890), 17 A.R. (Ont.) 221, and the cases referred to therein. It seems to me clear that where the local Legislature has power to pass a law such as the British Columbia Prohibition Act, 1916, ch. 49 (and it is conceded, in this argument, that the Legislature had that power) the penalty of imprisonment may be imposed for the breach of that law, and the enactment of the procedure to enforce the penalty is competent to the local Legislature. That is the whole point in this case. In so holding, I am simply following past decisions of our Courts. The appeal is dismissed.

Martin, J.A.:—In my opinion the question submitted to us should be answered in the affirmative. The contention of counsel for the appellant is so fully covered and answered by the decision of the Court of Appeal in Ontario, in the unanimous decision of Regina v. Wason, supra, it is necessary to add very little to that. I am especially in accord with what Burton, J.A., says in his judgment. He points out (p. 236), the distinction that exists and arises "from the lax use of the expression 'crime', as applied to penalties inflicted by the Local Legislature." The whole of his judgment is so appropriate I adopt it; and I also lay great stress upon the unanimous decision of the Full Court of Manitoba delivered by Killam, J., in The Queen v. Robertson (1886), 3 Man. L.R. 613, where, in dealing with the conviction under the Game Laws, where a penalty was imposed, a penalty of a fine, he says, at pp. 627-8, in regard to the express point before us:—

"If this enactment be not ultra vires of the Provincial Legislature as coming wtihin the subject of Criminal Law, it appears necessarily to follow that the prosecution for an offence against the Act is not one of the 'Criminal Matters' the procedure in which is a subject of Dominion legislation."

If it is excepted from sub-sec. (27) or sec. 91, any doubt at all that has arisen from certain expressions used by the Supreme Court of Canada, in the McNutt case (1912), 10 D.L.R. 834, 21 Can Cr. Cas. 157, 47 Can. S. C.R. 259, is ex-

B.C.
C.A.
REX
v.
DAHLIN

plained and removed by the recent decision of the Appellate Court of Alberta in Rex v. Covert (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349.

I forgot to refer to Lefroy's Canadian Constitutional Law, 1918, at pp. 140-3, where the matter is well summarised.

McPhillips, J.A.:—I am also of the opinion that the question submitted should be answered in the affirmative. The counsel for the appellant did not challenge the constitutionality of the British Columbia Prohibition Act, save in respect of procedure. That is, the constitutionality of the Prohibition Act was admitted, but it was contended that anything that had relation to the enforcement of the penalties, coupled with imprisonment, could only be criminal procedure falling within sub-sec. (27) of sec. 91 of the B.N.A. Act, powers wholly within the jurisdiction of the Parliament of Canada. As opposed to that, it is submitted that sec. 92, sub-sec. (15) is all sufficient to meet the objection. That is, that the Prohibition Act being a constitutional enactment, all necessary and proper provisions for its due operation are within the power of the Provincial Legislature. That seems to me to be the only reasonable conclusion. All the statute law has to be read together, especially here where we have a written constitution.

For over 50 years we in Canada have been able to work fairly efficiently under our written constitution, both Federal and Provincial. That which is dealt with here is peculiarly within the province of the Legislature. And the legislation, to be given effect to, must have some reasonable machinery for its operation. That machinery is provided under the Summary Convictions Act R.S.B.C. 1911, ch. 218 of the Province. As to the policy of the legislation, it is well known that the Courts have nothing to say in that regard. All that can be said in regard to that matter is that it will be dealt with by another forum, and I would be sorry to have to come to the conclusion that any infraction of the Prohibition Act can be said to be a crime. There might be things that follow from infractions of the Prohibition Act, overt acts owing to intoxication which would bring about crimes, but so far as the Prohibition Act itself is concerned I can see nothing in it that could be at all stigmatised as crime, as crime is understood, not only in the law, but as crime is understood in the language of the people.

Appeal dismissed.

LUNDY AND McLEOD v. POWELL.

Saskatchewan King's Bench, Taylor, J. October 10, 1921.

Damages (§IIIA—60)—Caveat Wrongfully Filed—Reckless Indifference to Rights of Others—Measure of Compensation—Land Titles Act R.S.S. 1920, ch. 67 sec. 140.

The effect of a caveat being to tie up the title and prevent any dealings with the land a caveator who unreasonably lodges a caveat against lands which are on the market for sale will be saddled with the cost of carrying the land during the period in which his caveat wrongfully clouds the title, or for a reasonable time in which to procure its removal, and the costs incurred in obtaining such removal. The measure of damages under the Land Titles Act 1920 R.S.S. ch. 67 sec. 140 or in law would be the same.

[Crerer and Patterson v. Braybrook (1919), 48 D.L.R. 683, 15 Alta. L.R. 441; Massey v. Sladen (1868), L.R. 4 Ex. 13; Moore v. Shelley (1893), 8 App. Cas. 285, referred to.]

ACTION to recover alleged special and general damages for the wrongfully filing of a caveat on certain lands.

P. E. MacKenzie, K.C., for plaintiffs.

G. A. Cruise, for defendant.

Taylor, J.:—This is an action to recover alleged special and general damages for the wrongful filing of a caveat on certain lands in the Prince Albert district owned by the plaintiffs, consisting of 8,244 acres.

The defendant was at one time the owner of these lands. On June 1, 1911, he entered into an agreement to sell them to one James A. Powell for $84,831.20. The agreement contained a provision that in addition to this purchase price survey fees amounting to 10 cents per acre were payable with the final instalment of the purchase moneys, and it is further provided in the agreement that if there was any portion of the said lands owned by the vendor in the ranges set out in the schedule to the agreement in excess of the acreage set out in the said schedule, then the vendor should deliver the same to the purchaser, who should accept and pay for the same at the said rate per acre. There is also provision for payment before maturity.

On the same date Powell entered into an agreement to sell the same lands to the plaintiffs John E. Lundy and George B. McLeod, for $113,589.25. Subsequently, the plaintiffs arranged to take title, placing a mortgage on the whole of the property, paying the defendant Powell in full before maturity and giving to James A. Powell a second mortgage for the balance of the purchase price due him. To avoid double registration Max Powell was requested to convey the lands directly to the sub-purchasers, the plaintiffs. In the closing out of the transaction he claimed of the

Sask.

K.B.

LUNDY v. POWELL.

solicitors for the mortgagees, who were passing the title and who purported to act as well for James A. Powell, payment of this survey fee amounting to $824.40. The correspondence shews that payment was refused. He accepted payment of the amount which they offered as payment in full, with a statement that he reserved the survey fee for further consideration, and he gave transfer as requested to the sub-purchasers, the plaintiffs in this action, and the documents were duly recorded as a closed transaction. Subsequently, he communicated with the same solicitors advancing his claim to 10 cents an acre survey fee, and in addition thereto claimed that he had discovered that he had certain lands in the ranges referred to in the schedule to the agreement, and that under his agreement, notwithstanding that it was a closed transaction, he was entitled to payment therefor,—less than 40 acres, for which the defendant sought to recover $9 per acre. He never in any way communicated his claim to the plaintiffs in this action, and he was not called at the trial (though present in Court) to substantiate this claim.

Certificates of title had been issued to the plaintiffs on August 10, 1914. On May 27, 1915, the defendant filed on the whole tract of 8,244 acres a caveat claiming an "equitable estate or interest in an estate in fee simple in possession under and by virtue of an agreement for sale made between Max Leon Powell and James A. Powell, dated the 1st of June, 1911, in the lands in the name of Lundy, McLeod & Company, and forbid the registration of any person as transferee or owner of, or of any instrument affecting the same estate or interest unless such instrument be expressed to be subject to this claim." In this way he effectively tied up the whole tract, for which he had received $84,831.20, to enforce payment of claim of about $1,200.

The correspondence, and the documents which he executed when he transferred to the plaintiffs, shew that he knew that they were a firm of real estate brokers. He communicated with them in no way and he made no endeavour whatsoever to ascertain whether they still had title to the lands, and apparently utterly disregarded the serious consequences that might ensue to the then owners by reason of his filing the caveat. It will be noted, too, that he did not purport in the caveat to disclose the comparatively meagre nature of the claim which he was making. He is an attorney-at-law practising in the State of Vermont, in the United States.

To my mind, it is very plain and requires little consideration to shew that there is no basis to his claim against the tract of land for which he had given conveyance because in the agreement there happened to be a collateral undertaking of his purchaser to purchase and pay for other portions of land. As to the payment of the survey fees, the correspondence shews that the solicitors paid him a balance as in full of his claim against the lands, and that he accepted it as such. I cannot but conclude that the filing of the caveat in the broad language used therein was an intended abuse of the right conferred by the statute, and that the caveat was lodged against the land in entire disregard of the rights of the plaintiffs or of any consequences that might ensue therefrom. The defendant could not help but know that these lands had been acquired for resale in the ordinary course of business to incoming settlers in parcels. To tie up the whole tract of 8,244 acres for a comparatively paltry claim, even had it been a valid claim, would have been something which a reasonably minded man would had refrained from doing.

On October 5th, 1917, the plaintiff company advised the defendant that they had found that there was a caveat filed on the property, asked the reason therefor, and to have it removed. To this the defendant replied on October 10, 1917, setting out his claim for survey fees and to the alleged agreement to purchase the small broken pieces, and added: "I shall not remove my caveat until these matters have been adjusted." After some correspondence, in which the defendant maintained his position that he refused to remove the caveat until his claim was adjusted, notice was given under the Land Title Act, R.S.S. 1920, ch. 67, that the caveat would lapse unless continued by order of a Judge. Such an order was procured, but subsequently the defendant's counsel and solicitors abandoned their claim to a caveat and it lapsed on January 8, 1919.

The plaintiffs were required to pay for solicitors' fees in obtaining the removal of the caveat, $53,78, and in addition claim that in the year 1917 they lost opportunity to make sale of the land by reason of the caveat being recorded against it. The mortgagee, James A. Powell, had been endeavoring to make sale of the property for them. He was called as a witness and said that in 1916 he got in touch with one Zimmerman, of Spokane, who with a man named Smythe came up and inspected the property, and after inspection they verbally agreed to buy a certain quantity, that is that

Sask.

K.B.

LUNDY AND McLEOD v. POWELL.

portion of the tract east of a line drawn on a map thereof which they had, which contains about 5,140 acres. This they agreed to purchase at $17 per acre. They were to go into Lloydminster, where James A. Powell was to meet them next day; they were to pay a deposit, agreement was to be drawn, and preparations made for closing the sale. The next day when James A. Powell went in there he was informed that they had searched the title and found this caveat registered, and would have nothing to do with the property by reason of the caveat. James A. Powell's evidence is corroborated by one Lawrenceson, who was employed by James A. Powell at that time and overheard some of the conversations. Neither Zimmerman nor Smythe were called as witnesses.

This would have been a very profitable resale, but I have no evidence of the financial standing of Zimmerman or Smythe or their capacity to handle the purchase, and I find it difficult to conclude that after coming from Spokane to inspect this land and going to the trouble of inspecting it, they withdrew it entirely from consideration simply by reason of the caveat filed. Objection was taken to the admission of the statements purporting to have been made by them, and I received the evidence as evidencing the attitude which these alleged buyers took at the time, but the evidence does not seem to me to be sufficient to establish that Zimmerman and Smythe were able and willing to purchase at the price of $17 an acre, and that they were deterred from purchasing because they discovered this caveat on these lands. Whilst they may have taken that attitude with Powell, the unsworn statement alone is not to my mind sufficient to prove the fact. As it is put in the quotation in Wigmore on Evidence, Can. ed. sec. 1789, p. 2314: "Such evidence is admitted for the purpose of establishing merely the utterance of the words and not their truth."

The other sale alleged to have been made, "the Cummings purchase," never passed the stage of negotiations. The plaintiffs, therefore, in my opinion, fail to establish the alleged special damages other than the sum of $53.78 paid to solicitors.

It seems to me, however, that as the effect of a caveat is to tie up the title and prevent any dealings with the land, that a caveator who unreasonably lodges a caveat against lands which are on the market for sale might well be saddled with the cost of carrying the lands during the period in which his caveat wrongfully clouds the title; that it follows

as a natural result of the filing of the caveat that the owners must carry the land during that period, be out the payment of taxes imposed, and have in addition to meet any interest charges and hold their investment without return in that period. If the land depreciate in value subsequently and opportunities to sell be in fact lost, that might be an additional element of damages, and even if the land increase in value the owners nevertheless had the carrying charges and an unremunerative investment during the period when the title was clouded. The evidence would appear to establish that the probability of making sales and the land had its best market for years during the time the caveat was lodged. But there was great delay on the part of the plaintiffs in moving to vacate it.

At the trial a case in New Zealand was referred to as the only case in which counsel had discovered an analogous decision and a memorandum of this decision has been furnished by counsel. It does not, however, lay down any principle. Scott, J., in Crerer and Patterson v. Braybrook, [1919] 1 W.W.R. 640, (Alberta) in awarding damages for filing a caveat which had held up the payment of purchase price under an agreement for sale, allowed interest on the money so withheld, and reasonable expenses and solicitors' fees incurred in connection with the withdrawal. His decision on this point was affirmed without discussion in (1919), 48 D.L.R. 683, 15 Alta. L.R. 441.

It is provided in the Land Titles Act that any person registering or continuing a caveat wrongfully and without reasonable cause shall make compensation to any person who has sustained damage thereby. Independently of the statute, the wrongful registration of a caveat would probably be held in law to be wrongful invasion of a legal right, and that the registered owner has a proprietary interest in the recorded title; and any interference analogous to trespass would be actionable. The measure of damages would in either form of action be the same. In such an action the opinion of the writer of Bevan on Negligence, Can. ed. p. 43, is that where the tort is aggravated by an evil motive, or is the result of that reckless indifference to the rights of others which is equivalent to intentional violation of them, in assessing the damages the Court should not confine itself to the actual damage suffered but may award exemplary, punitive or vindictive damages. The following quotation appears at p. 43:

"Vindictive damages are said to be allowable in Denver,

Sask.

K.B.

LUNDY AND McLEOD v. POWELL.

&c. Ry. v. Harris, 122 U. S. (15 Davis) 597, 609, 'in actions of trespass where the injury has been wanton or malicious, or gross and outrageous'; see also Lake Shore, &c. Ry. Co. v. Prentice, 147 U. S. (40 Davis) 101, 107; per Gray, J.—'In this Court the doctrine is well settled that in actions of tort the jury in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages.' This principle of assessment is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or servant."

Mayne on Damages, 9th ed. p. 42, is to the same effect.

The rule is well settled in England that in such cases the Court is not confined to actual damages, but should give substantial damages even where the wrong has actually occasioned but little damage; Massey v. Sladen (1868), L.R. 4 Ex. 13. There, a seizure had been made under a bill of sale given as security without first having made the demand required (as it was held) by the deed. It was argued that even had the demand been made it would not have been complied with and the seizure made, so that there was in fact no real damage. Kelly, C.J., it is noted at p. 18, "came to the conclusion that although the plaintiff would in fact have sustained as much pecuniary loss if the seizure had been made after personal demand to the plaintiff, yet under the circumstances of the case a jury would be entitled to give substantial damages, and that £100 having been agreed on by the parties as the amount for which the verdict should be taken the Court would not interfere with it, and in this the learned Barons concurred." This decision was followed in the Judicial Committee of the Privy Council in Moore v. Shelley (1883), 8 App. Cas. 285.

In 10 Hals., p. 341, it was stated that in actions of trespass the amount of damages may always be indefinitely enhanced by evidence of malicious motive or violent and insulting conduct on the part of the defendant. In Manitoba Free Press v. Nagy (1907), 39 Can. S.C.R. 340, it was held that the reckless publication of an untruth respecting the

complainant's property, the natural result of which is to produce, and where it does produce actual damage is sufficient evidence of the absence of bona fides and of the malice required by law. It was held by the Court en banc in Nagy v. Venne (1916), 9 S.L.R. 186, that injuries to property are only visited with damages proportioned to the actual pecuniary loss sustained, in the absence of circumstances of aggravation.

I have no hesitation in concluding that this caveat was wrongfully filed at least with a reckless indifference to the rights of others, equivalent to mala fides, and I am not so sure that it was indifference merely. It seems more, that the defendant must have intended to so embarrass the plaintiffs in handling the whole tract of 8,244 acres that they would quickly meet his claim, which would be less than $20 against any one quarter-section. Otherwise why blanket the whole tract, when any section would have afforded ample security?

The carrying charges to which I have referred would, for the period which the plaintiffs were embarrassed by the defendant's caveat, I refer to what seems to me a reasonable time in which to procure its removal, amount on the evidence to at least $5,000. This sum would not, under all the circumstances, be out of the way to award as substantial damages, but it should not be twice awarded.

There will be judgment for the plaintiffs for the sum of $5,053,78, and costs.

Judgment accordingly.

RE THOMAS.

Ontario Supreme Court in Bankruptcy, Orde, J. June 4, 1921.

Bankruptcy (§I—4)—Chattel Mortgage given in Part for Past Indebtedness—Fraudulent Preference—Act of Bankruptcy—Bankruptcy Act secs. 31 (1) 31 (2), 3 (c).

A chattel mortgage upon all the goods and chattels in the tailoring shop of the mortgagor to secure what purported to be a present advance of $2,500, the only money advanced at the time the mortgage was given being $300.50, the balance representing an existing indebtedness for moneys previously borrowed, and for goods purchased, has the effect of giving the mortgagee a preference over the other creditors and will be presumed prima facie to have been made with a view of giving such preference under sec. 31 (2) of the Bankruptcy Act and unless the presumption is met, must be deemed fraudulent and void as against the trustee under sec. 31 (1) of the Act and therefore constitutes an act of bankruptcy under sec. 3 (c) of the Act.

[See Annotations, Bankruptcy Act 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 59 D.L.R. 1.]

Ont.

S.C.

RE THOMAS

RENEWED MOTION for a receiving order.

D. G. M. Galbraith, for the petitioning creditors.

J. R. Robinson, for Thomas.

Orde, J.:—Since my judgment in this matter of April 14 last (see end of this case) some of the bills of exchange upon which the petition was based have matured and have been taken up by the petitioners, and one of the banks which held some of the bills has consented to be added as a petitioner, so that the objection to the status of the petitioners has now been removed.

The alleged act of bankruptcy consisted in the giving of a chattel mortgage by the debtor to one Bosada under circumstances which constituted it a fraudulent preference. As it was strenuously argued that the transaction was not preferential, I directed that the debtor attend at Haileybury to be cross-examined upon his affidavit and that notice of the appointment to cross-examine Thomas be given to Bosada, the chattel mortgagee, and that he be at liberty to attend on the appointment and give evidence in support of his chattel mortgage. Thomas and Bosada have both been examined, and their evidence is before me.

Thomas commenced business at Timmins in the autumn of 1919 with a cash capital of about $1,000. In addition to this he borrowed money from his brother, and also from Bosada, who is his brother's brother-in-law. Bosada advanced on September 19, 1919, $501.25 without any security or promise of security. Then in December, 1919, Bosada sold the debtor some goods to the amount of $250 on credit, and in March, 1920, a further lot of goods to the amount of $448.25 on credit. On December 7, 1920, the debtor borrowed $1,000, promising to repay it during the following January. There was some suggestion in the evidence that when this loan was made Thomas promised Bosada that if it were not repaid in January he would secure it by a chattel mortgage, but I find, on the somewhat unsatisfactory answers that both Thomas and Bosada made on this point, that there was no agreement to give a chattel mortgage then, and that it was only given on January 27, 1921, because, as Bosada said on his examination: "He says he has not got it (i. e., the money) and he will give the security, the chattel mortgage, providing I give $300.50, making the even $2,500."

On that date, January, 27, 1921, Thomas gave Bosada a chattel mortgage upon all his goods and chattels in his tail-

oring shop in Timmins to secure what purported to be a present advance of $2,500 to be repaid on May 27, 1921, with interest at 8% per annum. The only money then advanced was the $300.50 above mentioned, the balance representing the existing indebtedness for moneys previously borrowed and for goods purchased, as already stated.

The mortgage has the effect of giving Bosada a preference over the other creditors, and must, therefore, be presumed prima facie to have been made with a view of giving such preference under sec. 31 (2) of the Bankruptcy Act as enacted by 1920, (Can.), ch. 34, sec. 8. Unless that presumption has been met, the mortgage must be deemed fraudulent and void as against the trustee under sub-sec. (1) of sec. 31, because it was made within 3 months prior to the presenting of the bankruptcy petition (even though the date of such presentation is treated as that on which the bank was added as a petitioner under my previous decision.)

The evidence of both Thomas and Bosada fails in my judgment to rebut that presumption.

Whether or not the provisions of para. (d) of sub-sec. (5) of sec. 6 of the Assignments and Preferences Act, R.S.O., 1914, ch. 134, which enables a creditor to take a security for a pre-existing debt if he makes a further advance in the bona fide belief that the advance will enable the debtor to continue his business and pay his debts in full can prevail to validate a security which is otherwise invalid under sec. 31 of the Bankruptcy Act, 1919 (Can.) ch. 36, it is not necessary now to determine, as in the present case there is no evidence to shew that Bosada was advancing the $300.50 with any such belief. On the contrary the evidence establishes almost conclusively that Bosada was then fully aware of the debtor's insolvent condition, that he stipulated for the chattel mortgage to secure the pre-existing debt upon making the advance of $300.59. Under these circumstances the chattel mortgage is fraudulent and void not only under sec. 31 of the Bankruptcy Act, but also sub-sec. 2, of sec. 5 of the Assignments and Preference Act, and would, therefore, constitute an act of bankruptcy under para. (b) as well as under para. (c) of sec. 3 of the Bankruptcy Act. See Re Wood (1872), L.R. 7 Ch. 302, 41 L.J. (Bk.) 21.

I must therefore conclude that the debtor in giving the chattel mortgage in question committed an act of bankruptcy, and I accordingly adjudge the debtor a bankrupt and appoint R. S. Deacon, of Toronto, an authorised trustee, re-

Ont.

S.C.

RE THOMAS

ceiver of his estate. In declaring the mortgage to be an act of bankruptcy, I ought to make it clear that I am not disposing of any possible claim of the mortgagee to hold the chattel mortgage as security for the $300.50 actually advanced when the mortgage was given. His rights, if any, in this respect, should not be determined without further argument. But the trustee will retain undisturbed possession of the mortgaged chattels, and be entitled to dispose of them without any interference from the mortgagee except upon the order of this Court.

The costs of the earlier motion were reserved to be dealt with upon its renewal. As the status of the petitioners to obtain a receiving order was then successfully resisted by the debtor, I think the costs which he then incurred should be paid by the petitioners to his solicitor, and I fix those costs at $60. The petitioners' costs will be paid out of the debtor's estate.

Order granted.

Note:—**Orde, J.,** in the judgment of April 14 referred to, said that the alleged act of bankruptcy consisted in the giving by the debtor, within 6 weeks before the presentation of the petition, of a chattel mortgage upon all his stock in trade and furniture, in circumstances which created a fraudulent preference in favour of the mortgagee.

The application was opposed by the debtor on the ground, among others, that the debts of the petitioning creditors had been secured by bills of exchange, accepted by the debtor, which had not yet matured, and that during the currency of the bills no debt existed upon which a receiving order could be based.

It appeared that the three petitioners had drawn bills on the debtor for the original debts, which were in respect of goods sold to the debtor, that he had accepted the bills, and that the bills were then under discount with the petitioners' respective bankers, but that the petitioners were liable to take up the bills at maturity if not paid by the debtor. The petitioners contended that, notwithstanding that the indebtedness represented by the bills was owing to the banks as holders, the petitioners were still entitled to present a petition in bankruptcy: (1) because of their liability upon the bills to the present holders; and (2) because they were entitled to claim payment of the original consideration for which the bills were taken.

(1) Without some express provision in the Act giving to

a surety—for that is substantially the position of an endorser of a discounted bill—the right to present a bankruptcy petition because of his liability to pay a bill if the acceptor should make default, the endorser could not be regarded as a creditor of the acceptor until the endorser had taken up the bill from the holder.

(2) By sub-sec. 3 of sec. 4 of the Bankruptcy Act, there must be a "debt owing by the debtor to the petitioning creditor" to the amount of $500. Counsel for the petitioners argued that the cause of action for the consideration was still vested in the petitioners, notwithstanding the discount of the bills. But it is a well-recognised principle that the transfer of a bill of exchange carries with it all securities accessory to the debt, though not expressly assigned: Central Bank of Canada v. Garland (1890), 20 O.R. 142.

The point is disposed of by direct authority in In re A Debtor, [1908] 1 K.B. 344, where it was held that, so long as a bill taken for the debt was outstanding in the hands of a third party, even though it had been dishonoured, the creditor who had taken and transferred the bill could not petition upon the original debt.

The petitioners had not brought themselvesh within the requirements of the Act—there was no debt owing to them at the date of the presentation of their petiion.

Theer was nothing in the Act or the Bankruptcy Rules expressly authorising the substitution or addition of the holders of the bills (the banks) as petitioning creditors. The present case did not come within either sub-sec. 7 or sub-sec. 8 of sec. 68 of the Act. But Bankruptcy Rule 152 makes the general practice of the Court in civil actions applicable in cases not provided for by the Bankruptcy Rules and not inconsistent with the Act or those Rules; and parties may be added or substituted under the practice authorised by the Supreme Court Rules.

But, in view of the English practice, it was unnecessary to invoke Bankruptcy Rule 152. Section 68 follows almost verbatim the provisions of secs. 109 to 113 of the English Act of 1914, and a perusal of the English cases makes it clear that the Courts there will in a proper case add or substitute parties to a petition, under the wide powers of amendment given by the section of the English Act which corresponds to sec. 68 (4) of our Act—"The Court may at any time amend any written process or pro-

B.C.

C.A.

THE KING v. HODGES.

ceedings under this Act upon such terms, if any, as it may think fit to impose."

This appeared to be a proper case for the addition or substitution of the banks as petitioners, under sec. 68 (4).

Although the application to join the banks as petitioners did not come from the banks themselves, this need not stand in the way, if the written consent of each bank to be added as a petitioner, with an affidavit verifying the statement that the bank is holder of the bill or bills in question, is filed.

The question of costs should be reserved to be dealt with upon the renewal of the motion. If the amendments are not made within two weeks, the petition will be dismissed with costs.

THE KING v. HODGES.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. May 6, 1921.

Bankruptcy (§III—40)—Contract to Build Ships—Advance by Crown of Percentage of Purchase Price—Special Lien to Secure Purchase Price—Possession by Crown for Purpose of Completing—Bankruptcy of Contractors—Seizure of Ships and Material by Receiver—Rights of Crown Under Lien, and Contract.

Under a contract for the building of certain ships, the Crown advanced 35% of the purchase price, and in alleged pursuance of a power conferred under the contract took possession of the ships and certain materials, and also of the yard, plant and equipment for the purpose of completing the building of the vessels. Shortly afterwards the contractors were adjudged bankrupt and the trustee in bankruptcy was appointed receiver and took possession of all the bankrupt's assets including those in possession of the Crown. The Court held, affirming the judgment of Murphy, J., that the trustee should give up possession to the Crown of the ships together with the slips in which they stood and free access to so much of the yards as should be found reasonably necessary to be used in completing the work on the ships, and also all material, engines, boilers, and auxiliaries and fittings which were actually on board the vessels or in the building yards, but there being no clause in the contract which expressly authorised the Crown to use the plant and equipment it was not entitled to such use, which could only be conferred by apt and unmistakable language.

Held also that the Crown although it had under a covenant in the contract a special lien for its advances upon the purchase price, was not a creditor and so could not file a claim or value its security and so could not conform with sec. 46 (3) of the Bankruptcy Act.

[See Annotations, Bankruptcy Act 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 59 D.L.R. 1.]

B.C.

C.A.

THE KING v. HODGES.

APPEAL by Crown from an order in bankruptcy made by Murphy, J. Affirmed.

R. L. Reid, K.C., for appellant.

W. M. Griffin, for respondent.

Martin, J.A.:—This is an appeal from an order in bankruptcy made by Murphy, J., on February 22 last, whereby the trustee and receiver in bankruptcy was directed to restore to the plaintiff-respondent the possession of two ships under construction at Prince Rupert, with their engines, boilers, etc., and certain material in the building yard. Several questions are raised for our consideration.

First, with regard to the objection to the jurisdiction of the Judge below to entertain the application by the Crown arising out of the contract in question, I am of the opinion that he had power to do so under sec. 39 of the Bankruptcy Act, of 1919, ch. 36, the Crown coming within the expression "any other person aggrieved by any act or decision of the trustee." Under the contract the Crown, though a lienholder, is clearly not a "creditor" at present, whatever it may become later on under para. 16 by completing itself the building of the two ships after taking them out of the contractors' hands, if that course is decided on; nor is the Crown a "secured creditor" as defined by sec. 2 (gg) because there is no "debt due or accruing due to (it) from the debtor." All it has is a lien under para. 14 upon "the hulls of the vessels and materials, their engines, boilers and auxiliaries and fittings, whether such shall be actually on board the vessels or in the building yards and whether wrought or in the rough state," such lien being only to the extent of "all moneys paid to the contractors on account of the purchase price which lien shall be for securing the completion and delivery of the vessels in accordance with these presents . . . "

The objection therefore should be over-ruled.

Second: Under the contract the Crown advanced 35% of the purchase money and in alleged pursuance of power conferred under para. 16, took possession, we are satisfied, on December 1 last, of the two ships and certain materials and also the yard, plant and equipment. On December 7 an order was made adjudging the contractors bankrupt and the trustee in bankruptcy was appointed receiver and took possession on or about January 4 last, of all the bankrupts' assets, including those in the possession of the Crown as above set out, but by the order appealed from, dated Feb-

B.C.
C.A.
THE KING
v.
HODGES.

ruary 22 last, the receiver was ordered to give up possession to the Crown of the two ships, "together with the slips in which the said ships stand, and free access to so much of the said yards of the said company as shall be found reasonably necessary to be used in completing the work on the said ships, and also all material, engines, boilers and auxiliaries and fittings which were . . . actually on board the said vessels or either of them, or in the building yards and whether wrought or in the rough."

It is submitted by the Crown that under the proper construction of the contract taken as a whole and in order to carry out its intention, i. e., "to complete the work" contracted for, viz., the completion of the two ships, it has the power to take possession of and use not only the said slips on which are the ships, and so much of the yard as is necessary to carry out the work of completion, but also to make use of the plant and equipment though no lien is given thereupon.

It is conceded that there is no clause which expressly authorised this use of the plant and equipment, but our attention has been directed to several clauses in the contract which are relied upon to support that submission, which was not accepted by the Judge below. I have carefully examined the whole contract in this light, but after having done so, find myself unable to differ from the conclusion reached below. At its best the language in para. 16, which is chiefly relied upon, is ambiguous and only affords room for inferences which are, to me, uncertain and the more so because in all the similar contracts cited where the use of plant is conferred, it has been done in no uncertain manner by apt language, as, e.g., in Seath & Co. v. Moore (1886), 11 App. Cas. 350, at p. 355, and Reid v. Macbeth & Gray, [1904] A.C. 223 at p. 225, 73 L.T. (P. C.) 57.

Third. On the cross-appeal it is submitted that there can be no lien upon materials except such as have been "affixed to or in a reasonable sense made part of the corpus" of the ship, as expressed in the two cases cited, which I have examined with care. In my opinion, however, they have no real application because they are both decided on the point of sale of goods and the passing of the right of property under the alleged sale in question But no such questions arise here, because there has been no sale and the right of property remained in the contractor, and all that is being dealt with is a lien of a very unusual kind conferred not upon

the builder but upon the purchaser in the manner aforesaid. I am quite unable to see in principle why that lien should not as a matter of contract extend as well to materials built into a ship or lying upon her deck, (as to which there could be no question) as to those lying by her side in the yard; it is all a question of appropriation to the contract and there is no dispute here that the materials in question were brought into the yard by the contractors to be built into these ships under the contract. In Reid's case, supra, Lord Davey's judgment shews that much turned upon an expression in the contract—"as the same proceeds" —and he went on to say at p. 231: "But whether you put the one or the other of those meanings upon the words, it is clear whatever else may be obscure in this fourth clause, that the goods in question are only to become the property of the purchaser from time to time as progress is made in the construction of the ship."

How different are those circumstances from the present case which is one in which there is not only a contract for completed ships, but a very unusual covenant in it to secure the purchaser, by means of a special lien, for his advances upon the purchase price. And it is to be observed that even in the Seath case, Lord Watson at p. 384, used this significant language:—

"Had they inspected the work and material as the purchasers had done in Clarke v. Spence, 4 Ad. & E. 448, and Wood v. Bell, 5 E. & B. 772; 6 E. & B. 355, there would have been room for the inference that they had accepted as in terms of the contract the work, so far as completed and accepted, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection."

But, as I have said, it was not even suggested here that the materials in question had not in fact been brought into this yard for the construction of these ships under this contract.

Fourth: It was submitted that this lien should have been enforced by an action and given effect to by an appropriate decree, and that it would be unfair to recognise the lien upon the bankrupts' property unless the Crown conforms to the Act by filing a claim and valuing its security under sec. 46 (3) and consenting to a sale of the property subject to the lien if that should be best to direct. But in the first place, the Crown, as already pointed out, is in the present

B.C.

C.A.

THE KING v. HODGES.

circumstances, under this peculiar lien, not a creditor and so cannot file a claim or value its security, and in the next place, all that the present application is directed to do is to correct under sec. 39 the wrongful "act" of the trustee by ordering him to restore to the Crown that possession which it was wrongfully deprived of by him. That does not prevent any further adjudication between the parties which may be necessary under the contract, but it is an expeditious and appropriate means of restoring the status quo ante. The general expressions of James, L.J., in Ex parte Fletcher (1878), 9 Ch. D. 381, are much in point.

It follows that the appeal and cross-appeal should be dismissed.

Galliher, J.A.:—On the question of jurisdiction raised by Mr. Griffin, my view is that the matter is properly in Court for determination.

In the main appeal Mr. Reid contends that the plant and equipment should have been declared subject to use by the Crown in the completion of the contract. Usually there are express words in contracts of this nature, giving such privileges or rights, but they are absent here, but if upon reading the whole contract and considering its object and scope such could be read into the contract without doing violence to its terms, the Court could do so.

Certainly, much can be said in favour of that view, but on the whole and considering that the Judge below decided against it, I am unable to say that he is clearly wrong.

As to the cross-appeal, I think the Judge was justified on the authorities in coming to the conclusion he did.

The result is, the appeal and cross-appeal will be dismissed.

McPhillips, J.A.:—I am of the opinion that Murphy, J., arrived at the right conclusion in holding that His Majesty the King was entitled to resume and have possession of the two ships and slips in which they stand and free access to the yards, in the work of completing the same and that the receiver should return to His Majesty the King, all material on board of the ships, whether wrought in or in the rough and free possession thereof—I however think, with great respect, that the judgment of the Judge did not go far enough, but should have extended to the right to the possession in His Majesty the King of all the plant and equipment in use in the carrying out of the undertaking of the construction of the ships, in that the same constituted a part of the "work" entered upon and contracted to be performed.

The contract has to be read as a whole, (Richards v. Bluck (1848), 6 C.B. 437, 136 E.R. 1319; Miller v. Borner, [1900] 1 Q. B. 691; David v. Sabin, [1893] 1 Ch. 523 at p. 532) to arrive at its true meaning, it is the reasonable conclusion to arrive at, and even if necessity required it, words could be read into the contract, (Waugh v. Bussell (1814), 5 Taunt. 707, 128 E. R. 868; Coles v. Hulme (1828), 8 B & C. 568, 108 E. R. 1153; Mourmand v. Le Clair, [1903] 2 K. B. 216; Elliott's case (1777), 2 East. P. C. 951, 1 Leach 175; Wilson v. Wilson, etc. (1854), 5 H. L. Cas. 40, 10 E. R. 811; Whitehouse v. Liverpool New Gaslight, etc., Co. (1848), 5 C. B. 798, 136 E. R. 1093; Mallan v. May (1844), 13 M. &. W. 511, at p. 517, 153 E. R. 213. The contract provides that if there should be any failure upon the part of the contractors to duly complete and execute the construction of the ships that then His Majesty the King should be at liberty to re-let the work and note this language, (see para. 16 of the Contract):—

"employ additional workmen, and provide material, tools and all other necessary things at the expense of the contractors, or sub-contractors shall and the contractors or sub-contractors shall in either case be liable for all damages and extra cost and expenditure which may be incurred by reason thereof and shall in either of such cases likewise forfeit all moneys then due under the conditions and stipulations or any or either of them herein contained."

The above language, in my opinion, gives the key to the true meaning and intent of the contract, i. e., it was plainly the intention that the assembled plant and equipment was to remain in possession of His Majesty the King during the time it would take to construct the ships. In short, the plant and equipment can well be said by the dictionary we have at hand in the contract itself, to be a part of the work that His Majesty the King was entitled to take possession of; otherwise with great respect to all contrary opinion, all would be chaos and the right to complete the ships would be hampered and delayed, well-nigh rendered impossible within any reasonable period of time because of the necessity to assemble the needed plant and equipment, that is to say the defaulting contractors, (the receiver in bankruptcy has no higher position in my opinion) could by possessing themselves of the plant and equipment render it impossible for His Majesty the King to, within any reasonable time, bring about the completion of the ships. To state this

B.C.

C.A.

THE KING v. HODGES.

proposition and visualise it brings immediate refutation to any contrary view. It is and must be idle contention, and further is most unconscionable and offends, as I read the contract, against the plain terms of the contract as expressed and the unquestionable intention of the parties to the contract. One way to discern the meaning of the contract is to ponder over, for a moment, the words to be found in the above quotation "employ additional workmen and provide material, tools and all other necessary things at the expense of the contractors." What would be the position of affairs if His Majesty the King disregarded the plant and equipment upon the ground brought there by the contractors, and proceeded at great expense and got other plant and equipment to complete the ships? Would any such outlay be allowed? It must be admitted it would not. It is not common sense, and why should the Court be driven to enunciate a nonsensical meaning to words used that can be given a plain common sense and reasonable meaning. It is profitless to say that the receiver in bankruptcy—the respondent contending otherwise—would not be able to complain if other plant and equipment had to be obtained and that no effective complaint on that score could be raised. That is no sufficient answer. The action of the receiver in taking possession of this plant and equipment was absolutely unjustifiable and cannot be supported. In my opinion, it was in breach of his duty, as his duty was to see to it that the completion of the ships should be facilitated at the least possible expense and to comport himself as the contractors would have been called to comport themselves if there had been failure, independent of bankruptcy, so that the bankrupt estate if not receiving any advantage from the completion of the ships would not be chargeable with any unnecessary outlay for the placing of plant and equipment upon the ground already there, and rightly available under the terms of the contract.

Further, it must have been in the contemplation of the parties that the plant and equipment necessary to carry the ships to completion would be available and capable of use in the event of there being default upon the part of the contractors when it is considered that, even apart from the well known principle, that, in commercial contracts, time is of the essence of the contract, the contract may be said to have been an emergency contract, entered into during the continuance of the Great War, and the ships were to be built

at a point somewhat remote and away from ship-building facilities that would be available at large ship-building centres. It is inconceivable that it could have been the intention that the contractors defaulting in the work could withdraw the plant and equipment, thereby rendering it impossible to take immediate steps to complete the ships. (Per curiam Pannell v. Mill (1846), 3 C. B. 625, 136 E. R. 250). These considerations are all helpful in the endeavour to determine the real meaning of the contract; it certainly would be inequitable to accede to contention advanced by the receiver, the respondent, and given effect to by the Judge. If the contract was in its terms intractable, then admittedly the contract would control, but I fail to see anything in the writing that admits of it being successfully maintained that His Majesty the King is disentitled from insisting upon the possession of the plant and equipment during the time that it will necessarily take to complete the ships.

I see nothing to prevent the sense I deduce from the words and language appearing in the sixteenth paragraph of the contract, and it is a conclusion that admits of its being reasonably certain that such was the intention of the parties to the contract. (Per curiam Ford v. Beech, (1848), 11 Q. B. 852, at p. 866, 116 E. R. 693; McGowan v. Baine, etc., The "Niobe", [1891] A. C. 401 at p. 408).

Then it is to be remembered that the construction of a contract shall be taken most strongly against the grantors as contractors, (see per Lord Selborne in Neill v. The Duke of Devonshire (1882), 8 App. Cas. 135 at 149 and Birrell v. Dryer (1884), 9 App. Cas. 345 at 350).

I conclude by referring to what Duff, J., said in Meeker v. Nicola, etc., Lumber Co., (1917), 39 D.L.R. 497, 55 Can. S.C.R. 494. There, a contract in absolute terms was under review, and we can view the situation here. What would have been said if the contingency of failure upon the part of the contractors was discussed at the time of the entry into the contract? It is not reasonable to say that the contractors would have said: "Undoubtedly if we fail to complete, the ships' completion can be gone on with and as the contract provides the plant and equipment can be used in the completion of the ships." Such a statement would be a rational one coming from the contractors and a fair and honest one, not the unfair and dishonest contention that comes from the receiver, and which he ought not to be allowed to put forward, which, in my opinion, is against the reasonable

Can.

Ex. C.

HODGINS v. THE KING.

and fair meaning of the contract. The Court should not hesitate to frown upon such a contention which not only offends against equity and good conscience, but cannot be supported by the terms of the contract. Duff, J., in the case above referred to said at pp. 506, 507:

"To apply the test often suggested by eminent judges—it it not possible—having regard to the dictates of common experience—to doubt that if the subject had been mentioned, (here it would be the utilisation of the plant and equipment, although as I view it, the contract is sufficient in its terms) at the time the contract was entered into that the appellant would not have been left free to obstruct by its conduct and declarations the respondents' application for a grant while retaining in full literal force the condition that the grant should be produced in order to entitle the respondent to receive the final instalment of the purchase money."

I would allow the appeal.

With respect to the cross-appeal, I am in agreement with my brother Martin and would dismiss it.

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

Appeal dismissed.

HODGINS v. THE KING.

Exchequer Court of Canada, Audette, J. March 19, 1921.

Pensions (I—1)—Officer in Canadian Militia—Appointment on Overseas Demobilization Committee for Six Months Pending Retirement—Basis on Which Pension Estimated—Militia Pension Act—Interpretation.

An officer of the Canadian Militia Force at a salary of $4,000 a year, who was about to be retired was by Order in Council appointed on the Overseas Demobilization Committee for a period of six months pending retirement at a salary of $6,000 per year, the order further declaring that at the expiration of his six months tenure of appointment he would be entitled to pension in accordance with the Militia Pension Act 1902. After the date of his appointment on the committee but before his actual retirement, two Orders in Council were passed, providing field and ration allowances, for officers of the permanent force. The Court held that as a general Act is not to be construed as repealing a previous particular Act, unless there is some express reference therein to such previous legislation or unless they are necessarily inconsistent, the subsequent Orders in Council did not affect the previous special order, and the extra field and ration allowances could not be considered, in estimating the amount of the pension, and furthermore the pension board having estimated the pension on the basis of the $6,000 salary, and this having been approved by Order in Council it was a question whether the Court had jurisdiction to interfere.

[The King v. Halifax Graving Dock Co. Ltd. (1920), 56 D.L.R. 44 applied.]

PETITON OF RIGHT, to have a pension granted under the Militia Pension Act increased, on the ground that the amount on which it was based was not the proper amount. Petition dismissed.

W. D. Hogg, K. C., for suppliant.

R. V. Sinclair, K.C., and H.H. Ellis for respondent.

Audette, J:—This is a Petition of Right whereby it is claimed, by the suppliant, who is a retired Major-General of the Canadian Militia Force, receiving a yearly pension of $4,200, that his pension instead of being $4,200, should be $4,647, under the circumstances hereinafter set forth.

In August, 1917, the suppliant having served 36 years, his retirement from the force was decided upon and he agreed and undertook to so retire. He was officer commanding District No. 1, when in January, 1915, he was detailed to Ottawa to perform the duties of Acting Adjutant-General, —still retaining the command of that district while it was administered by Lt.-Col. Shannon, and from January 1, 1915, up to September 7, 1917, the suppliant was receiving an annual salary of $4,000,—made up, as shewn by the pay-list, filed as Ex. A, of pay of $2,900, together with $1,100 for consolidated allowances.

When in August the question of his retirement had been passed upon and decided, instead of taking his six months' leave and remaining idle, he declared his willingness to forego the leave and do some work. (See Ex. 8). Then by the Order in Council of September 3, 1917, passed upon the recommendation of the Minister, made on August 30, 1917, the suppliant was specifically "appointed as the representative of the Militia Department, on the Overseas Demobilization Committee, for a period of six months, pending retirement, at the consolidated rates of pay and allowances of $6,000 per annum . . . (the consolidated rates of $6,000 per annum being equal to the pay and allowances of the chief of the general staff, and both inspector-generals in Canada)." And in para. 4 of this Order in Council it is further declared that "At the expiration of his six months' tenure of appointment,—this officer having reached the age limit—will be entitled to pension, in accordance with the Militia Pension Act of 1902."

On January 9, 1918, under the order of the Minister of Militia and Defence, the Pensions and Claims Board assembled for the purpose of reporting as to the pension due to Major-General W. E. Hodgins, who was to be retired

Can.
Ex. C.
HODGINS
v.
THE KING.

from the service in March, 1918. (See Ex. 2). And the Board fixed his pension at $4,200 upon the basis of pay at $4,600 and allowances at $1,400. This finding was subsequently—namely, during January, 1918 — approved by the Treasury Board and the Governor-General in Council.

Now, subsequent to the passing of the Order in Council of September 3, 1917, appointing the suppliant to this service in England at a fixed salary, specially created for him as said by the Deputy-Minister in his evidence, and prior to his retirement in March, 1918, two Orders in Council were passed on November 29, 1917, whereby officers of the permanent force of the same rank as the suppliant, were, in addition to their consolidated rates of pay and allowances, allowed field allowance at the rate of $1.50 per diem and also to a ration allowance of 50 cents per diem (less 25 cents already included in allowances) making in all $1.75,—and the suppliant claims that such allowances should have been added to the said sum of $6,000 as the proper amount upon which his pension should have been based. Furthermore, that such additional allowances amount to the yearly sum of $638 and that his pension should have been calculated on $6,638 instead of $6,000 with the result that the pension instead of being $4,200 should be $4,647.

Hence the present controversy.

The well-established rule of law for the construction of statutes embodied in the maxim of generalia specialibus non derogant, clearly applies here—"A general later statute . . . does not abrogate an earlier special one by mere implication; the law does not allow an interpretation that would have the effect of revoking or altering, by the construction of general words, any particular statute when the words may have their proper operation without it." This principle was applied to the construction of by-laws of a municipality in the case of The City of Vancouver v. Bailey (1895), 25 Can. S.C.R. 62, at pp. 67-68. And Maxwell, ed. 2, p. 213, upon the same question expresses the following opinion:

"Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to

embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

In Gagnon v. S.S. Savoy (1904), 9 Can. Ex. 238, it was further held that: "A general law may be impliedly repealed by a subsequent special law, in pari materia, if such special law is in conflict with the former, but the converse is not the case." That is a generalia specialibus non derogant—but generalibus specialia derogant.

As said in Broom's Legal Maxims, at p. 20, "when there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by an earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation."—Per Lord Selborne.

Seward v. Vera Cruz (1884), 10 App. Cas. 59, at p. 68, citing Hawkins v. Gathercole (1855), 6 DeG. M. & G. 1, 43 E.R. 1129. "The law will not allow the exposition to revoke or alter by construction of general words any particular statute, when the words may have their proper operation without it." Lyn v. Wyn, Bridgeman's Judgment 122, at p. 127 cited in L.R. 3 C.P. 421, L.R. 6 C.P. 135, 1 Ex. D. 78.

We also find In re Smith's Estate (1887), 35 Ch. D. 589, at p. 595, the following rule of construction that "where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal."

The same principle was adopted in the case of Thorpe v. Adams (1871), L.R. 6 C.P. 125, where it is held, at p. 135, that: The general principle to be applied to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular Act, unless there is

Can.
Ex. C.
HODGINS
v.
THE KING.

some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts."

This rule of construction is of such wide acceptance in the Courts that it is unnecessary to multiply authorities to the same effect.

Having adopted this rule of construction, I must find that the general Orders in Council of November 29, 1917, do not affect the special and particular Order in Council of September 3, 1917, which stands by itself, as representing the true position between the parties. The Petition of Right fails on that ground without more. Accepting this view, I am relieved from labouring many questions raised at Bar; however, it is but right to state that I have not withheld consideration from any point relevant to the case and stressed by counsel.

Let me refer to some of them. Section 4 of the Military Pension Act R.S.C. 1906, ch. 42, provides that a retiring officer "shall be entitled to a pension . . . not exceeding one-fiftieth of the pay and allowance of his rank or permanent appointment." Was not the suppliant's salary the sum of $4,000 a year on his permanent appointment?—and was not the salary he was receiving at the time of his retirement a temporary salary limited for this period of 6 months, following the time his retirement had been decided? If the temporary and higher salary has been used as a basis for the calculation of the pension, it follows the suppliant has been handsomely treated.

On the other hand, if this special Order in Council of September 3, 1917, is to be cast aside and ignored, then the suppliant has to fall back upon his rank and permanent appointment before that date at a salary of $4,000, whereby the pension would be much lower.

Does the word "shall" in sec. 42, so much relied upon at trial, come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority—especially when the words immediately following are, "not exceeding 1-50"—in other words creating a discretion that must be exercised. Conceding this, then the answer is such discretion has been exercised by the Minister and the Pension Board, and approved and confirmed by an Order in Council. Has the Court under such circumstances any jurisdiction to sit on appeal or in review from the exercise of such discretion? Does not the fixing

of the amount of the pension rest primarily and finally in the discretion of the executive authority? It would seem so on the authorities. See Matton v. The Queen (1897), 5 Can. Ex. 401, at p. 407; The King v. Halifax Graving Dock Co. (1920), 56 D.L.R. 21, 20 Can. Ex. 44, and cases therein cited.

There are a number of decisions given in England upon similar cases, but again I may repeat in the view I take of the case it is unnecessary to ascertain whether these decisions are given upon a similar state of law as in Canada. The nature of the engagement of a soldier or officer has been reviewed in the case of Leaman v. The King, [1920] 3 K.B. 663, 89 L.J. (K.B.) 1073, 36 Times L.R. 835. The following authorities may also be referred to: Gibson v. East India (1839), 5 Bing. (N.C.) 262, 132 E.R. 1105; In re Tufnell (1876), 3 Ch. D. 164, at p. 167; Robertson, Civil Proceedings, pp. 611, 359, 35, 643; Dunn v. The Queen, [1896] 1Q.B.D. 116; Mitchell v. The Queen (1890), 6 Times L.R. 181; [1896] 1 Q.B.D. 121n; Balderson v. The Queen (1898), 28 Can. S.C.R. 261; Cooper v. The Queen (1880), 14 Ch. D. 311, at p. 314; Gould v. Stuart, [1896] A.C. 575; De Dohse v. The Queen (1886), 66 L.J. (Q.B.) 422n; Yorke v. The King, [1915] 1 K.B. 852, 84 L.J. (K.B.) 947, 31 Times L.R. 2[illegible].

There will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right.

Judgment accordingly.

HONENS v. INTERNATIONAL HARVESTER CO.

Alberta Supreme Court, Simmons, J. February 24, 1921.

Landlord and Tenant (§IIID—105)—Statute 8 Anne ch. 14, secs. 1 and 8—Right of Landlord as Against Execution Creditors—Interpleader—When Rent in Arrear.

A landlord gave a lease from February 1 to December 1 at a rental for the term, payable on December 1. The Court held that the rental was not in arrear until the morning of December 2 and the landlord had no right to distrain before that date, also that the tenant's goods having been seized before any rent became due under the lease, the landlord had no claim as against the execution creditors on behalf of whom the seizure was made. The statute 8 Anne 1709 (Imp.), ch. 14, sec. 8 provides that where tenants hold over after the term the landlord may distrain, but only when the tenant is in actual possession, and sec. 1 of the same Act which provides that the sheriff must pay the landlord arrears of rent not exceeding one year's rent cannot be invoked unless there is an actual subsisting tenancy.

Alta.

S.C.

HONENS v. INTERNATIONAL HARVESTER.

INTERPLEADER issue in which the contest is between the claim of the landlord for rent, and the claims of execution creditors of the tenant.

D. M. Stirton, for plaintiff.

A. H. Clarke, K.C., and I. F. Fitch for defendant.

Simmons, J.:—Honens, the landlord, leased to Joseph L. Hansen 480 acres of farm land from February 1, 1919, until December 1, 1919, at a rental of $6,000, payable on December 1, 1919.

It was also provided in the lease that the lessee should have an option to purchase said lands at $45 per acre, up till and including December 1, 1919, provided the lessee had performed all the covenants made by him in said lease including the payment of rent stipulated for in said lease. It was also provided that in the event of the lessee exercising said option on or before December 1, 1919, no rental should be due and payable under the lease but that a contract for sale should be made as of the date of the lease (February 1, 1919) and the $6,000 cash payment to be applied on purchase-price and interest accrued at 6% per annum for February 1, 1919.

Executions issued against the lessee as follows:—

	Issued.	Received.	Amount.
International Harvester Co. of Canada	Feb. 28, 1919	Mar. 3, 1919	$ 696.00
Robert Wilkinson	Oct. 28, 1919	Oct. 28, 1919	$ 378.70
Henry Harry Honens	Dec. 23, 1919	Dec. 23, 1919	$1286.80
G. N. Anger	Jan. 7, 1920	Jan. 7, 1920	$ 879.94
Buetz Bros. et al	Jan. 7, 1920	Jan. 7, 1920	$ 420.89
John W. Dykes	Feb. 25, 1920	Feb. 25, 1920	$ 727.92

In addition to these executions claims were delivered to the sheriff by creditors pursuant to the Creditors' Relief Ordinance, 1910, 2nd Sess. (Alta.), ch. 4, on February 7, 1920, aggregating the sum of $2,341.86. The landlord is an execution creditor for a claim not arising out of the lease. On October 21, 1919, the sheriff under executions then filed with him directed against the goods and lands of Hansen, made seizure on said lands and premises of 5,000 bushels of wheat and oats in stock on 100 acres more or less. On November 4, 1919, the solicitor for the execution creditor, the Farmers' Supply Co., delivered to the sheriff an order of the Court to sell the goods and chattels so seized.

On November 26, 1919, the solicitor for the plaintiff de-

livered to the sheriff a letter claiming for $6,000 for rent.

On December 1, 1919, the solicitors for the plaintiff delivered to the sheriff a distress warrant directed to the sheriff. Of the wheat seized 410 bushels were delivered at the elevator at Keoma prior to December 1, 1919, and realised $775, which it is agreed is available for distribution among the execution creditors.

The balance of the goods seized by the sheriff are the property of Hansen and are the subject-matter of this issue; and 960 bushels included in this remained on said lands and were delivered to the order of the sheriff at the elevator at Keoma subsequently to December 1, 1919, and realised $1766.15.

Claims of O. W. Storey and J. M. Farlom for wages are admitted to be claims having priority over claims of the execution creditors.

On November 18, 1919, the sheriff seized on said lands, under and by virtue of the writs of execution in his hands directed against Hansen, further goods and chattels, a part of which consisted of the wheat and oats seized by the sheriff on October 21, 1919, and which remained continuously in the hands of the sheriff. On December 27, 1919, further seizures under said writs of execution were made by the sheriff. On January 8, 1920, the sheriff sold all oats seized on October 21, 1919, and feeding privileges for $2,400 of which $600 was the price of feeding privileges.

On January 9, 1920, the solicitors for Honens, the plaintiff, delivered to the sheriff an order of the Master in Chambers obtained ex parte whereby the sheriff upon the application of the plaintiff "an execution creditor of the defendant Joseph L. Hansen and also landlord of the lands and premises upon which seizure under execution hereinafter referred to is made, upon production of the report of the sheriff of the Judicial District of Calgary, dated December 18, 1919, in the suit at the instance of the International Harvester Co. as plaintiff against the defendant specifying grain....seized under and by virtue of writs of execution in his hands issued in said action" was ordered to remove and sell all seed grain, etc., seized by him and to deal with the moneys realised as he may be advised or as directed by law. A part of the goods so seized and ordered to be sold have not been realised upon yet.

The plaintiff claims that his rent which fell due on

Alta.

S.C.

HOXENS v. INTERNATIONAL HARVESTER.

December 1, 1919, should be paid by the sheriff in priority to the claim of the execution creditors.

The execution creditors claim that there was no real tenure created and that is an inference from the larger amount $6,000 provided for as rental, and, in the alternative, that the option of purchase given to the tenant has effect of making the term indeterminable and therefore no valid demise was created.

As a further alternative they claim that the right of distress as against goods then in custodia legis did not arise on December 1, 1919, as no rent was due on that date and the landlord could not therefore assert any claim against the sheriff to have arrears of rent paid, and that the goods seized subsequently to December 1, 1919, were in custodia legis and the relation of landlord and tenant no longer existing no claim for rent could be asserted by the landlord as against the goods and chattels seized under the executions.

Dealing with the first issue as to whether a valid lease existed or not it is obvious that if the landlord allowed his claim as an execution creditor to stand he would be in the anomalous position of plaintiff and defendant.

He was allowed to relinquish his claim as an execution creditor at the trial of the interpleader issue. There is a conflict of evidence as to what would be a fair rental value of the lands in question.

Special circumstances were related which would give an unusual value to the farm land where a considerable area was ready for cropping. The land consisted of 480 acres and two-thirds of this could be seeded during the term and a crop realised therefrom.

Farmers in the vicinity place the rental value at about $1,500 to $1,800.

Plaintiff gives evidence to the effect that with an average season and prevailing prices the lessee could realise $15,000 out of the crop. It may be observed that the tenant in addition to paying the $6,000 rent agreed to do the work of constructing buildings and fences on said lands. I am not able to find on the facts that there was any collusion between the landlord and tenant and as the option was unilateral and did not bind the tenant and was not acted upon by him, I conclude a valid lease was created between the parties. The sheriff had notice of a claim for rent on November 26, 1919, in which it was claimed by the landlord that the tenant had abandoned the premises and that the

rent of $6,000 was due on December 1, 1919, on the date of expiry of the lease.

It is clear that although the sheriff was then in possession of part of the goods in question under writs of execution that no rent was due then and no right of distress existed.

The rent was not in arrears until the morning of December 2, 1919. Dibble v. Bowater, etc. (1853), 2 El. & Bl. 564, 118 E.R. 879, 22 L.J. (Q.B.) 396; Redman's Landlord and Tenant, p. 428. The statute 8 Anne, ch. 14, sec. 8, provides that where tenants hold over after the end of the term the landlord may distrain, but the tenant must be in actual possession. The statute 8 Anne, ch. 14, sec. 1, which provides that the sheriff must pay the landlord arrears of rent not exceeding one year's rent cannot be invoked unless there is an actual subsisting tenancy. Riseley v. Ryle (1843), 11 M. & W. 16, 152 E.R. 697, 12 L.J. (Ex.) 322.

The term ended on December 1, 1919, and part of the goods were actually taken by the sheriff and sold and in regard to these no claim is made. A part of the goods seized on October 21, 1919, still remained under the seizure but were not removed from the premises.

The sheriff must under sec. 1 of 8 Anne, ch. 14, pay the arrears of rent not exceeding one year "all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution."

If the goods are taken when the sheriff enters into possession of them then there was no rent due in so far as the seizure on October 21, 1919, is concerned. The term "taking" apparently means some physical assertion of control and this would seem to imply that "taking" refers to the actual seizure and not to the removal of the goods from the premises.

The result is that when the first seizure was made no rent was due and the sheriff was under no obligation to pay rent to the landlord and when the subsequent seizures were made there was no existing term and the Statute 8 Anne, sec. 1, ch. 14, did not become operative; the goods then being in custodia legis. As to the distress warrant delivered to the sheriff on December 1, 1919, no rent was in arrears and in any case no seizure was made under it and the goods never came under it or became subject to it in any manner.

In regard to ch. 34 of N.W.T. 1915, being an Ordinance respecting Distress for Rent and Extra-Judicial Seizure:

Alta.

S.C.

HOXENS v. INTERNATIONAL HARVESTER.

Section 4 takes away the common-law right of distress against goods on the demised lands belonging to a person other than tenant but provides that this restriction shall not apply in favour of a person claiming title under and by virtue of an execution against the tenant.

If an execution creditor is a person claiming title under and by virtue of a writ of execution some question might arise as to whether the common law had been altered in regard to the right of distress when goods are in custodia legis; Ex parte Herefordshire; Re Mackenzie, [1899] 2 Q.B. 566, at p. 574, 68 L.J. (Q.B.) 1003, 81 L.T. 214. However, I do not think it is open to the plaintiff to raise it for the reason that he elected to pursue his remedy as an execution creditor and under the Creditors' Relief Act, 1910, 2nd sess., Alta. ch. 4, did so on behalf of all execution creditors. He therefore assented to sheriff's holding the goods under the writs. He obtained an order for sale of the goods held under the writs of execution and the words of the Master's order reciting that he applied as a "landlord" may be treated as a nullity as the said order recited that he applied as an execution creditor and as landlord and he had a right to apply as an execution creditor but had no right as a landlord as no distress had been made, and the goods were then held under the executions.

I conclude that the plaintiff is not entitled to the payment of the $6,000 or any lesser sum by virtue of his claim for rent.

The second issue is whether he is entitled to rank as an execution creditor. At common law he could not, as execution creditor, demand payment of rent in arrears due to him as landlord. The statute of Anne contemplated executions issued by the third parties and not by the landlord. Taylor v. Lanyon (1830), 6 Bing. 536, 130 E.R. 1387, 4 Moo. & P. 316, 8 L.J. (C.P.) 180.

I think the solicitor for the plaintiff properly withdrew the plaintiff's claim to share under the Creditors' Relief Act as an execution creditor.

The costs of these proceedings as between solicitor and client shall be a first charge on the moneys realised.

The plaintiff's claim is therefore dismissed with costs.

Claim dismissed.

RIMMER v. HANNON

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Macdonald, J. August 5, 1921.

Constitutional Law (§IE—130)—Surrogate Judge—Provincial Legislature—Appointive Powers—B.N.A. Act, secs. 92 (14) and 96—Sask. Stats. 1918-19 ch. 28 sec. 1.—Validity.

Were it not for sec. 96 of the B.N.A. Act the power to appoint or to provide for the appointment of the Judges of all Provincial Courts would exist in the Provincial Legislatures, under heading 14 of sec. 92 of the B.N.A. Act. Section 96 however gives the Governor-General power to appoint Judges of the Superior, District, and County Courts in each Province, and Surrogate Courts not being within these classes of Courts, the appointment of Judges for such Courts rests with the Provincial Legislatures, and sec. 1 of ch. 28 of the Statutes of Saskatchewan 1918-19 providing that the Lieutenant-Governor in Council shall make such appointments is intra vires.

[Annotation, 37 D.L.R. 183, referred to; King v. Sweeney (1912), 1 D.L.R. 476; Re Small Debts Recovery Act, (1917), 37 D.L.R. 170, followed; John Deere Plow Co. v. Wharton, annotated, 18 D.L.R. 353, [1915] A.C. 330, referred to.]

APPEAL from the judgment of Brown, C.J.K.B. (1920), 53 D.L.R. 463, dismissing an application made at the instance of R. Rimmer, Judge of the District Court of the Judicial District of Cannington, for an information in the nature of a quo warranto against the respondent to shew cause by what authority the respondent claimed to exercise the office of Judge of the Surrogate Court for the said Judicial District of Cannington. Affirmed.

C. E. Gregory, K.C., for appellant.

A. Hayworth, for respondent and for the Government of Saskatchewan.

Haultain, C.J.S., agrees with Lamont, J.A.

Lamont, J.A.:—In view of the conclusion at which I have arrived on the constitutional question involved in this appeal, I will refer to the question of the status of the appellant as relator only to say that, as his whole claim before the Chief Justice of the King's Bench was based upon his rights to enjoy the office of Judge of the Surrogate Court for the Judicial District of Cannington and exercise its jurisdiction, his application was, in my opinion, properly refused for the reasons stated by the Judge.

On the constitutional question the contention of the appellant is, that the power to appoint a Judge of the Surrogate Court is not vested in the Province and, therefore, cannot be exercised by the Lieutenant-Governor.

The appointment of a Judge is an exercise of the Royal prerogative which is to be performed by the Sovereign per-

Sask.

C.A.

RIMMER v. HANNON.

sonally, unless the right of appointment has been parted with. A gift of legislative power carries with it a corresponding executive power, even when such executive power is of a prerogative character, unless there is some restraining enactment. It seems now to be well settled that in Canada the prerogative rights of the Crown, which relate to or are connected with any subject matter over which the Parliament of Canada has legislative jurisdiction, are to be exercised by the Governor-General; while those which relate to or are connected with any subject matter over which the Legislatures of the Provinces have jurisdiction are to be exercised by the Lieutenant-Governors of the Provinces.

The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick, [1892] A.C. 437; The Att'y-Gen'l for Dominion of Canada v. Att'y-Gen'l for the Province of Ontario, [1898] A. C. 247.

By the B.N.A. Act of 1867, the authority to legislate was apportioned between the Parliament of Canada and the Legislatures of the Provinces. To that Act, therefore, we must look to ascertain whether the right to appoint Surrogate Court Judges is vested in the Federal or the Provincial authorities. Two sections of the Act, particularly, are material. They are sec. 92, sub-sec. 14 and sec. 96, and they read as follows:—

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say . . .

14. The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

96. The Governor-General shall appoint the Judges of the Superior District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The allocating to the Provincial Legislature of the exclusive right to legislate in respect of the administration of justice in the Province, gave to the provincial authorities the right and imposed upon them the duty of providing the whole machinery required for the administration of justice, including the constitution, maintenance and organization of the Courts and the appointment of all Judges and officers requisite therefor, subject only to the limitations thereon

imposed by the Act.

In Re Small Debts Act (1896), 5 B.C.R. 246, Walkem, J., at p. 260, said:—"Where, therefore, the Legislature constitutes a Court, whether of superior or inferior jurisdiction, the power to appoint the Judge rests, exclusively, if section 96 does not interfere with it, with the Lieutenant-Governor."

See also judgment of Street, J., in Regina v. Bush (1888), 15 O.R. 398, at p. 403.

The only section of the Act which limits the right of the Provinces to appoint the Judges requisite for the Provincial Courts is sec. 96, above quoted.

The question then is: Are the Surrogate Courts of this Province Superior, District or County Courts," within the meaning of sec. 96?

It is not disputed that sec. 96 is to be interpreted by a reference to the Courts existing at Confederation. A list of these Courts in each of the Provinces, as far as the same could be ascertained from the statutes available here, has been furnished to us by counsel. From that list, and from an article on the subject by A. H. F. Lefroy, found in 37 D.L.R. 183, it would appear that there was at the date of the Union in each of the Provinces a Superior Court, modelled upon the principle of the Superior Courts of Law in England, the territorial jurisdiction of which was limited only by the boundaries of the Province in which it was established. There were also District Courts and County Courts. In Upper Canada a portion of the country had been organised into counties. These portions which were not included within the limits of any organised county were formed into Provisional Judicial Districts under the authority of C.S.U.C. (1859), ch. 128, sec. 92. In each of the organised counties (in some cases two counties were united) there was a Court known as the "County Court," and in each of the Provisional Judicial Districts there was a Court known as the "District Court." The status and jurisdiction of these two Courts were identical. The jurisdiction of each was limited territorially by the boundaries of the District or County (or union of counties), respectively, in which the Court was established. Each had jurisdiction in all personal actions where the debt or damages claimed did not exceed $200, and in all cases or suits relating to debt, covenant or contract, up to $400, where the amount was liquidated or ascertained by the act

Sask.
C.A.
RIMMER
v.
HANNON.

of the parties or by the signature of the defendant. They also had jurisdiction to grant equitable relief in certain cases. It was expressly provided that those Courts should not have jurisdiction in any action in which the title to land was brought in question, or the validity of a bequest or device was disputed; or where the action was for libel, slander, criminal conversation, seduction, or against a Justice of the Peace for anything done by him in the exercise of his office, if he objected thereto. The Judges of both Courts were required to be appointed from the Bar of the Province, and to be barristers of at least 5 years' standing.

In the Province of New Brunswick, just prior to Confederation, County Courts had been established with jurisdiction in actions of debt up to $200, and in actions of tort up to $100, but, like the County Courts of Upper Canada, those Courts had not jurisdiction to try the classes of actions above mentioned, with these exceptions; that in New Brunswick they could try actions for libel or slander, but not actions for breach of promise of marriage. There were no Courts known as County Courts in the other Provinces.

In Lower Canada there were Courts called Circuit Courts. The Province was divided into 20 districts and a Court established in each, having jurisdiction in civil actions up to $200. Mr. Lefroy, in his article above referred to, 37 D.L.R. 183, at p. 186, states that the term "district" was an alternative to the term "circuit." Those Courts were presided over by a Superior Court Judge, and Sir John Thompson, in his celebrated report on the Quebec District Magistrates' Act (1888), states that they were, in one sense, branches of the Superior Courts. We find, therefore, that at the date of the Union there were established Courts with clearly defined jurisdiction, known respectively as Superior, District and County Courts.

These, however, were by no means all the established Courts. There were Probate Courts in Nova Scotia and New Brunswick and Surrogate Courts in Upper Canada, where there were also Division Courts presided over by the Judges of the County Courts, and with jurisdiction up to $100. There were Commissioners' Courts in Lower Canada for small debts, Justices' Courts for small debts in Nova Scotia and New Brunswick, and Police Courts in all the Provinces.

The scheme of the framers of the Act would appear to

have been that the new Dominion to be created would acquire the right to appoint the Judges for those Courts highest in dignity, rank and jurisdiction, and be charged with the obligation of providing their salaries, allowances and pensions (sec. 100). The Courts answering this description were the Superior, District and County Courts, and the Courts of Probate. It was however, decided that the Courts of Probate, which existed only in Nova Scotia and New Brunswick, should be excluded from the operation of sec. 96. That these Courts were considered Superior Courts I do not doubt. That is the conclusion reached by Harvey, C.J., in Re Small Debts Recovery Act (1917), 37 D.L.R. 170, 12 Alta. L.R. 32. A perusal of the Nova Scotia Act (R.S.N.S. 1864, ch. 127) shews that, in addition to the grant and revocations of probate of wills and letters of administration, and citations to account, the Judges of the Probate Courts in that Province exercised jurisdiction in matters which are ordinarily dealt with by a Judge of a Superior Court. In certain cases they had all the power of the Court of Chancery (sec. 66). They had power to authorise a sale, mortgage or lease of land for the payment of debts and legacies (sec. 26). If the deceased at the time of his death was liable to perform any contract for the sale and conveyance of real and personal property, they had power to declare the administrator a trustee thereof (sec. 36); also to order a division of the real estate among the next of kin (sec. 40), and they could order that the surplus assets remaining after the settlement of an executor's or administrator's account be distributed among the parties entitled (sec. 68). I have not had access to the statutes of New Brunswick prior to Confederation, but I take it that the jurisdiction in that Province was very similar. That the Judges of these Courts were not to be appointed by the Governor-General may have been due to the fact that their jurisdiction was not a general one, but was limited to a certain class of matters only; or it may have been due to the fact that the Judges of these Courts were not paid a salary out of the revenues of the Province, but were remunerated by fees paid out of estates coming before them. As this system of remunerating the Judges of these Courts continued after the union. I have no doubt that when sec. 96 was under discussion it was proposed that they should continue to be remunerated in the same manner. Whatever considerations led to making these Courts an exception

Sask.

C.A.

RIMMER v. HANNON.

in sec. 96, this much is clear, that if they were considered Superior Courts it was necessary to expressly except them, otherwise the Federal Parliament would have been under obligation to provide salaries for the Judges thereof.

If the reasons above suggested led to the appointment of the Judges of those Courts being left in the hands of the Provincial authorities, they apply with equal force to the Surrogate Courts of Upper Canada, whose jurisdiction, though similar in character in so far as the granting and revocation of probates and letters of administration were concerned, was far less extensive than that of the Probate Courts. The Judges of the Surrogate Courts were also remunerated for the surrogate work by fees, although, under the Act, the senior Judge of the County Court was the Judge of the Surrogate Court. These Surrogate Courts were not mentioned in sec. 96. This in my opinion, was due to the fact that they were not considered to be Superior, District, or County Courts.

A perusal of the Act (R.S.U.C. 1859, ch. 16) satisfies me that they were not Superior Courts. That they were considered to be inferior to the Courts of Probate in Nova Scotia and New Brunswick is, I think, established by the fact that they had not the jurisdiction of those Courts in the matters above referred to as being ordinarily exercised by a Judge of a Superior Court. That they were inferior to the former Court of Probate in Upper Canada is established by the fact that appeals from the Surrogate Courts were heard by the Court of Probate until its abolition in 1858, and after that date by the Court of Chancery.

Then, were they considered District or County Courts? The only resemblance they bore to those Courts was, that the boundary of each Court was co-terminous with the boundaries of the District or County in which the Court was established. This alone, in my opinion, would not make them District or County Courts, within the meaning of sec. 96. A District Court, as it was then known, did not simply mean any Court whose territorial jurisdiction coincided with the boundaries of the district. It signified a particular Court, with a known and particular jurisdiction, which it exercised within the boundaries of the district. The same applies to a County Court. Where we find particular Courts referred to in sec. 96, and find in existence at the Union Courts bearing these identical

names with clearly defined jurisdiction and character, we must, I think, take it that the Courts mentioned in the section refer to the existing Courts bearing the same names. In order, then to ascertain if the Judge of a particular Court is to be appointed by the Governor-General or by the Lieutenant-Governor, we must compare that Court with the Superior, District and County Courts in existence at the date of the Union, and the comparison must be not merely as to the extent of their territorial jurisdiction but, as Beck, J., pointed out in Re Small Debts Recovery Act 37 D.L.R. 170 at p. 181, it must take into consideration the character of the Court and "the extent and nature of its jurisdiction both absolutely and relatively to other courts of the province."

If in these respects the Court in question can be said to approximate to the Superior, District or County Courts in existence at Confederation, the power to appoint the Judge thereof is vested in the Governor-General. If not, it is vested in the Lieutenant-Governor of the Province in which the Court has been established.

That this was the view of Sir John Thompson, Minister of Justice, appears from the language of a report made by him in 1889, where he said:

"Judges of the Superior, District and County Courts include all classes of Judges like those designated and not merely the Judges of the particular Courts which at the time of the passage of that Act, happened to bear those names." See Lefroy on Canada's Federal System, p. 527.

Were these considerations not the test of the appointing power, a Provincial Legislature might establish a Court similar in character and jurisdiction to a District or County Court, and by giving it some other name deprive the Governor-General of the right to appoint the Judge thereof. On the other hand, the Legislature might establish a Court inferior in character and jurisdiction to these Courts, and by styling it "District Court" or "County Court" cast upon the Federal Parliament the obligation of providing a salary for the Judge of such Court. The Surrogate Courts of Upper Canada at the time of Confederation did not, in my opinion, bear any resemblance, either in the character of the Court or in the extent and nature of their jurisdiction, to the Superior, District, or County Courts then in existence. They did not, therefore, come within the class of Courts whose Judges were, under sec. 96, to be appointed by the Governor-General.

Sask.

C.A.

RIMMER v. HANNON.

The Surrogate Courts of Saskatchewan are very similar in character, rank, and jurisdiction to the Surrogate Courts in Upper Canada at the date of the Union, and like these Courts bear no resemblance to the Superior, District, or County Courts referred to in sec. 96.

For these reasons, therefore, I am of opinion that the power to appoint the Judges of the Surrogate Courts of this Province is vested in the Lieutenant-Governor.

The appointment of the respondent as Judge of the Surrogate Court for the Judicial District of Cannington was, therefore, valid, and he is entitled to exercise the functions of the office.

The appeal should, therefore, be dismissed.

Macdonald, J.:—This is an appeal from the judgment of Brown, C.J., K.B. (1920), 53 D.L.R. 463, dismissing an application made at the instance of Rimmer, J., Judge of the District Court for the Judicial District of Cannington, for an information in the nature of a quo warranto against the respondent to shew cause by what authority the respondent claimed to exercise the office of Judge of the Surrogate Court for the said Judicial District of Cannington.

The grounds on which the application to Brown, C.J., K.B., was based, were as follows:—(1) The above named Reginald Rimmer is and has been since 1907 the Surrogate Court Judge for the said district. (2) That by the provisions of the Surrogate Act there can be only one Judge for said district. (3) That the above named Reginald Rimmer is the only Judge who has authority to act as Surrogate Court Judge in the said District of Cannington. (4) That on or about the 11th day of October last past and divers others days and times since and more particularly on the 28th day of February, 1920, you, the said James W. Hannon undertook to act and did act as Surrogate Court Judge in the said District without proper or lawful authority, without being duly and properly appointed as Surrogate Court Judge of the said District. (5) And because you, the said James W. Hannon, are continuing to exercise and propose to exercise the duties and functions of Judge of the Surrogate Court for the said District. (6) Because said Reginald Rimmer having been duly appointed Judge of the District for the Judicial District of Cannington, and having been duly sworn in as Judge of the said Court and also as Judge of the Surrogate Court of the said District has never been dismissed or relieved of office. (7) Because

neither the Local Legislature of the Province of Saskatchewan nor the Governor in Council of said Province has any power to appoint Surrogate Court Judges in the Province of Saskatchewan. (8) Because neither the Legislature of the Province of Saskatchewan nor the Governor in Council of the said Province has any power to dismiss any Surrogate Court Judges of the said Province heretofore appointed or holding office as Surrogate Court Judges in the said Province. (9) Because Chapter 28 of the Statutes of the Province of Saskatchewan, 1918-19, is ultra vires.

The relator was in November, 1907, appointed Judge of the District Court for the Judicial District of Cannington. Sections 3, 6 and 8 of the Surrogate Courts Act, 1907 (Sask.), ch. 10, of the Province, then in force, read as follows:—

"(3) In and for every judicial district as the same are from time to time established under The District Courts Act there shall be a court of record to be called 'The Surrogate Court' of each respective district over which court one Judge shall preside; and there shall also be a clerk and such officers as may be necessary for the exercise of the jurisdiction to the said court belonging. (6) The Judge of each district court in the province shall be the judge of the surrogate court for the judicial district in which the district court of which he is judge is situated. (8) Every judge of a surrogate court shall before executing the duties of his office take the following oath before some one authorised by law to administer the same: 'I....., do solemnly and sincerely promise and swear that I will duly and faithfully and according to the best of my skill and power execute the office of judge of the surrogate court of the judicial district of ..... So help me God.'"

The relator upon his appointment and receipt of his commission as Judge of the District Court took the oath of office required by the District Courts' Act, and also the oath of office required to be taken by a judge of the Surrogate Court. He thereupon entered upon his duties as Judge of the Surrogate Court for the Judicial district of Cannington, and continued to discharge the same until November 12, 1919, or a short time theretofore.

By sec. 1 of ch. 28 of the Statutes of Saskatchewan, 1918-19, assented to on February 5, 1919, it is enacted as follows:—"1.—(1) Section 6 of The Surrogate Courts Act, being chapter 54 of The Revised Statutes of Saskatchewan,

Sask.

C.A.

RIMMER v. HANNON.

1909, is repealed and the following substituted therefor: '6. The judge of the surrogate court shall be appointed by the Lieutenant Governor in Council.'"

By sub-sec. (2) of said sec. 1, the said section came into force on April 1, 1919.

On November 12, 1919, the Lieutenant Governor in Council appointed the respondent, James W. Hannon, Judge of the District Court for the Judicial District of Regina, as Judge of the Surrogate Court for the Judicial District of Cannington. Wherefore the appellant applied for said information in the nature of a quo warranto.

On the application before Brown, C.J., K.B., 53 D.L.R. 463, the appellant based his status as relator on his own claim to the office of Judge of the Surrogate Court of the Judicial District of Cannington. The Chief Justice holds at p. 467, that "whatever interest or status the relator has by virtue of which he claims the right to question the defendant's title to office was secured under sec. 6 of the Surrogate Courts Act." Further on, p. 467, he says: "The Legislature having appointed the relator to office as Judge of the Surrogate Court would have the right to cancel his appointment, which they did, by repealing sec. 6, and by appointing the defendant under the substituted clause. It therefore follows that if the defendant has no title to the office in question, the relator has not, and never did have, any better title." He therefore concluded that the applicant had no status to question the right of the respondent to hold the office in question.

On appeal to this Court, however, the appellant claims status also on the ground that he is a resident of the Judicial District of Cannington, and on the fact that he owns real property in said District. That this claim is an afterthought is shewn by the fact that in the material filed, the only reference to his residence within said Judicial District is the incidental one in the following quotation from one of the appellant's affidavits:—"I, Reginald Rimmer, His Majesty's Judge of the District Court for the Judicial District of Cannington, residing at Arcola in the Province of Saskatchewan, make oath and say as follows:"

Arcola is the judicial centre of the Judicial District of Cannington, a fact of which judicial notice may be taken. There is no evidence but it is admitted that the appellant owns real property in said Judicial District.

On this ground I am of opinion that the appellant had

sufficient interest to qualify him as relator herein. Rex v. Speyer, [1916] 1 K.B. 595.

The appellant contends:—(1) That by virtue of his appointment as Judge of the District Court of the Judicial District of Cannington at a time when the Surrogate Courts Act, by sec. 6 thereof, provided that the Judge of the District Court of each district should be the Judge of the Surrogate Court of such district, he was appointed such Surrogate Court Judge by the Governor-General in Council. (2) That, the right to appoint Judges is a prerogative right which has never been conferred on the Lieutenant-Governors of the Provinces, or on the Provincial Legislatures, and remains in Canada in the Governor-General. (3) That said sec. 1 of ch. 28 of the Statutes of Saskatchewan, 1918-19, is ultra vires of the Provincial Legislature.

As has been already seen, sec. 6 of said ch. 28, in its original form, 1907 (Sask.), ch. 10, provided as follows:—"The judge of each district court in the province shall be the judge of the surrogate court for the judicial district in which the district court of which he is judge is situated."

The first question that arises is whether this section is to be regarded as making an appointment to the office of Judge of the Surrogate Court, or as extending the jurisdiction of the Judge of the District Court. Were this a case of first impression I should have had no hesitation in coming to the conclusion that the section was an appointing one. Statutes involving, in my opinion, the same question have however already received judicial interpretation. In the case of Piel Ke-ark-an v. Regina (1891), 2 B.C.R. 53, one of the questions for decision was as to the constitutionality of sec. 9 of ch. 8 of 1890, passed by the Legislature of British Columbia. Said section reads as follows:—

"Until a County Court Judge of Kootenay is appointed the Judge of the County Court of Yale shall act as and perform the duties of the County Court Judge of Koteonay, and shall while so acting.....have in respect of all actions, suits, matters or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the Judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purposes of this Act, but not further, or otherwise, the several districts, as defined by sections 5 and 7 of the 'County Courts Act' over which the 'County Court of Yale' and the

Sask.

C.A.

RIMMER v. HANNON.

'County Court of Kootenay,' respectively, have jurisdiction, shall be united."

A Judge of the County Court of Yale had been appointed but there had been no appointment of a Judge of the County Court of Kootenay. The said Judge of the County Court of Yale held a trial under the Speedy Trials Act, R.S.C. 1886, ch. 175, in the County of Kootenay. The prisoner having been convicted obtained a Writ of Error. The matter came for argument before the Court-en-Banc.

M. B. Begbie, C.J., says as follows, at pp. 60, 61:—

"Now, the Provincial Legislature having, as it is not contested, lawfully in 1883 created two County Courts, viz.: of Yale and Kootenay, might in 1890 just as lawfully have repealed that Act, and created one County Court extending over all the territory comprised in the two County Court Districts created in 1883. The effect might have been that the Yale Court would have become extinct. What would have been the position of the Judge it is unnecessary to inquire; but this seems clear, that he would not have been without a fresh appointment by the Governor-General, the Judge of the New County Court thus created. The Provincial Legislature would not, probably, have attempted in such a case to appoint the Judge of the new Court, directly; but this is just what section 9 attempts to do indirectly. For the repeal and extinction and new creation is by no means the object nor the effect of that section 9. The Legislature by no means intend to extinguish the Kootenay County Court, which they had created in 1883. They carefully provide for its continuance, and expressly contemplate the appointment at some future time of a Judge of that Court (viz. by the Governor-General). They certainly abstain from appointing a judge de nomine; but they confer upon Mr. Spinks, for the present, all the powers and authorities which a Judge, if appointed (viz., by the Governor-General), would have had in the district. But the person who has all the powers and duties, all the authorities and jurisdiction of a Judge, what is he but the Judge? He may also have some other designation; a Collector, a District Magistrate, etc. He is, nevertheless, the Judge, and the sole Judge for the time being in that Court in which he presides; and so the Legislature evidently intends Mr. Spinks to be. It would be absurd to suppose that section 96 of the British North America Act could be defeated by the simple contrivance of calling the person invested with

all the judicial powers and duties of the County Court Judge, a Commissioner, or Administrator, or by leaving him without any specific title whatever, as in the present case. The Provincial Legislature might with precisely the same propriety, and a similar infraction of the same section 96 of the British North America Act, appoint some person during the temporary inability or absence of the Lieutenant Governor to exercise his powers and perform his duties, carefully abstaining from calling their nominee a 'Lieutenant Governor,' or some person to perform the duties and exercise the jurisdiction of a Judge of this Court, so long as they did not call their appointee a 'Judge.' Nor could these encroachments of the Provincial Legislature be validated by having received the Royal Assent, announced at the close of the Session by the Lieutenant Governor, nor could they be validated by an Act of the Dominion Parliament. It is sufficient to point out that the power of appointment having been placed where it is by an Act of the Imperial Parliament, nothing less than another Act of that Parliament can repeal or vary the arrangement.

I am, therefore, of opinion that Mr. Spinks derived no authority whatever from section 9 to exercise any judicial authority in the Court of Kootenay."

Walkem, J., after quoting said sec. 9, says, at pp. 71, 72:

"The districts which are thus united constitute the statutory Counties of Yale and of Kootenay. In each of those Counties, a separate County Court has been created by the County Courts Act—with its separate seal, expressive of its title. 'The Seal of the County Court of Yale,' 'The Seal of the County Court of Kootenay.' As we have, as Judges of the Supreme Court, concurrent jurisdiction by statute with the Judges of the County Courts in their respective Courts, we may take judicial notice, also, of the fact, that up to the present each of the two Courts has had its Registrar and staff of officers, and each of the two Counties its Sheriff. Although by the section the Counties are united, their respective Courts are not. There is no extinction of either, no merger, no one Court, for example, for the united Counties. They are left as independent of each other as when first established. In this condition of things, the section proceeds in substance to enact that until a County Court Judge of Kootenay be appointed by the Governor-General, the Judge of Yale shall fill his place. What is this but the appointment of a Judge to a vacant Judgeship? The ar-

Sask.

C.A.

RIMMER v. HANNON.

rangement, it is true, is provisional; but it is not the less an appointment on that score. Cases were cited to show that a Provincial Legislature may extend the jurisdiction of a County Court in respect of area as well as subject matter; but the present is not legislation of that character. It does not enlarge the area of the Yale Court—but what it assumes to do is to appoint the Judge of that Court—and he is not the Court—to be Judge of the Kootenay Court. The mere device of uniting the two Counties cannot give the Legislature such a prerogative right, and correspondingly dispossess the Governor-General of it. By section 96 of the British North America Act, The Governor-General shall appoint the Judges of the Superior District, and County Courts in each Province, except those of the Courts of Probate of Nova Scotia and New Brunswick.' As section 9 trenches upon this provision it is unconstitutional; hence Judge Spinks has acquired no jurisdiction under it in Kootenay."

Drake, J., also held that said sec. 9 was ultra vires; the other two Judges did not find it necessary to deal with this question.

After the decision in Piel Ke-ark-an v. Regina, supra, was rendered, and no doubt in consequence thereof, a special case was referred to the Supreme Court of Canada; In Re County Courts of British Columbia (1892), 21 Can. S.C.R. 446, and among the questions asked were the following, at p. 452:—

"(1) Was section 14 of the said County Courts Act (C.S. of B.C. cap. 25, so amended as aforesaid) ultra vires of the provincial legislature, either in whole or in part? (2) Was section 9 of the said County Courts Amendment Act, 1890 (53 Vic. Cap. 8) ultra vires, either in whole or in part?"

Section 14 of the County Courts Act, C.S. B.C. 1888, ch. 23, as amended enacted that "any County Court Judge appointed under this Act may act as County Court Judge in any other district upon the death, illness, or unavoidable absence of, or at the request of, the Judge of that district, and while so acting the said first-mentioned Judge shall possess all the powers and authorities of a County Court Judge in the said district; provided, however, that the said Judge so acting out of his district shall immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof."

Said sec. 9, referred to in the second question, has already been quoted.

The Court answered both questions in the negative.

Strong, J., at pp. 453, 454, says as follows:—

"In answers to questions 1 and 2 I am of the opinion that both section 14 of the County Courts Act (Con. Stats. of British Columbia, ch. 25) as amended by 54 Vic. ch. 7, section 1 (the County Court Amendment Act, 1891) and section 9 of the County Courts Amendment Act, 1890 (53 Vict. ch. 8) were within the powers of the Legislature of British Columbia, and I am of opinion that they are so intra vires independently of any Federal legislation.

My reasons for this opinion are that such legislation was a valid exercise of the power conferred upon the provinces by sub-section 14 of section 92 of the British North America Act, whereby provincial legislatures were empowered to make laws regarding the administration of justice in the provinces including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction, including civil procedure in those courts. The powers of the federal government respecting provincial courts are limited to the appointment and payment of the Judges of those Courts and to regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by sub-sec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organisation of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

Then if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.

If this were not so it would be necessary, whenever the territorial jurisdiction of a county court was altered or enlarged, that recourse should be had to federal legislation, under the general reserved powers of parliament, to sanction the change, or that the judges should be re-appointed by a new commission. I think it is clear that parliament in such a matter could not legislate without infringing the exclusive powers of the provincial legislature, and the notion that a new commission would be requisite in every

Sask

C.A.

RIMMER v. HANNON.

case of an enlargement of the territorial jurisdiction of any of the courts in question is too preposterous to be entertained. It must follow, therefore, that the whole power of legislating as regards the jurisdiction of provincial courts is restricted to the provincial legislatures.

I therefore answer the two first questions in the negative."

Taschereau, J. took no part in the consultation; Gwynne, J. concurred, and so did Patterson, J. who remarks that he can scarcely understand how any doubt could have arisen among the Judges in British Columbia.

To say the least, it is doubtful if these opinions of the Judges of the Supreme Court of Canada, given on a case referred by the Governor in Council, are to be regarded as decisions binding on this Court. In re Criminal Code of Canada (1910), 16 Can. Cr. Cas. 43, Can. S.C.R. 434.

If I may regard myself as not bound to follow the opinions in In Re County Courts of British Columbia, supra, I, with all respect, must say that the reasoning of M. B. Begbie, C.J., and of Walkem, J. in Piel Ke-Ark-An. v. Regina, supra, much more strongly commends itself to my humble judgment. However, whether one regards sec. 6 of the Surrogate Courts Act as originally enacted, as a section appointing a Surrogate Court Judge, or as merely extending the jurisdiction of the District Court Judge, the same result, in my opinion, follows: if the Provincial Legislature could appoint a Judge, it could remove him and appoint another in his stead. R.S.S. ch. 1 sec. 6 (39); if the section merely extends the jurisdiction of the Judge of the District Court, the Legislature could undoubtedly curtail that jurisdiction. In either case the appellant owed whatever jurisdiction he had as Surrogate Court Judge to provincial legislation.

The next contention is that the right to appoint Judges is a prerogative right which has never been conferred on the Lieutenant-Governors of the Provinces, or on the Provincial Legislatures, and remains in Canada in the Governor-General.

Section 96 of the B.N.A. Act reads:—"The Governor-General shall appoint the judges of the superior, district, and county courts in each province except those of the courts of probate in Nova Scotia and New Brunswick."

Section 92 of the B.N.A. Act enumerating the classes of subjects in relation to matters coming within which the

Legislature in each Province may exclusively make laws, mentions under head 14:

"The administration of justice in the province including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

Lefroy in his Constitutional Law of Canada, at p. 139, states:—

"Subject to power given to the Governor-General to appoint the judges of the Superior, District and County Courts in each province, under section 96 of the Federation Act, the provinces may by virtue of their power over the administration of justice in the province, appoint judicial officers, as for example, the Ontario Division Court judges, the judges of the Parish Courts in New Brunswick, Fire Marshals in Quebec, Magistrates and justices of the peace, Masters in Chambers, Masters in Ordinary; Local Masters; Judges and Referees; a Railway Committee of the Executive Council," and he cites in support of his proposition a long line of decisions which may be found in notes 319 to 324 inclusive.

In the case of the King v. Sweeney (1912), 1 D.L.R. 476, 19 Can. Cr. Cas. 222, 45 N.S.R. 494, where it was contended that an Act of the Legislature of Nova Scotia authorising the appointment of stipendiary magistrates by the Lieutenant-Governor, was ultra vires, Russell, J., in delivering the judgment of the Court, says at pp. 480, 481:—

"The Provincial Legislature has the authority to legislate on the subject of the administration of justice including the constitution, maintenance and organization of provincial courts, etc., and also with reference to the appointment of judicial officers. Under these provisions I see no reason why it would not be able to legislate with reference to the appointment of stipendiary magistrates. The only part of this general legislative authority that cannot be exercised by the provincial legislatures is that which relates to the appointment of Superior, District and County Court Judges."

The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, [1892] A.C. 437, holds, at p. 443, that "A Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government." In Re Small Debts Recovery Act, 37 D.L.R. 170, 12 Alta. L.R. 32, Beck,

Sask.

C.A.

RIMMER v. HANNON

J., says, at p. 182:—"If the provincial authority, apart from legislation, is the Lieutenant-Governor by virtue of the Royal prerogative, that authority is subject to the legislative power of the province and so the power to appoint or to provide for the appointment of judges to these inferior courts exists in the provincial legislatures."

The conclusion I therefore come to is that were it not for sec. 96 of the B.N.A. Act the power to appoint, or to provide for the appointment of Judges of all Provincial Courts would exist in the Provincial Legislature under head 14 of sec. 92 of the B.N.A. Act. See in Re Small Debts Act, 5 B.C.R. 246, per Walkem, J., at p. 260; Re Small Debts Recovery Act, 37 D.L.R. 170, per Harvey, C.J., at pp. 176 and 177. Section 96 however gives the Governor-General power to appoint certain Judges and this section must be read as an exception to the general power of the Provinces.

Logically pursued the appellant's argument would involve the conclusion that there was no power anywhere to appoint the Judges of the Courts of Probate in Nova Scotia and New Brunswick: they are excepted from the power of appointment of the Governor-General, so that if the power does not lie with the Lieutenant-Governor, it lies with no one.

The third contention of the appellant is that sec. 1 of ch. 28 of the Statutes of Saskatchewan, 1918-19, which repeals sec. 6 of the Surrogate Courts Act, and enacts that "the judge of the Surrogate Court shall be appointed by the Lieutenant-Governor-in-Council" is ultra vires. The appellant says that as sec. 96 of the B.N.A. Act provides that the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick, it is recognised that said Courts of Probate are deemed to be Superior Courts; that the Surrogate Courts of Saskatchewan are essentially of the same character as said Courts of Probate, and therefore Superior Courts; and that the power of appointment of the Judges of the Surrogate Courts in Saskatchewan therefore lies with the Governor-General, as the Judges of the Surrogate Court of Saskatchewan are not mentioned in the exception to the power of the Governor-General to appoint the Judges of the Superior Courts.

Counsel for the respondent argues that while the Courts of Probate in Nova Scotia and New Brunswick may be

Superior Courts, the Surrogate Courts of Saskatchewan are not; and he gives in detail the differences between the jurisdiction of such Courts. Without going minutely into such differences I may say that in my opinion, the Surrogate Courts of Saskatchewan are essentially of the same kind and character as the Courts of Probate in Nova Scotia and New Brunswick, so that if the latter must be deemed to be Superior Courts so must the former.

At Confederation, there were Superior Courts in all the Provinces that then entered the Union; there were County Courts in New Brunswick (Statutes of 1867 ch. 10); and Upper Canada (Consol. Stats. U.C. 1859, ch. 15; Stats. of Canada 1860, ch. 43). In Lower Canada there were Circuit Courts, presided over by Judges of the Superior Court, and it appears that these were sometimes called District Courts. (See Annotation in 37 D.L.R. at p. 186). There were Courts of Probate in Nova Scotia (R.S.N.S. 1864, ch. 127) and in New Brunswick (R.S. N.B. 1854, ch. 136); and there were Surrogate Courts in Upper Canada (Consol. Stats. U.C. 1859, ch. 59).

The Governor of the Province appointed the Judges of the Courts of Probate in Nova Scotia and New Brunswick respectively.

Section 4 of ch. 16 of the Consolidated Statutes of Upper Canada, 1859, reads:—

"The Senior Judge of the County Court in each County, shall be ex officio Judge of the Surrogate Court for the County, and in case of the illness or absence of any Judge of a Surrogate Court, the Junior Judge or the Deputy Judge (if there be one in the County) of the County Court shall have all the powers and privileges and perform all the duties of the Judge of the Surrogate Court, during such illness or absence, as is now provided for by law in case of the illness or absence of the Judge of the County Court."

In his report on the Quebec District Magistrates' Act (set out in full in Lefroy on Canada's Federal System at p. 527), Sir John Thompson, Minister of Justice, says:—

"That view has been taken by nearly all the Ministers of Justice, since the union of the provinces, namely, that the words of the British North America Act, referring to 'Judges of the Superior, District and County Courts' include all classes of judges like those designated, and not merely the judges of the particular Courts which at the time of the passage of that Act happened to bear those names."

Sask.

C.A.

RIMMER v. HANNON.

In Re Small Debts Act, 5 B.C.R. 246, Drake, J., says at p. 264:—

". . . the Province could not by abolishing the existing Courts, and establishing others under a different nomenclature with equal jurisdiction escape from the supreme power vested in the Governor-General of appointing the Judges."

To the like effect are the remarks of the same Judge in Buik v. Tunstall (1890), 2 B.C.R. 12.

In Re Small Debts Recovery Act, 37 D.L.R. 170, Beck, J., says, at p. 181:—

"When the three kinds of Courts, Superior, District and County, are mentioned in sec. 96 it is clear to my mind that the character of the Court is not to be determined by the name by which the provincial government chooses to designate it, but I think by a consideration of its character, to the extent and nature of its jurisdiction both absolutely and relatively to other courts of the province."

It seems therefore abundantly established that the expression "Superior, District and County Courts" in sec. 96 embraces all Courts, howsoever named, of the same character as the Courts existing at Confederation under these names.

In like manner it seems to me that the expression "Courts of Probate in Nova Scotia and New Brunswick," in said sec. 96 is not intended to be a special provision respecting Courts in those two Provinces as distinguished from the other Provinces, but is intended to be a description of a class of Courts, the appointment of the Judges of which was not to belong to the Governor-General. In other words, the provision that the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province has been interpreted to mean that the Governor-General shall appoint the Judges of the Courts in each Province of the same character as the Courts by those names existing at Confederation; so that the exception should be interpreted as extending to all Courts of the same character as the Courts of Probate then existing in Nova Scotia and New Brunswick.

It may pertinently be inquired why the Surrogate Courts of Ontario are not mentioned in the exception to sec. 96, if the exception is to be construed as descriptive of a class of Courts.

As has already been stated, the Governors of the Pro-

vinces of Nova Scotia and New Brunswick, respectively, appointed the Judges of Probate in these two Provinces, while in Upper Canada the Judges of the County Courts were by sec. 4 of ch. 16 of the Consolidated Statutes of Upper Canada, 1859, already quoted, declared to be ex officio Judges of the Surrogate Courts. That Statute was continued in force by sec. 129 of the B.N.A. Act. I have already ventured to express the opinion that such an enactment as said sec. 4 is one making an appointment and this seems to be the view of the Chief Justice of Alberta who in Re Small Debts Recovery Act, 37 D.L.R. 170, says at p. 176:—

"The Surrogate Courts and Division Courts of Upper Canada were courts of the county, but the selection of the judges to preside over them has since Confederation been made by the province, though it was till recently made by statute in the person of the county court judge who, of course, was appointed by the Dominion."

If this view of the statute be the correct one, then the appointment of Surrogate Court Judges was left to the Province of Ontario by virtue of sec. 129 of the B.N.A. Act continuing in force sec. 4 of said ch. 16; the appointment of the Judges of the Courts of Probate in Nova Scotia and New Brunswick was left to those respective Provinces by the exception in sec. 96; thus the appointment of the Judges of all the then existing Courts of Probate, and Surrogate Courts was left to the Provinces.

And if we regard sec. 4 of said ch. 16 as merely extending the jurisdiction of the Judges of the County Courts, following what I take to be the result of the opinions in In re County Courts of British Columbia, supra, then the result is that there were no Surrogate Courts, properly so-called, in Upper Canada at all at Confederation; the Surrogate Courts, so-called, were merely branches of the County Courts, just as Sir John Thompson, in his report on the Quebec District Magistrates' Act, 1888, said the Circuit Court of Quebec was, in one sense, a branch of the Superior Court.

No reason has been suggested nor can I conceive of any, why the framers of the B.N.A. Act should make any distinction between Nova Scotia and New Brunswick, and the other Provinces as to the appointment of Judges of Courts of Probate, or Courts of a like character.

In 1910 the Legislature of Ontario provided for the appointment of the Judges of the Surrogate Courts by the

B.C.
C.A.
NEW YORK OUTFITTING CO. v. BATT.

Lieutenant-Governor in Council, and I cannot find that the legislation has ever been challenged, and it seems to me that what Haldane, L.C., in John Deere Plow Co. v. Wharton (annotated), 18 D.L.R. 353, [1915] A.C. 330, said at p. 358 of secs. 91 and 92 may well be said of the sections in question here: ". . . those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision."

I am therefore of opinion that sec. 1 of ch. 28 of the Statutes of Saskatchewan, 1918-19, is intra vires, and the appeal must be dismissed with costs.

Appeal dismissed.

NEW YORK OUTFITTING CO. v. BATT.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin Galliher, McPhillips and Eberts, JJ.A. June 7, 1921.

Contracts (§IID—151)—Not to enter Competitive Business—"Terminate the Agreement and Withdraw from the Employment"—Construction.

An agreement between the plaintiff and the defendant contained the following clause "in the event of his (the defendant) terminating this agreement and withdrawing from the employment of the parties of the first part (the plaintiffs), that he shall not thereafter for a period of five years engage in like business in Vancouver." The defendant terminated the agreement but did not withdraw from the employment, being subsequently dismissed by the plaintiffs. The Court held that both these events must take place before the restrictive clause could become effective.

APPEAL by defendant from the judgment at the trial of an action for breach of a restrictive covenant in an agreement. Reversed.

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

R. Cassidy, K.C., for respondent.

Macdonald, C.J.A.:—I do not find it necessary to decide whether the agreement in question was or was not in restraint of trade. The parties have plainly said that "in the event of his (the defendant) terminating this agreement and withdrawing from the employment of the parties of the first part (the plaintiffs), that he shall not thereafter for a period of five years" engage in like business in Vancouver.

Inter alia the agreement provides for two things: the advance of money by defendant to plaintiffs with an option to defendant to acquire an interest in the plaintiffs' business or to have the money back if he shall so decide within a

stated period, and secondly, an indefinite hiring at a weekly wage. This hiring is the "employment" mentioned above. Within the time specified, the defendant gave the plaintiffs notice, saying: "My agreement is now open to be terminated, and I place myself in your hands." But as the balance of the letter shews he did not place himself in their hands as to his advance of moneys as aforesaid, he definitely as was his right, demanded them back and relinquished his right to take an interest in the business. He then averts to his services, i.e., his employment, and says: "You can have same if you desire," and again: "I will stay as long as you desire or quit when you wish." The fact is that he stayed until subsequently dismissed by the plaintiffs without, as the Judge has found, any fault on his part.

The parties distinctly differentiate between "agreement" and the "employment," the termination of both must, at the will of the defendant have concurred before he can be restrained from engaging in a like business in Vancouver.

I would allow the appeal.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I would allow the appeal.

Two things were necessary before the restrictive clause in the agreement was to take effect: First, the plaintiff was to put an end to the agreement, and, second, withdraw from the employment.

The defendant terminated the agreement, but in my view of the case (in which I, with every respect differ from the trial Judge) he did not terminate the employment.

Reliance is placed by the plaintiffs upon a letter written by defendant to plaintiffs, dated June 3, 1919, Ex. 2, A.B. 56. My interpretation of that letter is that defendant terminated the agreement by deciding not to take any financial interest in the undertaking and requesting the moneys advanced to be paid back, but left himself entirely in the hands of the plaintiffs as to his continuing in its service.

The words "I will stay as long as you desire or quit when you wish" do not indicate on his part an intention or even a desire to withdraw, but on the contrary, he points out in another part of his letter the necessity of plaintiffs having a salesman and setting out his own qualifications. This is surely not a withdrawal and a re-hiring.

The Judge seems to have experienced some difficulty in reconciling para. 10 of the agreement with para. 8, but I think when carefully considered it can be taken to be as

B.C.

C.A.

NEW YORK OUTFITTING CO. v. BATT.

referring only to the termination of the agreement as to taking the financial interest and as it says for the enforcement of same for the return of the money. Clause 8, I think, disposes of the matter—there the termination of the agreement and the withdrawal from employment are treated separately, and it is only on the happening of both events that the restrictive clause comes into operation.

The defendant continued in the employment of plaintiffs and was afterwards dismissed by them.

McPhillips, J.A.:—I would allow the appeal. The event did not happen which would entitle the covenant being invoked, that is the respondent put the contract as to the personal services at an end, not the appellant. Further, even if the covenant could be looked at it was not established that the appellant engaged "in a like or similar business" to that set forth in the agreement and upon that point alone, the appellant is entitled to succeed upon this appeal.

In Bowler, etc., v. Lovegrove (1921), 37 T.L.R. 424, Lawrence, J., said at p. 425:—"I am aware that this conclusion involves placing a very narrow and strict construction upon clause 5, but in my opinion, the nature of the clause is such that it ought to be construed in the narrowest and strictest possible manner against the plaintiffs."

Further, were I wrong in this, then I am of the opinion that the present case is one between employer and employee and I would again refer upon this point to what Lawrence, J., said at p. 425:—

"To ascertain the principles which are applicable to this part of the case I need not travel beyond the decision of the House of Lords in Morris v. Saxelby (32 The Times L.R. 397; [1916] 1 A.C. 688) and the decision of the Court of Appeal in Attwood v. Lamont (36 The Times L.R. 895, [1920] 3 K.B. 571). These decisions shew clearly that as the present case is one between employer and employee, the clause is prima facie invalid, and that to establish its validity it is incumbent on the plaintiffs to prove that there existed some special circumstances which rendered it reasonably necessary for the protection of the plaintiffs' business. To ascertain whether the plaintiffs have discharged this onus it is necessary to state the relevant facts."

And at pp. 427, 428 we have Lawrence, J., saying:—

"In conclusion I will only add that the case of Dewes v. Fitch, supra, which was so strongly relied upon by the

plaintiffs, is, in my opinion, distinguishable from the present case on the facts. I am of course bound by that decision in so far as it lays down any principle upon which the Court ought to act, but as was pointed out by Lord Parker in Morris v. Saxelby (see [1916] 1 A.C. at p. 708), it becomes necessary to consider in each particular case what it is which, and what it is against which, protection is required. This I have endeavoured to do in the present case, and the action will be dismissed with costs."

The covenant in the present case is, in my opinion, invalid, being in restraint of trade—this alone of course would dispose of the appeal.

I would therefore allow the appeal, the action should be dismissed with costs here and in the Court below.

Eberts, J.A., would allow the appeal.

Appeal allowed.

GIDDINGS v. C. N. R. CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon JJ.A. August 5, 1921..

Jury (§IB—7)—Notice of Trial by—New Trial Ordered as to Part of claim—Interpretation of Judgment—Original Action by Jury—New trial as to Issue to be by Jury.

A judgment of the Court of Appeal of Saskatchewan, (1920), 53 D.L.R. 3, in an action under Lord Campbell's Act, having found that the appeal failed on the general question of damages allowed to the widow proceeded to discuss the question of damages allowed to the infant son and found that they were excessive, and concluded by saying "The judgment therefore cannot stand, . . . The appeal . . . should be allowed . . . and a new trial ordered." The Court held that these words must be read and interpreted in the light of the context, and that the Court only intended that there should be a new trial as to the amount of the damages that should be awarded to the infant, not a new trial of the action generally, and the original trial having been by jury the plaintiff had no right to serve a new notice of the trial of the issue without a jury.

[Sask. Rule of Court 651, Hockley v. G.T.R. Co. (1905), 10 O.L.R. 363; Clarke v. London St. R. Co. (1906), 12 O.L.R. 279; Hesse v. St. John R. Co. (1899), 30 Can. S.C.R. 218; Western Canada Power Co. v. Bergklint (1916), 34 D.L.R. 467, 54 Can. S.C.R. 285, considered.]

APPEAL by defendant from a judgment of Macdonald, J., on an application to set aside a notice of trial in an action brought under Lord Campbell's Act. Affirmed.

J. N. Fish, K.C., for appellant.

D. Campbell, for respondent.

The judgment of the Court was delivered by

Sask.

C.A.

GIDDINGS v. C.N.R. Co.

Haultain, C.J.S.:—This action was brought under an Act respecting Compensation to the Families of Persons killed by Accidents, R.S.S. 1909, ch. 135, commonly known as Lord Campbell's Act, by the respondent as administratrix of the estate of Albert Charles Giddings, deceased, for the benefit of the respondent, as the widow, and Robert L. Giddings, the infant son of the deceased.

The action was tried in December, 1919, by Macdonald, J., with a jury, and resulted in a verdict of $8,000 for the widow and $12,000 for the infant son. The railway company appealed and it is in regard to the decision of this Court on that appeal (1920), 53 D.L.R. 3, 13 S.L.R. 314, that the present controversy arises.

The main points raised in that appeal and to which the reasons for decision were exclusively directed were, (1) that there was no finding of negligence by the jury and that, even if there had been, there was no evidence to support it; and (2), that the damages awarded were excessive. This Court unanimously held that there was evidence of negligence upon which a finding of negligence could be made and was made by the jury. We also found that the damages awarded to the widow were not excessive, but that, as regards the child, the jury had awarded excessive damages.

The judgment of my brother Lamont, which was the judgment of the majority of the Court, after dealing with the question of negligence, the subject of the first ground of appeal, states the following conclusion, at p. 8:—

"The jury's answer to my mind does contain a finding, not well expressed it is true, but yet a clear finding, that the defendants were negligent in not assigning a man to warn employees who might be crossing the track in pursuance of their duties. The first ground of appeal therefore fails."

The judgment then proceeds to deal with the question of damages, and supports the verdict so far as the widow is concerned, but finds that the damages awarded to the son are excessive. The judgment then concludes as follows, at p. 10:—

"I am therefore driven to the conclusion from the amount awarded to the child that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages. The judgment therefore cannot stand. Johnston v. G.W.R. Co., [1904] 2 K.B. 250. The appeal in my opinion should be

allowed with costs and a new trial ordered, unless the parties consent to have judgment entered with the damages to the child reduced to $6,000, which, I think, is the equivalent of the utmost pecuniary benefit of which the child had any reasonable expectation."

As the result of this decision formal judgment was taken out by the appellants in the following terms:—

"It is ordered that the defendant's said appeal be allowed with costs and a new trial had unless the plaintiff and the defendant consent to having judgment entered with the damages so reduced that there shall be payable to the child of the deceased, Albert Charles Giddings, the sum of $6,000 instead of the sum of $12,000 as directed by the said judgment so appealed from. Should the parties hereto so consent the judgment appealed from, varied as so consented to, shall stand as the judgment of the Court."

Later on notice of trial was given by the plaintiff in the following terms:—

"Take notice of the trial of the issue herein of the amount of the plaintiff's damages on behalf of the infant Robert L. Giddings, as ordered by the Court of Appeal on Monday, the 14th day of June, A.D. 1920, at the next sittings of this Court at Regina to commence on the 8th day of March next."

The Court for which this notice was given was a Court presided over by a single Judge without a jury.

The defendant then moved before the Master in Chambers to set aside the notice of trial on the following grounds:—

"1. Setting aside as void and unwarranted by any enactment or Rule or by the practice of this Honourable Court a document styled "Notice of Trial" served herein by the solicitor for the plaintiff upon the solicitors for the defendant February 19th instant. 2. In the alternative setting aside the said document as irregular in that: (a) It is not in fact a notice of trial. (b) No order has been made for the trial of any issues herein or the assessment of any damages, apart from or other than the trial of the action as a whole. (c) The said document does not specify or refer to any such order. (d) The said document does not state whether the issues of fact or the assessment or inquiry of damages are to be tried by a jury."

This application was dismissed by the Master, and the defendant appealed to a Judge in Chambers. The matter

Sask.
C.A.
GIDDINGS
v.
C.N.R. Co.

came before Macdonald, J., in Chambers, and was disposed of by him in the manner set out in his reasons for his decision, which are as follows:—

"From a perusal of the reasons for judgment given in the Court of Appeal, I am satisfied that all the Court intended was that on failure of the parties to agree to have the amount of damages awarded the infant reduced as therein provided there should be a new trial as to the amount of damages that should be awarded the infant, not a new trial of the action generally.

I am however of opinion that as the original trial was by jury, plaintiff had no right to give a notice of the trial of such issue without a jury. The plaintiff will have leave to serve a new notice for trial of the issue with a jury.

The result is that the notice of trial without a jury will be set aside and leave given plaintiff to serve a new notice of trial as to the amount of damages to which the infant is entitled, with a jury. The chief contest before me was as to whether the new trial should be of the action generally or only of said issue. On this point I uphold the plaintiff's contention though I set aside the notice on another ground. There will therefore be no costs to either party."

The present appeal is taken from this order.

In my opinion both the Master and Macdonald, J., correctly interpreted the intention and meaning of the judgment of this Court. The words "the appeal in my opinion should be allowed with costs and a new trial ordered," used by Lamont, J.A., at the conclusion of his judgment, 53 D.L.R. 3, at p. 10, must be read and interpreted in the light of the context. Having found that the appeal failed on the general question of negligence and the particular question as to damages allowed to the widow, he proceeds to discuss the question of the damages allowed to the infant son, finds that they are excessive, and concludes by saying "the judgment therefore cannot stand." Those words must surely only apply to that part of the judgment appealed from which is found to be wrong and not to that part which is supported.

Section 3 of Lord Campbell's Act, R.S.S. 1909, ch. 135, enumerates the several classes of persons for whose benefit an action may be brought, and provides that:—

"In every such action the judge or jury may give such damages as he or they think proportioned to the injury re-

sulting from such death to the parties respectively for whom and for whose benefit such action has been brought."

Whether there has been pecuniary injury or not and what is a fair compensation, are distinct issues in the case of each person for whose benefit the action has been brought. There may be pecuniary injury in the one case and not in the other, and the amount of compensation must be decided as a rule on separate and distinct facts and considerations in the case of each person for whose benefit the action has been brought. In the present case, the jury has found that there was pecuniary injury to the widow and has awarded her fair compensation, and the verdict on each of these questions has been affirmed on appeal by this Court. In the case of the infant son both the jury and this Court have found that there was pecuniary injury, but this Court has further found that the compensation awarded to the son by the jury was not fair and has ordered a new trial. See 53 D.L.R. 3. The language of the judgment ordering a new trial, apart from the context, is broad, but, in view of the findings both at the trial and in appeal, there can, in my opinion, be no doubt as to what the meaning and intention of that judgment was.

So far as the verdict for the widow is concerned it was obviously intended not to disturb it, but, possibly, in the case of the son it might have been better for us to have more explicitly exercised the power conferred by Rule of Court 651. From the language of the judgment of my brother Lamont, however, as I have already stated, it is quite clear that we intended to do what we had the power to do. Rule of Court 651; Hockley v. G.T.R. Co. (1905), 5 Can. Ry. Cas. 122, 10 O.L.R. 363; Clarke v. London St. R. Co. (1906), 5 Can. Ry. Cas. 381, 12 O.L.R. 279; Hesse v. St. John R. Co. (1899), 30 Can. S.C.R. 218 at p. 240.

On this point I would also refer to the remarks of Duff, J., in Western Canada Power Co. v. Bergklint (1916), 34 D.L.R. 467, at pp. 476-8, 54 Can. S.C.R. 285.

As to the question of costs raised in this appeal, I think that there was ample material upon which the Judge in Chambers could properly exercise his discretion by depriving the defendant of its costs of the motion. The notice of motion before the Master in Chambers, the decisions of the Master and the Judge in Chambers and the real question involved in this appeal, all shew that there were more important matters raised by the defendant than the ques-

N.B.

App. Div.

TURNBULL v. SAUNDERS.

tion whether the notice of trial should be for a jury or non-jury sittings. The notice of trial was set aside, but the defendant failed on the most important question involved in the motion, and under those circumstances the discretion of the Judge should not be interfered with.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

TURNBULL v. SAUNDERS.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. April 22, 1921.

Boundaries (§IIC—19)—Right of Crown in Sea-shore—High water Mark—How Determined—Removal of Gravel—Liability for—Amount of Compensation.

The high water mark of a tidal river where the right of the Crown in the sea-shore ends, is the mean height of the water between ordinary spring and neap tides.

[Lee v. Arthurs (1919), 48 D.L.R. 78, 46 N.B.R. 482, referred to; Att'y-Gen'l v. Chambers (1854), 4 DeG. M. & G. 206, 43 E.R. 486 followed.]

APPLICATION by defendant to set aside a verdict entered for the plaintiff and to enter a verdict for the defendant, or for a new trial, in an action to recover compensation for gravel illegally removed from the sea-shore above high water mark on the plaintiff's property. Application dismissed.

J. J. F. Winslow, supports appeal.

H. H. McLean, Jr., contra.

The judgment of the Court was delivered by

Hazen, C.J.:—The plaintiff, who is the owner of a lot of land on Long Island in the Kennebecasis River, brought action against the defendant, who is a road supervisor for the County of Kings, under the Government of New Brunswick, to recover damages in the way of compensation for gravel which he claims was without his permission removed from the beach or shore of his lot in 1919, for use on the public roads. It is stated in the Judge's charge that while it was not put on record it was not disputed that the Government of the Province was standing behind Saunders, and if in what he conceived to be the exercise of his duty he had trespassed upon Turnbull's property, he understood the Government was willing "to stand in his shoes and bear the responsibility." In addition to the claim for the removal of gravel in 1919 there was a further claim for a few loads of gravel that had been hauled off the plaintiff's land

in 1917 by the defendant, who was then a teamster under one A. M. Saunders who was then road supervisor. In addition to the claim for the value of gravel so taken from the beach in these years, there was a further claim for damages alleged to have been done to plaintiff's lands in the removal of the gravel.

The defences set up by the defendant were that the gravel was not taken from the land of the plaintiff, and that the material that he took from the beach of Turnbull's lot of land on Long Island was taken from below high water mark, and really belonged to the Crown; and another defence was that if the supervisor took any material from the plaintiff's land above high water mark, the plaintiff's remedy was by application to the Minister of Public Works for compensation, and not by an action at law before the common law Courts of the country. The defendant claimed exemption from liability under the provisions of the New Brunswick Statute 1918, ch. 8, An Act Respecting Highways, and cited sub-sec. 2 of sec. 50 thereof, which provides that the supervisor may take below high water mark any beach gravel, stone or other material without the consent of any riparian owner, but in case any injury shall be done to the lands of any such owner by any such taking, the Minister of Public Works may make him suitable compensation for any such injury. This only applies to cases where the material is taken below high water mark, and in this case, as will subsequently appear, the jury found that the material taken was above high water mark and was therefore taken from the plaintiff's own property. Sub-section 2 which I have just referred to was no doubt enacted for the purpose of providing that where the property of a riparian proprietor is injured by the removal of stone or gravel below high water mark, he shall not be without remedy against the Government, even though it has a perfect right to remove such stone or gravel for purposes of road making, and to my mind it is not applicable to the present case. The defendant also sought to rely on the provision of sec. 50, which provides that the supervisor may enter upon any uncultivated lands in order to obtain material for making roads, and that any damage done thereby shall be appraised and ascertained by the judgment of three indifferent freeholders. But this provision is only effective when no agreement can be made with the owner, and in this case no attempt was made to make any agreement with him. At

N.B.

App. Div.

TURNBULL v. SAUNDERS.

the time the material was taken he was overseas serving his country, and no application for the material was made to him or to anyone on his behalf. His address was easily ascertainable, and it would have been quite possible to have carried on negotiations with him even though he was not in New Brunswick, and after his return home, when he first learned of the trespass on his property he communicated with the Department of Public Works and his claim was resisted on the ground that the material had been removed not from his property but from the property of the Crown in right of the Provincial Government, on the foreshore below high water mark. In my opinion the defendant cannot succeed on these grounds.

The principle point involved is a question as to what is high water mark. The Kennebecasis River or bay as it is sometimes called, is an arm of the River St. John flowing into it about 7 or 8 miles from its mouth. It is a tidal river there being a rise and fall at ordinary times of the tide of several feet, and it is the same river upon which the property that was the subject of dispute in Lee v. Arthurs and Lee v. Logan, which was recently the subject of litigation (1919), 48 D.L.R. 78, 46 N.B.R. 482, was situated. There is a regular ebb and flow of the tide, and as in similar places along the River St. John tributaries that are affected by the tide, it seems to me that it should be possible to determine where the high tide mark is by a view of the premises. The questions submitted by the Judge to the jury, with the answers thereto were as follows:—

"1. Did the defendant during the year 1917 take from the beach or river shore of the plaintiff's lot of land above high water mark any gravel? A. Yes (unanimous). 2. If so what quantity was taken and what was its fair removal value at the place where taken? A. Fifteen loads at 40 cents a load (double) (unanimous). 3. Did the defendant during the year 1919 take from the beach or river shore of the plaintiff's lot of land above high water mark any gravel? A. Yes (unanimous). 4. If so what quantity was taken and what was its fair value at the place where taken? A. 750 yards at 65 cents per yard (unanimous). 5. What damages if any do you assess to the plaintiff for the damage or injury to the plaintiff's bank or shore exclusive of the value of the gravel? A. $150 (unanimous). 6. What was the total value of gravel taken by the Government from the defendant's land above

high water mark in 1917? A. Impossible to determine further than the 15 loads accounted for in Question 2 (unanimous)."

Questions by the defendant.

"1. Is there a line on the (ground across the front of) plaintiff's land indicated by the ending of land vegetation and the commencement of sand and gravel as mentioned by Mr. Cushing and other witnesses? A. Some distance above high water mark there is an irregular line on the plaintiff's land. 2. (a) How much gravel was taken by the defendant in 1919 on the landward side of such line? A. Unable to determine (unanimous). (b) What was the value thereof? A. Unable to determine (unanimous). 3. (a) How much gravel was taken by defendant in 1919 on the river side of such line? A. Unable to determine (unanimous). (b) What was the value thereof? A. Unable to determine (unanimous). 4. What amount of gravel was taken by defendant in 1917 below such line of vegetation as indicated on the ground? A. Unable to determine (unanimous). 5. Where do you find the line of high water mark to be across the plaintiff's land? A. We find the high water mark to be the mean height of the water between ordinary spring and neap tides as indicated on the shore by a slight ridge of gravel (unanimous)."

The jury having found, subject to the Judge's instructions, the high water mark to be the mean height of the water between ordinary spring and neap tides as indicated on the shore by a slight ridge of gravel, and having found the quantity taken from the plaintiff's lot above high water mark in 1917 and again in 1919, a verdict was directed for $643.50, being made up as follows:

15 loads in 1917 at 40 cents a load $6, 750 loads in 1919 at 65 cents a yard $487.50, and $150 for damage to the bank exclusive of the gravel $150; total, $643.50.

The defendant moves for a new trial on the following grounds:—1. The verdict is against law. 2. The verdict is against evidence. 3. On the answers to the jury the verdict should have been entered for the defendant. 4. Mis-direction of the learned Judge. 5. Improper admission of evidence. 6. The plaintiff's remedy for damage if any is by application to the Minister of Public Works and not by action against the supervisor. 7. Damages are excessive and assessed upon a wrong principle.

Of these points, Nos. 1, 3, 4 and 6 depend upon the same

N.B.

App. Div.

TURNBULL v. SAUNDERS.

question of law, and that question is what is meant in the statute by the expression "high water mark." In this connection it must be remembered that the jury viewed the premises themselves, and from the appearance and marks upon the beach, subject to the instructions they had received from the trial Judge, drew the conclusion that high water mark, being as they were instructed the mean height of the water between ordinary and spring tides, was indicated on the shore by a ridge of gravel.

Now the objection to the Judge's charge which is taken by the appellant has reference to the fact that he instructed the jury that if they were able to find the medium high tide line between the spring and the neap tides, they could call that line high water mark, pointing out to them at the same time that in the case of Lee v. Arthurs, 48 D.L.R. 78, it was determined by the Court of Appeal that the words "high water mark" should not be construed as exceptionally high or exceptionally low water mark, but ordinary high water mark. The defendant's contention was that high water mark was the line where vegetation ceased and gravel and sand commenced, and in reference to this the Judge directed that he did not think the question of vegetation had anything to do with high water mark. "High water mark," he said, "may go clean beyond the trees along the shore. It might be 100 feet below the grass. Grass would not grow within 100 ft. of it. That does not affect where high water mark is. It may be in some conditions, on some shores, a kind of vegetation will grow up upon the land never covered with water. In some places where the land is sometimes covered with water a man may be able to say the water never rises above such a point or never recedes below such a point. To the ordinary man I do not think the question of vegetation in connection with high water mark cuts any figure at all. That is my judgment." There is no doubt that at many points along the River St. John and its tributaries and along all tidal rivers there are marks made by high water, caused perhaps by unusual tides, by freshet or by gales blowing the water up to a higher point than usual, which are easily discernible, but there is a very distinct difference between freshet mark on a tidal river and high water mark, and in my opinion the trial Judge correctly stated the law when he informed the jury that if they could find the medium high tide line between the spring and the neap tides that that line could be called high

water mark. When the jury viewed the premises that line was distinctly found, although they at the same time found a line across the front of the plaintiff's land further up which no doubt was the freshet mark.

The trial Judge had ample authority for directing the jury as he did in effect that the right of the Crown to the seashore landwards is prima facie limited by the line of the medium high tide between spring and neap, as this was the decision in Att'y Gen'l v. Chambers (1854), 4 DeG. M. & G. 206, 43 E.R. 486, a decision which has been followed in many subsequent cases. In his judgment in that case Cranworth, L.C., said, at pp. 215, 216:

"The question for decision is, what is the extent of the right of the Crown to the seashore? Its right to the littus maris is not disputed, but what is the littus? Is it so much as is covered by ordinary spring tides, or is it something less?"

And then after considering these questions he said, at p. 218:—"The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the Judges, whose valuable assistance I had, in thinking that medium line must be treated as bounding the right of the Crown."

In the case of Lee v. Arthurs, 48 D.L.R. 78, before referred to, it was held that high water mark on the River St. John where there is an ebb and flow of tide, means ordinary high water mark and not high water mark at freshet time. Having heard the evidence of the different witnesses and having viewed the premises, the jury under a direction that I think was eminently proper, fixed a high water mark, and they found it was above that mark that the gravel had been removed by the defendant, and I therefore find that there is no reason whatever for disturbing their finding on the principal ground that was urged before us on the argument.

The second ground, that the verdict is against evidence refers more particularly to the amount of damages that was awarded. It seems to me, however, that there was ample

N.B.

App. Div.

TURNBULL v. SAUNDERS.

evidence to justify the finding. It was shewn that an ash tree situated on the plaintiff's property had been uprooted and that certain cedar trees had been treated in the same way by the defendant or those for whom he was responsible. The trees are described as being ornamental and an attraction to the property, and it seems to me that while the amount may seem somewhat large, this Court would not be justified in reducing the sum which was found by the members of the jury, all of whom I understand reside in the neighbourhood of the property and should be able to come to a reasonable conclusion so far as the damage caused to the property in this respect was concerned.

In addition to the uprooting and destruction of the trees, the plaintiff's property was damaged by the digging of the holes that were necessary in order to remove the gravel. It is claimed, although there is evidence to the contrary, that by the action of the tides these holes will fill in again in the course of time, and the property will not ultimately be injured. This, however, was a fact for the jury, which no doubt was taken into consideration by them, and I do not think that the amount of the damage under the circumstances is so large as to justify any reduction.

With regard to the value of the gravel itself, and the quantity, the plaintiff, who is an engineer, made very careful measurements which shewed that the amount of gravel taken by defendant between January 1, 1919, and February 7, 1919, from his beach on Long Island amounted to 1029 cubic yards, which he valued at 75 cents a cubic yard, or $772 in all, and also claimed that the gravel removed in 1917 amounted to $375, a total of $1,147 for the gravel alone. His measurements were made with a level from the top of the ice, which gave the high water mark in the winter months. According to Mr. Turnbull's evidence the rise and fall of the tide varied from 18 inches at neap tide to 3 feet at spring tide. He also claimed in his evidence that the general level of the beach had been materially lowered, and that the nature of the bottom of the river was such that gravel would not wash into the holes but would come from another portion of his beach. This was in answer to a contention made by the defendant that little or no damage was done by removing the gravel from Mr. Turnbull's beach, as the holes would fill up with gravel again, and the contention as I understand it that the damages were not awarded on a right and proper principle goes to the fact that although

the gravel was removed the holes would in time fill in again, and therefore there would be little or no loss. I think, however, the plaintiff was clearly entitled to be paid the value of his gravel at the then market price. The gravel was used for the repairing of roads on the mainland opposite the island, and the value of gravel for that purpose was proved in evidence, and in any event evidence was given to the effect that when gravel is removed to any depth it does not fill again. Other evidence was given for the plaintiff in support of his claim for damages, and the evidence of the defendant does not conflict materially with that of the plaintiff.

Saunders, the defendant, stated in his evidence that they hauled altogether some 779¼ yards from the island, and he thinks about 500 of that was from Turnbull's beach. He states that he took the gravel to a depth of about 2 feet, and partly dug around the ash tree which stood away down below the mark of vegetation, and that he understood it was practically undermined. Another witness, Flewelling, said he measured the gravel hauled in 1919, and 779¼ yards was hauled from Long Island. The jury had this and other evidence before them, and having arrived at the conclusion that the amount of gravel hauled from the plaintiff's beach was 15 loads in 1917, and 750 yards in 1919, a less amount than the plaintiff claimed, I do not think I should interfere with their finding in that regard or with the price which they put upon it, in support of which I think there was ample evidence. It also appeared that a statement of the amount arrived at by the plaintiff after he had measured the quantity of gravel removed in 1919, shewing 1,029 cubic yards, was forwarded to the Minister of Public Works, containing the details of the amount and shewing the quantity taken from each hole, and at no time prior to the trial was any question raised as to the accuracy of his statement. I feel that it is not reasonable to assume that less than the amount the jury found, 750 cubic yards, was taken from the plaintiff's beach, in view of the deductions they made from the plaintiff's original claim.

So far as improper admission of evidence is concerned, this is confined to two particulars, the first of which is the correspondence between the plaintiff, the Chief Commissioner of Public Works, the Premier of the Province, and his private secretary. It clearly appears from the evidence given by Saunders that the real defendant in this case is

N.S.

S.C.

FEENER v. HOPGOOD

the Government of the Province, and it also appears from the correspondence that the Government invited the plaintiff to bring the action, and undertook to defend. It therefore seems to me that there can be no weight in this objection.

The other objection is to the admissibility of the photographs that were taken by Turnbull, shewing the condition in which his beach had been left by the defendant. It is hardly necessary to cite authority for the proposition that photographs are admissible in evidence. In this case though it seems to me they were of little importance in view of the fact that the jury themselves viewed the premises and saw the change that had taken place in the level of the beach.

The application should be dismissed with costs.

Application dismissed.

FEENER v. HOPGOOD, ET AL.

Nova Scotia Supreme Court, Russell and Longley, JJ., and Ritchie, E.J. April 2, 1921.

Contracts (§ IVC—345)—To remodel Building—Construction—Refusal of Architect to give Proper Certificates—Impossibility of Performance—Discharge of Contract—Recovery on Implied Contract for a Quantum Meruit.

A written contract to enlarge and remodel a building provided that "the work and materials should be paid for in instalments, eighty per cent. of labour and materials delivered, on the certificate of the architect, first payment on the value of labour amounting to five hundred dollars, other payments fortnightly as the work progresses, eighty per cent. of full amount of contract to be paid as herein provided, the final payment shall be made within thirty-three days after the contract is fulfilled." The Court held that while there might be difference of opinion as to the first payment, whether it should be five hundred dollars or eighty per cent. of that sum, as to the intermediate progress estimates, the contractor was entitled to a certificate for eighty per cent. of the value of the materials and labour, and not as the architect contended, a proportion estimated on the contract price, and that the continued refusal of the architect to certify and the defendants to pay in accordance with the terms of the contract as properly interpreted, was such a breach as to justify the contractor in treating the contract as discharged and claiming for the value of the work and materials on an implied contract for a Quantum Meruit.

[Withers v. Reynolds (1831), 2 B. & Ad. 882, 109 E.R. 1370, followed.]

APPEAL by plaintiff from the judgment of Mellish, J., dismissing with costs plaintiff's action claiming damages for breach of a building contract.

C. J. Burchell, K.C., for appellant.
W. C. McDonald, for respondents.

Russell, J.:—The plaintiff, a contractor, undertook to enlarge and remodel a building for the defendants under a written contract and according to written specifications. There was no complaint on the part of the defendants as to the quality of his work or materials. The whole controversy between the parties turns upon their interpretation of the terms of the agreement providing for payment as the work progressed. The contract provided that the work and materials should be paid for in instalments, 80% of labour and materials delivered, on the certificate of the architect, first payment on the value of labour amounting to $500, other payments fortnightly as the work progresses, 80% of full amount of contract to be paid as herein provided, the final payment shall be made within 33 days after this contract is fulfilled.

There may be a fair difference of opinion as to the first payment, whether it should be $500 or only 80% of that sum. As to the other payments, I am unable to see any difficulty. The plain reading of the contract seems to me to be that the defendants were to be at liberty to retain 20% of the total amount payable under the contract until 33 days after completion. As to the intermediate progress estimates, subject to the retention of the said 20%, the plaintiff was entitled to a certificate for 80% of the value of the labour and of the materials delivered. The difficulty arose because of the view taken by the architect to the effect that the plaintiff should not receive 80% of the value of the materials and labour, but a much smaller sum. His conception of the contract was that the amount on which the 80% should be paid must be arrived at by a process which may be stated as a sum in simple proportion, to wit: As the total probable cost of the work contracted for as estimated by the architect is to the actual value of the work and materials done and provided, so is the total contract price to the amount on which the 80% payment is to be made. Perhaps his contention may be stated more simply by an illustration. When the work is half done the plaintiff according to the architect's idea should receive 80% of half the contract price, although it may happen that because of advances in the cost of labour and materials or because the contract was taken at too low a figure the plaintiff may have actually expended 50 or 100% more

N.S.

S.C.

FEENER v. HOPGOOD

than the amount for which the architect under this method would be prepared to certify to the extent of 80%. Counsel for the defendants was asked to suggest what words he would add to or substitute for those used by the parties in order to present the correct interpretation of the contract. He was unable to do so and I can fully sympathise with his difficulty. If we must go beyond the plain meaning of the words for the purpose of interpreting them, let us look at the circumstances. The plaintiff assumed that his contract price would pay him for his labour and materials and the defendants had no reason for supposing that they were to get thousands of dollars in value from the plaintiff for nothing. Both parties would assume that there was to be a fair price for a good job. Now the defendants obviously in any possible reading of the contract, even that sought to be imposed upon the plaintiff by the architect, considered that 20% margin would be a sufficient amount to be retained as security on the completion of the work. Why should they assume that a larger margin would be requisite on the progress estimates? The defendant's interpretation is one that would never have been dreamed of had it not been for the discovery early in the progress of the work that the contract had been taken at too low a figure. But there is no suggestion that this discovery was made before the signing of the agreement and in order to ascertain the meaning of the parties we must place ourselves in their position at the time the contract was signed. There is no room for doubt as to the view taken by the architect. He was questioned as to the date at which the plaintiff first complained of the unfairness of his certificates, and he will not deny that plaintiff complained when the second payment was made. The evidence of the defendant Hopgood is to the same effect. Neither Horton nor Hopgood will say positively that plaintiff did not complain before the third payment was made. Counsel for the plaintiff then asked the architect the following questions and received the following answers:—

"Q. Did he speak about 80% of the wage bill and material bill? A. He understood from the contract he was only to get 80%. Q. But you were not giving him 80% of the value of the wages and material? A. Oh, no. Q. And did he claim that you should give him 80% of the actual value? A. Yes. I was giving him the contract value and not what it cost him. Q. That was the difficulty between

you all the way through—you were giving him 80% of the value of the contract and he was claiming 80% of the actual cost? A. Yes. Q. This was not a new thing for him to tell you that he could not go on if you did not give him more money—he had said it on a good many occasions? A. No, I don't remember him saying he could not go on without more money before I gave him the last certificate, the Friday before I gave him the last certificate he said he would quit. Q. What did he say previous to that? A. He was paying the men but not for his material; he may have said the other but I am not certain; he may have told me he could not go on without more money but I do not remember it."

There was clear evidence of earlier and more frequent complaints than the architect is here willing to admit. Finally as the architect says, the plaintiff gave notice that he would quit unless the defendants were willing to pay for his work and materials according to the stipulations of the contract, and on August 15 plaintiff wrote and addressed to the architect the following letter:—

"Dear Sir:—I wish to inform you that up to August 15th, I have labour and material used in the reconstruction of W. J. Hopgood's building which is under your care, amounting to $6766 and received $3200 on the 80% basis which leaves a balance of $2212 due me on Aug. 15th. To comply with the agreement I need the said amount to pay balance due to creditors. This is a business problem. Mr. Hopgood wants his building as soon as possible and I want to give it to him as soon as I can and it is only the matter of paying up the 80% as per agreement that keeps me from rushing the job. And unless this amount is ordered to be paid I will close down at noon Saturday until such time matters are re-considered and straightened up.

I hope you will make this satisfactory so as to cause no trouble.—Yours truly,

Austin J. Feener."

This is the notice on which the trial Judge bases his decision that the plaintiff by his breach of the agreement entitled the defendants to consider the contract as discharged. Even if the architect's construction of the contract were the correct one, cases and authorities have been cited by counsel for the plaintiff to shew that this letter did not warrant the defendants in treating the alleged breach as a ground for claiming a discharge. It is not, he con-

N.S.
S.C.
FEETER
v.
HOPGOOD

tends, such an absolute refusal on the part of the plaintiff as to amount to a total breach. I incline to agree with him but it is not in my opinion necessary so to decide, because if I have correctly interpreted the terms of the contract the plaintiff was entirely within his rights in serving the notice contained in the letter in the form in which it was given. The continuous refusal of the architect to certify and of the defendants to pay in accordance with the terms of the contract as properly interpreted was such a breach as to justify the plaintiff in treating the contract as discharged and claiming for the value of the work and materials on an implied or quasi-contract for a quantum meruit. The facts of the case seem to me to be exactly analogous to those in the old case of Withers v. Reynolds (1831), 2 B. & Ad. 882, 109 E.R. 1370, which is the fountain head of all the learning as to discharge by breach going to the essence of the contract. There the plaintiff's continuous refusal to pay for the loads of straw as delivered and his insistence on always keeping one payment in arrear, was held to be such a breach as to discharge the defendant from the further performance of his contract. Just so in this case, the defendants' continuous refusal to pay the proper amount on the successive progress estimates discharged the plaintiff from further obligation under the express contract and gave rise to a new and so-called "implied" contract to pay the actual value of the work done and materials delivered, on the footing of a quantum meruit. The principle is too plain to call for citations.

The trial Judge has found some expressions in the letter of the plaintiff of August 21 which indicate to him that the plaintiff was not willing and ready to perform his contract. There had been an abortive effort to settle the controversy between himself and the architect by arbitration. Nothing came of the effort and the plaintiff wrote the defendants a letter in which he made the admission which is relied on as an intimation that he was not willing to complete the contract. All that he says is that he had become aware long ago that his figures were too low to complete the job under the conditions he was brought to. He was plainly referring to the conditions imposed upon him by the unfair reductions made in his progress estimates by the architect. The arbitrators, he says, are all high grade contractors. His own figures are less than their "estimates and his estimate to finish the job is a whole lot less than

theirs." There are suggestions as to possible alternative solutions of the difficulty that has arisen, but I can find nothing in this letter to indicate that the plaintiff is unwilling to complete his contract if its terms are lived up to by the defendants. It certainly does not contain any such repudiation of liability as would justify the defendants in regarding it as a breach by renunciation.

A technical objection has been taken to the statement of claim on the ground that it is not based on a quantum meruit. I do not see that it is anything else but a claim for a quantum meruit, except that the plaintiff has stated his claim in plain English and not in Latin. He has set out the terms of the agreement between the parties, the fact that he was duly proceeding with the work with promptness and diligence until on or about August 22 on which the defendants terminated the plaintiff's employment under the said contract and prevented the plaintiff from completing. And he claims as damages the amount of materials supplied and labour performed under the contract. He would also be entitled to claim for the anticipated profits but it is very clear under the evidence that if the defendants had not discharged him by their breach, and he had been allowed to complete his contract it would have resulted in a loss.

We have really nothing whatever to do with the consequences to either of the parties. If we had, I am unable to see that the defendant suffers any injustice. He gets value for every dollar the plaintiff asks him to pay. If the contract had not been put an end to by the acts of his own architect, which entitled the plaintiff to claim that the contract was discharged he would have got his work done, it seems probable, for several thousand dollars less than it was worth. His failure to realise this profit at the expense of the plaintiff is under the circumstances no grievance.

The appeal should be allowed and judgment entered for the plaintiff for the proved value of the work and materials.

As I understand the evidence this will be $4,110.53, but if there is any misunderstanding as to this it can be settled on taking out the rule.

Longley, J. (dissenting):—I have read the evidence over in this case and I have reached the same conclusion as the trial Judge. I find that Feener took the contract too low. I find that Horton gave his certificates as high as he could give them, and I find further that in the case of all con-

B.C.

C.A.

MALTBY v. BRITISH COLUMBIA ELECTRIC R. Co.

tracts taken with the condition that 20% be left unpaid means 20% of the entire contract. The fact that the contract called for the amount paid up to 80% has ever been held by those letting large contracts to be interpreted in the manner I have interpreted it, and I think that Horton correctly and absolutely interpreted it and the plaintiff was bound by this certificate.

Under these conditions I think they were justified in taking the work out of his hands as they did, and completing it, although it cost considerably more than $20,000.

The arbitration proceedings were purely farcical; both parties dropped them and neither has any fault to find with the other for dropping them.

Ritchie, E.J., agrees with Russell, J.

Appeal allowed.

MALTBY v. BRITISH COLUMBIA ELECTRIC R. CO. LTD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 6, 1920.

Trial (§IIB—45)—Collision between Motor Car and Street Railway Car—Negligence of Driver of Motor Car—Verdict of Jury in Favour of Plaintiff—Judgment in Favour of Defendant—Negligence of Plaintiff Prohibiting Recovery.

Where the driver of an automobile drives his car so negligently that an injury caused by a collision between the automobile and a street car is not only the actual consequence but the consequence which any reasonable person in the drivers' position, knowing what the driver knew, must have seen to be the probable consequences of his negligence and the chain of casualty is not interpreted by the negligence of the street railway company he cannot recover damages for the injury, and the trial Judge is justified in giving judgment for the defendant, notwithstanding that the jury has found for the plaintiff.

[Jones v. Spencer (1897), 77 L.T. 536; Columbia Bitulithic Ltd. v. B. C. Electric R. Co. (1917), 37 D.L.R. 64; Fawkes v. Poulson (1892), 8 T.L.R. 725; Fraser v. B. C. Electric R. Co. (1919), 26 B.C.R. 536; McPhee v. Esquimalt and Nanaimo R. Co. (1913), 16 D.L.R. 756; Banbury v. Bank of Montreal (1918), 44 D.L.R. 234, referred to; and see also annotation 39 D. L. R. 615, on Evidence sufficient to go to the Jury in Negligence Actions and under what circumstances the trial Judge is justified in withdrawing the case from the jury.]

APPEAL from the decision of Ruggles Co. Ct. J., of July, 6, 1919, dismissing an action for damages owing to a collision between his automobile and a car of the defendant company, the plaintiff claiming $309.05 for damages to his car and $5 a day for 11 days' loss of use of car. One Carrie had hired the car in question from the plaintiff on January

31, 1919. On the same day, shortly after 7 o'clock in the evening, he was driving along 8th Ave. westerly. On approaching the intersection of 8th Ave. and the defendant company's right of way he was going at about 10 miles an hour. When about 10 ft. from the track he saw a car of the defendant company coming north, and he put on the brakes, at the same time turning his car to the left, but he struck the defendant's tram-car about three-quarters of the way back as it was crossing the street and the automobile was wrecked. There was a slight down grade as the defendant's tram-car came from 9th to 8th Ave. and there was a down grade from the east on 8th Ave. as the street approached the car line. The defendant did not move for nonsuit at the end of the plaintiff's case but proceeded with the evidence. The jury brought in a verdict for the plaintiff. On motion for judgment the defendant moved for dismissal, notwithstanding the verdict of the jury. The action was dismissed. The plaintiff appealed.

S. S. Taylor, K.C., for appellant.

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

Macdonald, C.J.A.:—Assuming that there was evidence of defendant's negligence, the question is, could the jury reasonably acquit the driver of the plaintiff's auto of contributory negligence? I think not. The driver knew the locality, he knew the dangerous situation of the crossing which he was approaching, and he came coasting down the grade towards it at, as he says, the rate of 10 to 12 miles an hour. He did not see the approaching tram-car until he was right upon it. It was night time, and the tram-car was lighted, and I assume carried a head-light, as there was no suggestion to the contrary. The auto was coming down the centre of the highway. Looking at the plan, and drawing a line between a point on the centre of the highway 25 ft. back from the near rail and clear of the house and fence, the driver had a full view of the railway track in the direction from which the tram-car was coming of more than 100 feet. At 20 ft. back from the rail, the view would be extended to half a block or about 200 feet.

The driver was asked:—"Now the evidence in here is at 20 feet, you could have seen half a block? I was not watching the left hand side (the side from which the car was coming). The first time you looked you were ten feet from the track? I was watching the right-hand side, then I looked to the left."

B.C.

C.A.

MALTBY v. BRITISH COLUMBIA ELECTRIC R. Co.

The evidence of the plaintiff is that the motor-car could have been stopped in a very short distance, he would not quite say, three or four feet. To my mind on his own evidence and that furnished by the locus in quo, there is only one conclusion to which reasonable and honest men could come, namely, that had the driver exercised any care at all, he could have avoided the collision.

I would dismiss the appeal.

Martin, J.A. (dissenting):—In my opinion, this is a case where, with all respect to the action taken by the County Judge, the verdict of the jury in favour of the plaintiff should have been allowed to stand, because, shortly, the address of the Judge to the jury itself shews that there was evidence before them upon which they could reasonably find the verdict that they did find. The appeal, therefore, I think, should be allowed.

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

McPhillips, J.A.:—In my opinion the trial Judge, Ruggles, Co. Ct. J., arrived at the right conclusion upon the facts of this case in dismissing the action, notwithstanding the verdict of the jury, which was unreasonable. See Lord Morris in Jones v. Spencer (1897), 77 L.T. 536, at p. 538. This case is within the language of Duff, J., in Columbia Bitulithic Ltd. v. B.C. Electric R. Co. (1917), 37 D.L.R. 64, at p. 80, 25 Can. Ry. Cas. 243, 55 Can. S.C.R. 1:—

"That is to say if the injury is not only the actual consequence but the consequence which any reasonable person in the plaintiff's position, knowing what the plaintiff knew, must have seen to be the probable consequence of his negligence and the chain of casuality is not interrupted by the negligence of the defendant, then it is settled law that the plaintiff cannot recover."

Upon the facts of the present case—the driver of the automobile upon his own testimony was going slow, admitted that he could have stopped, he did not even look in the direction in which he knew the electric-car would come but looked the other way—he was throughout negligent and reckless—and he was the author of the injury to the car.

Fawkes v. Poulson & Son (1892), 8 T.L.R. 725, was an action for negligence, personal injuries being sustained. The jury found for the plaintiff and the Court of Appeal directed judgment to be entered for the defendants. Lindley, L.J., said, at p. 725, "that the plaintiff had made out a prima facie case (although that prima facie case was uncommonly

slight) and the Judge had acted wisely in not withdrawing the case from the jury. But the question was whether, when all the facts were brought to light, there was any such evidence as would warrant the jury in finding a verdict for the plaintiff."

Here upon the facts the driver of the automobile so negligently proceeded that it was an inevitable accident which the railway company could not possibly prevent. There was no failure of the exercise of reasonable care upon the part of the railway company.

Fraser v. B.C. Electric R. Co. (1919), 26 B.C.R. 536, was a case where it was held by this Court that the plaintiff was disentitled to recover for injury through collision between the automobile which he was driving and defendant's tram-car because the accident occurred at a dangerous point where the plaintiff should have looked to see if the car were coming and if he looked he would have seen it, and either the failure to look, or, if he looked, the crossing in front of the car, was reckless conduct constituting contributory negligence on his part, which was the causa causans of the accident.

In that case I took occasion to review a large number of cases bearing on contributory negligence, establishing that where upon the facts it can be easily said that one view only is permissible judgment may rightly be entered in accordance with that view, which was the course adopted by the trial Judge in the present case. See Duff, J., in McPhee v. Esquimalt and Nanaimo R. Co. (1913), 16 D.L.R. 756, at p. 762, 49 Can. S.C.R. 43.

That this is a proper case to sustain the judgment for the defendant and not direct a new trial is conclusively established by the judgment of the House of Lords in Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626. At p. 298, we find Lord Parker saying:—

"Instead of granting a new trial, they can, in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties—for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case."

I would dismiss the appeal.

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

Appeal dismissed.

Sask.

C.A.

PROCTER v. ANDERSON AND NORTHERN ELEVATOR CO. et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. August 5, 1921.

PROCTER v. ANDERSON AND NORTHERN ELEVATOR CO.

Chattel Mortgage (§IIC—18)—Mortgage given for price of seed Grain—Other Considerations—Validity—Affidavit not in compliance with Bills of Sale and Chattel Mortgage Act (Man.)—Failure to Comply With Conditions of Saskatchewan Act on Bringing Crop into Saskatchewan. Rights of Mortgagee as against Creditors.

A mortgage given under the Bills of Sale and Chattel Mortgage Act R.S.M. 1913 which assumes to bind a growing crop for something more and other than the purchase-price of seed grain is absolutely void under sec. 33; it is also null and void if the affidavit of bona fides does not set forth "that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage," and in any event if the mortgagee has not filed a copy of the mortgage in the proper office within three weeks from the removal of the grain into Saskatchewan, as required by sec. 35 (2) of the Chattel Mortgage Act of Saskatchewan, R.S.S. 1920 ch. 200, he will not be permitted to set up any right of property or right of possession to the grain under his mortgage against the creditors of the mortgagor. The term "creditors" means all the creditors of the mortgagor and not merely the execution creditors.

[Grand Trunk Pacific R. Co. v. Dearborn (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315 referred to. See Annotation, Chattel mortgage of after-acquired goods. 13 D.L.R. 178.]

APPEAL by plaintiff from the judgment at the trial of an interpleader action to determine the priority of a claim under a seed grain mortgage, a claim for threshing and a claim for wages. Reversed.

A. T. Procter, for appellants.

Douglas Fraser, for respondents.

Haultain, C.J.S.:—In September, 1919, one Govett purchased from the respondent Elman 245 bushels of seed wheat, the purchase-price being $1.99 3/8 per bushel. On January 20 following, Gorvett executed a mortgage upon the crop to be grown upon certain land in the Province of Manitoba during the year 1920, to secure the price of the said seed wheat. Gorvett proceeded to cultivate the land in Manitoba in 1920, and employed the appellant Procter to thresh the crop grown thereon. Procter threshed a portion of the crop in September, 1920, and became entitled for his services during that month to $116 for threshing. In the following November he went back to Gorvett's farm and threshed the remainder of the crop, for which he was entitled to $184. Towards the end of November Procter gave Gorvett notice of his thresher's lien, in accordance with the provisions of the Manitoba Statute, R.S.M. 1913, ch. 197. Very shortly after the last threshing was done, Procter

made an arrangement with Gorvett under which Gorvett was to deliver to Procter sufficient grain to satisfy his thresher's lien. Accordingly, Procter and Gorvett drew 524 bushels of wheat to the elevator of the respondent company at Fleming, in the Province of Saskatchewan. The wheat was delivered at the elevator by Procter and Gorvett to the respondent Anderson, who was the manager at Fleming of the elevator of the respondent company. Anderson was requested by Procter and Gorvett to make out tickets to Procter for sufficient of the wheat so delivered to make up the amount due to Procter for threshing, namely, $300. Prior to the delivery of this wheat, Anderson had been notified of Ekman's claim under his mortgage, and Anderson, in accordance with general instructions received from his company, refused to issue tickets to either Procter or Gorvett for any of the wheat. On December 3, 1920, Procter brought an action against Anderson and the respondent company for the conversion of the wheat delivered by Procter and by Gorvett on Procter's behalf. On December 14, Anderson, acting on behalf of his company, sold all the wheat delivered by Procter and Gorvett for $708.35, and made out the cash tickets for the whole amount in Gorvett's name. As Gorvett did not claim any interest in the wheat, he, at Anderson's request, endorsed the tickets, which were sent by Anderson to the solicitors for the Elevator Co. to be cashed and paid into Court on an application for an interpleader order, which was applied for by the respondents in view of the conflicting claims of Procter and Ekman. These proceedings, as well as the action by Procter against the respondents, were taken in the District Court of the Judicial District of Moosomin.

On December 20, the appellant Mallery brought an action in the same Court for $325 for wages due to him by Gorvett, and on the same day a garnishee summons was issued in the action and served upon the respondent company. Mallery, who was a resident of Saskatchewan, was engaged by Gorvett under an agreement of hiring made in Fleming, in this Province, to work on his farm. An application was made on behalf of the respondents for an interpleader order to determine the respective rights of the appellants to the proceeds of the wheat which had been paid into Court. On the motion for an interpleader order it was agreed by all parties that the matter should be disposed of summarily.

Sask.

C.A.

PROCTER v. ANDERSON AND NORTHERN ELEVATOR CO.

The trial Judge found against the claim of Mallery, on the ground that there was no money due from Anderson or the Elevator Co. to Gorvett on December 20, when the garnishee summons was served. He based this finding on the fact that, by endorsing the cash grain tickets over to the company for the purpose of payment into Court, Gorvett acknowledged his indebtedness to Procter and Ekman, the only claimants at that date, and appropriated the proceeds of the wheat to them. He further held that Procter was entitled to $184, the amount due to him for the second threshing, but that, as he had not asserted his lien for the first threshing within the statutory period of 30 days, Ekman's claim had priority so far as that portion of the cost of threshing was concerned. In view of his opinion with regard to the effect of Gorvett's endorsement and delivery of the cash grain tickets, the trial Judge held it to be unnecessary to consider the validity of the mortgage.

In my opinion the whole of this case turns on that question.

By consent of all parties, the consideration and application of the law of Manitoba in this regard has been left to us.

Sections 33 and 35 of the Bills of Sale and Chattel Mortgage Act R.S.M. ch. 17 are as follows:—

"33. Every mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment, executed or created, and which is intended to operate and have effect as security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop, or crop to be grown in the future, in whole or in part, be absolutely void, unless the same be made, executed or created as a security for the purchase price, and interest thereon, of seed grain.

35. Every mortgage or encumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Act; and the affidavit of bona fides of the mortgagee or his agent shall contain an additional or further statement that the same is taken to secure the purchase of seed grain."

The mortgage, which is dated January 20, 1920, recites that the mortgagor Gorvett purchased from the mortgagee Ekman "275 bushels of wheat at $1.99 3/8 cents per bushel on Wednesday, the seventeenth day of September, 1919." This amounts to $549. The mortgage then provides for the

payment of $549, on September 17, together with interest at 8% per annum to be computed from September 17, 1919. This is followed by a further proviso in the following words:—

"Provided that in addition to the said principal sum of Five Hundred and forty-nine dollars, the mortgagor shall pay to the mortgagee the amount per bushel on 275 bushels which shall be paid on the participation certificates issued upon grains sold to elevators."

The mortgage further recites a sale of 200 bushels of oats at 80 cents per bushel, and provides for payment of $160, with interest from January 20, 1920.

The affidavit of bona fides contains the following statements:—

"That Leslie Gorvett the mortgagor in the foregoing bill of sale by way of mortgage named is justly and truly indebted to me this deponent the mortgagee therein named, in the sum of five hundred and forty-nine dollars mentioned therein. That the said bill of sale by way of mortgage was executed in good faith to secure the purchase price of seed grain and for the express purpose of securing payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the crops mentioned in the said bill of sale by way of mortgage against the creditors of the said Leslie Gorvett the mortgagor therein named or of preventing the creditors of such mortgagor from obtaining payment of any claim against Leslie Gorvett the said mortgagor. That the mortgagor purchased the said seed grain mentioned in the above chattel mortgage herein on Wednesday, the 17th day of September, 1919. That the said seed grain purchased by the mortgagor consisted of 275 bushels of wheat at 199 3/8 cents per bushel."

It will thus appear, on the face of it, that the affidavit of bona fides does not comply with the provisions of sec. 5 of the above mentioned Act, and it does not set forth "that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage." The mortgage was consequently "null and void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for good or valuable consideration." (sec. 5).

The same result follows under sec. 35, because there is no statement in the affidavit with regard to the oats.

I am further of opinion that the mortgage is "absolutely

Sask.

C.A.

PROCTER v. ANDERSON AND NORTHERN ELEVATOR CO.

void" under sec. 33, because it assumes to bind a growing crop for something other than the purchase-price of seed grain.

It follows, then, that Procter is entitled to the full amount of his claim, namely $300, as wheat to that amount was delivered to the Elevator Co. by him or for him by Gorvett.

The question remains as to the respective claims of Mallery and Ekman. I do not think that the endorsement of the cash grain tickets by Gorvett, under the circumstances related above, can be taken as an appropriation by him of the money obtained from the sale of the wheat to Ekman. Mallery, who was a resident of Saskatchewan, brought his action against Gorvett on a contract made in Saskatchewan. On December 20, 1920, when the garnishee summons was served on the respondent company, the proceeds of the wheat were still in the hands of the company or of their solicitors. The notice of motion for an interpleader order is dated January 22, 1921, and the money was not paid into Court until that day. Up to January 22, at least, there was a present debt due from the company to Gorvett, and that debt was bound by the garnishee summons served on December 20, 1920.

In any event, under the provisions of sec. 35 (2) of the Chattel Mortgage Act, R.S.S. 1920, ch. 200, Ekman cannot "be permitted to set up any right of property or right of possession" to the wheat under his mortgage against the creditors of Gorvett, the mortgagee, as no copy of the mortgage, etc., was filed in the proper office within 3 weeks from the removal of the wheat into Saskatchewan. Mallery was a creditor of Gorvett, and was entitled to the protection of the Act. Grand Trunk Pacific R. Co. v. Dearborn (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315.

The appeal should, therefore, be allowed with costs. The judgment below will be set aside, and judgment entered allowing the claims of Procter and Mallery as prior claims to the extent of $300 and $325 respectively, and declaring Ekman entitled to the balance of the money paid into Court. Procter and Mallery are entitled to their costs of the interpleader proceedings as against Ekman. These costs when taxed will be paid pro tanto in equal proportions out of any money in Court to which Ekman may be entitled.

Lamont, J.A.:—I concur. Ekman's mortgage being null and void he loses his priority.

Turgeon, J.A.:—I concur in the conclusion arrived at by

the learned Chief Justice, as I am of opinion that Ekman's mortgage is void for the reasons given by him.

Appeal allowed.

BURNS v. JARDINE.

Prince Edward Island Supreme Court, Mathieson, C.J., and Haszard, J. May 3, 1921.

Appeal (§VIIM—655)—Trial by jury—Verdict of—Evidence to warrant—Appellate Court will not Reverse.

An Appellate Court will not interfere with the verdict of a jury if there is evidence in the record which if believed by them would justify the verdict, although such Court if acting in their place would not have given the verdict which they gave.

[Scotland v. Canadian Cartridge Co. (1919), 50 D.L.R. 666, 59 Can. S.C.R. 471 referred to.]

2. New Trial (§I—2)—Criminal Action—Statement of Counsel Imputing Misconduct to one of the Jurymen.

If counsel for the plaintiff during the course of a criminal trial, and after the jury has been sworn, and before they give their verdict in open Court and in the hearing of the jury charges the defendant with having improperly attempted to influence one of the jurymen in his conduct as such, a new trial will be granted.

APPEAL from the judgment at the trial of an action brought by a patient against a physician to recover damages on three counts, viz: (1) For assault and battery, causing the plaintiff to become sick, etc. (2) For forcibly and against her will and consent delivering her of a child, she then being six months with child, and (3) For mal-practice in the same manner. New trial ordered.

G. S. Inman, K.C., and J. J. Johnston, K.C., for plaintiff.

A. C. Saunders, K.C., and W. E. Bentley, K.C., for defendant.

Mathieson, C.J.:—The cause was tried at the last Hilary Term, before FitzGerald, J., and a jury, when a verdict was rendered for the plaintiff for $200.

The defendant now moves to have the verdict set aside and a new trial granted upon 8 grounds, set forth in the motion. Two of these grounds, the 7th and 8th, were abandoned at the hearing, and of the remaining 6, two only were substantial and will be here considered in the following order: First, that the verdict was against the weight of evidence, and second, that during the course of the trial, and after the jury had been sworn, and before they had given their verdict, counsel for the plaintiff in open Court, and in the hearing of the jury, stated that it had been brought to his

P.E.I.
S.C.
BURNS
v.
JARDINE

attention that defendant had approached one Bertram, a juryman, then in attendance at the said Court, but who was not one of the jury trying the cause, and had requested the said Bertram to see, on behalf of the defendant, one of the jurymen in the cause, and that the plaintiff's counsel had seen the said Bertram, and had inquired of him whether such report was true, and that Bertram had admitted to plaintiff's counsel that defendant had approached him and asked him to see one of the jurymen sworn in the cause on defendant's behalf, and that the same counsel, in the hearing of the jury empannelled in the cause, brought the said matter to the attention of the Court, thereby charging defendant with having unlawfully and improperly attempted to influence one of the jurymen in his conduct as such, with a criminal offence and thereby prejudicing the jury empannelled in the cause, against the defendant.

The matters of fact alleged in this second ground are supported by the affidavit of defendant, filed by his counsel, on the hearing of this application.

The evidence is very voluminous and in relation to the events which happened on February 6 and 8, contradictory on most essential points.

The principal undisputed points are—that plaintiff was then 6 months at least, gone in pregnancy. She had previously borne three living children and one still-born child. She had also had a mis-carriage in February, 1918. The present was therefore her sixth conception.

On February 6, Burns went to the telephone office to telephone Dr. Jardine to visit the plaintiff professionally. He there learned that defendant was in Lower Freetown, at Scott Jardine's, where he found him. At his request, defendant drove over to Burns' house, 3 miles away. He examined an aching tooth, and then made a physical examination of the plaintiff. As a result, he informed her that she was threatened with a mis-carriage. She replied that Dr. McGuigan had told her something like that when he examined her on the preceding December 30.

The defendant departed without any arrangement being made for his return. On Saturday, February 8, Burns again went after the defendant and found him at Bernards, where he was making a professional visit, and arranged with him to call at his house, 3 or 4 miles away, to see the plaintiff, which defendant accordingly did, arriving there about 11 or 11.30 o'clock a.m. He examined the plaintiff

and declared that her condition required immediate delivery of the child. The children were taken from the house to the barn by their father, at Mrs. Reeves' request. The defendant administered the chloroform until the patient was under its influence, and then handed it over to Mrs. Reeves (who had previously rendered a similar service) to continue its administration under his direction.

He delivered plaintiff of a living child, which died shortly afterwards. Later he sent Bernard back to his own home, to change horses and get his dinner, whilst defendant remained to give the plaintiff further attention. Dinner was prepared and served to defendant and Burns, Mrs. Reeves assisting in the service. On Bernard's return with a fresh horse, defendant left with him for Kensington, and sent back with Bernard, for plaintiff, a syringe and medicine, as he had promised. Sometime after defendant left, Burns went to the telephone office, to call him up, but found that he was not at home. He then got Dr. Gillis on the telephone, and as a result, Dr. Gillis arrived at Burns about 4 o'clock in the same afternoon.

On Sunday, February 9, Burns notified defendant not to return, and thus his connection with the case ended.

On Monday, February 10, Dr. Sinclair was called in.

The plaintiff's case is: That on February 6, the defendant was called in to look after her aching tooth, and for no other purpose. He was not called in to treat her in regard to pregnancy. Having no instruments, he could not extract her tooth, but when the question of a pain in her side came up, he suggested that he had a patient in Kensington, who had a similar pain, and he treated her for it, and carried her through her pregnancy safely.

Burns' call for the defendant on Saturday was, he said, mainly for the purpose of getting him to treat his wife as he had treated the Kensington woman; instead of this, the defendant had forcibly delivered the plaintiff of a child, not only without the consent or knowledge of the husband, but against the will of the plaintiff, who had struggled with him to prevent it.

That the defendant had also refused to call in another medical doctor, but insisted on proceeding alone.

That before the plaintiff had come from under the influence of the anaesthetic, forcibly administered to her by the defendant, he had departed without having taken the care and precautions necessary in such case, and that a

P.E.I.
S.C.
BURNS
v.
JARDINE

protracted illness of the plaintiff resulted.

The defendant denies the wrongful acts and omissions alleged, and states that on his first visit, on February 6, he made a physical examination of the plaintiff, and found the premonitory symptoms of a premature birth, of which he informed her.

On his second visit, two days later, he found her so far advanced in process of child-birth, and in such a state of exhaustion, that immediate delivery of the child was necessary to save the patient's life. As to calling in another doctor, defendant says there was something said about it, and he wished they could have another doctor, "we were all so busy, it was simply out of the question to get a second doctor there to help her."

Mrs. Reeves and the patient, so far as she could, assisted in every possible way in preparing the bed and making other arrangements for the delivery of the child.

The delivery was completed without instruments, in about half an hour from the time when the doctor's assistance commenced.

After the delivery, the defendant says—"I kept watch on the patient, and she was all right, doing splendidly, and as soon as I thought it safe for me to leave I went to the barn to tell her husband." Then he says he sent Bernard home to have his dinner, while he waited and watched his patient, and gave her such medicine and other treatment as she required. The patient meantime, was "coming out of the anaesthetic very nicely" and replied to his question of how she felt, "not too bad." Afterwards he went into another room and had dinner with the husband, while Mrs. Reeves waited on the table. Nearly two hours after the child was born, the defendant left for his home in Kensington, 7 miles away, having made arrangements as to his return. Next day he was notified by plaintiff's husband, that his further services were not required, that Dr. Gillis had the case.

Before considering the expert evidence in this case, I shall briefly refer to a sequence of events, which seem to me, after a careful study of the evidence, to indicate a concerted effort on the part of the plaintiff her mother and her husband, to minimise the seriousness of the plaintiff's illness, from the time defendant was called in until the delivery of the child began. They appear to me to resist every suggestion that plaintiff's illness was a stage in the

process of mis-carriage, and seek to limit her illness to her aching tooth; and, in a secondary degree, conceded with reluctance, to a chronic ovarian disorder, giving rise to an intermittent pain.

On the day the defendant was first called in to treat plaintiff, Burns brought his mother-in-law from her home, 4 miles away. She had been present and acted as nurse on the occasion of her daughter's previous confinements, and no other nurse had ever been employed. Mrs. Reeves explains Burns' visit by saying—"He came to see me about some threshing with the boys."

Later in the same day, Burns went to Freetown, to telephone to defendant to come from Kensington, 7 miles away, for the sole purpose, so he says, of extracting an aching tooth of plaintiff. He found that defendant was visiting a patient 4 miles away, went after him, and took him to see the plaintiff, though Burns knew that defendant had no dental instruments with him.

On February 8, the children were taken from the house to the barn by Burns, preparatory to the delivery of the plaintiff, but he claims to have been in complete ignorance of the cause.

The barn was only about 100 feet distant from the house, but no attempt was made to communicate with the husband that anything objectionable was happening.

When it was all over, the husband sat quietly down to dinner with the defendant, when they were waited on by Mrs. Reeves. Yet the husband says that at that time his wife was still unconscious, her body was cold and he "thought she was dying."

What may be described as the fixed circumstances of the case and, indeed, the general tenor of the evidence accord with the defendant's statement that the mis-carriage was imminent and was anticipated, and they do not accord with the plaintiff's contention of minor ailments and a forced delivery.

The controlling issue is, on the second count, for forcible delivery.

Upon this question, and upon the medical treatment of the case generally, there was examined a number of the leading physicians of this Province, including Doctor Alexander McNeill, President of the Medical Association of Canada, and the concensus of their opinion is, that a forced delivery could not have been accomplished in the time and

P.E.I.
S.C.
BURNS
v.
JARDINE

circumstances alleged by the plaintiff's witness, but that the process of child-birth must have been far advanced before the defendant came to her assistance.

The charge of mal-practice alleged in the third count of the declaration is scarcely supported by the evidence of Dr. Gillis, and is discredited by the testimon of the other physicians.

On consideration of the whole case, I am not satisfied with the verdict of the jury. I think. that in their place, I would have found for the defendant, but that is not the question I have now to decide. It is—"is there evidence in the record which if believed by them, would justify the verdict?"

With exact application to my position in this case, I quote and adopt from the judgment of the Chief Justice of the Supreme Court of Canada in Scotland v. Canadian Cartridge Co. (1919), 50 D.L.R. 666, at p. 670, 59 Can.S.C.R. 471, at p. 477. "I say on this main and controlling issue I would as a juryman, probably have found against the plaintiff. But that is not my province. I have only to determine whether in the conflict of evidence we have before us in this case, scientific and practical, we find enough to justify reasonable men in reaching the conclusion these jurymen did. After much consideration and thought, I have reached the conclusion, though not without much doubt, that there is such evidence in the record and that I ought not, in view of the extreme jurisdiction which juries are permitted to have over questions of fact, to set aside their findings on my reaching on the reading of the evidence, a conclusion different from that the jury reached."

On the second ground, defendant's claim is that the statement, complained of tended to prejudice the fair trial of the cause, and should not therefore have been made in the presence of the jury.

Before considering the arguments of counsel and the cases cited by them, it is necessary to note that the question to be decided is not one relating to misconduct on the part of the jury, nor to the disqualification of one or more of its members. In such case, the rule of practice is established, that if the defect were known to the party moving to set the verdict aside, and with such knowledge he elected to proceed to trial and take his chance of a favourable verdict, he has waived his right of objection and must abide by the result.

The question is upon the material which was placed be-

fore the jury by the statement of counsel for the plaintiff, above set forth.

The law has long been settled that the misbehaviour of the prevailing party towards the jury is a good ground for a new trial. Tidds Practice, vol. 2, p. 906; Bacons Abridgement, vol. 7, pp. 769, 770, etc.

It goes even further in the case of Coster v. Merest, reported in (1882), 3 Brod. & Bing. 272 at p. 273, 129 E.R. 1289, where it was sworn that handbills reflecting on the plaintiff's character had been distributed in Court and shewn to the jury, on the day of the trial; the Court would not receive from the jury affidavits in contradiction, but granted a new trial against the defendant, though he denied all knowledge of the handbills.

Our Courts are constantly on the alert to prevent material, which is not evidence, from being presented to the jury. The difficulty or most common occurrence is on the admissibility of evidence, and the procedure is settled that, when an objection is taken, and the discussion of counsel on the objection, in the presence of the jury may, in the opinion of the Judge be prejudicial to either of the parties, the proper course is to send the jury to their room and then hear the arguments in Court. The King v. Thompson, [1917] 2 K.B. 630.

The common provision in criminal laws preventing the proof of even mention of a former offence before the subsequent offence is tried and the statutory prohibition of comment by Judge or prosecuting counsel on the election of the accused not to testify on his own behalf, illustrate the settled policy of the law to exclude prejudicial matter and keep the issues clear.

Counsel for plaintiff contended: (1) That in making the statement complained of in the presence of the jury, he was taking the only course open to him. (2) That the defendant does not, in his affidavit, deny the truth of the statement. (3) That no objection was taken by counsel for defendant, at the time the statement was made. (4) That upon the statement being made, it was for the trial Judge to say if Bertram (the alleged informer) should be examined.

In support of the first contention, counsel for the plaintiff referred to two former cases tried in this Province; one in the Admiralty Court, where the attention of the Court had been drawn to the misconduct of counsel by interfering with

P.E.I.

S.C.

BURNS v. JARDINE

an adverse witness. And another in this Court, where the attention of the Court was called to the misconduct of the clerk of one of the counsel.

In the Admiralty Court, there was of course, no jury, and it does not appear whether or not there was a jury in the second case. Neither the names of the cases nor their dates were given. The citation is too vague to have any value.

As to the second contention, the whole value and aim of the affidavit was to bring before this Court, the contents of the statement. Whether the rumour was true or false, is not a question with which this Court sitting as a Court of Appeal, can deal. We take the case where it ended at nisi prius, and try it on that as a closed record.

As to the third contention of the plaintiff, that statement was not objected to by opposing counsel.

In the ordinary and regular process of a trial, there are frequent occasions when the objection of counsel is material, and failure to object is construed as acquiescence, but this was a matter completely outside the record, which could not be anticipated, which objection would almost certainly come too late to prevent, and which even retraction by counsel or remarks by the Judge, might only mitigate, at best.

The defendant could not make an application for the discharge of the jury, as there was no misconduct or disqualification imputed to them, and proceeding with the trial was therefore no waiver nor acquiescence on the part of the defendant.

As to the fourth contention, that it was for the trial Judge to determine what action should be taken on the statement; it never was the practice of the Court to take action upon a mere rumour or complaint, unsupported by affidavit or motion.

Under our practice, if counsel desire to bring to the attention of the Court any matter which might tend to prejudice the jury, the preliminary application must first be made for the retirement of the jury, and then the remedial motion must follow in the regular way.

It is not open to counsel, by taking an irregular course to impose upon his opponent an obligation to take any particular line of action, in pain of waiver or estoppel.

I have examined with care, all the cases cited on behalf of the plaintiff; they all deal with the misconduct or disqualification of a jury, or one or more of its members, and

therefore do not assist in the determination of the question under consideration.

The essence of this case is that the jury went to their room, with their minds charged, not only with the evidence given in the cause, but with a statement of counsel, imputing to the defendant misconduct, not only affecting his character generally, but directly relating to the cause being tried by them, and of so grave a kind that it could hardly fail to influence them in a manner prejudicial to the defendant.

In my view of the case, it is not material to consider whether counsel for defendant exercised his discretion rightly or wrongly, in not objecting to the statement. It got home to the jury, and was at best, as disturbing a factor as injurious evidence improperly admitted, and would equally tend to vitiate their verdict.

I am therefore of the opinion that the verdict should stand, but that a new trial should be granted.

Haszard, J.:—In this case if the sole question to be decided was as to the sufficiency of the evidence, I would not be disposed to disturb the verdict, it appearing to be within the province of the jury to have found the verdict they did.

The question raised on the sixth point taken by defendant, required the fullest consideration.

The course pursued, in bringing to the notice of the Court, the improper action (if true) of the defendant, in attempting, through a juror on the panel, to tamper with a jury sworn on the trial, was, in my opinion objectionable, and very liable to prejudice the jury in arriving at a verdict. If the course taken should be established as the practice of the Court, it would be attended with great danger and uncertainty, to say the least.

In Cameron v. Ottawa Electric R. Co. (1900), 32 O.R. 24, Boyd, C.J., at p. 26, in a case where a new trial was asked for, on grounds having reference to jurors, somewhat similar to the present case, said: "It is essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties interested, to be fairly conducted."

It is an admitted fact that, in jury cases, too much care cannot be exercised in protecting juries from statements being made to them which are not evidence.

While it is the duty of counsel to bring to the notice

P.E.I.

S.C.

BURNS
v.
JARDINE

of the Court, an irregularity, such as was complained of here, the fact of its not being evidence which they could consider, rendered it necessary that it should have been brought to the notice of the Court, in the absence of the jury. In this way the Court could become fully seized of the facts and make such order as the circumstances would require. Meanwhile the interests of all parties would be protected, while the functions of the jury would not be disturbed.

Here, a charge was made by counsel against defendant in the presence of the jury, of something that had been told to him (the counsel) by a third party, and which if true, amounted to a serious offence on the part of defendant, and it would be natural that the jurors, or some of them, might have been prejudiced, by what took place.

I am convinced that the course pursued was not a proper one, and that an injustice may have been occasioned by the irregularity complained of, which can best be remedied by granting a new trial.

The verdict should be set aside and a new trial granted

New trial granted.

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.

GREGORY v. WINNIPEG PAINT & GLASS CO. LTD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Estoppel (§IIIE—70)—By Conduct—Recovery Back of Money Paid—Mistake of Fact—Cheque for Personal and Firm Account—Cheque Desposited to Personal Account—Belief that Cheque Paid Before Sending Cheque for Firm Account—Cheque not Paid—Correspondence as Establishing.

APPEAL by defendant in an action to recover a sum of money alleged to have been paid under a mistake of fact. Reversed.

H. E. Grosch, for appellant; A. E. Bence, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—In this action the plaintiff sues to recover the sum of $492 paid by him to the defendants in April, 1913. This payment, he alleges, was made under a mistake of fact. The circumstances on which he relies are as follows:—

The plaintiff in April, 1913, was the president of the North Western Supply Co. of Battleford. This company was indebted to the defendants in some $3,600. The McManus Construction Co. was indebted to the North Western Supply Co. and had given to that company two promissory notes for $763.45 each, which the Supply Co. had endorsed over to the defendants as collateral security for their indebtedness. The defendants were pressing the Supply Co. for payment of their account. The defendants' credit manager saw the plaintiff, and urged him to try to get the McManus Construction Co. to pay something on account of the notes above mentioned. The plaintiff took the matter up with the McManus Co. and obtained that Company's cheque for $1,752, being $1,268 which the company owed him personally, and $492 to be applied on the said notes. This cheque the plaintiff received on April 15. It was payable at Moose Jaw, and was drawn in favour of the plaintiff personally. He deposited the cheque with his bankers at Battleford and waited until April 23 to see if it would be paid. Not having received any notice of its dishonour, and in the absence of such notice assuming that it had been paid, the plaintiff on April 23 sent his own accepted cheque to the

Sask.

defendants for $492. The following day he received notice that the cheque of the Construction Co. had been dishonoured. The plaintiff did not notify the defendants that the cheque had not been paid until May 31, when he did so by letter in the following language:—

> "The McManus Construction Co. have finished their work and are entitled to several thousand dollars from the City but cannot get it, but if you think wise you might sue for the overdue notes and garnishee the City. If you do, sue for the whole claim as the cheque on Moose Jaw which includes the $492 which I sent you was dishonoured and protested, the next day after I wrote you my own cheque, so I am out that amount, and thus you are not bound for purposes of suit to apply that on their account."

Some time later the plaintiff sued the McManus Co. on their dishonoured cheque and obtained judgment and issued execution thereon. In April, 1916, the plaintiff filed a claim against the North Western Supply Co., then in liquidation, and clause 3 of his statutory declaration, in part, reads as follows:—

> "3. That the said Company, (that is the North Western Supply Co.) is also indebted to me in respect of the following accounts which I have paid on its behalf in the respective amounts set opposite: $492 paid Winnipeg Paint & Glass Co."

On this claim he received a small dividend. In 1917 the defendants received their first notice that the plaintiff was demanding a return of the $492. The plaintiff testified that in July, 1913, he wrote the defendants notifying them that he wanted a return of the money, but he could not produce any copy of the letter, and the defendants' credit manager testified that the defendants had never received any such letter. There is, therefore, no evidence that, prior to 1917, the defendants had any notice of a claim on part of the plaintiff for a return of the money. In April, 1919, this action was commenced. Among other defences, the defendants claim that, under the circumstances above set out, the plaintiff is estopped from recovering, (1) because, owing to his delay in making the claim, the defendants' position was prejudicially affected. They claim that had the $492 not been paid, they would have proceeded against both the North Western Supply Co. and the McManus Construction Co.; (2) by taking a judgment against the McManus Con-

Sask.

struction Co. for the $492, and (3) by claiming against the North Western Supply Co. in respect of having paid that amount to the defendants.

Whatever right the plaintiff might otherwise have had, his letter of May 31, in my opinion, estops him from now recovering. That letter, written more than a month after he knew that the McManus Co.'s cheque had been dishonoured, not only did not demand a return of the $492, but in my opinion is a clear ratification of the appropriation by the defendants of the $492 in part payment of the account of the North Western Supply Co. for which the notes were held as collateral security. The plaintiff suggested that the defendants sue the McManus Construction Co. on their notes, and says if they do so they should sue for the full amount thereof, because that company had not paid any part of their notes, their cheque for that purpose not being paid. As the result of that cheque not having been paid, the plaintiff says he is "out" the amount. Now he could not consider himself "out" the $492 unless he were acquiescing in the defendants retaining it and applying it on the account of the Supply Co. of which he was the active head. There is no intimation in that letter that the defendants were not entitled to retain the money, or that the plaintiff wanted it back. On the contrary, the whole tenor of the letter is an acquiescence on the part of the plaintiff to its retention by the defendants. That it was the plaintiff's intention that the defendants should retain it is also shewn by the fact that he sued the McManus Construction Co. for the $492 and took a judgment against them, as well as by the fact that he claimed against the Supply Co. for the same amount. His declaration in 1916 that the Supply Co. was indebted to him in respect of the $492 paid by him to the defendants, correctly indicates, I think, the true nature of the transaction, and is entirely inconsistent with his present claim against the defendants.. When the plaintiff sent his cheque to the defendants, he no doubt believed that the McManus cheque had been or would be paid, but, when he learned that the contrary was the case, he did not repudiate the appropriation of his cheque to his company's debt or demand its return, but, by his letter of May 31, and by taking judgment against the McManus Construction Co., he led the defendants to believe that he was acquiescing in their retaining the cheque until both of the companies liable had become insolvent. Whatever misapprehension of fact the plaintiff may have been under when he sent his cheque,

Sask.

he was under none when he wrote the letter of May 31. Under these circumstances, I cannot see how he can now be heard to say that he paid the money under a mistake of fact.

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

Appeal allowed.

MORTON v. BOSWELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

Garnishment (§IIA—37)—Money Paid into Court by Garnishee—Garnishee Proceedings Set Aside for Irregularity—Payment Out to Garnishee—Leave to Appeal Granted—Second Garnishee Summons Issued—Rights of Parties.

APPEAL by defendant from an order dismissing an application for payment out to him and ordering money paid into Court by a garnishee to be paid out to such garnishee. Affirmed.

H. M. Allan, for appellant; no one contra.

The judgment of the Court was delivered by

Haultain, C.J.S.:—The plaintiff in this action issued a garnishee summons before judgment directed to Sarah Martha Niven as garnishee, who thereupon paid $209 into Court. The garnishee proceedings were later on set aside on the ground of irregularity. The defendant then made an application for payment out to him of the money in Court. This application was refused and the money was ordered to be paid out to the garnishee. This appeal is taken from that order by the defendant. The money in Court was paid out to the garnishee before leave to appeal was granted to the defendant, and another garnishee summons has been issued by the plaintiff and served upon the garnishee.

Apart from these later circumstances, I am of opinion that the defendant had no right to have the money paid out to him after the first garnishee proceedings were set aside. The appellant contends that the payment into Court by the garnishee operated as a valid discharge to her against him to the amount paid in, although the garnishee proceedings were subsequently set aside.

Section 15 of the Attachment of Debts Act 1920, (Sask.) ch. 59 provides that,

> "Payment made by or execution levied upon the garnishee as aforesaid shall be a valid discharge to him

Sask.

against the judgment debtor to the amount paid or levied, although such proceedings may be set aside, or the judgment or order reversed."

This section does not apply to the present case as the appellant is not a judgment debtor, but only a defendant against whom a claim has been made. As the garnishee proceedings were set aside, the defendant and the garnishee were left in the same position as they were before the garnishee proceedings were taken. There is still an attachable debt, and apparently that debt has been attached by another garnishee summons.

I would therefore dismiss the appeal, but without costs.

Appeal dismissed.

SHARP v. RIZER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Appeal (§VII.M—535)—Contract—Reversing Trial Judgment on Question of Fact—Insufficient Weight Given to Evidence.

APPEAL by plaintiff from the trial judgment in an action on a contract. Reversed.

R. Mulcaster, for appellant; Arthur Frame, for respondents.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case I find myself forced to the conclusion that the judgment of the trial Judge is wrong and should be reversed. I say this with all deference, and after great hesitation, because the question is purely one of fact, and the facts must be deduced from evidence of a most conflicting character and upon which the trial Judge has commented in language with which I agree. Nevertheless I am of the opinion that the reasons given for the judgment cannot be supported by the evidence. The judgment in favour of the defendants is based upon two grounds, (1), that the contract set up by the plaintiff is unreasonable in its terms, and (2), that the letter written by the defendant Rizer on July 7, 1919, ought not to be construed as an admission of such a contract. As to the first point, I cannot see how a contract which would allow the defendants a profit of over 10 per cent. on their turnover, after making allowance for freight charges, can be said to be in its terms so unfavourable to the defendants as to raise a presumption against its having been entered into by them. As to Rizer's letter of July 7, 1919, it would appear to me that

Sask.

the trial Judge, in commenting upon it as he does, cannot have given sufficient weight to the evidence taken from Rizer's examination for discovery and to be found in the appeal book at p. 66. Then, in addition to the matters dealt with in the trial Judge's reasons for judgment, I am of opinion that the account stated by the defendants, and shewing in itemised form the dealings had between the parties, is much more consistent in its terms with a contract for the sale of the goods outright from the plaintiff to the defendants than with an agency contract for a sale by the defendants to third parties on a commission basis.

In holding as I do, that the judgment in the Court below ought to be reversed, I am not unmindful of the difficulties which attend an Appellate Court in dealing with deductions of fact to be drawn from conflicting evidence, or of the degree of certainty which the Court should possess as to the trial Judge being in error before reversing his judgment in such cases. The principles involved are set out in a number of cases to be found in our own reports, and notably in Cowie v. Robins (1916), 27 D.L.R. 502, 9 S.L.R. 191, and Goddard v. Prime (1917), 33 D.L.R. 790, 10 S.L.R. 102. Despite the difficulties in the way, however, I am of the opinion that this appeal should be allowed with costs.

There is much confusion in the evidence as to the price to be charged to the plaintiff for freight, and also as to the terms upon which the boxes for packing the fish were to be supplied by the defendants. I think, however, that it can be gathered that the defendants are entitled to be paid for freighting at the rate of $1.50 per cwt., and also to receive from the plaintiff 50c. for each box supplied by them and not returned, if any.

The judgment in the Court below should be set aside and judgment entered for the plaintiff, with costs, for the value of the fish delivered to the defendants at the rate of 8½ cents per pound, less the sums already received on account thereof and less the deductions for freight and boxes above referred to. If the parties cannot agree as to the items involved, a reference may be had to the Local Registrar. The plaintiff is entitled to interest on the balance due him at the rate of 7 per cent. per annum from the date of the issue of the writ.

Appeal allowed.

Sask.

ELLIOTT v. ARRO-LITE CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. July 7, 1921.

Damages (§III.A—65)—Sale of Chattels—Purchaser Relying on Warranty of Vendor—Breach of Warranty—Measure of Compensation.

APPEAL by defendant from the judgment at the trial in an action for damages for breach of warranty. Damages reduced.

J. W. Corman, for appellant; F. P. Collins, for respondent.

Haultain, C.J.S.:—The plaintiff purchased from the defendant two gas burners for $60, which was paid on delivery of the goods. In purchasing the goods the plaintiff relied on the warranty of the defendants that the burners would operate for at least 6 hours for each gallon of oil used. At the trial of the action the trial Judge found that there had been a breach of warranty, and that finding is, in my opinion, quite justified by the evidence. He further found that the goods would have been worth $90 if they had answered to the warranty, and were of no use to the plaintiff at the time of delivery. He accordingly awarded the plaintiff $90 damages.

This is clearly wrong, for the plaintiff, having already paid $60 for the goods, only recovers $30 damages under that award.

Accepting the finding that the goods were of no value at the time of delivery, I would assess the damages at $60, that being the amount the plaintiff agreed to pay for the goods as warranted. The judgment below should, therefore, be varied by reducing the amount of damages from $90 to $60.

The appellant should have his costs of appeal.

Lamont, J.A., concurs with Haultain, C.J.S.

Turgeon, J.A.:—The plaintiff purchased the two gas burners for $60, which sum he paid in cash. The trial Judge has found, and I think rightly, that these gas burners are of no practical value. The plaintiff's damages, therefore, in my opinion should be $60, being the difference between the amount paid by the plaintiff and the actual value of the goods, which is nothing at all.

The judgment of the Court below should, therefore, be varied by reducing the amount of the damages to the plaintiff from $90 to $60.

I think, also, that the defendants should have their costs of this appeal.

Judgment varied.

Sask.

WALPOLE v. CANADIAN NORTHERN RAILWAY CO.

Saskatchewan King's Bench, Bigelow, J. November 30, 1920.

Domicil (§I.—1) — Master and Servant — Employee Domiciled in British Columbia at Time of Accident—Accident in British Columbia—Workmen's Compensation Act of British Columbia, 1916, ch. 77 secs. 11 (1) and 67 (1)—Jurisdiction of Saskatchewan Court to award damages.

ACTION brought by the administrator on behalf of the widow and child of a locomotive engineer who was killed in an accident which arose out of and in the course of his employment. Action dismissed.

D. Campbell, for plaintiff; O. H. Clark, K.C. (Winnipeg), and J. N. Fish, K.C., for defendant.

Bigelow, J.:—The accident in this case was a fatal one, and this action is being brought by the administratrix on behalf of the widow and child.

The deceased at the time of the accident was domiciled in the Province of British Columbia and was a locomotive engineer in the employment of the defendant, and the accident arose out of and in the course of the deceased's employment. It occurred in British Columbia, and the jury has found that it was caused by the negligence of the defendant and has assessed damages at $16,000.

The Workmen's Compensation Act of British Columbia, 1916, ch. 77, sec. 11 (1), provides:

> "The provisions of this part shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law or by any Statute, against the employer of such workman for or by reason of any accident which happens to him arising out of and in the course of his employment, and no action against the employer shall lie in respect of such accident."

And sec. 67 (1) provides:

> "The Board shall have exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law necessary to be determined in connection with compensation payments and the administration thereof, and the collection of the funds therefor, and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board under this Part; and the action and the decision of the Board thereon shall be final and conclusive, and shall not be restrained by injunction prohibition or other process or proceedings in any Court or be removable by certiorari or otherwise into any Court."

I am of the opinion that the questions involved here are similar to those in McMillan v. C.N.R. Co. (1920), 56 D.L.R. 56, decided by me today, and for the reasons I have stated in that judgment, this action is dismissed with costs.

Action dismissed.

Sask.

INDEX

CASES—Continued.

CASES—Continued.

CERTIORARI—

CHATTEL MORTGAGE—

2

4

12

18

28

60

75

181

45

45

105

269
1
173
492
209
452
273
169
253
309
253
452
1
173
510
208